



Senior Connection Expo

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PROBATE

CATEGORIES OF DECEDENT'S ASSETS

1. Determine whether assets are in joint tenancy or community property with right of survivorship or have beneficiary designations such as pay on death or transfer on death or have named beneficiaries on life insurance, annuities, or retirement plans. These assets are not part of the probate estate or governed by a will unless the named beneficiaries have all predeceased or the estate is specifically named as a beneficiary.
2. Determine which assets are titled in the name of a trust. These assets are not part of the probate estate and are not governed by a will.
3. Determine which assets do not fall into categories one and two. These are the assets that are titled in the decedent's name and don't have co-title owners with right of survivorship, beneficiary designations (other than a beneficiary that is the estate) and are not titled into the name of a trust. Divide those assets into two categories: real property and personal property. Everything except real property is considered personal property.

IS A PROBATE COURT PROCEEDING REQUIRED?

1. Add up the value of all of the real property potentially subject to probate. If the total value of all of the real property combined based on property tax assessed value minus liens and encumbrances is more than \$100,000, then a probate proceeding with the Court will be required.
2. Add up the value of all the personal property (technically, this should also include the value of the decedent's tangible personal property, i.e. furniture, jewelry, clothing, appliances, and other household items) and if the total is more than \$75,000, then a probate proceeding with the Court will be required.
3. Note that for married couples the decedent's property interests include all of the decedent's separate property (i.e. property acquired prior to the marriage that was kept separately from the marital funds and property acquired during the marriage through inheritance or gift or by exchange for other separate property) plus fifty percent of any community property (i.e. property acquired by either spouse during the marriage other

than by inheritance, gift, or exchange of separate property). Separate property includes all property the decedent acquired by the decedent before the marriage and kept separate and all the property he acquired by gift or inheritance during the course of the marriage and kept separate.

HOW TO COLLECT PROPERTY POTENTIALLY SUBJECT TO PROBATE BY A SMALL ESTATE AFFIDAVIT WHEN THE TOTAL VALUES ARE UNDER THE LIMIT FOR A PROBATE COURT PROCEEDING

1. For personal property, the assets can be collected by an Affidavit for Collection of Personal Property (also known as a “small estate affidavit”). The affiant must swear before a notary that he is entitled to the assets as a devisee, i.e. he is the named devisee under a valid will, or is an intestate heir (i.e. no valid will exists and the person is an heir under Arizona Revised Statutes Sections 14-2102 or 14-2103), that the total value of all the decedent’s personal property is less than \$75,000 (only the property potentially subject to probate), and that at least thirty days has passed since the decedent died. See Arizona Revised Statutes Section 14-3971. This author normally also includes in the affidavit a list of all of the personal property that is potentially subject to probate, the values of each asset, and specifically why the beneficiary is entitled to the asset or assets. Duplicate originals should be done if there is more than one asset subject to collection so that there is one for each asset to collect.
2. For real property, title can be passed to the entitled beneficiary by an Affidavit for Succession to Real Property. See Arizona Revised Statute Section 14-3971. The affiant must swear that at least six months have passed since the date of death, that he is entitled to the property, that the total value of all real property in the probate estate is less than \$100,000, that there is no pending probate proceeding and a personal representative has not been appointed, and that creditors have been paid. This means that the house cannot be sold for six months and therefore in some cases a decision might be made to institute a probate proceeding anyway, even though not required, in order to sell the house faster. And during the six month period without a personal representative having been appointed, it is impossible to obtain property insurance on the property in this author’s experience. The legal process is also a little more complicated than with an affidavit for collection of personal property. The affidavit must be filed with the court and if the probate registrar determines the affidavit is complete then the registrar will issue a certified copy of the affidavit which must be recorded with the county recorder’s office.

HOW TO PROCEED IF THE PROBATE ESTATE VALUE REQUIRES A PROBATE PROCEEDING

WILLS

1. First look for an original will. Without an original will, a copy can be probated as discussed below, but the probate proceeding then has to be formal, i.e. must go before a judge.
2. What is required to make a typed will legally valid?
 - a. The testator or testatrix must be eighteen years of age or older, be of sound mind and not subject to undue influence.
 - b. The will must be signed by the testator or testatrix (hereinafter, testator) or signed in the testator's name by some other individual in the testator's conscious presence and by the testator's direction, and witnessed by two witnesses and signed by them within a reasonable time after the testator signed the will.
 - c. To be self-proved, the will must be notarized. Self-proved simply means that if the will has to be admitted into probate after a ruling by the judge, the witnesses don't necessarily have to testify, unless it is contested.
 - d. The will must have language indicating that the testator intended the document to be a will, i.e. to express his testamentary wishes.
 - e. The will does not have to nominate a personal representative for it to be legally valid, but obviously it is very important to include the nomination.
3. What is a pour-over will? It is simply a will that names a trust as a beneficiary. This does not mean that the will does not have to be probated. The same rules discussed above apply to pour over wills, just like with any other will.
4. What is required for a legally valid holographic will? The signature and the material provisions must be in the handwriting of the testator.
5. A copy of a will can be admitted into probate with a court order from a judge, but it is rebuttably presumed under the law that the original was destroyed and it must be proved that the will was not destroyed. This must be done with circumstantial evidence.

WHAT IF THERE IS NO WILL?

1. If the value of the probate estate requires a probate proceeding and there is no legally valid will, then the decedent is considered to have died intestate, i.e. without a will, and the Arizona laws of intestacy determine who the heirs are. See A.R.S. Sections 14-2102 through 2106. Note that the surviving spouse gets everything if all of the decedent's issue (i.e. children) are common to the marriage, but only one-half of the decedent's separate property and none of the decedent's community property if the decedent has

surviving issue some of whom are not the surviving spouse's issue. The rest goes to the decedent's surviving issue by right of representation.

2. An applicant for the appointment of a personal representative must be one of the persons named in A.R.S. § 14-3301:
 - a. The surviving spouse of the decedent.
 - b. An adult child, a parent, a brother or a sister of the decedent.
 - c. A person who is an heir of the decedent.
 - d. If the decedent was a nonresident, any person who is qualified under the preceding paragraphs or a personal representative appointed in the state of domicile or the nominee of that personal representative.
 - e. If the decedent was a veteran, the department of veterans' services.
 - f. Forty-five days after the death of the decedent, any creditor.
 - g. If no person is qualified and willing to serve as personal representative under the preceding paragraphs, the public fiduciary.

WHAT IS AN INFORMAL PROBATE PROCEEDING?

1. In an informal probate proceeding, the probate registrar, without a hearing before a judge and without witnesses, may admit a will informally into probate and appoint a personal representative if he or she determines that certain legal requirements have been met:
 - a. The application is complete, signed by a qualified applicant, and is notarized.
 - b. Venue is proper (i.e. the applicant filed in the correct court, which is the court in the county where the decedent resided immediately preceding his death),
 - c. No more than two years has elapsed since the decedent died.
 - d. The will is legally valid if any, or if an intestacy application that the applicant has sworn that he has searched for a will with reasonable diligence.
2. Just because a probate proceeding is initiated informally does not mean that all administration has to be done informally (i.e. without supervision by the judge). The probate code allows for the personal representative to choose whether to proceed formally or informally with respect to different stages of the probate administration. For example, the proceeding to admit the will and appoint the personal representative might be informal, but the personal representative can choose to file with the court a petition for the court to approve an accounting, which would be a formal proceeding, and then

the personal representative could still file an informal closing statement without obtaining a judge's order if he wanted.

WHEN IS A FORMAL PROBATE PROCEEDING (i.e. a proceeding before a judge) REQUIRED OR ADVISED?

1. You only have a copy of the will and not the original.
2. When the probate registrar rejects the will due to irregularity and the applicant still believes there is a legal basis for admission of the will.
3. When it is anticipated that the will or intestacy proceeding will be contested.
4. When any of the heirs or devisees contest an accounting.
5. When there is a question regarding the disposition of an asset or a dispute with regard to distributions.
6. When there is a contest of the will or the appointment of the personal representative. You can contest the appointment of the personal representative without contesting the entire will. Grounds for contesting will:
 - a. Not executed in accordance with the law.
 - b. Lack of testamentary capacity.
 - c. Undue influence.
 - d. Fraud.
 - e. Mistake.

ANCILLARY PROBATE PROCEEDING

1. An ancillary probate proceeding is necessary when real property is located outside of the state in which the decedent resided, e.g. decedent resided in Arizona and probate is initiated in Arizona, but owned real property in Oregon, or the decedent died in Ohio, but owned real property in Arizona.
2. Often, it is possible for the personal representative to obtain the right to deal with property located in Arizona in a summary or expedited manner. This is done by filing certified copies of the appointment and proof of bond. A.R.S. § 14-4204.

ADMINISTERING A PROBATE

The personal representative must:

1. Prepare and file:
 - a. For informal probate: Application for Informal Probate and Statement of Informal Appointment of Personal Representative (Applications are made to the Probate Registrar of the Court).
 - b. For formal probate: Petition for Formal Probate (Petitions are filed when an order from a judge is sought).
2. Complete the court training for non-licensed fiduciaries: <https://www.azcourts.gov/probate/Training/Probate-Training-Non-Licensed-Fiduciaries>. The completed and signed training certificate must be filed with the court.
3. For formal probate, obtain a hearing date.
4. Obtain a bond if not waived by the will or the devisees, or in an intestate estate by the heirs.
5. Obtain certified Letters of Personal Representative and record Letters if there is real property.
6. Investigate, gather, and protect assets. If the will does not prohibit the personal representative from charging a fee for their services, the personal representative may charge a fee which is normally charged on an hourly basis and he or she should keep track of the time spent on estate tasks.
7. Provide notice to heirs, devisees, and anyone who filed a demand for notice, of the PR's appointment in an informal probate within 30 days of the appointment. For a formal probate, 14 days' notice must be given prior to the hearing to the surviving spouse and children of the decedent, the decedent's heirs at law, the devisees, and executors (personal representatives) who have been appointed or for whom appointment is being sought in a court, and anyone else who has filed a demand for notice.
8. Obtain an employer identification number (EIN) for the estate using IRS Form SS-4. The PR will also need to complete IRS Form 56 and Arizona Department of Revenue Form 210 to notify the taxing authorities of the appointment. The PR will need to file the decedent's final tax returns as well. Finally, the personal representative will have to file estate income tax returns.
9. Retitle assets into the name of estate, and set up an estate checking account using estate EIN. Remember as so many clients do not, that a power of attorney terminates upon the death of the principal so a power of attorney cannot be used to conduct estate business!
10. Pursuant to A.R.S. §14-3709(B), a personal representative or other interested person can petition the court for an order compelling any person the petitioner believes has estate

property or documents, including a will, to appear before a judge to be questioned about the missing property, or any income earned by the estate during the probate. If they don't appear or turn over property as ordered by the court, they can be held in contempt of court.

11. Publish notice to creditors once a week for three successive weeks in a newspaper of general circulation in the county announcing the appointment and the address to mail claims and notifying creditors of the estate to present their claims within four months after the date of the first publication of the notice or be forever barred.
12. Mail notice to any known creditors informing them of the appointment and that they must present the creditor's claim within four months after the published notice, or within sixty days after the mailing or other delivery of the notice, whichever is later, or be forever barred.
13. Prepare and file an inventory of estate assets within 90 days after the appointment.
14. Comply with the legal duty of undivided loyalty to the beneficiaries and the creditors of the estate. The PR is held to the same standard of care as a trustee except as otherwise provided in the will. The attorney cannot represent the personal interests of his client if he represents the client as a personal representative because otherwise he will be in a conflict of interest. Similarly, the personal representative must set aside any beneficial interest he has in the estate when exercising his duties.
15. Consider duty of care which is the same as for a trustee, which includes exercising reasonable care, skill and caution. Query whether, if the Decedent for decades had held a massive position in Disney stock with little diversification, if the stock should be sold. Perhaps in a case like that the advice of a qualified financial planner should be obtained along with a consensus from the beneficiaries, or a court order.
16. After expiration of the creditor's claim period, pay the valid debts and any taxes owed, and prepare a distribution plan and accounting. If the estate is insolvent the creditors must be paid proportionally in order of priority under A.R.S. § 14-3805:
 - a. Costs and expenses of administration.
 - b. Reasonable funeral expenses.
 - c. Debts and taxes with preference under federal law.
 - d. Reasonable and necessary medical and hospital expenses of the last illness of the decedent, including compensation of persons attending him.
 - e. Debts and taxes with preference under the laws of this state (for example, court-ordered spousal or child support in arrears).
 - f. All other claims.

PAYING CREDITOR CLAIMS

1. The personal representative must pay creditors with valid claims presented within the time frame (includes PR fees).
2. Creditors must provide their claim within 60 days from mailing of notice or 120 days from publication of notice, whichever comes later.
3. The personal representative must either allow or disallow the claim within 60 days after presentation or the claim is deemed allowed, but the personal representative may rescind allowance on an unpaid allowed claim within six months of allowance.
4. The priority for payment of claims is in the following order: costs and expenses of administration, reasonable funeral expenses, debts and taxes with preference under federal law, reasonable and necessary medical expenses of last illness, debts and taxes with preference under state law, and then all other claims.
5. If the probate estate is insufficient, nonprobate assets can be subject to liability for the deficiency.
6. Bringing claims by the estate. The running of a statute of limitation that starts with an event "other than death" is tolled during the four months of the creditors' claim period. A.R.S. § 14-3802. Claims that arise at or after the death of the decedent are barred unless presented within "two years after the decedent's death plus the time remaining in the period commenced by an actual or published notice."
7. Defending claims brought against the estate. If the personal representative defends or prosecutes any proceeding in good faith, whether successful or not, he is entitled to receive from the estate his necessary expenses and disbursements including reasonable attorneys' fees incurred.

ACCOUNTING

The personal representative:

1. Must prepare a final accounting, and should provide it to devisees or heirs with request for them to sign a waiver of liability form for the personal representative before making final distributions. If court approval of the accounting is sought, then a petition for approval of the accounting must be filed with the court.
2. Not required by statute but our firm recommends:
 - a. That the accounting provided to the devisees or heirs be accompanied by a proposal for distributions before final distributions are made.
 - b. That the PR hold back an amount to cover final fees and costs when making distributions, and that the proposal for distributions indicate the amount being

held back. Our firm normally will hold the funds for distribution in our trust account and notify the devisees or heirs that the distribution funds are being held there.

- c. That once signed waivers are received from all of the heirs or devisees that distribution checks be sent out with receipt forms to be signed.
- d. That the PR then prepare a “final final” informal accounting and provide it with distribution of any remaining funds from the hold-back to the devisees/heirs.

DISTRIBUTIONS

1. If closing formally:
 - a. Petition for Approval of Final Accounting and for Decree of Settlement and Distribution of Estate must be filed with the Court, to be heard by the judge before distributions are made.
 - b. Prepare Schedule of Distribution to file with petition.
2. The personal representative makes the distributions and distributes tangible personal property per the Will or intestacy law.
3. If an heir or devisee dies after the decedent, but before distribution:
 - a. The survival statute (A.R.S. § 14-2702) says that an heir or devisee is treated as if they predeceased the decedent unless there is clear and convincing evidence that they survived for at least 120 hours (5 days) after the decedent’s death, unless the will provides for a longer survival time frame.
 - b. If the heir or devisee is deemed to have survived the decedent, the distribution would be made to the personal representative of the devisee’s/heir’s estate or the affiant if the devisee’s/heir’s estate can be collected by small estate affidavit.
4. Note that the law favors distributions in kind so the personal representative should always contact the heirs/devisees and inquire whether they want particular personal or real property before he disposes of it. This includes the family home. In cases where the heirs/devisees don’t agree with the personal representative’s decisions regarding sale of the home, a court order should be sought.

COMMON GROUNDS FOR REMOVAL OF PERSONAL REPRESENTATIVE

1. Conflict of interest – between client as PR and as devisee/heir.
2. PR fails to timely administer probate estate.
3. PR misappropriates estate assets.

CLOSING THE ESTATE

1. The personal representative may file an informal closing statement or close formally by obtaining a court order.
2. If an informal closing statement is filed, the probate is not officially closed until one year after the filing date of the closing statement, pursuant to A.R.S. § 14-3933(B). At that time, the appointment will terminate and any potential claims against the PR for breach of fiduciary duty, except for fraud, are barred unless a proceeding is commenced within six months after the filing of the closing statement.
3. The personal representative can close formally in a probate initiated informally and close informally in a probate initiated formally.
4. The personal representative should obtain a release of liability from the court when closing formally.