

Overview of the Administration of a Testate Estate

This document provides general information about the administration of an estate and the general duties of an executor. It may also be of assistance to the beneficiaries and should cause them to realize that the administration can take a considerable period of time. This document is a general overview, and it does not address any specific estate or circumstances. It should not be construed as creating an attorney-client relationship, and it is not offered as legal advice or counsel for any specific estate.

1. Overall Objective. The general objectives of the administration of all estates are to:
 - (1) collect the assets that belong to the estate, including assets that are in the form of interests in partnerships and fractional interests in other assets such as land;
 - (2) pay the debts of the estate and of the decedent, including the expenses of administration and taxes; and,
 - (3) distribute the balance of the assets in accordance with the Will of the decedent.

The administration will be complete when all of the assets have been distributed, at which time it may be appropriate to petition the court for letters of dismission from further responsibilities.

2. Probate Process. The probate process takes place in the Probate Court of the county of the decedent's residence and is for the purpose of proving that what appears to be the Will of the decedent is, in fact, the Will of the decedent. A paper that looks like a Will is not automatically recognized under the laws of Georgia as a testamentary instrument.

Once the Court accepts that the paper is genuine and is properly a Will, the Court will issue Letters Testamentary to the person or persons named as Executor. The Executor is often referred to as the personal representative of the decedent. The Executor tends to the business, assets and affairs of the decedent much the same as the decedent would do if in life. The Letters Testamentary are an official recognition of the status of the Executor as the personal representative, and they may be looked upon as a commission from the state legally empowering the executor to wind up the affairs of the decedent.

Most Wills relieve the personal representative from carrying out certain duties that would otherwise be mandated by law. For example, most Wills relieve the Executor from the duty of posting a fidelity bond, from the duty of filing an inventory, from the duty of filing annual returns and from the duty of filing final returns. The result is that the only court appearance that the Executor will probably have to make in the course of the administration is an appearance for the purpose of proving the Will and of taking the oath that the duties and obligations of the Executor will be faithfully performed.

The relief from these statutory obligations, which are designed to protect the beneficiaries of the Will where a decedent does not have total confidence in the Executors, means that the administration of the estate will be done in private and that public documents will not show the size of the estate or its detailed composition. The Will itself becomes a document available for public inspection when it is filed for probate. However, the relief from statutory obligations does not mean that these duties of making an inventory, making an appraisal, keeping proper records, etc. need not be performed, but the performance will be in private and the results will not be available for public scrutiny as would be the case if reports had to be filed in the Probate Court.

In sum, the end result of the probate process is the issuance of Letters Testamentary which confers upon the executor the legal authority to carry out the duties of administering the estate.

3. Ownership of Property. Property which is involved in the administration of an estate may have been owned by the decedent in a number of different forms:
 - (A) In Decedent's Own Name Alone. Personal property, such as bank accounts, stocks and bonds, automobiles, etc. may be registered in the name of the decedent alone. Real estate also is often

registered in the name of the decedent alone. The probate process results in property formerly registered in the name of the decedent either being sold by the estate or distributed and re-registered in the name of the person named in the Will to receive the property. Our experience has taught us that property registered in the name of the decedent alone is the easiest property to administer.

- (B) Joint Ownership. Often property is registered in the name of more than one person. As a familiar example, real estate may be registered in the name of John Doe and Mary Doe. In such a case, the Estate of the decedent generally will own a one-half undivided interest in the property, and the joint owner will continue to own a one-half undivided interest. If, instead, the real property is titled in the names of John Doe and Mary Doe as joint tenants with right of survivorship, the decedent's ownership interest in that real property passes to the survivor and not to the Estate.

Frequently, bank accounts may be registered in joint names. Such registration, however, is not conclusive as to the ownership of that account. It simply means that the survivor has the right to withdraw the funds upon the death of the decedent and that the bank is protected when it pays the amount on deposit to the survivor. Sometimes litigation is required to determine the true owner, if there is a dispute between the executor and the surviving party as to the intent of the person who established the account. Did the decedent intend to make a gift or was the joint arrangement for convenience only?

4. Trust Assets. Assets held in a trust established by someone other than the decedent or by the decedent during his or her lifetime, are non-probate assets. That is, they are assets which do not become the responsibility of the executor. Title to trust assets passes in accordance with the terms of the Trust instrument, rather than under the terms of the Will. Occasionally, the Trust instrument provides that some or all of the trust assets are to be added to the decedent's estate, in which case they do become property of the estate. Generally, however, except for the possible requirement of contribution toward death taxes, trust assets pass completely outside of the probate proceedings, and the Trustee, not the Executor, will be responsible for distributing these assets at the proper time as is provided in the Trust instrument.
5. Beneficiary Designation Property. Beneficiary designation property is generally non-probate property which passes in accordance with beneficiary designations signed by the decedent. Life insurance proceeds and employee death benefits (e.g., pension and profit-sharing death benefits, 401k's, and IRA's) are typically beneficiary designation properties. Some brokerage accounts also name a beneficiary. This category can include other assets where benefits are determined by contract signed by the decedent rather than by Will. However, unless the estate is named as beneficiary, property passing pursuant to a beneficiary designation does not require action by the executor.
6. Roles. An understanding of the duties of each participant in the administration will be helpful.
- (A) Personal Representative. As stated above, the executor is the person responsible for carrying out the terms of the Will.

It is the executor's duty to collect the assets; to manage them during administration; to keep records; to pay debts and expenses; to compute and pay income taxes, estate taxes, and other taxes and file required tax returns; and to distribute the estate assets as directed in the Will. The executor generally performs these duties with the help of others, such as an attorney and an accountant; also, often with the help of investment counsel, real estate consultants, etc. The executor generally assists with the collection of non-probate assets such as pension benefits, social security benefits and life insurance proceeds. The executor, in effect, steps into the shoes of the decedent in collecting, managing and distributing the decedent's assets during the period of administration.

The executor is entitled to compensation for services performed, but this is often waived when the executor is a family member and receives benefits under the Will. The compensation of a corporate executor often is provided for in a contract between the decedent and the corporate executor. Absent a specific agreement, the executor is entitled to the fee provided by Georgia law which, generally, is 2-1/2% of the cash received by the personal representative and 2-1/2% of the cash distributed by the personal representative. The fee may or may not be applicable to distributions in kind, that is, to distributions of assets in the same form as the assets were received by the personal representative. Additional fees may be charged for extraordinary services. Banks generally have published fee schedules which are based on the value of the estate. They also may charge for additional extraordinary services.

When a family member who benefits under the Will serves as executor, the question of whether it is advantageous to waive the fee will often depend upon tax factors. For example, if the estate is required to pay no estate taxes, the individual executor will generally waive the fee, for the fee will constitute taxable income whereas, if no fee is charged, the benefit under the Will will be received free of any tax inroads.

When there are co-executors, one of which is a bank, the corporate executor will generally have custody and safekeeping responsibility for the assets, will do most of the administration work, and will expect to receive substantially all the fees.

- (B) The Attorney. Since the executor must be appointed by the probate court, the attorney's initial responsibility will be to probate the Will and secure the appointment of the executor. In most estates, the attorney's role is basically concluded at this point. However, the attorney is available to advise the executor in the administration of the estate. In an estate that may be required to pay estate taxes, there are many tax elections available to reduce or defer taxes under some circumstances, and the attorney and accountant, if any, will advise on the available procedures and elections which will produce the least overall taxes.

Attorney's fees are based on the time required, the risks and responsibilities incurred, the results achieved, the complications which may arise, and the efforts expended. The more the many details are handled directly by the executor, the less are the attorney's fees.

- (C) Other Professionals. Where the decedent has a regular accountant, most of the record keeping and tax work will be performed by the accountant on a fee basis. This relieves the attorney from doing this work, with a corresponding reduction in attorney's fees.

Additionally, stockbrokers and real estate brokers may be employed, and they will make customary charges for their services.

Insurance agents generally assist in the collection of life insurance proceeds and do not charge for this service.

- (D) The Beneficiaries. The beneficiaries must be adequately informed by the executor throughout the process of estate administration. Beneficiaries are often (and understandably) impatient to receive the benefits which the decedent has provided in the Will, and keeping them informed will cause them to understand why estates cannot be distributed immediately. As a rule of thumb, when an estate tax return is required, the administration takes about two years. Interim distribution may be appropriate during this period.

7. Check List for the Executor. All of the following are not applicable to each estate, but the list is a partial catalog of items that frequently need to be considered. Some of these steps must be taken before the Will is offered for probate.

- (A) Arrange for the security of any assets which may be at risk (e.g., jewelry in the decedent's home). Check on the insurance coverage for the house and other property which is normally covered by insurance.
- (B) Notify the postmaster of death and who is to receive the decedent's mail, if no one will be living at the decedent's home.
- (C) Prepare a list of all assets of the decedent as soon as this can conveniently be done. Add to the list as additional assets are located.
- (D) Locate the Will. If the decedent had a safe deposit box, the Will may be located in it. If the only person entitled to go into the box was the decedent, it will be necessary to obtain a court order to permit entry for the purpose of removing the Will. If other persons have the right to go into the safe deposit box, this court order is not necessary, and such person in the presence of the executor should enter the box and remove only the Will. It should properly be delivered to the attorney to prepare the petition for probate.
- (E) After the Will has been probated, inventory the contents of the safe deposit box. Replace the contents in the box or, perhaps, in a separate box of the estate.
- (F) Apply for a tax identification number for the estate with the Internal Revenue Service when the estate is likely to receive income and/or will open a bank account. The tax ID number can be obtained on line at the IRS website.
- (G) Verify that the attorney will run the statutory legal advertisement which is a notice to the debtors and creditors of the estate.
- (H) Open a new bank account in the name of the estate; deposit any checks on hand; transfer to the new account all amounts on deposit in bank accounts which are solely in the name of the decedent; pay routine bills; consider whether to transfer securities into the name of the estate. This, in some cases, may be an unnecessary intermediate step but the advisability of doing this should be considered.
- (I) Collect life insurance proceeds and IRA, pension and other employee death benefits payable to the estate; and file Social Security, Medicare and health insurance claims.

It should be remembered that life insurance generally is considered a part of the taxable estate in determining the value of the estate, although the proceeds of the life insurance may go directly to the beneficiary and may not pass through the account of the executor.

- (J) Locate all assets; make a detailed itemized inventory of all estate assets; value publicly traded securities as of the date of death; arrange for date of death appraisals of tangible personal property, real estate and closely held businesses; investigate all gifts made by the decedent and locate any gift tax returns which may have been filed by the decedent.
- (K) Determine cash requirements for debts, death taxes, funeral and administration expenses and cash benefits; consider sales of estate assets to raise the required funds; consider investment policy and changes; arrange for the management and operation of any closely held businesses; maintain or arrange for the maintenance of proper accounting records; run all receipts and disbursements through the estate account; if assets of the estate will have to be sold, consider the timing of the sale(s).

- (L) Handle any contested matters such as disputed claims filed against the state, Will contests and suits against third parties to recover assets which belong to the estate; close any guardianship or incompetency proceeding that may have involved the decedent; advise the surviving spouse concerning possible disclaimers; consider applying for a year's support for the surviving spouse.
- (M) In a taxable estate, consider available tax elections; consider deducting administration and certain medical expenses on the estate tax return or income tax returns; consider a QTIP election; consider available options to defer payment of estate taxes.
- (N) In a taxable estate, prepare for the filing of fiduciary income tax returns (IRC Form 1041) for each year of the estate and arrange to pay estimated fiduciary income taxes for the third and succeeding years, if the estate is held open that long.
- (O) The final steps in the administration of an estate involve preparing and providing a final accounting with the beneficiaries and completing distributions by transferring the balance of the estate assets to the beneficiaries, giving attention to the timing of distributions and the income tax consequences, if any.

This document is a general outline of the principal steps which are taken in the course of the administration of most estates. Most estates do not require that all of these steps be taken, or even that most of these steps be taken. The main purpose of the listing is to serve as a checklist of what may be necessary.

Our attorneys are available to provide representation in the probate process and throughout the administration of the estate. We can handle all details that you do not feel comfortable in handling yourself, but we would urge clients to take care of as many details as possible for two reasons: (1) to become involved will give you a personal familiarity with the assets and will enable you to do a better job; and, (2) you will hold down fees and other expenses.

A final word: do not feel that everything has to be done immediately. Only the safeguarding of the decedent's property is urgent; the other steps can be taken pretty much at your convenience over a period of several months.