

## **What is Probate?**

Everyone tells you that probate is bad. People come into my office and ask me all the time: "How can I avoid probate?". The purpose of this article is to put out there an explanation of what probate is and a brief overview of the process. When someone dies owning property (real property, as well as tangible and intangible personal property) in Florida, the law provides a legal procedure for settlement of the estate. This procedure, commonly called "probate," involves determining what property the person owned and its value; what debts the person owed; and distributing or assigning title of the decedent's (the person who dies) property to its new rightful owners. Federal estate taxes also will be determined, although these must be paid even if no probate procedure is required.

Not all property is subject to the Florida probate process. For example, property held in a living trust does not go through probate although similar steps are generally followed by the trustee -- but without court supervision. Property held in joint tenancy with right of survivorship is not generally subject to probate, either. Life insurance proceeds, Individual Retirement Accounts, U.S. savings bonds and similar property where there is a named beneficiary (unless the estate is the beneficiary) also bypass probate.

Via publication of a Notice, a period of three months is required after notice is given to creditors to allow them to make claims against the estate for debts owed to them by the decedent. In certain circumstances, with court approval, an estate may be administered as a "summary administration," where direct court supervision of the activities of the personal representative is not generally required, except to open and to close the estate.

No probate proceeding is required in a few cases. An example would be if the decedent had no outstanding debts (or if any debts are assumed and paid by other people) and no interest in property subject to the probate process. The probate process includes the following steps guided by the Florida Probate Code:

1. Petition for probate of the will or for administration of the estate
2. Appointment of a personal representative
3. Notice to creditors
4. Assembly, inventory and appraisal of property
5. Classification and payment of demands against the estate (such as debts of the decedent and liens against his or her property)
6. Determination of homestead rights and family allowances
7. Management (and sale, if necessary) of property
8. Payment of state and federal taxes
9. Accounting to the court and distribution of property.

The person who carries out the plan for the settlement of an estate is called a "personal representative." This can be an individual residing in Florida or a blood relative of the deceased, a bank with trust authority or a trust company.

The court determines whether the proposed personal representative is legally competent to serve. If named in the decedent's will or trust, the person is referred to as a personal representative. If legally competent, the court will appoint that person. If there is no will naming a personal representative, the personal representative is named by the court.

Settlement of a decedent's estate involves continual contact with the court. Various legal rights and responsibilities must be determined. For that reason, it is advisable for the personal representative to hire an attorney for assistance. The personal representative makes the choice of an attorney, although a person can state in his or her will or trust a preference for a particular attorney to help in administration of the estate.