Questionnaire for Understanding Your Probate Case

This questionnaire may be useful for assisting individuals in assessing whether or not a matter should be (or must be) filed in Probate Court, and whether or not to enlist the services of an attorney. The questionnaire will help you to focus on key questions you should consider as you decide whether filing with the probate court is the best course of action. This questionnaire may be most helpful for executors of an estate, or prospective executors. For those seeking guardianship or conservatorship, or having issues related to a guardian or conservator, please see our Guardianship Questionnaire.

DISCLAIMER: This questionnaire is for educational and informational purposes and does not constitute legal advice regarding any specific issue(s) or claim(s) you may be dealing with. You agree that you may not and will not rely on this information in making a decision not to proceed with filing in Probate Court. If you do not understand information presented here, or if you have more questions or uncertainty, you should consult an attorney who handles probate cases. You also understand that this questionnaire provides only a general guide and is not specific to your county or state, where laws and court rules, and probate practices may differ from the generalized descriptions provided here. You should particularly consult an attorney where the value of an estate is significant, where there are minors involved, where there is likely to be one or more persons with strongly-held views or openly-stated opposition or intentions to contest, or where the interests of a party are of grave importance to themselves, family members, or others with an interest in the outcome.

This Questionnaire will provide a general overview of some key questions to consider before filing with the court. It also helps identify important terms used in the probate process, as well as helping to identify other interested parties and some of their relevant legal rights. Please note there is some overlap among topics, and for that reason a few pieces of information will be repeated in different sections.

I. Questionnaire – Key Questions:

1. Do I need an attorney?

While you are not required to have an attorney for the probate process, an attorney experienced in probate law will often save you time and money on complicated matters, or might be able to simply answer questions about the process. It is especially important to consider using an attorney when the claims or issues are likely to have significant financial impact, or substantial impact on the health, well-being, liberty, or other important issues for any interested party.

2. Do I understand the role of Probate Court?

Probate is the legal process of getting court authority to transfer property of another person after that person's death. To start a probate case, a petition or application must be filed with the court. A personal representative is then appointed by a court order. In the vast majority of cases, the personal representative is the person named in the will to be personal representative. The personal representative is responsible for the following:

- Collection, inventory, and appraisal of assets of the person who has died;
- Protection of those assets;
- Payment of the debts of the person who has died; and
- Distribution of the remaining assets to the proper parties, as provided by law.

Some states have what is called a "Living Probate" or "Ante Mortem Probate." This process is for establishing a guardianship or conservatorship over a living person prior to that person's death. It can be done when a person in need of a guardian (called the "ward") is not mentally competent to oversee their own financial interests. "Living Probate" or "Ante Mortem Probate" is a separate and distinct process from the probate concerning a decedent's estate. The process and procedures involved vary from state-to-state.

3. Is Probate required whenever someone dies?

The need for probate is determined by the kind of assets the person owned when they died, not whether they had a will. The mere fact of having a will does not dictate whether probate will be required.

Probate is not always necessary. In many states, probate is not required if, at the time of death, the decedent did not own any real estate in their name alone; and they did not own personal property in their name alone worth more than $75,000 (Note: these amounts may be different, depending on the state).

4. Is Probate required in my situation?

This questionnaire is not intended to answer this question specifically. However, here's a helpful 'rule of thumb':

Probate will be required if:

- The estate is insolvent (more money is owed by the estate than what is in the estate);
- The existence or location of interested parties is unknown;
- The original will cannot be found;
- There is disagreement among the heirs or devisees;

- There are ambiguous or impossible provisions in a will that need clarification;
- The interests of vulnerable parties (such as minors or creditors) need protection;
- The validity of the will must be determined or is being contested;
- The estate requires supervision of complex administrative procedures; or
- The proceeds of the estate must be distributed differently from the terms of the will. In such a case, the estate must obtain judicial approval of these changes.

If you are not clear on whether your situation requires probate, you should consult with an attorney.

5. When do I need to file to probate an estate?

The timing can be important. In most states, a probate cannot be filed within the first 120 hours (5 days) after the death of the decedent. Probating an estate generally must occur within three years of the death of the decedent. It is important not to miss deadlines – be sure to be fully informed.

6. Do I understand the important terms used in probate court?

There are a number of important terms worth understanding before proceeding to court. It is recommended that you review the key terms defined in Section II, below.

7. Do I understand the process used in probate court?

Understanding the probate process will help you decide whether filing with the court is the best next step for your case. Section VI below provides a general overview of the probate process and is meant to help guide you through the legal system.

8. Would I be considered an "interested party"?

"Interested parties" generally include the following: The decedent's heirs, devisees, children, spouse, creditors, beneficiaries, anyone with priority for appointment as personal representative; anyone having a property right in or claim against the decedent's estate that may be affected by a probate proceeding, or the fiduciary representing someone who does (for example, a guardian, conservator, or trustee); and other individuals as determined by the court. There may be others who could be deemed interested parties, depending on state law and the terms of the will.

The "Executor," "Administrator," or "Personal Representative" of the estate is an interested party. To be one of those persons, one generally is one or more of the following:

- The person named in a will as the one that should serve as the personal representative;
- The surviving spouse, if they are entitled to receive property according to the will;
- Other people who are entitled to receive property under the will;
- The surviving spouse, if they are not entitled to receive property according to the will or if there is no will;
- Other heirs, if there is no will;
- Any creditor, as long as 45 days has passed since the time of death; or
- A conservator who has not been discharged, as long as 90 days have passed since the time of death, and as long as no probate case has already been opened with the court.
- Domestic Partners – Not all states extend automatic legal rights to domestic partners. Generally, domestic partners are couples who have entered into a legal relationship that is recognized under the authorization of the local city or county government, but that is not a legal marriage under state law. Without a will, the rights of a domestic partner are governed exclusively by state law. It is important to know whether or not rights exist within your state for domestic partners.

9. Is there a will?

The need for probate is determined by the kind of assets the person owned when they died, not whether they had a will. The sole fact of having a will does not affect whether probate is required.

10. Is the will valid?

As a rule, the most recent/current will is deemed to be the valid will.

State law sets out the minimum requirements for a valid will. In most states, in order for a will to be deemed valid, it must:

- Be in writing;
- Signed by the testator (the person describing how they want their property distributed); and
- Signed by at least two witnesses, each of whom is over the age of 18.

The will and the signatures should be dated. A "self-proving" affidavit is not a requirement, but it can simplify the process by showing that the testator was of sound mind when he or she executed the will.

11. Is the will being contested?

If the will is being contested, you will probably want to consult an attorney.

12. Are there codicils/amendments to the will?

Codicils are official amendments to the will. A codicil is not necessarily valid just because the will is deemed valid.

13. Was the decedent receiving benefits/income/support from any government agency?

If the decedent was receiving county, state, or federal benefits in any form, you should consult with the agency involved when filing for probate. The agency may have a claim against the estate for those benefits.

14. Is there "real property" involved?

See "Real Property" in the Terms section to determine whether real property is involved in your case. Real property usually takes the form of land, buildings, or land rights.

15. How is the real property owned?

The way that the ownership of the real property is transferred in probate depends on whether it was owned solely by the decedent, whether he or she just had a life estate, or whether the property was co-owned in joint tenancy, or tenancy-in-common. Liens against the property will also impact how ownership is transferred.

16. Is there intellectual property in the estate?

Intellectual property means copyright, trademarks, patents, or related rights such as licenses to use someone else's intellectual property. Intellectual property is regarded as personal property, not real property, and like other personal property, ownership interest in intellectual property needs to be transferred to the estate or other owners in writing. *See,* Ownership and Privacy of Records in Guardianship and Conservatorship White Paper

17. What is the approximate value of all assets?

The value of all assets that the probate court will deal with must be determined. As the executor of the estate, the first responsibility is to collect all property of the decedent and have it appraised to determine the estimated total value.

18. How do I know where to file my case?

Generally, a probate case should be filed in the county and state of the decedent's legal residence or domicile. If the decedent is a non-resident of the state where they owned property, the case may be filed in any county where the property exists. Keep in mind that court staff is unable to assist with deciding where a case can and should be filed. If a decedent owns property in more than one state, a separate proceeding will have to be filed. For example, if a decedent was a resident of New Mexico, but also owned a vacation home in Florida, a separate proceeding in Florida limited to the inheritance of the vacation home would have to be filed. If you are not sure where to file a case, or where property needs to be probated, you should consult with an attorney who handles probate cases.

19. Do I need to try to settle any of this outside of court first?

As the executor, you do not need to try to settle debts or claims outside of court. Debts should be resolved after the assets have been appraised.

20. What documentation will I need to file?

Every state has different forms and different requirements, but typically, you will need to file the following documents with the court:

- Request for probate (this is often referred to as an "application" or "petition")
- Death certificate
- The will
- Proof that notice of probate was published in a local newspaper (according to local rules);
- Proof that notice was mailed to creditors, heirs, and beneficiaries;
- A bond, if required; and
- The "self-proving affidavit" from witnesses of the will

21. How long does a probate case take?

Probate cases with simple issues usually resolve relatively quickly. More complex cases may take well more than a year to resolve. Issues that can make a case more complicated may include whether a valid will exists, the number of beneficiaries, whether the beneficiaries agree or are contesting the will, how complicated the ownership of the assets is, the total value of assets, the amount of debt, and whether there are Federal or state estate taxes to be paid. The more complicated the issues are in a case, the more important it may be to consult with an attorney.

II. <u>Important Terms Used in the Probate Process</u>

Administrator: see Personal Representative

Assets: Property (both real or personal) owned in whole or in part that has or potentially has financial value. The term includes land, buildings, possessions, financial holdings, intellectual property, and cash.

Codicil: A document that is used to make changes to an existing will. Codicils add to or supplement a will rather than replace the will altogether. For a codicil to be valid under the laws of most states, it must meet the same requirements as a valid will.

Creditor: Any person or business that has a financial claim against (that is, is owed or may be owed money by) the estate.

Decedent: The person who has died.

Descendant or Issue: A biological or legally adopted person directly descended from a decedent, including children, grandchildren, great-grandchildren, etc.

Devisee: Any person designated (named) in a will to receive property.

Domicile: The county and/or state that is the primary residence of an individual.

Executor: see Personal Representative

Heir: A person who is entitled to the property of a person who died intestate (See "Intestate" below.).

Insolvent: When the decedent/estate has more debt than it has money or assets.

Interested Person A title that usually includes:

- Heirs of the decedent;
- Devisees of the decedent;
- Children of the decedent;
- Spouse of the decedent;
- Creditors of the decedent;
- Beneficiaries;
- Anyone with priority for appointment as personal representative;
- Anyone else having a property right in or claim against the decedent's estate that may be affected by a probate proceeding, or the fiduciary representing someone who does, such as a guardian, conservator, or trustee; and
- Other individuals as determined by the court.

Intestate: When a person has not made a valid will before dying, they are said to have "died intestate."

Joint Tenancy with Right of Survivorship: A way for two or more people to share ownership of property (real property or personal property) so that when one joint owner dies, that joint owner's share automatically transfers to the other owner(s) and is not considered part of the estate of the person who died.

Letters of General Administration: Court authorization to act as personal representative when there is no will.

Letters Testamentary: Court authorization to act as personal representative when there is a will.

Non-Probate Assets: Assets of the decedent that can be transferred to a new owner without going through the probate process. For example:

- Real property held as joint tenants with right of survivorship;
- Bank or brokerage accounts that are held jointly or with a payable-on-death beneficiary designation to a surviving person;
- Investment or retirement accounts or insurance policies that have a designated beneficiary other than the decedent that survives the decedent; or
- Property held in a trust.

Personal Property: All property other than real property. The term includes tangible property such as cars, jewelry, furniture, and intangible property such as stocks, bonds, cash in a bank account, and intellectual property.

Personal Representative: The person appointed by the court to be responsible for administering the estate of a person who has died. Being named a personal representative in a will does not necessarily mean that you will be the representative. A court has to authorize you to act as a personal representative by issuing Letters (e.g. Letters Testamentary if there was a will, or Letters of General Administration if there was no will).

Probate: The legal process of getting court authority to transfer property of a person after death. To start a probate case, a petition or application must be filed with the court, and a personal representative must be appointed by a court order. The personal representative is responsible for the following:

- Collection, inventory, and appraisal of the assets of the person who has died;
- Protection of the estate's assets;
- Payment of the debts of the person who has died; and
- Distribution of the remaining assets to the proper parties, as provided by law.

Probate Assets: Assets of the decedent that require court involvement to be transferred to a new owner. For example:

- Real property that is not held by joint tenants with right of survivorship;
- Bank or brokerage accounts that are not held jointly or with any payable-on-death designation to a surviving person;
- Investment or retirement accounts or insurance policies that do not have a designated beneficiary that survives the decedent; or
- Property that is not held in a trust.

Real Property: Land and buildings or other improvements permanently attached to the land (also called real estate).

Separate Writing Gifting Personal Property: A document that lists what the testator wants to have happen to specific items of tangible personal property (other than cash, coin collections, or property used in a trade/business) that are not specifically addressed in the will. The "separate writing" does not have to meet the same formal requirements as the will, but must:

- Be referred to in a valid will,
- Be in the testator's handwriting or signed by the testator, and
- Describe clearly the items and the people they will go to.

Tenancy-in-Common or Tenants-in-Common: A way for two or more people to share ownership of property so that when one tenant-in-common dies, that tenant-in-common's share passes to his or her heirs or devisees rather than to the other owners.

Testate: When a person dies after making a valid will, they are said to have "died testate."

Will: A legally valid document describing how a person wants their property distributed after they have died**.** Generally, in order to be valid, a will must be:

- In writing;
- Signed by the testator (the person describing how they want their property distributed); and
- Signed by at least two witnesses over the age of 18.

III. <u>Hiring an Attorney</u>

1. Am I required to get an attorney to represent me?

See above. Hiring an attorney is not strictly required, but you should not rule it out until you are certain that you are capable of convincing the court to take the action or

issue the order you think is warranted – whether that is appointing or confirming an executor or guardian, transferring or dividing property, reversing or upholding decisions made by an executor or guardian, etc. The more complicated the matter, or the more important the consequences are, the more you should consider consulting with and engaging an attorney.

2. How much will it cost me for an attorney?

The fee charged by an attorney is a matter for negotiation with the individual attorney. While you may want to ask others in your community about their experiences, attorneys are legally barred from agreeing with other attorneys to set a standard fee. There are three ways attorneys can be paid. The three ways are:

- Hourly;
- Flat or fixed fee-based; and
- Contingency.

An "hourly" arrangement is when the attorney is paid a certain amount per hour that he or she works on a matter. Most attorneys will give an estimate of the total number of hours that will be required. Keep in mind that this is only an estimate. The actual number of hours depends on a number of things, including how complex the matter is. Since it is difficult to know in advance exactly how many hours will be needed to resolve a matter, it is important to have an honest discussion with the attorney of what options are available and what a reasonable estimate of hours will be based on each option. Additionally, attorneys that are hired on an hourly basis will require an upfront amount of payment to get the process started. This upfront amount is referred to as a "retainer". In most states, attorneys are required to deposit the retainer in a special account that can only be accessed after the work has started.

A "flat or fixed fee-based arrangement" is where the attorney charges you a total fee for the completion of all the work that is to be done. Generally, this will be the total cost that you will have to pay. There may be some additional fees, but an experienced attorney will be able to provide the client with a clear breakdown of how the total fee is derived and what court-related costs are or are not included. Some attorneys who work on this basis will require the client to pay the full amount at the beginning, while some will start work on the case after a "retainer" or "deposit" is paid upfront.

A "contingency fee" is when the attorney is not guaranteed any payment to begin working on the matter but receives a percentage of the monetary award at the completion of the case. The client is still liable for court costs, such as filing fees. It is important to know that doing probate work on a contingency basis is prohibited in many states.

It is crucial to know which arrangement you are entering into before the process begins. Most attorneys will want to make sure that it is completely clear which

services will be needed, how they will be paid, and what is expected from the attorney and the client. This information should be provided to the client in a written engagement agreement specifying all of the terms of the representation prior to starting any legal work.

3. What should I ask the attorney?

Hiring an attorney can be a complicated process. The most important thing is finding an attorney experienced in the type of matter that you have. Most reputable attorneys will tell you what types of legal services they provide. It is important to find an attorney with probate court experience. While the majority of cases settle out of court, it is important that the attorney address expectations about the likelihood of going to court and the filing of paperwork.

You should also discuss in advance what your role will be. Most attorneys will be able to tell you about their expectations for your participation. Most attorneys will give you a preferred method of communication and tell you how frequently they will be updating you on the case.

IV. Overview of Probate Process (Formal, Informal, Without Court Involvement)

Probate can be thought of as a series of individual steps. While these steps may vary from state-to-state, the following are the most common steps in the order they are usually taken.

Step 1. Beginning Probate/Requesting Appointment as Executor

Whether there is or is not a will, the first step in probate is to ask the probate court to name you executor, personal representative, or administrator (whichever term is used in your state).

Typically, you will need to file an application, death certificate, and the original will, or whatever documents the probate court requires, with the local probate court in the county where the deceased person was living at the time of death.

If the deceased person owned real estate in more than one county in the same state, you can usually handle it all in one probate proceeding.

Step 2. The First Probate Hearing

The Probate Court will schedule a hearing to give interested parties a chance to object to your appointment as executor. Before the hearing, you will need to send formal legal notice to beneficiaries named in the will and to heirs under state law. You will also have to send out notices to creditors you know about and publish a legal notice in a local newspaper to alert other interested parties you may not know about.

In most cases, the hearing is a formality. You likely will not even need to show up. If your request is approved, the court will issue documents that authorize you to act on behalf of the estate. In most states, these documents are called Letters of Authority or Letters Testamentary, or Letters of Administration if there is no will. They are often referred to just as "letters."

Step 3. Posting a Bond

The Probate Court may require you to post a bond. A bond is a kind of insurance policy that protects the estate from losses you cause it, up to a certain dollar amount.

Step 4. Proving the Will is Valid

If there is a will, you must prove that it is valid. Usually, all you need is the statement of one or more of the witnesses to the will. The statement can be in one of these forms:

- A notarized statement, called a "self-proving affidavit," which the witnesses signed when they witnessed the will being signed;
- A statement sworn and signed by a witness now; or
- Live testimony in court from a witness.

Step 5. Paying Debts

While the probate case is pending, you can gather assets and open a bank account in the name of the estate and use the account to pay creditors. This includes all obvious bills (credit card bills, utilities, funeral expenses, etc.) but may also include other debts, such as attorney's fees and unpaid income taxes.

Most states require that probate cases must also stay open for at least four to six months. The reason for this is to give creditors a chance to come forward.

Step 6. Paying Taxes

As the executor, you will also be responsible for filing tax returns and paying tax bills on time. This includes payment of any unpaid taxes the decedent may have owed at the time of death.

Step 7. Distributing Property and Closing the Estate

When the time period for creditors to make their claims has passed, and you have paid debts, filed all necessary tax returns and settled any disputes, you are ready to distribute the remaining property to the beneficiaries. Although you may be able to distribute some of the assets prior to the probate, it is usually best to wait until the claim period has passed and all debts have been paid.

Once the property is distributed, you may close the estate. At the time of closing the estate, you will need to give the court an accounting of your activities. The accounting will show where all the estate assets have gone and which creditors have been paid. It can also include documentation of any income the estate received during probate and any losses to the estate.

When the estate is closed and the final accounting is filed, you are automatically released from your duties as executor.