

PROBATE

THE FOLLOWING INFORMATION IS PROVIDED
COURTESY OF THE MISSOURI BAR ASSOCIATION:

The Probate Division

Most people are familiar with the operation of the civil and criminal divisions, having seen trials portrayed on television and described in various newspaper articles. However, to the average person, the role of the probate division (formerly the “probate court”) is a complete mystery. In fact, many people remain unaware of the existence of the probate division until they are faced with the many financial and legal details which may arise on the death of a close friend or relative.

Why Do We Have A Probate Division?

In this country, we have the right to own private property and, upon our deaths, to pass that property on to those we select as our beneficiaries. However, this right is not absolute. We can pass our property on to our spouses, our children and other beneficiaries only by following certain formal requirements. In most cases these requirements will be met by the execution of a will, prepared and signed in accordance with the law of the state in which you reside.

When one dies leaving a will, we say that person died **testate**. If one dies without a will, the person is said to have died **intestate**. Whether the deceased left a will or not, the distribution of most property in the state of Missouri, over certain minimum amounts as set forth in the statutes, will involve the appointment of a Personal Representative and the opening of an estate in a probate division of the circuit court – usually in the county in which the deceased permanently resided at the time of death. The individuals who will share in that distribution are then determined either by referring to the deceased’s will or by Missouri statutes if no will has been made.

If a deceased person’s estate is below the statutory minimums, certain summary procedures may be followed which eliminate the necessity of a full administration and the appointment of a personal representative.

Transfer of Property at Death

The probate division has been established primarily to protect the rights of one’s heirs, beneficiaries under a will and creditors, and to assure the orderly transfer of property. However, if an individual disposes of all property prior to death, either by gift, living trust, joint accounts with right of survivorship, pay-on-death accounts, beneficiary accounts or other similar transfer-on-death provisions, then there may be no need to probate the estate, as the distribution of such property is not affected by the terms of a will or the laws of intestate succession. However, in the case of most individuals dying with property in Missouri, some involvement with the probate division will be necessary. The assets of the deceased, except for any real estate passing to heirs or devisees under the will, are held and managed by the Personal Representative during the administration of the estate. The Personal Representative makes distribution of the estate when the administration is ended and the Personal Representative has reported all transactions to the probate division for approval.

The earliest that an estate may be closed and distribution made to the heirs or beneficiaries is approximately six (6) months after the opening of the estate. However, it is unusual for all administrative duties to be finalized within that period of time.

Rights of Creditors and Collection of Debts

The probate division serves as a forum through which creditors of the deceased can protect their claims and seek payment. Also, the Personal Representative of the estate can pursue and collect payment of any debts that may have been owed to the deceased, as well as seek the recovery of property owned by the deceased which is in the possession of others.

Payment of Death Taxes

Another important function of the probate division is to provide for the collection of any taxes which might have been due by reason of the deceased's death or on the transfer of his or her property. The administration of the estate normally may not be closed until all death taxes (state and federal), final income taxes, fiduciary income taxes and personal property taxes have been paid. The Missouri Estate Tax Law has completely eliminated Missouri death taxes for most small and medium sized estates. Thus, a Missouri Estate Tax Return is necessary only for estates for which a federal estate tax return must be filed. Such estates are those involving probate and nonprobate assets over a minimum amount. That amount, which changes each year, is as follows:

| <u>Year</u> | <u>Amount</u> |
|-------------|---------------|
| 2004-05 | \$1.5 million |
| 2006-08 | \$2.0 million |
| 2009 | \$3.5 million |
| 2010 | Tax Repealed |
| 2011 | \$1.0 million |

Establishing Title to Real Estate

The administration of an estate in the probate division also serves to establish clear title to any real estate which the deceased may have owned at the time of death. Real property passes directly to one's heirs, or to one's devisee if a will is admitted to probate; thus, it does not technically form a part of the probate estate unless it becomes necessary to sell the property to pay debts or for certain other reasons as set out in the statutes.

However, even though real property does not always form a part of the estate, if there is no probate administration it may be impossible for the heirs to pass clear title to the property for one year after death. This is due to the fact that, in Missouri, a will may be filed at any time within one year after the death of the individual executing the will – and that will could possibly alter the ownership of the property.

Similarly, creditors, **may** take actions to enforce claims which could force the sale of real property. However, if an estate is probated, the period of time in which the title to the real property can be so affected is reduced to approximately six months after the opening of the estate.

The Surviving Spouse's Rights

A common misconception is that, upon death, all of an individual's property passes directly to the surviving spouse.

This is simply not the case. In Missouri, if a person dies without having left a will, the surviving spouse is entitled to receive one-half (1/2) of the estate if the deceased is survived by children, and the first \$20,000 from the estate if the surviving spouse is also the parent of all of the surviving children. This share is in addition to certain exempt property and other statutory allowances. The exempt property is that which the spouse or the unmarried minor children are entitled to receive absolutely, without regard to any provisions of the deceased might have made for the disposition of other assets. The exempt property includes the family Bible, books, clothing, household appliances, furniture, one automobile, and the like. The support allowance is an award made to the surviving spouse for his or her maintenance (and that of the unmarried minor children) for a period of one year after the deceased's death. The amount of the award is judged by the family's previous standard of living.

On the other hand, in Missouri (even if an individual leaves a will) the spouse cannot be completely disinherited unless some form of contractual arrangement has been made before death. For example, a spouse is entitled to receive as his or her minimum share either one-half (1/2) of the deceased's property if there are not children or grandchildren, or one-third of the property if the deceased spouse is survived by children or grandchildren.

This participation in the deceased's estate is subject to the claims of creditors, and is in addition to the survivor's statutory allowances and exempt property as discussed above. However, in determining

the statutory percentages, certain other property received by the survivor (such as life insurance, joint property and trust assets) must also be taken into account.

If the deceased leaves a will giving the spouse less than these percentages, the spouse may within a specified time elect to “take against the will” and thus receive the statutory share instead of the provisions made in the will. The probate division is required to notify the surviving spouse of this right of election shortly after the will is probated. “Omitted” spouses, or those who were married after the deceased’s will was executed, may claim an intestate share of the estate. In certain cases, similar provisions are also included for any children who might have been born after the will was executed.

Expenses of Probate

The administration of any probate estate involves the payment of certain expenses. Those assisting in its management are entitled to be paid for their services, and the court must be compensated for the time it devotes to the administration of the estate. The expenditures are, in most cases, governed by statute. The expenses usually encountered in the average estate fall into four main categories.

- (1) **Bond Premiums:** The Personal Representative may be required to provide the court with an indemnity bond to guarantee the faithful performance of his or her duties. The necessity for such a bond may, however, be waived by the deceased in the will or, in certain cases, by the court or all beneficiaries. The cost of such a bond is paid out of the assets of the estate and varies with the amount of property to be administered.
- (2) **Costs of Publication:** Generally, two notices must be published during the administration of each estate, one announcing that the estate has been opened (Notice to Creditors) and a second one when the estate is in a position to be closed (Notice of Intention to File a Final Settlement or Statement of Account). These notices are for the protection of those interested in the estate and vary in cost depending upon the type of newspaper in which they are published.
- (3) **Court Costs:** While the probate division is a part of the state government, it is not entirely supported by taxpayers. Every estate must pay a share of the expenses the court incurs on its behalf. These court costs are generally based upon the size of the estate being administered and, in some cases, on the extent of service the court is called upon to provide.
- (4) **Personal Representative’s Commission and Attorney’s Fees:** The fees the Personal Representative receives are based upon the size of the estate and the amount of work performed. Missouri statutes provide for a minimum fee schedule which is followed in most estates. Compensation in excess of this scheduled fee may be paid only upon an order of the court or upon consent of all beneficiaries. The minimum scheduled fees are based upon a percentage of the amount of money and personal property distributed from the estate. This percentage is based upon a graduated scale as follows: 5% of the first \$5,000; 4% of the next \$20,000; 3% of the net \$75,000; 2.75% of the net \$300,000; 2.5% of the next \$600,000; and 2% of everything over \$1,000,000. Special provisions are made for situations in which an estate has more than one Personal Representative.

The attorney who assists in the administration of an estate (and only an attorney can represent an estate before the probate division) receives a fee based upon the same scale established for the Personal Representative. However, if this attorney also serves as the Personal Representative, he or she will receive only one fee. Attorneys frequently have a minimum fee for handling a probate case which could exceed the percentage on a smaller estate.

Other Functions of the Probate Division

In addition to its role in administering decedents’ estates, the probate division has general supervisory jurisdiction over the estates of minors and those adults whom the court finds to be disabled or incapacitated. Thus, if individuals cannot handle their own affairs, either because they

are under age or in some way disabled, the probate division may then step in (upon proper application, hearing and determination) and appoint a conservator to look after these matters for them. In a similar manner, the probate division may appoint a guardian for the care and custody of a minor of an incapacitated adult unable to care for himself or herself.

In metropolitan areas, the probate division handles probate and similar matters exclusively. However, in the smaller counties, judges of this division may have other judicial duties as well.