

# *The Probate Process and Techniques for Avoiding Probate*

A large number of calls to the Legal Hotline for Michigan Seniors are about probate and how to avoid it. There is a great deal of confusion about exactly what probate is and a substantial amount of inaccurate information about the ways of avoiding it. Our lawyers help callers sort through the information (and misinformation) so that they are in a better position to know what to do.

The word “probate” is commonly used to refer to the administration of a deceased person’s estate, regardless of whether the person died **testate** (with a valid will) or **intestate** (without a valid will). If a person dies testate, then their estate is distributed in accordance with the provisions in their will. If a person dies intestate, then his or her estate is distributed in accordance with the provisions of the state’s intestate succession law. The term **heirs** refers to those persons entitled to the property of the deceased under the intestate succession law.

In Michigan, probate administration is under the jurisdiction of the **probate court**, which is generally organized along county lines. A petition to admit a will to probate or a petition for the administration of the estate of a person dying intestate is properly filed in the probate court in the county in which the person resided at the time of his or her death.

Probate administration may not be necessary upon the death of an individual. If the person owned no property titled in his or her name alone, then there is no property to administer and no need for probate. For example, if spouses own all of their property together as husband and wife, then upon the death of the first spouse, the property passes automatically to the surviving spouse without the need for probate.

The administration of a decedent’s estate is the task of the **personal representative**. “Personal representative” is the term used under Michigan law for the position which was formerly called

the "executor" or "administrator." In most instances, the personal representative hires an attorney, and perhaps other professionals (e.g. accountant, realtor) to perform services related to the administration of the estate. Many of the services provided are in satisfaction of requirements of the probate process.

Most of the cost of probate is the fee for attorney services. Because attorneys typically bill by the hour, the more time spent in complying with probate requirements, the greater the fee incurred. Difficulty ascertaining the ownership of assets, tying up loose ends, responding to disputed claims and will contests are things that can require an attorney to put in extra time and thus increase the cost of administering the estate. The personal representative is allowed to charge a fee that is subject to approval by the court. Also, there is an inventory fee (amounting to less than one half of one per cent), payable to the court and based on the value of the assets that are part of the estate. Thus, the cost of probate is going to be different for each estate and it is difficult to come up with an average or estimate.

It is important to note that the avoidance of probate does not necessarily mean a complete avoidance of attorney fees and other costs upon death. An attorney may still be necessary for the coordination of asset transfers and preparation of required tax returns. Family members may need to hire an attorney to assist with managing a trust. However, in most cases, the avoidance of probate should reduce these fees.

Concern over the costs related to probate administration has led many individuals to take steps to ensure that there will be no need for probate administration upon their deaths. This concern is usually grounded in a desire to reduce death related expenses as much as possible for maximum estate preservation. A number of techniques for achieving this goal are employed. They all have one thing in common – the individual dies owning no property or assets titled in his or her name alone.

## **THE PROBATE PROCESS**

If the estate of a deceased person consists of property valued at **\$18,000 or less** (in 2006), then a shortened probate procedure (Small Estate Proceeding) is available. The probate court issues an order that the property be turned over to the person

who paid the funeral expenses, with any remaining amount going to the surviving spouse or, if there is no surviving spouse, to the heirs. The probate court has a form for this procedure (Petition for Assignment of Estate under \$18,000) and often people are able to handle the matter without the assistance of an attorney. Help with filling out the form and other questions about the small estate procedure can be obtained by calling the Legal Hotline.

Probate proceedings for estates larger than \$18,000 are governed by the rules of either ***informal probate*** or ***formal probate administration***. The rules of informal probate eliminate the need for a proceeding before the probate court for most of the steps in the probate process. If the estate can be handled through informal probate, there is seldom any need for a hearing before the judge. The rules of formal administration retain the supervision of the probate court over certain steps in the probate process. The law allows a probate estate to be closed after 5 months if all claims and other matters are resolved. Most estates are closed within a few months thereafter, although if time is needed for the sale of assets, for instance the sale of a home or other realty, then the estate will usually have to stay open until such sale is completed.

Probate proceedings are generally public in nature. In most circumstances, anyone can examine the court file for a deceased person's estate. However, the personal representative is given the discretion not to file the inventory of the estate with the court and in this way the value and nature of the estate may be hidden from the general public.

If the only asset or assets of the estate are an automobile or automobiles valued at \$60,000 or less, then transfer of ownership to the spouse or next of kin can be accomplished through the Secretary of State and no probate proceedings are necessary.

Next month's *Senior Supplement* article will cover various strategies and options for avoiding probate, and some of their advantages and disadvantages. Generally, they should only be undertaken after careful thought and consideration. The assistance of a lawyer is highly recommended.

The Legal Hotline can answer questions about the probate process and the options to avoid probate. You can call the Hotline

weekdays from 9 to 5 to make an appointment for a lawyer to call you back within a day or two.