legal lines

from
MOORE, SUSLER, MCNUTT & WRIGLEY
Lawyers

What is Probate...Really?

It has been said that in California people fear probate more than AIDS. It may not have that priority for Illinoisans, but it may rank right up there with a root canal.

Speaking of roots, probate derives from the Latin verb probare, to **prove**. And an important aspect of probate is to prove who is entitled to our assets (the real and personal property we cannot take with us) at our deaths.

Key in this is OUR assets at our deaths. If I hold title to any assets in joint tenancy (with another) or own my residence as tenant by the entirety with my spouse, or if I have legally made some other designation as to what is to happen to an asset at my death (such as naming a spouse or children as life insurance beneficiaries), such assets are not MINE at my death and do not go through probate. The same would be true of assets I give away before my death or put into a living trust.

But if I do own assets at my death, what will be the process to get them where they should go? The first question to be answered is: Did the one who died leave a will? If yes, there will be one or two procedures for carrying it out, getting the assets to the people named in the will, called legatees.

If no will is found, the State Legislature has already made a will for the person who has died. It is called the statute of Descent and Distribution. This law says who your heirs will be and in what proportions. Obviously spouses and children are favored, then parents, brothers, sisters, nephews, nieces and cousins. Finally, if you have none of the above and you leave no will, the State of Illinois will take your assets and say "Thank you very much."

The simplest procedure for getting assets into the hands of the legatees or heirs is the Small Estates Act. Presently that applies to any estate where the decedent's assets *other than real estate* do not exceed $50,000 in final probate value. Then a Small Estate Affidavit, a certified copy of a Will filed with the Circuit Clerk (if there is one) and a death certificate should enable the legatees of the Will or the heirs at law under the statute to receive the assets.

As to real estate, this procedure will only work if the legatees of the real estate would also have been the heirs at law under the statute of Descent and Distribution, and if title insurance is obtainable. It might also be made to work even though the legatees are different from the heirs at law, if the heirs are willing to honor the will provisions without probate and convey their interest as heirs to the legatees.

If there are too many assets (over $50,000 other than real estate) in the decedent's name alone, or if a deed cannot be obtained from necessary heirs as to real estate, then formal probate will be necessary.

If Probate is necessary...

Even if there is a will, the heirs at law must be notified. This is often a surprise to the decedent's executor in cases in which the will gives the assets to none, or less than all, of those who would be heirs at law if there was no will. The reason for this notice is to give those heirs not left anything a chance to contest the will. The law gives them this protection.

People to whom the decedent may have owed money are also entitled to notice, and an opportunity to file claims. This is done by a Claim Date Notice, published in the newspaper, and by separate mailings to known creditors. Creditors have six months to file their claims and heirs dissatisfied with the will have the same period to begin a contest of the will. Of course, mere dissatisfaction is insufficient. The contester must prove that the decedent was of unsound mind or was under undue influence at the time he or she made the will being probated.

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Announcing

a seminar

Enjoying Personal Independence

Saturday, October 25
1:00 to 4:30 pm

Area professionals in the fields of travel, volunteer work, finance and law will speak on topics of interest to seniors who are now experiencing or want to experience the challenge of living to a ripe old age, and loving every minute of it!

See the enclosed flyer for additional details on this seminar.

My child is 18 so my child support ends, Right? Not Necessarily.

Jack and Jill were married for 7 years and had beautiful twin girls. But financial worries took a toll on them and the couple began fighting more frequently. Their dissatisfaction with each other grew and finally, the realization hit them that the marriage just was not working. So, with the help of cooperative attorneys, a mutual agreement was reached between them and a divorce was granted.

Jill got custody of the girls (with Jack's blessing) and Jack was to have frequent and liberal visitation. All went well for a few years and the children remained close to their father. Every week his child support payments were promptly written and delivered. Then Jill met another man and the two of them were married. Suddenly, Jack's relationship with his little girls was strained due to the constant presence of another man in their lives. And as the years went by, Jack came to look forward to that magic date when the girls would turn 18 and, according to the divorce decree, his child support payments would automatically end.

This is a fairy tale. Children do not suddenly become self-sufficient because they reach their 18th birthday and the courts recognize this. As a result, the law in Illinois is if, when a child reaches majority and plans to attend college or other secondary education program and resources are available to the parents, they will be ordered to contribute to those expenses. Learning this often comes as a shock to the non-custodial parent.

The court has a great deal of discretion in deciding how much each parent must contribute, though, and the statutory percentages of net income that are usually applied in setting child support for a minor do not apply. Furthermore, the child's financial resources will be considered. For example, if the child has received a full ride scholarship and is working a part-time job, there may be very little need for additional help from Mom or Dad.

On the other hand, the parents may find themselves paying for Junior to attend private school, with a $7,500 per semester housing contract if that is where Junior is accepted and wants to go. In that case, the court will consider the standard of living the child would have had if the parents had not divorced. Of course this is an entirely subjective test, but if it appears to the court that the family would have prospered financially, Junior will not be denied an opportunity he should have otherwise been given.

Finally, there is no room to argue that a parent has been estranged from his/her child and, therefore, should not have to continue support payments. The relationship between parent and child is a legal one and does not end because of personality differences or separations. However, if the non-custodial parent has a new family, and if that family will be impoverished as a result of continuing or increased support payments, the court will consider that fact in making its decision.

People like to be able to see the end of an obligation, whether it's a car loan, a home mortgage or court-ordered child support. That doesn't mean their love for the car, the home or the child lessens; only that it is human nature to seek finality. But children are a never-ending source—of joy, of worry, and of need—and whether they are the product of divorced parents or not is immaterial. Knowing the law ahead of time is one way to prepare for the endless list of possibilities our children provide us.

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For many reasons, especially if the estate is large enough to require filing of a federal estate tax return, the estate may need to remain open considerably longer than the statutory six month claim and contest period. Meanwhile, the executor (or administrator if there is no will) will be busy collecting the assets, paying authorized claims, liquidating assets not specifically given by a will or to be distributed "as is" and generally getting prepared to distribute the estate to the beneficiaries.

At the end of the probate, the executor (or administrator) will account to all the residuary legatees, those who share in the estate after any specific legatees. (Specific legatees are people or institutions given specified items by a will such as a piece of real estate, a piece of jewelry, an automobile, a stock or bond or a specified amount of money. Residuary legatees are ones who get a stated fraction or percent of what, if anything, is left after the specific legacies, if any, are paid as well as debts of the decedent and costs of administration, such as executor or administrator and attorney fees.)

When you look at what must happen to pass our property on, you may share Californians fear of probate. Two solutions seem to be available: Get rid of everything but $50,000 or put it all in a revocable living trust. The first one goes against what most of us plan for - our secure independence. The living trust not only preserves our independence, but also allows our assets to work better for us, if we should become unable to manage them ourselves. Finally, it avoids the ill-effects of probate as the final chapter.

Moore, Susler, McNutt & Wrigley
3071 North Water Street
Decatur, IL 62526
(217) 872-1600

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