

"By failing to prepare, you are preparing to fail." Benjamin Franklin

## Understanding Probate

### What is Probate?

The term "probate" is often discussed but frequently misunderstood. Simply put, probate describes the process a court of law undertakes when settling the assets and liabilities of a person's probate estate following their death. Specifically, it is during this process the will is filed with the court, the personal representative is appointed, and the deceased's beneficiaries and creditors are established.

### Importance of Understanding Probate

While the probate process can be simplistic, it has drawbacks and the occurrence of the following typically complicates the process:

- 1) A person dies without a will.
- 2) More than one person seeks to be appointed personal representative.
- 3) The validity of a will is challenged.
- 4) A dispute exists regarding inheritance.

As family members do pass away without preparing estate planning documents (e.g. a will and trust), understanding your probate rights and the importance of prompt action can be the difference between receiving an inheritance or losing it to another family member or a third party.

### Dying Without a Will

When a person dies without a will, they die "intestate." Conversely, when a person dies with a valid will, they die "testate." In the event a person dies without a will, Arizona laws, referred to as the laws of intestate succession, dictate the prioritization of many legal issues including the determination of the deceased's heirs, and the appointment of the personal representative. Although the State of Arizona may have the best intentions when appointing the deceased's personal representative and identifying the beneficiaries, the State is simply not designed to ensure that the personal representative and beneficiaries selected, on behalf of the deceased, reflect the deceased's wishes.

As a result, if you have loved ones without a valid will, speak with them about the importance of putting their testamentary wishes in writing. Further, if you have recently suffered the loss of a family member or loved one who died without a will, then immediate action is called for to ensure the proper administration of the deceased's probate estate. Failure to act can dramatically increase the duration and costs associated with probate.

## Challenging a Will

In order to challenge the validity of a will, the challenging party must successfully persuade the court that the will: (i) did not satisfy formation requirements; (ii) the person for whom the will was created lacked the required testamentary intent or capacity; (iii) the will was executed under any of the following: undue influence, duress, fraud or mistake; or (iv) the will had been previously revoked.

## Appointing a Personal Representative

Pursuant to Arizona law, the personal representative of a deceased's probate estate is appointed in the following order: 1) pursuant to the terms of the probated will; 2) to the surviving spouse, if the surviving spouse inherits under the terms of the will; and 3) to other beneficiaries of the deceased. This list is not exhaustive. In the event a dispute arises as to the appointment of a personal representative, the beneficiaries should consider petitioning the court to have a formal, as opposed to an informal, probate conducted.

## Inheritance Disputes

When a dispute arises regarding inheritance or the identity of the deceased's heirs, a formal testacy proceeding should be commenced. Unlike probating a will informally, a formal testacy proceeding enlists the services of the court to resolve the disputed issues.

If you or a loved one is involved in a dispute giving rise to the need for a formal testacy proceeding, do not delay in taking action as formal testacy proceedings must be commenced within the sooner of 12 months from informal probate or two years from the deceased's date of death, unless sooner terminated by Arizona law.

## Ways to Avoid Probate

As a result of the complexities often associated with probating an estate, many people choose to take steps during their lifetime to avoid probate all together. While the reasons an individual or family decides to engage in probate avoidance planning varies, some of the more common reasons include:

- 1) Cost - probate can be expensive (more than probate avoidance planning) especially when out of state property is involved. (e.g. a second home)
- 2) Publicity - probate is public, meaning both friends and strangers alike can access and view the deceased's probate estate and related documents.
- 3) Time - probate can be a lengthy process. This is especially problematic when the beneficiaries' inheritance is dependent upon the sale of the deceased's real property.

As evidenced by the reasons set forth above, if you or a loved one is currently faced with probate issues or faced with the decision of whether to engage in probate avoidance planning, seek the counsel of an experienced estate planning attorney.

### About the Author

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Scott F. Burns, Esq. is an Arizona attorney whose clientele includes professional athletes, business owners, and families desirous of protecting their personal and professional legacies through the use of asset protection strategies, estate planning and business consulting.

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