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The Florida Probate Process

Petition for Administration (Florida Probate - With a Will or Without a Will): To formally open the probate estate, a Petition for Administration is required to be filed with the probate Court. This document provides the probate court with the information needed to open the Florida Probate estate, including the decedents name, last known address, date of death, name of heirs/beneficiaries and the nature and value of the decedent's estate, among other information. The exact form used, of course, will depend on whether the decedent had a Will or not.

Waiver of priority, Consent to Appointment: This document allows the heirs/beneficiaries to consent to the Florida personal representative's appointment without hearings or delay, and to agree that the Florida will that is filed with the court is the valid will of the decedent. Without these waivers, heirs are entitled to receive notice by certified mail and have a hearing related to the appointment of the Florida personal representative.

Death Certificate: Florida statutes require that the court receive proof of death, which is ordinarily in the form of a certified Florida death certificate. A Florida death certificate must be filed in the probate court file and another in the real estate records for any county where the decedent owned real property.

Oath of witness to Will (Decedent's with a Will): A will and each codicil must be proven before being admitted to the Florida probate court. A will is self-proving under Florida law if the person making the will and each witness signs the will and an additional affidavit confirming that they all signed in each other's presence. If the will or a codicil is not self-proving, it must be proven by an oath of one of the witnesses to the will. The oath can be taken at the Clerk's office when the estate is opened. The witness will sign the oath before a clerk at the probate department.

Oath of Personal Representative: The personal representative's oath confirms that the Florida personal representative is qualified to serve as the personal representative (over eighteen years of age, a relative of the decedent or a Florida resident, and no felony

convictions). The personal representative further promises to administer the estate according to Florida Law. The form also designates the estate's attorney as the resident agent for service of process in the event that a suit is filed against the estate.

Bond and Bond Application: In some counties, the probate judge routinely requires a surety bond for personal representative who are not Florida residents, even when the will waives the requirement of a bond. The cost for a Florida Probate Bond is roughly \$100.00 for every \$18,000.00 of face bond amount.

Order Admitting Will to Probate: After the judge reviews the will, the Petition for Administration, the death certificate, and the Oath of Witness to Will, he or she will enter the Order Admitting Will to Probate. This gives judicial approval to the will and authorizes the Personal Representative to administer the estate according to the terms of the will.

Letters of Administration: This document provides official proof that the personal representative is entitled to act for the estate, including the ability to gather any assets and settle creditor claims. The Letters of Administration will be needed to transfer bank accounts, stocks and other assets. One copy is recorded in the public records. Additional copies should be recorded in other counties where the decedent owned real property.

Gathering and Protecting Assets: Once appointed, the Florida personal representative can begin gathering and protecting assets. Insurance premiums should be paid for the home and any automobile. Great care should be taken concerning the use of the home and any automobile.

Automobiles should not be driven while the title remains in the name of the decedent. An accident with the automobile or in the home could expose the estate to litigation that could tie up the estate for years. Any expenses paid to protect assets should be discussed with your attorney to insure that they can be paid by the estate.

Notice to Creditors: Florida Law requires that the Personal Representative mail a notice to known creditors, and publish a notice in the newspaper for unknown creditors. Creditors must then file a claim within three months of the date the notice is published, but no less than thirty days if they receive a copy by mail. This process helps determine which creditors should be paid, and who should be paid first. The attorney for the estate will need a list of names and addresses of known creditors. The estate's attorney and staff will write or speak with any of the creditors as needed. For any creditors who file a claim, the personal representative must obtain a release in the proper form for filing with the court before the estate can be closed.

Medicaid Recovery: To comply with Federal requirements, the State of Florida has procedures to recover Medicaid benefits paid for a decedent's medical care, including nursing home care. The Notice to Creditors must be served upon Florida Health Management Systems, pursuant to the Florida Medicaid recovery program. Unless the decedent received Medicaid benefits after age 55, a Medicaid recovery claim will not be filed. The estate must still serve a notice by certified mail, and file proof of service with the court.

Notice of Administration: Each beneficiary of the estate, including the surviving spouse, and anyone affected by the will is also entitled to a copy of the notice. This service of this notice can be waived in writing by any of the beneficiaries or interested persons.

Inventory: Within sixty days of the appointment of the Florida personal representative, the estate must file an inventory that lists the probate assets. This will only include assets that require a court order to pass to the heirs/beneficiaries. For the personal effects, a good estimate should be made, and in many cases, an appraisal obtained. The “date of death value” is the figure that should be used for each item on the inventory. A copy of the completed inventory must be served on the Florida Department of Revenue and each of the heirs.

Affidavit of No Estate Tax Due: For decedents passing away in 2009, there is no Federal Estate Tax Return filing required if the value of all assets in which they had an interest does not exceed \$3.5 million. Florida does not require an estate tax return unless a Federal return is due. The Florida taxes are equal to the maximum exemption allowed on the Federal return for state taxes (a/ k/ a “sponge tax”). The Internal Revenue code no longer allows such an exemption. The court must have proof of payment of any taxes due, or proof that a return is not required.

Taxes: The personal representative should file the income Tax return (1040) for the year of death. We suggest that clients contact the tax-preparer group used for previous returns. They usually have a good idea what to look for in preparing the return, and can advise if no return is required. The estate will not be required to file an income tax return (form 1041) unless the income earned by the Estate is more than \$600.00 during a year that the estate is pending.

Closing the Estate: Once all valid creditor claims have been paid, the estate can be closed. When all of the estate assets have been distributed, and creditors paid, the estate attorney will prepare a Petition for Discharge and waivers for the heirs/beneficiaries to sign.

Distributing Assets: The distribution of assets involves many considerations, such as the number of heirs, the types of assets, the creditors who must be paid, and the possibility of disputes as to the validity or interpretation of the will. It is best that all heirs and beneficiaries not count on distribution at any time prior to the closing of the estate, which could mean six months to a year in a normal estate, and longer in estates where there are will contests, disagreements among beneficiaries and federal estate tax issues.

Florida Homestead: The Florida Constitution contains protections for the surviving family members of a decedent who owned real property in the decedent’s name alone. If the will, or the law for estates without wills, results in a family member inheriting the decedent’s primary residence, the home passes to the beneficiary without being subject to the decedent’s creditor claims. This protection can have tremendous value. However, the ownership passes at the moment of death, and therefore, the beneficiaries are the owners immediately. As such, the Florida personal representative should not use estate assets to pay for the maintenance of the home. If expenses such as insurance, mortgage payments and utilities are paid, arrangements should be made by the person or persons inheriting the home to pay these from their own funds. The home can be sold early in the probate

process, but the net proceeds from the sale may need to be held in escrow until an “Order Determining Homestead” can be obtained. This order can not be obtained until after the three creditor claim period expires and confirms that the property was in fact the decedent’s Homestead as defined under the Probate laws. The Constitutional protections depend upon many factors, including whether or not the decedent was survived by a spouse or minor child. Therefore, a Florida attorney will need to review the facts in each case to evaluate the application of the Homestead protection.

Expenses and Fees: The Florida statutes provide a schedule of attorney fees based upon the Inventory value of the estate, together with any income earned by the estate while it is open. The statutes provide fees that are presumed to be reasonable for ordinary services in administering an estate. Here is a [link to the statute](#) which explains this information. Further, Florida Statutes section 733.6171(4) also addresses “extraordinary” fees for services such as those relating to preparation of a Federal Estate tax return, Homestead real property, will contests, contested claims, elective share proceedings, tax advice on post-death tax matters, purchase or sale of property, fee disputes and ancillary administration issues. Fees for preparation of the estate tax return will be billed at the rate of one-half of one percent for estates up to \$10,000,000.00 and one-fourth of one percent for the value in excess of \$10,000,000.00.

Florida Personal Representation Fees: The statutes provide that the personal representative is entitled to 3% of the Probate inventory value. It is important to remember that not everything goes through the probate process, and therefore, the Inventory is often much lower than the actual amount of all property owned by the decedent. While reasonable expenses can be reimbursed by the probate estate, the heirs/beneficiaries will have the opportunity to object to items that don’t seem reasonable.

If you are interested in finding out more information about the Florida Probate Process, I advise you to consult an experienced [Broward County Florida Probate Attorney](#) or, alternatively, read our [Florida Probate](#) Blog.