Glossary & Frequently Asked Questions About Probate Issues

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Glossary of Important Probate Terminology

Probate

When a person dies, their last will and testament (assuming they prepared on in advance) is handled and their wishes for the distribution of their personal property implemented through a process called probate. Probate simply means the procedure by which their last written directives are legally certified as the final statement of their wishes in regard to their worldly possessions (including any property or properties they may have owned). It also confirms the appointment of a person or entity the deceased person selected to administer their estate. The term probate is also frequently used to refer to the entire process of "probating" an estate. In this usage, it refers to the entire process that gathers all of the available assets, pays any outstanding debts, taxes, administrative expenses and then finally makes the specified distribution of remaining assets to those persons or entities designated by the will.

The personal representative (also know as the executor or executrix) who is named in the will is legally in charge of this process and is responsible for handling the orderly method for administration of the estate as set forth by the probate laws and procedures of their state. The executor is typically held accountable for their actions and decisions by the heirs

and other beneficiaries and in some cases may be formally supervised by a probate court. If a will does not exist or a personal representative is not designated in the will, the court will appoint one (assuming there is personal property to distribute).

The personal representative is often entitled by law to a reasonable fee or commission for their services.

Probate law generally encourages or provides for partial distributions of funds during the period of administration and assets are often distributed “in kind” rather than sold during this period. Tax laws generally look to the personal representative as being responsible for making death tax filings and other tax payments from the outstanding assets of the deceased. Therefore, choosing an executor / executrix / personal representative is an important decision.

The basic job of administration and accounting for assets must be done whether the estate is handled by a personal representative as part of the probate process or if probate is avoided. In the recent past, lawyers and other professionals have advocated the use of probate avoidance techniques (such as revocable trusts, etc.) in states where the probate process has been seen to be too slow and overly expensive. In recent years, many states have simplified or streamlined their probate processes and in such states, there is now less reason to employ probate avoidance techniques.

Probate Court

A probate court, which is sometimes referred to as a surrogate court, is a specialized court and legal process that deals with matters pertaining to the probate and the administration of the estate of deceased persons.

These specialized courts ascertain and oversee that proper administration and distribution of the assets of a decedent (one who has died), determine and certify the validity of wills, enforce the provisions of a valid will (by issuing the grant of probate), prevent improper action or malfeasance by executors and administrators of estates, and provide for the

equitable distribution of the assets of persons who die intestate (without a valid will). In such cases, the court may appoint a personal representative to administer the matters pertaining to an estate.

If there are disputes regarding an estate, the probate court ultimately decides who is to receive the property of a deceased person. In a case of an intestacy, the court determines who is to receive the deceased's property under the laws it is governed by. The probate court will oversee the process of distributing the deceased's assets to the proper beneficiaries. In some states or jurisdictions, probate courts are also referred to as orphans courts, superior court, courts of ordinary or other names. Not all jurisdictions have specific probate courts and in some locales, probate matters are handled by a chancery court or another court of equity.

The probate court can be petitioned by parties that are interested in or who have claims against an estate, such as when a beneficiary feels that an estate is being mishandled or someone to whom the decedent owed money. The court has the authority to demand that an executor, executrix or personal representative give an account of their actions on behalf of an estate.

Probate Court

The Personal Representative, also known as the Executor (if the personal representative is a male) or Executrix (if the personal representative is a female) is the person who is designated by the will of person who has died to administer their estate and handle the distribution of its assets to those entities designated by the provisions of the will. Unless there is some valid objection or the person designated refuses to serve in that capacity, the probate judge will appoint the person who is named in the will to serve as the personal representative.

It is the duty of the personal representative to ensure that the deceased person's wishes, as expressed in the will, are carried out. Some of the tasks that may be required to be performed by the personal representative include determining and protecting the specific

assets of the estate; obtaining information (name and location) in regard to all beneficiaries named in the will and any other potential heirs; collecting and arranging for payment of the debts (if any) of the estate; approving or contesting any claims made by creditors; making sure estate taxes are calculated and paid, filing any required forms, and assisting the attorney for the estate (often selected by the personal representative if not specified in the will).

Joint Tenancy With Rights of Survivorship

Joint tenants (or tenancy) with right of survivorship (JTWROS) is a type of ownership of real property or financial assets in which all joint owners have equal portions of ownership that are immediately re-allocated to remaining owners if one or more owner dies.

Testate

This term refers to a person who has died and left a “Last Will and Testament” that specifies their wishes pertaining to the distribution of the assets of their estate following their death. In this case, the estate will be distributed according to the provisions of the will.

Intestate

This term refers to a person who has died and did not leave a “Last Will and Testament”. In this case, the administration of the estate will be handled by the court of jurisdiction and according to the laws of the state.

Codicil

A codicil is a document, attachment or rider that is added to an existing will that modifies or supersedes existing provisions or adds new provisions. This is done as an alternative to redrawing the entire will and is often done to change a beneficiary or assign disposition of a particular property or define the rights of a specific beneficiary.

Probate Definitions And General Information

Q: How does the probate process work?

A: While the process can vary from state to state and is often subject to outside factors that can certainly change it, the list below represents a VERY simplified step-by-step description of the process:

- An original (signed and executed) copy of the will is delivered to the local probate court or whatever court supervises probates in that locale.
- A notice of the Petition for Probate is published in a local newspaper. This is usually a requirement prior to the formal appointment and/or certification of the personal representative (executor / executrix) who was named in the will, assuming a will exists (legally referred to as “testate”), or the court-appointed administrator if there is no will (referred to as “intestate”).
- After the certification or appointment of the personal representative has been made official, they then file their formal petition with the court to probate the estate.
- Following that step and generally for a legally specified period of time (four months is typical) from the date of the public notification of the petition for probate, creditors against the estate are allowed to file their claims. This includes any previously unpaid debts, other liens or judgments, debts resulting from medical care, funeral expenses, outstanding taxes, and other encumbrances.
- During this same period, the personal representative will be working to identify, gather and secure the assets of the estate in such a manner as to be able to ultimately distribute them in accordance with the will or court directives. To accomplish this, the personal representative will also need to locate and access all bank and other types of security accounts; determine any of the remaining debts owed by the decedent that require settlement; determine any real property(s) owned by the decedent and secure the titles to these and any other assets that will ultimately need to be disposed of.
- It’s also the responsibility of the personal representative to maintain these assets safely, properly and in good condition during their period of stewardship as well as collecting any income (rents, residuals, interest payments, etc.) that are due to the Estate. To do so, the representative must be aware of and maintain proper insurance coverage; protecting the assets from theft or damage, etc.
- The personal representative may also (if permitted or desired) liquidate some of the hard assets such as cars, real estate, etc. This is often done to provide the cash required to compensate creditors.
- When the formal claims period has expired and all assets have been collected; property that needed to be sold has been sold; and assuming no problems have arisen such as a contesting of the will by any of the heirs or other contested claims against the estate, the personal representative will usually file their final petition with

the probate court to allow a complete distribution of all remaining assets to the heirs and beneficiaries. This final petition includes a detailed accounting to the court explaining all of the expenses incurred, funds and assets received and disbursed, how any assets were invested or otherwise used, and the proposed final plan for final asset distribution.

- Assuming the court approves this petition, the personal representative then distributes the assets as instructed in the will and detailed by the approved petition, and/or as required by law or the courts if there was no will.

Q: How long does probate usually take to complete?

A: The duration of the probate process is subject to lots of different variables, but a general rule of thumb is approximately six months. However, you should be aware that it can and frequently does takes far longer. Some of the matters that can delay the completion of the process (among others) can include:

- Problems in locating the heirs and beneficiaries
- A contest of the will (disputing the validity of the document) by the heirs or beneficiaries
- Claims or liens against the estate that remain unsettled
- Real estate or other property that cannot be sold for some reason
- Failure to properly notify one or more creditors during the claim period
- Dissatisfaction regarding the actions of the personal representative by the heirs or beneficiaries

The complexity of the task and these myriad of possible delaying factors make it all the more imperative that a well-organized and meticulous personal representative be selected who can effectively manage the process and reduce the chances of complications and delays.

Q: Why is probate actually required?

A: There are many reasons for probate, but some of the most important are:

- Transferring the legal title / ownership of the decedent's property and assets to the heirs and/or beneficiaries. generally, if there is no property to transfer, there is usually no need for probate.

- The collection of any taxes due to various taxing authorities that may be owed by the decedent or his/her estate at the time of death or taxes that become due when a property is transferred.
- As stated above, probate also provides a legally mandated deadline for creditors to file claims against the estate. This prevents old or unpaid creditors from future claims against the heirs or beneficiaries.
- If the deceased owned real estate in his own name, no one could properly accept title to that property nor would a bank give a mortgage to a new buyer mortgage unless the estate went through probate and a "clear title" could be given the new buyer.
- Generally, no one would enter into any other transactions involving the deceased's property until the will has been filed for probate and someone has been legally appointed to act for the estate.
- Finally, it provides a legal method for the actual physical distribution of the remainder of the estate's property to the heirs and beneficiaries.

Q: Is it necessary for all of the decedent's property to go through probate?

Not necessarily, however, some legal method must be employed to transfer the legal title and ownership of the deceased's property into the name of the beneficiaries and/or heirs. Many states also allow a some types of property to pass to certain beneficiaries free of probate or via a simplified (express or fast-track) probate procedure.

Usually, real and personal property owned under a structure called "joint tenancy with rights of survivorship" passes to the surviving co-owner(s) without a requirement for probate.

Other types of benefits, such as a life insurance policy or an annuity that is payable directly to a named beneficiary can often be tendered without the requirement for probate. Also, IRAs, Keoghs, and 401(k) accounts usually transfer to the persons named therein as heirs or beneficiaries automatically without probate. Bank accounts that are set up as "payable-on-death" accounts; ones that are being "held in trust for" specific heirs or beneficiaries (also called a "Totten Trust") also pass the proceeds directly to the named heirs or beneficiaries without probate.

A “living trust” that holds title to a property held in trust also passes that property to the heirs or beneficiaries without probate. Such a trust is a legal entity which survives after the death of the person who created it.

Q: How much does probate cost?

A: The cost of probate may be set by state law or by practice and custom in your community.

When all the costs are added up – and the costs may include appraisal costs, executor’s fees, court costs, costs for a type of insurance policy known as a “surety bond”, plus legal and accounting fees, probate can easily cost from 3% to 7% of the total estate value, and more. If there is a “Will contest” all bets are off.

Q: If there is a really small estate, is probate still necessary?

A: Possibly. In some states, there are processes often referred to as “simplified procedures” that are used for estates whose value is below certain financial thresholds. The limits can be as small as a few thousand dollars or as much as a hundred thousand dollars. It depends on the court of jurisdiction. This is certainly a matter to consult with an attorney about, but if there is real estate involved or there are debts against the estate, regardless of the size of the estate, the full probate process may be required or advisable.

Q: What goes on in the probate of an uncontested will?

A: Typically the person named as the deceased’s Personal Representative (a more formal term is “Executor” or “Executrix”) goes to an attorney experienced in probate matters, who then prepares a “Petition” for the court and takes it, along with the Will, and files it with the probate court.

The lawyer for the person seeking to have the Will admitted to probate typically must notify all those who would have legally been entitled to receive property from the deceased if the deceased died without a Will, plus all those named in the Will, and give them an opportunity to file a formal objection to admitting the Will to probate.

A hearing on the probate petition is typically scheduled several weeks to months after the matter is filed. Depending on the state, and sometimes who the named beneficiaries are, how long before the death the Will was signed, whether the Will was prepared by an attorney, who supervised the “execution” of the Will, and/or whether the Will was executed with certain affidavits, it may be necessary to bring in the persons who witnessed the deceased’s signature on the Will.

If no objections are received, and everything seems in order, the court approves the petition, appoints the Personal representative, orders that taxes and creditors be paid, and requires the Personal Representative to file reports with the court to assure all the deceased’s property is accounted for and distributed in accordance with the terms and conditions of the Will.

Q: Where is Probate handled?

A: The appropriate court in the State and County where the deceased permanently resided at the time of his or her death is usually the court where the probate is processed. A court that handles issues such as these can often be referred to my several different names. For example, in the state of New York, the court that handles probate is called the Surrogate’s Court, while, in the state of California, it is called Superior Court, Probate Division. However, it’s most common for it to be referred to simply as “probate court”.

Q: Can I handle probate without a lawyer?

A: While there is usually no legal requirement to use a probate lawyer, probate is a rather formalistic procedure. One minor omission, one failure to send Great Aunt Maggie a copy of the petition, or a missed deadline, can cause everything to come to a grinding halt or expose everyone to liability.

The death of a family member or friend sometimes tends to bring out the very worst in some people. Experience shows that even in close families there is a tendency to get overly emotional about relatively trivial matters at the time of a loved one’s death, such as who gets the iron frying pan and who gets the kettle. Such minor matters or any delays or

inconveniences can be upsetting, pose issues of fairness, and create unfounded suspicion among family members. Thus, it generally is a very good idea to “let a lawyer do it”.

Definition and Duties of the Personal Representative / Executor / Executrix

Q: What happens when the person who dies owned land in multiple states?
A: Usually, the laws of the state in which the deceased was last a permanent resident prevail in regard to governance of probate issues – covering all of the deceased’s personal property, wherever it was located, and all the deceased’s real property located within the state. Therefore, probate almost always filed in the last state where the deceased person lived.

If the decedent owned out-of-state real property, the laws of the other state can govern (or certainly affect) who inherits it if there is no will. If a will exists and it has been filed for probate in the state of most recent residence of the deceased, it usually must be submitted to probate in the other state(s) of jurisdiction in which the deceased owned real property. That additional probate filing is formally referred to as “ancillary probate”. Some states require the appointment of a personal representative who is a local resident or the state to administer any in-state property.

If there is no Will, probate is usually required in each state where the real property is situated, in addition to the home state and each individual state can impose it own methodology that controls the distribution of assets. As an example, in one state, the real estate might go only to the spouse. In another state, it might be equally divided between a spouse and each of his or her children. In still another, half of the assets might go to a spouse and the remainder divided equally between the children. This is one of the reasons a will is so important to properly express the wishes of the deceased and prevent family struggles and quarrels following a death.

Q: Who is legally responsible for handling the probate process?

A: If there is a will, the Personal Representative (sometimes referred to as the "executor" or "executrix") is usually responsible. If there is no will, an "administrator" is appointed by the court as part of the probate proceeding and that person has the responsibility for managing the estate through the proceeding, subject to established probate rules and procedures.

In many states, the probate court has a considerable amount of control over the activities of the Personal Representative, and requires that she or he obtain prior permission of the court before certain actions, such as the sale of real estate or business interests owned by the estate, may take place.

Q: What are the main duties of a personal representative?

A: The main tasks of a Personal Representative are to:

(1) determine if there are any probate assets;

(2) identify, gather, and inventory the assets of the deceased;

(3) receive payments due the estate, including interest, dividends, and other income (e.g., unpaid salary, vacation pay, and other company benefits);

(4) set up a checking account for the estate;

(5) figure out who is going to get what and how much under the Will (if there is no Will, the state's "interstate succession laws" apply);

(6) value or appraise the estate's assets;

(7) give legal notice to potential creditors (the procedure and deadlines for creditors to file claims vary from state-to-state);

(8) investigate the validity of all claims against the estate;

(9) pay funeral bills, outstanding debts, and valid claims;

(10) pay the expenses of administrating the estate;

(11) handle various paperwork, such as discontinuing utilities and charge cards, and notifying Social Security, Civil Service, and Veterans Administration of the death;

(12) file and pay income and estate taxes;

(13) distribute the remaining property in accordance with the instructions provided in the deceased's Will; and

(14) close probate.

Q: If I am named as the personal representative, do I have to accept the job?
A: Of course not. It is always your option to serve or decline. Even if you agree to serve you can resign later. If you do quit before the completion of probate, you may be required to provide an "accounting" for the period you served. If you decline to serve (or accept and resign later) any alternate named in the will is typically appointed by the court. If no alternate representative is named in the will or the named alternate dies or is unwilling to serve (or, of course, if a person dies without a will, the probate court will appoint someone to serve as the personal representative.

Q: Are personal representatives usually paid for their work?
A: It is not a requirement, but usually they are compensated. Certainly all personal expenses they incur in the management and process of settling the estate must be paid for. Typically, a personal representative earns a fee of +/- 2% of the total value of the estate for their work. This can be mandated by the courts or by law in some states and also varies moderately from state to state. Generally, this percentage diminishes as a percentage as the size of the estate increases.

All of the funds paid to the personal representative are subject to approval by the probate court. Additional fees may be allowed by the court in cases of unusual difficulty or extraordinary circumstances. On the other hand, if a personal representative does not perform their duties in an orderly or timely manner, the court may reduce or deny compensation and the Personal Representative may be held responsible for any damages caused.

If a person is both the sole beneficiary of the estate, and the estate is not subject to Federal Estate Tax, it usually does not make sense to take any fees as all fee income is subject to income tax. (The money a beneficiary receives from the estate is income tax-free.)

Q: What happens if the personal representative fails to perform his or her duty?
A: An executor or administrator who is derelict in his or her duty is personally liable for damages caused in the administration of the estate.

Liability may arise from improperly managing the assets of the estate, failing to collect claims and moneys due the estate, overpaying claimants, selling an asset without the authority to do so, or at an inappropriate price, neglecting to file tax returns on time, distributing property to the wrong beneficiaries, etc.

This means that the Personal Representative might wind up paying for the loss out of his or her own pocket.

Q: What if someone objects to or contests the will?
A: If someone files an objection to the Will or produces another Will, what is known as a "Will contest" has begun. While Will contests are not that rare, and while few people actually win one, they can be extraordinarily costly and create incredible delays.

It's also important to know that the requirements for contesting a will require a person to have "standing" to mount a contest. Despite the fact that you feel your next door neighbor's children ignored her and treated her badly. that does not give you the right to contest her will. If, a person has proper standing to contest a will (ex: a child who was cut out of the Will

by an angry parent, or even by a kindly parent who felt that the local charity, not his children, should get his assets) that person would have standing to bring a “Will contest”. If a Will gives one sibling 2/3rds of a parent’s estate and the other 1/3rd, the one receiving less has standing to bring a Will contest. Similarly, if a later Will is less favorable to someone than an earlier Will, or no Will at all, that person has standing. A Will contest sometimes is launched to have a different person, bank or trust company serve as Personal Representative for the estate, or as a trustee of Trusts created by the Will.

Q: What is the basis for a will contest?

A: Most of the challenges to invalidate Wills are by potential heirs or beneficiaries who got little or nothing. Questions on the validity of a Will must be filed in probate court within a certain number of days after receiving notice of the death or petition to admit the Will to probate.

The typical objections and unhappiness is not one of them are:

(1) the Will was not properly drawn, signed or witnessed, according to the state’s formal requirements;

(2) the decedent lacked mental capacity at the time the Will was executed;

(3) there was fraud, force or undue influence; or

(4) the Will was a forgery.

If the Will is held invalid, the probate court may invalidate all provisions or only the challenged portion. If the entire Will is held invalid, generally the proceeds are distributed under the laws of intestacy of the probating state.

Needless to say, if there is even the possibility of a Will contest, an experienced probate lawyer is a must.

Q: How can a will be “contested”?

A: A “contest” is usually mounted by the filing of the necessary documents with the probate court by an heir, prospective heir or another beneficiary. Each state has different time limits that control the window for filing. To successfully challenge a will, there must be sufficient evidence that the will was not created properly. Sour grapes or being upset that a person didn’t receive what they felt they had coming are not sufficient grounds for contesting a will. Typically, only certain factors are mandated by law to be contestable. These might encompass the incapacity or incompetence of the decedent at the time the will was prepared, fraudulent intent on the part of some parties to the will or undue influence or duress perpetrated on the decedent.

Q: What if there is no will?

A: If a person dies without a Will (known as dying “intestate”), the probate court appoints a Personal Representative frequently called an “Administrator” to receive all claims against the estate, pay creditors, and then distribute all remaining property in accordance with the laws of the state.

The major difference between dying testate and dying intestate is that without a valid Will an intestate estate is distributed to beneficiaries in accordance with the distribution plan established by state law; a testate estate is distributed in accordance with the instructions provided by the decedent in his/her Will.

Q: What happens if a will cannot be found?

A: Missing Wills raise all sorts of interesting legal issues which often turn on the specific facts and circumstances, and the law of the state in which the deceased resided.

The Will may be missing because the deceased intentionally revoked it, in which case, depending on state law, an earlier Will or the state’s rules on intestate succession would determine who gets the deceased’s estate.

Alternatively, the Will may be missing because it can be proven the Will was stored in a bank vault that was destroyed in an explosion and fire. In that case, the probate court may accept a photocopy of the Will (or the lawyer's draft or computer file), together with evidence that the deceased duly signed the original.

Q: How can I find out if there was a will?

A: The first place to check is with the probate court in the County of the State where the deceased lived. In almost every case the Will, if filed, will be available to the public.

Anyone can get to see it, and for a modest fee, obtain a copy. If you are far away, a local lawyer or legal service bureau often can arrange to do a search and get a copy for you, at a relatively modest fee.

The fact that a person died — even if he or she "owned" substantial assets — does not mean that he or she actually had a Will, or that the Will was duly filed with the Court. In fact, if the deceased held property exclusively through a Living Trust or a joint ownership arrangement, there may not have been a need to file a Will, because the Trust did not "die" with the individual. Also, with certain forms of joint ownership, the property usually passes to the other joint owners automatically.

Q: How can I avoid probate of my estate?

A: One approach to reduce or eliminate the need for probate is through the use of a Living Trust that holds legal title to some or all of your property at the time of your death. The Trust is a legal entity which survives you after your death.

Q: How are creditors against the estate handled?

A: Creditors are notified of the death as part of the probate process. This notification process can vary from state-to-state and can range from a letter to each creditor to a blanket notice to all creditors published in the local newspaper. Once this filing or notification has occurred, creditors have a fixed period of time (defined by the court of jurisdiction) to to file any claims against the estate either by notifying the personal

representative or, in some states, notifying the probate court. If the claim is approved by the personal representative, the bill is usually paid out of the estate. However, if the personal representative rejects a claim is, the creditor must sue the estate for payment.

If the estate does not have sufficient funds to pay the lawful debts to the creditors, the determination of who receives payment and in what order is usually a matter of law. Also, the personal representative may be required to sell some or all of the decedent's property to satisfy the claims of the creditors.

Q: Do beneficiaries have to pay creditors out of their own pocket if the estate is insolvent?

A: Generally not. Just as you "can't take it with you" you just can't make others responsible for your general debts, at least without their consent. (Otherwise a person could run up lots of debts, name his worst enemy as his beneficiary, and saddle his enemy with those debts at his or her death.)

Unless the deceased had gifted away his or her assets to someone shortly before dying, or otherwise acted in concert with them to defraud his or her creditors, beneficiaries should not have any liability to the deceased's creditors just because they are beneficiaries. Of course, the Estate may not have anything left for them, but the beneficiaries would not be in the hole.

Of course, if the children or beneficiaries took any property or benefits from the deceased or the estate or had assumed liability for care given the deceased, or guaranteed payment, they could be held liable for some or all of the deceased's debts separately, not because they are relatives or beneficiaries.

Q: How are taxes handled in probate?

A: For federal and state tax purposes, death triggers two events:

(1) It ends the decedent's last tax year for purposes of filing an income tax return, and,

(2) It establishes a new, separate entity for tax purposes, the “estate.”

For Federal tax purposes, it may be necessary to complete and file one or more of the following, depending on the decedent’s income, the size of the estate, and the income of the estate:

(1) Final Form 1040 Federal Income Tax return.

(2) Form 1041 Federal Fiduciary Income Tax returns for the estate.

(3) Form 709 Federal Gift Tax return(s).

(4) Form 706 Federal Estate Tax return.

For state purposes, an executor must file the appropriate state income tax return (assuming the decedent was required to do so while living) and any state income tax returns during the probate period, plus possible estate tax, inheritance tax and gift tax returns. (In many states, gift, estate and inheritance taxes have been eliminated for most small and medium-sized estates.) The requirements for filing and payment vary widely from state-to-state.

Other taxes require the attention of the personal representative in the probate process, such as local real estate and personal property taxes, business taxes, and any special state taxes.

The Personal Representative should also be alert to the possibility of issues arising from tax years prior to the decedent’s death.

Q: After a will is created, can it be modified?

A: Of course. The only real requirement is that the person making the will be competent to make the change. In the movies, you have probably heard this stated as “of sound mind”. A will can be modified with an addendum, often referred to as a codicil or replaced by a completely new will. Sometimes the law can modify the effect of a will. This is especially

common in cases of divorce which usually terminates an ex-spouse's rights unless a specific provision keeps them in place. However, separation doesn't terminate a spouse's rights. This just one example, but a probate attorney should always be up to date on prevailing legal issues in your state.

Q: Are provisions for the care and guardianship of minor children usually provided for in a will?

A: Often they are, but a court is not bound by these provisions and might overrule them if there was a specific reason to do so or a justifiable challenge to the guardianship was offered by another family member or interested party. It is also possible that a different guardian would be appointed if a designated guardian was deemed to be incompetent to adequately serve in such a role or is judged to be an otherwise inappropriate choice, based on moral or other character issues. In all such cases, the decision of the judge will determine the final guardianship, but the wishes of the person making the will always be given first consideration. It is important to add this provision to a will since it is possibly the only way your wishes in this matters would ever become known.

Q: Are there any specific rules about how property can be disposed of?

A: In general, the answer is yes, but if (for example) you indicated that all your effects should be buried in a big hole in the back of your property, that request might be deemed inappropriate by the courts and denied. A judge can void all or part of a will. You cannot change the effects of law just by stating your wishes in your will. For example, you may not suspend or terminate any legal rights or claims that a spouse, child or business relationship may rightfully have against an estate just by stating that in a will. They will remain in effect.

Q: Can there be more than one designated personal representative?

A: You could do so by appointing co-representatives or a secondary representative. However, this could not only cause problems during probate if there is a disagreement between the representatives. Normally, one representative is all that is needed and

appointing more than one should only be done where there is a specific reason to do so. A possible example might be where one person handled only the real estate aspects of probate and the other one was designated to handle all other issues. Appointing co-representatives just to protect someone's "feelings" is almost always a bad decision and should be avoided. Often, a frank discussion with the people involved can eliminate any issues of concern and allow one person to take on the challenging role or representative without the added challenges of co-representation.

Q: Is it necessary for the personal representative to live in the decedent's state?
A: It depends on the laws of the state, but usually isn't an absolute requirement, but it is usually easier – especially in regard to larger estates and real estate.

Q: How does "joint tenancy" effect a will?
A: Joint tenancy with right of survivorship (JTWROS) is a common legal method of defining property ownership when shared with another person, but it doesn't replace a will. Typical, this "survivor" is a spouse, but can apply to other relationships. If one of the owners dies, the other becomes the sole owner of the property. This means that the real estate isn't part of the decedent's estate, and therefore, is not subject to probate. However, all parties should be aware of possible tax liability implications (if any) of such survivorship.

Q: Must a will actually be read out loud to the family by the personal representative or attorney

A: A state law could possibly require this, but generally this is a movie scenario and not done in real life. Usually, the personal representative of the estate provides notice of probate to all interested parties and they can obtain a copy of the will from the probate court if desired. Often, enough copies of the will are made and distributed to the affected parties by the representative.

Q: Should a will provide a separate list that details and bequeaths specific personal property?

A: If this is allowable in the state in question, the benefit of doing so is that the list can be changed from time to time as opposed to changing or adding codicils to the will.

Q: What are the actual requirements for a will to be valid?

A: While each state may impose additional or alternate requirements, in general, a valid will must be hand-written or printed and signed by the person who has created it. This person is the "testator" and a will is usually witnessed by two (or more) persons who must normally be "disinterested" parties – meaning they are not named as beneficiaries in the will. Witnesses must also be of "sound mind" (mentally competent). The required number of witnesses may differ by state. The testator needs to have reached the age of "majority" (18 in most states) and also be of "sound mind" (mentally competent) when the will is executed. A married person who has not yet reached the age of majority is usually adjudged legally capable of executing a will. Normally, it is not a technical requirement for a will to be notarized, but it certainly is helpful to add strength to the will. Fully "holographic" (totally handwritten) wills are still recognized as valid in many states without being witnessed. Such a will must be in the normal and provable handwriting of and signed by the testator. As always, state law might impose other conditions on a holographic will.

Q: What happens if a person dies without leaving a will?

A: The laws of each state usually provide a "default will" for any person who dies without a will, which is referred to as "intestate". The spouse and children of the decedent will usually be given the property of the deceased. If no spouse and no children exist, then the decedent's parents will usually receive the property. Following them if they are not alive are

other siblings, grandparents, and children of the grandparents. If no close direct family can be found, the property will eventually revert to the state. Just be aware that in all cases, any creditors (including taxing entities such as the state, local and federal government) will be allowed to extract what they are owed from the estate prior to its final disposition and this could necessitate the sale of property to provide funding for these liabilities.

Q: When should make a will?

A: The simple answer is … immediately. Usually, death comes as a surprise to us all and no one is aware of their impending demise. Making a will represents doing the "right thing" today for those you love and you should occasionally review your will to make sure it continues to represent your final wishes. If not – modify it. Also, almost everyone who dies owns some sort of personal property, therefore, everyone needs to provide their heirs with a will to prevent confusion or strife after their death. While state law will decide what happens to property in the estate of a person who dies intestate, the default plan normally distributes property to relatives. Therefore, a girlfriend, boyfriend, partner or fiance' will have no provision made for them by law unless provide by a valid will.

Q: Who can or should draft my will?

A: If you do not do it yourself (which is perfectly acceptable) only an attorney can legally draft a will for you. Be aware that personally drafted wills are often incomplete and therefore, some or all of such will can be held to be invalid under state laws. While there are certainly kits available from multiple resources for creating a will, they are often not state-specific. If your will fails to follow state law in creation areas, it could be held to be invalid.