

FEB 27 1980

Probate of Missouri Estates

Stephen F. Matthews, Associate Professor and Attorney, and Patrick B. Starke, Research Analyst, Agricultural Economics Department, College of Agriculture, and
Ellen S. Roper, Circuit Judge of Boone County, Mo., Probate Division

Nearly everyone who dies leaves sufficient assets to require probate of his or her estate. This article answers common questions about probate. It does not qualify you as an executor or administrator but does give you general information about probating an estate.

What Is the Function of Probate?

Probate performs the following functions:

- Provides for an orderly transfer of the decedent's property in accordance with his or her will or the intestacy laws of Missouri. Intestacy laws specify to whom property passes when someone dies without a will.
- Determines the legitimacy of claims by the decedent's creditors and ensures payment of proper claims.
- Clears the title to the decedent's property for heirs.

What Is a Personal Representative?

A personal representative is the spokesman of the estate throughout the probate process. Major duties are:

- Gathering the decedent's assets.
- Paying the decedent's creditors with these assets.
- Computing and paying estate and inheritance taxes.
- Distributing assets to the beneficiaries designated by law or a will.

What Happens to the Estate's Property?

The personal representative may automatically take possession of nearly all the decedent's *personal property* for the duration of probate. Personal property is all the assets of the decedent other than land, improvements on land, and growing crops. Examples of personal property are cars, trucks, livestock, harvested crops, stocks, and bonds. The personal representative may also take possession of the decedent's *real property*, but only if the Probate Division or the decedent's will orders him or her to do so. Real property consists of the decedent's land, all improvements to the land, and any growing crops.

What Estates are NOT Required to Pass Through Probate?

Estates are usually required to pass through probate administration. Administration is necessary if the decedent held title to property alone or by tenancy in common with another. Property held by joint tenancy or tenancy by the entireties does not pass through probate (for example, a joint

savings account). An estate consisting entirely of property held in joint tenancy or tenancy by the entireties need not be probated. However, few decedents hold all their property in this fashion. Similarly, life insurance proceeds payable directly to a named beneficiary other than the executor for the estate are not probated.

The reason for the non-probate of joint tenancies, tenancies by the entireties, and most life insurance is the legal characteristic of automatic transfer of ownership rights upon the present owner's death. That legal characteristic is known as a "right of survivorship" for both the joint tenancies and the tenancies by the entireties. For life insurance policies, the automatic transfer is part of the contract agreement.

Certain small estates may also avoid lengthy probate. Full probate is not necessary if the decedent leaves a surviving spouse and the value of the estate does not exceed the value of the *exempt property* and the *family allowance*. These terms are defined in the following section.

An estate must be brought into the Probate Division even if full probate is not required. The Probate Division must approve the exemption from administration. Otherwise, administration is required. Also, exemption from probate does not exempt the estate from state or federal death or income taxes.

What Special Rights Does the Surviving Spouse Have?

Exempt Property. The decedent's surviving spouse (or, if none, the unmarried minor children) is entitled to the estate's exempt property free and clear of any claims against the estate. Exempt property includes:

- The family Bible and other books.
- All wearing apparel of the decedent.
- All household electrical appliances.
- All household musical and other instruments.
- All household and kitchen furniture, appliances, utensils, and implements.

The following rules apply to exempt property. References to the surviving spouse also apply to the unmarried minor children unless otherwise indicated:

- Application for exempt property must be made within a reasonable time after the estate is admitted to probate.
- The value is not charged against the spouse's interest under a will or the intestacy laws.
- The value may be taken in addition to other allowances.
- The property is not subject to the claims of distributees or creditors.
- Should this property be sold or destroyed, the spouse is entitled to the sale or insurance proceeds.
- If the decedent's unmarried minor children take exempt

property, they take it in equal shares.

Family Allowance. The family allowance is a support allowance for the surviving spouse and the unmarried minor children for one year after the death of the decedent. The amount of the allowance is based on the family's previous standard of living and the condition of the decedent's estate. The same rules applying to exempt property apply to the family allowance. Additionally, the spouse or unmarried minor children may take all or part of the allowance in property rather than cash.

Homestead Allowance. The homestead allowance is a supplemental allowance that may be taken in cash or property. The amount is 50 percent of the value of the gross estate (minus the exempt property and family allowance) up to \$7,500.

The homestead allowance is subject to the rules listed under the section on exempt property with the following variations:

- The amount received is charged against the interest the spouse receives under the intestacy laws or will.
- The surviving spouse and unmarried minor children may elect to take property in lieu of a cash sum.
- Application must be made after the inventory is complete but not later than 10 days after the time allowed for filing claims (usually six months).

How Is an Estate Opened for Probate?

The first step of probate administration is to open the estate. This means the correct person must make application in the correct court.

The probate court is actually a division of the Circuit Court. Application for probate should be made in the Probate Division of the Circuit Court in the county where the decedent last lived. Special rules apply if the decedent did not live in Missouri.

The person having custody of the decedent's will must surrender it to the Probate Division when the decedent dies. The court can order someone to surrender a will. If the will is in a safety deposit box, the bank must turn it over to the court. No will, though, may be admitted to probate more than six months after the estate is opened.

Anyone may apply to have an estate opened. The individual designated in the will as the personal representative usually applies to open the estate. If the decedent died without a will, the surviving spouse or heirs can apply for probate administration. The decedent's creditors or the *public administrator* may apply for administration should the persons mentioned above fail to do so. The public administrator is an elected official who acts as the personal representative of estates where no one applies to represent the estate.

The actual application must be verified and state the following:

- The name, age, residence, domicile, sex, date, and place of death of the decedent.
- The approximate value and location of real and personal property.
- The name, address, and relationship of any heirs. Both the beneficiaries under a will and intestate beneficiaries should be named. The birth date of any minor children should be stated.
- The application (where the applicant is also applying to be the personal representative) must state why the applicant is entitled to administer the estate.
- If a will exists, it should be attached to the application. The person requesting that a will be admitted to probate must establish four facts:
 1. The death of the testator.
 2. The application is being offered in the correct court.

3. The deceased was competent to make a will at the time the will was made.
4. The will was properly executed in accordance with the law.

After the estate is opened, the Probate Division will order publication of the opening of administration in the local newspaper for four weeks. Also, the court will send direct notice to the decedent's heirs by law, and, if he or she left a will, to those persons named as beneficiaries under the will. Anyone wishing to challenge the will must do so within six months of the first published notice of administration. Also, creditors with claims against the estate must file their claims within the same time period. Creditor's claims are filed with the probate clerk, while challenges to the will are filed with the circuit clerk.

Who May Be the Personal Representative?

There are two types of personal representatives, but their duties are identical. A personal representative nominated by a will is called an executor. All other personal representatives are called administrators.

Any competent person with a beneficial interest in the estate may serve as personal representative. Certain persons have priority, though. The person named in the decedent's will heads the list to become executor of the estate. If no will exists, the surviving spouse has priority. In either situation, if these persons with priority fail to apply or if they waive their right, the Probate Division may appoint a qualified person to administer the estate.

Certain persons are disqualified and may not serve as personal representatives. They are:

- Any judge or clerk of a Probate Division.
- Non-residents of Missouri.
- Habitual drunks.
- Persons under 21.

Must the Personal Representative Post a Bond?

The personal representative must post a bond with the Probate Division. If the personal representative uses his or her own assets as bond, the minimum bond amount is twice the value of the personal property of the estate. More commonly, though, the personal representative purchases a corporate bond.

A corporate bond is an insurance policy for the beneficiaries to protect against any mismanagement of the estate by the personal representative. The amount of the bond in this instance is the value of the personal property of the estate. The estate pays the cost of this bond which is about \$20 per \$5,000 of personal property.

No bond is required if the decedent waives bond for the executor by provision in a will.

What Are the Personal Representative's Duties?

Inventory and Appraisal. The initial duty of the personal representative, in conjunction with two court appointed appraisers, is to inventory and to appraise all of the decedent's property. This duty must be completed within 30 days of the personal representative's appointment. The Probate Division, though, may grant an extension.

The person applying to be personal representative nominates two appraisers, but the Probate Division makes the actual appointment. The appraisers may not be creditors of the decedent or otherwise interested in the estate. They value

the estate and accompany the personal representative in the inventory of the estate. Assets are valued at current market value. The personal representative should not open or examine any of the estate property without the appraisers. If he or she does, he or she may be subject to a fine of up to \$1,000.

The inventory includes all real and personal property belonging to the decedent at death. All property subject to the Missouri inheritance tax must also be included in the inventory. See Extension Manual 68, *Estate Planning for Missouri Families*, for more information on the inheritance tax.

The major items of the inventory are:

- Contents of the deceased's safety deposit box.
- Stocks and bonds.
- Debts owed by the decedent.
- Household goods.
- The decedent's share of any operating business.
- Life insurance proceeds.
- Contract rights.
- Personal property that belongs to another but was in the decedent's possession at death. (The personal representative must have the court's permission to return these items to the rightful owner.)
- Gifts by the deceased within three years of death.
- Uncollected judgments rendered in favor of the deceased during life.
- Real estate owned by the decedent at death.

The personal representative should also collect records and documents pertinent to administration, including:

- Cancelled checks and checkbooks for the last three years.
- Income tax returns for the last three years.
- Documents supporting the valuation of all assets.
- All gift tax returns filed by the decedent.
- Deeds, abstracts, and certificates of title on all real estate in which the decedent had an interest.

Collection. The second duty of the personal representative is to collect and take possession of all the decedent's personal property. If the surviving spouse or unmarried minor children request possession of household goods and personal effects, the personal representative can allow their request. The personal representative does not take possession of real estate unless the Probate Division or the decedent's will orders him or her to do so. The Probate Division will normally order the personal representative to take possession of real estate to do the following:

- Pay property taxes.
- Collect rents and earnings of the property.
- Rent the real property.
- Repair the real property.
- Insure the real property.
- Sue to acquire possession or clear title.

Management. The personal representative's third major duty is management of the estate property. The personal representative is a *fiduciary*. This means he must deal with the assets of the estate with the utmost of *good faith*. The personal representative will be liable for any negligent loss of assets or decline in value. He or she should manage the estate as if it were his or her own property.

The following are the more important management duties of the personal representative:

- Collect all debts, money, and personal property due the decedent, and sue for the same should the decedent's debtors fail to pay. The personal representative may not sue on matters involving real property unless the probate court has ordered him or her to take possession of the real property.
- Deposit the funds of the estate in a bank to earn interest. However, he or she is generally not authorized to invest the funds of the estate in stocks, bonds, or other property.

- Manage and continue the decedent's business, but only if the probate court or the decedent's will authorizes him or her to do so. Otherwise, the personal representative may *not* continue the decedent's business.
- Employ persons whose services are necessary and beneficial to the estate (for example, someone to harvest crops).
- Employ an attorney to represent the estate. The personal representative who is not an attorney *must* employ an attorney to assist him or her. Fees are statutorily set and are based upon the value of *personal* property in the estate. The following statutory fees are set out for the executor and the attorney of the estate. Only the value of personal property and the proceeds of real property sold under order of the Probate Division are subject to the percentage fees. The court may allow additional compensation to these individuals if deemed "reasonable and adequate" for the work done. If the attorney also serves as the executor, only one percentage fee can be claimed. Otherwise, fees by both the executor and the attorney can be expected. The fee is cumulative.

Amount		Fee scale
the first 0-\$5,000	@	5%
the next \$5,000-\$25,000	@	4%
the next \$25,000-\$100,000	@	3%
the next \$100,000-\$400,000	@	2¾%
the next \$400,000-\$1,000,000	@	2½%
over \$1,000,000	@	2%

For example, an estate worth \$150,000 total with \$50,000 of personal property could expect an attorney's fee of \$1,800 as well as an executor's fee of \$1,800 [(5,000 x .05) + (20,000 x .04) + (25,000 x .03) = 1,800]. For the fees to be larger, the attorney or executor would have to prove to the judge's satisfaction that the request for additional compensation was reasonable in light of the time, expense, and work involved. Of course, the lawyer or executor could waive part or all of the statutory fee. This is most often done by an executor who is a relative and heir of the decedent.

Payment of Claims Against Estate. A fourth major duty of the personal representative is to pay the decedent's debts. All claims against the decedent's estate, except state and federal taxes and administration expenses, must be filed with the Probate Division within six months of the date of first publication of notice of administration. The Probate Division *must* approve payment of all claims greater than \$500. The personal representative may pay claims of less than \$500 and any tax liability of the estate without an order from the Probate Division.

Claims against the estate are given various priorities by classifying them into five different categories. Should insufficient assets exist to completely pay claims in any class, payment is prorated among claims of that class. No claims of a lower priority are paid until all claims of a higher priority are completely satisfied.

Claims are paid in order of the following priority:

- Funeral expenses (except the tombstone expense).
- Expenses of the decedent's last illness. The reasonable cost of a tombstone is included in this category.
- Income and property taxes due to local, state, and federal governments.
- Judgments rendered against the decedent in his lifetime.
- All other claims filed within six months of first publication of notice of administration of the decedent's estate.

This classification does not apply to preferred claims against specific assets (for example, a mortgage on a particular tract of land). All payments must yield to an established claim of a third party, such as a bank or Production Credit Association, to a specific asset.

The family and homestead allowances and administration costs are also paid before the above categories of claims.

Sale of Personal or Real Property. Usually the personal representative must have the Probate Division's permission to sell the personal property of the estate. Personal property may be sold to pay the following:

- Claims allowed against the estate.
- Allowances made to the surviving spouse or unmarried minor children.
- Expenses of administration.
- Gift, inheritance, or estate taxes due.
- Bequests in the decedent's will (if one exists) where sale of personal property will facilitate distribution. Some types of personal property may not be sold (if the surviving spouse or unmarried minor children request this).

The following personal property may not be sold:

- Household furnishings (that is, exempt property).
- Property the surviving spouse or unmarried minor children select in place of the family allowance and household allowance.
- Property specifically bequeathed or that the deceased directs by his will not to be sold. However, if the estate has insufficient assets to pay the decedent's debts, this property may be sold.

Real property may be leased, mortgaged, or sold for any of these same purposes. The personal representative may sell real property only when the decedent's will or the Probate Division directs him to do so.

Payment of Taxes. The personal representative is responsible for the payment of all state, local, and federal taxes for the estate. Inheritance taxes are paid out of each beneficiary's share before the beneficiary receives his or her share. The Circuit Judge of the Probate Division usually will not allow final distribution of the estate until an estate tax closing letter from the Internal Revenue Service and a tax receipt from the state and county governments are filed in the Probate Division. These documents indicate satisfaction of the estate's various tax liabilities.

Accounting for the Estate. The personal representative must account to the Probate Division for all of the estate's assets. Accountings are called settlements. The law requires a semi-annual settlement six months after the personal representative's appointment, but more time may be allowed by the Probate Division if necessary to locate heirs, property, and creditors and to resolve any other issues such as a will contest.

Distributing the Estate. Distribution is a final transfer of the decedent's title and interest in property to the beneficiaries of the estate. The personal representative distributes the assets according to the directions of the Probate Division. The Division will order distribution in accordance with the decedent's will. If there is no will, Missouri intestacy laws govern distribution. See Manual 68 for more information.

Before probate administration is finished, the Probate Division may allow partial distribution of the estate. Partial distribution is allowed where the inventory shows more than sufficient assets to pay all claims against the estate. The Probate Division will order partial distribution only when it determines no one will be prejudiced by the distribution.

Can a Surviving Spouse Be Disinherited?

The surviving spouse has a right to *elect against the will*. This means the spouse may choose a statutorily set portion of the estate in place of his or her amount specified in the will.

The following rules apply to the elective portion:

- The amount is one-half the net estate if no lineal descendants (sons, daughters, grandsons, granddaughters) survive the decedent, or one-third of the net estate if lineal descendants are alive at the decedent's death.
- This portion is subject to the claims of creditors.
- The spouse will receive notice from the Probate Division of the right to elect against the will within 30 days after the will is admitted to probate and a personal representative is appointed.
- The election must be made within 10 days after the time allowed to contest the will (six months after first published notice of the opening of the estate).
- This right is available only to the surviving spouse and is not transferred to the surviving spouse's heirs should he or she die before using it.
- Once the election is made, it may not be rescinded.

If the decedent dies without a will, the spouse is guaranteed a share of the estate after claims are satisfied. This share is the spouse's intestate share. The amount of this share is one-half the net estate if the deceased is survived by any of the following:

- Children.
- The deceased's father, mother, brother, or sister.
- Descendants of any of the above.

The surviving spouse takes the entire estate where there is no will and none of the above listed persons are alive. In any case, the spouse's intestate share is second to the claims of creditors.

If There Is No Will, What Property Goes to the Decedent's Children?

The children of the decedent are entitled to a certain portion of the estate if the decedent leaves no will. This portion is called the children's intestate share. *Children* includes the following:

- Natural children of the decedent.
- Adopted children.
- Descendants of any of the above.

The children share equally in that portion of the estate the surviving spouse does not take. The surviving spouse, if there is one, is entitled to one-half of the estate where lineal descendants survive the deceased. If no spouse survives the decedent, the decedent's children share the entire estate equally. The children's intestate shares are subject to the claims of the decedent's creditors.

What Happens to Unmarried Minor Children Who Are Orphans?

The Probate Division will appoint a guardian for any unmarried minor children should the decedent's death make them orphans. The guardian is charged with the care of the children. He or she is also responsible for protecting the children's interest in the estate and pursuing any of the special rights listed above.

If a guardian is nominated in the decedent's will, the person named will usually be appointed. Otherwise, the Probate Division will select a guardian.

An individual must be of good moral character and be able to provide a good environment for the child before he or she will be appointed guardian. Additionally, the individual must be of sound mind and must also be at least 21 years of age. A guardian must also be a Missouri resident.