

The Kentucky Probate Process and How to Avoid It

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Introduction

The Kentucky estate administration process is generally referred to by lawyers and laypersons alike as "probate." The most important objective of probate is to see that the property of a deceased person (the "decedent") is transferred to his or her rightful heirs. However, probate also involves the payment of the collection of the decedent's property and the payment of the decedent's debts and taxes.

The rules governing the probate process in Kentucky are found in Chapters 394-396 of the Kentucky Revised Statutes. Unlike other states where probate laws can be complex and onerous, Kentucky's probate laws and procedures are fairly simple and straightforward.

The Petition

Essentially, there are three basic steps in the Kentucky probate process. First, a petition must be filed by an appropriate person in the decedent's county of residence to begin the probate process. Pursuant to KRS Chapter 24, district courts have jurisdiction over probate matters in Kentucky, and the petition is, therefore, filed with the district court clerk.

Per KRS 395.015, the petition must state:

- a. The names of the surviving spouse, all known heirs at law, and their addresses;
- b. Date of death;
- c. Statement in general terms as to what the estate consists of and probable values of real and personal property; and
- d. Statement of indebtedness owed to the petitioner

(if any).

The petition is embodied in AOC 805 which is a form available from the district court clerk. It must be submitted in duplicate and in verified form (under oath) pursuant to KRS 395.015. The petition must also be submitted with a filing fee which is typically around \$60.00.

If the decedent died with a will, the original will must be submitted with the petition. A will is valid in Kentucky only if it is in writing, in English and signed at the end by the decedent. If the will is not entirely in the handwriting of the decedent, it must be signed or acknowledged by the decedent in the presence of at least two witnesses, who also must sign in the presence of the decedent and each other. The witnesses must testify at the hearing on the petition in order to prove the will unless the will is "self proving." KRS 394.225 provides that any will may be proven without the testimony of witnesses if it has been executed and attested in the form provided by KRS 394.225(1). Essentially, if a will is witnessed by two witnesses and the signatures of the decedent and the two witnesses are notarized, the will shall be deemed to be self proving.

If the decedent died without a will, he is said to have died "intestate." In cases of intestacy, KRS 395.015 requires that notice of probate be given to all of the decedent's heirs at law. In such cases, a hearing on the appointment of the personal representative will be held by the Court pursuant to KRS 395.016

Once the petition has been filed, the district court clerk will set the matter for a hearing. Generally, a district court judge will set aside an hour during the week for probate hearings. This is known as probate court. For example, in McCracken County,

probate court is currently held every Monday morning beginning at 8:30 a.m. Because all required filings are made and the filing fees are paid prior to the hearing, the only thing that usually occurs at the hearing is the administration of the oath by the district judge to the personal representative (the executor or administrator). The personal representative is the person who will be handling the administration of the estate and is usually the same person who submitted the petition.

The Two Month Inventory

The next step in the Kentucky probate process is the filing of an inventory of the estate. Per KRS 395.250, the personal representative has a duty to file the inventory within two (2) months from his or her appointment. The two month inventory must be submitted in duplicate, and its filing makes the assets of the estate and their values a public record.

The Final Settlement

The last step in the probate process has to do with closing the estate. The procedure by which an estate is closed begins when the personal representative files a "final settlement." A final settlement is the personal representative's detailed accounting to the Court of all receipts and disbursements relating to the estate and must be supported by vouchers, receipts, and similar supporting documentation. Final settlements must balance to the penny.

After the final settlement is filed, the district judge reviews the accounting and files a written report. The clerk shall then set a date for the hearing on the judge's report. The judge may hear evidence, question the personal representative under oath, and summon witnesses, if necessary to the preparation of the written report.

The clerk then publishes notice of the filing of the final settlement pursuant to the provisions of KRS Chapter 424. The notice will contain the date of the hearing, and if no exceptions are filed to the final settlement prior to the hearing, the Judge's report will be approved and recorded. If exceptions are filed, a hearing may be held and the Judge may reject, alter, or confirm the report as he or she determines.

Because of the detailed accounting that must be

provided, the final accounting is usually the most daunting aspect of the probate process. However, Kentucky law provides a more simple procedure for closing an estate under certain circumstances. This more simple procedure is found at KRS 395.605, which provides that a personal representative may file what is called an "informal settlement." For example, if the personal representative is the sole beneficiary of the estate, the Court may dispense with the requirements of the filing of the final settlement and accept an informal settlement. Also, if there is more than one beneficiary, and all of the beneficiaries execute verified waivers of a final settlement, the Court is required to accept an informal settlement filed by a personal representative. Further, it is not necessary to obtain waivers from beneficiaries who have received and given receipts for their legacies. It is sufficient to attach to the informal final settlement the canceled checks or signed receipts. In addition, there is no requirement of giving notice to any person when an informal settlement is filed.

KRS 395.605(1) provides that an informal settlement shall be made under oath by the personal representative and shall state that:

- a. The estate was solvent;
- b. All legal claims and debts have been paid for (or, if not paid, the manner in which said claims and debts have been provided for is described);
- c. All inheritance, estate, or death taxes have been paid, with a duplicate or photocopy of such tax release attached, if available;
- d. All court costs have been paid;
- e. Beneficiaries have received their share of the estate; and
- f. The name of the attorney(s), if any, representing the personal representative, and the amount of the attorney's fee.

After the personal representative files an informal settlement, the judge may immediately enter an order closing the estate.

Duration of Probate

Although there is no statute that requires an estate to stay open for any particular length of time,

estates will generally stay open a minimum of 6 months. This is because KRS Chapter 396 states that creditors of estates have 6 months in which to file claims, and any claims not filed within the 6 month period are not enforceable. Lawyers for estates usually recommend that a personal representative wait to make any distributions from an estate until the expiration of the 6 month period so that all claims of creditors can be ascertained. Since any claims made after 6 months are barred, the personal representative may thereafter make distributions from the estate without having to worry about later claims against the property of the estate. On the other hand, if a personal representative were to make distributions from an estate prior to the expiration of the 6 months and the property of the estate was insufficient to satisfy the claims of creditors, the personal representative could become personally liable for the claims.

Avoiding Probate

Although the Kentucky probate process is not as burdensome as the probate process in other states, it is still usually best to avoid it if possible. Kentucky law provides for many different manners in which to avoid probate. For example, probate is altogether unnecessary for small estates. KRS 395.455 provides that where the total amount of probatable assets is less \$15,000.00, administration of an estate may be dispensed with the assets distributed to the surviving spouse or surviving children.

There also exist several other mechanisms altogether outside of the court system that may be implemented to avoid probate. These are known as "will substitutes" because they dispose of a decedent's property just like a will. In fact, will substitutes have priority over a decedent's will and generally control the passing of property regardless of whether the decedent's will contains a contrary disposition.

One of the most common will substitutes is ownership of property as "Joint Tenants with Rights of Survivorship." This is sometimes referred to simply as owning property "in survivorship." Persons may own accounts, securities, or real property in survivorship. Property owned in survivorship will become the property of the surviving owner immediately upon the death of the other owner. In this way, the owner who dies first passes his or her interest in the property to the

survivor, and the interest in property does not have to go through the probate process. It is quite common for a husband and wife to own their home, bank accounts, and other properties as joint tenants with rights of survivorship. In fact, most lawyers recommend that married couples own property in survivorship in order to avoid probate upon the first spouse's death. There is, however, an exception to this rule for couples who have large estates and have implemented an estate plan designed to save estate taxes.

Another will substitute is the payable on death account or POD account. Some financial institutions refer to these will substitutes as the transfer on death account or TOD account. The POD account is an account that is owned by one person (the "account owner") during account owner's lifetime and then owned by another person upon the death of the account owner. Essentially, the account owner will designate the person who will become the owner of the account upon the account owner's death. This designation of ownership upon death vests ownership of the account directly in the designee and avoids the need for the probate process. One of the most prevalent types of POD accounts is an IRA or 401(k) account. It is important to note that pursuant to KRS 391.315, the right of ownership arising from the express terms of a POD designation cannot be changed by language contained in a will.

One of the most popular (and in this lawyer's opinion, perhaps over-sold) will substitutes in use today is the revocable trust. Revocable trusts are sometime also referred to as "living trusts" because they are created during one's lifetime. (This is in contrast to a "testamentary trust" that may be established in one's will.) A revocable trust may be changed or revoked at anytime prior to the death of the creator ("grantor") of the trust. Typically, the grantor acts as trustee of the trust until death or incapacity so that the grantor continues to control the assets which are contributed to the trust. Assets which the grantor transfers to the trust are not probatable assets upon the grantor's death because title to the assets are held by the trust, not the grantor.

There are advantages and disadvantages to the use of revocable trusts. Obviously, the primary advantage to the use of a revocable trust is avoiding probate with respect to the assets owned by the trust. If the grantor has transferred all of his or her assets to the trust, the probate process may

be avoided altogether. As noted above, in probate, a decedent's property becomes a public record with the filing of the inventory. Use of a revocable trust allows the decedent's property to be handled privately by the successor trustee. Avoiding probate may also mean avoiding legal fees if a lawyer is retained by the personal representative to assist with the probate process.

There are, however, disadvantages to the use of revocable trusts. First, revocable trusts are typically much more expensive than wills. In addition, one who opts to use a revocable trust must put forth the time and effort necessary to transfer all of his or her assets to the trust. This means that all titled properties must be retitled in the name of the trust. New deeds will must be drafted for real property, and account titles must be changed. Failure to place any one asset in the revocable trust may result in having to go through the probate process nonetheless.

In addition, there is actually a disadvantage to avoiding probate. Potential claims of creditors will not be barred unless the estate is probated. Remember that all claims of creditors are barred after 6 months from the date the personal representative is appointed. If the estate is not opened, claims of decedent's creditors will continue to exist, potentially for an indefinite period of time.

It is also important to note that revocable trusts do not have tax planning advantages over wills. One can perform the same tax planning with a will that one can perform with a revocable trust. In addition, revocable trusts do not protect assets from consideration when a nursing home resident is applying for Medicaid assistance.

Conclusion

The prospect of going through probate in Kentucky is certainly no cause for panic. While Kentucky's probate laws are sufficient to ensure that a decedent's assets are properly managed and distributed to the appropriate persons, the requirements of the probate process are minimal enough that most people navigate it smoothly without incident. However, it is almost universally agreed that probate should be avoided when possible. This is especially true in the case of married couples desiring that the survivor receive all of the deceased spouse's property. In such a case, assuming there is no need to perform any tax planning, probate is most easily avoided by owning property as joint tenants with rights of survivorship or by having property payable on death to

the surviving spouse. In cases where tax planning is necessary, a more complex estate plan involving the use of revocable trusts may be necessary. In addition, avoiding probate is merely one aspect to consider in creating and implementing a well-rounded estate plan. Married couples and single individuals alike should consult with an experienced estate planning lawyer for advice based on their particular circumstances.

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Ted's experience at **Denton & Keuler** spans a broad spectrum of business law and taxation, including purchases, mergers, acquisitions, and business planning. His skill has been invaluable to clients arranging multi-million dollar mergers as well as to those planning for closely held businesses. Ted also concentrates his practice in estate planning for clients with needs ranging from basic wills to more complex estate and gift tax planning.

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