

Probate Explained

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The Functions of Probate

Probate serves several important functions, including:

1. Identifying the decedent's will or determining that the decedent left no will (or is "intestate") and compiling contact information for each heir;
2. Appointing the individual(s) nominated as personal representative in the decedent's last will and testament;¹
3. Notifying the heirs that a probate proceeding has commenced and who the personal representative is;
4. Identifying creditors of the estate and making arrangements to compromise, disallow or pay them;²
5. Identifying and preserving estate property until distributions can be made;
6. Determining whether any assets need to be sold in order to pay creditors or prepare for appropriate distributions to the heirs;
7. Arranging for the preparation of appropriate tax returns and payment of taxes (e.g., final form 1040 income tax return(s) for the decedent, form 1041 income tax returns for the estate and a form 706 federal estate tax return, if one is required);
8. Preparing an inventory of estate assets, calculating the fees of the personal representative (unless waived by the personal representative), and an accounting of the estate (unless waived by the heirs); and
9. Finally, making arrangements for and carrying out distributions to the heirs.

There are means by which the probate process can be avoided. The most commonly utilized technique is through a "living trust" (also known as a revocable living trust). The

¹ If the decedent is intestate, a statute lists the persons entitled to be appointed as personal representative in order of priority. SDCL 29A-3-203(a)(2)-(6).

² Notifications to creditors can include publishing a notice to any unknown creditors in a local newspaper and notifying the Department of Social Services in case of any "estate recovery" claim for Medicaid benefits provided to the decedent or the decedent's spouse.

merits and advantages of the use of living trusts is beyond the scope of this article. It should be noted, however, that the administration of a living trust following an individual's death will require many of the same tasks and undertakings as occur within probate, although without the involvement of the probate court.

Generally, within the probate process, an estate is "administered" meaning that the decedent's property is applied to debts (e.g., credit card obligations incurred during life) and expenses (e.g., funeral expenses), certain property may be sold if necessary, and distributions are made to the heirs.

How Much Does it Cost?

In 1995, the South Dakota Legislature adopted a slightly modified version of the Uniform Probate Code. The intent of the new probate code was "to promote simplification, clarification, and efficiency in the law of decedent's estates."³ While that goal might not have been fully achieved, probate proceedings in South Dakota and other states which have adopted the uniform act are much more streamlined than under prior law. In fact, some even complain that the proceedings are now *too* streamlined to adequately protect heirs and creditors.

At any rate, the simplification of the law reduced the costs of probate. South Dakota's repeal of the state inheritance tax in 2001 also eliminated the costs associated with preparing and filing a state inheritance tax return. Typical costs associated with a probate include the personal representative's fees, legal fees, and administrative expenses, each of which is briefly discussed below:

Personal Representative's Fees. A personal representative is entitled to a fee or wage for their work and responsibilities assumed. Typically, a personal representative is surprised by the time commitment required to administer even a relatively simple estate. If the will does not set the personal representative's fee, South Dakota law suggests compensation of approximately 2½% of the value of the estate.⁴ A personal representative is also entitled to reimbursement for any expenses advanced for the estate's benefit.

Legal Fees. Most lawyers bill their hourly rate for representing the personal representative of an estate. Hourly rates for South Dakota lawyers typically range between \$150 and \$300. Some lawyers utilize qualified paralegals to assist with probate administration with a lower hourly rate. Legal fees also include the court filing fee to commence a probate (\$100) and sales tax. Less commonly, lawyers will charge a flat legal fee based upon a percentage of the value of the estate or other relevant factors.

³ SDCL 29A-1-102.

⁴ SDCL 29A-3-719(c).

Administrative Expenses. Administrative expenses include any other cost incurred to “get the job done” in a probate such as accountant fees, liability insurance premiums, storage or cleaning costs, appraisal fees, broker fees, etc.

Just as important as how much these types of expenses (as well as creditor claims, funeral expenses, etc.) add up to is the source for their payment. A last will and testament can direct what assets or accounts will be used to pay expenses. In the absence of a directive, expenses are typically *not* charged against “specific bequests” such as a gift of a specific sum or property to an individual, but rather against the “residue.” The “residue” is the assets of an estate left over after satisfying any specific bequests.⁵ Nonprobate assets such as jointly titled property and life insurance which pass outside the will are typically not a source for the payment of expenses.

What Makes Probate Take too Long and Cost too Much?

South Dakota law provides that the earliest an estate can be closed is four months after the date of the original appointment of the personal representative.⁶ It is not unusual for a probate to take up to a year or more, in some cases. If a federal estate tax return must be filed, the estate usually must await a “closing letter” from the IRS which is issued upon review of the return.

Factors which increase the time and expense of a probate include:

1. Creditor or tax issues;
2. Valuation issues;
3. Distribution issues; and
4. Will contests or will construction (interpreting a will) issues.

In most cases, it is the nature of the decedent’s assets and the existence of any creditors which increase time and expense, although contentious heirs can also result in delays and costs.

One factor which invariably increases costs is real property owned in another state since an ancillary probate proceeding is usually required. An additional probate proceeding in every state in which the decedent owned real property is usually required.

⁵ Federal estate taxes, on the other hand, are generally subject to “equitable apportionment” among the heirs unless the will directs otherwise. See SDCL 29A-3-916; In re Estate of Siebrasse, 652 N.W.2d 384, 2002 SD 118.

⁶ SDCL 29A-3-1001(a), 29A-3-1002(a).

Ultimately, although the word “probate” has developed a decidedly negative connotation, the process aims to achieve finality in “wrapping up” the decedent’s affairs and making final distributions to the heirs consistent with the decedent’s will (or intestacy statutes). Probate serves an important function. When it works, heirs have the peace of mind in knowing that when they receive their inheritance, they won’t be contacted later about an issue or problem that could have been resolved by the estate’s personal representative *before* making distributions. Probate is a relatively well-defined proceeding to provide this peace of mind.

WHERE TO FIND THE LAW

The law is generally comprised of statutes, regulations and caselaw (reported opinions by a court to specific facts). The law cited within the above discussion can be found at the links provided in the “Law” section of the ThomasESimmons.com website. South Dakota statutes are abbreviated as “SDCL” for South Dakota Codified Laws. South Dakota administrative rules are abbreviated as “SDAR.” Federal statutes are abbreviated as “USC” for United States Code.

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