

When is Probate Necessary and Why

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The Need for Probate

The word “probate” has a nasty connotation for most people. While a clear understanding of what is actually involved in a probate proceeding is generally limited to lawyers and persons who have experienced it first-hand, the great majority of individuals suspect that probate is something to be avoided, and, if it cannot be avoided, it is viewed with dread.

The word “probate” in its narrowest and traditional sense means a court proceeding which determines the validity and authenticity of a decedent’s last will and testament. But probate in today’s world also includes proceedings when a decedent leaves no will, or is “intestate.” And while probate proceedings can include will contests and litigation on the question of whether a decedent’s last will and testament is valid or invalid, the typical probate proceeding assumes that a will is valid, and will contests are relatively rare.

A respected legal dictionary describes probate as follows:

Generally, the probate process involves collecting a decedent’s assets, liquidating liabilities, paying necessary taxes, and distributing property to heirs. These activities are carried out by the executor or administrator of the estate, usually under the supervision of the probate court or other court of appropriate jurisdiction.¹

The benefits of probate include a recognized, orderly set of procedures by which issues arising within the estate administration process can be resolved.

When Probate is Necessary

Probate is a legal proceeding governed by state, not federal, law.² The probate statutes in South Dakota are based upon the Uniform Probate Code, a set of laws which is intended to be largely uniform among the states which adopt it. The probate code is found in chapter 29A of South Dakota Codified Laws.

¹ Black’s Law Dictionary 6th ed. at 1202 (1990).

² But see *Marshall v. Marshall*, 547 U.S. 293 (2006) (permitting a claim by Anna Nicole Smith that her late husband’s son wrongfully deprived her of inheriting a \$1.6 billion estate to be heard in federal bankruptcy court).

Probate is necessary when an individual passes away leaving assets titled in their own name. During the decedent's lifetime, he or she had legal control and authority over the assets, and could enjoy them, transfer them or sell them. Once the individual has passed away, however, there is no person with legal authority over those assets unless that authority is conferred upon a "personal representative"³ by a probate court. When a personal representative is appointed, the individual is vested with the power and authority to administer the decedent's assets.

Probate is also necessary whenever the decedent owned an interest in real property unless the decedent's interest was that of a joint tenant, in which case no probate is necessary to vest the property in the surviving joint tenants's name. An affidavit must be properly filed to terminate the decedent's interest in real property as a joint tenant.⁴

When Probate May be Unnecessary

Probate may be avoided when there is no real property in the decedent's name *and* the value of the estate does not exceed \$50,000.⁵ In that case, a "small estate affidavit" can be utilized.⁶ This proceeding is conducted outside of court and is called the "Summary Administration Procedure for Small Estates." An individual utilizing this simplified procedure must see that any creditor claims, taxes or administrative expenses are properly paid in the priorities set by statute,⁷ and that any remaining property is distributed to the proper heirs.⁸

If a decedent's assets are "nonprobate" in nature, it is not necessary to utilize the probate process to transfer them to the heirs. Examples of nonprobate assets not requiring the appointment of a personal representative include: assets titled jointly with rights of survivorship, assets with beneficiary designations to heirs (such as life insurance and retirement benefits), accounts with "payable on death" designations (abbreviated as POD or TOD) and assets titled in a trust. Nonprobate assets still need to be administered, applied towards creditors and properly distributed, but this process can occur without the utilization of probate proceedings.

³ A "personal representative" is the same as an "executor." An "executrix" is a female executor. The term "personal representative" is gender neutral.

⁴ SDCL 21-44-2.

⁵ SDCL 29A-3-1201.

⁶ The sworn statements which the affidavit must contain are listed at SDCL 29A-3-1201(a)(1)-(5).

⁷ SDCL 29A-3-805.

⁸ SDCL 29A-3-1202(d).

In the case of an asset such as life insurance which has no named beneficiary, the life insurance passes to the estate and therefore becomes a probate asset which may require the appointment of a personal representative. The same result can occur if an asset such as life insurance names a deceased primary beneficiary (such as a predeceased spouse) but no contingent beneficiary.

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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