

The Law and You

Probate: A Viable Alternative to a Trust

Fear mongers often promote trusts by issuing dire warnings to avoid probate. Such fear and promotions are unfounded and do little to serve the public. Most such promotions are misleading and intended solely for pecuniary gain to the promoter.

In Utah, probate is quick and easy. The court costs are presently \$360. The Legislature has in the past increased from time to time the filing fee for probate. But it is still a relatively modest fee.

For very small estates under \$100,000, no probate is necessary, unless the estate owns real property. A simple affidavit prescribed by statute will suffice to transfer assets from an estate to the heirs. So, most estates going through probate have a value far in excess of \$100,000.

In most instances, the will, if there is a will, is uncontested. The person named as the Personal Representative is usually nearby and available to serve. Those individuals named in the will and who are to receive the deceased's estate are most often children of the deceased. They typically do not contest the will.

The person nominated in the will as the Personal Representative usually applies for informal probate of the will. Children who are taking under the will are permitted to sign a waiver to avoid the statutory ten-day waiting period.

The Application for Informal Probate is then submitted to the Clerk of the Probate Court, along with the required fee, the original will, the necessary statutory language, the waivers, and the acceptance by the Personal Representative. Upon receipt of the completed Application and fee, the Clerk then issues Letters Testamentary to the Personal Representative. This usually takes place in a matter of a few minutes, not weeks, months or years.

With Letters Testamentary in hand, the Personal Representative is then empowered with all the necessary authority and power for the administration of the estate of the deceased. The Personal Representative can then gather all assets of the deceased and distribute them in accordance with the instructions contained in the will.

If the persons to receive the deceased's estate are not readily available to sign a waiver of notice, the nominated Personal Representative can still file an Application for Informal Probate. However, instead of being immediately issued the Letters Testamentary, the Applicant must wait the statutory 10 days.

If formal probate is desired, notice and hearing are required. The hearing usually takes place within 2-3 weeks from the date the Application is filed. During this period of time, the Probate Court sends a notice to each person named in the will. This notice informs the person that an application for probate has been filed, by whom, and the date, time, and place for the hearing.

The hearing in the Probate Court is brief and is only to determine whether anyone opposes the Application. If there is no opposition at the hearing, then Letters Testamentary are issued that same day to the Personal Representative. If there is opposition to the Application, then the matter is referred to a trial court to probate the will and/or to appoint a Personal Representative.

It is important to understand that once the Probate Court issues Letters Testamentary, the Probate Court is no longer involved or watching over the shoulder of the Personal Representative. Further, no additional fees, beyond the initial filing fee, are required by the Probate Court.

Except for challenges to a will or to the actions of a Personal Representative, the affairs and administration of an estate are

conducted entirely outside the Probate Court. The Probate Court does not oversee nor receive reports concerning the administration of the estate. The Personal Representative acts very much like a Trustee of a trust.

There should be no fear of Probate. It is quick, simple and reasonably inexpensive. In deciding what is best for your particular situation, you should consult an Elder Law Attorney. If needed, check with the National Academy of Elder Law Attorneys at (520) 325-7925 or at their web site: www.naela.com, or consult your local Yellow Pages.