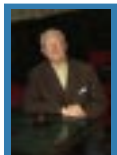
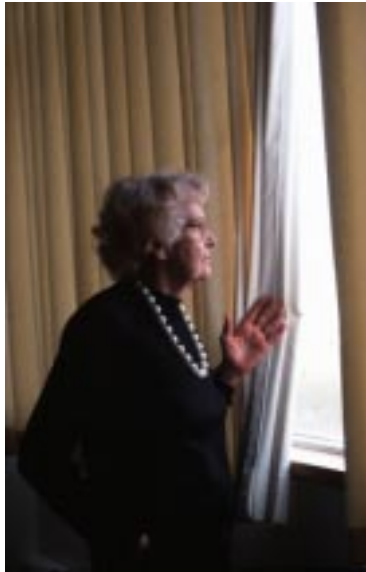


# Probate Administration of a Decedent's Estate



# *Notes*

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## 1. What is Probate?

The term **probate** refers to the manner of administering the property (the estate) of a decedent by a personal representative (**PR**) under the jurisdiction of one of Michigan's county probate courts. The estate's PR is appointed by the court, usually on the basis of being named in the will or by the interested person asking the court for commencement of the probate proceedings. The administration of a decedent's estate essentially involves 3 steps after the court has appointed the PR:

First, the **marshalling of assets** (the assembly, securing, valuation, and sorting of the decedent's property),

Second, the **payment of charges** (last illness and funeral expenses, amounts owed to creditors, taxes, family allowances, and general expenses of administration), and

Third, **distribution** of what is left to the estate beneficiaries (either according to the terms of the decedent's will or, if there is no will, in accordance with Michigan's law of intestate succession).

## 2. When is Probate Required?

Generally speaking, probate is only necessary when a person dies leaving property in his or her own name (such as a house titled only in the name of the decedent) or having rights to receive property (such as wrongful death claim or a debt owed to the decedent). However, not all property in which the decedent has an interest will be subject to probate. There are 4 kinds of property which pass to a new owner on death without going through probate.

- ⇒ Property which is owned by the decedent and another person as joint tenants with right of survivorship will pass automatically to the surviving joint owner without going through probate (except in the case of certain joint bank accounts which are established with another person who is to act as agent for the decedent).
- ⇒ Beneficiary designated properties (such as life insurance, pension benefits, and IRAs) are payable on death, without probate, to the beneficiary designated by the decedent (or, if none, as designated in the contract or plan itself).
- ⇒ Properties owned by a revocable trust do not go through probate but instead are disposed of after death in accordance with the instructions written into the trust document.
- ⇒ There are even some forms of property owned solely by the decedent which would otherwise require probate that are exempt in certain instances. Those notable exceptions include the following:
  - Unpaid wages. An employer in Michigan may pay the wages due a

deceased employee to the employee's spouse, children, parents or siblings in that order unless the employee filed a request to the contrary with the employer.

- Cash up to \$500 and wearing apparel. A hospital, convalescent or nursing home, morgue, or law enforcement agency in Michigan holding cash not exceeding \$500 and wearing apparel of the decedent may deliver that property to the decedent's spouse, child, or parent who provides (i) suitable identification and (ii) an affidavit which states the person's relationship to the decedent and that there are no pending probate proceedings for the decedent's estate.
- Travelers checks. Most issuing companies (such as American Express) will redeem unused travelers checks following the death of the owner without requiring the appointment of a PR on submission of the checks, a death certificate, and an appropriate affidavit by the next of kin indicating to whom payment should be made.
- Motor vehicle transfers. If the combined value of one or more of the decedent's motor vehicles does not exceed \$60,000 and there are no probate proceedings for the decedent's estate, registration of title may be transferred by the Michigan Secretary of State to the surviving spouse or next of kin upon submitting a death certificate, an affidavit of kinship, the vehicle's certificate of title, and certain other Michigan Secretary of State documents.
- Watercraft transfers. If the combined value of all of the decedent's watercraft does not exceed \$100,000, and there are no probate proceedings for the decedent's estate, registration of title may be transferred by the Michigan Secretary of State to the surviving spouse or next of kin upon submitting a death certificate, an affidavit of kinship, and the certificate of title for the watercraft.
- Income tax refund claims. These may be collected without probate by filing IRS or Michigan form 1310.
- Transfer by affidavit. Personal property with a value not exceeding \$15,000 may be transferred to a decedent's successor by presenting a death certificate and an affidavit stating who is entitled to the property.

### 3. Types of Probate Administration

**Small Estates**—There are two types of proceedings for small estates - in either case, Michigan's small estate law provides for the manner of distributing the estate assets (i) even though the decedent may have had a will giving the property to other persons or (ii) regardless of Michigan's law of intestate succession in certain instances (if there is no will).

The first small estate proceeding applies to those cases where all of the real and personal property owned by the decedent has a total value equal to or less than the sum of the following: (1) the funeral expenses; plus (2) \$15,000. Upon presentation of a petition and payment of the filing fee, the probate court may order that the funeral expenses be paid, if they have not been paid, or that the person who paid them be reimbursed. The balance of the property will be assigned to the surviving spouse, or if none, to the decedent's heirs under Michigan's law of intestate succession. No court hearing is held. During the 63 day period following the court's assignment of the property, the heir, if neither the decedent's surviving spouse nor minor child, will be responsible for any unsatisfied debt of the decedent up to the value of the property received.

For somewhat larger estates, a second kind of small estate summary proceeding may be available in those cases when the decedent is survived by his or her spouse or minor/dependent children. If, upon preparation of the estate's inventory, the value of the estate is less than the sum of the following:

- ⇒ All mortgages and liens,
- ⇒ The homestead allowance (such an allowance of \$15,000 can be paid to the surviving spouse or, if none, to the decedent's minor and dependent children),
- ⇒ Exempt property (up to \$10,000 of the decedent's personal and household articles can be selected by the surviving spouse or, if none, by the decedent's children),
- ⇒ The family allowance (of up to \$18,000; if a higher amount is desired, it must be approved by the probate court),
- ⇒ Funeral, last illness, and administrative expenses, then the PR may simply pay the amounts due the secured creditors and the balance to the surviving spouse (or, in some cases, to the conservator for the minor children) and then close the estate.

**Regular Estates**—There are two forms of regular administration of a decedent's estate. The first, **unsupervised administration**, permits the PR to act in a manner independent of the court unless intervention is requested by the PR or an interested person (such as an unpaid creditor or an estate beneficiary). This form of administration is generally preferred unless there is a specific reason to request the court's supervision of the estate. In addition, since there is less court involvement, fewer details concerning the estate's administration will be in the court file and available for inspection by the public and the media, unsupervised administration offers some privacy for the decedent's family.

The second form of probate administration, **supervised administration**, requires the probate court's review and approval of much of the estate ac-

tivities. For example, in supervised administration the court would be required to (i) approve the sale of the decedent's real estate (unless the decedent's will authorizes the PR to do so), (ii) authorize the payment of PR and attorney fees, (iii) review the PR's accounting of all receipts and disbursements, and (iv) prior approval of all distributions to heirs (people receiving property from the estate if there is no will) and devisees (people receiving property under a will). While the court's involvement frequently adds to the time and expense of administering an estate, the court's supervision will likely afford greater protection to the PR and the other interested persons against losses and claims.

Unsupervised administration is begun by filing either an application or petition with the probate court. Supervised administration is begun by filing a petition that includes a request for supervision.

#### **4. Responsibilities Following Death**

**Initial Responsibilities of the Family**—Immediately following death and before a PR is appointed, the following steps should be undertaken by members of the decedent's family:

- ⇒ Make funeral arrangements and order sufficient copies of the death certificate (before appointment, the PR named in the will may carry out the written instructions of the decedent relating to the decedent's body as well as funeral and burial arrangements).
- ⇒ Determine the existence and location of the decedent's will and provide for safeguarding the decedent's important documents.
- ⇒ Obtain the names, addresses, and social security numbers of the decedent's heirs and all persons named in the will.
- ⇒ Obtain a list of the decedent's properties and the manner in which they are held [e.g., sole name, in trust, joint names, beneficiary designated (such as life insurance, IRAs, employee benefits, and so on), etc.].
- ⇒ Arrange for the security of the decedent's home and business.
- ⇒ Notify the Social Security Administration of death and determine whether any survivor benefits will be available.
- ⇒ Keep careful records of all funeral and estate related expenses incurred.
- ⇒ Determine whether a probate proceeding is necessary for the decedent's estate properties, determine who will be acting as PR, and, if necessary, take steps for filing a petition for appointment of a PR and determination of testacy or an application for appointment of a PR and, if there is a will, for probate in the probate court in the county of the decedent's residence.

It should be emphasized that the PR nominated in a decedent's will has no authority to act on behalf of the estate until such person has actually been appointed by the court (as evidenced by its issuing letters of authority). However, if there is a problem or dispute prior to the court's appointment of the nominated regular PR, the court can quickly appoint that person (or another) as a special PR to act on an interim basis for the purpose of preserving estate assets, obtaining the original will, or pursuing certain legal rights.

## **5. General Duties of a Personal Representative**

Following appointment, a PR is charged with the role of an active stakeholder—a PR has many duties to carry out while holding the decedent's property for the estate's interested persons (i.e., creditors, taxation authorities, and beneficiaries). A PR must not only be honest and impartially fair but must also be diligent, responsible, and prudent in the completion of his or her legally imposed obligations.

A PR has a duty of loyalty and thus cannot use estate assets for personal benefit. While a PR will likely employ an attorney or other professionals to assist with the estate's administration, the PR is still ultimately responsible for "getting the job done"—regardless of whether the administration is supervised or unsupervised. It is very important that a PR timely communicate with and respond to any inquiries of beneficiaries and others who have an interest in the estate as it progresses.

A PR is required to carefully manage the estate's assets. Basically, a PR must achieve a reasonable rate of return from interest, dividends, and rent on the estate's assets, with a minimum of risk, while prudently preserving estate values. Thus, for example, leaving substantial funds in a non-interest bearing checking account for an unreasonable length of time or investing estate assets in a highly speculative venture may be improper. The kinds of permissible investments are dictated by Michigan's Prudent Investor Rule and past court decisions, the decedent's will and by order of the probate court. Typically acceptable investments include insured bank accounts and certificates of deposit, money market accounts, and good quality publicly traded stocks and bonds.

## **6. Initial Responsibilities of the Personal Representative**

After appointment by the court and receiving the letters of authority, the PR should:

- ⇒ Open and inventory the decedent's safe deposit boxes in the manner provided by law.
- ⇒ Set up an accurate system to record all estate transactions.
- ⇒ Arrange for the forwarding of the decedent's mail.

- ⇒ Collect dividends, interest, rents, and other income from businesses or other property owned by the decedent.
- ⇒ Determine insurance, social security, pension, veteran, or other benefits payable to the estate or its beneficiaries.
- ⇒ Give required notice to creditors of the estate to file their claims.
- ⇒ Obtain possession of all known assets of the decedent on behalf of the estate.
- ⇒ Confer with family, business associates, and others who may know of the decedent's property.
- ⇒ Review the insurance on the decedent's property and obtain, increase, and renew casualty and liability coverage as needed.
- ⇒ Maintain any business or venture owned by the decedent.
- ⇒ Examine the decedent's records and tax returns for income patterns which may indicate assets.
- ⇒ Determine the valuation of those estate assets having readily ascertainable values.
- ⇒ Examine real estate leases and mortgages and determine what effect they have on asset valuations.
- ⇒ Employ appraisers if necessary to determine the value of real estate, antiques, art collections, or other assets without easily ascertained value (an appraisal listing the contents of the decedent's home is normally needed for purposes of federal and Michigan death taxes).
- ⇒ If the decedent owned property in other states, arrange for ancillary administration if necessary.
- ⇒ Carefully prepare the estate inventory reflecting the date of death holdings and values, and then send a copy to the estate's beneficiaries.

## **7. Other Responsibilities of a Personal Representative**

During and after assembly of the estate's assets, the PR should also:

- ⇒ Starting at the earliest time possible, plan to meet ultimate obligations of taxes, claims, administration expenses, allowances, and distributions.
- ⇒ Process the payment of all valid claims of creditors and give notice to those whose claims are being disallowed (if the estate may be insolvent, extreme care must be taken to prioritize the claims before payment is made).
- ⇒ Provide for the distribution of exempt property and allowances to the decedent's spouse, minor children, and others who were in fact supported by the decedent.

- ⇒ Operate any business of the decedent if it will benefit the estate and if authorized to do so by the court or the decedent's will.
- ⇒ Maintain prudent investment and business practices and carefully record all investment transactions.
- ⇒ Follow legal requirements when any sale of assets is necessary .
- ⇒ Obtain clearances from both federal and state taxing authorities.
- ⇒ Prepare annual accountings (which reflect all estate transactions) and send copies to the estate's beneficiaries.

## **8. Tax Returns**

From the very beginning, a PR should be mindful of the need to file tax returns, both for the decedent and the estate. The following returns may be required:

- ⇒ Decedent's federal, state, and city final income and intangibles tax returns (typically due in April following the calendar year of death).
- ⇒ Gift tax returns (an IRS form 709 must be filed on April 15 of the year following the calendar year of death or the due date of the estate tax return, whichever is earlier).
- ⇒ Federal, state, and city business, sales, and/or payroll tax returns (FUTA, FICA/withholding, federal corporation or partnership returns, Michigan single business tax returns, etc.).
- ⇒ Federal information returns (IRS forms 1096 and 1099).
- ⇒ Federal estate tax return (an IRS Form 706) if the decedent's probate and other property interests (joint bank accounts, insurance and pension benefits, interests in revocable living trusts, etc.), before deducting debts and expenses exceed \$675,000 in 2006. This amount is scheduled to increase in subsequent years.
- ⇒ Michigan estate tax return if a Federal estate tax return must be filed.
- ⇒ Federal and Michigan generation skipping transfer tax returns; the Federal and Michigan returns are due 9 months after the date of death.
- ⇒ Failure to timely file a return and pay any tax when due may subject the PR to personal liability for any interest, penalties, and possibly the tax itself.

## **9. Distribution of Assets and Closing Estate**

Perhaps a PR's most pleasant task is distributing assets to the beneficiaries of the estate. However, a PR's enthusiasm for satisfying the beneficiaries' desires to receive their inheritance should be tempered by caution.

The PR must be certain that all charges against the estate have been provided for or satisfied. To the extent there are insufficient assets, amounts distributable to certain beneficiaries may be reduced or eliminated. If there is a question of interpreting the decedent's will or the laws of intestate succession (if there is no will), obtaining court approval of a proposed distribution may be necessary. Prior court approval is required for estates in supervised administration before distributing any assets to estate beneficiaries.

Also, a complete or final distribution should not occur until after all tax returns and necessary tax clearances have been secured. Receipts from the estate beneficiaries and a final accounting may be required to close the estate.

## **10. Other Aspects of Estate Administration**

**Engaging an Attorney and Other Professionals**—Most persons appointed as a PR do not have the technical expertise to carry out all of the responsibilities in handling the estate. Often it will be advisable for a PR to retain the professional assistance of an accountant, attorney, bank trust department, or investment counselor. The fee to be charged by an attorney must be discussed, understood, and agreed to in writing. A copy of the writing must be provided to all interested persons. Fees to be paid to other professionals should also be discussed and agreed to in the same manner, although a copy of these other fee agreements need not be provided to anyone else. Also, the role to be assumed by each professional should be expressly defined and monitored throughout the estate's administration.

**Compensation of the Personal Representative**—In Michigan, there are no fee schedules or formulas for computing the amount of compensation for a PR's services. Although the law requires that a PR's fee must be just and reasonable, the following six major factors are usually considered:

- ⇒ The time expended to complete the administration of the estate. More and more, the court (and the IRS) considers the quantity (and quality) of the time spent by the PR to be a significant factor. For this reason, each PR should log the amount of time spent each day on estate matters (which should include a detailed description of the services performed).
- ⇒ The professional expertise required. Higher PR fees are justified to the extent the work actually undertaken by the PR entails a greater level of expertise and skill (in securities, real estate, taxes, asset management, etc.) Correspondingly, lower PR fees are appropriate when little expertise or skill is necessary or when much of the expertise work is performed by professionals (lawyers, investment counselors, accountants, etc.) who charge the estate for their services.

- ⇒ The nature, number, and complexity of the estate assets. A PR is justified in receiving higher fees in those estates with diverse, numerous, and/or unique assets than in those with a simple composition.
- ⇒ The makeup of parties who are interested in the estate. A greater number of creditors and beneficiaries of an estate will generally cause more questions, communications, and coordination. Likewise, interested parties whose actions are adversarial or who are uncooperative will be a basis for higher PR fees.
- ⇒ The extent of the responsibilities and risks assumed. The total dollar value of the estate's assets is some measure of the responsibilities and potential loss exposure undertaken by the PR and is thus an important factor in determining reasonableness (e.g., all else being equal, an estate valued at \$200,000 warrants a higher fee than an estate valued at \$50,000). In addition to assuming responsibility for a decedent's assets, a PR may also be required to carry out or respond to transactions engaged in or events occurring before death, which is a basis for receiving a higher fee.
- ⇒ The results obtained in administering the estate. Favorable results in the investment and disposition of estate properties, minimizing estate expenses, and timely execution of responsibilities by the PR are also bases for the amount of a fee.

**Removal of a Personal Representative**—In the event of delinquency in performing duties, a PR may be removed by the probate court. Any interested person or the court itself may commence proceedings to remove a PR or compel compliance. A PR may be found personally liable for losses caused by errors or omissions or by the failure to act quickly, prudently, or fairly.