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What is Probate?

“Probate” may be one of the most commonly misunderstood terms in estate planning. Put simply, probate is a court process that is intended to ensure the orderly distribution of your property to creditors, heirs and/or devisees after your death. The probate process typically involves the appointment of an executor—known in Maine as the “personal representative”—to administer and distribute your “estate” as defined below. In addition, if you have signed a Will, the probate process also involves a determination that such Will is valid and therefore governs the distribution of your estate.

At the outset, it is important to establish a clear definition of the term “estate” for purposes of this Alert, because the term has multiple meanings depending on the context. In the context of probate, the term “estate” only includes assets you own at death that do not pass automatically by operation of law or by beneficiary designation. Examples of assets that pass by operation of law include joint bank accounts and real estate owned with one or more others as joint tenants; in each such instance, the property passes automatically to the surviving joint owner(s) without the necessity of probating the asset. Property that passes by beneficiary designation includes policies of life insurance and retirement accounts. It is generally not a good approach to name your estate as the beneficiary of such assets or fail to name a beneficiary, which often results in the estate being the default beneficiary. This is because doing so could trigger the need to probate your estate where such probate would not otherwise be required, will increase the cost of probating the estate, and will subject the asset to the claims of your creditors. Additionally, retirement benefits will be subject to income tax within five years of your death if retirement accounts are paid to your estate; if not paid to your estate, withdrawal of benefits may generally be extended over the life of the beneficiary. Your probate estate therefore generally includes bank/investment accounts and real estate owned solely by you, household contents and vehicles (if you don’t have a surviving spouse), and interests in closely-held businesses, as well as other less common types of solely-owned assets. Because the assets of many married couples consist entirely of jointly-owned assets or assets that pass by beneficiary designation, probate is often unnecessary when the first spouse dies.

If probate of the estate of a Maine resident is required, the process begins with the filing of a short form application that provides information about the deceased individual (“decedent”) and the person, people, or entity applying to serve as personal representative. The application is filed with the Probate Court located in the county where the decedent lived at death; it can be filed as soon as 120 hours after death, and generally must be filed within 3 years of death. All legal heirs of the decedent and all recipients of property under the Will (known as “devisees”) must also be listed on the application along with their addresses so the Court can provide notice of the estate proceeding to each individual and organization. If the decedent had a Will, the

original Will is also filed with the Probate Court. In the majority of cases, there is no dispute about who should serve as personal representative or the validity of the decedent's last Will. In such instances, the probate can be done "informally" meaning that the Register of Probate, rather than the Probate Judge, can make all necessary findings to appoint the personal representative, determine devisees and/or heirs, and, as applicable, declare the Will valid. In instances where there is a dispute, probate must generally proceed "formally" which usually requires one or more hearings before the Judge and is more time-consuming, complicated and expensive than an informal proceeding.

At the time the application is filed, an estimate of the value of the estate must also be provided, upon which the court bases the filing fee. The filing fee ranges from \$20 for an estate of \$10,000 or less, to \$950 for estates between \$2 Million and \$2.5 Million, and increases by \$100 for every increase in value of \$500,000 or part thereof above \$2.5 Million. There are also additional fees for publishing a notice to creditors, providing notice to heirs and devisees, and, if applicable, filing an abstract in one or more Registries of Deeds regarding any real estate owned by the decedent in Maine. Overall, Maine's filing fees are not particularly burdensome.

If you own real estate in another state, an "ancillary" probate proceeding is usually required in order to transfer such real estate after death. However, if you establish a trust during your life (which can be revocable or irrevocable while you're alive), any property that is validly transferred to the trust during your life is not subject to probate. For this reason, it may be beneficial to transfer solely-owned real estate outside of Maine to a trust during your life, to avoid the need for an ancillary probate proceeding. In many states, probate is much more expensive and complicated than it is in Maine.

Probate also provides an orderly process for the payment of your creditors, if any, as well as for the payment of expenses related to the administration of the estate (including accounting and legal fees incurred by the personal representative) and funeral costs. Unsecured creditors generally must notify the personal representative of a debt within the earlier of (a) 4 months from the date the notice to creditors is published in the newspaper, or (b) 9 months from the date of death, or such claim is barred. After the creditor claims period has passed, the personal representative should proceed to make distributions to creditors with valid claims, then devisees under the Will or the heirs as determined under Maine's law of intestacy if there is no Will.

Overall, probating an estate in Maine is typically not overly complicated or expensive. There may, however, be instances in which it is advisable to plan to avoid probate. Although the process is usually simple in Maine, there are a number of responsibilities and steps involved with serving as a personal representative of a Maine estate; we plan to focus on this topic in our next client alert.

Please feel free to forward this Alert to friends and family.