

*Probate Law:
Preserving Litigation
Rights*

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Table of Contents*

Introduction.....1

Types of Lawsuits.....2

The First Steps.....3

The Job of Personal Representative.....4

Frequently Asked Questions.....5

Condusion.....8

Offices in Tampa, St. Petersburg, and Sun City
Center

*Many of the monetary and other guidelines discussed in this
booklet change frequently. Please be certain to verify their
accuracy before acting based on these numbers.

Introduction

As you read this, you are likely in the situation of resolving the estate of a loved one who may or may not have left a will or trust. Regardless of the situation, we can guide you through the probate process with the goal of making at least one aspect of this troubling time easier for you.

You may be wondering why your attorney referred you to us, how much we will charge, and why you just couldn't use the same attorney for this process. Different attorneys have different skills, and it is common for an office that focuses on personal injury litigation to prefer to let probate attorneys help their clients with matters such as these. Rest assured that we will keep your original attorney informed about what is going on.

We will not only advance costs to you during the resolution of the estate, but we also do not charge fees up front. We are paid from a portion of the inventory of the estate, generally three percent.

We are used to dealing with a variety of estates, including both those with and without wills. According to the American Bar Foundation, only 40 percent of Americans have wills. For those over 55, the number increases to 70 percent. This means that when a victim of an accident or negligence dies, it is more likely than not that the person will not have a

will. Even in the case of improper nursing home care, there is a significant chance the patient died without first resolving how assets would be distributed.

Contrary to what many believe, dying without a will -- intestate -- does not mean that your money goes to the state. What it does mean is that the state has written your will for you. There are specific rules in place that govern how assets must be distributed absent specific instruction in the form of a will or trust. We are experienced in this area and will make sure the process goes smoothly for you.

Types of Lawsuits

The type of lawsuit that is part of the estate will determine to some extent how the proceeds of the settlement or litigation will be handled. For example, in a wrongful death suit, the decedent was not the party with the claim: You or other family members were. Therefore, the proceeds from the suit will not be a part of your loved one's estate. This means that we will be able to help you finalize the estate proceedings without waiting for the lawsuit to end.

On the other hand, if the lawsuit claims that the nursing home, car driver, or other party acted negligently, then the proceeds of the settlement will go through your loved one's estate since it is actually their claim that is bringing the lawsuit.

To pursue the lawsuit on behalf of your loved one, you must have a personal representative to act on the estate's behalf during the proceedings. If you select us as the probate counsel, we will work with your original attorney to make sure your lawsuit proceeds as it should, and make sure that the appropriate documents are filed to settle the estate.

The first steps

To begin the probate process, we will need:

- The original will
- The death certificate
- Names and addresses of all beneficiaries
- A list of assets

A copy of the death certificate must be filed with the probate court, along with a copy of the will. If your service provider did not furnish you with copies, we can apply for them from the county. If you decide to handle this yourself, remember you will need the victim's full name, date of death and county of death. Social Security number and place of birth are also helpful. We can also assist you in resolving any outstanding leases, terminate credit cards, and notify banks.

The Job of Personal Representative

The personal representative of the estate must coordinate the paying of bills, including taxes and creditors, and ensure the assets of the estate are divided up properly. If the victim had a will, then the division is made according to the terms of the will. If not, then state law will govern who gets what assets. Even if the victim had a trust, more times than not it is necessary to go through the probate process to ensure the estate is safe from creditors.

A personal representative is bound to act with fiduciary duty, to do what is right and ethical, and act in good faith in the distribution of the estate. It is a role of great responsibility. The personal representative must also try to track down heirs and transfer any property that can be immediately transferred.

The personal representative must manage the estate and assets during the probate process, including setting up bank accounts where necessary.

The probate process is not nearly as intimidating, time consuming, or bureaucratic as many believe. With the right personal representative -- perhaps a family member guided by experienced advisors -- the process will go quite smoothly. You may also hire an

outside personal representative, and we would be pleased to provide that service to you.

Frequently Asked Questions

How long will settling the estate take?

It varies depending on the circumstances of your case and what is involved with the probate process. If the estate cannot be finalized until the lawsuit is resolved, it may two years or more.

How much will it cost?

Our firm does not charge a professional fee up front for administering the estate. We generally recover three percent of the total estate inventory at the conclusion of the matter. We also advance the costs of administering the estate, so you will not have to worry about that aspect of your financial situation.

Who I will have to pay from the recovery?

After the lawsuit concludes, the attorneys (including our office), expert witnesses, medical providers, and others would be considered creditors of the estate and would be paid from the estate. The advantage to this is that you are able to bring lawsuit to right the injustice done without having to advance the costs of litigation.

All creditors of the estate (that is, anyone who came

forward during the ninety-day notice period as a creditor) get paid first before the funds are distributed.

Why do I have to pay Medicaid back?

Medicaid is a government benefit paid to those who cannot afford medical care. To ensure this benefit is available to others, the government generally requires the benefit paid to be returned to the state after the recipient passes away. Medicaid will not recover their money if the recipient was under 55 years old, or when there is a surviving spouse, minor child, or disabled child. When Medicaid does recover, it only recovers on the portion paid for services rendered after the recipient was 55 years old.

Do I have to give money to my brother/sister/uncle who never visited my father/mother/aunt?

Regardless of the personal situation and emotions involved, a will or trust is a legally binding document that we are obligated to use in administering the estate. Absent a will or trust, the State of Florida has a law in place that will determine how assets are divided regardless of family dynamics.

How do we choose a personal representative?

If your loved one left a will, the personal

representative is named in that document. If there is no will, then the majority of the beneficiaries must decide and appoint one. Keep in mind that the lawsuit is delayed until there is a personal representative appointed. Without the representative, there is no one with the right to bring the lawsuit on behalf of the estate.

I received a letter with dates. What does that mean?

If you live in Hillsborough County, you will receive a letter notifying you of what legal process regarding the estate will happen when. You would not have received that letter without having a personal representative who has already begun the process for you. Consequently, you do not have to do anything about the letter. It is for informational purposes only.

Do I have to hire an attorney to do the probate? Can't I do it myself?

Under Florida law, if there is a lawsuit involved as part of the estate, you must have an attorney involved in settling the estate.

What is a supplemental needs trust?

It is a document that allows you to protect the proceeds from the lawsuit. If you are receiving Medicaid benefits, or think you will ever want to, a supplemental needs trusts will help protect your ability to do so. In some instances, the Medicaid

administrators have viewed any receipt of estate proceeds as being constructively received by all. If you are interested in a supplemental needs trust, it's important to have it in place before any proceeds of the estate are distributed.

Please refer to Self-Settled Supplemental Needs Trusts on our website for more information.

Conclusion

Facing the death of a loved one is never easy, and it especially difficult and complicated when you are faced with litigation as well. We offer a variety of services, from consultation to complete estate administration, to help you maneuver through this complicated process.

As with all areas of elder law, constantly changing state and federal laws and regulations make this a particularly difficult area of the law to navigate. Our firm keeps current on these changes not only by tracking legislation, but by regularly attending and presenting at local, state, and national elder law seminars. We look at our clients' situations in a holistic manner, taking into consideration physical, spiritual, and financial needs.

For additional helpful articles on elder law, please visit our website at www.law4elders.com.

Jack M. Rosenkranz

Jack M. Rosenkranz received his law degree from the Walter F. George School of Law at Mercer University and his undergraduate degree from Memphis State University. His talents as an advocate began young, when he challenged the grade school chocolate milk policy. In college, and again in law school, he used his skills and his knowledge of statistics to bring much-needed changes to campus policies.

Mr. Rosenkranz was the first to receive both the Outstanding Achievement Award for the Florida Chapter of National Academy of Elder Law Attorneys and the Member of the Year Award for the Elder Law Section of the Florida Bar in the same year. In 1998, he was the chair of the Joint Program, coordinating the two groups.

Focusing on all matters affecting the aging population, Mr. Rosenkranz remains active in the Elder Law Section of the Florida Bar, the Florida Chapter of the National Academy of Elder Law Attorneys and the National Academy of Elder Law Attorneys, Inc.

Jack Rosenkranz has co-hosted a weekly radio program, "The Informed Elder" on 570 WHNZ. He regularly gives presentations and other informative talks about elder law to the public and to other attorneys.