

Probate Overview

By Harry Kessaram

If you have just had a death in the family you may be wondering what to do as far as dealing with the deceased's estate. Perhaps the deceased left a will: what now?

Consult a lawyer for help having the will probated. Probate is the process by which the executor proves (and the Court "probes", if you like) the authenticity of a will. If satisfied, the Court will grant probate of the will to the executor, which is tantamount to certifying that the will is a valid last will and testament of the deceased.

When consulted, a probate lawyer will usually enquire of the executor whether he is sure he has the last will of the deceased. If there is some uncertainty, then a letter is usually sent to all local law firms asking whether a later will may have been executed.

Assuming the will in the executor's possession is the only valid one, the lawyer then compiles three documents: (1) a Probate application form (2) an Oath of executor and (3) an Affidavit of Value.

The first document states who is applying for probate and lists the documents forwarded in support of the application (such as the Will, Death certificate, Oath, Affidavit of Value etc.). This document has to be "stamped" with up to \$250 depending on the gross value of the estate.

The second document is an oath in which the executor swears that he believes the will is the true last will of the deceased, that he will administer the deceased's estate in accordance with the will, and that the gross value of the estate is a certain amount.

The third document sets out what the deceased owned and owed as at the date of his death. The executor swears the correctness of this document "to the best of his knowledge information and belief", and it is on the net value of the deceased's estate as expressed in this

document that stamp duty is paid. This duty is the so-called "death tax" that everyone talks about. This document is perhaps the most scrutinized document because of its fiscal ramifications. Improperly prepared, it could cost the estate money. If the deceased was considerate enough to leave a list of all his assets with his will, that helps when compiling the affidavit. Ordinarily, a lawyer would write to all local banks, deposit and insurance companies to see if any estate assets were held by them. If the deceased had a mortgage on his property or unpaid bills at his death, these will also be declared in the affidavit and these debts are deducted from the gross value of the estate thus reducing the amount of tax payable. (Other valid deductions include a legacy to a surviving spouse or to charity). The value of any real estate declared in the affidavit is usually checked by the Land Valuation department when the affidavit is filed and if the value is significantly different from what is declared, then the court may require the affidavit be amended to reflect such value.

When the documents have been drafted and the executor has approved them, he will then "swear" the affidavits, and this usually occurs in front of a lawyer at a different law firm. The executor and the attesting lawyer sign the top of the original will which is then sent to the Court (along with the other documents) to be probated.

After the court satisfies itself that all is in order, it will issue a certificate of probate to the executor which then serves as his authority to get in the deceased's assets, pay estate debts and distribute the estate to those entitled under the will. The Court also issues a "bill" if you like (.... and you probably won't) for the stamp duty payable on the estate and this must usually be paid within three months of probate.

Needless to say, a lot more is involved, but hopefully the above will serve to give a useful insight into probate procedure.

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