

**PJG**

Patrick J. Gibbs, P.C.  
Attorney at Law  
Roswell, Georgia

**Wills, Trusts and Estates  
Corporate and Business Law**



## **Probating an Estate**

### **Part One: Opening the Estate**

I have often written that probate in Georgia is not the terrible ordeal that people fear in other states. However settling the affairs of a deceased person is real work. That process (commonly referred to as “probate”) constitutes the administration of an estate. The probate of a will is complete once a probate judge has entered an order officially recognizing a document as the Last Will and Testament of the deceased and appointing an executor. Then the estate administration begins.

If there was no will then one of the legal heirs to the estate (those persons who are entitled to the decedent’s property under the laws of inheritance) will normally ask the probate court to appoint him or her as administrator of the estate. The Georgia Probate Code refers to both executors and administrators together as personal representatives for purposes of the provisions that apply to them both equally. I will use that term for the remainder of this article.

The first task facing the personal representative is to identify the assets and how ownership of them will pass. In Georgia there are basically four “classes” of ownership: joint tenancy with right of survivorship (“JTROS”), beneficiary designated assets (e.g. life insurance, IRA’s, etc.), personally owned assets and those owned in a revocable trust.

The personal representative must safeguard the assets that were personally owned by the decedent or payable to his estate. Those assets are considered to be in the probate estate. That will usually involve taking custody of physical assets, closing the accounts for financial assets (and transferring them to an account opened for the estate) and obtaining appropriate insurance policies on structures (e.g., a home) and physical assets.

Only the assets in the probate estate change ownership under the supervision of the probate court. However for purposes of calculating any federal death tax all four classes of assets are considered to be “owned” by the decedent. Collectively they make up the “taxable estate.” The personal representative can be personally responsible if he or she transfers all the assets of the estate before settling up with the IRS on the death tax liability.

As of January 1, 2006, the taxable estate must exceed \$2 million to generate a possible estate tax liability. The threshold amount for the death tax is going to change to \$3.5 million on January 1, 2009. Supposedly the tax will be repealed in 2010 for one year with a reinstatement of the tax in 2011. However, in my opinion no promises of changes in the tax code effective more than two years from now are worth anything. Congress is not that trustworthy.

Even when no estate tax is due, because of deductions and credits, the return must be filed within nine months of the date of death when the taxable estate exceeds the threshold amount.

A common misconception among people who establish “living trusts” is that, upon their death, all their property will be covered by that trust. That is only true to the extent that they formally changed the title

of any asset to make the trust the owner. Similarly, jointly titled property is not covered by a person's will after death. Unless it is a "tenancy in common," which is not often done, such property passes by right of survivorship to the other joint owner(s).

Finding the records of the decedent is an essential part of the personal representative's job. A checklist is helpful in this regard. The following items should be on any checklist: bank records, including check registers and canceled checks; mortgages and deeds; stock brokerage statements; stock certificates; life insurance policies; pension benefit statements; loan documents; income tax returns for the past three years; any prior gift tax returns; recent credit card statements; inventories and appraisals of valuable assets (e.g. art, jewelry, coins); burial plot contracts; motor vehicle titles; and insurance policies covering the home and personal property.

One consolation to the survivors is that they do not have to do all of this work on their own. The decedent's attorney and accountant can be of immense help in organizing the effort and providing expertise. However the first inheritance from the decedent will be the organization, or chaos, they have brought to their own affairs.

## **Part Two: Closing the Estate**

The probate process culminates in the distribution of the estate's assets. If the personal representative of the estate is to completely perform his or her responsibilities, there must be a formal process of terminating the estate administration. Assuming the personal representative has completed the estate administration, a "petition for discharge" can be filed in the probate court to formally close the estate. When the personal representative is also the only beneficiary of the estate, this last court filing may not be necessary. I am going to discuss those situations where the personal representative must formally close the estate.

How long does it take to close an estate? The personal representative can accomplish this as soon as six months after being appointed, if there is no federal estate tax return required and there is minimal income tax accounting to be done for the decedent or the estate. Since the tax collector has a priority claim, the personal representative has to resolve the tax situation first. After that the claims of other creditors of the estate must be addressed so the personal representative can give a good title to the assets transferred to the beneficiaries.

The estate administration starts with a "notice to creditors and debtors" being published in the newspaper by the personal representative for four consecutive weeks. By statute the estate must remain open for a four month period after the last "insertion" of that notice so that creditors can present their claims to the personal representative for payment.

Under Georgia law the only way the estate's assets can be distributed so as to defeat the claims of creditors is after a petition in probate court by a surviving spouse and/or minor children for a "year's support." Georgia has a policy of protecting widows and minor children with the equivalent of a bankruptcy for a spouse/parent who dies with only enough assets to support his family for one year. For purposes of this discussion we will assume that the decedent's assets were sufficient to pay the claims of the creditors and the year's support petition was not necessary.

If the estate is open long enough to generate significant income on its assets, then the personal representative has the additional duty of filing a "fiduciary income tax return" for both federal and state taxes. Unless there is a waiver of the inventory and formal returns in the will or by all of the beneficiaries of an intestate estate (a decedent without a will), the personal representative must file

reports with the probate court with details of the estate's assets, income and expenditures. By this time you are probably thinking that the personal representative has a lot of work to do. Even when such court filings are waived by the terms of the will, the beneficiaries are entitled to an annual report from the personal representative completely accounting for the estate's activities.

The personal representative will have to make a decision whether to charge for all the work done in administering the estate. Roughly speaking, a "commission" of almost five percent of the probate estate's cash assets can be paid from the estate's assets to the personal representative without obtaining an order from the probate court. Often a surviving spouse or a family member will serve as personal representative without seeking any commission because of a sense of duty.

After using the estate's assets to satisfy the priority claims for medical bills (from the last illness), burial expenses, taxes, administrative expenses and debts, the personal representative should formally distribute the estate's remaining property. Legal title of any real property should be formally transferred by a deed, whether to a purchaser for value or to a beneficiary of the estate. Delivery of other property should be acknowledged with a written receipt. Heirs/beneficiaries who receive any valuable assets should be given sufficient data to be able to determine their tax basis in those assets in case of future sale and resulting capital gains taxes.

Only by dealing with all of these details in a process that might take a couple of years to finish can the personal representative honestly file a petition for discharge and be released by the probate court. Both the personal representative and the beneficiaries need this closure, which is formally given only by the probate court's order granting that petition. This is another one of those instances where the job is not done until the paperwork is completed.

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Patrick J. Gibbs, P.C.

Patrick J. Gibbs practices law in Roswell, Georgia with a concentration on Wills, Trusts and Estates. This article is intended to be educational. Legal advice should be obtained as to individual needs before taking any action.