

# Estate Planning Fundamentals III – Basic Probate Proceedings

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# Fundamentals of Probate

Probate is the process of legally passing assets from a deceased person to their heirs or devisees.

Probates may occur with or without a will. The individual tasked with completing a probate is referred to as the “Personal Representative.” During the probate process, a probate court will have oversight of the Personal Representative’s administration of the estate.

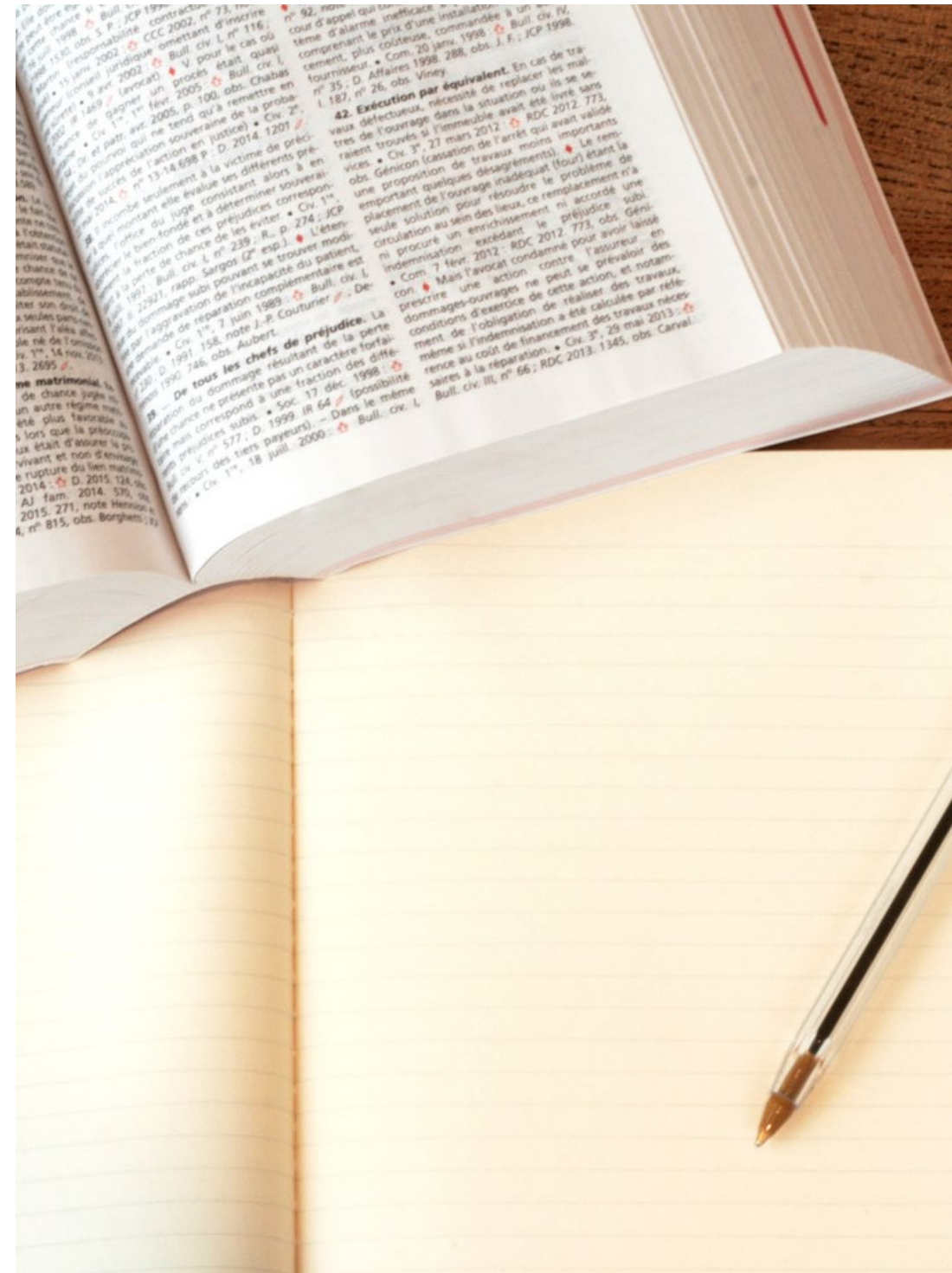


# Is a probate really needed?

- **Are there any assets subject to probate?**
- **Is probate required or helpful?**
  - Small Estate Affidavits (real v. personal property)
  - Beneficiary Designations
  - Pay on Death Designations
  - Summary Administration
  - Trust v. Will
  - Creditor Issues



# Who is your client and what hat are they wearing?



- **Personal Representative**
  - Fiduciary obligations; Derivative duties
  - *Practice Pointer: Address your derivative duty in your Engagement letter*
- **Personal Representative also a Beneficiary**
  - Exercise caution in the event disputes arise
- **Other Beneficiaries**
- **Creditors**

# Probate Shortcut?

## Items that may be collected by Affidavit:

- **Wages: A.R.S. § 14-3971(A)**
  - Any time after death
  - Employer owing wages, salary, or other compensation to Decedent
  - Payable to spouse
  - Not to exceed \$5,000
  - Affidavit must state it is by or for the spouse and NO application for appointment of Personal Representative is pending or granted
- **Personal Property or Debts: A.R.S. § 14-3971(B)**
  - No sooner than 30 days after death
  - Affiant is entitled to payment or delivery of property
- **Motor Vehicles: A.R.S. § 14-3971(D)**
  - Via MVD Affidavit
- **Real Property: A.R.S. § 14-3971(E)**
  - No sooner than 6 months after death
  - Successor(s) of Decedent's interest; including debt secured by a lien



# Getting The Party Started

- **Determine if there is a will**
  - Open safe deposit box pursuant to A.R.S. § 6-1008
  - Testamentary documents can be delivered to person named in documents or to clerk of court
  - Life insurance documents can be delivered to beneficiaries named therein
  - Will is presumed revoked by Decedent if it cannot be located
- **Evaluate the validity of any signed testamentary documents**
  - Witnesses
  - No obvious edits or switched pages
  - Holographic
    - Material portions in handwriting of Decedent and signed
    - No date or witnesses required



# Where's the Will?

- **Lost Wills, A.R.S. § 14-3415**
  - **Presumption of Destruction:** If a will last seen with Decedent is now lost, it is presumed to have been destroyed
  - **Overcoming the Presumption with a Copy:** The presumption of destruction can be overcome by a “preponderance of evidence” if there is a copy of the will and no one disputes the validity; formal probate will be required
  - **Overcoming the Presumption without a Copy:** If no copy is available, the contents of the missing will can be proven by “clear and convincing evidence”; formal probate will be required
- **Withheld Wills, A.R.S. §§ 14-3709(B) & 14-2516**
  - Any person who withholds a will must turn it over at the request of an interested person and can be compelled to do so



# If there is a Will...there is a way.

- **Review document and codicils**
- **Determine correct venue**
  - Domicile
  - Real property located in Arizona
- **Determine whether the nominated Personal Representative is willing and able to serve**
  - Priority of appointment under A.R.S. § 14-3203:
    - Person named in the will
    - Surviving spouse, but only if also a devisee of the Decedent
    - Other Devisees
    - Surviving spouse of the Decedent
    - Other heirs of the Decedent
    - If veteran (or spouse or child of vet), Dept. of Veterans Services
    - 45 days after death; any creditor
    - The public fiduciary
  - Good cause may exist to alter priority order
- **Determine whether bond is required**
  - A.R.S. § 14-3603(A)(1): Waiver of bond via terms of the will
  - A.R.S. § 14-3603(A)(2): Written waiver of all devisees
  - A.R.S. § 14-3604(A): Reduction of bond via restrictions on real property





# Initiating an Informal Probate

- Probate Cover Sheet
- Probate Information Form
- Application for Informal Probate and Appointment of Personal Representative (Testate or Intestate)
- Renunciations, Nominations, Waivers and Consents (if any)
- Waiver of Bond (if needed)
- Statement of Informal Probate and Appointment of Personal Representative
- Certificate or Declaration of Completion of Personal Representative Training
- Order to Personal Representative and Acknowledgment and Information to Devisees
- Acceptance of Appointment
- Letters of Personal Representative
- Notice of Informal Probate of Will and Appointment of Personal Representative
- Proof of Notice of Informal Probate of Will and Appointment of Personal Representative
- Notice to Creditors



# Renunciations and Waivers

- **Renunciation of Personal Representative Priority:** If anyone with equal or higher priority to act as Personal Representative does not wish to serve, they must renounce their right to do so or the process will go through a formal probate
- **Waiver of Bond:** If a will requests bond, or an estate is being administered intestate, then bond may only be avoided via a written waiver of all heirs/devisees
- **Waiver of Inventory and Accounting:** To avoid filing an inventory and accounting with the Court, all heirs/devisees **MUST** waive these requirements



# Blue Ink Required

- Probate Information Form
- Application for Informal Probate and Appointment of Personal Representative (notarized)
- Acceptance of Appointment of Personal Representative (notarized)
- Certificate of Completion – Personal Representative
- Certificate of Completion – Unlicensed Fiduciary
- Order to Personal Representative and Acknowledgment and Information to Devisees
- COVID-19 temporarily altered some original requirements



# Originals for the Clerk:

- The ORIGINAL Last Will and Testament
  - Court will keep the original will; make copies before filing
- An ORIGINAL death certificate of any persons nominated as Personal Representative who predeceased decedent
  - Court may accept photocopies, but originals are best



# The Waiting Game

- Documents reviewed by the Probate Registrar within three (3) business days
- If accepted, notifications, paperwork, and letters processed at the filing site and available for pickup at filing site
- If not accepted, notification of deficiency will be provided
- ***Practice Pointer:*** *If a name in the will is incorrect and/or has changed since the drafting of the will, use both names in the initiating probate document and include an “aka” or “fka” identifier. The clerk must verify that names match and will reject it if it is unclear that the parties named and those that signed the documents are the same.*



# You've been appointed...

## Now what?

- **Within 30 days of appointment, mail the following to interested persons:**
  - Notice of Informal Probate and Appointment of Personal Representative
  - Order to Personal Representative
  - Copy of will
- **Discuss Fiduciary Responsibilities:**
  - Personal Representative vs. Heir/Devisee status
  - Record keeping obligations
  - Preservation of assets
  - Employer Identification Number
  - Accounts in the name of the Personal Representative
- **Prepare client for what to expect:**
  - Priority of claims
  - Specific gifts
  - Statutory allowances
  - Dealing with creditors and beneficiaries

# Bills, Bills, Bills

- **Publication of Notice to Creditors (unknown) / Notice to Creditors (known)**
  - 4 months to come forward to make claims
  - Date runs from 1<sup>st</sup> publication date or actual notice
- **Premature Payment:** Absent limited exceptions, the Personal Representative should not pay claims except for those necessary to preserve estate assets (i.e., mortgage, utilities, insurance, etc.), as it is best to wait for all creditors to be identified.
- **Disallow claims that are:**
  - Untimely
  - Not documentable
  - Not the responsibility of Decedent's Estate

# Who Gets Paid and When?

**A.R.S. § 14-3805**

- **Costs and Expenses of Administration**
  - Attorney and Accountant fees
  - Personal Representative fees
  - Hard costs such as court/filing/postage/mileage, etc.
- **Statutory allowances:**
  - Homestead Allowance max \$18,000 (A.R.S. § 14-2402)
  - Family Allowance –reasonable –1 year max (A.R.S. § 14-2404)
  - Exempt Property Allowance max \$7,000 (A.R.S. § 14-2403)
- **Reasonable funeral expenses:**
  - Transport of body
  - Possibly the travel cost of immediate family, subject to review
- **Debts and taxes with preference under federal law**
- **Reasonable expenses of last illness**
- **Debts and taxes with preference under state law**
- **All other claims: secured and unsecured**





# Ancillary Probate or Proof of Authority

- **Domicile:** It is not possible to have multiple domiciles. A determination of domicile considers the physical presence and intent to remain indefinitely.
- **Ancillary Probate/Proof of Authority:** Only one state can have primary probate. An ancillary probate may be necessary depending on the secondary jurisdiction(s). A Proof of Authority may be an option in some states.
- **Dying with property in more than one state:**
  - Personal property may be collected by affidavit pursuant to A.R.S. § 14-4201
  - Real property requires filing of Proof of Authority with a certified copy of Order of Personal Representative from foreign domicile (not available in all jurisdictions) or ancillary probate



# 'Broke' Estates

- **Insufficient Funds:** If an estate has insufficient funds to pay all of its debts and obligations, payments will be made in order of priority pursuant to A.R.S. § 14-3805
- **Potential for Personal Liability:** If a Personal Representative pays a claim out of order, the Personal Representative may be held *personally* liable for that claim
- **Claw Back:** If insolvency is due to non-probate transfers, pursuant to A.R.S. § 14-6102, the Personal Representative may “claw back” assets to pay creditors and/or statutory allowances, subject to the following restrictions:
  - Two year time limit for making demand
  - Does not apply to real property held in joint tenancy
  - Does not apply to life insurance unless it was used as security of a debt

# That's a Wrap!

- **Distribution of Assets:**

- If Non-Taxable Estate: distribution can be made upon expiration of creditors' claim period and pursuant to the terms of the will
- If Taxable Estate:
  - Wait for the IRS closing letter
  - If audit is required by the IRS, complete audit
  - If there is no audit or closing letter, then Personal Representative may distribute after the expiration of the statute of limitations (usually three years)

- **Closing the Estate:**

- All debts and taxes are paid
- Prepare an accounting, if not waived
- Petition for formal closure or Closing Statement
- Send proposed distribution to heirs/devisees
- Prepare receipts and releases
- Release bond, if applicable





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Nora Jones is a skilled trial attorney specializing in probate and trust litigation, elder law, guardianships and conservatorships, and estate and trust administration. A recognized leader in the elder law community, Nora blends compassion and strength to resolve matters with her clients' best interests at heart. Nora recognizes that issues in this area of law sometimes require outside the box strategies and multi-faceted solutions and employs a holistic approach to her cases to achieve client goals.

Nora is recognized by the Arizona Board of Legal Specialization as a Certified Specialist in estates and trusts. In addition, Nora has an AV Preeminent Rating, the highest possible rating in both legal ability and ethical standards, by Martindale-Hubbell and has a Perfect 10 rating with AVVO. Nora has been recognized year after year as a Rising Star by Super Lawyers and has repeatedly been honored for her vision, influence, and leadership in Elder Law by Arizona Business Leaders. Additionally, Nora and her team have been recognized as a top law firm for Trust and Estate Litigation by U.S. News & World Report. Nora is also an acting Judge Pro Tempore with the Superior Court of Maricopa County for the Probate Court division.

An Arizona native, Nora graduated summa cum laude from Barrett, the Honors College at Arizona State University, with a degree in Political Science and a Certificate in Civic Education. Nora received her Juris Doctor from the James E. Rogers College of Law at the University of Arizona.





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Chelsea A. Hesla practices exclusively in the areas of trust and probate litigation, estate administration, elder law, and real estate law. With over ten years of residential and commercial real estate experience, Chelsea is particularly well-suited to handle trust and estate matters that include a real estate component. Further, as a former prosecutor, Chelsea has the courtroom and trial experience needed to develop successful litigation strategies.

Chelsea advocates for her clients in will and trust contests; breach of fiduciary duty claims; financial exploitation claims; and guardianship and conservatorship proceedings. Chelsea's clients benefit from her assertive yet thoughtful approach to crafting practical and effective results short of trial; however, having tried a variety of cases to favorable jury verdicts, Chelsea is also a strong advocate in the courtroom and is well-versed in serving her clients in both small and complex litigation matters.

Chelsea received her Juris Doctor from the Sandra Day O'Connor College of Law at Arizona State University where she was a National Moot Court Champion, scholarship recipient, and Trial Advocacy Fellow. Chelsea earned her Bachelor's degree in real estate and business from Arizona State University.

