

# What You Need To Know About Probate Of An Estate

**Moschella & Winston, LLP**  
440 Broadway  
Somerville, Massachusetts 02145  
(617) 776-3300 Phone  
(617) 629-7500 Fax  
[info@moschellawinston.com](mailto:info@moschellawinston.com)  
[www.moschellawinston.com](http://www.moschellawinston.com)

When an individual dies owning property or the right to receive property in his or her own name, the individual has a "**probate estate**". Property held jointly with another individual such as a joint bank account or real estate held with rights of survivorship, life insurance, retirement accounts, or annuities naming a third party as beneficiary do not pass through an individual's probate estate. Nevertheless, all such property needs to be calculated to determine if it is part of the individual's **taxable estate** for estate taxes. Another example in which property would not pass through an estate would be property held in a trust that names one or more successor beneficiaries other than the individual's estate.

An estate with a valid Will is called a "**testate estate**", and an estate without a valid Will is called an "**intestate estate**". Property of a testate estate passes according to the terms of the Will, and property of an intestate estate passes according to the legal relationship of heirs to the decedent as described in Chapter 190 of the Massachusetts General Laws.

The Probate Court must appoint an individual as "**Executor**" or "**Administrator**" of an individual's estate to give authority to act as the estate's legal representative. An Executor is appointed when there is a Last Will and Testament, and an Administrator is appointed when there is no Will. To be appointed as a legal representative of an estate, a **Petition for Appointment** must be filed with the Probate Court. Other filings include a Military Affidavit regarding whether an interested party is in active service, and other notifications to other individuals and entities who are considered as legally "**interested parties**" in the estate assets and debts.

The petitioner must also file a "**Bond**", which is a promise, called a "**surety**", by the legal representative to properly handle the property. Bonds come in different forms, but they usually involve the legal representative and two other individuals promising to personally guarantee that the legal representative will properly handle the assets of the estate. A Will may exempt the legal representative from providing surety, or the Court may require that a legal representative purchase a **Corporate Bond** from a bonding company.

After the documents are filed, the Court will issue a "**citation**", which is a description of the legal proceeding that will be sent to interested parties and published in a local newspaper. The citation will give a date unto which any party has time to object to the appointment of the legal representative or approval of the Will. Interested parties are "**served**" with the notice, and

while it may be served in hand by a process server or other responsible party, but is usually done by certified mail.

The Probate Court sets the "**return date**", usually within 20 to 30 days after publication, during which any party objecting to the appointment of the legal representative or allowance of the Will must file an "**appearance**" with the Probate Court. If no appearance is filed within the time limit, then the Petition for Allowance and/or Appointment will be approved, and the Court will issue an order to that effect. The legal representative will then have full authority to take control of the individual's property under the Probate Court rules and the terms of the Will.

Pending and after appointment, it is very important that the legal representative carefully safeguard the property and inventory it for a report to the Probate Court. Property of uncertain or variable value such as vehicles, real estate, jewelry, and other property and items of significant value should be appraised for purposes of determining the Inventory amounts. The first duty of the legal representative will be to file an **Inventory** within 90 days of appointment. The Inventory value of the estate is determined as of the date of death. The legal representative becomes legally responsible for the property at the time of appointment, and therefore should always treat it as belonging to the estate rather than as personal property until such time as the attorney and the legal representative discuss distributions to the lawful heirs through the Will or by intestate succession if there is no Will.

The formal probate procedure takes at least one year after the date of death, although many estates often take longer to close. Regardless of how long after date of death that the legal representative is appointed, enough time must be taken to find and determine the value of all assets, administer the estate according to the Will or by intestate succession law, pay or resolve valid or enforceable estate debts, and otherwise wrap up the affairs of the estate. Creditors should properly file claims against the estate within one year from date of death.

Federal and state estate taxes are due nine months from the date of death regardless of whether or not a legal representative has been appointed, and whether or not the estate has enough liquidity to pay the taxes on time. Penalties and interest are usually levied on late estate tax payments. An extension can be requested if the estate tax returns are not filed on time, but the extension for the return does not allow the payment to be made late without penalty. If the estate property earns income during the estate administration procedure, the legal representative may also be required to pay income taxes and file timely state and federal income tax returns for each tax year of administration.

Distributions from the estate can be made as soon as the legal representative is appointed, but care should be taken that enough of estate property is retained to pay off all debts and costs of administration, including legal fees and expenses, because the legal representative will otherwise become personally responsible if any shortfall is due to the legal representative distributing too much too soon or is otherwise negligent in mishandling the property.

An **Accounting** must be filed by the legal representative for each year of administration, beginning with the date of appointment. While an Inventory is an estimate of the estate property, the accounting is a more precise calculation of estate assets, income, expenses, gains and losses,

adjustments, and distributions. After all of the other business of estate administration has been concluded, including income and estate tax returns if necessary, then the legal representative will file a **Final Accounting**. Sometimes, all of the accountings will be grouped together in one document, and called a **First and Final Accounting**, covering the entire period of administration of the estate. All heirs and legatees under the Will or intestate estate will be notified of the account filing, and if there are no objections, then the Court will issue judgment allowing the accounting. After a final accounting is approved, the estate will be effectively closed.