

**INITIATING PROBATE,
2003 OLI CLE**

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A. Why Probate?

"The probate process involves collecting a decedent's assets, liquidating liabilities, paying necessary taxes, and distributing property to heirs." Black's Law Dictionary 1220 (6th ed. 1990). Many families go to the lawyer after a loved one has died expecting to avoid probate because there is a valid Will. The fear of probate is a common one. Most clients have no firsthand knowledge of the probate process. Even worse, they have often heard horror stories, from well-meaning friends and family, of probates that went on for several years and cost tens of thousands of dollars. The attorney's job is to educate the client. Providing factual information alleviates the client's fears and dispels many myths.

Despite the fear that it evokes in many of our clients, probate can be a useful tool. For example, probate serves to cut off creditor claims. This is helpful when the decedent was a professional, such as a doctor, architect or lawyer. Probate will resolve disputes about the validity of a Will. Also, a personal representative can file and resolve personal injury claims and collect other debts owed to the decedent.

While this outline will provide you with information and forms to assist in the initiation of probate proceedings, attorneys who do probate work in Oregon should familiarize themselves with each county's Supplemental Local Rules, ORS Chapters 111 through 118, as well as the Oregon State Bar Continuing Legal Education publication *Administering Oregon Estates* (Oregon CLE 1991) known as the Ablack book. @

B. Who Is Your Client?

It is important to be clear, both with the personal representative and with any estate beneficiaries, that *you represent the personal representative*. You will undoubtedly be contacted by heirs, devisees, and even creditors of the estate. Some of these people may look to you for legal advice believing that you are the attorney for the entire estate. You must be very clear with each person you speak to that you can give legal advice only to the personal representative. Recommend to any others seeking legal advice that they contact their own counsel. It is a good idea to put this in writing. OSB Legal Ethics Opinion No 1991-62 states, "Under Oregon law, an attorney for a personal representative represents the personal representative and not the estate or the beneficiaries as such." As the personal representative's attorney you still have a fiduciary duty to the estate, the beneficiaries and the creditors. Nevertheless, you cannot give legal advice to these

parties. OSB Formal Ethics Opinion No 1991-119 clarifies the issue by stating that if an attorney did undertake to represent estate beneficiaries, and not just the personal representative, a multiple client conflict could exist under DR 5-105.

Personal representatives may appear unrepresented in Probate Court. However, they must be sure to abide by any local rules such as the Multnomah County SLR 9.085 (2003) which states:

1. If a personal representative or conservator intends to appear without an attorney in any matter assigned to the Probate Court, that person must provide to the court notice of such intent and proof of competency in such matters. If such proof provided is not sufficient to assure the court that the estate or interest will be protected, the court shall take appropriate action.

2. A person other than a personal representative, conservator, or corporation may appear in person without counsel in any matter before the Probate Court as authorized or allowed by law. The person appearing and counsel for the personal representative shall notify the Probate Court if any party to a proceeding is appearing pro per. The Chief Judge or designee shall decide whether further hearings shall be required.

C. Use of Retainer Agreements, Checklists and Systems

1. Retainer Agreements. It is important in almost every case to have a signed retainer agreement (see, e.g., Form 2-1). This document serves many purposes. The agreement clearly states how the case is going to be billed and at what rates. The agreement also clearly denotes who is responsible for paying attorney fees and costs.

2. Computer Programs and Paper Checklists. Once we have the relevant dates my assistant prepares an Estate Checklist (see Form 2-2). We use an Excel spreadsheet that lists the date of death, date of appointment, inventory due date, end of the four-month creditor search period as well as dates important for taxes.

I strongly recommend the use of some sort of checklist and tickle system. As the Probate Court staff reminds us, we cannot use the court's delinquency notice system as our reminder system. Our office uses Time Matters for Windows 4.0. With this computer program both attorneys and assistants are able to track important due dates. We also use Time Matters for case management and calendaring. If you prefer working off a hard copy, Administering Oregon Estates has a great critical dates checklist in Chapter 5.

It is also important to keep track of financial information from the probate bank accounts. We use Quicken and set up a folder for each probate (or conservatorship) within which we set up the separate accounts. Each month, as the client sends in the bank statement with all cancelled checks, Quicken is updated so that the accounting information is ready for use at final (or annual) accounting time.

D. Preparation of the Petition, Order and Notices

1. Initial Considerations. When a client calls to set a new probate appointment it is important to acknowledge his or her loss. This may seem obvious but even well-meaning attorneys can miss this important detail in their haste to obtain the necessary legal information. Often the client is calling within days of the death. Encourage clients to take care of the funeral and family matters before they worry about the legal aspects of the estate.

Although arguments over the disposition of a decedent's remains are not commonplace, these conflicts can be especially difficult for a grieving client. The disposition of a decedent's remains is governed by ORS 97.130 which establishes a priority for who may control this disposition. Although ORS 114.305 authorizes the personal direct the disposition of a decedent's remains and incur funeral expenses, careful attention should be paid to the priority statute in the event of a disagreement.

2. The Will. Usually the personal representative finds the original Will before the initial appointment. However, if the Will cannot be located after checking the decedent's safe and important papers, it may be in a safe deposit box. ORS 708A.655 allows an "interested person," as defined by the statute, to access a decedent's safe deposit box for the purpose of conducting a Will search. The statute requires an affidavit (see Form 2-3) and, if the interested person does not have a key, he or she should be prepared to pay the cost of drilling the box.

3. Preparing the Petition. Before the initial appointment it is helpful to send out a list of necessary information for the client to bring, along with a map to your office. More often, however, I simply read the list to the client on the phone to give the client some time before the appointment to search for documents.

You will need the following information to prepare the probate Petition (see Forms 2-4 and 2-5):

- Death Certificate (if available).
- If Death Certificate is not available you will need the following information about the decedent:
 - (i) Date of birth
 - (ii) Domicile
 - (iii) Post office address
 - (iv) Date and place of death

- (v) Social security number
- Original Will and any Codicils or Trust and any Amendments (if any).
- Original Affidavit of Attesting Witnesses (if any).
- Names, relationships and addresses of all people mentioned in the Will.
- Names, relationships and addresses of all intestate heirs. See Administering Oregon Estates (CLE 1991) Chapter 4 for helpful charts.
- Preliminary list of assets and liabilities.
- Date of death bank statements and current deeds and contracts (if available).

When asked for the most persistent mistakes made on probate petitions, Probate Court staff indicates that attorneys often fail to make the distinction between intestate heirs and devisees. Everyone who would inherit from the decedent pursuant to ORS 112.025-112.055 must be listed in the initial petition. In addition, if the decedent died with a valid Will, all devisees must also be listed in the petition. If heirs and devisees are the same people, as they often are, you must list them *twice*. It is important to state the relationship of each party to the decedent and the birth date for any minors listed. Finally, if an heir or devisee is deceased you should also state that fact.

Venue is established in the county where the decedent had a domicile or a place of abode at the time of death, the county where property of the decedent is located, or the county in which decedent died. ORS 113.015.

4. Choosing the Personal Representative. This is the time to decide who will be the personal representative. If the person nominated as personal representative does not want to serve in that capacity he/she can sign a Renunciation (see Form 2-6). If there is no Will or the nominated personal representative is deceased, ORS 113.085 sets out the preference for appointment of the personal representative. In limited cases you may be called upon to help determine who should act as personal representative. It is important for a personal representative to have an understanding of and compassion for the family situation. It is helpful if the personal representative is geographically close to the estate, especially when there is real property to manage and/or sell. A personal representative also needs be organized. It is essential that the personal representative be willing to ask questions and that they take the job seriously. **Prior experience with estates or accounting experience is helpful but rarely required.**

5. The Order and Bond. The Order (see Form 2-7) includes the name of the personal representative, the date of the Will (if any), and states whether or not a bond is required. The Order also states that letters will be issued to the personal representative.

The name, address and telephone number of the personal representative must appear on the last page of every order. UTCR 9.030 (2002).

The initial bond amount is based on the value of the probate assets as set out in the petition. If the value cannot be determined at the time the petition is filed, it is advisable to give the court a reasonable estimate. The actual value will be set out in the Inventory and the bond can be either increased or decreased at that time. You may also have to increase your filing fee when the Inventory is filed depending on how much you paid with the petition.

If the Will waives the bond, you should state this in your Petition and Order. If, however, there is no Will or the Will does not waive the bond, ORS 113.105 may require a bond. If the personal representative is the sole heir or devisee then ORS 113.105(1) states that no bond is required but be aware of local rules that require a bond if the court is not satisfied that the creditors will be paid. (See Form 2-8). Because waiver of the bond can mean great savings to the estate, information can be added to the Petition **to assure the court that the bond is unnecessary. Even in cases where a bond is required, a motion, affidavit and order can be submitted pursuant to ORS 113.105(4) to waive the bond in appropriate cases. (See Form 2-9). Assets can also be restricted in the original petition or by a later motion to decrease the bond. UTCR 9.020 (2002).**

6. Information to Heirs and Devisees. The personal representative must deliver or mail to the devisees, heirs and those described in ORS 113.035(7) the information required in ORS 113.145(1). (See Form 2-10). The failure of the personal representative to give this information is a breach of duty but does not affect the validity of the appointment. ORS 113.145(3). Within 30 days of appointment the personal representative is required to file an affidavit of the delivery of the information to heirs. ORS 113.145(4). (See Form 2-11). In addition, the personal representative must provide the Estate Administration Unit with the information to heirs and a copy of the death certificate. ORS 113.145(6). This step is easy to miss and will result in a delay in the signing of subsequent orders.

7. Publication. A notice to interested persons is published for three consecutive weeks in either a newspaper published in the county of the probate or a newspaper designated by the court. ORS 113.155. You should contact the probate department to find out where to publish in a given county. Be sure to carefully double check the proof that the publisher will send you before the notice is published. If you frequently file probates in Multnomah County you may already have an account with the Daily Journal of Commerce who will pick up your new probate and publish it for you. The cost for publication varies from county to county but is generally \$90 to \$150. Failure to publish is a breach of duty. ORS 113.155(3). Claims must be presented within four months of the date of first publication. ORS 115.005.

E. Instructing the Personal Representative

1. Fiduciary Duties. It is very important to instruct the personal representative as to his/her fiduciary duties early in the administration of an estate. Do not wait until something goes wrong. I set an appointment with the personal representative as soon as I receive the Letters from the court. At this meeting I give my client the original Letters and go through a fiduciary duty letter. (See, e.g., Form 2-12). I have found that simply sending a detailed letter to my client is not enough. The personal representative is already dealing with an overload of paperwork and is unlikely to take the time to study the letter sufficiently. The fiduciary meeting typically lasts from a half-hour to an hour. I encourage the personal representative to ask questions during the meeting. Frequently my letter reminds my client of questions he/she had meant to ask. If I have an out-of-state client or a client whose work schedule does not coincide with mine I will mail the fiduciary duty letter in advance and schedule an appointment to go over it on the telephone. I attach the Creditor Search Checklist (see Form 2-13) to my fiduciary duty letter. At the appointment we go through this checklist to help the personal representative comply with the requirement to make reasonably diligent efforts to ascertain creditors. ORS 115.003(1).

2. Tax identification Numbers. As soon as I have the Letters from the court I will assign a tax identification number (EIN) for the estate. This can usually be obtained by faxing IRS Form SS-4. (See Form 2-14). Be sure to fill in the "Third Party Designee" portion at the bottom of the form. If your office uses a large number of EIN's every month you can arrange with the IRS to assign you a block of ten numbers at a time. You can reach the Internal Revenue Service EIN Department by calling 215-516-5514. Although I have not tried this myself, I understand that it is also possible to get an EIN online by filling out the form at https://sa1.www4.irs.gov/sa_vign/newFormSS4.do. **I also file IRS Form 56 at this time so that any of the decedent's tax notices will come to the personal representative. (See Form 2-15).**

3. Custody Receipts. This is also a good time to discuss Custody Receipts with the personal representative. A personal representative can distribute tangible personal property pursuant to the Will or the statute and have the recipient sign a Custody Receipt. The recipient acknowledges receipt of and the value of the personal property **and agrees to be responsible for this amount if necessary to pay estate taxes or creditors. (See Form 2-16.)**

4. The Checkbook. Although there are certainly advantages to having the attorney keep the estate checkbook, I rarely do this. If your client is well-informed about fiduciary duties and how to set up estate account(s), I believe it is much less cumbersome to allow the personal representative to handle the checkbook. This is especially true with distant or out-of-state clients. I recommend you arrange for the client to mail bank statements with cancelled checks to your office *each month*. Review the checks to confirm that the bank has correctly designated your client as personal representative and that your client is signing appropriately as a fiduciary. Emphasize during your fiduciary duty meeting that the client should contact you before making any large expenditures or paying any questionable bills.

5. Inventory. The personal representative should immediately begin working on the Inventory, which is due within 60 days of appointment. ORS 113.165. The Inventory will list all probate assets known to the personal representative along with cash values as of the date of death. The statute allows the court to grant a longer time to file so contact the court *before the 60 days* if you predict that you will not make the deadline. ORS 113.165.

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