

**FLORIDA  
HANDBOOK ON  
WILLS, TRUST,  
*and* PROBATE**



**Rothenburg**

L A W F I R M

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## BIOGRAPHY



Steve Rothenburg was licensed to practice law in Florida in 1988. He graduated from the University of Tennessee College of Law. Upon graduation, Steve was an Assistant State Attorney, Assistant Public Defender, and Senior Attorney prosecuting doctors before the Florida Board of Medicine. For the past 25 years Steve has been in the private practice of law practicing in the areas of Wills, Trusts and Probate, Personal Injury, Medical Malpractice and Eminent Domain. Steve is an avid cyclist; he likes to fish and is constantly reading.

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## **INTRODUCTION**

This handbook will give you a brief overview of wills, trusts and the probate process. It will provide you with basic information to help you understand the three primary parts that make up Probate in Florida. It is not intended as a substitute for consulting with an attorney.

The law casebooks are filled with instances where persons tried to write their own wills with the result often being an outcome that is not what was intended by the person who wrote the will. When a will is written precisely and clearly the deceased intent is usually clear. When the will is not written precisely and clearly courts are required to try and determine what the deceased intended.

To be sure your estate documents are accurate and precise, it is recommended that you consult with an attorney.

## **WHAT IS A WILL?**

A will is a writing, signed by the decedent and witnesses, that meets the requirements of Florida law. In a will, the decedent can name the beneficiaries whom the decedent wants to receive the decedent's probate assets. The decedent also can designate a personal representative (Florida's term for an executor) to administer the probate estate.

If the decedent's will disposes of all of the decedent's probate assets and designates a personal representative, the will controls over the default provisions of Florida law. If the decedent did not have a valid will, or if the will fails in some respect, the identities of those who will receive the decedent's probate assets, as well as who will be selected as the personal representative of the decedent's probate estate, will be as provided by Florida law.

## **FOR HOW LONG IS A WILL GOOD?**

It is "good" until it is changed or revoked in the manner required by law. Your will may be changed as often as you desire while you are sane and not under undue influence, duress or fraud, provided it is changed in the required manner.

## **WHAT IF YOU MOVE TO FLORIDA FROM ANOTHER STATE?**

If you have moved to Florida from another state, it is wise to have your will reviewed by a Florida lawyer in order to be sure that it is properly executed according to the laws of Florida, that the witnesses are readily available to prove your will in Florida, and that your personal representative is qualified to serve in Florida.

## **DOES A WILL INCREASE PROBATE EXPENSES?**

No. If there is property to be administered or taxes to be paid or both, the existence of a will does not increase probate expenses. A will frequently reduces expenses and eliminates uncertainties. If there is real or personal property to be transferred at your death, the probate court will have jurisdiction to ensure that it is transferred properly, either according to your will or, if there is no will, in accordance with the inheritance (“intestacy”) statute.

## **IS A LIFE INSURANCE PROGRAM A SUBSTITUTE FOR A WILL?**

No. Life insurance is only one kind of property that you may own, and a will is necessary to dispose of other assets that you own at death. If a life insurance

policy is payable to an individual, your will has no effect on the proceeds.

### **IS A TRUST A SUBSTITUTE FOR A WILL?**

No, in most situations. A trust may be used in *addition* to a will. This is because a trust can handle only the property that has been put into it. Any property of yours that is not placed in the trust either during life or at death in most instances escapes the control of the trust.

### **DO YOU HAVE TO GO TO COURT TO PROBATE A WILL?**

No, personal court appearances are usually not needed to probate a will. However, documents must be filed with the court to procure a probate order and administer estates. In most counties, neither the estate attorney nor the interested persons ever appear in the courtroom.

**The following additional documents should be considered for signing when you make your will:**

**Living will:** Florida statutes now provide for a written declaration by an individual specifying directions as to use of life-prolonging procedures.

**Power of attorney:** This document can assist in handling your property if you become incapacitated, without having

to open a guardianship proceeding in court. This is especially valuable for paying your bills and protecting your assets. A power of attorney is no longer valid or enforceable after your death.

**Health care surrogate:** Florida law now allows you to designate a person to make health care decisions for you when you may not be able to do so. Included in this important appointment is the power to decide when to withdraw medical procedures.

**Pre-need guardian designation:** Florida law allows you to designate a person who could be appointed guardian over you should you become incapacitated and/or over your children should you become incapacitated or upon your death. If you fail to designate a guardian, the court will do so for you if it becomes necessary.

## **WHAT IS A REVOCABLE TRUST?**

A revocable trust is a document (the “trust agreement”) created by you to manage your assets during your lifetime and distribute the remaining assets after your death. The person who creates a trust is called the “grantor” or “settlor.” The person responsible for the management of the trust assets is the “trustee.” You can serve as trustee, or you may appoint another person, bank or trust company to serve as your trustee. The trust is “revocable” since you may modify or terminate the trust

during your lifetime, as long as you are not incapacitated.

During your lifetime the trustee invests and manages the trust property. Most trust agreements allow the grantor to withdraw money or assets from the trust at any time, and in any amount. If you become incapacitated, the trustee is authorized to continue to manage your trust assets, pay your bills, and make investment decisions. This may avoid the need for a court-appointed guardian of your property. This is one of the advantages of a revocable trust.

Upon your death, the trustee (or your successor if you were the initial trustee) is responsible for paying all claims and taxes, and then distributing the assets to your beneficiaries as described in the trust agreement.

Your assets, such as bank accounts, real estate and investments, must be formally transferred to the trust before your death. This process is called “funding” the trust and requires changing the ownership of the assets to the trust. Assets that are not properly transferred to the trust may be subject to probate. However, certain assets should not be transferred to a trust because income tax problems may result. You should consult with your attorney, tax advisor and investment advisor to determine if your assets are appropriate for trust ownership.



## **WHAT IS PROBATE?**

Probate is the court-supervised administration of a decedent's estate. It is a process created by state law to transfer assets from the decedent's name to his or her beneficiaries. A personal representative is appointed to handle the estate administration. The probate process ensures that creditors, taxes and expenses are paid before distribution of the estate to the beneficiaries. The personal representative is accountable to the court as well as the estate beneficiaries for his or her actions during the administration.

## **WHY IS PROBATE NECESSARY?**

Probate is necessary to pass ownership of the decedent's probate assets to the decedent's beneficiaries. If the decedent left a valid will, unless the will is admitted to probate in the court, it will be ineffective to pass ownership of probate assets to the decedent's beneficiaries. If the decedent had no will, probate is necessary to pass ownership of the decedent's probate assets to those who are to receive them under Florida law.

Probate is also necessary to wind up the decedent's financial affairs. Administration of the decedent's estate ensures that the decedent's creditors are paid if certain procedures are correctly followed.

## **ARE ALL ASSETS SUBJECT TO PROBATE?**

No, only assets owned by a decedent in his or her individual name require probate. Assets owned jointly as “tenants by the entirety” with a spouse, or “with rights of survivorship” with a spouse or any other person will pass to the surviving owner without probate. This is also true for assets with designated beneficiaries, such as life insurance, retirement accounts, annuities, and bank accounts and investments designated as “pay on death” or “in trust for” a named beneficiary. Assets held in trust will also avoid probate.

## **HOW DOES A REVOCABLE TRUST AVOID PROBATE?**

A revocable trust avoids probate by effecting the transfer of assets during your lifetime to the trustee. This avoids the need to use the probate process to make the transfer after your death. The trustee has immediate authority to manage the trust assets at your death; appointment by the court is not necessary.

The “funding” of a revocable trust is critical to successfully avoid probate. Those persons who do not fully fund their trusts often need both a probate administration for the non-trust assets as well as a trust administration to completely distribute the assets. Because the revocable trust may not completely

avoid probate, a simple “pour over” will is needed to transfer any probate assets to the trust after death.

## **WHAT ARE PROBATE ASSETS?**

Probate administration applies only to probate assets. Probate assets are those assets that were owned in the decedent’s sole name at death, or that were owned by the decedent and one or more co-owners and lacked a provision for automatic succession of ownership at death.

For example:

- A bank account or investment account in the sole name of a decedent is a probate asset, but a bank account or investment account owned by the decedent and payable on death or transferable on death to another, or held jointly with rights of survivorship with another, is not a probate asset.
- A life insurance policy, annuity contract or individual retirement account that is payable to a specific beneficiary is not a probate asset, but a life insurance policy, annuity contract or individual retirement account payable to the decedent’s estate is a probate asset.
- Real estate titled in the sole name of the decedent, or in the name of the decedent and another person as tenants in common, is a probate asset (unless it is homestead property),

but real estate titled in the name of the decedent and one or more other persons as joint tenants with rights of survivorship is not a probate asset.

- Property owned by spouses as tenants by the entirety is not a probate asset on the death of the first spouse to die, but goes automatically to the surviving spouse.

This list is not exclusive but is intended to be illustrative.

### **WHAT ARE THE RIGHTS OF THE DECEDENT'S SURVIVING FAMILY?**

The decedent's surviving spouse and children may be entitled to receive probate assets from the decedent's probate estate, even if the decedent's will gives them nothing. Florida law protects the decedent's surviving spouse and certain surviving children from total disinheritance.

### **WHAT RIGHTS DO OTHER POTENTIAL BENEFICIARIES HAVE IN THE DECEDENT'S PROBATE ESTATE?**

Except as provided in the immediately preceding section, a Florida resident has the right to entirely disinherit anyone. It is not necessary to give the disinherited beneficiary a nominal gift of, for example, \$1.00.

## **HOW LONG DOES PROBATE TAKE?**

It depends on the facts of each situation. For example, the personal representative may need to sell real estate before settling the probate estate, or resolve a disputed claim filed by a creditor or a lawsuit filed to challenge the validity of the will. Any of these circumstances would tend to lengthen the process of administration. Even the simplest of probate estates must be open for at least the three-month creditor claim period; it is reasonable to expect that a simple probate estate will take about five or six months to properly handle.

## **WHAT IF THERE IS A REVOCABLE TRUST?**

If the decedent had established what is commonly referred to as a “Revocable Trust,” a “Living Trust” or a “Revocable Living Trust,” in certain circumstances, the trustee may be required to pay expenses of administration of the decedent’s probate estate, enforceable claims of the decedent’s creditors and any federal estate taxes payable from the trust assets.

The trustee of such a trust is always required to file a “Notice of Trust” with the clerk of the court in the county in which the decedent resided at the time of the decedent’s death. The notice of trust gives information concerning the identity of the decedent as the grantor

or settlor of the trust, and the current trustee of the trust. The purpose of the notice of trust is to make the decedent's creditors aware of the existence of the trust and of their rights to enforce their claims against the trust assets.

All of the tasks that must be performed by a personal representative in connection with the administration of a probate estate must also be performed by the trustee of a revocable trust, though the trustee generally will not need to file the same documents with the clerk of the court. Furthermore, if a probate proceeding is not commenced, the assets making up the decedent's revocable trust are subject to a two-year creditor's claim period, rather than the three-month non-claim period available to a personal representative.

The assets in the decedent's revocable trust are a part of the gross estate for purposes of determining federal estate tax liability.

## **CONCLUSION**

Rothenburg Law Firm is dedicated to the accurate preparation of the documents that will meet your specific needs and lead you through the Probate process. We will work hard to help bring you the peace of mind that you deserve. Call for a free consultation.



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