

PROBATING A VERMONT ESTATE

This Summary is designed to help you carry out your duties as an executor or administrator of an estate. The information in this booklet is based on Vermont law in effect at the time of publication and is issued as a public service for general information only. **It is not a substitute for legal advice.** Rather, it is intended to help you recognize when you need legal advice and to help you understand the advice you receive. **There are many circumstances that may arise which are not covered here and, in most instances, it is wise to consult an attorney familiar with the probate process.** If you feel you need the advice of an attorney and don't know whom to call, the Lawyer Referral Service of the Vermont Bar Association can help. Call 800-639-7036 for more information.

1. GENERAL OVERVIEW

Are you named in a will as the executor of an estate? Is it possible that the Probate Court may consider appointing you as the administrator of an estate for someone who died without a will? If the answer is "yes," then you will need to become familiar with the duties and responsibilities of a "**fiduciary**." A fiduciary includes any person appointed by the Court to be either the executor or administrator of an estate.

As a fiduciary, your primary responsibility is the prompt, efficient and impartial administration of the decedent's estate. There are two main purposes for probating a decedent's estate:

- (1) payment of debts owed by the decedent; and
- (2) distribution of the remaining assets in the estate to those legally entitled to receive them.

YOU MAY NOT DISTRIBUTE ANY ASSETS TO ANY BENEFICIARY WITHOUT PRIOR APPROVAL OF THE COURT.

In order to achieve these purposes, the law requires you to:

- Identify and collect all assets of the estate;
- Pay the debts of decedent. If the amount of debts appears to be greater than the value of the assets (an insolvent estate), you should not pay any debts until you are ordered to do so by the court.
- Notify "Interested Persons" and parties of all matters which may affect their interests.

Some of your duties must be performed within certain time limits and you should be careful to follow those time limits. Although court personnel may be able to help you with procedural questions, **they cannot give you legal advice or complete forms for you. If you need legal advice, you should consult an attorney.**

Forms for most documents that you are required to file with the court are available on the court's website, www.vermontjudiciary.org under Forms for Estates. You should always use a pre-approved court form if one is available rather than attempting to make up your own form.

It is your responsibility to administer the estate competently and promptly in accordance with law. If you fail to do so, the court may impose sanctions. Sanctions may include your removal as the fiduciary. *Probate Rule 67; 14 VSA Section 917*

2. GETTING STARTED.

To begin, you will need to file a **PETITION TO OPEN DECEDENT'S ESTATE** with the Court. You must file the Petition in the Probate Division in the county where the decedent resided the time of death. In the Petition, you will list the name and residence of the decedent, the *approximate* value of any real estate and personal estate that the decedent owned at the time of death, and whether or not there was a Last Will and Testament. You will also need to pay a filing fee to the "Vermont Superior Court." The fee is based upon the value of the Estate. The Vermont Judiciary website (www.vermontjudiciary.org) has a list of the filing fees, which depends upon the value of the Estate.

- A. When you file the Petition with the Court, you must also include a certified copy of the Death Certificate, and the **ORIGINAL** Last Will and Testament, if there is one.
- B. You must also file a **LIST OF INTERESTED PERSONS**. This will include the **heirs at law** (which includes the surviving spouse (if applicable), all surviving children of the decedent, and the children of any child who has died before the decedent), plus all other persons or entities named in the Last Will and Testament. You must provide the Court with certified copies of the death certificates for any of those who are deceased. In the List, you should state whether children [or grandchildren] of the decedent are also children [or grandchildren] of the surviving spouse or are children [or grandchildren] of the decedent through a previous spouse/partner. If there are no surviving spouse, children or grandchildren, or there is no Will, the issue is rather complicated and more than can be discussed in this Summary. **In that case, you should consult an attorney.**

In the Petition, you will ask the Court to open the Estate and name you as the Fiduciary to administer the estate. Court approval occurs in one of two ways. If all of the **heirs at law** sign a Consent form agreeing to the Court's approval of the Last Will and Testament and the appointment of you as the Fiduciary, the Court does not need to hold a hearing to allow the Will. The heirs will agree by signing the Consent which is part of the Petition. If there are other beneficiaries named in the Will, however, such as nieces and nephews, or

Charities, the Court is required to hold a Hearing. You can avoid the need for a Hearing if those people and entities sign a Waiver saying that they agree that a Hearing is not needed.

If not all of the heirs will consent, or you are unable to obtain their consent, the Court will have to hold a hearing. The Court will send you a Notice of Hearing. **You will need to send a copy of the Notice of Hearing, Petition, and Last Will and Testament (if any) by certified mail, return receipt requested, to each of the heirs and beneficiaries named in the Will. Signed receipts dated at least 14 days before the date of hearing must be filed with the Court.**

At the Hearing, you will have to "prove" the Last Will and Testament if there is a Will. If an heir is challenging the Will, all of the Witnesses in the Will should be made available to testify. This is a complicated matter and beyond the scope of this Summary.

If there is no Last Will and Testament, you will ask in the Petition simply that you be appointed Fiduciary. This is called an "Intestate Estate." Vermont law will determine how the property in the Estate will be distributed.

Before the Court will actually appoint you, you will need to file an **Estate Administration Bond** with the Court. This is your promise to administer the Estate properly. The court may or may not require a Surety. A Surety is usually an insurance company that will reimburse the Estate if a Fiduciary improperly administers the Estate. The insurance company will charge a fee, which will be an administration expense (discussed below) which should be paid from the Estate.

3. FILING THE INVENTORY.

Within 30 days after your appointment as the Fiduciary, you must file with the Court a list of all of the decedent's assets. This list is called the "Inventory," and can be found on the Vermont Judiciary website. This filing deadline may be extended up to a maximum of 90 days from the date of appointment, but only for a good reason and only if the extension is approved by the court. *Probate Rule 66a*. Describe each asset as accurately as you can and record the fair market value as of the date of the decedent's death. Each titled asset (such as real estate, motor vehicles, bank accounts, investment accounts, etc.) must be itemized separately. Untitled assets (such as household furniture and furnishings and personal effects) may be aggregated and listed in a group if doing so results in a fair representation, unless specific items are given to specific people in the Will. It is not necessary to list every piece of furniture and personal item separately; list only those of substantial value such as valuable antiques.

Do *not* list any of the following assets in the Inventory:

- Assets jointly owned with another person (for example, property owned as joint tenants with rights of survivorship). NOTE: this does not include assets which may have been owned as tenants in common. In that case, you should include the decedent's fractional share.

- Insurance policies with a designated beneficiary living at the time of decedent's death.
- Bank accounts and other assets payable or transferable on death.
- Any other asset which passes directly to another person without probate action, such as Annuities, IRA's, 401(k) Accounts and Retirement Accounts in which a beneficiary is named.

If an Annuity, IRA or Retirement Account does not have a named beneficiary, or if the named beneficiaries die before the decedent, the Account should be included in the Inventory.

If you are unsure as to whether an asset should be included, include it, or contact a lawyer.

In preparing the Inventory, you may need to contact a financial institution to obtain the balance in an account at that Institution. To prove that you are the Fiduciary and have the authority to obtain the information, use a Certificate of Appointment. This document is commonly required by banks, investment companies, brokerage firms, insurance companies, decedent's employers, and the Social Security Administration. When you are appointed, the Court will issue two Certificates of Appointment. Often, a photocopy will be sufficient to show your appointment, although you may have to show a certified copy first. If you need extra Certificates of Appointment, the Court will issue them for a nominal fee.

How you determine date-of-death fair-market-values of the decedent's assets is within your discretion and judgment; however, the values you determine may have significant tax implications for the estate or the person who receives the asset. If you are unable to estimate values with confidence or determine values from independent reliable sources, you may decide to hire one or more appraisers. Situations in which professional appraisals may be appropriate include real estate, specific items given to specific persons, items of perceived significant value, items which must be divided among persons, and items the value of which is or may become disputed. If you later find that you have omitted or incorrectly valued an asset, you may file an amended Inventory or make an appropriate entry on your next account.

You must mail copies of your signed and notarized Inventory to all parties. *Probate Rules 5(a), 5.1, 17(b) and 66.*

4. SEPARATE BANK ACCOUNTS.

You must maintain separate accounts (such as checking and savings accounts) for estate funds. The account name should be " Estate of [name of Decedent], [your name], Fiduciary."

Before you open an account for the Estate you will need to obtain a Tax Identification Number (sometimes referred to as an EIN or TIN) for the Estate. You obtain the Number by going to the Internal Revenue Service website, IRS.gov, and applying for the number using IRS FORM SS-4. You will need the Decedent's Social Security Number and your Social Security Number to get the Taxpayer Identification Number. **When applying for the Number through the Internet, please be sure that you are on the Internal Revenue Service Website. There is no charge for obtaining the Number from the IRS. There are websites with similar names, however, that will charge you a fee.**

Use the Estate's Tax Identification Number for the account, not your Social Security Number or the decedent's Social Security Number, when opening the account.

Estate funds must be kept separate from your personal funds and must not be mixed with funds belonging to anyone else. You must keep exact records of all assets coming into the estate and all assets paid out or distributed from the estate. Ledger sheets having columns for "Date", "Description of Transaction", and whether the asset came "In" or went "Out" should provide a complete and accurate record. You will need this information to prepare the Accounting for the Estate, which is discussed later.

5. SPOUSAL ELECTIONS AND RIGHTS.

A surviving spouse has certain rights which take priority over the rights of other family members and non-family members named in the Will. Within 30 days of your appointment as the fiduciary the court must provide the surviving spouse with a notice of these rights. A surviving spouse must elect any desired spousal rights within 8 months of the date you are appointed as the fiduciary. Any election must be in writing and filed with the court. The possible elections and rights include:

1. The election to waive the provisions made for the surviving spouse in the decedent's Will and instead to take one-half of the estate after payment of claims and expenses of administration. *Probate Rule 13 & 14 VSA Section 319.*
2. The right to have the homestead set out pursuant to *27 VSA Section 105.*
3. The right to request that household goods and furnishings be awarded pursuant to *14 VSA Section 312.*
4. The right to request an allowance for maintenance of the surviving spouse and minor children, or either, pursuant to *14 VSA Section 316.*

6. NOTICE TO CREDITORS.

Within thirty (30) days of your appointment as fiduciary, you must send a Notice to Creditors, a form that can be found on the Vermont Judiciary website, to all known creditors and to creditors reasonably ascertainable by you.

You also must publish the Notice to Creditors on one occasion in a newspaper generally circulating in the community in which the decedent was a resident. You must provide the court with satisfactory proof of publication by filing a copy of the Notice published in the Newspaper. You must also send a copy of the Notice to any known creditors. The purpose of the Notice to Creditors is to alert creditors that they must file claims with the court and with you within 4 months of the date of publication if they wish to be paid. If a creditor fails to do this, the creditor's claim may be barred.

If you are certain that you know of all the decedent's debts (including Medicaid reimbursement claims) or that the decedent had no debts, you may file a Motion to Waive the Notice to Creditors-asking the court to waive the requirement to publish the Notice to Creditors. Being allowed not to publish the Notice to Creditors may save some money and enable you to close the estate sooner; however, carefully consider the advantages and disadvantages. If the decedent had creditors you do not know about, failing to publish the Notice extends the time within which creditors may file a claim to 3 years after the date of decedent's death.

If you published the Notice to Creditors, you should not pay any claims until the 4-month period for filing claims has expired. You will then know if there are sufficient assets in the estate to pay all valid claims. If there is not enough money to pay all valid claims, the law sets a priority of which claims shall be paid, in what amounts and in what order. The list of priorities can be found in *14 VSA Section 1205*. If you make a mistake and pay a claim not entitled to be paid, you, personally, may have to repay the estate for the amount improperly paid. In estates where there is not enough money to pay all the debts in full, a hearing will be held and the court will issue a formal Order of Dividend determining the priority of claims and the amounts to be paid.

7. HANDLING CLAIMS OF CREDITORS.

If a creditor files a claim against the Estate, you must decide how to respond. To contest or deny a claim, you must send a Denial of Claim to the creditor within 60 days after receiving the claim. You should also file a copy with the Court.

The Notice you send **MUST** include the following statement of warning to the creditor:

Unless you file a petition with the Probate Division asking the court to allow your claim, or unless you file a proceeding against the personal representative of the Estate in the Civil Division, within 60 days after this Notice is disallowed, your claim will be barred forever.

If you contest or deny the claim within the proper time, the creditor must file a petition with the Court, or file a lawsuit in the Civil Division, within 60 days after the mailing of the notice. Failure to do so will result in the claim being denied.

If the creditor files a petition, the court will hold a hearing on the petition and determine whether or not the claim should be allowed.

When claims are paid, you must file with the court the creditor's release of the claim, receipt signed by the creditor, or other evidence of payment of the claim satisfactory to the court.

8. ADMINISTRATION EXPENSES.

During your administration of the estate you are responsible for preserving the assets of the estate. Doing so may require you to arrange for the safe storage of tangible personal property, keeping real estate and tangible personal property insured, paying promissory notes secured by estate assets, paying gas, electric, fuel oil and similar bills. Bills for gathering, preserving and maintaining estate assets are called Administration Expenses. Administration Expenses have priority over creditors' claims.

You are not responsible for paying these administration expenses or the decedent's debts from your personal funds. If you do so, and there is not enough money to pay all of the administrative expenses or the creditor's bills, you might not be reimbursed from the Estate.

9. LICENSES TO SELL.

If you determine that it is necessary or in the best interest of the estate and the persons interested in the estate to sell real or personal estate, or to convey, mortgage or lease real or personal estate, you must file a **Motion for License to Sell**. (Personal property, whether tangible or intangible, includes everything other than real property.) There are special rules for selling real or personal estate at PUBLIC AUCTION.

When filing a Motion for License to Sell with respect to real estate, it is important that you accurately describe the real estate. This is usually done by listing the date, Volume and Page of the Deed through which the Decedent acquired the real estate. **Because you will need an attorney when you sell the real estate, it is advisable that you obtain an attorney's advice and help in preparing the Motion for License to Sell for real estate.** There is a fee for filing the Motion for License to Sell Real Estate. Before filing the Motion, check with the court to see what the fee is.

As a matter of planning, you may wish to review your Inventory and request licenses to sell for any asset which might be sold during administration of the estate even though you may not have any immediate plans to dispose of an asset. Any asset for which a license to sell is requested must be carefully described and match the description in your Inventory.

Unless all parties consent to a Motion for License to Sell, or unless the decedent's Will specifically grants the requested power to the Fiduciary, the court will schedule a hearing and provide notice to all parties. *14 VSA Sections are 1651 & 1653.* If your motion is granted the court will issue the license to sell. A certified copy of any license to sell for real estate must be delivered for recording to the Town Clerk when the real estate is sold.

The court may increase the amount of your bond before issuing a license because you will control more liquid assets after the sale than previously. You must file a Report on The License within 30 days of the transaction.

10. PURCHASING ASSETS FOR THE ESTATE.

Because you are responsible for conserving assets of the estate, you should not purchase new assets without court permission.

11. ACCOUNTINGS.

If it takes more than one year for you to complete the administration of the Estate, Annual Interim Accountings of your administration must be filed with the Court. *14 VSA Section 906(3)*. These should be filed on the anniversary of your appointment as Fiduciary. There is a filing fee for filing an Interim Accounting. You should check the Vermont Judiciary website for the filing fee (www.vermontjudiciary.org).

Additionally, the court may require an interim account at any time. ***If the court requires an interim account, it will also require that you obtain consents to the interim account from all of the interested parties. If you are unable to obtain consents from all of the interested parties, the court will hold a hearing on the interim account.***

It may be helpful to think of it in these terms: the assets with which the Estate started the accounting period, as shown on the Inventory or most recent interim account as the case may be, plus what additional assets and income that have come into the Estate's possession or control, less what you have paid out and distributed, is the balance on hand for distribution to the heirs at law and other persons named in the will, if any. The Schedules that are part of the Accounting are simply separate pages on which you provide the details of the appropriate transactions; the total from each Schedule is then transferred to the account form. More than one Schedule may appear on a sheet but the Schedules must be kept in the order established by the account form.

Some assets (stocks, bonds, investment accounts, and real estate, for example) frequently change market value over the course of estate administration due to fluctuations of markets. For purposes of probate accounting, use the Inventory values unless or until sold.

12. FINAL ACCOUNTING.

It is important to be aware that all creditors' claims must be resolved before there can be any distribution from the Estate. This includes paying the debts of the decedent and any successful claims made against the Estate. Occasionally, there is not enough money in the Estate to pay all of the debts and claims. In that case, none of the heirs or the beneficiaries named in the Last Will and Testament will receive anything.

In addition, the Court will want to be sure that the Funeral Bill has been paid, so you will need to submit to the Court a copy of the paid funeral bill.

Once you have collected all of the decedent's assets, sold any assets when appropriate, and paid all of the decedent's bills, you should file a Final Summary of Account with the Court. In this, you will list the assets you started with or assets from the last interim accounting, any additional assets found, and income earned, less remaining bills, Administrative Expenses, and Attorney and fiduciary fees that you have paid, and list the assets remaining in the Estate. With respect to Attorney and fiduciary fees, you should include a copy of attorney fee invoices and an itemized summary of the charges that you propose as fiduciary. Finally, you should also include a proposed Distribution of the remaining assets. If there is a Last Will and Testament, the proposed Distribution should be in accordance with the terms of the Will. If there is no Last Will and Testament, the Distribution will be in accordance with the intestate laws of Vermont. The intestate laws are provisions that provide how the Estate will be distributed when there is no Last Will and Testament. It can become rather complicated to determine how the Estate will be divided, so you should consult with an attorney to complete this process.

You will need to send a copy of the Final Accounting to each of the individuals entitled to receive a distribution from the Estate. **The Court will have to approve the Final Accounting before you can distribute the Estate assets.** If all of the individuals consent to the Final Accounting, the Court might not hold a Hearing. If not everyone consents to the Final Accounting, or there are objections to the Final Accounting, the Court will have to hold a Hearing. The Court will schedule the matter for Hearing, and send you a Notice of Hearing form. **You will need to send a copy of the Notice of Hearing and of the Final Accounting to each of the individuals who has not consented.** After you send the Notice and Final Accounting to each of the individuals, you will need to file a Certificate of Service with the Court showing that you mailed the Notice and Final Accounting to each of the individuals. Objections to the Final Accounting must be filed in writing with the Court at least 3 days before the hearing date.

Sometimes, it is best to ask the Court to schedule a Hearing even if you expect everyone to Consent. This gives everyone a deadline by which they need to send you the Consent form.

13. FIDUCIARY AND ATTORNEY FEES.

Fiduciary and attorney fees must be shown in detail (date, activity, hourly rate, time spent, and total). They may not be paid until approved by the court. The Court will review all fees for reasonableness. Among the factors are the time and labor required and the experience of the fiduciary and attorney. *Probate Rule 66(c)*

14. TAXES.

You are responsible for filing all tax returns and forms. These may include final federal and state income tax returns for the decedent (unless a surviving spouse elects to file a

joint return for the decedent's year of death), federal and state fiduciary income tax returns (income tax returns for the estate), federal and state gift and estate tax returns, and other forms if the decedent was an employer. The fiduciary should contact the decedent's usual tax preparer for information and coordinate compliance either with that preparer or another of the fiduciary's choosing.

You will not be able to close the Estate until the Vermont Department of Taxes issues a Clearance Letter indicating all taxes, if any, have been paid. To obtain the Clearance Letter, you will need to send the Vermont Department of Taxes an Application for Tax Clearance form. (Form E2A is available at the Vermont Department of Taxes website.)

The Court will not issue the final Decree of Distribution until it has received the Clearance Letter from the Tax Department.

15. COMPLETING AND CLOSING THE ESTATE.

Assuming that the Court approves the Final Accounting, the Court will issue a Decree of Distribution telling you how the remaining Estate Assets should be distributed. It is then your responsibility to distribute the assets in accordance with the terms of the Decree. You will need to obtain a Receipt from each of the parties receiving something from the Estate. Once you have received Receipts from all of the individuals, you will need to file a Fiduciary's Closing Report, together with the Receipts, with the Court. The Court will then issue an Order closing the Estate.