

# FLORIDA COUNSEL REPORT

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## 2010 FLORIDA PROBATE QUICK REFERENCE GUIDE

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### A. Three Types of Proceedings

Florida has three types of probate proceedings to transfer title of a decedent's assets.

**1. Summary Administration.** F.S. 735.201(2) provides that summary administration may be used for either a resident or non-resident decedent's estate if (a) the value of the decedent's entire estate subject to administration in this state, exclusive of exempt property, does not exceed \$75,000; or (b) the decedent has been dead for more than two years, regardless of the size of the estate. **NOTE:** The "value" is the gross as opposed to the net value of the estate.

Time Frame: Usually 1-4 months for simple, uncontested administrations.

Attorney's Fees: After reviewing the will (if there is one), inventory, and death certificate, we can give your client a reasonable estimate of our fees.

**2. Formal Administration.** This administration must be used if the decedent's estate does not qualify for summary administration: the decedent's estate exceeds \$75,000, or the decedent has been dead for less than two years, or the will requires formal administration. Strategically, if the decedent had all assets in a trust, formal administration may be advisable to clearly cut off creditor claims.

Time Frame: A simple, uncontested formal administration can be a minimum of 4 months. More complex estates range from 6 months to 1 year. If a 706 is required additional time may be required to close out all issues with the IRS.

Attorney's Fees: F.S. 733.6171 sets forth a presumptive statutory fee schedule; for estates above \$100,000-\$1 million the fee is 3%; above \$1 million-\$3 million the fee is 2.5%; above \$3

million-\$5 million the fee is 2%. Additional fees may be charged at an hourly rate for extraordinary services, such as sale of real estate, preparation of a 706, etc.

Personal Representative's Fees: The fee rates for the PR are similar to, but not the same as, the attorney rates. See F.S. 733.617.

**3. Ancillary Administration.** If the decedent has a will that is being probated in another state, the non-resident may qualify to petition the court to admit the decedent's foreign will to record. Once the foreign will is admitted to record by order of a Florida court, the will shall be as valid and effectual as if it were executed in Florida allowing for the probate of the non-resident's Florida property. The qualifying criteria for this type of petition are very narrow and should first be discussed with a Florida attorney. F.S. 734.104. For a checklist of items we typically need to open an Ancillary Administration see Part E. below.

## **B. Homestead: Many Traps for the Unwary**

Homestead issues are the single most common issue that may trip-up attorneys. (*See Florida Law Report: Florida Sand Traps: Probate Issues Sometimes Missed, Vol. 6; Five Dangerous Homestead Traps, Vol. 10; and Florida Homestead: Even More Traps, Vol. 20, at [www.raricklaw.com](http://www.raricklaw.com), "Florida Counsel".*)

First, identify if the decedent had a Florida homestead. If the decedent lived in Florida and had Florida real estate the possibility of homestead issues must be analyzed. If the decedent split time living in Florida and another state, you must first determine the state of domicile, as only a Florida resident can claim homestead.

If the decedent is survived by a spouse or minor child (a minor is any child under 18), Florida homestead law will trump anything written in the decedent's will or trust. The surviving spouse is given a life estate and the minor child a remainder interest.

Homestead is not considered part of the probate estate, but the personal representative may have the responsibility to preserve, insure and protect it. See F.S. 733.608(2).

If there is any question regarding whether the property is homestead or if the decedent has creditors, the Homestead Petition should be filed, since homestead passes to qualified heirs free of claims against the estate.

## **C. Critical Time Frames**

1. Deposit Will: 10 days after death.
2. Notice to Creditors: 90 days for publication.
3. Creditor Deadline for filing claim against estate: On or before the later of the date of three months after the first date of publication or thirty days after service of notice of creditors, F. S. 733.702(1). If there is no publication or service of the notice to creditors, then the deadline is two years from the date of death.

4. Personal Representative Deadline for Objecting to a Claim: The PR may object to a claim at any time within the later of four months from first publication of the notice of creditors or 30 days from the timely filing of a claim or amendment of a claim. F.S. 733.705(2). If the PR fails to object within this time period, the claim is deemed allowed.

5. Statute of Limitations for claims against either an administered or Un-administered estate: 2 years from date of death, except for any IRS claims.

(See *Florida Law Report, Florida Probate Hard Deadlines, Vol. 21*, at [www.raricklaw.com](http://www.raricklaw.com), "FL Counsel".)

#### **D. Revocable Trust Administration and Closure**

If the decedent created a revocable trust, in certain circumstances, the trustee may be required to pay expenses of administration of the decedent's estate and enforceable claims of the decedent's creditors. F.S. 733.707(3). In any event, the trustee is required to file a Notice of Trust with the court where the decedent lived.

#### **E. Documents Needed to Open Ancillary Florida Administration**

The following documents are usually needed to open a testate Florida ancillary probate:

Court-authenticated copy of:

- (1) Decedents last will;
- (2) Petition for Probate;
- (3) Order admitting the will to probate;
- (4) Letters of administration; and
- (5) Two Certified Death Certificates.

If not set forth in the Petition for Probate, we will also need:

- (6) Name and address of all beneficiaries;
- (7) Inventory of Florida property;
- (8) Copy of any deeds; and
- (9) Copy of tax bills for any real property.

If the decedent is intestate, call our office and we will send you a "Mini-Master Information" form.

#### **F. Probate Filing Fees**

Due to recent legislative changes in Florida, the filing fees in all counties either were increased last year. If your client needs an estimate of the costs associated with a probate administration in Florida, our office will be able to provide an estimate to you after a review of the will and inventory.