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WHEN THE CHARIOT COMES FOR GLADYS, DOES HER ESTATE NEED TO BE PROBATED?
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Once you have sent Aunt Gladys to Rest in Peace, someone will need to administer her estate. If Aunt Gladys (or "Auntie G" for short!) had any property in her own name at her death, said property might need to be probated and Jack is the lucky person to whom Auntie G has given this responsibility. In this edition of the Bove & Langa Report, we will walk you through the probate process for Auntie G's estate and provide an overview of everything you ever wanted to know about probate in Massachusetts.

What in the World is Probate Anyway and Why Would You Want to Avoid it? Quite simply, probate is the name of the court process to transfer probate assets from Auntie G over to the beneficiaries of her estate. To open probate, a petition for probate will need to be filed with the court so a "Personal Representative" (a role previously known as the "executor" or "administrator" and referred to in this report as "PR") can be appointed by the court. Nowadays the forms (there are a lot of them!) are filed electronically. Jack, as PR, will need to gather up Auntie G's probate property, and Jack can't take title and control of the probate property until the court grants its permission to do so. Once in control of the assets stuck in probate, Jack will pay all of the expenses of Auntie G's estate, and then distribute the remaining property to the beneficiaries of the estate. Because Auntie G died with an estate plan, the beneficiaries of her estate are the individuals, trusts, or organizations that she chose to include in the estate plan. If Auntie G had died without an estate plan, then the beneficiaries of the estate are determined by the intestacy laws, and would be her relatives, if any, otherwise the Commonwealth of Massachusetts (or the state of her domicile).

On its face, the probate process does not sound too bad, so why are people always looking to avoid it? The three most common reasons are (i) something can happen to the probate property before the PR is appointed by the court; (ii) the time that a probate proceeding can take (often more than a year), (iii) the costs associated with probate (court filing fees and legal fees), and (iv) probate is public (do you really want your neighbors having access to information about Aunt Gladys's assets?).

Wait, What is a Probate Asset?! A probate asset is something owned by a decedent in their individual name at the time of their death and is not subject to an automatic transfer that takes effect at the decedent's death. For example, let's say Aunt Gladys was a long time fanatical bridge player and at her death, she owned everything in her own name, including a mahogany card table and the bank account that she used exclusively to fund her bridge related activities. All of these assets would be probate assets and would have to pass through probate to her beneficiaries unless she had added something like a transfer on death designation or a beneficiary designation to the asset (both discussed in greater detail below in the section on how to avoid probate).

All the Fun and Varied Ways to Open Probate: Since 2012, when Massachusetts adopted the Massachusetts Uniform Probate Code, there are two options for opening probate and one probate alternative for small estates.

Voluntary Administration is available when dealing with an estate with less than twenty-five thousand dollars ($25,000) in non-real estate probate assets plus a car. While not a full probate proceeding, this option permits someone to be appointed as an administrator of a small estate to take control of the probate property and transfer it to the beneficiaries of the estate. This is a wonderful option when the only probate asset happens to be a small bank account or that fire engine red Mustang Aunty G owned, because as she always said "I'm old, not dead".

Informal Probate is a streamlined version of probate, and is the process most of our clients go through when an estate has probate property. We advise clients to use Informal Probate when everyone involved gets along well

and there are no special issues. It is quicker to open than Formal Probate (discussed below), because the court does not issue a judgment related to testacy or heirs-at-law.

Formal Probate is the traditional probate from the days before the Massachusetts Uniform Probate Code was enacted. Our clients who end up going through the Formal Probate process generally do so because real estate needs to be probated. Formal Probate is also required when an heir-at-law is an incapacitated person to ensure that such individual's rights are fully protected.

Supervised Administration is an additional level of formality that can be requested during a Formal Probate proceeding. Generally, only a warring family opts for Supervised Administration. (For example, when crazy Cousin Pete thinks that Aunt Gladys's Mustang should go to him and he will fight tooth and nail to get it.) With Supervised Administration, the petitioner (either the PR or other interested party) is requesting that the court oversee all aspects of the administration of the estate. Needless to say, this is a very cumbersome way to administer an estate and due to the burden on court resources and the significant increase in legal fees and time cause by Supervised Administration, this option is rarely used. In fact, Supervised Administration is discouraged by the court itself except in instances where there is an actual need for it.

Help! Aunt Gladys has Probate Property In Arizona and Massachusetts: What happens if Aunt Gladys dies as a resident of Arizona and holds a vacation home in the Berkshires (Massachusetts)? If probate has already been opened in Arizona, a second probate proceeding (which may be Formal, Informal, or Supervised), called "ancillary probate," will need to be started in Massachusetts, which grants the Arizona PR authority to act with regards to Auntie G's Berkshires home. The only person who has the power to bring an ancillary probate in Massachusetts is the appointed PR from the primary jurisdiction (Arizona) or the person Auntie G specifically appointed as her Massachusetts PR in her Last Will. (Yes, you can have two PRs.)

What if Auntie G only had her Berkshires home furnishings, or other personal property, to probate in Massachusetts? Massachusetts has a simplified procedure called "Proof of Authority", which grants the PR authority over all Auntie G's personal property in Massachusetts and does not require the PR to open ancillary probate. This process is only available if no other administration proceedings are pending in Massachusetts.

Every state has its own procedures for ancillary probate. So, Jack, as Auntie G's PR , should engage an attorney in each jurisdiction where Auntie G had probate property to discuss the best way to open (or avoid) an ancillary proceeding in that jurisdiction.

Opening Pandora's Box… When Probate Is Unavoidable: Many estate plans are designed to avoid probate. Even if Aunt Gladys's estate plan positioned all of her assets to avoid probate, there are certain times where probate is unavoidable. For example, what if she dies leaving behind her minor child? If no one has parental rights, probate will need to be opened to appoint the guardian who is nominated in Auntie G's Last Will. Similarly, if said young child directly inherits property from her mother, the court will need to appoint the conservator nominated in the Last Will. Additionally, if Auntie G died in a manner that would give rise to a wrongful death claim, probate will need to be opened to pursue the claim. Finally, probate will need to be opened if Auntie G exercised a power of appointment in her Last Will. (A power of appointment can be granted to a beneficiary of a trust to re-direct trust property either during the beneficiary's life or at their death.)

How to Reduce your Estate, Pay More Probate Costs!: There are many fees that need to be paid when probating an estate, including probate court costs, newspaper publication fees, and PR fees. The person filing Aunt Gladys's estate tax return will be able to deduct many of these expenses on the return. If no tax return needs to be filed, these expenses may be deductible on an income tax return. One of the larger expenses of passing an estate through

probate is the legal fees. And, these fees can increase as the complexity of the estate increases. But this is not necessarily the lawyer's fault, because lawyers charge for their time and responsibility, and the larger or more acrimonious the estate, the more time and responsibility involved. Generally, non-probate estates take less lawyer's time to settle than estates subject to probate (and therefore, fewer fees), which is one of the reasons that we urge our clients to avoid probate, and why so many of our clients agree.

Aunt Gladys Didn't Know What She Was Doing!: In the few months preceding Aunt Gladys's death, she became very close to some of the younger members of her beloved bridge club and ultimately left her entire probate estate to them, cutting off her family. As a result, her descendants may want to challenge her Last Will, hoping that it will be deemed invalid (either due to undue influence or claims of Auntie G's incapacity). Once a petition for probate has been filed in Massachusetts, there are ways disgruntled heirs can contest the offered Last Will. If the court agrees with the disgruntled heirs, a probate petition may be filed to probate the Last Will Auntie G created prior to the invalidated Last Will. If it is determined that the prior Last Will is valid, the probate property will be administered pursuant to its terms. The disgruntled heirs will trump the bridge club. If there is no prior Last Will, the probate property will be administered pursuant to the laws of intestacy. Where a fighting family is a client concern, a Forfeiture Clause (also called a "No Contest Clause" or "In Terrorem Clause" and discussed the July 2013 Bove & Langa Report) may be inserted into the Last Will to make such a contest unattractive to potential interfering relatives.

Burying the Hatchet: Uncertainty or disagreement about the terms of Aunt Gladys's Last Will does not mean that adversarial proceedings are the only way forward. There are court-connected dispute resolution services available, which may serve as a first step to resolving a disagreement. If that does not work, the parties involved can settle their dispute with a "Will compromise". A Will compromise must be agreed to by all parties having an interest in Auntie G's estate, including family, the bridge club, and the trustee of any trust that may have been created or funded under the Last Will. (Note, interestingly, that the PR does not need to be a party to the Will compromise, but often is.) Will compromises generally involve court oversight to ensure that the required parties are involved and formalities are met. Court oversight also allows the PR to more confidently rely on the Will compromise when administering Auntie G's estate, but comes at the cost of significant time and legal fees.

Just Because the Original Last Will is Lost Does Not Mean that All Hope is Lost: What if Aunt Gladys's Last Will cannot be found? Fret not! A copy of her Last Will can be probated instead, as long as the probate petition states that the original cannot be found and there is no evidence that it was destroyed. In order to probate a copy, Jack, as PR, will need to begin a Formal Probate proceeding. So if Aunt Gladys's Last Will was left in a flood zone or burned in a California wildfire, and all interested parties are in agreement that the copy of the Last Will represents her lost original Last Will, Jack can submit it to probate.

A Very Personal Choice – of Representative: Every fiduciary role in Aunt Gladys's estate plan has a specialized function, and therefore particular skills and traits lend themselves to different roles. Jack is no exception. Assuming there is no trustee to do so, in addition to the obvious task of probating Auntie G's Last Will, Jack will need to pull together her financial information, locate her assets, prepare tax returns, coordinate with the beneficiaries to distribute assets, and generally be a "jack" of all trades. Jack's work as the PR also begins soon after Aunt Gladys dies, adding an additional emotional burden to the work. To top it all off, elements of this work have deadlines, adding time pressure to an already significant undertaking. During her life, Aunt Gladys's should have carefully considered how Jack would handle these tasks when naming him as PR . That being said, Jack does not have to do everything on his own, as he can secure professional advice and counsel to guide him through the probate process.

Seeing the Light at the End of the Tunnel: Once Jack has endured the probate process and is ready to step aside from being the "jack" of all trades, how does he conclude his responsibilities? While he could just walk away into the sunset, he would still have his fiduciary duty hanging over his head. Instead, Jack could "close" probate, which can be done formally or informally. If Jack opts to close Aunt Gladys's estate informally, there is a one year period where the closing can be challenged, after which a challenge can only be brought for fraud or manifest error. To avoid the one year period, Jack could close Aunt Gladys's estate formally by petitioning the court for complete settlement of the estate, which involves court oversight, but provides the most protection for Jack against future challenges to his administration of the estate.

***Avoiding the Probate Red Tape*:** As we have seen, the probate process can be time-consuming, public, and prohibitively expensive. It's no wonder that avoiding probate is such a popular topic. But as with any "short cuts," there are right and wrong ways to do it. Holding assets in joint names, for example, will avoid probate, but only on the first death. Here is a brief overview of the ways to avoid probate and some of the caveats:

- *Joint ownership (with "right of survivorship").* Here, on the death of either joint tenant (owner), the asset will become fully owned by the survivor, avoiding the need for probate, but if left as is, the same asset will be subject to probate on the death of the survivor and could cause a loss of opportunity to save estate taxes.
- *Beneficiary designation.* Some assets permit you to name a beneficiary to inherit the asset at your death (e.g., life insurance or annuity contracts, retirement plans, deferred compensation, stock-bonus plans, pay-on-death (POD) accounts, or transfer-on-death (TOD) accounts). Make sure that you name a contingent (secondary) beneficiary in the event that the primary beneficiary predeceases you.
- *Trusts.* Establishing a trust to hold one's assets during lifetime without giving up control is probably the most popular estate planning approach in the U.S. today. A trust can contain specific instruction on the use and application of the assets held in the trust, typically for the decedent's spouse and children and typically in a manner that saves estate taxes and protects the family assets from creditors.

So which probate avoidance technique is right for you? Determining how to hold your assets to avoid probate can be tricky and does not have a "one size fits all" solution. All of the foregoing can successfully avoid probate, and each has its own benefits and drawbacks that we can help you navigate to help you avoid probate and achieve your goals.

Peace of Mind: As this Report has illustrated, there are many intricacies to the probate process in Massachusetts. If a loved one rides off in the chariot to the great beyond with a probate estate, don't panic! Although probate can sometime be arduous, you do not have to go through the process alone. Now is also a good time to look at your own estate plan to save your loved ones having to probate your estate.

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