The United States by Barbara R Hauser, JD

I. Probate disputes: Court arbitration or mediation

In the United States when someone dies there is a "probate" process, to oversee the registration of the title of assets that were owned by the deceased to the new owner. This process is completely separate from any tax procedures. There are separate probate courts for this process. The primary probate court will be the court located in the county in which the deceased was domiciled. If there is real estate in another jurisdiction there is also an extra (ancillary) probate proceeding in that county as well.

The first step taken by the probate court is to appoint an executor (sometimes called a "personal representative") who will have the legal authority over all the assets. In U.S. states that have enacted the "Uniform Probate Code" (UPC), which are the majority of the states, there are several types of probate, including voluntary, unsupervised, and supervised, the latter meaning the entire probate process will be supervised by the probate court. In a supervised probate, the executor will file the original will with the court together with an inventory of the assets and liabilities. The court will oversee the process of changing the legal title to all the assets. When that is completed the executor is released and the probate is closed.

For clients from civil law jurisdictions who are not familiar with the probate system it often happens that they ignore the probate process requirements. However, that only defers the requirements to a future time, when the asset is to be sold but its owner's name is still the deceased person, requiring a whole new proceeding. A trap to avoid is that in states with the UPC, probate must be opened within 3 years of death. After that time it is more difficult to open probate, and the powers of the executor are greatly restricted.

As an example of a claim against the estate, if someone dies domiciled in New York, the probate court there is called the Surrogates Court, and someone who wants to make a claim—such as a surviving spouse who was not included in the Will—may make the claim in that court. On the New York Surrogate Court website:

> Generally, a surviving spouse may file a "Right of Election" which would entitle him/her to take a share of the deceased spouse's estate. Generally, this "election" must be made within six months from the date letters testamentary issue to the executor, but in no event later than two years after the decedent's death; and may entitle her/him to the greater of $50,000.00 or one-third of the net estate, if the decedent died on or after September 1, 1992.

As a practical matter there is likely to be a form to make any claim against the estate, so a local lawyer or the probate court itself should be contacted for assistance. If the decedent was domiciled in Miami the probate is handled by the Dade County Probate Court. Their website stresses the importance of having a lawyer: "The court recommends that you hire an attorney to

handle your spouse's estate. In most instances, an attorney is required. The two exceptions when the law does not require an attorney is when the estate is of a small amount and when you are the only beneficiary to the estate." Note, too, that many states have a very short statute of limitations for claims against an estate. In Massachusetts it is one year from the date of death – and not only does a notice of claim have to be filed in the probate court, an actual complaint must be filed in court within the one year period, commencing a lawsuit to enforce the claim.

If there are claims that are not handled by the probate process described above, those civil lawsuits can follow the regular procedures that apply to civil lawsuits. However probate claims are especially emotional. The bitter family fights over inheritance issues have motivated the American Bar Association (ABA) to promote the use of mediation.

In 2016 the ABA published an excellent text book, Mediation for Estate Planners: Managing Family Conflict. Written by a team of experienced attorneys and mediators, "this book provides the basic tools to understand and employ mediation within an estate planning practice. It provides practice-proven guidance on recommending mediation to clients, either at the planning stage or soon after a dispute surfaces, so that families may be able to resolve disagreements before entrenched positions are established."

II. Protection of Same-sex inheritances

In general all inheritance issues are governed by individual states within the United States. Similarly all issues of whether there is a marriage relationship have been handled by the separate states. For the last many years the inheritance rights of same-sex couples varied drastically by state. But that ended in 2015 when the U.S. Supreme Court ruled that no state could refuse to issue a marriage license to a same-sex couple. Obergefell v. Hodges (and three related cases). The Internal Revenue Service acquiesced, stating that it would recognize for tax purposes any marriage that is recognized by a state. Note that other domestic arrangements that are not a "marriage" do not qualify for this protection, such as domestic partnerships or civil unions.

III. Motivating Clients for Testamentary Planning

In the United States most wealthy clients do have estate planning lawyers, who assist them with wills and trusts. For the general population a starting question is often to look at what would happen if they died without a will. The distribution of assets will depend on the specific state's rule of intestate distribution. What is often overlooked is that many client assets are jointly owned (the home, bank accounts, investment accounts, etc.) or are in the nature of a beneficiary designation (life insurance, retirement accounts, etc.). Those jointly owned assets and beneficiary designated assets will pass automatically to the survivor or the named beneficiary, regardless of whether or not there is a will. A surprising number of clients will have a well-drafted will but then none of their assets will "pass" under the terms of a will.

One major motivator in the United States is that a proper revocable trust, with the asset transfers, can make it possible for beneficiaries to avoid the entire probate process. When the probate court asks, at the death of someone domiciled in that county (see above) for an inventory of their assets, a perfectly planned revocable trust provides an answer that "nothing" was in the decedent's name, This is because the trustee of the revocable trust was already the owner of the assets, and the trust/trustee did not die. In this case there is no role for the probate court.

Many clients, especially as they get older, do like the idea of saving their heirs from a lengthy and expensive probate proceeding. For a while these revocable trusts were so heavily marketed in retirement states that they were called "loving trusts." Unfortunately what often happened is that the client would sign, and pay for, the revocable trust agreement but not follow up on the transfer of ownership of assts. The result would be that all the assets needed to go through the probate process.

U.S. lawyers are so pleased with the benefits (avoiding probate) of a revocable trust that they often use them automatically for the ownership of foreign assets—not realizing that this can cause tax and title problems, often in a jurisdiction that did not have any probate process to avoid in the first place.