



**Vermont Bar Association
Seminar Materials**

62nd Mid-Year Meeting

**Basic Skills Track 1:
Probate 101**

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PROBATE 101

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Probate 101

- I. The Probate Courts
- II. Uncontested Estate Administration
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- V. Contested Trust Administration
- VI. Uncontested Trust Proceedings
- VII. Adult Involuntary Guardianship Proceedings
- VIII. Adult Voluntary Guardianship Proceedings
- IX. Minor Guardianship Proceedings
- X. Everything Else
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I. The Probate Courts

What is the Probate Court?

- A specialized division of the Superior Court
- There are 14 probate division judges (one for each of Vermont's 14 counties) who are each elected for four-year terms. Most serve part-time.

What does the Probate Court do?

- Probate (proving the validity) of estates and wills
- Trust interpretation, administrations and accountings
- Guardianship
- Adoptions
- Corrections to birth, death, and marriage records
- Emancipation

I. The Probate Courts

Ways to end up in probate court

- Estate Administration
 - Executor or Administrator
 - Interested person in an estate
 - Creditor
- Trust Probate Proceedings
 - Trustee
 - Beneficiary
- Guardianship Proceedings
 - Guardian
 - Ward
 - Family or friend of ward
 - Creditor

I. The Probate Courts

How do the Probate Courts differ from other VT Courts?

- Own set of rules that control over statute (VRPP 81)
- Less formal, but also heavily forms driven
- Probate judges are elected

How do Probate Courts differ from one another?

- Administration processes not uniform across counties
- Judges can stay on the job for decades



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II. Uncontested Estate Administration

What is probate estate administration?

- Process of transferring title from the decedent to the intended recipient under a will or laws of intestacy.

What is a Will? What are the laws of intestacy?

Is probate estate administration necessary?

- Assets in the sole name of the decedent.
- Cause of action to be brought on behalf of decedent.
- Creditors open probate to bring claims.

Special types of estates:

- Ancillary Estate
- Small Estate
- Waiver of Probate

II. Uncontested Estate Administration

Is there a Will?

- Intestate estate = decedent died without a will.
- Testate estate = decedent left a will.
- If testate, find the original will.

Petition to Open Decedent's Estate

- With the cooperation of the intended executor (testate) or administrator (intestate), file a petition requesting that the court open probate and appoint executor/administrator.
- The following documents must accompany the petition:
 - Original will
 - Codicils (if any)
 - Certified death certificate
 - List of Interested Persons
 - Consents of all interested persons (can follow)
 - Appointment of a resident agent (if executor/administrator out of state)
 - Filing fee

II. Uncontested Estate Administration

Court examines Petition and attachments

- If testate estate, reviews will's validity and formally recognizes executor (absent contest).
- If intestate estate, considers whether petitioner is best suited given priority for appointment.

Bonds:

- Before appointing the administrator or executor, court will require a bond

Certificate of Appointment of Fiduciary issued

II. Uncontested Estate Administration

Duties of Executor/Administrator:

- In general: Establish contents of estate, pay off all valid debts, and distribute estate to beneficiaries after issuance of decree.
- The Specifics:
 - Locate and protect assets
 - File Inventory
 - Publish Notice to Creditors
 - Liquidate and consolidate assets (if appropriate)
 - File estate tax return (if applicable) and income tax returns
 - Obtain tax clearance
 - File annual accountings
 - Submit final accounting and proposed final decree of distribution
 - Collect Receipts
 - File Closing Report

II. Uncontested Estate Administration

Waiver of Administration (New as of 2018):

- Proposed to avoid most formalities of administration if sole executor or administrator is also sole beneficiary
- Two stages:
 - Petition with request to waive court's supervision
 - Affidavit required that all debts satisfied, and the State has been paid
- Thinking = formalities of probate serve no purpose when sole beneficiary and fiduciary are the same person.
- Opportunities to disadvantage creditors are not greater and burden is on creditors to pursue claims

III. Contested Estate Administration

Ways An Estate Can Be Contested

- Interpretation of the Will
- Will Contest
- Challenging the Appointment of a Fiduciary
- Challenging the Fiduciary's Actions
- Creditor Claim

III. Contested Estate Administration

Will Contest

- How do they Begin?
- The Process
- How Does it End?

Similar Proceeding – Challenging a Fiduciary

III. Contested Estate Administration

Challenging a Fiduciary's Actions

- Valuing of an Asset
- Accounting
- Proposed Distribution
- Theft
- Wasting of the Estate
- Management of Creditor's Claims
- Etc.

III. Contested Estate Administration

Creditor's Claims

- This is a way lots of non-Probate practitioners find themselves in Probate Court.
- Highly Technical
 - Four-Month Statute of Limitation
 - Additional time limits for filings
- Court Ultimately Decides

IV. Estate Planning to Avoid Probate

Some assets pass automatically and do not require probate:

- Assets with a beneficiary designation: retirement accounts, life insurance, bank accounts with a payable on death designation
- Jointly held assets

Can you avoid probate on assets that don't pass automatically?

- Yes! By titling assets in a revocable trust during your lifetime.

IV. Estate Planning to Avoid Probate

What is a revocable trust?

- Entity under which a Donor gives assets to a Trustee to hold in trust and administer according to the terms of the trust document.
- Will substitute.
- May be changed or revoked during life, but irrevocable upon death.
- Not subject to probate administration if properly funded during life.

How are trusts funded?

- Financial assets and accounts: Retitle account in name of trust with the relevant financial advisor or institution
- Real Estate: Prepare a new deed transferring real estate to trust.

Goal = To title everything either in trust or in such a way that it passes automatically by operation of law.

V. Contested Trust Administration

A note on the relevant law. . . The Uniform Trust Code

Types of Contested Trust Administrations

- Challenges to The Trust Document
- Challenges to a Trustee's Actions
- Removal of a Trustee
- Termination of a Trust

V. Contested Trust Administration

Removal of Trustee

- **Statutory Factors - UTC**
 - All Beneficiaries Agree – This is the Most Important
 - Unsuitable or Change in Nature of Trustee
 - Breach of Trust
 - Disagreement Among Trustees
 - Persistent Failure to Administer
 - Trustee is Unfit or Unwilling to Act as Trustee
 - Substantial Change in Circumstances (and all beneficiaries agree)
 - For Any Cause. . .
- **Statutory Factors – Common Law**
 - Or if it's in keeping with the intent of the settlor.
 - A number of Factors then apply

V. Contested Trust Administration

- Trusts can be terminated if
 - They're "Uneconomical"
 - \$100,000 is the Magic Number
 - Everyone Agrees and No Remaining Material Purpose

VI. Uncontested Trust Proceeding

Potential reasons for Probate Trust Administration

- Formality of court approval is required or helpful to satisfy a fiduciary or 3rd party
- Action that the parties could generally also accomplish by non-judicial settlement agreement, but parties are more comfortable with formal court proceeding to avoid future claims.
- Testamentary Trusts: Trusts created in a will

VII. Guardianship Proceedings

- There are four primary types
 - Adult Voluntary
 - Adult Involuntary
 - Minor Voluntary
 - Minor Involuntary

- The Things They Have In Common
 - Initiated by a Petition to Appoint a Guardian
 - Can be Guardianship Over the Person or the Finances or Both
 - Guardian Stands in the Place of the Person – Most Rights Taken Away
 - Guardian Owes Duties to the Ward
 - Guardian has to Account and Report

VII. Adult Involuntary Guardianship Proceedings

- The Process For Filing
- Children or Parents or Siblings or Closest Relatives are Interested Parties.
- Evaluation is Required
- The Key Question is Capacity
- Most Cases are Uncontested

VIII. Adult Voluntary Guardianship Proceedings

- Not For A Person In Need Of Guardianship
- Provides Ward with some control.
- Ward Must Understand the Process and How to Terminate
- Same fiduciary duty, same reporting/accounting requirements
- Ward can terminate it at any time.

IX. Minor Guardianship Proceedings

- Financial Guardianships
 - Often when a parent or relative dies
 - Court Supervision Until 18
 - These are only contested when Guardian is not named in will

IX. Minor Guardianship Proceedings

- Voluntary and Involuntary Guardianships (Non-Financial)
 - Consensual – Need Formal Agreement
 - Clear and Convincing Evidence that guardianship is needed and voluntary
 - Terminated upon petition unless Guardian contests
 - Non-Consensual – Contested Hearing
 - Formal Rules of Evidence
 - Clear and convincing evidence that parents are not fit and guardian is
 - DCF or police often involved.

X. Everything Else

- Adoption
- Name Change
- Birth/Death Certificate Change
- Emancipation
- Approval of Accountings under POA

XI. Q & A

