Wills & Estates

Some of Genealogy's Goldmines

by Jack Butler

From the first permanent settlement in America, courts were established to handle the disposition of property after death. Probate records are some of the easiest to access in a courthouse for they are usually public and open. Laws differ slightly from state to state, but once you learn about the probate process, you can apply your knowledge to work the system.

Probate is the lawful process that gives a deceased person's property to another person or persons. Probate records are important in genealogical research. They can provide information about family relationships. They usually tell the decedent's date and place of death. They may provide clues to a former place of residence. Reference to religious affiliation or land ownership provides guidance to research in church or land records. It may be possible to identify a parent or child of the deceased, possibly even several generations, by references to property such as a tract of land or a named slave.

There are two basic types of Probate:

- Testate - The deceased left a will stating how his assets were to be disposed of. The court followed the deceased's wishes – in accordance with the law.
- Intestate – The deceased left no will. The court appointed administrators to handle disposition of the estate.

When There Was A Will - Testate

Wills bequeath real estate and buildings attached to it. ***Testaments*** bequeath personal property. Which is why we have "The last will and testament of . . ."

There are three kinds of wills:

- ***Attested:*** wills prepared in writing and signed by the testator and responsible witnesses.
- ***Holographic****:* wills written in the handwriting of the person making the will, signed, dated, and not witnessed. It must be found among the individual's important papers after he dies.
- ***Nuncupative:*** oral, deathbed wills dictated to witnesses who convert the words to writing and present them to the court. Usually, they can only be used to dispose of personal property.

A will may name the testator's spouse and children or even grandchildren and collateral relatives. It may give the daughters' married names or be even more helpful by referring to "my daughter Sallie, wife of Fred Tomkins." A testator who died without marrying may name parents, brothers, sisters, and other relatives. On the other hand, the deceased may leave his property to "my beloved wife and children" without giving any names..

A will may refer to the testator's land in very specific terms. It may indicate from whom those lands were inherited or purchased. References to land owned in another county or state may indicate a former place of residence. Other wills may refer to land only in such general terms as "the plantation on which I now live" or "all my lands in Jackson County."

Approximate ages of children can be calculated if a guardian is appointed or provisions are made for certain property to pass to a child when he reaches twenty-one. The statement that a child has already received his or her portion of the estate usually indicates that he or she had married and established a separate household.

An executor named in a will is usually a member of the immediate family or a very close, long term friend. Often the widow and the eldest son are named joint executors. In cases where non-family members are appointed, it is not uncommon for two executors to be named in the will, with the requirement that both agree on the disposition of assets.

Witnesses to an early will are often relatives or neighbors. In more recent times, beneficiaries of the will cannot be witnesses.

The appointment by the court of a guardian to protect the rights and estates of minor children and incompetents was normal practice. In earlier years, widows were often considered incapable of being guardians of their children's property. The courts appointed men who may or may not have been related as guardians of the children.

Unless a guardian is named in the will, the court appoints a guardian for the decedent's minor children. The court is required to appoint a guardian when a child is left a legacy by a grandparent or another person even though both parents are alive.

The Probate process when the deceased person left a will was basically as follows:

- the executor presents the will to the court for probate.
- The Witnesses “prove” the will by acknowledging their signatures and testifying that the testator was of sound mind when he or she made the will.
- If it is not contested, the will is admitted to probate.
- The executor is authorized to carry out the provisions of the will; a bond may be required.
- If there are minor children, the court appoints a guardian for them.
- An inventory of the estate is made, and its value appraised by court-appointed appraisers.
- The executor pays the debts of the estate, collects any debts owed it.
- Following final settlement of the estate, the executor is dismissed of further responsibility.

When There is No Will – Intestate

Intestate estates are handled similarly to testate:

- ❖ An interested person, usually the surviving spouse or next of kin, files for letters of administration testifying to the decedent's death and asking for authority to settle the estate.
- ❖ If the court approves, it issues a letters of administration. A bond is required.
- ❖ After this, the probate process becomes very similar to that of Testate probate. Guardians are appointed, inventories are taken, etc.

Both forms create a Probate packet or file that may include any of the following, depending upon the jurisdiction and time period:

With A Will - Testate	**No Will - Intestate**
Wills	
Petitions for probate	Applications for letters of administration
Letters testamentary (Authorizes the executor to proceed)	Letters of administration (Authorizes the Administrator to proceed)
Executor's Bonds	Administrator's bonds (Administrators are far more likely to be required to post a bond than are executors.)
Will contests and proofs of heirship	
Appointments of guardians (It is not uncommon for different children to have different guardians.)	Appointments of guardians (It is not uncommon for different children to have different guardians.)
Inventories	Inventories
Sale bills (a list of sales of the deceased's moveable property – usually includes the name of the buyer.)	Sale bills (a list of sales of the deceased's moveable property – usually includes the name of the buyer.)
Assignments of dower	Assignments of dower
Accounts and final settlements	Accounts and final settlements
Decrees of distribution	Decrees of distribution
Receipts	Receipts

Unfortunately, in earlier intestate cases it often occurred that the only thing copied into the probate book were the estate inventories and the Administrators annual reporting of accounts. It is not uncommon for these documents to be all of an intestate probate file to survive.

A Couple of Legal Considerations for Wills

The first two, "femme covert" and dower, governed the rights of women:

As a set of English colonies, early America – up to at least the mid-1850s – adopted the English common law principle of **"femme covert"** (veiled or overshadowed woman). The basics of this principle were that as soon as a woman married, her husband became the representative of the joined couple and she became a secondary party, overshadowed by her husband. Any property that she owned came under his governance and even ownership.

There were some regional differences in how this principle was applied. For example, some Southern colonies had strict laws requiring an independent examination of a wife before a husband could sell property that had originated in his wife's family – basically, she had to agree to the sale.

During this time period, married women rarely owned property and rarely left wills.

There were two other exceptions to the "femme covert" principle:

- If a woman inherited property from a father who specifically stated in his will that the property she received was for her personal use and support and was not to pass into the husband's control, she retained her rights to that property. The father could also stipulate in his will that his daughter was to have full power to rent and devise the property and to receive rents, profits, and income from the property in her own name. Not surprisingly, this tended to happen when the father thought poorly of his son-in-law.
- Widows, freed from "femme covert" by the deaths of their husbands, became whole persons once more and could own and dispose of their property as they saw fit. They could and often did leave wills.

Happily, the principle of femme covert began to disappear from the States in the early to mid-1850s.

The other legal consideration for women was the concept of **dower**. The dower right guaranteed the widow the use of 1/3 of her husband's estate for her support during the remainder of her life. Note that it did not give her ownership of this 1/3, but just the use. She had no rights to dispose of the property and after her death it passed to her husband's other heirs.

The third oddity of carryover from English common law was **Primogeniture**, which required that when the father died intestate, the eldest living son inherited all of his real property (land, houses, etc.). The remaining heir – wife and children – could find themselves at the mercy of the eldest son. Primogeniture was abolished in most states around the time of the American Revolution.