

STRATEGY SPOTLIGHT*

Probate

Probate is the legal process where the validity of a will of a person who is deceased (or decedent) is proven and where a decedent's estate is administered and processed through the legal system. It is only after this process is complete that a decedent's probate assets can be distributed to the heirs.

KEY POINTS



An individual's estate will go through probate whether or not the decedent has a will.



Probate is a legal process that is necessary in order for probate assets to pass from the decedent to the decedent's heirs.



The executor is responsible for collecting a deceased's assets, paying all debts, and ultimately distributing the assets pursuant to the instructions of the will.

Probate provides an orderly and court-supervised transfer of a deceased person's probate assets to their heirs. One misconception about probate is that if there is a will then there is no need for probate. This is wrong. An estate will be probated whether or not the deceased has a will. If the deceased has written a will, the probate court must determine if it should be admitted to probate and deemed valid (i.e., the will has been properly executed and witnessed). If the decedent dies without a will, the court will take a more hands-on role, and the state's laws of intestacy will control who is appointed executor and who receives the estate.

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The probate proceedings may involve either formal or informal procedures. Most small estates and uncontested estates benefit from informal proceedings. In fact, all states have rules that allow estates under a certain dollar amount to be distributed through an affidavit without any court proceedings and supervision. In most instances, the complexity, length of time, and cost of probate proceedings will depend on state law and the type of property subject to probate.

Proving the Will

Before an estate can be probated, the will must be filed with the probate court. Admitting a will to probate is called “proving” the will. Proving a will means proving its genuineness in probate court. Genuineness means that the testator (person who has made a will) had the mental capacity to create a will, the testator was not under any fraud or duress, and the will was signed by at least two witnesses in the presence of each other and the testator. If there are questions about its genuineness, the court may determine that the will is invalid.

Self-proving affidavits are common in many states. These affidavits are usually signed during the execution of a will and attached to it. They are notarized and include an oath by each witness acknowledging their presence at the time of execution. Generally, if a will is not self-proved, one or all of the witnesses will need to sign an oath in front of a probate court official or notary indicating the will is authentic.

As a general rule, a will has no effect until a judge determines its legality. The executor usually files a petition to officially submit the will to probate to start the probate process. On the other hand, if there is no will, an interested party will petition the court to initiate probate proceedings.

The Probate Process

Generally, probate involves collecting the decedent’s assets, paying any debts and taxes, and distributing remaining property to heirs.

Even though each state has its own probate court and therefore has different rules, all states follow the same basic processes and steps, which typically include:

- Appointing the executor or personal representative.
- Publishing notice of death.
- Collection and protection of estate assets.
- Distributing the estate (including paying creditors and taxes).

Appointing the Executor/Guardian

A will names an executor. However, an executor cannot act until he is sworn in by the probate judge. This involves taking an oath and receiving Letters of Testamentary (this is a court order that gives the executor the authority to collect and control the probate assets). The executor is the person in charge of the probate estate after a decedent’s death. If there is no will or the named executor(s) cannot act, then the court will appoint one.

Additionally, although a guardian for minor children may be named in a will, a guardian must be officially appointed by the court before he or she can act on behalf of any minor children. If there is no will, then the probate judge will appoint a guardian for any minor children.

Publishing Notice of Death

The next step in the probate process is publication of the notice of death in the local newspaper. The purpose of the publication is to give notice of the estate's probate to those who think they may have an interest in the estate. Anyone who thinks they may have an interest in the estate may file a claim within a specific time frame. If the claim isn't made within that time frame, then that person (or creditor) is forever barred from making a claim.

Collection and Protection of Estate Assets

Next, the executor is charged with collecting and inventorying the deceased's assets. This is important for two reasons:

- **To ensure that the assets are sufficient to cover debts and taxes** — If the estate isn't large enough to satisfy creditors and heirs, then it is subject to abatement, meaning one or more beneficiaries will get less than what is given to them in the will.
- **To ensure all property is located and accounted** — The executor is responsible for finding, collecting, and protecting the estate's assets so that the intended beneficiaries receive the property that they are supposed to receive under the will. However, if a beneficiary is supposed to receive a specific asset that the deceased did not own at death, then state law may require that the beneficiary receive an asset of equivalent value.

Distribution of Estate Assets

In the final step, the executor pays all debts and distributes the assets to the heirs listed in the will. Creditors with valid claims get paid first. Generally, valid claims will get paid in the following order (although there may be variation from state to state):

- Estate administration costs.
- Family allowances.
- Funeral expenses.
- Taxes and debts.
- All remaining claims.
- After all creditors have been paid, the heirs get what's left, and the executor can close the estate.

ADVANTAGES AND DISADVANTAGES OF THE PROBATE PROCESS

Advantages

- Limits time for creditor claims.
- Supervision of executor/guardian.

Disadvantages

- Assets cannot be distributed, with some exceptions, to beneficiaries until probate estate is closed, which may be 9-12 months.
- Attorney fees and court costs make probate expensive (some states allow attorney fees as a percentage of the estate).
- Probate is a public court hearing. Also, the will is filed with the court and becomes part of the public record.

What Types of Assets go Through Probate?

Not every asset a deceased individual owns has to go through probate. Generally, only individually owned real and personal tangible and intangible property must go through probate. Tangible and intangible personal property is probated in the state in which the deceased lived; however, real estate is probated in the state where the property is located. This means that there can be a probate in more than one state. However, not all property is subject to probate. There are some exceptions. These non-probate assets include assets with a beneficiary designation, such as life insurance, annuities, and retirement plans. Other non-probate assets include assets owned as joint tenants and assets owned by a trust.

The Bottom Line

Although the probate process can be relatively easy, without the necessary knowledge and preparation, there can be substantial delays. In short, a properly drafted will, updated regularly to account for life changes, organized records of debts, personal property, and other assets simplifies the probate process. The more these steps are taken, the easier it is for the executor to navigate the probate process.

Additional Resources

[Estate Planning - Strategies for Getting Started](#)

[What Type of Planning Do We Really Need? Strategy Snapshot](#)

[Revocable Living Trusts Strategy Spotlight](#)

[Importance of a Will Strategy Spotlight](#)

[Health Care Power of Attorney and Living Will Strategy Spotlight](#)

[Financial Power of Attorney Strategy Spotlight](#)



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