

LIFE ADVANCED MARKETS

Understanding the probate process

WHAT IS PROBATE?

Probate is a legal process used by a state court to interpret a deceased person's last will and testament, approve the appointment of a personal representative, and in some cases, approve the payment of claims and allow distributions to those identified in the will.

The specific steps to be followed in the probate process are determined by the laws of each state. Consequently, the procedures may vary from state to state, so it is generally a good idea to consult an attorney to determine:

- Whether a probate proceeding is necessary.
- Whether a personal representative must obtain a bond (a requirement that is sometimes waived in the will).
- What reports (such as an inventory or final account) must be prepared and filed with the court.

Depending on the amount of the probate assets, some states allow simplified or abbreviated procedures to settle smaller estates. The threshold amounts vary, but generally, if the total value of the probate assets is \$75,000 or less, then a simplified process may be used (though in some states, the threshold may be \$100,000 or more).

DOES EVERY WILL NEED TO GO THROUGH PROBATE?

No, not all wills require probate. In some cases, assets may pass directly to beneficiaries without the need for a probate, as discussed in more detail later.

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IS PROBATE REQUIRED IF THE DECEASED PERSON LEFT NO WRITTEN WILL?

Yes. If the deceased person left no written will, most states will consider that person to have died “intestate,” meaning without a “last will and testament.” In fact, many states may also require that a will be typed, as opposed to handwritten. A handwritten will is sometimes referred to as a “holographic will” and may not be eligible to be admitted for probate. For someone who dies “intestate,” some courts may require a more formal probate process, in which the personal representative must schedule a hearing and obtain court approval before taking certain actions. This is sometimes referred to as a “formal” or “court-supervised” probate.

ARE THERE DISADVANTAGES TO PROBATE?

The probate process has a number of characteristics that may make it undesirable for some individuals. Here are a few things to consider:

1. **Public nature of probate proceedings:** First of all, because probate is a court procedure and most court proceedings are public, probate filings are available for any member of the public to view at any time. This would generally include the will, death certificate, inventory of assets, information as to who will receive distributions of assets, and required accountings. This information can continue to be publicly accessed after the probate is completed and the court file has been closed. Most people would prefer to keep financial information and other information related to the estate private, especially in light of the increase in identity theft and related crimes.
2. **Unavoidable fees and costs:** Generally, there are administrative costs associated with a probate, including court filing fees, certified document fees, and publication fees (for filing legally required notices in an official legal newspaper). In addition to these costs, the personal representative is generally allowed to charge fees for their services. If an attorney is needed, the attorney’s fees will also need to be paid. The combined fees and costs can easily exceed several thousand dollars.
3. **Time delays and required notice to the decedent’s creditors:** Probate rules in most states require that the personal representative provide a written notice of the probate proceeding to each of the decedent’s creditors. In addition, a written notice to creditors must be published in an official, local legal newspaper. The estate may need to remain open for several months

in order for creditors to have sufficient opportunity to assert claims against the decedent’s estate. Therefore, the personal representative may want to wait to distribute assets to those named in the will until after the claim period has run in case any unexpected claims are filed.

4. **Probate may be necessary in more than one state:** A state court only has jurisdiction over residents of, and property located in, that state. Consequently, if an individual dies owning property in more than one state, then a probate may need to be commenced in each such state. Generally, the primary probate proceeding will take place in the state in which the deceased person maintained their primary residence. The probate in the other state is referred to as an “ancillary probate.” Obviously, the need to have multiple probate proceedings will likely result in additional fees and costs.

These are four reasons why it may be better to avoid probate, if possible. Avoiding probate is often one of the main objectives in estate planning.

HOW CAN PROBATE BE AVOIDED?

Whether probate will be required depends on the following: (1) whether assets are owned solely by the decedent at death; (2) the total amount of such assets; and (3) whether the asset can be transferred outside of probate.

Examples of assets which may be transferred outside of probate include:

- Life insurance death benefits paid to the beneficiary named in the policy.
- A qualified retirement account (e.g., IRA, 401(k) plan, SEPP, SIMPLE, Roth IRA, 457) that passes directly to beneficiaries designated by the account holder or plan participant.
- Annuities where the contract designates a beneficiary.
- A bank deposit account or other financial account designated as “transfer-on-death” (TOD) or “payable-on-death” (POD) to designated transferees.
- Title to real estate, via a transfer-on-death deed (TODD), if allowed in that state.

Another common method to avoid probate is by use of a trust – commonly a revocable living trust established by the decedent during their lifetime. Generally, any assets held in a trust will transfer outside of probate to the beneficiaries identified in the trust.

Step-by-step overview of the probate process

This brief description of the probate process is based on the *Uniform Probate Code (UPC)*. Although the UPC aims to standardize laws related to overall probate process, not all states have adopted the entire code – but many states have incorporated at least parts of the UPC into their own laws.

Step 1: Prepare the required application or petition for probate of the will

Step 2: File the following documents with the probate court and pay the applicable filing fee:

- Application or petition for probate
- Original, signed will
- Certified copy of the death certificate

Step 3: Publish notice to creditors in the official legal newspaper, and provide written notice of the probate to the deceased person's creditors, as required by state law.

Step 4: Order any necessary appraisals to determine valuation of assets; prepare and file an inventory of assets subject to probate, using values as of the date of death.

Step 5: Pay any allowed claims and administrative expenses (e.g., taxes, expenses of final illness, funeral, personal representative's fees, attorney's fees or other professional fees).

Step 6: Make appropriate interim distributions to beneficiaries and charities.

Step 7: Prepare and file a final account. The beginning balance shown on the final account should equal the values of assets shown on the inventory. Each item of income to the estate should be listed, as well as all expenses paid. The net amount should equal the remaining assets on hand for distribution to the beneficiaries listed in the will.

Step 8: Close the probate and be sure the personal representative is discharged from further service.



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