



# Understanding the Probate Process

**KEY QUESTIONS AND ANSWERS**

## **Understanding the Probate Process**

Loss of a loved one is among the most difficult of experiences, and the legal and financial issues arising after a death can be overwhelming. The following list of frequently asked questions regarding the probate process may help ease some of your concerns during this challenging time.

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## What is probate?

**Probate**—the legal process that takes place after someone dies—is designed to transfer assets owned by a decedent to his or her beneficiaries under a will or state law. It is the court-supervised process by which legal title to property is transferred from the decedent's estate to his or her beneficiaries.

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## What is involved?

Typically if someone dies with a valid will, probate involves:

- ▣ Proving that a will is valid
- ▣ Appointing a legal representative
- ▣ Taking inventory and appraising the decedent's property
- ▣ Paying debts and taxes
- ▣ Distributing property according to the terms of the will

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## What if my loved one did not have a will?

If your loved one dies without a valid will, in order to properly administer the decedent's assets, the estate will still require probate if it exceeds the statutory limits. With a valid will, the estate is distributed at the close of probate. Without a valid will, the estate is distributed to beneficiaries in accordance with the rules established by state law. State law also determines who may be appointed as the legal representative.

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## My loved one named me as the legal representative. What happens now?

You should consult with a lawyer as soon as possible. The legal representative named in a will is not obligated to serve and may choose to decline the appointment or resign at any time. However, if you choose to pursue the role, a lawyer can help you ascertain if a probate is necessary. If you determine a probate is either necessary or desirable based on the totality of the circumstances, a lawyer will help you file the paperwork to open the probate and obtain court approval for your appointment as legal representative.

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## Does all property go through probate when a person dies?

Not all property goes through probate when someone passes away. "Probate assets" are property subject to the authority of the probate court. "Non-probate assets" are distributed outside the probate process and are part of a person's non-probate estate.

Probate assets are generally those that are in name of the deceased, and also can include vehicles, household goods and furnishings, and personal collectibles.

Non-probate assets are those which pass by beneficiary designation or form of ownership under a written instrument other than a will. Your lawyer can assist you in determining which assets are subject to probate.

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## How long does probate take?

This will vary from state to state. In many states, there is a waiting period required by law before a probate can be completed to ensure that all interested parties and creditors have an opportunity to respond to the initiation of probate. Probate frequently takes longer than the required waiting period if the estate is complex or property must be sold before concluding. Even though the probate process takes months to complete, the legal representative can manage the estate, sell property and pay needed bills immediately after appointment. If needed, distributions can be made from the probate estate to take care of the decedent's spouse or dependents well before the probate is finished.

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## The value of my loved one's probate assets are below the amounts required for probate.

### Do I need to do anything?

Even if the value of the property is below the amount required for probate, something needs to be done to transfer assets that normally would be probated. There are several easier alternatives available. For example, most states have a small estate process, which is simpler than normal probate. A statutory affidavit can be used for some bank accounts. Also, many vehicles can be re-titled using an affidavit procedure with the Department of Motor Vehicles.

Without conferring with an experienced lawyer, even these simpler processes can be difficult. In addition, if all the assets of the estate pass outside of probate, there may be state and/or federal tax issues. A lawyer or an accountant can assist you in determining and minimizing tax obligations associated with the decedent's estate.

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## Can I file for probate without a lawyer?

Yes. However, in most cases, it can be difficult to attempt to interact with the court as a legal representative without the assistance of a lawyer. Additionally, the legal representative can be held personally liable for errors, omissions and negligent actions no matter how well intended. Also, even in a simple and uncontested probate, there are a number of legally required notices and accountings with formal filing deadlines and formatting requirements. By working with a lawyer, the legal representative is best positioned to fulfill his or her duty to the creditors and beneficiaries, and protect himself or herself from financial liability.

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I am not the legal representative of the estate, but I am an heir/beneficiary of the estate. Should I consult with an lawyer?

One purpose of the probate process is to protect the rights of heirs and beneficiaries of an estate and provide a forum for objections. If you believe your rights need protection, a lawyer is best positioned to assist you in evaluating your claim and enforcing your rights. A lawyer can advise you on potential issues that may affect you as a beneficiary, such as disclaiming your inheritance in favor of your heirs or how to manage your inheritance with an eye toward long-term goals and tax planning needs. If you have inherited money, a lawyer can also assist you with updating or creating your own estate plan.

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What happens if my loved one owned property in more than one state?

If the decedent owned property in more than one state, there is an additional layer of complexity. Often, this requires two or more proceedings, one in each state.

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My loved one had a trust. Do we still need a probate?

If the trust was a revocable living trust and all of the decedent's assets were titled in the trust, then the decedent's assets will be held or distributed in accordance with the terms of the trust. A probate may not be necessary. If you are named trustee or successor trustee under the trust, many of the same rules that apply to a legal representative appointed under a will also apply to a trustee. A trustee also has a fiduciary duty and can be personally liable for his or her acts or omissions. You should still confer with a lawyer and an accountant to ensure that you have properly identified all your loved one's assets, debts and tax obligations. A probate may be necessary if there are assets outside of the trust. Also, there are forms of trust that require more complex administration.



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## What should I do if I have questions?

Contact your probate lawyer or a member of our estate planning and probate team. Our estate planning team includes a number of professionals; however, if you contact Darin Christensen at 503.499.4497 he will be able to help you. You can also find more information about us online at [www.bullivant.com](http://www.bullivant.com).