

## **Probate – A General Overview of the Process and Multi-State Issues**

Probate is a mandatory process in which the state determines what you own when you die, who gets it, and who is in charge of distributing it. Every state in the U.S. has a probate system. The process is relatively similar among all states. However, some states have very strict probate laws that can make the entire process much more time consuming and expensive than in other states.

First, a few definitions:

- “Estate” - All property owned by the decedent.
- “Decedent” - The person who has passed away.
- “Personal representative” - The person is in charge of distributing the estate.
- “Interested party” - Any person who is an “heir” at law or anyone named in the will as a “devisee.”
- “Heirs” - Those who would inherit the decedent’s property if there was no will, according to the state laws of intestacy.
- “Devisee” - Anyone that gets something under the will.
- “Letters Testamentary”

### **Step 1: Gather Information:**

**Locate decedent’s will.** If the decedent has a will, use it as the starting point. You should find out who is named as the personal representative and make them aware of that fact. They should be the one taking charge and filing for probate. The personal representative should find out who the interested parties are and get their contact information.

**Determine what property the decedent owned.** Whether or not probate is required depends on what property the decedent owned. Each state has its own probate laws. In Utah, probate is required if the decedent owned more than \$100,000 worth of assets in their individual name, or if they held real property in their individual name (regardless of the value of the property). There are some exceptions. Real property held in joint tenancy, life insurance proceeds, retirement accounts, and payable on death accounts, for example, are not subject to probate in Utah. Property that is held in a trust is not subject to probate because it is not held in the decedent’s individual name (For more about revocable trusts, see our post on revocable trusts). NOTE: Neglecting to file a probate when it is required is very ill advised, especially when real estate is involved. This only leads to problems down the road.

**Determine whether to file informal or formal probate.** Informal probate is exactly what it sounds like. It is a streamlined, watered down version of probate. The upside to informal probate is that there are fewer filing requirements than with formal probate and thus it is easier and less expensive. The downside to Informal probate is that it leaves the personal representative and the estate open to potential claims from interested parties and creditors for

a longer period of time than formal probate. Generally, informal probate is recommended when all of the parties are amicable and there is no foreseeable dispute regarding the will or the actions of the personal representative. However, it is highly recommended that you consult with a probate attorney before making this determination.

**Step 2: Apply for Probate.** NOTE: The probate process requires several filings with technical legal requirements. Before filing anything with the probate court, you should consider consulting with an experienced probate attorney in your local jurisdiction.

**File the Application.** The personal representative, or executor of the estate, should file an application for probate of the decedent's will and appointment as personal representative. An original copy of the decedent's will should be included. A filing fee is required. Different courts have different fees. In Utah, the probate filing fee is \$360.00 (at the time this article was written).

**Send Notice to Interested Parties.** All interested parties to the will must be notified that an application for probate has been filed and that the applicant is seeking appointment as personal representative. The reason for this requirement is to allow any interested party to object. An objection may be based on a belief that the will is invalid or that someone else is entitled to appointment as personal representative. If no objections are made within the statutory period (ten days in Utah), and there are no other problems with the application, the probate court will issue Letters Testamentary to the applicant. Problems arise where an interested party cannot be found, and thus cannot be given notice. In that case, depending on the jurisdiction, notice by publication is required.

The technical requirements for what has to be stated in the notice may vary depending on the jurisdiction. You should consult with an experienced probate attorney. Assuming none of the interested parties has any objections, the court will appoint the personal representative and issue "letters testamentary." This is an official document from the registrar of the court stating that the person is officially appointed as personal representative. With this document, the personal representative can offer proof to banks, title companies, county recorders, etc...that they are legally authorized to transfer and take possession of assets the decedent owned when they died.

**Step 3: Gather and Marshal Assets, Publish Notice to Creditors.** Once letters testamentary have issued, there is a mandatory minimum period of time for which the personal representative must give notice to creditors of the decedent's death and the ensuing probate of the estate. This is usually done through publication in a newspaper in the location where the decedent lived when they died. During this period, creditors (if there are any) will submit claims to the personal representative or the registrar of the court. These claims are usually things like final utility bills, credit card bills, etc... In the meantime, the Personal representative should be gathering all of the assets of the estate and preparing for distribution. This may include selling real estate, transferring bank accounts, business interests, stocks, etc... This may also include taking possession of personal property (the gun collection, jewelry, home furnishings, tools, etc...). Assuming the notice period has passed and all creditor claims have

been submitted, the personal representative then pays the legitimate creditor claims and then makes distributions to the devisees listed in the will (or the intestate heirs if there is no will). Keep in mind however, depending on the state, there are court filings that may or may not be required at each step along the way.

**Step 4: Close the Estate.** The wrapping up stage usually involves filing a final accounting with the court and obtaining “receipts and releases” from the devisees to which the personal representative has made distributions. In a receipt and release, the devisee acknowledges that what they received and releases the personal representative from all claims regarding the probate of the estate. Next, the personal representative files a closing statement with the court. If the estate is being closed formally, the personal representative may petition the court for a final order declaring that the estate has been properly probated and the personal representative is officially discharged of their duties and is no longer liable for anything regarding the probate of the estate (except under claims for fraud or breach of fiduciary duties). This petition usually requires an in court hearing. It is considered best practice when a dispute is anticipated.

**General Probate Jurisdiction Requirements:** In general, the probate court of the state where the decedent lived when they died has jurisdiction over the estate. There are a few exceptions though. Some property is not required to pass through probate and can pass directly to the decedent’s loved ones. These assets include, among other things, real property held in joint tenancy (will only pass to the other joint tenant), retirement accounts, payable-on-death accounts, and life insurance proceeds (keep in mind, however, that all of these assets are still included in your taxable estate for purposes of the estate tax).

Another exception is real property located in another state. When this situation occurs (which is quite common), the personal representative may need to file an “Ancillary Probate” in the state where the property sits. An ancillary probate gives the personal representative authority to carry out its duties (hold, manage, and distribute assets) with regard to the out of state property. Some states (about 15 currently) make it very easy on personal representatives of estates by allowing transfer-on-death real property. Holding property in this way makes ancillary probate unnecessary and can streamline the whole process.

### **Consult with an Attorney**

This overview is generalized and contains general advice that may not apply to you. If you find yourself in a situation where you must navigate the probate laws of your state or another state, you should speak with an experienced probate attorney that specializes in probate in the state which has jurisdiction over the estate you are in charge of.