

# Understanding Probate

Probate court is a specialized type of court that deals with the property and debts of a person who has died. The basic role of the probate court judge is to assure that the deceased person's creditors are paid, and that any remaining assets are distributed to the proper beneficiaries.

## What Is Probate?

Probate is a legal procedure by which a court oversees the distribution of property of a person who has died. Many states have a specialized probate court. The court appoints someone to take control of the deceased person's assets, ensure that all debts are properly paid, and distribute the remaining property to the proper beneficiaries.

## Probate Without a Will

When a person dies without a will, the property is distributed to the deceased person's next of kin, as determined by the state's probate law. This part of the probate law is known as the law of intestate succession. It outlines the order in which the next of kin inherit. A surviving spouse gets a share of the decedent's property. The law further breaks down the order in which grandchildren, siblings, parents, and aunts and uncles inherit.

The details vary from state to state, but as my old mentor used to say, "Don't worry, if you haven't made a will, the State of California has made a will for you."

## Probate With a Will

When a person dies with a will, the property is distributed to the people or organizations (e.g., nonprofits) the will designates to receive the assets. To probate a will, the court must also make a determination that the will is valid. If someone contests the validity of the will, the court will decide the matter.

In California (community property), barring a separate agreement between spouses, one-half of the property earned by the couple during marriage belongs to the surviving spouse, and the will dictates how the decedent's share of the community property and the decedent's separate property are distributed.

## The Probate Process

The probate process begins with someone filing a petition for probate with the probate court. This is usually done by a relative or someone designated in a will. If there is a will, a copy of the will must also be filed (unless it has already been filed in one of the states allowing filing prior to death).

## The Probate Process: Four Steps

The court will then issue an order appointing someone to represent the estate. Generally, this person is called a personal representative or executor, but may also be called an administrator if there is no will, and an executor if there is a will. Most, if not all, wills designate someone to fill that role. Often, the personal representative hires a probate lawyer to assist in some of these tasks.

## The Cost of Probate

The costs of probate include, among other things, court filing fees, costs for publishing notices in newspapers, and attorney's and executor's fees. If the estate is complex, there may also be fees for an accountant. Fees for a probate attorney may be based on an hourly rate, a percentage of the value of the estate, or a combination of these.

A probate can take months, or even years, to complete. For an average modest estate, it can take from six months to two years. The longer it takes, the more it costs. If any heirs contest a will, things get more time-consuming and expensive.

Probate makes the deceased person's financial situation a matter of public record. This includes the nature and extent of the assets, the person's debts, and who will get the assets.

**Avoiding Probate**

One way to avoid probate is to hold assets in a revocable trust. One must carefully plan by titling assets and naming beneficiaries on assets not titled in a trust, e.g., pay on death or transfer on death accounts.