



PROBATE



The material in this handout represents general legal principles. The law is continually changing; although the information in the handout was current as of the date it was drafted, some provisions in this pamphlet may have changed. It is always best to consult an attorney about your legal rights and responsibilities regarding your particular case.

Q: WHAT IS PROBATE?

A: Probate is the court-supervised legal process that determines the validity of your will, if you have one, and gathers and distributes your assets to those designated as beneficiaries in the will. If you die without a will, it is the process for distributing your assets according to the State intestacy statute. The term probate is also used in the larger sense of probating your estate.

Q: WHO IS RESPONSIBLE FOR PROBATE?

A: The executor or personal representative named in the will is in charge of this process, and probate provides an orderly method for administration of the estate. The executor is held accountable by the beneficiaries (and sometimes is supervised formally by a probate court). The executor is entitled to a reasonable fee or commission. Most state probate laws encourage or provide for partial distribution during the period of administration and assets may generally be distributed in kind rather than sold during this time. The tax laws generally focus the responsibility for death tax filings and payments on the executor under a will. Thus, the choice of an executor is an important one.

Q: HOW DOES PROBATE WORK?

A: Your assets are collected and applied to pay debts, taxes, and the expenses of estate administration. The remaining assets are then distributed to beneficiaries. Probate assets include those owned in your name and that are not transferred to another at death by contract or operation of law. Non-probate assets include life insurance payable to another, pensions and IRAs payable to another, accounts payable on death to another and any property owned with another with survivorship rights. Depending on your state's laws, property owned by spouses as community property may or may not be subject to probate. Even if an asset is not subject to probate it still may be taxable under estate tax law.

Q: WHAT HAPPENS IN PROBATE?

A: Legal title of property you own individually transfers to your beneficiaries. If you die with a will, the probate process will establish the validity of your will under state law and distribute your property covered by your will in accordance with its terms and conditions. In some states (for example, California, Colorado, Florida, Georgia, Texas, Virginia, Washington) the probate process is streamlined for estates under certain dollar limits.

On the other hand, if you die without a will ("intestate"), the probate court appoints an administrator to receive claims against your estate, pay creditors, and distribute all remaining property in accordance with the laws of the state. Because you have no will, your property must go through "probate" for legal title to transfer to your heirs at law. The law of the state of your legal residence defines your heirs at law. In most cases, there is a presumption that your property will pass to your spouse and children.



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Q: HOW DOES PROBATE START?

A: If you die with a will, probate usually begins by your executor filing a petition to administer your will. An executor is the person you named in your will and the executor's job is to protect your property until all the debts and taxes have been paid and then ensure the remaining property is transferred to your beneficiaries. An executor has a special duty to act with the highest degree of honesty, impartiality, and diligence.

Q: HOW MAY I FIND MY STATE'S PROBATE INFORMATION?

A: Many probate courts are part of county governments and many counties have their own websites that include probate information. You can contact your county's probate court or ask your attorney for information on your state's probate laws and regulations.

Q: I'VE HEARD I SHOULD AVOID PROBATE AT ALL COSTS; SHOULD I?

A: Some states have more complicated and expensive probate processes than others. For most people, the complexity of the probate procedures of the state you live in is probably the single most important factor in deciding whether to use probate avoidance techniques. Many states have streamlined procedures for small estate administration, and in many cases the probate process is not the expensive, time-consuming beast that it is portrayed as by those individuals advocating "*Living Trusts*." For some people, probate avoidance should be the primary goal of their estate plan, but for many other families, especially those of moderate means, it can actually be more trouble to avoid probate than to go through the probate process. If you do intend to save money by avoiding probate, be sure you consult an attorney to make sure you will accomplish all of your goals with your probate avoidance plan.

HELPFUL WEBSITES:

North Carolina Legal Aid: <http://www.legalaidnc.org/>

North Carolina Courts: <http://www.nccourts.org/Support/FAQs/FAQs.asp?Type=18&language=1>

Armed Forces Legal Assistance Website: <http://legalassistance.law.af.mil/>