

Estate Planning Basics: Understanding Probate

Your estate consists of your assets (money, real estate, and belongings). Your estate also includes your debts, expenses, and unpaid taxes. Once you pass away, someone must take charge of your estate and settle your affairs. This person will take your estate through probate, a court-supervised process that winds up your financial affairs. The proceedings take place in the state where you were living at the time of death. Owning property in more than one state can result in multiple probate proceedings. This is known as ancillary probate.

How does probate start?

If your estate is subject to probate, someone (usually a family member) begins the process by filing an application for the probate of your will. The application is known as a petition and the petitioner brings it to probate court along with your will. Usually, the petitioner will file an application for the appointment of an executor at the same time. The court first rules on the validity of the will, and assuming that the will meets all of your state's legal requirements, the court will then rule on the application for an executor. If the executor meets your state's requirements and is otherwise fit to serve, the court generally approves the application.

What is an executor?

The executor is the person whom you choose to handle the settlement of your estate. Typically, the executor is a spouse or a close family member, but you may want to name a professional executor, such as a bank or attorney. You will want to choose someone whom you trust will be able to carry out your wishes as stated in your will. The executor has a fiduciary duty — meaning, a heightened responsibility to be honest, impartial, and financially responsible. Now, this does not mean that your executor has to be an attorney or tax wizard, but merely has the common sense to know when to ask for specialized advice.

Your executor's duties may include:

- Finding and collecting your assets, including outstanding debts owed to you
- Inventorying and appraising your assets
- Giving notice to your creditors (e.g., credit card companies, banks, retail stores)
- Filing an estate tax return and paying estate taxes, if any
- Paying any debts or other taxes
- Distributing your assets according to your will and the law
- Providing a detailed report of how the estate was settled to the court and all interested parties

The probate court supervises and oversees the entire process. Some states allow a less formal process if the estate is small and there are no complicated issues to resolve. In states with informal probate processes, the court may be involved only indirectly. This may speed up the probate process, which can take years in some instances.

What if you do not name an executor?

If you do not name an executor in your will, or if the executor cannot serve for some reason, the court will appoint an administrator to settle your estate according to the terms of your will. If you die without a will, the court will also appoint an administrator to settle your estate. This administrator will follow a special set of laws, known as intestacy laws, which are made for such situations.

Is all of your property subject to probate?

Although most assets in your estate may pass through the probate process, other assets may not. It often depends on the type of asset or how an asset is titled. For example, many married couples own their residence jointly with rights of survivorship. Property owned in this manner bypasses probate entirely and passes by "operation of law." That is, at death, the property passes directly to the joint owner regardless of the terms of the will and without going through probate. Other assets that may bypass probate include:

- Investments and bank accounts set up to pass automatically to a named person at death (payable on death)
- Life insurance policies with a named beneficiary (someone other than the estate)
- Retirement plans with a named beneficiary
- Other property owned jointly with rights of survivorship

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