



What Is Probate?

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I hear this question fairly often: “Just what exactly is ‘probate’?” Many people have heard the term, and they know it has something to do with estate planning, but they aren’t quite sure what probate is.

Probate is essentially a title-clearing function. It operates according to state statute and involves the action of a court, which is why it tends to take awhile and cost a lot.

Probate is necessary when a person dies with assets titled in his or her name alone. In order to transfer those assets to someone else, the person signing the transfer document needs to have legal authority to do so. For example, to sell a home, someone must sign a sale contract and a deed, and a person does not have authority to do those things just by virtue of being a relative of the deceased person or because he or she was named Executor or Personal Representative in the deceased person’s will. Instead, a court must empower that person to act, and this is done via probate.

The following steps are involved in probate: First, the Executor meets with an attorney to get the process started. The attorney will need several items, including the will and a list of assets of the person who died. The attorney prepares and files a petition with the court, which asks the court to open a probate estate. The court may require the Executor to post a bond. The court then issues a document called “Letters Testamentary” or “Letters of Office” to the Executor. These Letters give the Executor legal authority to gather the assets of the deceased

person and to dispose of them according to the will. If the person did not leave a will, probate involves an extra step in that the court must select who the Executor will be. In that case, the laws of the state determine who will receive the person's assets (for example, a spouse, children, siblings, or parents).

Next the attorney files a notice in a local newspaper. The notice states that the person has died and gives creditors a certain amount of time to make claims. The attorney also sends various notices to the heirs and the persons given assets under the will.

In the meantime, the Executor works on an inventory and an accounting for the estate. The inventory lists the assets of the estate and their value, and the accounting lists all monies coming into or going out of the estate. For example, bills must be paid while the estate is being administered, and the Executor keeps track of this by doing the accounting. Some states require notice of the accounting to be filed in the newspaper.

When the assets have been gathered, the bills paid, and the time for creditors to make claims has passed, the Executor will distribute the assets to the persons entitled to them. Various notices will again be sent to heirs and other interested parties, and the attorney will file documents with the court, asking the court to release the Executor and close the estate.

Probate generally takes around nine months to complete. The time varies depending on the complexity of the estate and the responsiveness of the Executor, attorney, and court. In an upcoming column, I'll discuss ways to avoid probate.

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