

# Answering your legal questions about probate

Many people assume probate is a time-consuming, expensive process. While it does entail costs and take time, probate may be less cumbersome than you fear. This brochure presents basic information about what probate does and how it works – and when it is unnecessary.

## What is probate?

Probate is a court-supervised procedure for transferring ownership of someone's assets after he or she dies. This process validates the person's will and distributes property as the will directs. If the decedent left no will or other legal arrangement for transferring assets upon death, the estate still goes through probate.

The goal of probate is to protect the rights of heirs or other beneficiaries and others who have an interest in an estate. Probate determines what the estate owes in taxes and to creditors.

## Who oversees the probate process?

The will names a personal representative who is responsible for overseeing the probate of an estate. A personal representative (called an executor in many states) may be a family member, friend, business associate, financial institution, or trust company. If the will designates no personal representative, the court appoints one.

The personal representative's main duties are to:

- Identify and collect the decedent's assets.
- Manage those assets during the probate process.
- Determine the surviving spouse's rights under the state marital property law.

- Pay debts, claims, taxes, and probate administrative expenses.
- Make any distributions to the surviving spouse or dependent children required under state law.
- Distribute the remaining assets to those named in the will (or if there is no will, to the heirs at law).

## What's the difference between formal and informal administration?

A probate judge presides in formal administration, while the county's register in probate supervises informal administration. Generally, you must use formal administration if the will has contested issues. Only a probate judge can rule on such disputes. If contested issues arise during informal proceedings, the matter would have to be switched to formal administration.

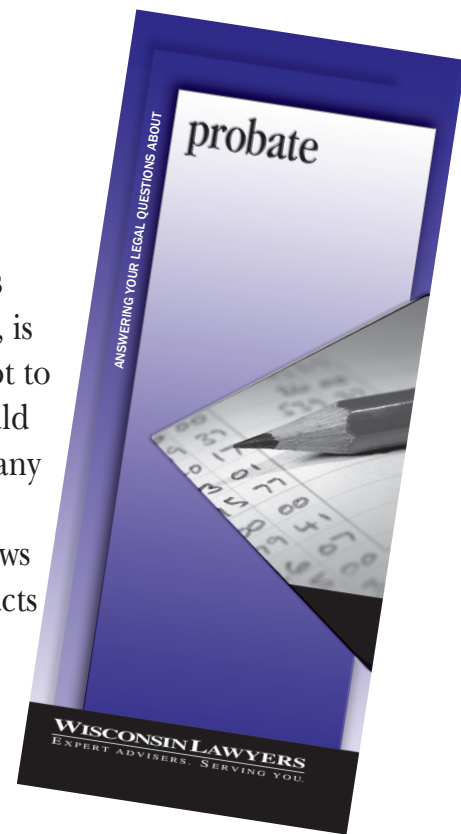
Informal administration costs less than formal, and, in many cases, you can handle all or most of the process through the mail. Milwaukee County, however, does require the personal representative to appear in person at the initial hearing.

## Should I hire an attorney to handle probate?

The personal representative may wish to turn to a lawyer for professional legal advice related to the probate process. The personal representative is free to hire any attorney of choice; this need not be the lawyer who drafted the will.

For formal probate proceedings, a lawyer must represent the estate's personal representative. And, though not required, it's advisable for the attorney to attend informal administration hearings, if there are any. The register of probate's staff can answer basic questions about procedures and preparing forms. But, unlike an attorney, they can't evaluate your case and provide legal advice.

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## Which assets can bypass probate?

Probate is unnecessary if the property solely owned by the decedent totals less than \$50,000 in value. Then all that's required to transfer property is completing a "transfer by affidavit" form.

Also exempt from probate is property titled in joint ownership, which automatically passes to the surviving owner. In addition, life insurance payments and funds in an IRA, pension, 401(k), or other retirement plan bypass probate – if the decedent has named beneficiaries other than the estate. Those beneficiaries would receive the funds directly. But if the decedent named no beneficiaries, or named the estate as the beneficiary, these assets would go through probate.

Other assets may be exempt from probate, as well, if the decedent has done the necessary estate planning before death. More on this later.

## How much does probate cost?

The major probate expenses include court costs, costs of putting up a probate bond if bond is not waived by the will, and fees paid to the personal representative and the attorney. The funds to pay these expenses come out of the estate.

The value of the estate's assets will determine the court filing fees. Attorney fees vary depending on the complexity of the estate. Also, fees vary from one attorney to another, depending on experience and other factors. Billing methods also differ. Some lawyers charge by the hour; others charge a fixed fee. But by law, the attorney cannot base charges for probate services on a percentage of the estate's value.

Once an attorney has basic information about the estate, he or she should be able to give you a rough estimate of total fees. Be sure you understand the fee arrangement before retaining the attorney.

The personal representative has a right to reimbursement for expenses incurred in managing and settling the estate, and for time spent carrying out those duties. Payment for the latter may equal 2 percent of the inventory value of the estate assets (less any mort-

gages or liens). Or it may be some other amount the decedent specified, or the beneficiaries agreed upon, or the court approved. If the personal representative is derelict in carrying out duties, the court may reduce or deny compensation. The court also must approve expenses and attorney fees in formal probate proceedings.

### What taxes does probate involve?

The estate must pay state and federal income taxes on income the estate earns from date of death until completion of probate. In addition, there may be state and federal estate taxes. The value of the estate assets determines the amount of estate taxes.

No estate taxes are due on property distributed to a surviving spouse who is a U.S. citizen. In addition, in 2008 the first \$2 million of assets are exempt from federal estate tax. This exemption is scheduled to increase under current law to \$3.5 million for persons dying in 2009. The federal estate tax is repealed for one year in 2010, but returns in 2011 with a \$1 million exemption. The Wisconsin estate tax expired Dec. 31, 2007.

### How long does probate take?

Probate can take two years, even longer, for a large or contested estate. But the process may last up to six months even for a small, uncomplicated estate. Why does it take so long?

One reason is the time allowed for creditors to file claims against the estate. Usually it takes a few weeks to notify creditors after death. Once that's occurred, creditors have three months to file claims against the estate. Also, the personal representative must file any outstanding income tax returns for the decedent as well as income tax returns for any income earned by the estate after the decedent's death. If the estate is large enough, the personal representative may also need to file estate tax returns (due nine months after the date of death). The personal representative must then wait to receive tax closing letters from the Department of Revenue and Internal Revenue Service in order to close the probate.

Thus, the time needed for probate depends on such factors as estate size, type of assets owned, form of ownership, tax issues, complexity of creditors' claims, marital property issues, and whether a business is involved. State law requires that an estate be closed within 18 months. However, several counties have adopted a benchmark for completing probate within 12 months. For either period, a court may grant a Petition for Extension. If the process goes beyond the allowed time, the court can replace the personal representative or the attorney for the estate, or both.

Even while the estate is still in probate, however, beneficiaries may be able to receive part of their inheritance. Once the creditors' claim period is past, the personal representative should make sure the estate has enough funds set aside to cover all expenses and taxes. Then out of remaining funds, the personal representative could make a partial distribution to beneficiaries before probate is complete.

### Can I avoid probate?

As noted earlier, some estates and types of assets are not subject to probate. Certain types of estate planning also can make probate unnecessary. For example, you can put your assets into joint ownership or into a revocable living trust (see the State Bar of Wisconsin's pamphlet, "Revocable Living Trusts").

Still, even with this kind of advance planning, probate may be necessary for some assets. This could occur, for instance, if an owner overlooked certain assets when transferring property to a revocable living trust. Or additional assets, such as a personal injury settlement, could be payable to the estate after the owner's death and thus not be included in the trust.

And, creating a living trust doesn't eliminate the need to pay taxes. The trust will owe federal and state income taxes on income the trust earns, and also federal and state estate taxes if the estate is large enough.

Is it smart to plan so that your heirs or other beneficiaries can avoid probate? The answer depends on many factors. Your attorney can help you sort out your options. ◀

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(800) 728-7788

(608) 257-3838

P.O. Box 7158, Madison, WI 53707-7158

E-mail [service@wisbar.org](mailto:service@wisbar.org)

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