



## Probate and Intestacy

### What Is Probate?

Probate is the legal process of administering the estate of the deceased, paying all debts and claims, and distributing assets to heirs and beneficiaries as stated in the will. The probate court appoints the executor, generally named in the will, who will have legal power and responsibility to settle the deceased's estate.

Probate can be arduous and time-consuming. Several factors affect the length of probate, including the size and complexity of the estate, challenges to the will or its provisions, creditor claims against the estate, state probate laws, the state court system, and tax issues. The time frame varies greatly, with some states requiring a minimum processing time of four months, and other states taking more than two years to finalize the probate process.

Probate can also be expensive, with the cost depending on the size and makeup of the estate, the laws of the state(s)

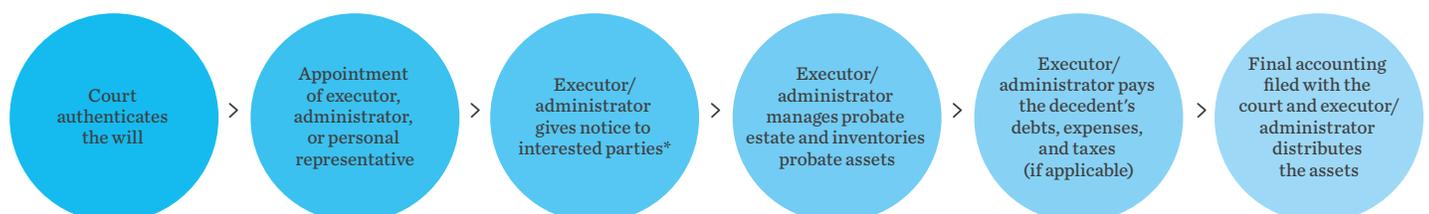
where the assets are held, and the will. Probate costs can include court fees, appraisal and valuation fees, account fees, fees paid by the executor, and attorney fees. The cost of probate typically ranges from 1% to 5% of the value of the assets that go through the process.

Probate records are available to the public at the courthouse and can be viewed by anyone who wishes to examine them in their entirety.

### Probate Process With a Will

The probate process begins when someone such as a family member files an application, known as a petition, to the probate court. The original will needs to be delivered to the local probate court and validated.

For more information, see William Blair's publication [\*Settling the Affairs of a Loved One\*](#), which outlines key steps to take and includes a checklist of responsibilities.



\*Notice is given not only to creditors, but interested parties such as spouse and beneficiaries

### Assets That Are Subject to Probate

Not all assets go through probate, and it often depends on the type of asset or how an asset is titled. It is important to note that the probate estate is different from one's taxable estate. The taxable estate is the value of a deceased person's assets that are subject to estate tax, which can include cash and investment accounts owned at death, retirement plans, business interests, and real estate. Estate planning can help avoid unnecessary costs, delays, and conflicts. For more information on reviewing your estate plan, see William

Blair's publications *Estate Planning Checklist* and *Avoid the Most Common Mistakes in Estate Planning*.

Assets held individually with no beneficiary typically will have to go through probate and assets that have a named beneficiary will not. Generally speaking, if a named beneficiary conflicts with what is stated in the will, the named beneficiary takes precedence. We recommend discussing your specific situation with your attorney, as laws that vary from state to state may apply and dictate how the assets transfer.

#### USUALLY SUBJECT TO PROBATE



Cash, accounts and assets without TOD and POD designations



Personal property, including valuable items



Assets that allow naming of beneficiaries, but for which none have been named



Assets held as tenants in common

#### NOT USUALLY SUBJECT TO PROBATE



Accounts that allow for the naming of beneficiaries including IRAs, defined contribution plans like 401(k)s or 403(b)s, equity compensation like stock options, and accounts and assets with TOD and POD designations



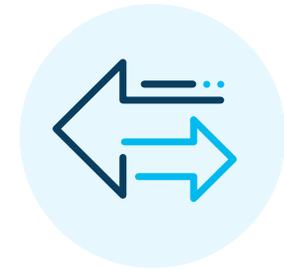
Trusts, including assets placed in trusts that might otherwise have to go through probate (cash, real estate)



Insurance policies with a named beneficiary or a trust as beneficiary



Real estate owned joint tenant with right of survivorship



Assets with joint ownership with right of survivorship

### Ancillary Probate

Probate proceedings typically take place in the state of residence at the time of death; however, owning property in more than one state can result in multiple probate proceedings, known as ancillary probate. Generally, real estate is probated in the state in which it is located, and personal property is probated in the state in which you are domiciled (i.e., reside) at the time of death.

### Steps to Minimize or Avoid Probate

In most situations, the size and complexity of the estate may warrant a review with your estate planning attorney to explore alternatives to avoid probate. The following recommendations may help you avoid probate.

#### Transfer assets to a revocable living trust

- Revocable trusts can be drafted with flexibility to own almost any asset. During your lifetime, you can act as trustee and distribute property as needed from the trust. Upon your death, the successor trustee distributes the trust assets to the trust beneficiaries according to the trust agreement.
- If you have property in multiple states, there are state-specific rules depending on where you live. Be sure to consult with your estate planning attorney if advanced planning is needed.
- Trust documents often require a lawyer to draft and can be costly to create and maintain.
- Revocable living trusts do not shield your estate from creditors, creditors of the estate, or estate taxes.

#### Title property as joint tenancy with rights of survivorship (JTWROS)

- Assets titled as JTWROS automatically transfer to the surviving joint owner(s) at death
- Re-titling has minimal costs
- The joint tenant has immediate access to the property
- The joint owner's creditors may reach the jointly held property

#### Designate beneficiaries

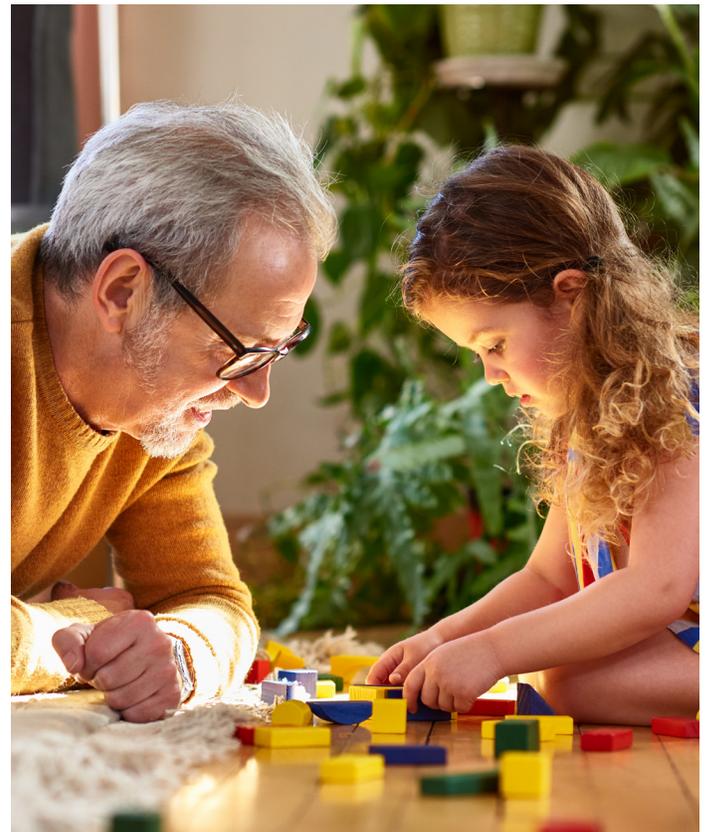
- Assets pass to designated beneficiaries outside probate if pay-on-death provisions are established. For example, cash and brokerage accounts; retirement accounts such as profit-sharing plans, 401(k)s, and IRAs; life insurance death proceeds (if beneficiary other than the estate is designated).

#### Make lifetime gifts

- Gifts to beneficiaries made during lifetime are complete and not subject to probate

#### Small estate affidavit

- Depending on specific state guidelines, a small estate affidavit can settle the estate informally
- Beneficiaries can claim assets by presenting a notarized affidavit. Real estate is usually disqualified from claims by affidavit.
- Executor can file for simplified probate, a streamlined process that generally involves paper filing only and requires no attorney. State rules vary widely regarding allowable estate size for simplified probate.



## Intestacy

In this case, you may need to hire a lawyer to file a petition to become the administrator of the deceased's estate.

An intestate estate is one where the decedent did not leave a valid will or the will of the decedent is not accepted as valid by the probate court, as a result of an error in the document or because an heir successfully contested it. The probate court has authority over the estate, and the state's intestacy laws will dictate who is entitled to receive the assets and will govern the property distribution of someone who dies intestate.

Each of the 50 states has adopted intestate succession laws that spell out how this distribution is to occur, and although state laws vary, there are some common general principles. The laws are designed to transfer legal ownership of property you own or control to the people the state considers your heirs. These laws also control how these individuals are to receive this property and when the property is distributed. Partial intestacy can occur if a will does not dispose of all of your property or if a clause in an otherwise valid will is found to be invalid.

The duties of the administrator are similar to those of the executor—paying bills, settling claims, and distributing assets. If more than one person wishes to serve as the administrator, each individual should file a petition with the probate court, which will then determine who is best suited to the task. Once all the claims are settled, most state laws allow the administrator to distribute the deceased's assets.

## Why Should You Avoid Intestacy?

### Can be costly

Intestacy can be more costly than drafting and probating a will. In most states, an administrator must furnish a bond. In addition, an administrator's powers are limited, and he or she must seek permission from the court to execute his or her responsibilities. The estate pays for the cost of these proceedings.

### The state will determine who receives your property

As referenced above, state intestacy laws will determine who receives your property. These laws divide your property among your heirs. If you have no heirs, the state will claim your property. Unlike beneficiaries under your will who can be anyone to whom you wish to leave property, heirs are defined as your legal spouse and specific relatives in your family. Your heirs, as defined by the state, are considered your loved ones, whether you loved them or not. Your heirs will take priority in receiving a portion of your estate, even if your intention is to leave a charitable legacy. The laws of your state determine the order in which heirs will receive your property, the percentage that each will receive, and in what form they will receive it, whether in cash, property, lump sum, annuity, or other.

Creating a will and reviewing your estate plan can be a productive exercise to help you not only determine the disposition of your assets, but also provide care for your family and establish your legacy.