



# Is Probate Needed?

## Q: What is meant by probating an estate?

**A:** Upon the death of a property owner, Oklahoma law provides for a legal process to take control of the deceased owner's probate assets, assess their value, pay creditors and distribute the assets to the person's legatees (if the person died with a will) or heirs (if the person died without a will). Such procedures take place in the district court of the county where the deceased property owner lived. If there is probate real property of the deceased located in another state, additional proceedings called "ancillary administration" will be necessary in that state.

## Q: Why is probate necessary?

**A:** An estate is probated for the following reasons:

- to identify and take control of the probate property,
- to protect the estate's property,
- to pay debts and taxes,
- to determine who is entitled to share in the estate and distribute the property to the proper parties and
- in the case of real estate and other record ownership property, probate provides a method to transfer title to the property to the ultimate takers and thereby maintain a clear chain of title to the property.

Someone is required to step into the shoes of the deceased person, so to speak, and carry out the business of the estate and pay the debts, taxes and expenses and, in the end, see that the property is distributed to the rightful parties in interest. That someone is called the personal representative of the estate. All these functions are carried out under the supervision of the district court.

## Q: What property must go through probate court?

**A:** When a person dies, that person's property can be classified as either 1) *probate property* or 2) *nonprobate property*. Probate property generally includes any property owned by the deceased person in their name alone that does not have a named beneficiary (*i.e.*, real estate and solely owned bank accounts and securities accounts). Probate property *must* go through probate court.

Nowadays, many people own much of their property in nonprobate property types of ownership. Nonprobate property includes property held in a trust, retirement accounts such as 401(k)s and IRAs, life insurance, pay-on-death (POD) bank accounts, transfer-on-death (TOD) securities accounts and property held in joint tenancy. Nonprobate property *does not* go through probate court.

## Q: Can a small estate avoid probate?

**A:** Yes. If the cumulative value of a deceased person's probate personal property (not including real estate) that would otherwise go

through probate court is less than \$50,000, that probate property can be obtained by the deceased person's successors by the use of a Small Estates Affidavit and thus avoid probate.

## Q: What determines who receives the probate property?

**A:** If the deceased person had a will, the person's will determines who receives the probate property. If the deceased person did not have a will, the Oklahoma laws of descent and distribution determine who receives the probate property.

## Q: What are the laws of descent and distribution?

**A:** If a person dies without a will, the Oklahoma laws of descent and distribution determine how that person's probate property will be distributed in the following circumstances. If the deceased person is survived by a spouse and children, the surviving spouse receives half of the probate property, and the remaining half of the probate property passes in equal shares to the surviving children. If the deceased person is single but is survived by children, the entire estate passes to the children. In either case, if a person's child has predeceased them, if that deceased child is survived by their own children (the deceased person's grandchildren), those grandchildren will receive in equal shares the portion of the estate their parent would have received if living. There are some special rules if the deceased person owned both property acquired during marriage and property acquired before marriage or acquired during marriage via a gift or inheritance from another person. Those rules are not covered in this pamphlet.

If the deceased person has no living spouse or descendants (*i.e.*, children, grandchildren, etc.), the entire estate goes to the deceased person's parents. If both parents are deceased, the entire estate goes to the deceased person's brothers and sisters and the children of any deceased brothers and sisters. If there are no living siblings or descendants of siblings, the entire estate goes to the deceased person's grandparents and their descendants (most likely aunts, uncles and cousins).

## Q: Do I need a will or a trust?

**A:** Whether or not you make a will or create a trust is up to you. A major factor in deciding whether to use a will or trust is the fact that wills must be probated to accomplish the transfer of probate property while trusts can accomplish the transfer of both probate property and nonprobate property without going through the probate court. See the Oklahoma Bar Association brochure titled "Do You Need a Will or Trust?" for additional information on this topic. Regardless of whether you choose a will or trust, experience has proven the wisdom of one who carefully considers the provisions of these estate planning documents. Having your will or trust time-

ly and properly drawn will assure you and your loved ones that upon your death, the disposition of your property will be as you intended. After you have made your will or trust, it is important that you periodically review it with your attorney to keep it up to date as circumstances change.

### **Q: What does probate involve?**

**A:** Probating an estate requires that a responsible party, called the personal representative, be appointed by a district court judge at a hearing to carry out the duties outlined below. The personal representative may be an individual, such as the deceased person's spouse or adult child, or it may be a bank or trust company. If the deceased names a personal representative in a will, that party is usually appointed by the district court. If the deceased does not have a will, the district court will usually appoint the closest relative as the personal representative. The functions and duties of the personal representative are:

- to identify, take possession, protect and conserve all the real and personal property of the estate,
- to receive and collect all rents, payments and debts due to the estate, including interest, dividends, claims and notes,
- to determine the names, ages, residence and degree of relationship of all possible heirs,
- to determine and pay any outstanding valid debts, including taxes and
- to carry out the orders of the district court in all matters before the court and to distribute the property to the proper parties.

These steps and proceedings require preparing and filing numerous legal documents, publishing certain notices in a newspaper, holding district court hearings, securing appraisals of property, preparing interim and final income tax returns and any required federal gift and estate tax returns, providing an accounting of funds, making actual distribution of the property and receiving the final discharge of the personal representative by the district court.

All these proceedings are under the jurisdiction and supervision of the judge of the district court. Every action taken by the personal representative is subject to the scrutiny and approval of the judge. All determinations are made by the judge, including the payments of debts, payment of attorney and personal representative fees and the final distribution of the estate assets.

### **Q: How long does probate take?**

**A:** It is difficult to predict how long it will take to administer any estate because each one is different. Creditors must be given two months in which to submit claims following publication of a notice to creditors in a newspaper. The personal representative must file an inventory of the estate assets within two months after appointment unless the inventory is waived by the court.

The personal representative must file an accounting of the handling of the estate funds at the conclusion of the probate and a

minimum of 20 days notice must be given for a hearing on the accounting.

The minimum time required to administer a simple estate is normally six to 12 months. Complex estates with property to be sold usually take longer. In the increasingly rare case where an estate is subject to federal estate tax, a tax release from the Internal Revenue Service must be filed with the court before the judge will issue a final decree distributing the estate property. Special procedures are available for administering small estates and estates passing completely to a surviving spouse. In these cases, the time required may be considerably shorter.

### **Q: What expenses are involved in probate?**

**A:** The expenses incurred in probate court include what are called the "expenses of administration," such as appraisal fees, newspaper publication charges and court costs. Court costs are charged by the district court for filing the case and other filings and usually amount to a few hundred dollars.

Regarding estate taxes, Oklahoma no longer has an estate tax for persons who died after Jan. 1, 2010. It is highly unlikely that federal estate taxes will be incurred due to the extremely high threshold for being subject to this tax. Federal estate taxes are assessed against estates where the total value of the probate property and nonprobate property exceeds the exemption amount for the year in which the person died, as set forth below:

2015	\$5,430,000
2016	\$5,450,000
2017	\$5,490,000
2018	\$11,200,000

In addition, there will be attorney fees and possibly personal representative fees. Attorney fees are based upon the reasonable charges necessary to provide appropriate compensation to the attorney, considering the scope and extent of services rendered. The personal representative is allowed a fee, fixed by law, of approximately 2.5% of the value of the probate property. Family members serving as personal representatives sometimes waive their fees. Fees for attorneys and personal representatives are subject to the approval of the district court.

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