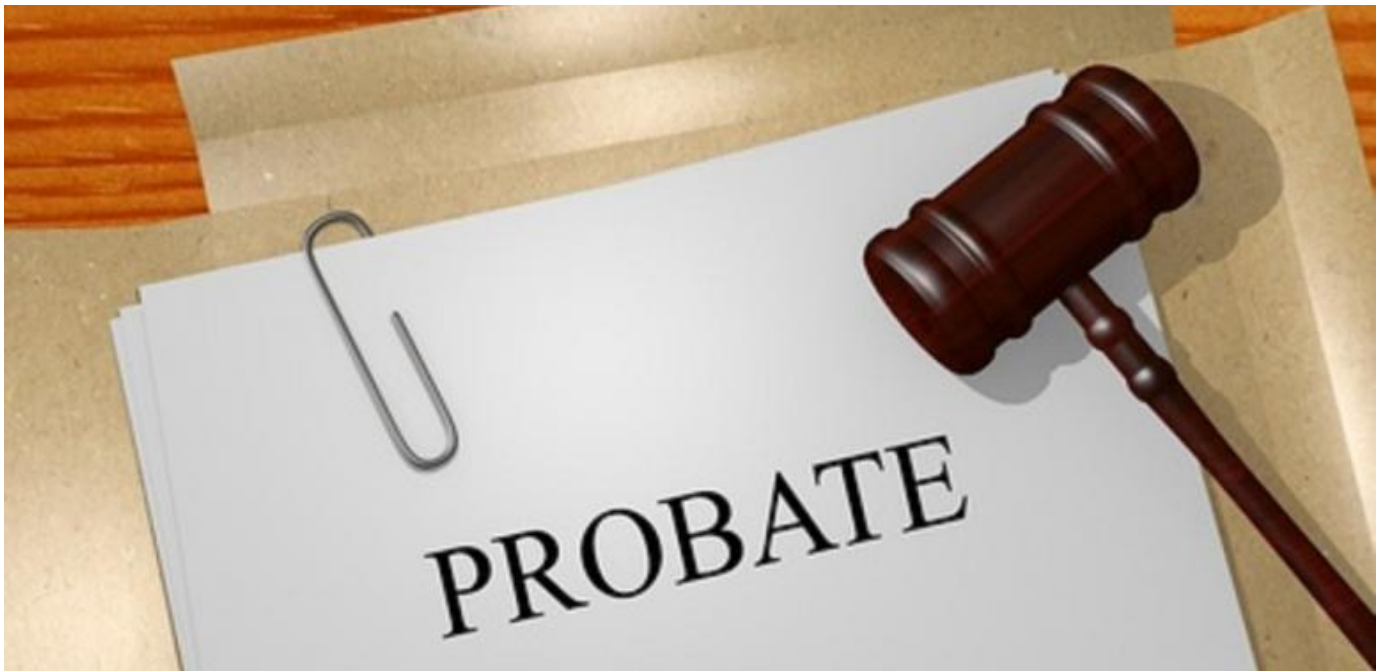


# What Is Probate?



## **Decedent's Probate**

This article provide a description of probate procedures to transfer property when a person dies. "Probate" is a court-supervised process of transferring legal title from a person who has died (the "decedent") to the person's distributees. Probate is necessary to protect the rights to the probate estate of a decedent's heirs, devisees, and creditors. An orderly transfer of property is done after estate property and debts are administered.

## **What These Terms Mean**

*Claim* - a debt or liability owed by the decedent at the time of death, the funeral expenses, and the costs and expenses of administering the probate estate. A "claim-ant" is a creditor who files a claim against a probate estate.

*Devisee* - a distributee that is named in a will to receive certain property. May be a person or an entity such as a charity.

*Distributee* - person or entity to receive a distribution through probate.

*Heir* - a distributee, as determined by the Missouri statute of intestate succession, to receive real or personal property of an intestate.

*Intestate* – a decedent who has died without having made a will.

*Letters of Administration* – document from the probate court appointing the personal representative of an intestate's estate (i.e., no will).

*Letters Testamentary* – document from the court appointing the personal representative of a testate's estate (i.e., with a will).

*Personal Representative* – a person appointed by the court to be in charge of a decedent's probate estate. Also called an executor or administrator.

*Probate Estate* – real estate and personal property owned by the decedent and subject to administration supervised by the probate court, including any income after death.

*Publication* – notice published in a newspaper in the county where the decedent resided.

*Testate* – a decedent who has died leaving a will.

## **Is Probate Necessary to Transfer Property at Death?**

Yes, probate is necessary unless the decedent did not have any property to be transferred at death through probate. A person may take steps with the titles to their property or rules of various agreements to avoid probate while alive, such as the following (some of these techniques are described in other chapters of this booklet):

- Giving away property;
- Putting property in a living trust;
- Setting up joint accounts with right of survivorship;
- Creating pay-on-death (POD) or transfer-on-death (TOD or beneficiary deeds) designations; and
- Naming beneficiaries of life insurance or retirement accounts (IRAs).

## **How Does Probate Work?**

The decedent's property is held and managed by the personal representative during the administration of the estate. The personal representative makes distribution of the estate when the probate court approves the transactions made to pay claims and expenses and the proposed distribution schedule.

The earliest that an estate may be closed and distribution made to the heirs or beneficiaries is approximately six months and 10 days after the date of first publication. However, it often takes a year or more to finish the administration.

The following are steps in probate administration:

- Hire an attorney to represent you.
- Apply for Letters Testamentary if there is a will admitted (or apply for Letters of Administration without a will).
- Publish notice to creditors. The date of first publication starts a six-month period for claimants to submit their claims to the court and the personal representative.
- Inventory and appraise assets.
- Administer the estate and sell property if funds are needed to pay bills.
- Pay debts, claims, taxes, and expenses.
- Prepare a settlement showing income and disbursements.
- Obtain court approval for distribution and close estate.

### **Rights of Creditors and Collection of Debts**

The probate court serves as a forum through which creditors of the deceased can protect their claims and seek payment. Also, the personal representative can collect payment of any debts owed to the decedent, as well as seek the recovery of property owned by the deceased in the possession of others. Claims and family allowances against an estate shall be paid by the personal representative before the heirs and devisees can receive their distributions. If there are not sufficient assets to pay all claims and allowances, they are paid in proportion by certain priority classifications (for example, the funeral bill must be paid before general claims).

### **Taxes Payable After Death**

An important function of probate is to assure payment of any tax liability. A probate estate must have a federal tax number called an employer identification number. Fiduciary income tax return may have to be filed for the estate. The fiscal year for tax purposes can start with the decedent's date of death.

The administration of the estate normally may not be closed until taxes (state and federal) have been paid, including the death transfer taxes, the decedent's final income taxes, estate income taxes, and real estate and personal property taxes.

Death-transfer taxes must be paid on probate assets and other assets transferred at death (for example, life insurance) over a minimum amount. That amount is subject to change by Congress each year.

## **Expenses of Probate**

The administration of any probate estate involves the payment of certain expenses. The expenses usually encountered in the average estate fall into four main categories.

**Bond Premiums:** The probate estate may have to pay for a bond for the personal representative to guarantee the proper handling of the estate. All distributees of the estate or the decedent in the will may waive the necessity of a bond if allowed by the court.

**Costs of Publication:** A notice to creditors must be published announcing that the estate has been opened. A Notice of Intention to File a Final Settlement or Statement of Account must be published before the estate can be closed unless it is waived in writing by the distributees.

**Court Costs:** Every estate must pay costs based upon the size of the estate being administered and the services the court is called upon to provide.

**Personal Representative's Commission and Attorney's Fees:** Missouri statutes provide for a minimum fee schedule for each. Compensation in excess of this scheduled fee may be paid upon an order of the court or upon consent of all distributees. The minimum scheduled fees are based upon a percentage of the amount of money and personal property administered in the estate. This percentage is based upon a graduated scale as follows: 5 percent of the first \$5,000; 4 percent of the next \$20,000; 3 percent of the next \$75,000; 2.75 percent of the next \$300,000; 2.5 percent of the next \$600,000; and 2 percent of everything more than \$1 million. For example, an estate in which \$110,000 is administered would generate a personal representative or minimum attorney fee of \$3,575 each (6.5 percent of estate for both fees).

## **Establishing Title to Real Estate**

The administration of a decedent's probate estate serves to establish clear title to any real estate which the deceased may have owned at the time of death. Real property passes directly to one's heirs or to one's devisee if a will is admitted to probate. The personal representative will have to obtain a court order to take possession of or sell the real estate unless the will gives the personal representative that authority. It does not technically form a part of the probate estate unless it is necessary to sell the property to pay debts or for other reasons as set out in Missouri law. It is impossible for the heirs or devisees to sell or receive clear title to the property subject to probate for one year after death unless it goes through probate. In Missouri, probate may be opened and administered and a will may be filed within one year after the decedent's death.

Similarly, creditors **may** take actions to enforce claims which could force the sale of real property within a year of the date of death. However, if an estate is probated, the period of time in which the title to the real property can be so affected is reduced to approximately six months after the first publication of letters.

### **The Surviving Spouse's Rights (If No Will)**

In Missouri, the spouse of a decedent is entitled to receive one-half of the estate of an intestate decedent. If the decedent is survived by children and the spouse of the intestate is also a parent of those children, the spouse receives an additional \$20,000. This is in addition to certain exempt property and other statutory allowances for the spouse.

Exempt property is that which the spouse or the unmarried minor children are entitled to receive absolutely, without regard to any provisions the deceased might have made for the disposition of other assets. The exempt property includes the family Bible, books, clothing, household appliances, furniture, one automobile, and the like.

The support allowance is an award made to the surviving spouse for his or her maintenance (and that of the unmarried minor children) for a period of one year after the decedent's death. The amount of the award is judged by the family's previous standard of living.

### **The Surviving Spouse's Rights (If There Is A Will)**

If the decedent leaves a will giving the spouse less than the spousal share, the spouse may, within a limited time, elect to “take against the will.” The spouse can then receive the statutory share rather than what was provided in the will. The probate court is required to notify the surviving spouse of this right of election shortly after the will is probated.

A spouse cannot be completely disinherited under a will unless some form of contractual arrangement (e.g., prenuptial or postnuptial agreement) has been made before death. A spouse is entitled to receive either one-half of the deceased’s property if there are no children or grandchildren of the decedent, or one-third of the property if the decedent was survived by children or grandchildren.

This election for a spousal distribution is subject to the claims of creditors and estate expenses, and is in addition to the survivor’s statutory allowances and ex-empt property. Other property received by the survivor outside of probate from decedent (such as life insurance, joint property and trust assets) serves to offset against the spousal share.

“Omitted” spouses, or those who were married after the deceased’s will was executed, may claim an intestate share of the estate. In certain cases, similar provisions are also included for any children who might have been born after the will was executed.

## **Types of Probate Administration**

**Two types of probate administration are permitted by Missouri probate law - “supervised” or “independent.”**

A supervised administration is closely monitored by the probate court. The court must approve many actions of the personal representative, who must also file annual settlements that are fully reviewed and audited by the probate division.

Independent administration is more informal and eliminates the need for supervision by the probate division and annual settlements. An estate may be “independently” administered if so designated in the deceased’s will, or if the distributees all agree.

**Streamlined Probate Alternatives** If a decedent's estate is valued at less than \$40,000, a small estate certificate may be obtained 30 days after the decedent's death by a distributee without going through the full probate process.

The distributee, called an "affiant," must file an affidavit promising to use the decedent's assets to pay debts and distribute the property according to law. Publication is required unless the estate is valued at less than \$15,000. Surviving spouses and the decedent's minor children can file what are called "refusals of letters" to have their statutory allowances paid from a decedent's estate if the estate is valued at a lesser amount than the allowances.

Creditors can also reach certain assets, such as bank accounts, to pay their bills by filing creditor refusals of letters if the estate value does not exceed \$15,000. Determination of heirship can be accomplished if, within a year of the date of death, no probate estate was opened and no will presented for probate. A petition may be filed to obtain a judgment determining heirship. Another alternative is an affidavit of heirship if acceptable to a title company insuring the title.

### **Is An Attorney Necessary in Probate?**

Yes, when a regular decedent's probate is undertaken. An attorney is required to represent the personal representative in both supervised and independent administrations in Missouri.

A lawyer can assure that all deadlines are met and avoid mistakes and delays. A lawyer can sometimes help explain the process to family members to prevent disagreements among them over various issues. Some people may file small estate affidavits and letters of refusal for spouses, minor children, or creditors without attorneys. But using an attorney can avoid costly mistakes, especially if real estate is involved.

You should find an attorney who practices probate law. If you need help finding a lawyer, The Missouri Bar offers a free Lawyer Search function, located at [MissouriLawyersHelp.org](http://MissouriLawyersHelp.org).

Those seeking representation can use the tool to locate lawyers by practice area, geographic location, and spoken language.

The Missouri Bar or the Office of Chief Disciplinary Counsel cannot provide legal advice or refer you to an attorney, but select local bar associations in Missouri offer assistance in finding representation. The Office of Chief Disciplinary Counsel does not screen the attorneys who are affiliated with these lawyer referral services, and OCDC does not have information on their credentials or abilities. If you would like a referral to an attorney in the St. Louis area, call (314) 621-6681. For a referral to an attorney in the Springfield or Greene County area, call (417) 831-2783.

Hiring a legal professional can be costly, but it is important to remember that you are paying for expertise. If you are unable to afford a lawyer, it might be possible to be represented at a lower rate or on a pro bono basis. In these situations, your quality of representation should not decrease, but your out-of-pocket costs will. The Missouri Bar does not match members of the public with pro bono lawyers, but it maintains a list of available discounted services, which is available at MissouriLawyersHelp.org.

Additionally, some matters, such as an uncontested divorce or traffic ticket, may not call for a lawyer at all. The Missouri Bar produces numerous brochures and blog posts – all available at MissouriLawyersHelp.org – that address general legal questions. While they are not a substitute for a hired lawyer, they are helpful for background information on matters and can help you decide if you need to seek representation.

For more information, go to MissouriLawyersHelp.org or call 573-635-4128.

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