



# LEGAL BRIEF

## PRACTICAL TIPS CONCERNING PROBATE

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### PREPARED BY

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### WHAT'S PROBATE?

When someone **with a will** dies their estate may enter Probate. Probate is a court supervised process that results in the paying of bills and ensuring the dead person's property is transferred as outlined in the will. **If there's no will**, then a similar process known as "Administration" is used following the state's intestacy statutes.

### WHAT ARE THE STAGES IN PROBATE?

In order to understand the general steps of probate, the following stages are common in probate administrations. Depending on the size of the estate, the process may be more streamlined than that provided below.

1. **Lodge the will:** Within 30 days of the person's death, his or her will must be filed with the Clerk of Court. The process is known as lodging the will. Don't worry, if it has been longer than 30 days since the person has died, the clerk will still accept and lodge the will. If the estate is to be settled using an Affidavit of Entitlement, a will need not be lodged.
2. **Determine the general size of the estate:** This will determine if probate is necessary or provide for the possibility of the use of an Affidavit of Entitlement or set aside without administration is possible. If a more formal probate proceeding is necessary, knowing the general size of the estate will help you determine between a Summary Administration and a General Administration. (More information about these is found below.)
3. **File a petition:** A petition is filed in District Court for issuance of Letters Testamentary. Letters Testamentary empower the executor (sometimes called a personal representative) to collect the estate's assets and begin the process of transferring title and distributing assets.
4. **Get a Tax ID:** A Federal Tax Identification Number for the estate will be obtained from the Internal Revenue Service (IRS). This, along with the Letters Testamentary, will allow the executor to open a bank account for the estate.
5. **Mail Notices of Death:** Notice of death should be sent to beneficiaries and known creditors.
6. **Publish a Notice to Creditors:** A Notice to Creditors is must be filed in a paper of general circulation regarding the opening of the estate. This begins the period in which creditors must submit their claims against the estate. Failure to do so timely may bar the creditor's claim.
7. **File an Inventory:** An inventory will be filed with the clerk's office within 60 days of appointment. The inventory should include the fair market value of the estates assets. If

the dead person has a surviving spouse, only ½ of the interest in community assets will be included.

8. **Filed an Accounting:** A verified account must be filed within 6 months of the executor's appointment. This account will show the money received and expended by the executor, the claims filed against the estate, and any other matters necessary to show the condition of the estate.
9. **Distribute Assets:** All assets should be distributed by the executor and income tax returns, if necessary, filed and taxes paid. An income tax return should be filed for both the estate and the individual.
10. **File a Final Account:** A final account and report will be filed to close the estate.
11. **Get a Discharge Order:** A Final Discharge Order being issued by the court. This is important as it ends the executor's role and responsibilities.

### **TYPES OF PROBATE PROCEEDINGS**

There are four types of probate proceedings in Nevada. They are based on the value of the estate. For purposes of determining the estates size for probate, only use the value of the assets that will pass through probate. One thing to keep in mind is that the value of the estate for estate tax purposes is not limited to the estate's value for probate purposes.

**Estates up to and including 25,000:** An **Affidavit of Entitlement** may be used to settle estates valued at \$25,000 or below if you are a surviving family member or a person entitled to inherit property from the estate. The court is not involved in this process. All that is required is an affidavit and a death certificate. The affidavit and death certificate are provided to the party holding the asset in question and title is changed accordingly. Under the Affidavit of Entitlement method, creditors have 18 months to pursue claims.

**Estates from \$25,001 to \$100,000:** A special petition allowing for a **Set Aside Without Administration** may be made to the court by those who are to inherit property under the will. The person who petitions the court for the estate to be "set aside" will receive a court order allowing the estate to be disturbed without further court proceedings. The petition may require some detail outlining the assets and their value as well as creditors' claims. A notice must be sent to interested parties within 10 days of the initial probate hearing. While there is no requirement that creditors receive notice, such notice is recommended.

**Estates from \$100,001 to \$300,000:** A **Summary Administration** may be had if the estate falls within this fair market value. This allows for a streamlined probate process following the stages of probate mentioned above. The creditor deadline is a reduced period of 60 days following publication of Notice to Creditors.

**Estates above \$300,000:** A **General Administration** is conducted if an estate exceeds \$300,000. It will generally follow the stages of probate outlined above. The creditor deadline is 90 days following publication of Notice to Creditors.

## **HOW LONG DOES PROBATE TAKE?**

This question usually results in the typical lawyer answer of “it depends.” If you are using an Affidavit of Entitlement or Set Aside Without Administration method, the process may be a matter of months. If you are going through a summary or general administration it can take from six months to a year depending complexity of the estate. More complicated estates may take longer than a year.

## **DO I NEED TO HIRE AN ATTORNEY?**

No. If you are the executor, you may file the necessary papers with the clerk of court without hiring an attorney. You may wish to retain an attorney to assist you through the process. Based on your financial circumstances and age you may be eligible for free legal assistance from the local legal aid organization.

If you decide to hire an attorney you should interview several attorneys before settling on one. Make sure to ask what their standard fees and if an initial consultation is free are before scheduling an appointment.

## **HOW TO AVOID PROBATE**

There are a number of ways to structure your property so that it will not need to pass through probate. Remember, a key component of probate is changing title on assets. The most common items a person owns that will need a change of title are homes, automobiles, and bank accounts. Remember, planning now helps your ease the burden on your loved ones later.

### **Real Estate**

**Community Property with Right of Survivorship:** If you are married and own real estate in Nevada with your spouse, you may title it a community property with right of survivorship. If so titled, the real estate will automatically pass to the surviving spouse upon your death. An additional benefit of titling your real estate as community property is that surviving spouse takes a stepped up basis in the entire piece of real estate upon the first spouse's death. This could minimize capital gains taxes when the property is ultimately sold. A death certificate may need to be filed at the County Clerk's office.

**Joint Tenancy:** If you own real estate with another person and it is deeded in the form of joint tenancy, the real estate will pass automatically upon your death to the surviving owner. A death certificate may need to be filed at the County Clerk's office.

**Deed Upon Death:** If you are the sole owner of your real estate, then you can file a Deed upon Death so that upon your death the real estate will automatically transfer to the person named on the deed. A death certificate may need to be filed at the County Clerk's office.

## **Personal Property**

**Designate a Beneficiary:** If you wish to leave your bank account, stocks, bonds, automobiles, insurance proceeds, or any number of other items to someone, you may be able to designate that person as a beneficiary.

For **insurance policies, retirement accounts, bank accounts, brokerage accounts, stocks, bonds**, and many other assets, you can contact the company holding the asset in question and ask to designate a beneficiary. The company will likely have its own form. Rather than using the term beneficiary, some of companies will title the asset as Transferable on Death (TOD).

For **automobiles** you can use a Transfer on Death form from the Nevada DMV. The form allows you to designate a beneficiary to receive your car upon your death. Upon your death, the beneficiary may be required to present a death certificate, pay a title fee, submit the title certificate, and completion necessary forms.

**Joint Tenancy or Community Property:** Just as with real estate, you can title your assets as joint tenancy or community property with rights of survivorship. When this is done, the dead owner's interest in the assets transfer to the surviving owner upon death.

## **WHAT ELSE SHOULD I KNOW?**

### **Who Can Withdraw Funds from a Deceased's Bank Account?**

Normally, if the account is held jointly with rights of survivorship, the surviving owner is entitled to withdraw the money or delete the deceased's name from the account. The financial institution will likely require a certified copy of the death certificate and proof that the deceased is the same person who owned the account. If the bank account was owned individually by the deceased, normally only the person appointed as Executor or Administrator of the estate may withdraw funds.

### **Can I Become the Executor of An Estate If I Don't Live in Nevada?**

Nevada does not impose restrictions on residency of an Executor named in a will, but does require a non-resident Administrator of an estate, when there is no will, to associate with a Nevada resident as co-administrator.

### **Is the Executor of An Estate personally Liable for the Deceased's Debts?**

No, not normally. However, the Executor or Administrator is obligated to act in the best interests of the estate and its beneficiaries. It is advisable to consult with an attorney regarding the duties and obligations of an Executor or Administrator prior to accepting the responsibility.