

WHAT DO I NEED TO KNOW ABOUT Probate?



THE BAILEY LAW FIRM
A Professional Corporation

WHAT IS PROBATE?

Probate is the legal, court-supervised process by which your assets are transferred at your death from your name to the names of your heirs or beneficiaries.

The word “probate” in latin means “to prove.” If you have a Will, then probate proves that your Will meets all of the legal requirements to be a last will and testament, such as being signed by you and by at least two witnesses. If you do NOT have a Will, then probate proves the identity of your legal heirs at law, i.e., the persons who will inherit your assets according to law.

WHO HANDLES PROBATE?

Each county in each state has a court and judge designated to handle probate cases. In Tennessee, the court is either the Probate Court or the Chancery Court. In Mississippi, it is the Chancery Court.

A probate case, or “Estate,” is opened by a Personal Representative. If you have a Will, then the personal representative is the person named in your Will, called the Executor. If you do NOT have a Will, then the Personal Representative is the person appointed by the court, called the Administrator.

The Personal Representative files a petition with the court clerk and appears before the judge with a probate attorney representing your estate. The judge grants the Personal Representative the authority to administer your estate, and the probate attorney guides the Personal Representative through the legal steps and hurdles of probate.

WHEN IS PROBATE REQUIRED?

Probate is required at your death if you die owning probate assets.

Probate Assets pass through probate and are transferred according to your Will or, if you do not have a will, by state statute. Examples of Probate Assets include any assets titled solely in your name such as stocks, bonds, mutual funds, certificates of deposit and real estate. Probate is required for these types of assets.

Non-Probate Assets pass outside probate and are transferred according to contract. Examples of Non-

Probate Assets include: (1) any assets with a beneficiary designation such as retirement accounts and life insurance policies; and (2) any jointly held assets with survivorship rights such as a married couple’s residence or joint financial accounts. No Probate is required for these types of assets.

PROBATE MAY BE REQUIRED WHETHER YOU DIE WITH A WILL OR WITHOUT A WILL.

If you die with a Will, then you die Testate, and all probate assets are distributed according to your Will. If you die without a Will, then you die Intestate, and all probate assets are distributed according to state intestacy laws, i.e. to your heirs-at-law. Your heirs-at-law include your spouse, children, grandchildren, parents, siblings, or nieces and nephews.

HOW MUCH DOES PROBATE COST?

Probate costs range from 2 to 5 percent of the value of your assets or “estate.” Probate costs include court filing fees, bond premiums, attorneys fees, accounting fees, appraisal costs, inventory costs and personal representatives fees. If you die without a Will (Intestate), then the cost is much higher.

Size of Estate	Reasonable Percentage Rates	Probate Costs
\$100,000	5%-6% OR HIGHER	\$5,000-\$6,000 OR MORE
\$300,000	3%-4% OR HIGHER	\$9,000-\$12,000 OR MORE
\$1,000,000	2%-3% OR HIGHER	\$20,000-\$30,000 OR MORE

HOW LONG DOES PROBATE TAKE?

From beginning to end, probate can last for 4 months, to more than 2 years. The estate must be opened, court papers must be filed, assets must be collected, creditors must be notified, and debts must be paid. Tax returns must be filed and inventories and appraisals must be completed. After the final distribution to beneficiaries, then the estate must be closed. Each of these steps takes time to complete.

The minimum time period to complete probate in Tennessee is 4 months, and the minimum time period in Mississippi is 90 days. The national average is 16 months.

HOW CAN I AVOID PROBATE?

You can avoid the cost and time delay of probate by using a number of different methods: (1) Joint tenancy with a right of survivorship (JTWROS); (2) Payable on Death (POD) or Transfer on Death (TOD) Accounts; (3) Beneficiary Designations; (4) Gifts During Lifetime; and (5) Revocable or “Living” Trusts (RLT).

JOINT TENANCY

If you own a bank account or real estate with another person as Joint Tenants with a Right of Survivorship, then, upon your death, the other owner or tenant inherits the asset with NO requirement of probate. However, Joint Tenancy only applies to that specific account or property. Therefore, if both you and the other owner are deceased, then probate may be required for that asset.



POD OR TOD

If you place a Payable On Death designation on your bank account or a Transfer On Death designation on your brokerage or mutual fund account, then, upon your death, the person designated as the POD or TOD beneficiary inherits the account with NO requirement of probate. Like Joint Tenancy, a POD or TOD applies only to that specific account. Therefore, if both you and the POD or TOD beneficiary are deceased, then probate may be required for that asset.

BENEFICIARY DESIGNATIONS

If you designate a friend or family member as the beneficiary of your life insurance or retirement account, then upon your death the beneficiary inherits the life insurance or retirement account with NO requirement of probate. This rule applies only to that specific policy or account. Once again, if both you and the designated beneficiary are deceased, then probate may be required for that life insurance policy or retirement account.

GIFTS DURING LIFETIME

If you give your assets away during your lifetime, then upon your death the gifted assets are not part of your probate estate, and the recipient has received the asset with NO requirement of probate. After you make a completed gift to someone, the asset is no longer yours and is no longer available for your use. Furthermore, gifting may result in a gift tax when the gift is made, or in a higher capital gains tax for the recipient when the gifted assets are sold.

REVOCABLE LIVING TRUSTS

If you place all of your probate assets in a revocable grantor or “living” trust, then, upon your death, the beneficiary of your trust will inherit ALL of the assets in the trust with NO requirement of probate. For that reason, the living trust is the most comprehensive method of avoiding probate.

Caution: Each method of avoiding probate has both advantages and disadvantages. Consultation with an estate planning and probate attorney is necessary to decide how to structure your assets to avoid probate and which methods are best for you and your family.

WHO SHOULD I ENGAGE TO ASSIST ME WITH PROBATE?

A probate attorney with experience in representing executors, administrators, beneficiaries and creditors should be engaged to represent you in a probate proceeding.

THE BAILEY LAW FIRM

The Bailey Law Firm concentrates its legal practice in the areas of wills and trusts, estate taxation and planning, asset protection planning, charitable gift planning, business succession planning, elder law, and estate administration and probate. The Bailey Law Firm has attorneys licensed to practice law in the states of Mississippi and Tennessee.

OLEN M. "MAC" BAILEY, JR.

The Bailey Law Firm was founded by Olen M. "Mac" Bailey, Jr. Mr. Bailey received his Master of Laws (LL.M.) degree in Elder Law with honors from Stetson University College of Law, his J.D. from Vanderbilt University School of Law, and his B.A. from Millsaps College. Mr. Bailey is an accredited attorney with the Department of Veterans Affairs.



Olen M. "Mac" Bailey, Jr.

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Call 901-843-2760 for a consultation
or visit www.thebaileylawfirm.com
5100 Wheelis Dr. Suite 215 - Memphis, TN 38117