
THE PERSONAL REPRESENTATIVE'S GUIDE TO
FLORIDA PROBATE



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INTRODUCTION

This guide gives straightforward answers to many of the questions that people have about Florida probate. In it you will learn:

- How to tell whether probate is required
- How to tell whether you need to hire an attorney
- How long the Florida probate process could take
- Different types of Florida probate proceedings
- Dealing with Florida property owned by nonresidents
- Whether there are any alternatives to probate that could apply
- Plain English definitions for some of the legal jargon you will encounter
- How to determine if a Last Will and Testament is valid under Florida law
- How to probate a Last Will and Testament in Florida
- How to administer a Florida estate if there is no Last Will and Testament
- The responsibilities of an executor or administrator under Florida law

This guide is divided into short chapters to help you find answers to your questions as quickly as possible.



CHAPTER 1: WHAT IS PROBATE?

Probate is a court-supervised process for distributing the assets of a deceased person to the people or organizations that are entitled to the assets. The probate court oversees the process to be sure that the right people receive the assets. Creditor claims are usually resolved as part of the probate proceeding.

Probate is for the benefit of third parties, such as buyers and banks. When a person dies, these third parties need to know who now owns the deceased person's assets and whether they have clear title. The purpose of probate is to give clear or marketable title to the deceased person's assets. After the probate process is complete, the individuals or organizations that end up with the assets can sell them, take out loans against them, and otherwise freely deal with the assets.

Probate is often required to access bank accounts and other financial assets that were in the name of the deceased person alone (without a joint owner or payable-on-death beneficiary). In fact, due to privacy concerns, many financial institutions will not even discuss the account until the estate is opened with the court.

The purpose of probate is to give *clear* or *marketable* title to the deceased person's assets. After the probate process is complete, the individuals or organizations that end up with the assets can sell them, take out loans against them, and otherwise freely deal with the assets.

Failure to deal with probate can result in a loss of value in real estate, giving rise to what is called *heir property*. *Heir property* is land that is jointly owned by descendants of a deceased person whose estate was never handled in probate. These descendants (heirs) have the right to use the property, but they do not have clear or marketable title to the property since the estate issues have not been resolved.

Over time, as each generation passes, the ownership of the heir property becomes more and more fragmented as it is divided among a larger group of people. At the same time, the number of unprobated estates in the title increases, bringing with it an added cost.

Before long, it isn't worthwhile for any one heir to pay the property taxes and the group of heirs cannot agree to keep up with the property. At that point, the property is usually sold for outstanding taxes. The new owner then acquires the property for a deeply discounted value. The heirs simply lose the economic value of the property. The best way to prevent the heir property scenario is to promptly deal with the estates of deceased property owners.

CHAPTER 2: A LEGALESE-ENGLISH DICTIONARY OF PROBATE TERMS



The legal jargon that attorneys and judges use to talk about the Florida probate process can be confusing. But, like it or not, these terms are so ingrained that they don't appear to be going anywhere soon. So let's get some basic terminology under our belts before moving on.

Asset – Generally any property that has monetary value, or, in the case of an estate, sentimental value.

Beneficiary – A person designated to receive money or other assets by a Will, trust, or insurance policy.

Decedent – The deceased person whose estate is being administered.

Executor/Executrix and Administrator/Administratrix – An executor (male) or executrix (female) is the person appointed by a Will to handle an estate. An administrator (male) or administratrix (female) is appointed by the court when there is no Will. Florida has replaced this terminology with the gender-neutral term "Personal Representative," but the old terminology is still used quite often.

Rights of Survivorship – Joint ownership of an asset with "rights of survivorship" means that ownership of the asset passes automatically to the survivor.

Personal Representative – Gender-neutral term referring to a person that is appointed by the court to represent an estate.

Probate/Estate Administration – These two terms are often used interchangeably, so don't get hung up here. But as a technical matter, "probate" refers to a court-supervised process for distributing an estate in accordance with a Will. "Estate administration" refers to the same process when there is no Will.

Testator/Testatrix – A testator (male) or testatrix (female) is a person who makes a valid Will.

Testate/Intestate – The term "testate" refers to an estate for which there is a valid Will. "Intestate" refers to an estate of a decedent who died without a valid Will.



CHAPTER 3: IS PROBATE NECESSARY?

Before you dive headfirst into probate, you will want to step back and think about whether probate is even necessary. In many cases, this depends on the decedent's assets. Some assets may be subject to probate; others may not. Here are a few questions to help you decide whether probate is required.

WHAT ASSETS DID THE DECEDENT OWN AT THE TIME OF DEATH?

The answer to this question is the most important factor in determining whether probate will be required. But this step is not as simple as it may seem. Some items that the decedent owned may not be "probate assets" under Florida law. These "non-probate assets" are not part of the Florida estate (but may be considered part of the taxable estate for estate tax purposes). You should look at everything the decedent owned to determine which items are Florida probate assets and which are not.

Probate assets include everything that the decedent owned that did not pass automatically to someone else at the decedent's death. Probate assets include real estate owned only by the decedent, bank accounts in the name of the decedent, and life insurance policies that fail to name a beneficiary or are payable to the estate. If the decedent owned any of these assets, Florida probate will probably be required.

Nonprobate assets usually fall into four categories:

1. **Living Trust Property** – Assets that are titled in the name of a valid living trust are not assets of the estate and do not need to go through probate.
2. **Beneficiary Designations** – Assets with payable-on-death or transfer-on-death designations do not go through probate. Examples include life insurance and retirement or other financial accounts with valid beneficiary designations.
3. **Property Owned Jointly with Rights of Survivorship** – Property that is owned jointly with rights of survivorship passes automatically to the surviving owner at the death of one owner.
4. **Life Estate Deeds and Tenancy by the Entirety** – Real estate that passes to a remainder beneficiary under a life estate deed/enhanced life estate deed or by tenancy by the entirety is not a probate asset.

These are just a few rules of thumb to help you figure out whether the decedent owned Florida probate assets. There are other considerations that come into play, such as homestead exemption, spousal/family rights, and alternatives to probate. You should talk to the Florida probate attorney about whether any item is a probate asset under Florida law.



If the decedent didn't own any probate assets, there's probably no need to probate the estate. If the decedent did own probate assets, take a look at the next questions to find out whether probate is necessary.

Question: How do I determine whether property is held jointly with rights of survivorship?

Answer: You will need to examine the deed to the property. Look for language that says "as joint tenants with rights of survivorship" or "as joint tenants with right of survivorship and not as tenants in common." This sort of language expresses a clear intent that the property pass to the surviving joint owner(s) at the death of one of the owners.

EXACTLY WHO OWNED THESE ASSETS?

If you find out that the decedent did own assets, make a list of how each asset is titled. There are several ways that an asset might be titled, including:

1. Decedent's name alone.
2. Tenants in common (i.e., jointly without rights of survivorship).
3. Jointly with rights of survivorship.
4. Tenancy by the entirety.
5. Revocable living trust.
6. Other separate entity (LLC, corporation, etc.).

Knowing the ownership details of each asset will help determine which assets will pass automatically to others (non-probate assets) and which may require Florida probate (probate assets).

ARE THERE ANY NAMED BENEFICIARIES FOR THE ASSETS?

Some assets—such as financial accounts and insurance policies—may have a "transfer on death" or "payable on death" designation that names a beneficiary. When the asset owner dies, the asset will automatically pass to the named beneficiary. While you will need to provide the financial institution or insurance company with a death certificate (and possibly fill out a few forms), assets with a valid beneficiary designation should pass outside of the Florida probate process.

WHERE ARE THE ASSETS LOCATED?

Even if you determine that probate will probably be required, this doesn't necessarily mean that Florida is the right state for the probate proceeding. If, for example, the decedent lived in Florida but owned real estate in California, Florida may be the best place to bring the probate proceeding. Questions about where to start the probate proceeding usually require the advice of an attorney.



WHAT IS THE VALUE OF THE PROBATE ASSETS?

Once you determine that there are probate assets, you should estimate the value of each asset. Debts owed by the decedent in connection with the asset should be subtracted from the gross value to give the asset's net worth. This will allow you to make an informed decision about whether to proceed with probate.

In a few situations, such as insolvent estates, some clients choose not to go through probate since there wouldn't be any assets left over to distribute. But even if there are a number of debts, there may be tools available to protect at least some of the assets from creditors. At a minimum, the Florida homestead exemption and other allowances (discussed below) should be considered.

Estate Planning Question: I have a Last Will and Testament. Doesn't this mean that my estate won't need to go through probate?

Unfortunately, no. A Will does not avoid probate. In fact, the term probate technically refers to "proving" a Will. There are ways to structure an estate plan to avoid probate (such as using revocable living trusts), but just having a Will won't do the job. Probate doesn't depend on whether or not you had a Will, but on what assets you own and how they are titled. For more information on avoiding probate in your own estate, [request our Guide to Avoiding Probate](#).



CHAPTER 4: TYPES OF FLORIDA PROBATE PROCEEDINGS

Not all Florida probate proceedings are the same. Florida probate law recognizes several different means of disposing of a decedent's assets, each of which depends on the circumstances involved. Florida probate alternatives include formal, summary, and ancillary administration, as well as disposition without administration.

FORMAL ADMINISTRATION

Formal Administration is the most common form of Florida probate proceeding. If an estate does not qualify for one of the other methods discussed below, it must be formally administered. In formal administration there is close court supervision of the collection and distribution of the decedent's assets. For more information on this type of probate, see Chapter 5: Formal Administration in 10 Steps.

SUMMARY ADMINISTRATION

Summary administration (also known as family administration) is well-suited to small estates. The assets of the estate are immediately distributed to beneficiaries and creditors upon the entry of the order admitting the estate to probate. In order for an estate to qualify for summary administration, either:

- The decedent must have been dead for more than two years, or
- The value of the entire estate subject to administration in Florida, less the value of property exempt from the claims of creditors, must not exceed \$75,000.

Also, a testate estate does not qualify for summary administration if the will specifically directs formal probate.

Summary administration requires much less time, effort, and expense than formal administration. The proceedings are begun by filing a petition for summary administration. This petition may be filed by any beneficiary or by a person nominated as a personal representative by the decedent's will, but must be signed and verified by the surviving spouse.

The probate rules require that a petition for summary administration to include facts showing that the estate is eligible for summary administration, a list of assets and their values, certain information about the estate's debt, and a plan for distributing the assets. Once the court receives the petition and is satisfied that the estate qualifies, the court issues an order distributing the assets.



ANCILLARY ADMINISTRATION

Ancillary administration is the administration of the estate of an out-of-state resident who leaves real or personal property in Florida, has credits due him from Florida residents, or has liens on property in Florida. It is procedurally similar to a formal probate proceeding. In this type of proceeding, the out-of-state probate is referred to as the domiciliary administration and the Florida proceeding is called an ancillary administration.

There are a few alternatives in ancillary proceedings that may allow you to forgo formal administration. If the decedent has already had a probate proceeding in another jurisdiction and leaves only real property in Florida, then the real property can be distributed without administration. All that is required is for any person to file a petition to admit the foreign will to record. This must be done after the discharge of the domiciliary personal representative or after two years from the death of the decedent. After the petition is admitted, the will passes title or interest to the real property in Florida as if by probate.

Similarly, ancillary probate may not require a formal proceeding if the decedent's Florida property is worth \$50,000 or less. After the domiciliary probate has concluded, the personal representative can file an authenticated transcript of the domiciliary proceeding to validate the will and identify the beneficiaries of the estate.

DISPOSITION WITHOUT ADMINISTRATION

No formal proceeding is required if the decedent's estate leaves only personal property, and the property is either (1) exempt under certain Florida laws; (2) exempt from the claims of creditors as part of the homestead under the Florida Constitution; or (3) worth no more than the sum of the amount of preferred funeral expenses and reasonable and necessary medical and hospital expenses of the last sixty days of the decedent's last illness.

Eligibility for disposition without administration is shown by supporting documents, including copies of medical bills, funeral bills, and a description of the property owned by the decedent. If the court decides that the assets may be disposed of without an administration it will issue a formal authorization of the transfer of assets to the persons entitled to receive them.



CHAPTER 5: FORMAL ADMINISTRATION IN 10 STEPS

Of the various types of Florida probate proceedings, formal administration is the most common. Like any probate matter, Florida probate administration can vary depending on the size of the estate, the decedent's asset profile, the number of creditors, and whether any disputes are involved. Here are ten steps that may be involved in formal administration:

1. **Deposit of wills with court.** By law, a custodian of a Florida Last Will and Testament must deposit it with the clerk of the appropriate court within ten days of learning of the testator's death.
2. **Petition for administration.** Any interested person may file a petition for formal administration of a testate or intestate estate. An "interested person" is any person who may reasonably expect to be affected by the outcome of the proceedings. Courts typically interpret this definition broadly.
3. **Appointment of personal representative.** The position of executor/executrix is known in Florida as a personal representative and is appointed by court order. The judge gives the personal representative authority to act for a decedent by granting letters of administration.
4. **Petition to Open Safe Deposit Box.** If the decedent's will cannot be found among the decedent's personal effects, it may be necessary to file a petition to authorize access to the decedent's safe deposit box.
5. **Validity of the will.** A will may be admitted to probate without further proof if it is self-proved and executed in accordance with Florida law. A will that is not self-proved may be admitted to probate upon the oath of any attesting witness to it. If the will cannot be proved by either of those means, it may be admitted to probate only upon the oath of the personal representative nominated by the will or upon the oath of any person having no interest in the will. The person must swear that he believes the writing to be the true last will of the decedent.
6. **Control of the decedent's assets.** The personal representative manages the assets before and during distribution. This includes collecting and inventorying the assets and determining whether to transfer property to or leave property with the persons presumptively entitled to it under the will.
7. **Interim accounting.** Before filing the final accounting, the personal representative has the option of filing one or more interim accountings with the court, but is not required to do so unless the court decides to order it.
8. **Final accounting.** After completing administration, the personal representative must make an accounting of the actions undertaken in administering the estate. This must include receipts for all transactions and a list of any disbursements, income,



compensation paid, etc. Once a final accounting has been filed the court then holds a formal hearing to approve the accounting, unless all interested parties consent to waive final accounting. An interested person may file an objection to any part of the accounting within 30 days of being served with notice of the accounting.

9. **Closing of the estate.** When everything required has been done, the personal representative files a petition for discharge of the estate, along with a proposed plan of final distribution of assets of the estate. When distribution of the estate's assets is complete, the personal representative then files evidence of distribution and evidence that creditors' claims have been disposed of. The court will then enter an order discharging the personal representative.
10. **Reopening of the estate.** A court may revoke an order of discharge and reopen an estate if additional property is discovered or if the court determines that further administration necessary for any reason, including fraud.

Of course, not every step applies to every probate. (If the decedent didn't have a safe deposit box, for example, there's no need to petition the court for authority to open it.) Questions regarding the steps necessary in your case should be directed to a Florida probate attorney.



CHAPTER 6: OPENING THE ESTATE

The first phase of Florida probate process is opening the estate. This consists of taking the preliminary steps, hiring the Florida probate attorney, and making the initial filings with the court.

PRIOR TO PROBATE

The duties and powers of the personal representative begin with the grant of letters of administration, but the powers can relate back in time to prior acts that are beneficial to the estate. There will be things to do before the Florida probate process starts that the person named personal representative should be taking care of. These tasks include:

- **Taking measures to protect assets.** If there is a possibility of damage to the decedent's property between death and the granting of letters of administration, a court can appoint a curator to take charge of the assets until letters are granted. But in many cases, a friend or family member will take action and bypass this formality. These actions can be later ratified by the PR if there are beneficial to the estate.
- **Hiring the probate attorney.** A personal representative must be represented by a Florida probate attorney unless (1) the personal representative is the only person with an interest in the estate or (2) the personal representative is an attorney admitted to practice in Florida. Since the attorney will need to be involved, you should consult with the attorney in the initial stages of the Florida probate process.
- **Planning.** A personal representative should begin to get a feel for the size and nature of the decedent's assets. Start by making a list of the assets, including their location, value, and how they are titled. Of course, knowing whether there is a valid Last Will and Testament is also important. This information will form the basis of your decisions regarding how (or if) to deal with probate under Florida law.

OPENING THE ESTATE

Once the attorney has been hired and all preliminary steps have been taken, it's time to open the estate. This requires several steps:

- **Petition the court to open the estate.** The probate attorney will prepare a document called a petition to file with the court to open the estate. This petition will ask the probate court to recognize the validity of the will, if any, and officially appoint the personal representative to act on behalf of the estate.
- **File proof of decedent's death.** For formal administration and ancillary proceedings, the proof must be filed within three months of the date of first publication of the notice to



creditors. For summary administration and disposition without administration, the proof must be filed before the entry of administration.

- **File oath of office.** This is usually in the form of a notarized, sworn written statement.
- **Designate resident agent.** A resident agent receives service of process or notice on the behalf of the personal representative.
- **Furnish bond.** Generally, a personal representative is required to furnish a bond, though this requirement can be waived in the will by the testator, or by the court.
- **Serve notice of administration.** Notice must be served on the decedent's surviving spouse, beneficiaries, trustees, and anyone who may be entitled to exempt property.

Taking these steps will conclude the first major phase of the probate process.



CHAPTER 7: FLORIDA ESTATE ADMINISTRATION

Florida estate administration is the second phase of the formal probate process. It comes after the personal representative has been formally appointed but before the estate is ready to close.

The administration of the estate is usually the most labor-intensive part of the probate process. While the probate attorney can provide guidance on various issues, it is up to the personal representative to gather the information necessary to move things along. Depending on the circumstances, Florida estate administration may involve the following steps:

- **Notify Creditors.** A notice of administration should be published as soon as possible. This notice contains identifying information about the estate and informs any potential creditors of their right to present claims in the probate proceeding. Any known creditors must also be provided with service of this notice. In each case, the creditors must be notified that failure to submit a claim within three months of the date of first publication will bar the claim.
- **Collect assets.** The personal representative is authorized to take possession or control of the decedent's assets, and is responsible for managing the assets before and during distribution.
- **Determine whether to leave assets with beneficiaries.** The personal representative can choose to leave property with the person presumptively entitled to it under the Last Will and Testament, or to transfer the property to the person.
- **Inventory assets.** An inventory of the decedent's assets should be filed within 60 days of the issuance of letters of administration. This inventory must list the property of the estate in reasonable detail, including the fair market value of each asset.
- **Collect debts.** The personal representative must collect all outstanding debts owed to the decedent. This includes maintaining actions against debtors that refuse to pay.
- **Continue decedent's business.** If there is "a reasonable means of preserving the value of the business," the personal representative is authorized to continue the decedent's business for up to four months after his appointment. Continuation of the business after that period may be approved by court order.
- **Invest assets.** The personal representative may invest estate funds, but must consider the needs of the estate and act as a prudent investor.
- **Maintain assets.** The personal representative may also, if necessary, borrow money, pay taxes and expenses, employ professionals, and contract with third parties.



- **Identify rights of beneficiaries.** The personal representative should identify any special rights to which the beneficiaries may be entitled, such as homestead rights or the elective share.
- **Prepare interim accounting.** Before filing the final accounting, the personal representative has the option of filing one or more interim accountings with the court, but is not required to do so unless the court decides to order it.
- **Process claims from creditors.** Claims must be paid within one year of the date of publication of notice to creditors, although this time may be extended for good cause. Payment of claims cannot be compelled until five months after publication.
- **Prepare objection to claim.** Any interested party may file an objection to a claim within four months of the publication of notice to creditors or within 30 days of the timely filing of a claim, whichever is later. Again, these time limits may be extended for good cause.
- **Handle unmatured and contingent claims.** These are claims that are not yet due. A personal representative may take steps to resolve claims that have not become due before the time for distribution.
- **Determine fees.** Fees are to be paid from the estate's assets to various persons for services. These persons include the personal representative, attorneys, accountants, and appraisers. If there are insufficient funds in the estate to pay everyone, then Florida law provides a priority of payment.
- **Apportion estate tax.** If a testator fails to specify the place in the estate from which taxes are to be paid, then all assets are proportionally taxed, with the taxes being paid by the residuary estate.

Each of these steps takes the estate one step closer to the date on which it can be closed.



CHAPTER 8: CLOSING THE ESTATE

The Florida probate estate can be closed as soon as the estate administration is complete. This happens after the time has expired for creditors to submit claims, all valid creditor claims and expenses of administration have been paid, all tax returns have been filed and taxes have been paid, and all assets are ready for distribution.

There are several ways that the estate may be closed. If you determine that the estate could qualify for one of the other types of Florida probate (summary administration or disposition without administration), the probate attorney could convert the proceeding into another type. But this is rare. In most cases, the attorney will file a petition with the court to close the estate.

It's much easier to close a Florida probate estate if all beneficiaries who could be affected by the distribution will sign waivers and consents. Under the "waiver and consent" provisions of the Florida probate code, any interested party can waive any right to notice or to the filing of any document (except inventory) and consent to the petition. If the personal representative is the only beneficiary or if all beneficiaries are comfortable that their final shares of the estate are correct, their waiver and consent to the petition will avoid the need for a formal accounting.

If the beneficiaries don't sign waivers and consents, the personal representative must make an accounting of the actions undertaken in administering the estate. This must include receipts for all transactions and a list of all income and disbursements. Once a final accounting has been filed, the court then holds a formal hearing to approve the accounting.

When distribution of the estate's assets is complete, the personal representative files evidence of distribution and evidence that creditors' claims have been disposed of. The court will then enter an order discharging the personal representative.



CHAPTER 9: THE FLORIDA PERSONAL REPRESENTATIVE

In the Florida probate process, each estate must be represented by someone. In many states, this “someone” is called an *executor* or *administrator*. Florida probate law often uses the gender-neutral term *personal representative*. The personal representative’s job begins when the judge issues letters of administration, a document authorizing the personal representative to act on behalf of the estate.

WHO CAN SERVE AS A PERSONAL REPRESENTATIVE IN FLORIDA

Convicted felons and minors are not eligible. Neither are individuals who are mentally or physically unable to handle the work. Beyond that, though, almost anyone can qualify. Florida personal representatives are chosen based on a statutory order of preference, depending on whether the estate is intestate (no will) or testate (will).

For a testate estate the order of preference is:

- the person or entity selected by the will or nominated by a power conferred by the will;
- the successor to the person or entity selected by the will or nominated by a power conferred by the will;
- the person selected by a majority in interest of the persons entitled to the estate;
- the best-qualified devisee under the will as selected by the court; and
- any capable person appointed by the court.

For an intestate estate the order of preference is:

- the surviving spouse;
- the person selected by a majority in interest of the heirs;
- the heir nearest in degree, or the best-qualified heir as selected by the court; and
- any capable person appointed by the court.

NONRESIDENTS AS PERSONAL REPRESENTATIVES

There are special rules for out-of-state residents who seek appointment as a Florida personal representative. Florida law provides that a nonresident can serve in this role if the person is:

- A legally adopted child or adoptive parent of the decedent;
- Related by lineal consanguinity to the decedent;
- A spouse or a brother, sister, uncle, aunt, nephew, or niece of the decedent, or someone related by lineal consanguinity to any such person; or
- The spouse of a person otherwise qualified under this section.



This means that a nonresident will not be allowed to serve unless he or she is the decedent's spouse, siblings, parents, children, or certain other close relatives. But since these are usually the persons who are most likely to serve anyway, this limitation does not prevent most out-of-state residents from serving as personal representative.



CHAPTER 10: INTESTACY – DYING WITHOUT A WILL IN FLORIDA

Intestate property is property that has not been disposed of by a Florida Last Will and Testament. Florida intestacy rules function as a default mechanism to distribute property that was not properly devised by a will. These rules designate certain people as heirs to intestate estates and specify how the shares are to be distributed.

Florida intestacy may be whole or partial. It is whole if a person did not leave a will or left a will that is invalid. Intestacy is partial if a will exists but only disposes of part of the person's assets. This may occur when portions of a will are determined to be invalid.

FLORIDA INTESTACY RULES

- A surviving spouse of the decedent receives the entire estate if the decedent has no surviving lineal descendants (children, grandchildren, great-grandchildren, etc).
- A surviving spouse of the decedent will also receive the entire estate if the decedent had descendants that are also descendants of the surviving spouse and neither the decedent nor the surviving spouse had any other children.
- If the decedent is survived by both a spouse and lineal descendants and any of the lineal descendants is not also a descendant of the spouse, then the spouse is entitled to one half of the estate, and the descendants share the balance, per stirpes.
- If there are lineal descendants but no surviving spouse, then the estate is shared by the lineal descendants.
- If there is no surviving spouse and no lineal descendants, then the estate passes to lineal ascendants (parents, grandparents, great-grandparents, etc.) and collateral relatives (siblings, aunts, uncles, etc.). This means that if the decedent's parents are alive then they are entitled to the estate. If the parents are not alive, then the estate passes to the decedent's brothers and sisters and their descendants, per stirpes.
- If none of the above heirs survive, then the estate passes to the heirs of the decedent's grandparents, per stirpes, with one half of the estate going to the decedent's maternal relatives and one half going to the decedent's paternal relatives. If there are no relatives on one side, then the entire estate passes to the other side.

PER STIRPES

"Per stirpes" is a method of distributing shares of an estate. The basic concept is that each descendant is entitled to an equal share, and the share of a deceased descendant is divided equally among his descendants.



For example, assume that a decedent had a son and a daughter. The son had a child, and the daughter had two children. The decedent dies without a will or a surviving spouse. Here is the result under *per stirpes* distribution:

- If both the son and the daughter are alive, they split the estate equally between them, each receiving 50 percent.
- If the daughter is dead at the time of the decedent's death, then her children share their mother's portion, each receiving 25 percent (half of 50 percent). The son still receives his 50 percent, while his child receives nothing.
- If both the son and the daughter are dead at the time of the decedent's death, then both of their share pass on to their children. The two children of the daughter again receive 25 percent (half of their mother's 50 percent), which the child of the son receives the son's share of 50 percent.

DISQUALIFICATION BY MISCONDUCT OR DIVORCE

A person involved in the murder of the decedent is disqualified from inheriting any share of the estate. A criminal conviction for murder is conclusive for this purpose. In the absence of a criminal conviction, the probate court may still find that there was an unlawful killing by the greater weight of the evidence, in which case the killer is likewise disqualified.

A spouse's right to inherit ends at the time of divorce. However, a spouse who is separated or in the process of divorcing still inherits if the decedent dies before the marriage is dissolved.

INTESTACY AND THE PROBATE PROCESS

Intestacy does not significantly change the probate process. The biggest difference is that there is no need to prove the validity of a Last Will and Testament. Otherwise, the personal representative's role still involves opening, administering, and closing the estate.



CHAPTER 11: HOW TO PROBATE A LAST WILL AND TESTAMENT IN FLORIDA

A primary purpose of probate is to prove the validity of the decedent's Last Will and Testament. There are several types of wills, only some of which can be recognized as a valid Florida Last Will and Testament.

- **Attested wills** are written and signed by the testator (or by a proxy) in the presence of two witnesses. They are recognized in Florida and are the most common type of Florida Last Will and Testament.
- **Military wills** are executed in accordance with Federal law by an eligible person. They contain many of the same formalities as attested wills and are valid in Florida.
- **Holographic wills** are handwritten and signed only by the testator, without the signatures of witnesses. They are not recognized in Florida. But a handwritten will that is properly signed and witnessed can be valid as an attested will and is not considered holographic.
- **Oral wills** are not in writing, but spoken to another person. They are invalid.
- **Out-of-state wills** can be valid in Florida, depending on the circumstances. If the will is in writing and valid in the jurisdiction where it was executed, it is valid in Florida even if it does not meet the Florida requirements.

If the document falls into one of these categories, the estate will be probated as a testate estate. If not, the decedent will be treated as having died without a will and the estate will be probated as an intestate estate.

REQUIREMENTS FOR VALID ATTESTED WILLS

Attested wills are the most common type of Florida Last Will and Testament. An attested will is one that meets all of the following requirements:

- **It must be in writing.** Oral wills are invalid.
- **It must be signed.** The testator must sign at the end, or a proxy may sign for the testator at his direction and in his presence. It is common practice for a testator to sign or initial each page, but this is not a legal requirement. Some probate courts have found validity even though the testator signed in the wrong place.
- **It must be attested to by two witnesses.** The witnesses can be anyone who is "competent," regardless of age. To be *competent*, a witness must, at the time of execution, have (1) the ability to observe the testator sign the will, and (2) the ability to understand the nature of what the testator is doing.
- **The testator must sign the will in the presence of the two attesting witnesses or acknowledge that he (or a proxy) has previously signed the will.** The witnesses need



not read the will, but they must sign it at the time of execution, after the testator has signed, and in the presence of the testator and each other.

TESTAMENTARY INTENT AND TESTAMENTARY CAPACITY

For a will to be valid, the testator must have testamentary intent and testamentary capacity at the time it is executed. Testamentary intent means that the person who created the document intended for it to serve as his will. Titling the document as a will is evidence of testamentary intent, but is not conclusive.

Testamentary capacity has two parts. First, the person must be of the age of majority. Age of majority is defined as being 18 years old or older, or being an emancipated minor. Second, the person must be of sound mind. “Sound mind” is defined as the ability to understand the extent of one’s property, the natural objects of one’s bounty, the nature of the disposition, and these matters in relation to each other.

FLORIDA WILL CONTESTS

A Florida Will can be challenged on several grounds, including defects in execution, forgery, fraud, duress, mistake, lack of testamentary capacity or intent, revocation, and undue influence. The statute of limitations for will contests is three months from the date of service of a copy of the notice of administration on the objecting person.

Probate Note: Will contests often arise because of suspicious circumstances. An elderly widow disinherits her children and leaves everything to her new beau. A feeble-minded grandfather leaves everything to his caretaker. Situations like these set the stage for a dispute.

Often there are valid reasons for the testator’s decision. Perhaps the elderly widow had a good reason for disinheriting the children. Perhaps the grandfather was not unduly influenced by the caretaker. In this type of situation, the assistance of a skilled estate planning attorney is critical. A good attorney will help document the basis for the decisions and provide a solid defense in the event of a later challenge.



CHAPTER 12: FOUR STEPS TO GET YOU STARTED

If you are ready to get started with dealing with a deceased person's final affairs, begin with these four steps. These steps will help you determine whether probate is necessary and, if necessary, communicate efficiently with an attorney.

STEP 1: MAKE A LIST OF THE DECEDENT'S ASSETS

You need to know what assets the decedent owned, where they are located, how much they are worth, and how they are titled (whether there are any co-owners or TOD designations). Knowing this information will help you decide how to deal with the estate under Florida law, or if you need to handle it in another state.

STEP 2: DETERMINE WHETHER THERE IS A VALID LAST WILL AND TESTAMENT

You also need to know there is a valid Last Will and Testament. If so, it will tell you who has the first choice of administering the estate and who should receive the assets.

STEP 3: MAKE A LIST OF THE NAMES AND ADDRESSES OF THE PARTIES INVOLVED

You cannot resolve Florida estate issues without knowing the names and addresses of the other parties involved. Save yourself (and your attorney) some time by putting together a list right away. Keep your eye on three groups:

1. Individuals or organizations named in the Will;
2. Close relatives of the decedent (especially spouses and children); and
3. Creditors or potential creditors of the decedent's estate.

Because each of these groups could be affected by the Florida probate proceeding, you should identify them early.

STEP 4: TALK TO FLORIDA PROBATE ATTORNEY

Consult with a Florida probate attorney early in the process. Certain deadlines could affect your rights if too much time passes without action on your part. A probate attorney can help you navigate this process and ensure that filings are made in a timely manner.

The choice of attorney is up to the personal representative. If you feel that you need an attorney, you should hire an attorney that understands Florida probate law and communicates effectively.

Florida law recognizes that the probate process is too difficult for most people to navigate without an attorney. Because of this, reasonable attorneys' fees are allowable probate costs and usually paid from the estate assets. As long as there are enough assets in the estate to pay



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attorney's fees, the attorney's fees are an expense of the estate and do not come out of the personal representative's pocket.

If we can be of assistance, please send an e-mail to Jeramie Fortenberry at jfortenberry@floridaprobatesolutions.com.

www.FloridaProbateSolutions.com