



Probate

What is probate?

Probate is the legal process whereby a court grants a person the authority to handle the legal affairs of a deceased person (the decedent).

When is probate necessary?

Probate is necessary when a person dies leaving property **titled in his/her name** (real estate, bank accounts, vehicles, stocks and bonds, etc.). Probate is **not** necessary to transfer property that is not “titled,” such as personal items including furniture, jewelry, artwork, other personal effects. Probate is also **not** necessary if the decedent has arranged for a non-probate transfer of “titled” property. Examples of non-probate transfers are: real estate held as Joint Tenants, real estate with a recorded Transfer on Death Deed, bank accounts with Payable on Death designations, brokerage accounts and life insurance policies with death beneficiary designations, etc.

No probate required for a “small estate.”

A **small estate** is defined as one where the decedent’s total estate is worth less than \$50,000 **and** does not include any real property (land, a house, a farm, etc.). If the decedent’s estate qualifies as a **small estate**, the decedent’s property can be distributed without probate by using an “**Affidavit of Successor in Interest**” if at least **30 days** have passed since the decedent’s death and no probate has been filed.

This simplified distribution is authorized by **New Mexico Statute Section 45-3-1201**. The affidavit must be signed by the person entitled (based on decedent’s will or the Intestacy law) to receive the decedent’s property and notarized. The affidavit can be presented to banks to collect the decedent’s money and other institutions such as the Motor Vehicle Department, to change title to the decedent’s vehicle’s.



No probate required to transfer the decedent’s primary residence to a surviving spouse.

The decedent’s primary residence can be transferred to the decedent’s surviving spouse without probate by using an “**Affidavit of Surviving Spouse**” if:

- At least **6 months** have passed since the decedent’s death;
- No probate has been filed;
- The only item required to be transferred from the decedent’s estate is decedent’s primary residence;
- The decedent and spouse owned the residence as community property **or** the decedent left (by will) his/her interest in the residence to the spouse; and
- The residence is worth less than \$500,000.

This simplified distribution is authorized by **New Mexico Statute Section 45-3-1205**. The affidavit must be signed and notarized by the surviving spouse. The affidavit is then filed with the county clerk in the county in which the residence is located.

Where and when to file a probate case.

If probate is necessary, the probate case must be filed with the **probate court** in the county where the decedent was domiciled (physically living) at the time of his/her death¹. If the decedent was domiciled (physically living) **outside of New Mexico** at the time of his/her death, but owned property in New Mexico, the probate case must be filed with the **probate court** in the county where the decedent’s

property is located². Probate courts are designed to help non-lawyers with simple, routine probate cases. The cost to file in probate court is \$30. Many probate courts have the forms and instructions necessary to file a probate case. The forms are also available online at https://nmsupremecourt.nmcourts.gov/legal-forms/vprobate_code.php. The probate case can be filed anytime between 5 days and 3 years after the decedent's death³.

Filing probate with a will.

If the decedent left a valid **will**, the person filing the probate must submit the **original will** and a certified copy of the decedent's death certificate to the probate court along with the necessary forms. Instructions for filing probate with a will are contained in probate forms 4B-021 and 4B-022, which can be found at https://nmsupremecourt.nmcourts.gov/legal-forms/vprobate_code.php. The court will appoint the person(s) designated in the will as "**Personal Representative**" of the decedent's estate.

Filing probate where there is not a will.

People who die without a will are said to have died "intestate". New Mexico has specific "Intestacy Laws" that detail who can be appointed Personal Representative of the Estate, who is entitled to the decedent's property, and the share of the property each person receives. A spouse has the highest priority for being appointed as Personal Representative, followed by the decedent's children. A person who wishes to be appointed Personal Representative must have the written consent of all other people with the same or higher priority for appointment. The person filing the probate must

submit a certified copy of the decedent's death certificate and copies of the written consent of others, if required, along with the necessary probate forms. Instructions for filing probate without a will are contained in probate forms 4B-011 and 4B-012, which can be found at https://nmsupremecourt.nmcourts.gov/legal-forms/vprobate_code.php.

Duties of a Personal Representative.

When the probate court appoints a person to be the Personal Representative (PR) of the decedent's estate, the court gives the PR a document called "Letters Testamentary" or, in the case of an intestate probate, "Letters of Administration". This document gives the PR the legal authority to transact business on the decedent's behalf. The PR is responsible for:

- Notifying all of the heirs of the decedent's estate.
- Gathering and inventorying the decedent's assets.
- Identifying and paying the decedent's debts (to the extent that funds are available in the estate to do so).
- Distributing the decedent's assets in accordance with decedent's will, or the intestacy statutes if there is no will.

If the decedent's estate includes real property (land, a house, a farm, etc.), the PR may need to execute a **Personal Representative's deed** in order to transfer the property out of the decedent's name. Deeds can be very tricky to properly draft and execute. It is a good idea to obtain the services of an attorney for this portion of the probate.

¹ In some cases, it may be necessary to file the probate case in District Court. The probate court will inform you if this is necessary. If this is the case, you should consult an attorney. This situation is beyond the scope of this guide.

² NMSA 1978, §45-1-404.

³ A probate may be filed **after** the 3 year period for the limited purpose of transferring title to real property from the decedent's name to the decedent's heirs. NMSA 1978, §45-3-108.