

Probate and Estate Planning

For more information call the LREP toll-free Legal Helpline
at 800-876-6657 or 505-797-6005 (Albuquerque area)
www.nmbar.org/LREP

Your estate is everything of value that you leave to others after your death. Probate takes place after your death. In probate, a personal representative is named to be sure your debts are paid and your estate is distributed to your heirs or beneficiaries according to your will or through the laws of inheritance that govern the distribution of your property when you don't have a will (intestate succession). Probate is the legal process that makes this happen.

How can I tell if my estate will require probate? If your heirs or beneficiaries can obtain ownership of your property through a **non-probate transfer**, your estate will not have to go through probate. There will usually be no need for probate if you have arranged for title to your property to be transferred by other means, as described below. If you own property to which there is a "title", such as automobiles, real estate, bank accounts or stocks and bonds, these assets may not require a probate proceeding. The way title to your property is held determines whether the property will need to go through probate. Also, if the only property you own when you die consists of personal items such as furniture, appliances, and clothing, your estate may not require probate.

Non-Probate Transfers

Property you own which is held in the following ways passes to your beneficiaries without a will and is not transferred through probate:

Real estate or other assets held in **Joint Tenancy with Right of Survivorship** passes directly to the other joint owner.

A **Transfer on Death Deed** transfers title to a house or land directly upon your death. This is a special deed that you can revoke or change at any time without the consent or knowledge of the beneficiary.

Assets like bank accounts may be held in Payable on Death (POD) accounts. On the death of the owner,



this type of account is paid to the beneficiary when that named beneficiary presents a copy of the death certificate to the bank or credit union.

Securities like stocks and bonds may be held in **Transfer on Death (TOD)** accounts. The transfer is carried out when the named beneficiary presents a copy of the death certificate to the company issuing the stock. The company will provide any other forms needed to make the transfer to the beneficiary.

Life insurance policies and annuities pay money directly to the named beneficiary without a will or probate.

Other Ways to Transfer Assets without Probate:

Affidavit of Successor in Interest (estates under \$50,000): If the total amount of your estate is less than \$50,000, and at least 30 days have passed since your death, if no one has applied to be appointed Personal Representative of the estate, a person entitled to your property can collect it by presenting a sworn statement ("affidavit") to the person holding the property. This process can be used to transfer title to motor vehicles with a form from the Motor Vehicle Department.

Transfer of title to homestead to surviving spouse by affidavit: If a home is titled only in the deceased spouse's name, the surviving spouse may be able to transfer title to the community property home to himself/herself. This is done through the use of an affidavit which would be filed six months after the spouse's death.

Frequently Asked Questions

Q. I'm worried that if I don't make a will, the State of New Mexico will take my property when I die. Is that true?

A. No, if you die without leaving a will and you have property which needs to be transferred to your heirs, the property will be distributed to your heirs under the New Mexico laws of inheritance. Generally, that means that your closest relatives will receive your property, not the State. Probate is the process used whether there is a will or not.

Q. I have money in a bank account which I want my three children to have when I'm gone. I think I'll put one of my children on that account. When I die, she can give her sister and brother their share of the money. Is this a good idea?

A. We do not advise people to do their estate planning this way. Sometimes the child who is supposed to share the money with his/her siblings does not do so. The better way to achieve the same result would be for the account to be held "payable on death" (POD) to the children. Then each child would automatically receive his/her share. (Note: putting a child's name on your account makes that child a joint owner of the money while you are alive and could make the money in the account available to your child's creditors.)

Q. I want my son to have my house when I'm gone. Would it be a good idea to transfer title to him now? Or maybe I should make him a joint-tenant with me?

A. Although both methods allow your house to pass to your son without probate, there are other possible problems which you should consider before you change title to your home. Once the title to the house is in your child's name (either as sole owner or joint tenant), the house becomes an asset which may be available to your child's creditors. If you transfer title to someone else, you lose control over what will happen to the property while you are alive. This can also affect your ability to qualify for Medicaid for nursing home care. The better solution would be for you to execute and record a Transfer on Death Deed. An owner of real estate located in New Mexico may execute a deed that designates a beneficiary who will become the

owner of the property at the owner's death. This deed can be revoked any time before the owner's death and does not give the beneficiary any rights of ownership until the owner has died. When the owner dies, the beneficiary files a copy of the death certificate with the county clerk in the county where the real estate is located and title passes to the beneficiary without going through probate.

Another advantage to this type of deed is that the beneficiary gets a stepped-up tax basis in the property to the value of the property at the date of death. This means the beneficiary won't have to pay capital gains taxes on the amount the property increased in value while the original owner owned it.

Q. How long does it take to probate an estate? Is it really expensive?

A. If no one contests the Will and there are no property or other issues to resolve, probate can often be completed in four to six months. There is no specific cost for probate, other than filing fees. Depending on how complicated the probate proceeding may be, the cost could range from a few hundred dollars to several thousand dollars if you hire a lawyer to help.

Q. Will my estate have to pay an estate tax?

A. In 2020 if your estate will not be over \$11.58 million, you probably don't have to worry about your estate paying "estate taxes". Persons who own substantial amounts of property (money/real estate) should consult with a tax advisor about this matter. Legal Resources for the Elderly Program does not provide advice in regard to taxes.

Q. If I owe money to people when I die, will they and other creditors be paid?

A. An important part of the probate process is paying valid debts owed to creditors. Your Personal Representative will be responsible for notifying your creditors about your death and asking those creditors to submit their bills. If your estate does not have enough money to pay the debts, these debts may be charged off by the creditors. Your Personal Representative does not use his/her own funds to pay your bills.