

CLIENT NEWSLETTER

A publication of:
Robert A.
Youngberg, Attorney
& Counselor at Law,
PLLC. Part of our
ongoing effort to
keep our valued
clients and friends
informed of
important legal
matters that affect
their personal and
business lives.



answering your questions about probate

Ever Wondered What Probate is About?

By Robert A. Youngberg

Many people think of probate as a long and expensive complication — just one more problem when a loved one dies.

While probate does take time and involve costs, it may be less trouble than you think. In many cases it can truly help to ease the burden when a loved one dies.

This newsletter gives you basic information about what probate is, what it does, and how it works — and how you might avoid it if you want.

Note: this newsletter uses the word “property” throughout. Sometimes people confuse “property” with “land.” However, property, as used here, refers to land, bank accounts, investments, money and personal possessions of every kind.

What is probate?

Probate is a legal process to transfer property to others after the owner dies. A probate court verifies a decedent’s will and ensures compliance with its terms. If there is no valid will, the probate court will see to the transfer of the decedent’s property to the right legal heirs or beneficiaries.

To make these transfers, the court appoints a “personal representative,” whose job is to stand in the decedent’s shoes and act as the legal owner of the decedent’s property until probate closes.

All this is done under the probate court’s supervision and protection.

A probate court’s primary aim is to see that every person

with rights to the decedent’s property is treated fairly.

Normally once the probate process is complete, probated property is free from creditors’ claims and additional taxes, thereby removing any clouds over the inheritance.

IMPORTANT PROBATE TERMS:

Probate - the legal process in which a court supervises a deceased person’s will, or if the decedent left no will, the decedent’s estate.

Decedent - a person who has died.

Estate - the decedent’s property that falls within the probate court’s jurisdiction.

Personal Representative - the person appointed by the court to look after a decedent’s estate.

What does a personal representative do?

A personal representative, sometimes called the “executor” or “administrator,” has these duties:

- Identify and collect records of the decedent's property.
- Manage the property.
- Pay debts, taxes and administrative expenses.
- Transfer the decedent’s property to those who are entitled to it.

A will usually names one. If the will doesn’t, or if the decedent died without a will, the court appoints one. He or she must be at least 21 years old, and is usually a close family member of the decedent, but can also be a friend, a bank, a business associate, or a lawyer.

What are the steps in a probate?

(1) The decedent’s family retains a probate lawyer and the lawyer prepares “opening documents” and files them with the court. If the decedent left a will, the court decides if the will is valid and if the named personal representative is able to serve. If there is no will, the court appoints a personal representative.

(2) With the lawyer’s help, the personal representative sends letters to creditors or publishes a notice in a local newspaper telling creditors to present

their claims within three months. In the meantime, the personal representative, with the lawyer’s assistance, administers and settles the estate, and pays or otherwise deals with any creditors’ claims.

(3) When the three-month notice period ends, creditors’ claims have been paid, and heirs and beneficiaries have received their property from the estate, the lawyer files “closing documents” with the court. The probate ends when the court approves the personal representative’s work and releases him or her from further responsibility.

How long does probate take?

The minimum time in Utah is four months. However, the process normally takes about six months for an informal probate. It can take a year, even longer, for a large or contested estate.

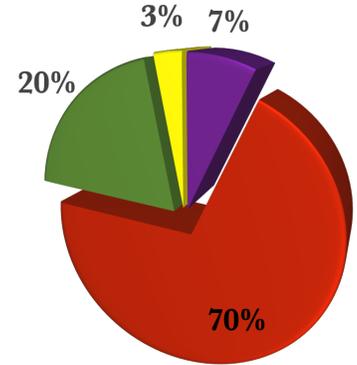
Why does it take so long?

One reason is the set period that creditors have to file claims. Another reason is that the IRS must approve all tax returns.

Other reasons include the estate’s size, the type of property the decedent owned and the type of ownership, the number and complexity of creditors’ claims, whether a business is involved, how quickly the personal representative acts, and whether the decedent’s heirs contest the personal representative’s decisions.

What Are the different kinds of probate?

- **Small Estate**
- **Informal**
- **Formal**
- **Other**



- **Small Estate Affidavit.** This type of probate is available if the estate has no real estate and the estate’s value is no more than \$100,000. A close family member or other heir signs a “small estate affidavit.” With this affidavit, he or she can collect and transfer the decedent's Utah personal property. This method is available starting 30 days after the decedent’s death.

If the estate is not eligible for the small estate affidavit, the most common probate options are:

- **Informal Probate.** This type of probate is for the simpler, uncontested estates. Because it requires little in-court time, informal probate is relatively quick and inexpensive.
- **Formal Probate.** This type of probate is for estates that are more complicated or in which potential heirs

Informal Probate is the Most Common Type of Probate in Utah

or beneficiaries do not agree about, or “contest,” either someone’s appointment to be the personal representative or



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“Property owned as ‘joint tenants with rights of survivorship’ automatically passes to the surviving owner(s) without the need for probate.”



who should receive property from the estate. Formal probate takes more time and costs more money because it requires more in-court time.

• **Order Determining Heirs.** This type of probate is most often used when more than three years have passed since the decedent’s death with no probate having been started and real estate or other property must be sold.

• **Ancillary Probate.** In this type, probate is opened in more than one state, with one probate supplementing the other(s). For instance, the estate of an Utah resident who owned land in another state requires probate in both states. The other state’s probate is “ancillary” to the primary probate in Utah, the decedent’s home state. This way, all property is probated.

What property doesn’t need probate?

“Untitled property” (property without a deed, certificate, or other legal proof of ownership), such as personal and household possessions

and money, usually can be transferred without probate. However, in some cases this property may be subject to the claims of the decedent’s creditors if it was transferred to others without probate.

Also, certain types of ownership allow property to pass to a new owner without the need for probate. These types of ownership include:

- Property owned by two or more people as “joint tenants with rights of survivorship.” Property owned in this way automatically passes to the surviving owner(s) without the need for probate. Most married couples own their homes, bank accounts and investments as joint tenants with rights of survivorship, although any two or more persons may own property in this way.

- Funds in an IRA, pension, 401(k), or other retirement plan avoid probate if the decedent did not name his or her estate as the beneficiary.

- Life insurance payments and accidental death benefits.

- POD (“Pay on Death”) bank accounts and TOD (“Transfer on Death”) stock brokerage accounts. These are methods of ownership offered by banks and stock brokers. They are paid “on death” to the person(s) the decedent named in his or her written agreement with the bank or brokerage company.

- Property held in a revocable living trust or other method of estate planning. However, probate may be necessary for any property the decedent overlooked and failed to add to the trust. Also, if additional

property, such as a personal injury settlement, is payable to the estate after the decedent dies, probate will be necessary.

Are there times when probate might be a good idea even when it can be avoided?

Even if the decedent left property that does not need probate, you might still consider probate if there is a dispute over who is entitled to the decedent’s property, or if the decedent left unpaid debts and you want to minimize potential claims from creditors (if the personal representative gives the required notice and three months pass without creditors filing their claims, their claims are forever barred).

You also may want to begin a probate if the decedent had a last will and you want to enforce the will in court. Only a will that goes through probate is enforceable.

In some rare cases, the decedent’s estate needs to make an IRS income tax or estate tax “election.” Only a personal

Property That May Not Require Probate
Property owned in “Joint Tenancy”
Funds in IRAs, 401(k)s, or Other Retirement Plans
Payments from Life Insurance
“Pay on Death” and “Transfer on Death” Accounts
Property Held in a Revocable Living Trust

representative appointed by a probate court can do this.

How much does probate cost?

Major probate expenses are court costs and lawyer fees. Funds to pay these expenses usually come from the estate.

At the time of this newsletter, probate court filing fees are \$360.

Lawyer fees vary from one lawyer to another, depending on experience

Types of Probate Expenses

<i>Court Filing Fee</i>	\$360
<i>Lawyer Fees</i>	These vary, depending on the lawyer and the case's complexity
<i>Taxes</i>	The estate pays taxes on income. Utah does not impose estate taxes, but the federal government might
<i>Fees for the PR</i>	A personal representative may charge "reasonable fees" for his or her time and work
<i>Misc</i>	Typical expenses: filing deeds (\$40 per deed); publishing notice to creditors (\$150)

and the complexity of the estate. Billing methods also differ. Some lawyers charge by the hour, while others charge a fixed fee. All probate cases are different, but once a lawyer has basic information, he or she should be able to give you an estimate of total fees or a promise of a fixed fee. Be sure the fee arrangement is clear before you retain the lawyer.

A personal representative has a right to fees for administering the estate, but in many cases, especially when the personal representative is a close family member, these fees are waived.

What taxes are involved?

The estate must pay state and federal income taxes on income the estate earns during probate.

On December 17, 2010, Congress changed the federal estate tax (Utah does not impose estate taxes). The new law imposes a 35% maximum estate and gift tax rate, subject to a \$5 million exclusion amount. This new rate is effective for tax years 2011 and 2012. The rate is likely to change again after 2012, and we will not know the changes until they happen.

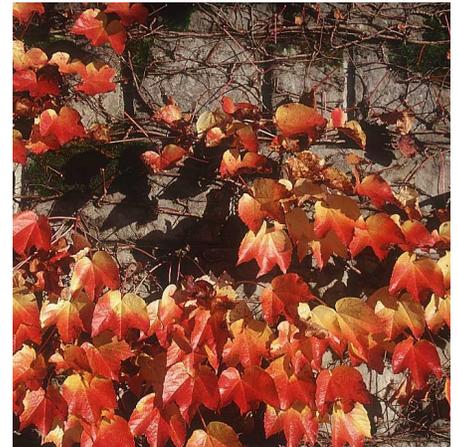
What can I do if I want my estate to avoid probate?

- Set up a revocable living trust and transfer all your property to it.
- Own property with a built-in method of transfer, such as POD (Pay on Death) bank accounts, life insurance, and retirement accounts, including IRAs and 401(k)s.
- Place your property in joint ownership with your spouse or other trusted person. However, remember

that joint ownership will not avoid a probate when the final joint owner dies. That is, if spouses jointly own property, the property will not need probate after the first spouse's death, but will require probate after the second spouse dies.

A word of caution: be careful about putting property in joint ownership with someone who is not your spouse. Jointly owned property can be taken by creditors and used to satisfy the debts of any joint owner. If your joint owner has many debts or becomes bankrupt, you could lose your property. □

If you have found this newsletter helpful and you have more questions about probate, call or write Rob Youngberg at the phone number or address listed below.



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