



## PROBATE IN NEVADA

*WHAT, WHY, AND HOW*

by Layne T. Rushforth

1. **What is Probate?:** “Probate” generally refers to the court proceeding required to formalize the transfer of the assets<sup>1</sup> belonging to a deceased person (“decedent”) that do not pass directly by law or under the terms of a contract. If the decedent leaves a will, he or she has died “testate”, and the **executor** nominated in the will is appointed by the court, and the estate passes to the **beneficiaries** named in the will. A person who dies without a will has died “intestate”, and his or her estate will be administered by a court-appointed **administrator**, and that person’s assets pass to his or her **heirs**, who are those designated under state law to inherit the estate.

2. **What Assets Are Subject to Probate?** Asset ownership is the key to determining what assets are subject to probate. As a general rule, only assets that are part of the “probate estate” are subject to probate court proceedings.

a. **Nonprobate Assets.** It is easier to define the “probate estate” by first explaining what assets are not part of it. Nonprobate assets are those that pass by operation of law or under the terms of a contract:

i. *By operation of law.* This category includes assets held by two or more persons in joint tenancy (which includes a “right of survivorship”) and property held by married couples as community property with a right of survivorship, as well as accounts and securities held with a beneficiary designation, such as “in trust for” or “payable on death to”.

ii. *Under the terms of a contract.* This includes various contracts that permit the designation of one or more beneficiaries, such as life insurance, retirement accounts (including IRAs, Keogh accounts, and qualified plan benefits), other retirement benefits, annuities, and some buy-sell agreements related to business entities.

iii. *Excluded Items.* Some assets that would normally be nonprobate assets sometimes become part of the probate estate. This happens if the estate is designated as the beneficiary under a contract, or if the person who would otherwise receive something by operation of law or under a contract files a disclaimer, which is a declaration that they decline to accept the asset(s) that would be distributed to them. Disclaimed assets pass as if the disclaimant were deceased, and if there is no alternate person who takes under that situation, the asset will become part of the probate estate.

b. **Probate Estate.** The “probate estate” includes all assets not passing by operation of law or under the terms of a contract. In other words, the probate estate consists of assets for which there is no co-owner with a right of survivorship and for which there is no beneficiary designation. Only the probate estate is governed by the decedent’s will (if there is a valid will) or by the laws of intestate succession (as to any assets not distributed pursuant to the terms of a valid will).

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<sup>1</sup>From a legal perspective, “assets”, “property”, and “estate” are synonyms.



**3. What Does A Nevada Probate Involve?** We refer to “probate” as the legal process of changing the title of assets from a deceased person to the person or entity entitled to receive those assets. Nevada’s probate law has different requirements based on the value of the probate estate.

a. *Affidavit of Entitlement.* If the probate estate is valued at \$20,000 or less and does not include any interest in real property (including a mortgage, lien, or trust deed), the assets can be claimed by an affidavit, and a court proceeding is not required. Under the statute (NRS 146.080), the claimant must be entitled to the assets by intestate succession or under the decedent's will. An affidavit is not valid until 40 days have elapsed since the decedent's death, and it does not work if there is a probate proceeding in any other jurisdiction. Filing a false affidavit is a felony in Nevada.

b. *Setting Aside Assets without Administration.* If the probate estate is valued at \$100,000 or less, the assets can be set aside without administration by court order. In determining the value of the estate, liens and encumbrances are deducted, so that an estate consisting solely of a \$170,000 home with an \$80,000 mortgage would qualify for this procedure. This requires the filing of a petition and a court hearing, but a personal representative (executor or administrator) is not appointed and a formal probate proceeding is not required. If there is a spouse or one or more minor children, the court has the discretion to disregard creditors and will provisions.

c. *Summary Administration.* An estate of \$200,000 or less can qualify for Nevada's “summary administration”. This is a formal probate procedure where the notice of the hearing on the initial petition need not be published, and the creditors' claim period is shortened from 90 to 60 days. Other than the shortened creditors' claim period and relief from some notice requirements, there is no significant benefit from this procedure, and if assets are shown to exceed \$200,000, then extra steps are needed to cancel the summary administration and proceed with a standard administration proceeding.

d. *Regular Administration.* For estates over \$100,000, a regular probate administration procedure is the usual course of action. The process is outlined as follows (with optional items marked with an asterisk):

- i. \*Petition for opening of safe deposit box.
- ii. \*Petition for appointment of special administrator if there is an urgency or if there will be a contest relating to the probate of the will or the appointment of a permanent personal representative<sup>2</sup>.
- iii. Petition for appointment of a personal representative and for probate (court acceptance) of the will.
- iv. Notice of hearing on initial petition is mailed to heirs and will beneficiaries.

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<sup>2</sup>A “personal representative” is the person appointed by the court to administer the estate and can be an executor (if there is a will) or an administrator (if there is no will).



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- v. \*Contests are filed opposing appointment of the personal representative and/or probate of will.
- vi. Hearing on initial petition; Court appoints a personal representative.
- vii. During the estate-administration period, which begins when the court grants the order formally appointing the personal representative and ends when the court issues an order formally discharging the personal representative:
- (1) Notice to creditors is published. (The creditors' claim period is 90 days unless summary administration is allowed, in which case there is a 60-day creditors' claim period.)
  - (2) The personal representative obtains appraisals, gathers assets, and prepares an inventory of the estate. The inventory contains a list of all assets and their respective values (as of the decedent's date of death).
  - (3) The personal representative pays priority claims and reviews other claims.
  - (4) The personal representative makes sure that all estate property is properly protected and prudently invested. As needed, the personal representative petitions for instructions, for confirmation of the sale of assets, for authorization to continue or conduct businesses, and for permission to make specific investments.
- viii. Upon conclusion of the creditors' claim period, the personal representative files an accounting and, in conjunction therewith, approves nonpriority claims and petitions for authority to pay the claims. If the estate is ready for final distribution, the first accounting can also be the final accounting. If the estate is not ready for final distribution, the petition can include a petition for a partial distribution. If distributions are approved, the personal representative makes the approved distributions and obtains receipts from the distributees.
- ix. After 6 months (or 18 months, if an estate tax return is required), the personal representative files an explanation why the estate is not closed.<sup>3</sup>
- x. An accounting is required annually until the court orders the final distribution.
- xi. After the court orders a final distribution:
- (1) The personal representative makes the approved distribution of the estate's assets and obtains receipts.

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<sup>3</sup>The Nevada legislature has indicated a desire to have all probate cases closed within six months. Unfortunately, if federal estate taxes are involved, the IRS has at least 18 months from the date of the decedent's death or nine months from the filing of the federal estate tax return (IRS form 709) to evaluate the estate tax return. For that reason, where an estate tax return is required, it is common for the estate to be open for at least 18 months or even longer.



(2) Upon the filing of all distributees' receipts, the court issues an order of final discharge.

e. *Independent Administration.* Since October 1, 2011, Nevada law has permitted a personal representative to ask for the "independent administration" of the estate. This is not appropriate if there are expected to be controversies or disputes, but it can be appropriate if all of those involved — the will beneficiaries (or the decedent's heirs if there is no will) and the personal representative — can work together without having to resort to the court to resolve disputes. When independent administration is granted, the number of things that require court approval is significantly reduced, and that should reduce the attorneys' fees (assuming that the attorney and his staff are billing for their time by the hour). For some actions, such as the sale of real property, the personal representative will give a "notice of proposed action" to the heirs or will beneficiaries, and if no one objects to the proposed action, the personal representative can proceed without court approval. If someone objects, the personal representative should not proceed without first obtaining court approval.

**4. Routine Procedure.** Court action begins with a petition. Where a personal representative (executor or administrator) is being appointed, the initial petition is signed by the personal representative. For small estates that qualify for a "set-aside" proceeding, as discussed in paragraph 3.b, above, the person or persons entitled to receive the estate normally file the petition, although one petitioner can file a petition on behalf of others. For most matters, the probate court and all interested persons must be given ten days' notice, usually by first-class mail. The notice of hearing for the initial probate hearing must be published in a newspaper as well. In the larger counties of Nevada, a Probate Commissioner has been appointed by the District Court judges to review all petitions and proposed orders and to give his or her recommendation to the judge. Routine petitions for which all requirements appear to be satisfied will be placed on the "approved list", which usually means that an appearance in court is not required.

**5. Will Contests.** Under Nevada law, a will is presumed valid unless someone can prove that: (a) the will was not properly signed and witnessed; (b) the maker of the will ("testator") lacked sufficient mental capacity<sup>4</sup>; or (c) the maker was coerced or unduly influenced by someone to the point that the Will does not reflect the maker's true desires. The burden of proof is on the contestant.

a. If a will contest is commenced, the probate court will normally appoint a "Special Administrator" to administer (but not distribute) the estate until the contest is resolved. The Special Administrator must either be a Nevada resident, bank, or trust company or associate a Nevada resident, bank, or trust company as a co-Administrator.

b. A will contest is essentially a form of litigation. The contestant is the plaintiff, and the petitioner for the probate of the will is the defendant. The rules generally applicable to civil litigation also apply to will contests. Each party is allowed to obtain information regarding the other parties' cases, which is done by "discovery" proceedings involving written interrogatories to other parties and the deposition (testimony under oath) of potential witnesses. Ultimately, the validity of the will is determined after an evidentiary hearing,

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<sup>4</sup>To establish that the testator was not mentally capable to sign a will, it must be provide that the testator did not have the capacity (i) to understand the nature and extent of his or her estate, (ii) to know his or her family (the "natural objects of one's bounty"), or (iii) to understand how he or she wanted his or her estate to be distributed.



which is like a trial.

c. Will contests are normally heard by the probate judge. Because the judge's calendar is frequently filled with other matters, it is common for the parties to stipulate to have the case heard by the Probate Commissioner as a "Special Master", who is a court-appointed official who acts as a liaison between the attorneys and the judge. Because this happens only when the parties agree to it in advance, the decision made by the Probate Court is binding on the parties as if made by the judge.

**6. Disputes Other than Will Contests.** Sometimes a dispute arises over matters not related to the validity of the will.

a. Such controversies include:

i. A dispute over the jurisdiction of the Nevada court, such as when the decedent has no assets here and died as the resident of another state.

ii. A dispute over who should be personal representative. This can occur when a named executor declines to serve, when someone entitled to serve has been convicted of a felony, or when more than one person is equally entitled to appointment. It can also occur if a court-appointed personal representative has committed embezzlement or otherwise acted inappropriately.

iii. A dispute over the administration of the estate. This might include a dispute over what assets are to be sold or leased, which creditors are to be paid, or how estate assets might be better invested.

iv. A dispute over the meaning of the will. Sometimes a provision in a will is subject to more than one interpretation.

b. Most disputes are resolved by filing a petition to the court asking for the court to give instructions or make a ruling. Depending on the circumstances and the legal and factual issues involved, an evidentiary hearing and/or a hearing on legal arguments may or may not be needed.

**7. Legal Fees and Other Expenses.** In Nevada, legal fees are set by agreement and not by statute. Most attorneys offer a free initial consultation, and a fee arrangement should be agreed upon before legal work is commenced. You are entitled to a written fee agreement. The Rushforth Firm, Ltd. offers a free initial consultation for new clients and, as a general rule, we charge for our services on a time-expended basis. In addition to the legal fees, clients are billed for out-of-pocket costs, such as filing fees, fax charges, overnight mail and courier charges, certified copies, long-distance telephone charges, fiduciary bond premiums, recording fees, appraisal fees, publication charges, service-of-process fees, etc. If real property is involved, you may need to also pay for an appraisal, but you should discuss that with us before you incur that expense.

**8. Other Considerations.** A court-appointed personal representative is expected to comply with all applicable federal and state tax laws, as well as the state laws relating to probate. The tax laws often apply to more than just the probate estate.



a. *Estate and Inheritance Taxes.* For example, a decedent's "taxable estate" under federal estate tax law includes all assets in which the decedent had an interest at the time of his or her death, whether classified as nonprobate assets (i.e., assets that pass by operation of law or under a contract) or as part of the probate estate. For taxable estates that exceed the "applicable exclusion" for estate tax purposes,<sup>5</sup> a federal estate tax return must be filed, even if deductions will reduce the tax to zero. Nevada has no "inheritance tax", it is no longer entitled to any portion of the federal tax.<sup>6</sup> Because of that, a copy of the federal estate tax return must be filed with the Nevada Department of Taxation. If the decedent's taxable estate includes assets located in one or more other states, each such state's inheritance tax laws must be followed.

b. *Income Tax.* A court-appointed personal representative has a duty to pay all income taxes owed by the decedent's probate estate and by the decedent (assuming the estate assets are sufficient to pay those taxes). The primary responsibility for paying taxes related to nonprobate assets belongs to those persons who receive those assets, but the personal representative should make sure that all income is properly reported.

**9. Conclusion.** "Probate" is the process of transferring a decedent's "probate estate" to those entitled to that estate under state law. Under Nevada law, for probate estates having a net value in excess of \$20,000, a court proceeding is required, and for probate estates having a value in excess of \$100,000, the appointment of a personal representative and a formal probate proceeding are required. The duties of a personal representative and the process involved during the probate proceeding will depend on the nature and value of the assets and liabilities, the existence or nonexistence of a will, the cooperation (or lack thereof) of the heirs or will beneficiaries, and applicable tax law. Because of that, each probate proceeding is unique. If you engage us to assist you, our job will be to educate and to assist you through the process.

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## The Rushforth Firm, Ltd.

A Nevada Professional Law Corporation

Receptionist: 702.255.4552 or 855.255.4552

Fax: 702.255.4677 or 855.RUSH.FAX

E-mail: [office@rushforth.net](mailto:office@rushforth.net)

WWW: <http://rushforth.net/> | <http://rushforthfirm.com/>

PO Box 371655

Las Vegas, NV 89137-1655

<sup>5</sup>Internal Revenue Code § 2010(c) provides for an "applicable exclusion", which is the cumulative amount that can pass free of gift and/or estate tax. For ESTATE TAX purposes, the applicable exclusion has been, is and will be: \$600,000 in 1997, \$625,000 in 1998; \$650,000 in 1999; \$675,000 in 2000 and 2001; \$1,000,000 in 2002 and 2003; \$1,500,000 in 2004 and 2005; \$2,000,000 in 2006, 2007, and 2008, \$3,500,000 in 2009; unlimited in 2010; \$5,000,000 in 2011; \$5,120,000 in 2012; and \$1,000,000 in 2013 and beyond. The applicable exclusion for GIFT TAX purposes is the same as that for estate tax purposes from 1997 to 2004 and for 2011 and 2012. For 2005 through 2010 and for 2013 and beyond, the applicable exclusion for GIFT TAX purposes is fixed at \$1,000,000.

<sup>6</sup>Nevada's constitution prohibits an estate tax unless it reduces the federal tax dollar for dollar, so that the taxpayer does not pay more with the Nevada estate tax than they would without it. Congress now allows a deduction (not a credit) for state death taxes, and the deduction would not completely offset the Nevada tax. Thus, Nevada asks for nothing.