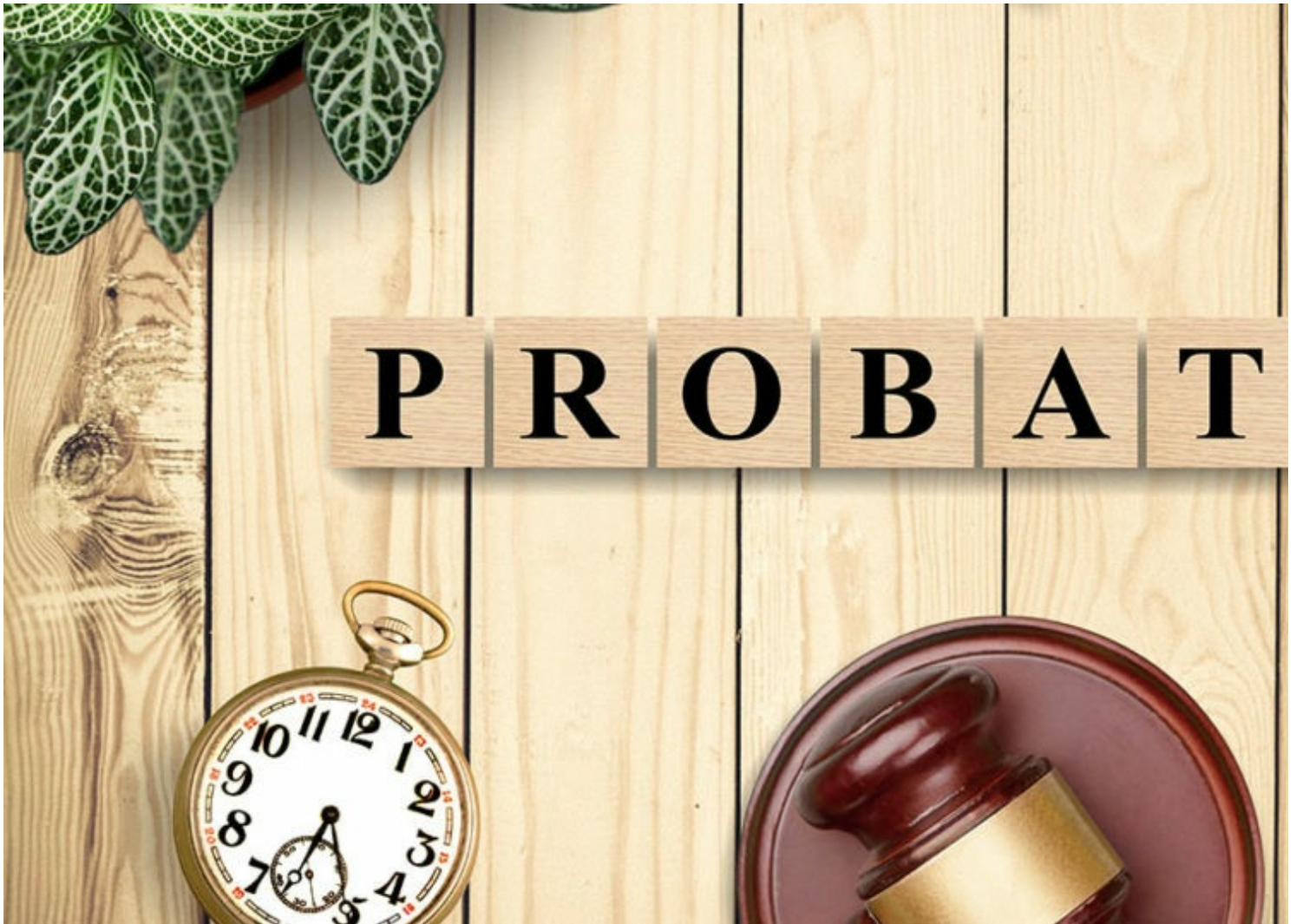


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# Estate Planning Basics: What is Probate?

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## **Defining Probate**

Have you ever been lost without directions? It is very frustrating. The death of a loved one can have that same feeling. A common and understandable question is simply – what do I need to do now? A few google searches reveal that a “probate” may be needed, but what is probate?

The term “probate” has both a narrow and a broad meaning. Narrowly, “probate” is the term used to describe the act of submitting a decedent’s will to the court and the court finding it valid. More broadly, however, the term “probate” is loosely used to refer to the entire court process of administering a decedent’s estate. This article uses the term “probate” in this broader sense.

In North Carolina, the clerk of superior court is responsible for overseeing the probate process. Each county has a clerk of superior court and all clerks are required to follow the same North Carolina law regarding the administration of a decedent’s estate.

Probate commences when a qualified person applies to be appointed as the personal representative of a decedent’s estate often in conjunction with submitting the decedent’s will to the court to be probated. There are rules that determine who is a qualified person, but the qualified person is commonly the person named in the decedent’s will to be Executor. If the court approves the application, the appointed Executor is issued “letters testamentary” which is the official name of the document that tells the world that the appointed person is the authorized representative of the decedent’s estate. Financial institutions and others holding a decedent’s assets will ask for a copy of the Executor’s

letters testamentary to be sure they are speaking with and giving the decedent's assets to the right person.

### **Executor Responsibilities**

An Executor's responsibilities are set out in the will and North Carolina law. In general, those responsibilities are to execute the will which includes ascertaining the decedent's assets and liabilities, paying back legitimate liabilities and expenses of administration, and distributing the remaining assets to the beneficiaries of the estate. Sounds simple enough, right?

An Executor must take certain required steps in the administration process to ensure these goals are accurately accomplished. Failing to properly take the required steps could result in consequences ranging from a minor headache to personal liability for the Executor. For example, Executors are required to publish a general notice to unknown creditors and send personal notices to certain known creditors. These notices, which are required to contain certain information, commence a limitation period for creditors to submit claims against the estate or have their claim time-barred. The Executor must file an affidavit with the court that this step has been completed. If the Executor fails to complete this step accurately and pays bills or makes a distribution with funds that should have been used to pay a creditor, the Executor can be personally liable to the creditor.

One very important duty of an Executor is the requirement to identify, safeguard and track the assets of the estate. This includes filing a required inventory with the clerk within 90 days from the date of qualification that itemizes the assets of the estate and their date of death values. The Executor is also required to file accountings itemizing all receipts, disbursements and distributions from the estate. The Clerk will audit both the inventory and the accountings and expect supporting documentation to be provided for the entries. Executors are sometimes surprised by the level of detail required to be provided to the Clerk and what expenses are appropriately paid from the estate and those that are not.

Executors have a variety of tools at their disposal to carry out their duties. This may include invoking a court process to recover assets, dispute or reject questionable claims, seek guidance about an ambiguous term in the will, or other matters that might arise in the administration process. However, it is important for an Executor to strictly comply with the various rules to implement these tools and to always remember that they serve as a steward to the parties interested in the estate and to act accordingly.

Executors are also responsible for certain tax filings, including filing of the decedent's final income tax return, the fiduciary income tax return for the estate, and potentially a federal estate tax return. The rules governing these filings are complicated and Executors should consult with qualified counsel about their tax obligations.

These are just some of the general responsibilities of an Executor. In some cases, an Executor must replicate this process in another state through an ancillary administration if the decedent owned property in the other state. The probate process can be a long road depending on the assets and issues in the estate. Therefore, Executors are encouraged to consult with qualified legal counsel at the outset to ensure a clear path forward.

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*The information contained in this article is of a general nature and is not intended as, nor should it be relied upon for, legal advice. No action should be taken in reliance upon the information contained in this article without obtaining the advice of an attorney.*

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**Related Links:**

- Estate Planning, Wills, Estates and Trusts
- Estate, Trust, Fiduciary and Guardianship Litigation
- Estate, Trust, Fiduciary & Guardianship Litigation – Frequently Asked Questions
- My Loved One Died. Does a Probate Estate Need to be Opened?
- How do I Recover Estate Property?
- Estate Planning When an Heir has a Substance Abuse Issue
- Estate Planning Checklist for Separation and Divorce
- Estate Planning Considerations in the Midst of the COVID-19 Outbreak

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