



# FLORIDA PROBATE GUIDE



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# ABOUT ATTORNEY NICOLE LOUGHLIN

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I'm Nicole Loughlin, attorney and founder of Loughlin Law, P.A., wife, mother of 3, entrepreneur, lover of audio books and Disney vacations, and fierce advocate for my clients.

My firm offers estate planning, probate, and personal injury legal services throughout the state of Florida. Our mission is to provide extraordinary, compassionate legal services to our clients, treating every person we encounter with respect, and giving every client the friendly and personal treatment they deserve.



ESTABLISHED

# WHAT IS A PROBATE?



In simple terms, a Florida probate is a court supervised process that is necessary when someone passes away and leaves behind assets in their name only (i.e. assets that were not jointly owned and did not have a designated beneficiary or successor). A probate may be required to legally transfer ownership of said assets to beneficiaries, and can include clearing title to real property.

# COURT OVERSIGHT

The probate process in Florida starts with a probate attorney filing a Petition for Administration in circuit court in the county where the decedent was domiciled. This petition is brought on behalf of the proposed personal representative of the estate. A judge will confirm the appointment of the personal representative and issue Letters of Administration so that the appointed personal representative can administer the estate.

The personal representative is tasked with identifying beneficiaries and/or heirs, gathering the assets that the decedent owned, notifying and paying creditors, and making final distributions to beneficiaries. If there was a will in place, the assets would be distributed to the designated beneficiary. If there was no will in place, the assets would be distributed to heirs as determined by Florida law. If you do not write a will, the state of Florida will write one for you!

## TESTATE V. INTESTATE

Heirs and beneficiaries are determined by the court based on whether the estate is testate or intestate. Testate estates are those where the deceased person left a valid will that describes what they want to happen to their property once they have passed. Intestate estates are just the opposite, meaning that the individual did not leave a will when they passed away. If a person dies “intestate”, Florida law determines how the individual’s assets will be distributed. If an individual dies “testate”, their testamentary wishes are carried out with assets being distributed to beneficiaries after valid creditor claims are paid

# METHODS TO AVOID PROBATE

***While a will alone will not keep you out of probate court, there are steps you can take to avoid the probate process in Florida.***

## **Joint Accounts & Jointly Held Assets:**

If an individual has a joint account or owns real property with another person as joint tenants with rights of survivorship, then the survivor will automatically retain ownership of the joint accounts or assets after the other's death. This means no court order is necessary to access the asset. The survivor retains full control over the asset and has no obligation to follow the will, trust, or verbal wishes of the decedent. If the survivor, out of the kindness of their heart, decides to share the asset with the decedent's intended beneficiaries, they may face gift tax consequences.

## **Beneficiary Designations:**

Probate can be avoided by designating beneficiaries on assets that allow such designations. For example, if a beneficiary is named on a life insurance policy, that individual will inherit the policy by operation of law outside of probate. You may also designate contingent beneficiaries on some assets in the event your primary beneficiary predeceases you.

## **POD/TOD Designations on Accounts:**

Similarly, probate can be avoided by designating pay on death or transfer on death beneficiaries on assets that allow it. This means the account will be paid to or transferred to your designated beneficiary outside of probate upon your death.



## **Enhanced Life Estate (a.k.a. “Lady Bird”) Deeds:**

In many cases, the biggest and most important asset that someone owns is their home. Under Florida Law, this is a protected homestead which means it is exempt from creditor claims. A Lady Bird Deed allows the property owner (life tenant) to retain control over the property while he or she is alive and then upon the death of the life tenant, the property will pass directly to the remaindermen (children or other individuals named on the deed) without having to go through probate.

## **Trust:**

Assets that are properly funded into a trust will avoid probate and be administered according to the trust. You can create a trust for the benefit of yourself during your life, and then your beneficiaries after your death. During your life, you can title assets into the name of the trust, which will ultimately keep those assets out of probate after your death.



# SUMMARY V. FORMAL ADMINISTRATION

There are two types of probate in Florida, Summary Administration and Formal Probate.

## SUMMARY ADMINISTRATION IN FLORIDA

Summary Administration is an expedited probate proceeding that does not require the appointment of a personal representative or publication of a notice to creditors. This option is available if it has been two years since the death of the decedent or if the value of the probate estate is less than \$75,000.

When filing a Petition for Summary Administration based on the \$75,000 threshold, the petitioner attests to the court that all debts owed by the decedent have been paid or will be paid from the assets, and there are no known open claims or debts against them. This detail is important for petitioners to understand because once an Order of Summary Administration is issued, the petitioner becomes solely responsible for all claims and debts made against the decedent's estate.

A Summary Administration is a great option when the only asset is the decedent's protected homestead. Even if the decedent's home has a value greater than \$75,000, it is considered exempt property for the purposes of the probate. If the beneficiaries or heirs wish to sell the decedent's homestead, they will simply file the petition for Summary Administration and a Petition to Determine Homestead Status of Real Property, send notice to all interested parties and known creditors, and file all jointer, waivers, and consents from the beneficiaries joining the petition.

If the court approves the Summary Administration, it will issue an order releasing the property directly to the creditors and beneficiaries or heirs. This type of court document can then be used to show ownership of the property. If a Petition to Determine Homestead was filed and approved, the court will issue an Order Determining Homestead. This order serves as a transfer in title from the estate to the beneficiaries, and will be recorded. The homestead property can then be sold by the beneficiaries without further oversight from the court.

# SUMMARY V. FORMAL ADMINISTRATION

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## FORMAL ADMINISTRATION IN FLORIDA

If the estate doesn't qualify for a Summary Administration, then a Formal Administration is required. The personal representative nominated in the will, or other interested party with preference of appointment and/or agreement among heirs, petitions or asks the court to appoint them as personal representative of the estate. The petitioner is required to send formal notice of the petition to all beneficiaries or heirs or obtain and file joinder, waivers, and consents for his or her appointment.

If the decedent died with a will, it must be deposited with the court and validated. If the will is "self-proving", meaning the witnesses previously signed an affidavit indicating they watched the testator of the will sign the document in front of a notary public, no further proof of will is required. If the will was not self-proving, it will be required to be proved by the witnesses or other means pursuant to Florida law.

Once the will, if any, has been admitted and a personal representative has been appointed, Letters of Administration are issued which give the newly appointed personal representative the power to administer the estate. The personal representative should immediately publish a notice to creditors, which will start the 3 month creditor period. The personal representative will be required to file an inventory of assets within 60 days of being appointed. Once all assets and creditors have been identified, the personal representative can petition the court to make distributions and eventually close the estate.

The formal probate process can take up to one year, but can be longer or shorter depending on the circumstances.



# WHO CAN SERVE AS PERSONAL REPRESENTATIVE

In Florida, the person appointed by the court to act on behalf of the estate during the administration is known as the personal representative. In other states, this representative is also known as an “executor” or “administrator”. To qualify as a personal representative, the party must be 18 years of age or old, mentally and physically able to perform the duties required (mentioned below), a resident of Florida (if not a resident, they must be related to the decedent by blood or marriage), and cannot be a convicted felon. If a personal representative is nominated in the will of the decedent and the individual meets these qualifications, the court will appoint this individual as the personal representative. If there is no will, Florida law has a preference of priority for choosing a personal representative.

Personal representatives are responsible for administering the estate in accordance with the law. Here is a breakdown of what they are in charge of:

- Identify, gather, and safeguard the probate assets;
- Publish a Notice to Creditors in a local paper and serve known or reasonably ascertainable creditors with such notice;
- Serve a Notice of Administration to any interested parties, or obtain joinder, waivers, and consents to their appointment;
- Object and defend against wrongful or improper claims;
- File appropriate tax returns;
- Hire professionals to assist in the probate process (attorneys, tax professionals, financial advisors, etc.);
- Pay any expenses associated with the professionals mentioned above and administration of the estate;
- Pay valid claims in order of priority based on Florida law;
- Distribute assets to the appropriate beneficiaries; and
- Close the probate estate.

A Florida licensed attorney is required by law to establish a formal administration. The proposed personal representatives should seek guidance from an attorney who routinely handles probate administration in Florida due to the complex nature of the personal representatives obligations and intricacies of probate court.

# WHO CAN SIGN A LISTING AGREEMENT AND SALES CONTRACT

If the wrong person signs a listing agreement and/or sales contract for the sale of real estate owned by the decedent, it can cause significant delays or even void the sale of the property altogether.

Before attempting to move forward with the sale of a property, seek guidance from a Florida probate attorney to ensure the right person signs the contract. The type of order needed from the court will depend on whether or not the property is protected homestead and how it was titled at the time of the decedent's death.

## MAKE SURE YOU HAVE THIS IN YOUR LISTING AGREEMENT AND SALES CONTRACTS

In order to avoid delays in probate when selling real estate, ensure that the listing agreement is signed by either the beneficiaries or heirs entitled to inherit under Florida's homestead law, or the appointed personal representative of the estate.

Any sales contract for homestead property should be signed by all beneficiaries or heirs as sellers since the order determining homestead serves as a transfer of title from the estate directly to the beneficiaries or heirs. The estate does not sell homestead property, beneficiaries or heirs do!

A sales contract for non-homestead property should always be contingent upon court approval.

# WHO PAYS CARRYING COSTS?



Carrying costs, as it relates to real estate, are the recurring expenses that are due monthly by the property owner. Examples of carrying costs are mortgage payments, homeowners insurance, utilities, HOA fees, and property taxes. The personal representative should take measures to maintain all estate property, including real property, using estate funds, but once title has been transferred to beneficiaries, the estate is no longer obligated to pay carrying costs. It often comes as a surprise to beneficiaries that once an asset is distributed to them, they are responsible for the maintenance and upkeep of the property. If they decide to sell a home after title has been transferred, they are responsible for said costs until the time of the sale. This can be a financial burden for some and it is important for realtors and attorneys to educate them of this responsibility.

# WHAT KIND OF COURT APPROVAL DO YOU NEED?

Different orders are required depending on whether or not the property was deemed the protected homestead of the decedent, how the property was titled at the time of death, whether or not there was a will, and if the will properly devised the property.

If title to real property was held between a husband and wife or joint tenants with rights of survivorship, no court order is necessary and title passes to the survivor by operation of law. In that case, a death certificate should be recorded to notify the property appraiser.

## Homestead

In a Summary or Formal Administration, if a property is exempt homestead, the court will issue an Order Determining Homestead which serves as a transfer in title directly to the beneficiaries or heirs. This will either be the person listed in the will or, if no will is available, to the individual entitled to the property by law. In turn, this means that the personal representative does not have the right to sell the home, and it should be sold by the new owners.

Be careful reviewing a last will and testament to determine who the beneficiary of a homestead property is, and ultimately who can sign a listing agreement and sales contract. Florida law protects spouses and children from losing their homestead rights, and it is imperative that homestead be properly devised by the decedent. If homestead property was improperly devised in a will, the devised will fail and be distributed according to the intestacy statute. This can happen if the decedent held title in his or her name alone, was married and/or had minor children, and attempted to devise property to someone other than his or her spouse or minor children.

## Order Authorizing Sale

An Order Authorizing Sale may be required if the property is not protected homestead and:

- there is no will, or,
- the personal representative denoted in the will is not given express power to sell a property.

If either of these situations occur, the personal representative appointed by the court must be granted a court order authorizing the sale of any property. Prior to the sale, judges may require a copy of the sales contract, a market analysis, and that the creditor period has expired. The personal representative will be required to send notice to all interested parties and/or file joinder, waivers, and consents.



# CREDITOR PERIOD

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Personal representatives are tasked with the responsibility of notifying creditors that an estate has been opened. Creditors include reasonably ascertainable creditors, meaning that with a little due diligence you would discover that debts were owed, known creditors, and unknown creditors which are creditors that were not found in the due diligence period, but put on notice by publication of notice to creditors.

If creditors are found, the personal representative must notify them that the individual is deceased. The creditors then have 30 days after the date they were notified to file a claim.

In addition to notifying known creditors, the personal representative must publish a Notice of Creditors in a local newspaper to alert unknown creditors and give them the opportunity to file a claim. They have three months from the first date of publication to file a claim.

If creditors are properly notified and they do not file a timely claim, their claim will be barred. All creditor claims are barred two years after the date of death.

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# BENEFICIARIES

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While you may see the terms “heir” and “beneficiary” used interchangeably there is actually a distinction in the terms when it comes to Florida probate. Per Florida law, a “beneficiary” is someone expressly named in a will who is given rights to assets transferred through the will. An “heir” is someone who stands to inherit assets under Florida intestate succession laws when no will is available.

Heirs have most of the same rights as beneficiaries, especially when it comes to informational rights, or the right to be informed of any estate administration updates.



# QUESTIONS OR CONCERNS?

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Do you need assistance with a Probate matter in the state of Florida or have questions regarding the process? [Loughlin Law](https://www.loughlinlawpa.com), P.A. would be honored to assist you with your case.

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