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## Probate in Montana

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*Probate is the process of settling an estate, whether a person dies with or without a Will. This MontGuide answers frequent questions about probate, types of probate, cost of probate and protections for the surviving spouse and children.*

**WHEN A PERSON DIES, WITH OR WITHOUT A WILL**, Montana law provides a legal process for transferring assets in the name of a deceased person (the “decedent”) to those surviving persons who are entitled to them. If the decedent dies with a valid Will, the assets are transferred according to that Will. If the decedent dies without a valid Will transferring assets, the assets are transferred according to Montana’s intestacy statutes. (Further information is provided in the MSU Extension MontGuides *Wills*, [MT198906HR](#) and *Dying Without a Will in Montana*, [MT198908HR](#).)

The Montana Legislature has adopted the Uniform Probate Code (UPC), simplifying the probate process. Probate in Montana is less burdensome and expensive than it is in other states that have not adopted the UPC. In some states, probate can be quite costly because an attorney and personal representative must appear before the court to approve every action involved in settling the estate. In Montana, most probates are conducted informally, without hearings before a judge.

This MontGuide is designed to explain some aspects of probate. It is not intended to serve as a complete guide for probate; all details could not be included. Statements apply to general situations. Solutions to specific problems relating to probate often depend upon the facts of each case.

### Why does Montana have a probate process?

Someone must conduct the business of the decedent’s estate and see that the decedent’s property is distributed to the legally designated parties. Probate proceedings have the following primary functions:

- to decide the validity of and interpret Wills.
- to discover, collect, manage, and protect estate assets until final distribution to beneficiaries,
- to settle claims of creditors,
- to settle federal and state income and federal estate tax obligations, if due,
- to distribute the decedent’s property to heirs according to Montana’s law of intestacy (*dying without a Will*) and devisees (*those named in the Will*), and
- to provide a method of securing the legal transfer of real estate or personal property (vehicles, stocks, bonds, mutual funds) that do not have beneficiary designations.

### Is there property that is not subject to probate in Montana?

Probate is not needed if all property held by the decedent is nonprobate property. Examples of nonprobate property include:

- property held as joint tenants with right of survivorship,
- property held in trust,
- life insurance payable to a named beneficiary,
- a vehicle or vessel with a beneficiary designation,
- pay-on-death (POD) deposits at financial institutions,
- assets in a pension plan to a named beneficiary,
- individual retirement accounts (IRAs) to a designated beneficiary,
- transfer-on-death (TOD) registrations for beneficiaries on securities accounts (stocks, bonds, mutual funds), and
- transfer-on-death deeds for real property (TODD).

However, income from the decedent’s property must be reported for Montana and federal income tax purposes.

Further, in large estates, there are reporting requirements for federal estate taxes. Additional information is provided in the MSU Extension MontGuide *Nonprobate Transfers* (MT199509HR).

### **Who is the personal representative and what do they do?**

The person nominated in a decedent's Will has priority for appointment as personal representative. The personal representative settles the decedent's estate according to the provisions of the Will or intestacy if the decedent died without a Will.

The personal representative may be a family member, a friend, an attorney, a corporate entity such as a bank or trust company, or a combination of these. If the decedent dies without a Will nominating a personal representative, Montana's UPC lists the order of persons with priority for appointment as a personal representative.

### **What are the responsibilities of a personal representative?**

The personal representative has a duty to settle and distribute the estate of the decedent according to the terms of any probated Will or the Montana intestacy laws.

The following responsibilities are typical:

1. The personal representative notifies heirs and devisees of the personal representative's appointment within 30 days.
2. Upon appointment, the personal representative publishes a notice announcing the appointment once a week for three consecutive weeks in a newspaper of general circulation in the county where the decedent lived. The personal representative notifies unsecured creditors of the estate to send claims to a specific address within four months after the first publication of the notice or they are forever prohibited.
3. The personal representative pays creditors and taxes from the assets of the estate and distributes the remaining assets to the heirs or devisees.
4. The personal representative may close the estate on an informal basis by filing a verified statement with the court saying the personal representative has followed the provisions of the probate code. In unusual situations, the personal representative may decide to close the estate formally. In a formal closing the personal representative gives notice to heirs and devisees about the time for a formal hearing before a district court judge.

A more detailed description of the responsibilities is included in the MSU Extension MontGuide *Personal Representative Responsibilities* (MT199008HR). An Acknowledgement of Fiduciary Relationship and Obligation Form for a personal representative is available online at [www.montana.edu/estateplanning/acknowledgementoffiduciaryrelationship.pdf](http://www.montana.edu/estateplanning/acknowledgementoffiduciaryrelationship.pdf)

### **What types of probate are used in Montana?**

Two distinct types of probate procedures are common in Montana. Most often, a probate is administered in an informal proceeding.

#### **INFORMAL PROCEEDING**

An application for informal probate of a Will or informal appointment of a personal representative is directed to the clerk of a district court no sooner than 120 hours after the decedent's death. If the clerk decides the application is complete and meets the requirements of Montana law, the personal representative is appointed without a court hearing.

#### **FORMAL PROCEEDING**

Formal probate may be advisable when the validity of a Will may be questioned or parties disagree about appointing a personal representative or distributing the decedent's assets. With formal probate, proceedings are held before a district court judge after notice of the hearing is given to interested parties. Interested persons include heirs, devisees named in the Will, and any other persons or businesses having a property right in, or a claim against, the estate.

Those who contest a Will have the burden of proving the person who wrote it lacked testamentary intent or capacity or was under undue influence or duress. Other circumstances for contesting a Will include fraud, mistake, or the Will's revocation.

#### **CLOSING AN ESTATE**

The personal representative may choose to close the estate on an informal or formal basis. If the personal representative decides to close the estate on an informal basis, the personal representative may do so six months after the personal representative's appointment if the creditor's claim period has expired. The personal representative must give notice to interested persons, file a final account, determine the identity of the heirs and devisees, and distribute property according to provisions of the Will or Montana's UPC intestacy provisions. Most estates are closed informally.

If the personal representative decides to close the estate formally, the personal representative petitions a district court

judge for an order closing the estate. Notice is given to the affected parties, and a hearing is conducted.

#### **COLLECTION OF PERSONAL PROPERTY BY AFFIDAVIT**

Even if the decedent owned assets that would otherwise be subject to probate, no probate is necessary if the total value of these assets (less liens and encumbrances) does not exceed \$100,000. Thirty days after a decedent dies, any devisee or heir may collect personal property, as well as money owed to the decedent.

The devisee or heir must present an affidavit (a sworn statement) to individuals or institutions holding the decedent's property. However, this procedure is not available if an application for the appointment of a personal representative has been granted or is pending. (Further information is provided in the MSU Extension MontGuide *Accessing a Deceased Person's Financial Accounts (MT200301HR)*). An affidavit for the Collection of Personal Property of the Decedent can be accessed online ([montana.edu/estateplanning/affidavitforcollectionofpersonalpropertyforpdffillableform.pdf](http://montana.edu/estateplanning/affidavitforcollectionofpersonalpropertyforpdffillableform.pdf)).

#### **How long does probate take?**

Because situations in estates vary, the time needed to complete probate varies. If the personal representative hires an attorney to help with probate, the attorney should be asked to provide an estimated time when the probate will be completed. In some situations, probate can be finished within six months. When a Will is contested or when the determination of the decedent's heirs is contested, probate usually will take much longer.

Exceptionally large estates are subject to federal estate taxation. In 2024, an unmarried decedent's estate with assets valued at \$13,610,000 or more is subject to the federal estate tax. Such estates must file federal estate tax returns. If the estate includes assets other than cash or assets traded on public markets, the personal representative must hire appraisers. Typically, such large estates include real property or closely held businesses, which must be appraised to show value. These requirements can take considerable time.

If an estate is not closed within two years from the date the personal representative is appointed, a Supreme Court administrator notifies the district court. The district court judge orders the personal representative and attorney to appear before the court to explain why the estate has not been closed. If there is no good cause, the judge may order the estate to be closed within 30 days and declare that the attorney and personal representative will not receive compensation.

#### **How much does probate cost?**

There is no standard answer to this question. The cost depends on the size and complexity of the estate. Costs include the personal representative's fee, fees charged by professionals hired by the personal representative, such as attorneys, and other expenses.

#### **PERSONAL REPRESENTATIVE'S FEE**

Montana law provides that the estate's personal representative is entitled to "reasonable compensation." The following factors are considered to determine the "reasonableness" of a fee:

- Nature of the work involved, which includes time, effort, difficulty, and skills needed.
- Compensation customarily charged in the community for similar services.
- Experience and capabilities of the personal representative.

A personal representative should record the time devoted to settling the estate: what tasks were performed, when, and how much time was spent on each task.

The personal representative may renounce a right to all or any part of the fee before being appointed. Surviving spouses and adult children often waive their fee for serving as personal representatives for two reasons. One reason is to save the estate money so more passes to the estate's beneficiaries. The second reason is that the personal representative must declare the fee as income and pay state and federal income taxes on the amount.

#### **PROFESSIONALS' FEES**

Montana law authorizes the personal representative to employ accountants, appraisers, attorneys and investment advisors to help settle the estate. Also, existing law allows an estate beneficiary to challenge the reasonableness of the personal representative's compensation and the fees charged by persons employed by the personal representative.

Often, a personal representative will hire an attorney to represent the estate in the probate process. Like the personal representative's fee, the attorney fee must be reasonable. When hiring an attorney, the personal representative should inquire about the basis of the attorney's fee. Many attorneys charge an hourly fee. More time will be needed by the personal representative and the estate's attorney if:

- the estate's beneficiaries are contentious,
- a Will contest ensues,
- the estate's assets are complex or challenging to manage.

The personal representative should ask an attorney to estimate the total fees during the first discussion about hiring the attorney to manage the probate.

The Montana Supreme Court has set up a seven-part test applicable to all civil matters by which the reasonableness of an attorney's fee is decided. For example, the court evaluates the requirements of the case, such as technical skills, the time needed, and the complexity of the issues. Some attorneys specialize in estate planning and estate administration. Further information is provided in the MSU Extension MontGuide *Selecting an Attorney in Montana to Develop an Estate Plan or Administer an Estate (Probate)* ([MT202107HR](#)).

#### **OTHER EXPENSES**

Other expenses include the filing fee to open a probate in district court (\$100 in 2024) and for copying papers in the clerk of court's files. Other costs may include publication costs, appraisals, advertising expenses for sales, other expenses for any auctions or property sales, and insurance premiums.

#### **Are there any protections against creditors' claims for the surviving spouse and children?**

Montana's Uniform Probate Code exempts certain property from creditors and provides allowances for the surviving spouse and children. They are entitled to these allowances in preference over unsecured creditors of the estate and persons to whom the decedent left property in a Will. These provisions include the homestead allowance, exempt property, and a family allowance. Additionally, the surviving spouse has a right to an elective share of the decedent's estate.

#### **HOMESTEAD ALLOWANCE**

A surviving spouse of the decedent who was a resident of Montana is entitled to a homestead allowance of \$22,500. If there is no surviving spouse, each minor child and each dependent child of the decedent is entitled to a share of the homestead allowance amounting to \$22,500 divided by the number of minor and dependent children of the decedent. The homestead allowance is exempt from and has priority over all claims against the estate, including unsecured creditors and persons to whom the decedent left property in a written Will.

#### **EXEMPT PROPERTY**

In addition to the homestead allowance, the surviving spouse of a decedent who was a resident of Montana is entitled to household furniture, automobiles, furnishings, appliances, and personal effects from the estate not exceeding \$15,000 in

value. If there is no surviving spouse, children of the decedent are entitled jointly to the same value. If there is not \$15,000 in value of exempt property in the estate, the spouse or children are entitled to other assets to the extent necessary to make up that amount.

#### **FAMILY ALLOWANCE**

The surviving spouse and minor children whom the decedent was obligated to support, and children who were, in fact, being supported, are entitled to a reasonable family allowance in cash from the estate for their maintenance during the period of probate administration. The personal representative may distribute the family allowance in a lump sum not exceeding \$27,000 or in periodic installments not exceeding \$2,250 per month for one year. The district court may approve a larger sum.

#### **SURVIVING SPOUSE'S RIGHT TO AN ELECTIVE SHARE**

The elective share is effective for the surviving spouse of a decedent domiciled in Montana. The spouse has the right to take an elective share that is a percentage of the augmented estate of the decedent and the surviving spouse.

The augmented estate includes assets owned by the decedent at the time of death, assets over which the decedent exercised control or enjoyment, and transfers made without consideration within two years prior to death. This provision is designed to make it difficult for the decedent spouse to intentionally disinherit a surviving spouse by giving the property away or placing it in a trust shortly before death. The augmented estate includes probate and nonprobate assets. Further, the augmented estate includes assets owned by the surviving spouse, as well as assets owned by the decedent spouse.

The elective share of the augmented estate increases depending on the length of the marriage. If the decedent and the surviving spouse have been married to each other for 15 or more years, the surviving spouse is entitled to 50% of the couple's assets.

If the resulting elective share is less than \$75,000, there is a supplemental elective share amount so that the surviving spouse receives \$75,000 in total. For example, if the surviving spouse is entitled to an elective share valued at \$50,000, the surviving spouse will also receive a supplemental elective share of \$25,000 to receive a total of \$75,000.

The spouse's elective share is in addition to other benefits provided under Montana's Uniform Probate Code, including the homestead allowance, exempt property, and the family allowance.

## **Can a spouse waive the right to an elective share and other allowances?**

The right of a surviving spouse to an elective share and the right of the surviving spouse to the homestead allowance, exempt property, and family allowance (or any of them) may be waived, wholly or partially, before or after marriage, by a written contract, agreement or waiver signed by the surviving spouse. However, the waiver of a surviving spouse is not enforceable if the surviving spouse proves:

- The agreement was executed involuntarily or as the result of duress,
- The surviving spouse did not have access to independent legal representation,
- Unless the surviving spouse had independent legal representation, the agreement did not include an explanation in plain language of the rights being affirmed, modified, or waived, or
- The surviving spouse did not receive adequate financial disclosure.

Montana's Uniform Probate Code defines "access to independent legal representation," "adequate financial disclosure," and other concepts in detail.

## **How long must a beneficiary survive a decedent?**

Montana's UPC states that any person who does not survive the decedent by more than 120 hours (five days) is considered to have died before the decedent for purposes of inheritance, homestead allowance, exempt property, and intestacy. This statute eliminates the need for double probate on the same property in situations where several members of the same family are killed or injured and die within a few days of one another. The 120-hour survival requirement also applies to those who have a Will unless the Will includes a different survival provision.

## **Summary**

Probate is a legal administrative process of settling an estate whether the decedent dies with or without a Will. Although the procedure may seem lengthy and detailed, it assures that all property of the decedent is accounted for, and that debts and taxes are paid. Probate in Montana is less burdensome or costly than it is in states that have not adopted the UPC.

## **Disclaimer**

This publication is not designed as a substitute for legal advice. Rather, it is designed to help people become better acquainted with probate in Montana. Future changes in laws cannot be predicted and statements in this MontGuide are based solely on the laws in force on the date of publication.

## **Acknowledgments**

Members of the Business, Estates, Trusts, Tax, and Real Property Law Section, State Bar of Montana have reviewed this MontGuide and recommend its reading by all Montanans who want to better understand the probate process and protections for the surviving spouse and children.

