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ALABAMA PROBATE SOLUTIONS.COM GUIDE TO

# ALABAMA PROBATE



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## INTRODUCTION

This guide gives straightforward answers to many of the questions that people have about Alabama probate. In it you will learn:

- How to tell whether probate is required
- How to tell whether you need to hire an attorney
- How long the Alabama probate process could take
- Whether there are any alternatives to probate that could apply
- Plain English definitions for some of the legal jargon you will encounter
- How to determine if a Last Will and Testament is valid under Alabama law
- How to probate a Last Will and Testament in Alabama
- How to administer a Alabama estate if there is no Last Will and Testament
- The duties of an executor or administrator under Alabama law
- How Alabama probate affects real estate

This guide is divided into short chapters to help you find answers to your questions as quickly as possible. Let's get started.

## CHAPTER 1: WHAT IS PROBATE?

Probate is a court-supervised process for distributing the assets of a deceased person to the people or organizations that are entitled to the assets. The probate court oversees the process to be sure that the right people receive the assets. Creditor claims are usually resolved as part of the probate proceeding.

Probate is often required to access bank accounts and other financial assets that were in the name of the deceased person alone (without a joint owner or payable-on-death beneficiary). In fact, due to privacy concerns, many financial institutions will not even discuss the account until the estate is opened with the court.

The purpose of probate is to give *clear* or *marketable* title to the deceased person's assets. After the probate process is complete, the individuals or organizations that end up with the assets can sell them, take out loans against them, and otherwise freely deal with the assets.

Failure to deal with probate can result in a loss of value in real estate, giving rise to what is called *heir property*. *Heir property* is land that is jointly owned by descendants of a deceased person whose estate was never handled in probate. These descendants (heirs) have the right to use the property, but they do not have clear or marketable title to the property since the estate issues have not been resolved.

Over time, as each generation passes, the ownership of the heir property becomes more and more fragmented as it is divided among a larger group of people. At the same time, the number of unprobated estates in the title increases, bringing with it an added cost. Before long, it isn't worthwhile for any one heir to pay the property taxes and the group of heirs cannot agree to keep up with the property. At that point, the property is usually sold for outstanding taxes. The new owner then acquires the property for a deeply discounted value. The heirs simply lose the economic value of the property.

The best way to prevent the heir property scenario is to promptly deal with the estates of deceased property owners.

## CHAPTER 2: A LEGALESE-ENGLISH DICTIONARY OF PROBATE TERMS

The legal jargon that attorneys and judges use to talk about the Alabama probate process can be confusing. But, like it or not, these terms are so ingrained that they don't appear to be going anywhere soon. So let's get some basic terminology under our belts before moving on.

*Asset* – Generally any property that has monetary value, or, in the case of an estate, sentimental value.

*Beneficiary* – A person designated to receive money or other assets by a Will, trust, or insurance policy.

*Decedent* – The deceased person whose estate is being administered.

*Executor/Executrix and Administrator/Administratrix* – An executor (male) or executrix (female) is the person appointed by a Will to handle an estate. An administrator (male) or administratrix (female) is appointed by the court when there is no Will. Alabama has replaced this terminology with the gender-neutral term “Personal Representative,” but the old terminology is still used quite often.

*Rights of Survivorship* – Joint ownership of an asset with “rights of survivorship” means that ownership of the asset passes automatically to the survivor.

*Personal Representative* – Gender-neutral term referring to a person that is appointed by the court to represent an estate.

*Probate/Estate Administration* – These two terms are often used interchangeably, so don't get hung up here. But as a technical matter, “probate” refers to a court-supervised process for distributing an estate in accordance with a Will. “Estate administration” refers to the same process when there is no Will.

*Testator/Testatrix* – A testator (male) or testatrix (female) is a person who makes a valid Will.

*Testate/Intestate* – The term “testate” refers to an estate for which there is a valid Will. “Intestate” refers to an estate of a decedent who died without a valid Will.

## CHAPTER 3: 5 COMMON PROBATE QUESTIONS

This section covers answers to frequently-asked questions about Alabama probate.

### QUESTION 1: IS ALABAMA PROBATE REQUIRED?

Whether or not probate is required depends on the assets involved and who exactly owns them. If the deceased person (the “decedent”) owned assets in his or her name alone, some form of court proceeding is usually required. See *Is Probate Necessary?* (Chapter 4) beginning on page 6 below.

### QUESTION 2: DO I NEED TO HIRE A ALABAMA PROBATE ATTORNEY?

Not necessarily. In our experience, most courts will recommend that you do so, but it is not a strict requirement. We have resources to help you represent yourself in Alabama probate should you choose to do so.

### QUESTION 3: HOW LONG DOES PROBATE TAKE?

In our experience, most simple estates are closed within 8 to 12 months. Alabama law requires that the estate stay open for at least 180 days to allow creditors to submit claims. This makes it impossible to settle an Alabama estate in less than 6 months.

### QUESTION 4: WHO CAN SERVE AS PERSONAL REPRESENTATIVE IN ALABAMA?

If the decedent left a valid Will, it will usually name the person or organization that is to serve as personal representative (executor). If that person is willing and able, he or she will serve as personal representative of the estate. If not, then other personal representatives named in the Will have the option of serving in the order named. If the Will does not name a personal representative (or if all personal representatives named are unwilling or unable to serve), any other person with an interest in the estate or who has custody of the Will can file the Will for probate.

If the decedent died without a Will (intestate), the court will appoint someone to serve as personal representative (administrator) of the estate. The personal representative cannot be under age 19, a convict of an “infamous” crime (whatever that means), or be mentally or otherwise unfit to serve. Preference is given to the following individuals:

1. Spouse;
2. “Next of kin” (an archaic term used to refer to the heirs of the estate);
3. Largest in-state creditor of the estate;
4. Any other person, except that in counties of over 400,000 persons, the county or general administrator is next in line behind the largest in-state creditor of the state.

Under the last category, the county administrator will have priority over the general public in Mobile and Jefferson County estates.

If the spouse, heirs, or largest in-state creditor fails to petition the probate court for letters of administration within 40 days, their right to priority is waived. The probate court will then appoint either the county administrator or any other qualified person who requests letters of administration. This “other qualified person” could still include the spouse or heirs, but they would no longer be entitled to priority.

**QUESTION 5: MUST THE PERSONAL REPRESENTATIVE BE AN ALABAMA RESIDENT?**

If the decedent left a Will naming a personal representative, that person need not be a resident of Alabama. But if there is no will, the personal representative must be an Alabama resident unless he or she has already been appointed to serve as personal representative in another state.

## CHAPTER 4: IS PROBATE NECESSARY?

Before you dive headfirst into probate, you will want to step back and think about whether probate is even necessary. In many cases, this depends on the decedent's assets. Some assets may be subject to probate; others may not. Here are a few questions to help you decide whether probate is required:

### WHAT ASSETS DID THE DECEDENT OWN AT THE TIME OF DEATH?

The answer to this question is the most important factor in determining whether probate will be required. But this step is not as simple as it may seem. Some items that the decedent owned may not be "probate assets" under Alabama law. These "non-probate assets" are not part of the Alabama estate (but may be considered part of the taxable estate for estate tax purposes). You should look at everything the decedent owned to determine which items are Alabama probate assets and which are not.

**Probate assets** include everything that the decedent owned that did not pass automatically to someone else at the decedent's death. Examples of probate assets include real estate owned only by the decedent, bank accounts in the name of the decedent, and life insurance policies that fail to name a beneficiary or are payable to the estate. If the decedent owned any of these assets, Alabama probate will probably be required.

**Nonprobate assets** usually fall into three categories:

1. **Living Trust Property** – Assets that are titled in the name of a valid living trust are not assets of the estate and do not need to go through probate.
2. **Beneficiary Designations** – Assets with payable-on-death or transfer-on-death designations do not go through probate. Examples include life insurance and retirement or other financial accounts with valid beneficiary designations.
3. **Property Owned Jointly with Rights of Survivorship** – Property that is owned jointly with rights of survivorship passes automatically to the surviving owner at the death of one owner. So, for example, real estate titled to a husband and wife with rights of survivorship will pass automatically to the survivor of them when the first spouse dies.

These are just a few rules of thumb to help you figure out whether the decedent owned Alabama probate assets. There are other considerations that come into play, such as homestead exemption, spousal/family rights, and alternatives to probate. You should talk to the Alabama probate attorney about whether any item is a probate asset under Alabama law.

If the decedent didn't own any assets, there's probably no need to probate the estate. If the decedent did own assets, take a look at the next questions to find out whether probate is necessary.

**Question: How do I determine whether property is held jointly with rights of survivorship?**

Answer: You will need to examine the deed to the property. Look for language that says "as joint tenants with rights of survivorship" or "as joint tenants with right of survivorship and not as tenants in common." This sort of language expresses a clear intent that the property pass to the surviving joint owner(s) at the death of one of the owners.

**EXACTLY WHO OWNED THESE ASSETS?**

If you find out that the decedent did own assets, make a list of how each asset is titled (that is, whether the decedent owns the assets in his or her name alone, or other people are co-owners). There are several ways that an asset might be titled, including:

1. Decedent's name alone.
2. Tenants in common (i.e., jointly without rights of survivorship).
3. Jointly with rights of survivorship.
4. Revocable living trust.
5. Other separate entity (LLC, corporation, etc.).

Knowing the ownership details of each asset will help determine which assets will pass automatically to others (non-probate assets) and which may require Alabama probate (probate assets).

**ARE THERE ANY NAMED BENEFICIARIES FOR THE ASSETS?**

Some assets—such as financial accounts and insurance policies—may have a "transfer on death" (also called a "payable on death") designation that names a beneficiary. When the asset owner dies, the asset will automatically pass to the named beneficiary without the need for probate of that asset. While you will need to provide the financial institution or insurance company with a death certificate (and possibly fill out a few forms), assets with a valid beneficiary designation should pass outside of the Alabama probate process.

**WHERE ARE THE ASSETS LOCATED?**

Even if you determine that probate will probably be required, this doesn't necessarily mean that Alabama is the right state for the probate proceeding. If, for example, the decedent lived in Alabama but owned real estate in Florida, Florida may be the best place to bring the probate proceeding. Questions about where to start the probate proceeding usually require the advice of an attorney.



## WHAT IS THE VALUE OF THE PROBATE ASSETS?

Once you determine that there are probate assets, you should estimate the value of each asset. Debts owed by the decedent in connection with the asset should be subtracted from the gross value to give the asset's net worth. This will allow you to make an informed decision about whether to proceed with probate.

In a few situations, such as insolvent estates, some clients choose not to go through probate since there wouldn't be any assets left over to distribute. But even if there are a number of debts, there may be tools available to protect at least some of the assets from creditors. At a minimum, the Alabama homestead exemption and other allowances (discussed below) should be considered.

**Estate Planning Question: I have a Last Will and Testament. Doesn't this mean that my estate won't need to go through probate?**

Unfortunately, no. A Will does not avoid probate. In fact, the term probate technically refers to "proving" a Will. There are ways to structure an estate plan to avoid probate (such as using revocable living trusts), but just having a Will won't do the job. Probate doesn't depend on whether or not you had a Will, but on what assets you own and how they are titled.

## CHAPTER 5: SUMMARY DISTRIBUTION OF SMALL ESTATES

Alabama has a small estates act that provides a shortcut to full probate for people who die with small estates (less than \$25,000 in 2009, indexed for inflation). This procedure applies regardless of whether the decedent left a valid Last Will and Testament or died intestate.

The following conditions must be met to qualify for disposition under the Alabama Small Estates Act:

1. The decedent must have owned Alabama probate assets that do not include real estate (i.e., the Alabama Small Estates Act will not apply if the decedent owned real estate);
2. The total value of the decedent's estate must be less than \$25,000 (indexed for inflation in 2009); and
3. All debts of the decedent's estate must have been paid.

If the estate meets these conditions, the surviving spouse (or other interested person) can file a Petition for Summary Distribution with the court in the county where the decedent lived. This Petition must describe the decedent's estate. If there is a Will, it must be attached.

Once the Petition for Summary Distribution is filed, notice must be published once in a newspaper of general circulation in the county where the decedent lived. When 30 days pass from the date that the notice of the filing of the Petition for Summary Distribution was first published, and assuming everything is in order, the court will issue for an Order granting the Petition for Summary Distribution.

## CHAPTER 6: HOW TO PROBATE AN ALABAMA LAST WILL AND TESTAMENT

The word “probate” essentially means “to prove.” To probate a Will is simply to provide its validity in court. For testate estates, proving the validity of the Will is the first step in the Alabama probate process.

The validity of the Will depends on a set of rules known as “testamentary formalities.” These rules require the Will to be:

1. in writing,
2. signed by the person making the Will (testator) or someone in the testator’s presence and under his or direction, and
3. attested by at least two witnesses who sign their names in the presence of the testator.

The person making the Will must also be at least 18 years old and competent to make the Will.

Probate Note: Unlike some states, Alabama does not recognize holographic or handwritten wills. Holographic wills are wills that are entirely in the handwriting of the testator. In some states, a holographic will is deemed valid regardless of whether or not it is properly witnessed. There is no such rule in Alabama. A Last Will and Testament will only be admitted to Alabama probate if it is properly signed and witnessed in accordance with Alabama law.

If there is a need to probate a Will in Alabama, it’s best to do it quickly. Wills are not effective in Alabama unless they are filed for probate in Alabama within five years from the death of the testator unless the Will was admitted to probate in another state within the five-year period. And if the Will is not filed within 12 months from the date of the testator’s death, certain good faith purchasers of estate assets may be able to keep good title. Concealing the existence of a last will and testament is considered fraud, and the Alabama probate court may compel a person to produce a Will under threat of contempt of court.

In many cases, the Will is self-proving under Alabama law. A will is *self-proving* if it is accompanied by affidavits testifying that the Will was executed in accordance with Alabama’s testamentary formalities. These affidavits are usually prepared and signed at the time the Will executed. If the Will is accompanied by a self-proving affidavit, no further evidence is required.

Probate Note: To determine if a Will is self-proving, look for a separate portion of the Will (usually on the last page or two) that contains a notarized statement by the witnesses that the Will was duly executed. The witnesses will usually have signed the Will twice: once as witnesses only and once on the affidavit.

If the Will is not self-proving, the Alabama estate lawyer must obtain the testimony of at least one of the witnesses to the Will. This is easy to do if the witness is alive, can be located, and is willing to cooperate. If a long period of time has passed since the Will was executed, locating the witnesses can be challenging.

If the witnesses are dead or reside out-of-state, testimony verifying the handwriting of the testator's signature and that of at least one witness can be provided in lieu of witness testimony. For out-of-state witnesses or those unable to come to court, the court may issue a commission to take the deposition of the witness.

Note: A *commission* is an order appointing some person as a type of notary public who is authorized to place the particular named witness under oath. The *deposition* is a written set of questions that the witness must answer and sign under oath.

## CHAPTER 7: HOW TO HANDLE THE ESTATE WHEN THERE IS NO WILL

The assets of a person who dies intestate (without a valid Will) are distributed in accordance with a default system known as laws of intestacy or intestate distribution. Alabama intestate law will apply to all assets (including real estate) located in Alabama.

### ADMINISTERING THE INTESTATE ESTATE

Most of the provisions of the Alabama Code that apply to testate estates also apply to intestate estates. But there are a few significant differences:

1. In an intestate proceeding, the law makes assumptions about which individuals should share in the decedent's estate. These individuals are referred to as the decedent's *heirs at law*. The application of these rules is mechanical and doesn't leave much of an opportunity to change who will receive the assets.
2. In most testate estates, the Will includes a clause waiving any need for a fiduciary bond. In an intestate estate, a fiduciary bond is required as a matter of law. This often results in the additional expense of having to post a fiduciary bond.
3. A person who leaves a Will usually names the person who will serve as executor of his or her estate. But in an intestate estate, the court must appoint someone to serve as administrator.

### HOW TO IDENTIFY A PERSON'S HEIRS AT LAW

When a person dies intestate, the Alabama laws of intestacy provide for distribution of the decedent's assets. This scheme of distribution may be referred to as intestate succession, intestate distribution or the laws of intestacy. These laws represent the Alabama legislature's best guess as to what most people would want to happen to their assets.

Under Alabama's laws of intestate distribution, any part of an estate that is not effectively disposed of through a valid Last Will and Testament is distributed to the decedent's heirs. The decedent's heirs are determined as follows:

1. If the decedent is survived by a spouse, the following rules apply:
  - a. If the decedent didn't leave parents or children, the spouse gets everything.
  - b. If the decedent was survived by parents but not by children, the spouse gets \$100,000 and half of the balance of the decedent's estate. The decedent's parents get the remaining half.
  - c. If the decedent had children who are also children of the surviving spouse, the surviving spouse gets \$50,000 and one half of the balance of the decedent's estate. The surviving children share the other half of the balance.



- d. If the decedent had living children that are not the children of the surviving spouse, the surviving spouse gets one half of the estate and the decedent's children get the remaining half.
2. If the decedent is not survived by a spouse, the estate passes to decedent's heirs by order of priority. Here is the order of priority:
  - a. Children and their descendants;
  - b. Parents;
  - c. Brothers and sisters, or, if all are deceased, nieces and nephews;
  - d. Grandparents, aunts, and uncles or, if all are deceased, to their descendants; and
  - e. The State of Alabama.

Within the various categories of heirs, each descendant of equal degree inherits equally and descendants of unequal degree inherit by representation (dividing the share that their parents would have taken). So, for example, if a person dies with three living children, each child would get one-third. If one of the three children is deceased but left descendants (i.e., grandchildren of the decedent), those descendants would share in the deceased child's one-third.

When several individuals are entitled to property under Alabama's intestate laws, they take title as tenants in common in proportion to their respective rights. So, for example, if six children are entitled to inherit the decedent's one piece of real estate, each child would have a one-sixth interest in the entire property. Note that this does not mean that each child would own one-sixth of the property (i.e., that the property itself is divided), but that each child has a one-sixth interest in the property as a whole.

## CHAPTER 8: THE ALABAMA PROBATE PROCESS

No two estate proceedings are the same. Because each estate involves different assets, individuals, and legal documents, the work required to administer each estate can vary. But the probate process generally unfolds in three primary stages:

1. Opening the estate
2. Administering the estate
3. Closing the estate.

### STAGE ONE: OPENING THE ESTATE IN ALABAMA PROBATE COURT

Once you've explored the alternatives to probate and determined that probate is necessary, it is time to proceed with opening the estate in probate court. This is where the probate and estate administration process really begins.

#### DETERMINE THE TYPE OF ALABAMA PROBATE PROCEEDING TO OPEN

The first step is to determine the type of probate proceeding to open. If an estate is not eligible for summary distribution as a small estate, a formal probate proceeding will probably be required.

#### DETERMINE THE APPROPRIATE ALABAMA PROBATE COURT (JURISDICTION)

An Alabama estate is usually opened in the county in which the decedent lived. If the decedent lived out-of-state, the estate should be opened in the county where his or her assets were located.

#### FILE A PETITION TO OPEN THE ESTATE WITH THE ALABAMA PROBATE COURT

A petition is a document requesting that the judge open the estate. This document brings the estate before the probate court.

The initial petition requests that the court appoint someone to act as personal representative on behalf of the estate. If the decedent did not leave a Will, the document appointing the personal representative is called Letters of Administration. If the decedent did leave a Will, the document is known as Letters Testamentary. In both cases, this document gives formal evidence that a person has legal authority to act on behalf of an estate.

To obtain Letters Testamentary or Letters of Administration, you or your attorney must file a Petition for Grant of Letters Testamentary (if there is a Will) or Petition for Grant of Letters of Administration (if there is no will) with the Alabama probate court. If there is a valid Last Will and Testament, the Petition for Grant of Letters Testamentary will also establish the validity of ("prove") the Will.

#### PROVIDE NOTICE TO SPOUSE/NEXT OF KIN

The spouse or heirs of the decedent are given at least 10 days notice before the hearing on the Petition to Admit Will to Probate is heard by the Alabama probate judge. Notice to out-of-state heirs must be given in accordance with the Alabama Rules of Civil Procedure. If there are minor children involved, a guardian ad litem may need to be appointed.

#### OBTAIN AND SUBMIT AN EXECUTOR'S BOND (PERSONAL REPRESENTATIVE'S BOND)

Unless the Will waives bond, the executor (personal representative) must execute a bond or give collateral generally equal to the amount under the personal representative's control, less the value of property under Ala. Code § 43-2-844 that can only be sold or conveyed with court authority. In practice, most wills waive bond. However, even if a Will waives bond, the Alabama probate court might still require it under certain circumstances.

For intestate estates, bond is statutorily required. In fact, Alabama probate judges can even be personally liable for damages resulting from their issuance of Letters of Administration without bond. Because of this liability, the bonding requirement is strictly enforced for intestate estates.

The information necessary to compute the amount of the bond is included in the Petition. This allows the court to set the bond amount when it grants the Petition. The Letters of Administration or Letters Testamentary will not be issued until any required bond is posted.

#### OBTAIN AN ORDER AND LETTERS TESTAMENTARY OR LETTERS OF ADMINISTRATION FROM THE PROBATE COURT

Once the initial documents are filed with the probate court, the probate judge will review them. Some judges may require an *ex parte* hearing, meaning a hearing that occurs in a non-adversarial setting to discuss the matter with the judge. In uncontested probate matters, it is not uncommon for the judge to open the estate without a hearing.

Once the attorney attends the hearing or otherwise presents the petition to the probate judge, the judge will issue an order opening the estate and grant Letters Testamentary or Letters of Administration. If bond is required, bond must be posted before the court will issue Letters of Administration or Letters Testamentary.

#### STAGE TWO: ESTATE ADMINISTRATION

Once the court issues Letters Testamentary or Letters of Administration, you can proceed with administering the estate. Estate administration involves three broad categories of activities: (1) collecting and managing the assets of the estate, (2) paying obligations of the estate, and (3) distributing what's left to the beneficiaries of the estate.

## COLLECTING THE ASSETS OF THE ESTATE

Unless the Will provides otherwise, a personal representative has both the right and the responsibility to collect the assets of the Alabama probate estate and take control of the decedent's property. The personal representative may, however, give real estate or tangible personal property to person entitled to the property until the personal representative determines that it is needed for estate administration purposes.

## INVENTORY OF THE ESTATE

An *inventory* is a detailed listing of property owned by the decedent at the time of death. It includes the fair market value of each asset on the date of death and the amount of any debts associated with the asset.

In Alabama, the personal representative must file an inventory within two months of appointment as personal representative. The personal representative must also send a copy of the inventory to any interested person who requests it.

Sometimes a Last Will and Testament will waive the requirement that a personal representative file an inventory. Courts will usually recognize such a waiver and not require an inventory unless the court decides that it is necessary to protect the estate assets. But even if the court does not require a formal inventory, at least some form of informal list is usually necessary to keep up with the assets.

## DISPOSING OF CLAIMS AGAINST THE ESTATE

Each Alabama personal representative is responsible for notifying creditors of the estate. The notice must state the name of the decedent, the date on which letters were granted, and the identity of the court that granted the letters. The notice must advise all persons having claims against the estate to present the same within the time allowed by law or that the same will be barred.

Known creditors are treated differently than unknown creditors. *Known creditors* (those that the personal representative is aware of or could easily identify) are given personal notice as soon as possible after their identity is known. The notice must be sent by first-class mail addressed to the creditors' last known addresses or by other means that will provide actual notice to such creditors. Known creditors must be notified within six months from the date that the personal representative is appointed (and much sooner if possible).

Notice to *unknown* creditors is handled by publication. Notice is published once a week for three successive weeks in a local newspaper in the county where the letters were granted. If no newspaper is published in the county, the notice should be published in the newspaper published nearest to the county courthouse or in an adjoining county.

All claims against the estate must be filed within six months of the date that letters testamentary or letters of administration are granted, as long as each known person who may have a claim against the estate is given at least 30 days personal notice. Creditors file claims by submitting an affidavit to the Alabama probate court for filing as a lien against the estate. Any claims (other than contingent claims) that are not submitted within the six-month window are time barred.

Note: Failure to submit a claim does not prevent a secured creditor (such as a bank with a mortgage on a home) from exercising its rights. If you neglect to pay a mortgage or car note, the lender can seize the asset.

Claims against the estate are paid from estate assets (other than assets that qualify for homestead exemption or family allowance). The debts of the probate estate are grouped in to preference categories and paid in order, with lower-tier categories to be paid only when the higher-tier categories have been paid in full. The categories of priorities are as follows:

1. Funeral expenses;
2. Fees and charges of estate administration;
3. Expenses of last illness (such as medical bills);
4. Taxes on the state;
5. Debts to employee's for services rendered in the year the decedent died; and
6. All other debts.

## STAGE THREE: SETTLING THE ESTATE

The final step in the Alabama probate process is settling (closing) the estate. Because each estate is different, the exact steps that must be done to settle the estate vary from one estate to the next. In most cases, you will present an accounting to the court along with a petition asking the court to approve settlement of the estate.

### SETTLEMENT AND ACCOUNTING

A *settlement* is an accounting of the assets that have been collected and the debts that have been paid. It typically includes a full or partial distribution to the heirs or beneficiaries of the estate.

Alabama personal representatives must make annual settlements of their administration. A final settlement can be made six months from the date of the grant of Letters Testamentary or Letters of Administration. If the estate is closed in less than one year, the final settlement is the only settlement of the estate.

If everyone agrees to the final settlement, the Petition for Final Settlement is presented to the probate court, along with consents by all heirs or beneficiaries of the estate. The court will then close the estate without the need for a formal hearing or full accounting.

Things are more complicated if not everyone agrees to the settlement. In that case, the personal representative will hold the assets until a final hearing is held. After the hearing, the court will issue a ruling on how to distribute the estate assets. Once the assets are distributed, the personal representative will file documentation with the court to report that all of the orders of the court have been fulfilled. This process can result in a delay in the distribution of assets and could cost additional attorney fees.

#### DISCHARGE OF THE PERSONAL REPRESENTATIVE

Once the court approves the final settlement and the accounting, the personal representative will distribute the assets to the heirs or beneficiaries in accordance with the court order. If there was an Alabama Last Will and Testament, the assets will generally be given to the beneficiaries as provided in the Will. If there was no will, the assets will be distributed in accordance with Alabama's laws of intestacy.

The personal representative may also prepare a final report to the probate court, stating that the terms of the order have been fulfilled. At this point, the probate court will usually discharge the surety (bond), close the estate, and discharge the personal representative from further obligations. In some counties (such as Mobile county), the discharge of the personal representative is automatic. In others, a separate request is required.



## CHAPTER 9: DUTIES OF THE EXECUTOR OR ADMINISTRATOR

Your role as executor or administrator in Alabama probate is a fiduciary role. This means that you must act in the best interest of everyone who has a monetary interest in the estate (creditors, heirs, and beneficiaries). You hold the estate assets for their benefit, and looking out for your interests alone will get you into trouble.

The role of an Alabama personal representative (executor) is one of great responsibility. You are responsible for handling the estate in the best interest of all concerned. What this looks like depends on the circumstances. What might be okay in one situation can get you into trouble in other circumstances. To protect yourself, talk to an attorney about any specific questions you have.

Although the probate court may limit the powers of the personal representative, the Mobile Alabama Probate Court has provided a helpful summary of the powers and duties of the personal representative:

**You can do this without prior court authorization:**

- retain assets
- receive assets
- perform deceased contracts
- satisfy written charitable pledges
- deposit funds in financial institutions
- abandon valueless personal property
- allocate expenses to income
- pay assessments
- hold securities
- insure assets
- borrow to protect estate
- settle with debtors
- settle claims
- pay taxes and expenses
- sell or exercise stock options
- enter leases up to one year
- vote stocks
- employ and pay lawyers and/or auditors
- prosecute or defend claims
- continue unincorporated business
- incorporate the business
- limit liability

**You can do this only with prior court authorization:**

- abandon an estate asset
- make repairs or demolish improvements
- subdivide, dedicate land
- leases greater than one year
- enter mineral leases
- sell real estate



Each of these rights and responsibilities are subject to the overarching fiduciary obligations of the personal representative. The personal representative's reason for the action is often as important as the action itself. For example, the decision to abandon valueless personal property can technically be made without court involvement. But if the decision is made with the intent to deprive one of the heirs of that asset, the personal representative will still be liable for breach of his or her fiduciary duty. All decisions must be in the best interest of the parties involved. If there is any question, it is best to get prior court approval.

## CHAPTER 10: ELECTIVE SHARE, HOMESTEAD EXEMPTION, AND ALLOWANCES

### THE ALABAMA ELECTIVE SHARE

Alabama, like many separate property states, has laws to stop a person from leaving his or her spouse penniless. These laws reflect public policy that a person should not be allowed to leave his or her spouse destitute by making little or no provision for the surviving spouse in his or her Last Will and Testament. This protection is embodied in Alabama's elective share statute.

Probate Note: The elective share is only relevant when there is a Last Will and Testament. Otherwise, the surviving spouse would be entitled to a share of the decedent's estate under the Alabama intestate laws, without any need for an elective share.

The elective share is a choice given to the surviving spouse to renounce or dissent from the decedent's Will. The Alabama elective share statute gives a surviving spouse (without regard to gender) the choice of either taking whatever the decedent left under the Will or taking an "elective share" of the decedent's estate. The elective share is the lesser of: (a) the value of the decedent's estate minus the value of the surviving spouse's estate; or (b) one-third of the decedent's estate. A simple mathematical computation using these variables will determine whether a surviving spouse will benefit from an elective share.

Like other allowances under Alabama law, the surviving spouse must affirmatively elect to claim his or her elective share. A Petition for Elective Share must be made within six months after the date of death or within six months after the probate of the Will, whichever is later. The court can extend this time period if there is good cause as long as the extension is requested and granted within the election time period.

If the surviving spouse elects to dissent from the Will and claim his or her elective share within the proper time period, the court will then hold a hearing to determine the proper amount of the elective share and order that the elective share be satisfied from the assets of the estate. Alabama law sets forth an order of priority for the assets that can be used to satisfy the elective share.

The elective share is entirely different from the homestead, exempt property, and family allowances provided under Alabama law. The surviving spouse is entitled to these allowances regardless of whether he or she dissents from the Will and claims an elective share. This means that the surviving spouse can effectively take everything that he or she is entitled to under the Will and request the full homestead, exempt property, and family allowances without making an election against the Will.

## ALABAMA HOMESTEAD EXEMPTION

Alabama law provides a monetary homestead exemption of \$6,000 to the surviving spouse of a decedent who lived in Alabama. If the decedent does not leave a surviving spouse, the homestead exemption is available to minor or dependent children. Each minor or dependent child is entitled \$6,000 divided by the number of minor and dependent children of the decedent. The Alabama homestead exemption is a super-priority claim that will trump all other claims against the estate.

The surviving spouse need not dissent from the Will (i.e., claim an elective share) to qualify for the homestead exemption. However, the homestead exemption does not take effect automatically –the surviving spouse must claim it during his or her lifetime. If the surviving spouse dies without claiming the homestead exemption, there is no statutory mechanism for the surviving spouse’s estate to later claim the homestead exemption. If the surviving spouse makes the election during his or her lifetime, however, the subsequent death of the surviving spouse will not terminate the homestead. Similar rules apply for children claiming the homestead exemption.

The Alabama homestead exemption is in addition to any share passing to the surviving spouse or minor or dependent child by the Will of the decedent unless otherwise provided in the Will, by intestate succession, or by way of elective share.

## EXEMPT PROPERTY ALLOWANCE

For decedents who lived in Alabama at the time of death, Alabama law provides an allowance of real and personal property up to \$3,500 in excess of any security interests therein in household furniture, automobiles, furnishings, appliances and personal effects (security interests are debts that are secured by an interest in property, such as a mortgage on a home to secure the loan on the home). The exempt property allowance is in addition to the homestead exemption. If there is no surviving spouse, the decedent’s children share jointly to the same value.

If there is not \$3,500 worth of exempt property of the estate or if there are no “free and clear” assets that are worth at least \$3,500, the \$3,500 exempt property allowance may come from other sources to the extent necessary to reach the \$3,500 value. Rights to exempt property and assets needed to make up a deficiency of exempt property have priority over all claims against the estate, except that the right to any assets to make up a deficiency of exempt property shall abate as necessary to permit prior payment of homestead exemption and family allowance.



As with the Alabama homestead exemption, the exempt property rights are in addition to any benefit or share passing to the surviving spouse or children by the Will of the decedent unless otherwise provided, by intestate succession, or by way of elective share.

### ALABAMA FAMILY ALLOWANCE (EXEMPTION)

If the decedent lived in Alabama at the time of death, an additional family allowance is available to support his family. This allowance can be used to support the surviving spouse and any minor children that the decedent was obligated to support or was in fact supporting at the time of death.

The amount of the family allowance is usually \$6,000. The personal representative can set aside a lump sum of \$6,000 or periodic installments not to exceed \$500 per month for one year to cover the family allowance. If there are factors to support an increase in the family allowance, the personal representative can petition the court for an increase in this amount.

The family allowance is intended to help support the decedent's family during estate administration. But if the estate is insolvent (more debts than assets), the family allowance is available for one year only. So even if the probate process extends beyond one year, the family allowance will stop at the end of the first year.

The family allowance is distributed for the benefit of the individuals it is intended to support. If there is a surviving spouse, he or she will receive the family allowance for his or her own benefit and the benefit of any minor children. If the child doesn't live with the surviving spouse, then the allowance may be made partially to the child (or his or her caretaker) and partially to the spouse. If there is no surviving spouse, the family allowance is payable to the children or their caretakers.

The family allowance will trump all claims against the estate, but it does not have priority over the homestead exemption. The family allowance is in addition to the amounts passing to the surviving spouse and children under the decedent's last will and testament (unless the Will provides otherwise), by the elective share, or by intestate succession. But the family allowance must be claimed during the life of the person(s) entitled to it. The death of any person entitled to family allowance terminates his right to any portion of the allowance that has not been paid.

## CHAPTER 11: FOUR STEPS TO GET YOU STARTED

If you are ready to get started with dealing with a deceased person's final affairs, we suggest that you begin with these four steps. These steps will help you determine whether probate is necessary and, if necessary, communicate efficiently with an attorney.

### STEP 1: MAKE A LIST OF THE DECEDENT'S ASSETS

You need to know what assets the decedent owned, where they are located, how much they are worth, and how they are titled (whether there are any co-owners or TOD designations). Knowing this information will help you decide how to deal with the estate under Alabama law, or if you need to handle it in another state.

### STEP 2: DETERMINE WHETHER THERE IS A VALID LAST WILL AND TESTAMENT

You also need to know there is a valid Last Will and Testament. If so, it will tell you who has the first choice of administering the estate and who should receive the assets.

### STEP 3: MAKE A LIST OF THE NAMES AND ADDRESSES OF THE PARTIES INVOLVED

You cannot resolve Alabama estate issues without knowing the names and addresses of the other parties involved. Save yourself (and your attorney) some time by putting together a list right away. Keep your eye on three groups:

1. Individuals or organizations named in the Will;
2. Close relatives of the decedent (especially spouses and children); and
3. Creditors or potential creditors of the decedent's estate.

Because each of these groups could be affected by the Alabama probate proceeding, you should identify them early.

### STEP 4: TALK TO ALABAMA PROBATE ATTORNEY

Consult with an Alabama probate attorney early in the process. Certain deadlines could affect your rights if too much time passes without action on your part. A probate attorney can help you navigate this process and ensure that filings are made in a timely manner.

The choice of attorney is up to the personal representative. If you feel that you need an attorney, you should hire an attorney that understands Alabama probate law and communicates effectively.

Alabama law recognizes that the probate process is too difficult for most people to navigate without an attorney. Because of this, reasonable attorneys' fees are allowable probate costs and usually paid from the estate assets. As long as there are enough assets in the estate to pay

attorney's fees, the attorney's fees are an expense of the estate and do not come out of the personal representative's pocket.

If we can be of assistance, please send an e-mail to Jeramie Fortenberry at [jfortenberry@alabamaprobatesolutions.com](mailto:jfortenberry@alabamaprobatesolutions.com).

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[www.alabamaprobatesolutions.com](http://www.alabamaprobatesolutions.com)