

# HANDLING YOUR FIRST ILLINOIS PROBATE ESTATE

By  
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## I. Introduction.

### A. Probate

1. A court process to transfer property from Decedent's name to his heirs or legatees (see below), after paying off all debts and expenses
2. Property owned by Decedent in his/her own name at death is referred to as "probate property" – THIS is the property that is subject to probate
3. Property owned by Decedent in some other form is called "non-probate property," and is not subject to probate – some examples:
  - a. Property with a valid beneficiary designation
  - b. Property held in a trust
  - c. Property owned jointly with right of survivorship
4. Resources for Probate
  - a. Illinois Probate Act (755 ILCS 5/) – referred to here as "the Act"
  - b. Illinois Supreme Court Rules (Rules 108, 110 – see below)
  - c. Local Court Rules and Forms, depending on your county

### B. Testate/Intestate

1. Dying testate = dying with a valid Will
2. Dying intestate = dying without a valid Will

### C. Personal Representative: the individual or entity who is running the estate

1. Executor: personal representative of a testate estate
2. Administrator: personal representative of...
  - a. an intestate estate OR
  - b. a testate estate in which no nominated executor is willing or able to act (because of death, declination to act, etc.) – in this case, the administrator is referred to as "administrator with the Will annexed" OR
  - c. an estate in which an "administrator to collect" is necessary, either because (i) the estate may be wasted, lost or embezzled or (ii) the situation involves a person who is missing and presumed dead. (See Article X of the Act)

### D. Heirs/Legatees

1. Heir: one of the decedent's closest relatives
  - a. as determined by the Probate Act's section on descent and distribution (Sec. 2-1 of the Act)

- b. in an intestate estate, heirs inherit all of decedent's probate property
  - 2. Legatee: beneficiary under the decedent's Will
  - 3. In other words, you can be an heir AND a legatee, just an heir, or just a legatee
  - 4. Heirs and legatees are "interested persons" for purposes of the Act, and therefore have certain rights (such as the right to receive notice, and the right to initiate a Will contest)
- E. Independent/Supervised Administration
  - 1. Independent Administration
    - a. Used in most cases – for purposes of this presentation, we assume independent administration
    - b. Very little court interaction required – basically, just to open and close the estate
    - c. The court's point of view: if the beneficiaries are happy, the court is happy
  - 2. Supervised Administration
    - a. Similar to a guardianship – court approval required for most actions taken by the personal representative
    - b. As a result, a probate in supervised administration is more expensive and more time-consuming
    - c. The time and expense may be worthwhile if there is significant conflict among heirs and/or legatees
    - d. Provisions in the Act relating to administration, investing of assets (see Articles XIX – XXI) are defaults, which can be overcome by provisions in a Will

II. Initial information you will need to get started. See also attached Intake Form.

- A. Decedent's death certificate
  - 1. Provides necessary information for petition, taxes
  - 2. May help you decide in which county probate should be commenced (see Sec. 5-1 of the Act) – usually it's the location of Decedent's "known place of residence"
- B. Decedent's (original) Will, if any
  - 1. You are required to file this with the local clerk's office
  - 2. See Sec. 6-1 of the Act
  - 3. Make copies before filing! You won't get the Will back later

- C. List of Decedent’s property (probate and non-probate)
  - 1. This will help you to determine whether a probate is needed at all
  - 2. If the probate property has a value of \$100,000 or less, a small estate affidavit may be used to transfer property (see Article XXV of the Act)
  - 3. If the only probate property is real estate, you may be able to transfer title by use of a “bond in lieu of probate” – check with a title company for details about this procedure
  - 4. Why do you need to know about Decedent’s non-probate property?
    - a. For estate tax return purposes
    - b. The personal representative may have to assist with the distribution of this property
  
- D. List of Decedent’s heirs and legatees, with contact information for each of them
  - a. Heirs and legatees will receive probate notices
  - b. Also, in an intestacy situation, their identities are important for determining who has priority for acting as (or nominating) the administrator
  
- E. List of Decedent’s debts, with contact information for each creditor

III. Documents for Opening the Estate – Testate.

- A. Petition for Probate of Will and For Letters Testamentary (see Sec. 6-2 of the Act)
  - 1. As the name suggests, we are asking the court to do two things:
    - a. Find the Will to be valid
    - b. Appoint the individual nominated in the Will as the executor of the estate
  - 2. Note that you must attach information about each heir and legatee
  - 3. The petitioner does not need to give notice of the filing of the petition, or of the hearing that will be held on it, beforehand (cf. an intestate estate)
  
- B. Oath and Bond or related (see Article XII of the Act)
  - 1. One of three forms must be completed
    - a. Acceptance of office: if executor is a corporation
    - b. Oath and Bond – No Surety: if the Will “waives” surety (look for language to effect that “no security, surety or bond shall be required of my executor”)
    - c. Oath and Bond – Surety: if the Will does not waive surety; in this case, you will either:

- i. Have to purchase a surety bond (basically an insurance policy) from a surety bond company; OR
    - ii. Have to find two individuals willing to act as sureties; OR
    - iii. Arrange for a deposit of assets in safekeeping in lieu of surety (see Sec. 12-7 of the Act)
  - 2. In cases involving the Oath and Bond – Surety form, you should make sure that this form has been executed by the personal representative AND by the surety bond company or individual sureties before you go into court
  - 3. Note that the cost of the bond is based on the value of the personal property (as opposed to real property) in the estate
    - a. The idea is that personal property could, potentially, be stolen by the personal representative
    - b. It's hard to steal a house!
    - c. But note that you may need to go back into court if the value of the personal property changes due to (for instance)...
      - i. Sale of real estate
      - ii. Discovery of significant personal property that you didn't know about when the estate was initially opened
- C. Copy of Will: some counties require you to submit a copy of the Will along with a signed statement saying that it is a true and correct copy of the original
- D. Affidavit of Heirship (see Sec. 5-3 of the Act)
  - 1. A narrative, describing in detail Decedent's relations
    - a. Some counties (e.g., DuPage and Lake) have fill-in forms for this
    - b. Others (like Cook) require you to prepare your own form
  - 2. Must involve detail – number of times Decedent was married, number of children Decedent had or adopted with each spouse, number of children born to or adopted outside of marriage
  - 3. Repeat this as needed – fairly easy if Decedent survived by spouse and all children; more difficult if Decedent died unmarried and with no descendants
  - 4. See Article II of the Act for other exceptions and for tricky situations
- E. Order Declaring Heirship
- F. Order Admitting Will to Probate and Appointing Representative
- G. Other potential papers
  - 1. Some situations require additional documents to the above
  - 2. For instance, Cook County requires the filing of a Resident Agent form if the personal representative does not live in Illinois

3. The Act (Article VII) also contains rules for the admission to probate of foreign Wills
4. Check local court rules to make sure no additional papers are needed.

#### IV. Documents for Opening the Estate – Intestate.

- A. Three introductory notes:
  1. Sec. 9-3 of the Act sets forth the order of preference for acting as (or nominating) the administrator:
    - a. Surviving spouse
    - b. Legatees
    - c. Children
    - d. Grandchildren
    - e. And so on
  2. If your client is not the surviving spouse, you will need to give notice of the hearing on your petition
    - a. notice goes to all individuals with priority the same as or higher than your client
    - b. notice must be mailed at least 30 days prior to the hearing
    - c. see Sec. 9-5 of the Act
  3. In “friendly” family situations, where everyone agrees on who should be named administrator, you can skip notice by obtaining written consent from everyone with an equal or greater right to act or nominate
- B. Petition for Letters of Administration (see Sec. 9-4 of the Act)
- C. Oath and Bond or related
  1. See III.B. above
  2. Obviously, there is no possibility of a waiver of surety here, so the choices will be...
    - a. Acceptance of Office
    - b. Oath and Bond - Surety
- D. Affidavit of Heirship: see III.D. above
- E. Order Declaring Heirship
- F. Order Appointing Representative of Decedent’s Estate - Intestate

#### V. After the Estate is Open – Initial Steps. Once the probate estate has been opened, the attorney should send out the appropriate notices:

- A. Claims notice (Sec. 18-3 of the Act)
  1. If creditor is known, notice should be sent directly to creditor

2. If creditor is unknown, notice will be need to be published in a local newspaper
  3. Notice should be sent ASAP after the estate has been opened, to start the “claims period” clock ticking
- B. Heirs/legatee notice
1. Notice of the filing of the petition, and of the entry of an order appointing a personal representative, must be given to heirs and legatees (see Sec. 6-10 of the Act for testate estates, and Sec. 9-5 of the Act for intestate estates)
  2. If the estate is in independent administration, notice of this fact must be sent to heirs and legatees (see Illinois Supreme Court Rule 110)
  3. If the estate is testate (that is, a Will has been admitted to probate), notice of this fact must be sent to heirs and legatees (see Illinois Supreme Court Rule 108)
- C. “Notice” should also be sent to the personal representative, setting forth the executor or administrator’s duties with respect to:
1. Collecting assets
    - a. The personal representative should also begin having Decedent’s mail forwarded
    - b. This will allow the personal representative to obtain property information for inventory and tax purposes
  2. Preparing an inventory
    - a. An inventory is required in supervised administration (see Sec. XIV of the Act), but isn’t required in independent administration
    - b. However, it’s good practice to prepare one for the beneficiaries, as a first step to keeping them apprised of the estate’s progress
    - c. Also is the first step in preparing the estate tax return, if needed
  3. Obtaining an EIN from the IRS
    - a. You can easily obtain this online
    - b. However, you will need a completed SS-4 form from the personal representative, naming you as third party designee
  4. Setting up an estate bank (checking) account
    - a. Liquidated property can be placed here
    - b. Claims can be paid from here (but see below)
  5. Investment of estate assets (see Article XXI of the Act)
  6. Tax returns
    - a. Income tax (Decedent) – federal and state
    - b. Income tax (estate) – federal and state
    - c. Estate tax – federal and state
  7. Payment of claims
  8. Preparation of an accounting

9. Fiduciary duties
- D. Letters of office should also be ordered
1. These are official court documents showing the personal representative's appointment
  2. The personal representative can use them to collect the decedent's property

VI. After the estate is open – ongoing matters

- A. This can and will vary wildly, depending on the estate
- B. Could include (but is not limited to):
1. Litigation
    - a. Claims
    - b. Will contest (see Article VIII of the Act)
    - c. Spousal renunciation of the Will (see Sec. 2-8 of the Act)
  2. The sale of assets (such as real estate or a business)
  3. Tax work (income tax for decedent and estate/trust, estate tax)
  4. Disclaimers (See Sec. 2-7 of the Act)

VII. Documents for Closing the Estate

- A. Final Report
1. Basically informs all beneficiaries that administration of the estate has been completed
  2. Accompanied by an accounting
- B. Receipts
1. Receipts should be obtained from each and every beneficiary, indicating that they have received their full share of the estate
  2. As a practical matter, you as attorney should require a signed receipt before you tell the personal representative to make distribution
  3. Note that, in Cook County, there is a special requirement in cases involving a trust – this requirement applies when...
    - a. part or all of the estate is payable to a trust; and
    - b. the trustee of that trust is also the personal representative of the estate
- C. Proof of Mailing and Publication
- D. Order of Discharge

**INTAKE FORM  
PROBATE ESTATE**

COUNTY OF PROBATE: \_\_\_\_\_ CASE NUMBER: \_\_\_\_\_

JUDGE: \_\_\_\_\_ HEARING DATE: \_\_\_\_\_

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**PART I: THE DECEDENT**

Do you have a death certificate for decedent?    Yes                      No

Decedent's name: \_\_\_\_\_

Date of death: \_\_\_\_\_

Place of death: \_\_\_\_\_

Residence address at death: \_\_\_\_\_

\_\_\_\_\_

Social security number: \_\_\_\_\_

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**PART II: THE DECEDENT'S WILL**

Did the decedent die with a Will?                      Yes                      No

(If no, skip to Part III)

Date of Will to be admitted to probate: \_\_\_\_\_

Date of Codicil (if any) to be admitted to probate: \_\_\_\_\_

Legatees under Will/Codicil:

<u>Name</u>	<u>Address</u>	<u>Notes</u>
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

Executors under Will/Codicil:

<u>Name</u>	<u>Address</u>	<u>Notes</u>
_____	_____	_____
_____	_____	_____
_____	_____	_____

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**PART III: THE DECEDENT'S HEIRS**

Was decedent married at death?                      Yes                      No

(If yes, name of spouse: \_\_\_\_\_)

Was decedent previously married?                      Yes                      No

(If yes, complete the following:

	Name	Date Ended	Reason Ended
Spouse #1:	_____	_____	_____
Spouse #2:	_____	_____	_____
Spouse #3:	_____	_____	_____
Spouse #4:	_____	_____	_____

Did the decedent have or adopt any children?    Yes                      No

(If yes, complete the following for living children and children of a deceased child:

Name	Address	Notes
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

If there is no Will, who will act as administrator? \_\_\_\_\_

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**PART III: THE DECEDENT'S PROPERTY**

Probate property

Real estate:

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Bank accounts:

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Investment accounts :  
(non-retirement)

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Retirement accounts:  
(401k, IRA, etc.)

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Life Insurance:

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Other:

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Non-probate property

Real estate:

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Bank accounts:

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Investment accounts :  
(non-retirement)

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Retirement accounts:  
(401k, IRA, etc.)

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Life Insurance:

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Other:

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