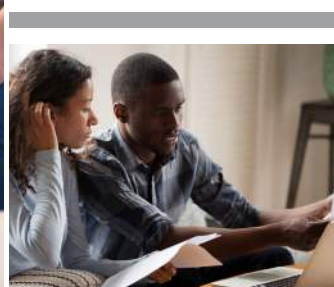




# Cholewicka Law



## *An Introduction to Settling an Estate Through Probate*



480.497.3770

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*Losing a loved one is difficult enough without the added stress of having to make important financial decisions while grieving. For many people, the duties and responsibilities of probating a loved one's estate can feel overwhelming.*

***We created this brochure to give you an introduction to probate:***

**WHAT IT IS AND WHAT THE PROCESS INVOLVES.**

*We hope you find the information helpful during this difficult time in your life.*



## WHAT IS PROBATE?

At the most basic level, probate is a court proceeding by which the estate of a person who has passed away (known as the “decedent”) is inventoried and distributed according to the decedent’s will or state laws. If the decedent had a last will and testament, its authenticity will be determined during probate. The person authorized to administer the decedent’s estate will also be determined, and appointed, during the probate process.

## HOW LONG DOES PROBATE TAKE?

The length of time it takes to complete the probate process depends on a number of factors, including the size and complexity of the estate, the number of creditors and beneficiaries, the court’s schedule, whether or not there are disputes between beneficiaries, and more. In addition, the probate process takes longer in some states than others.



## HOW MUCH DOES PROBATE COST?

The cost of probating an estate varies by state. The costs associated with probate include court fees, personal representative/executor fees, attorney fees, accounting fees, appraisal and business valuation fees, and a number of other miscellaneous fees. Attorney's fees are charged as a percentage of the value of the estate's assets (typically 3-8%), a flat-fee, or combination of the two. Costs do not include any income or estate taxes owed by the decedent.

## WHAT HAPPENS IF THE DECEDENT DIDN'T HAVE A WILL?

When a person passes away without a will, he or she is said to have died "intestate." In this situation, assets will be distributed according to what is known as "intestate succession," which involves ranking family members according to their right to inherit property. While each state has its own laws governing intestate succession, a surviving spouse typically receives at least half of the estate. Family members who are further down the intestate succession "list" will generally not receive anything if those ahead of him or her are still alive. Of course, intestate succession does not take into account the decedent's wishes regarding "who gets what." Assets are simply distributed according to state law.



## DO ALL ASSETS HAVE TO GO THROUGH PROBATE?

Certain assets are exempt from probate. Assets held in a trust, for example, avoid probate. It is important to note that only assets transferred and/or designated to the trust will avoid probate. Assets not in the trust will have to be probated unless they have a joint owner or beneficiary designation. In addition, jointly held assets do not have to go through probate if the co-owner is alive and competent. Assets with beneficiary designations, such as bank accounts, IRAs, and insurance policies, can avoid probate as well provided the beneficiary is alive and competent.

## WHAT ARE LETTERS TESTAMENTARY?

The term “letters testamentary” refers to a legal document issued by the court that authorizes the executor or personal representative of the will to collect, appraise, and distribute the decedent’s assets. If there is no will, the court will appoint someone to distribute the decedent’s assets and issue “letters of administration” authorizing the appointed administrator to collect, appraise, and distribute assets.

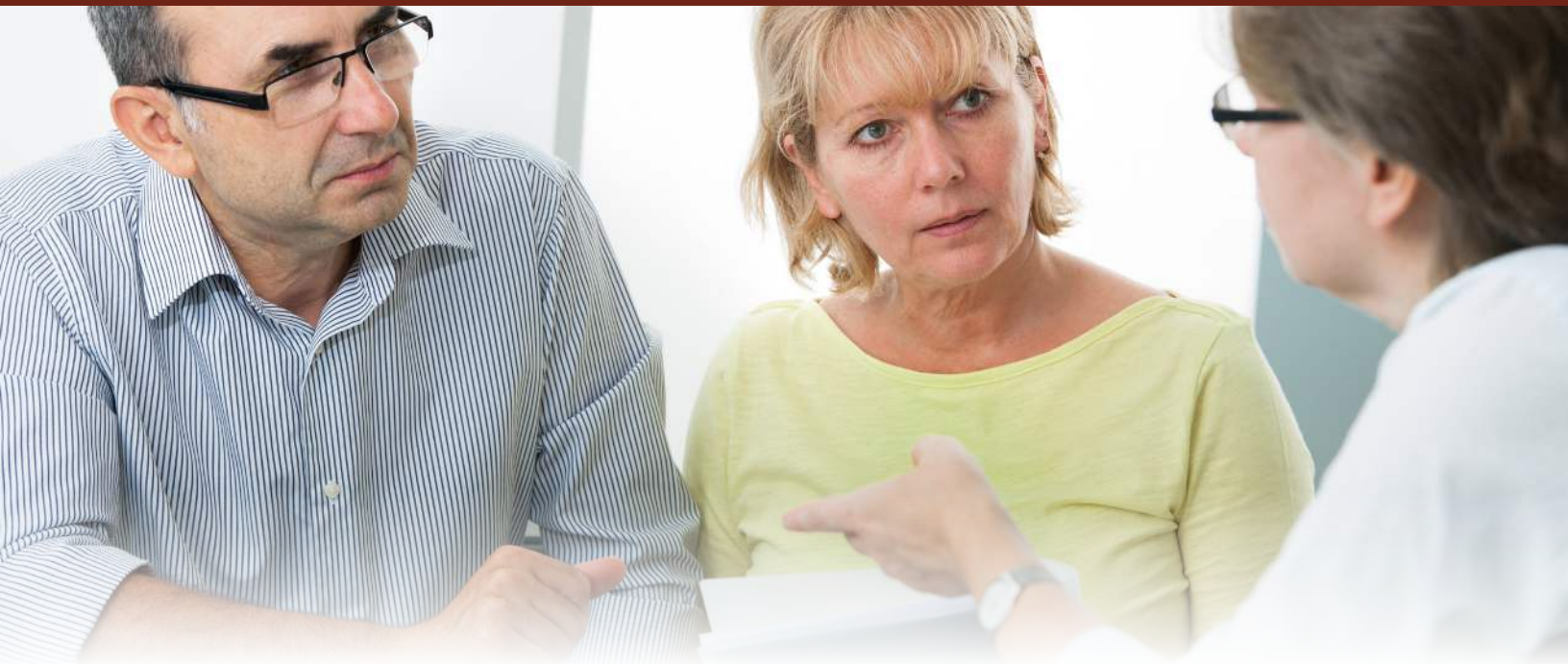


## WHAT ARE THE EXECUTOR'S RESPONSIBILITIES DURING PROBATE?

The executor is responsible for settling and distributing the decedent's estate as efficiently as possible by following the instructions contained in the decedent's will. While every probate is unique, here is a partial list of the duties required to settle an estate in a "typical" probate:

- Locate and file the Last Will and Testament with the local court
- File required probate documents with the court
- Ascertain, and notify, all known creditors of the estate
- Secure the decedent's personal residence and tangible personal property
- Locate, inventory, custody, close and transfer personal assets/accounts
- Process and receive life insurance death benefits
- Pay debts and expenses associated with the last illness and funeral
- Make payments to creditors, discharge obligations, and obtain creditor releases
- File appropriate tax returns (federal and state) and make appropriate tax elections
- Pay estate taxes and final personal income taxes
- Obtain tax releases and closing letters from local courts and the IRS
- Make specific bequests, as well as partial and final distributions, to beneficiaries and obtain releases
- Provide complete, detailed accounting to the local court and estate beneficiaries
- File closing paperwork/documentation with the court

It is important to note that if an executor fails to follow the will's instructions to the letter, he or she can be held personally and legally responsible—even if the errors were unintentional.



## DO YOU NEED A LAWYER TO PROBATE AN ESTATE?

You are not required to hire an attorney to probate an estate. However, probate is more complicated in some states than in others. In New York, for example, it is virtually impossible for a layperson to probate an estate. Here are some situations where you *might* be able to probate an estate yourself:

- The estate's assets are exempt from probate, so probate would be unnecessary
- The estate is eligible for "small estate" status and qualifies for a small estate affidavit or summary procedure
- Your state follows the Uniform Probate Code (a set of laws created to streamline probate) and the decedent's estate is not comprised of "complicated" assets
- There are no disputes among family member
- The estate has enough assets to pay all debts

Even in a situation like this, many families choose to hire an attorney to handle some, if not all, aspects of the probate process.





**THE BIGGEST MISTAKES  
PEOPLE MAKE WHEN  
PROBATING AN ESTATE**



**If you have been named as an executor or personal representative and are tasked with settling an estate through probate, you'll want to avoid these common mistakes.**

### ► **Handling Assets Incorrectly**

One of the first things an executor or personal representative must do is secure all of the decedent's assets. Accomplishing this requires taking different steps for different types of assets. For example, financial accounts may simply need to be closed, whereas real property (such as a house) might have to be secured and maintained.

### ► **Categorizing Assets Incorrectly**

Some assets do not have to go through probate. When you inventory assets, it is important to make sure you categorize them properly. Assets that are not typically subject to probate include:

- Assets held in trusts
- Funds held in certain “beneficiary designated” accounts (that is, accounts where beneficiaries have already been designated)
- Certain forms of property held jointly

### ► **Failing to Determine Date of Death Values**

The term “date of death values” refers to the fair market value of each estate asset at the time of the decedent's passing. The sooner this task is undertaken, the easier it will be to determine the correct value. Executors often turn to professional appraisers for assistance with this task.

### ► **Handling Creditors Improperly**

Every potential creditor of the estate must be notified about the estate going into probate. If the creditor is known, he or she can be notified personally. Unknown creditors, on the other hand, must also be notified. How? Through a notice published in a local newspaper. The probate must be kept open for a period of time mandated by state statute to allow creditors to file claims against the decedent's estate.

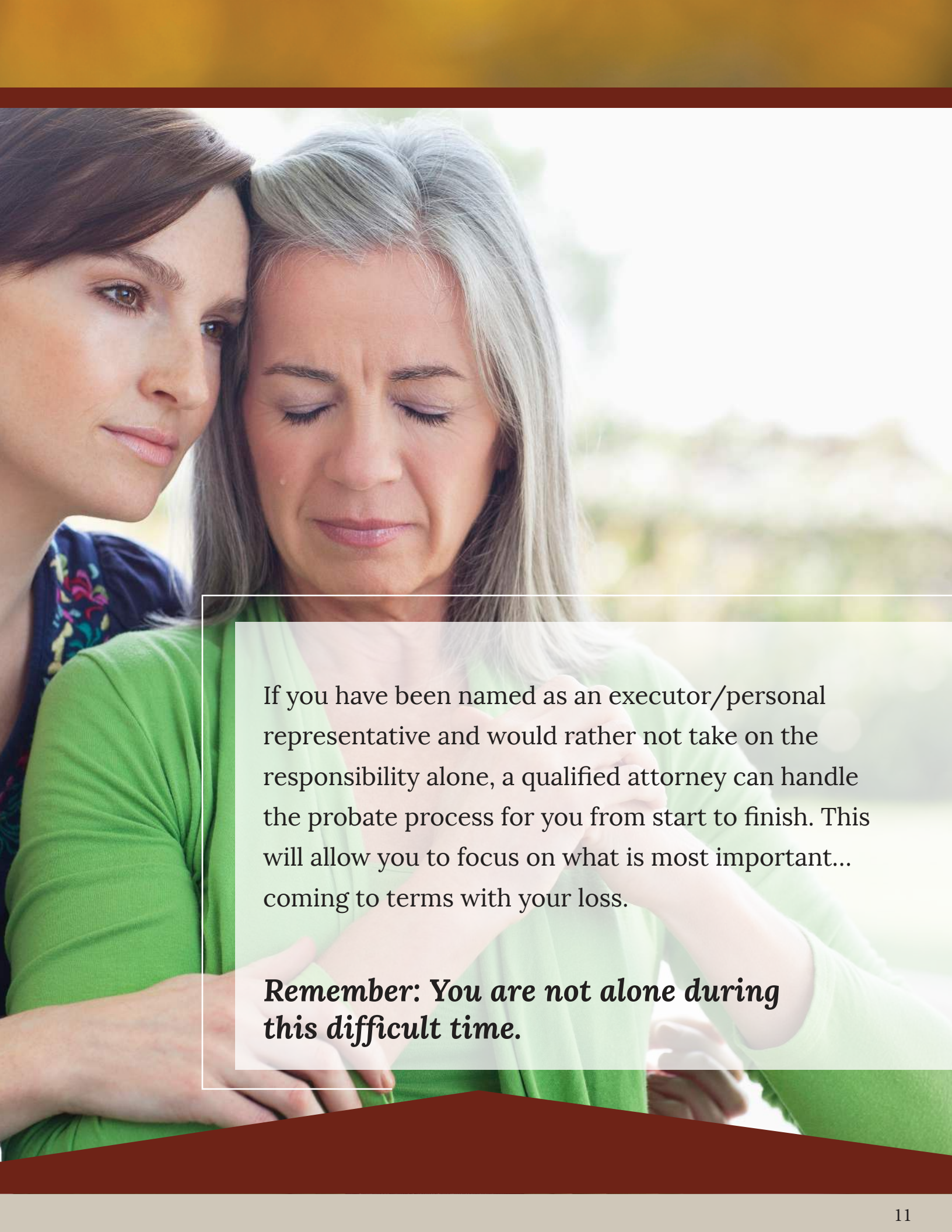
## ► **Failing to Communicate Effectively with Estate Beneficiaries**

Working closely with beneficiaries is not a legal requirement, but failing to keep them abreast of developments can be a big mistake. In fact, poor communication sometimes leads to unnecessary, and expensive, litigation. Remember: You are not the only one dealing with the loss of a loved one—so, too, are the decedent's heirs. It is an emotional time for them, and they may feel slighted or ill-treated if you don't stay in touch with them.

## ► **Distributing Estate Assets Too Soon**

As the estate's executor, you have the authority to distribute assets to beneficiaries as well as to approve and pay creditor claims. However, sometimes an estate lacks sufficient assets to honor bequests made in the will *and* pay every creditor claim. In such a situation, creditors must be prioritized according to the law and assets must be dispersed based on that prioritization. If you, as executor, do not follow the law, you could be held personally liable.





If you have been named as an executor/personal representative and would rather not take on the responsibility alone, a qualified attorney can handle the probate process for you from start to finish. This will allow you to focus on what is most important... coming to terms with your loss.

***Remember: You are not alone during this difficult time.***



# Cholewka Law

CONTACT US TODAY!

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