

# PROBATE

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For basic information about representing yourself in District Court, see also the [Appendix of this publication](#).

## **WHAT IS PROBATE?**

Probate is the legal process through which a court grants a person the legal authority to handle the legal affairs of a person who has died. **The person who has died is called the “decedent.”**

## **WHEN IS PROBATE NECESSARY?**

Probate is necessary when a person dies leaving property **titled in his/her name** (real estate, bank accounts, vehicles, stocks and bonds, etc.). **This property is called the “decedent’s estate.”**

## **WHEN IS PROBATE NOT NECESSARY?**

Probate is **not** necessary to transfer property that is not “titled,” such as personal items including furniture, jewelry, artwork, and other personal effects.

Probate is **not** necessary if the decedent has arranged for a non-probate transfer of titled property. Examples of non-probate transfers are: real estate held as Joint Tenants, real estate with a recorded Transfer on Death Deed, bank accounts with Payable on Death designations, brokerage accounts with death beneficiary designations, etc.

## **NO PROBATE REQUIRED FOR A “SMALL ESTATE”**

A “small estate” is defined as one where the decedent’s total estate is worth less than \$50,000 **and** does not include any real property (land, a house, a farm, etc.). Read more at [Section 45-3-1201 NMSA 1978](#).

If the decedent’s estate qualifies as a small estate, the decedent’s property can be distributed without probate by using an “Affidavit of Successor in Interest” if:

- At least **30 days** have passed since the decedent’s death; **and**
- No probate has been filed.

The affidavit must be signed by the person entitled to receive the decedent’s property and notarized.

The affidavit can be presented to banks to collect the decedent’s money and other institutions such as the Motor Vehicle Division, to change title to the decedent’s vehicles.

Check with your local Probate Court to find out where to get the forms and instructions to create an Affidavit of Successor in Interest.

## **NO PROBATE REQUIRED TO TRANSFER DECEDENT'S PRIMARY RESIDENCE TO SURVIVING SPOUSE**

The decedent’s primary residence can be transferred to the decedent’s surviving spouse without probate by

using an “Affidavit of Surviving Spouse” (read more at [Section 45-3-1205 NMSA 1978](#)) if:

At least **6 months** have passed since the decedent’s death; **and**

No probate has been filed; **and**

The only item required to be transferred from the decedent’s estate is the decedent’s primary residence; **and**

The decedent and spouse owned the residence as community property **or** the decedent left (by Will) his/her interest in the residence to the spouse; **and**

The full value of the residence, as assessed for property tax purposes, does not exceed \$500,000.

The affidavit must be signed by the surviving spouse and notarized.

The affidavit is then filed with the county clerk in the county in which the residence is located.

Check with your local Probate Court to find out where to get the forms and instructions to create an Affidavit of Surviving Spouse.

### **WHERE AND WHEN TO FILE A PROBATE CASE**

If probate is necessary, the probate case must be filed with the **Probate Court** in the county where the decedent was domiciled (physically living) at the time of his/her death.

**Note:** In some cases, it may be necessary to file the probate case in District Court. The Probate Court will inform you if this is necessary. If this is the case, you may wish to consult an attorney. That situation is beyond the scope of this guide.

Probate Courts are designed to help non-lawyers with probate cases that do not need to be filed in District Court. The current cost to file probate in Probate Court is \$30.

Many Probate Courts have the forms and instructions necessary to file a probate case. The forms are also available online at <https://nmsupremecourt.nmcourts.gov>.

Probate can be filed any time between 5 days and 3 years after the decedent’s death.

**Note:** A probate case may be filed after the 3 year period for the limited purpose of transferring title to real property from the decedent’s name to the decedent’s heirs. Read more at [Section 45-3-108 NMSA 1978](#).

### **FILING A PROBATE CASE WITH A WILL**

If the decedent left a valid Will, the person filing the probate case must submit the **original Will** and a certified copy of the decedent’s death certificate to the Probate Court along with the necessary forms.

Instructions for filing a probate case with a Will are contained in probate [Forms 4B-021](#) and [4B-022 NMRA](#). These forms are available online at <https://nmsupremecourt.nmcourts.gov>.

The court will appoint the person(s) designated in the Will as “Personal Representative” (“PR”) of the decedent’s estate. Another name for the Personal Representative is “Executor.”

### **FILING A PROBATE CASE WHERE THERE IS NOT A WILL**

People who die without a Will are said to have died “intestate.” New Mexico has specific “Intestacy Laws” that

detail who can be appointed PR of the Estate, who is entitled to the decedent's property, and the share of the property each person receives.

A spouse has the highest priority for being appointed PR, followed by the decedent's children. A person who wishes to be appointed PR must have the written consent of all other people with the same or higher priority for appointment.

The person filing the probate must submit a certified copy of the decedent's death certificate and copies of the written consent of other people with the same or higher priority for appointment, along with the necessary probate forms.

Instructions for filing a probate case without a Will are contained in probate [Forms 4B-011](#) and [4B-012 NMRA](#). These forms are available online at <https://nmsupremecourt.nmcourts.gov>.

## **DUTIES OF THE PERSONAL REPRESENTATIVE**

When the Probate Court appoints a person to be the Personal Representative of the decedent's estate, the court gives the PR a document called "Letters Testamentary." If the decedent died without a Will (intestate), the document is called "Letters of Administration." This document gives the PR the legal authority to transact business on the decedent's behalf.

The PR is responsible for:

- Notifying all of the heirs of the decedent's estate;
- Gathering and inventorying the decedent's assets;
- Identifying and paying the decedent's debts (to the extent that funds are available in the estate to do so);
- Distributing the decedent's assets in accordance with the decedent's Will or the intestacy laws if there is no Will; and
- Closing the probate case by filing a sworn statement with the court stating that the PR's duties are completed (read more at [Section 45-3-1003 NMSA 1978](#)). The probate case must be open for a minimum of 3 months before it can be closed.

The PR is **not** allowed to use funds from the estate for the PR's personal benefit. But, the PR is entitled to fair compensation from the estate for the time spent administering the estate (read more at [Section 45-3-719 NMSA 1978](#)). The PR should keep a written record of tasks performed and time spent. The PR may also use estate funds to pay for costs of administering the estate (i.e. postage, filing fees, copies, etc.).

If the decedent's estate includes real property (land, a house, a farm, etc.), the PR may need to execute a "Personal Representative's deed" in order to transfer the property out of the decedent's name. Deeds can be very tricky to properly draft and execute, so you may wish to hire an attorney for this portion of the probate.

## **APPENDIX: REPRESENTING YOURSELF – BASIC INFORMATION**

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### **WHO THIS GUIDE IS INTENDED TO HELP**

This guide is intended to help individuals who are representing themselves, either as a plaintiff/petitioner or a defendant/respondent in a civil lawsuit or a domestic matter filed in a New Mexico State District Court.

That means this guide is not intended to be used for any other type of court, including Metropolitan Court, Magistrate Court or Municipal Court. It does not have information about appeals from these courts. It is not to be used by defendants in a criminal case.

### **HOW THIS GUIDE IS INTENDED TO HELP YOU**

This guide is intended to be an informative and practical resource guide to understanding the basic practices of the court and the most common procedures encountered by people representing themselves without a lawyer (known as “self-represented litigants” or “pro se litigants”). It **IS NOT** a substitute for legal advice; it will not answer all your questions about what you need to do to represent yourself.

### **A WORD OF WARNING**

Because the law is constantly changing, the court does not guarantee the legal sufficiency of this information guide nor does it guarantee that it meets your specific needs. If you represent yourself in a court case, you are acting as your own lawyer. That means you are expected to know and follow the law and court rules. The potential risks associated with representing yourself are not always obvious. That is why the court encourages anyone who is thinking about representing themselves to talk to a lawyer first.

If you are a tribal member, please be aware that this guide does not address tribal law. Your rights and responsibilities in state court may be different than your rights and responsibilities in tribal court.

### **GETTING HELP**

Court employees are not lawyers and cannot tell you what you should do or how the law applies to your situation. Read more about what court employees can and cannot do at [Rule 23-113 NMRA](#).

Some courts have a resource center where court employees can help you with court procedures. They cannot give you legal advice. Check with your local district court to see what services are available to you.

While some courts offer packets of forms for certain kinds of court cases, there are not forms for every issue. Look for forms on the New Mexico Supreme Court website at <https://nmsupremecourt.nmcourts.gov> or check with your local district court to see what forms they offer. Sometimes you will need a lawyer to create legal documents for you.

To read about free and low-cost legal help, please go to the Resource List section of this guide.

## **ABOUT NEW MEXICO’S LAWS, RULES OF PROCEDURE, LOCAL RULES AND FORMS**

As a person representing yourself, you should be familiar with the laws (called “statutes”), rules, local rules, and forms that govern or must be used in your court case. But, court employees cannot help you with this. New Mexico laws, rules, and forms are referred to using a very specific format. You will see four common formats in this guide.

For New Mexico Laws (Statutes) the format looks like this: Section 40-8-1 NMSA 1978

For New Mexico Rules of Procedure, the format looks like this: Rule 23-112 NMRA

For Local District Court Rules, the format looks like this: LR1-306 NMRA

For New Mexico Supreme Court Approved forms, the format looks like this: Form **4-209** NMRA

For more information about New Mexico’s Laws, Rules, Local Rules, and Forms, contact the New Mexico Supreme Court Law Library by telephone at 505-827-4850, by email at [libref@nmcourts.gov](mailto:libref@nmcourts.gov), by regular mail at P.O. Drawer L, Santa Fe, New Mexico 87504-0848, or visit their website at [supremecourtlawlibrary.org](http://supremecourtlawlibrary.org). If you are viewing the electronic version of this guide, you can click on the number of any statute, rule, or form that is mentioned in this guide to see the text of that statute, rule, or form. You can also get free access to all New Mexico state statutes, rules, and forms on the New Mexico Compilation Commission’s public access website. The New Mexico Compilation Commission is the official legal publisher for the State of New Mexico. Directions for how to find and navigate the Compilation Commission’s public access website can be found at the end of this section of the guide (page 6).

### **STARTING A COURT CASE**

The pleading that starts a court case is called a “complaint.” Depending on the type of case, this first pleading can also be called a “petition” or an “application.”

The court case is started when a complaint is filed with the court. **Filing** a complaint requires a filing fee. Filing fees vary; check with the clerk’s office at your local district court for more information about filing fees. If your income is below a certain level, you may be entitled to a waiver of the filing fee. This is called “free process.” Ask the clerk’s office at your local district court for more information about free process.

Once a court case is started, the plaintiff must “serve” each defendant with a copy of all the court papers they filed.

### **SERVING THE COMPLAINT**

Each defendant must be notified that a lawsuit has been filed against them through a process that is specified under the law. Whether you are trying to serve a person, a business or a governmental agency, this can be a complicated process. Please read [Rule 1-004 NMRA](#) carefully for the steps to follow when serving a complaint.

Even if you can’t find the defendant, you still have to serve them. You may have to ask the court for permission to publish a notice in the newspaper by using New Mexico Supreme Court approved [Forms 4-209](#) and [4-209A NMRA](#). Again, please read [Rule 1-004 NMRA](#) carefully for more details.

One thing is very important – **you** do not serve the defendant; your job is to **arrange** for someone else to serve the complaint for you.

## **ANSWERING A COMPLAINT THAT HAS BEEN FILED AGAINST YOU**

It is important to file an “Answer” to the Complaint within 30 days from the date you are served. The date you are considered served with the Summons is determined by [Rule 1-004 NMRA](#). Otherwise, the plaintiff can ask the court for a judgment against you without you knowing anything is happening.

An “Answer” is a pleading. There are New Mexico Supreme Court approved Answer forms available for divorce and civil cases. Some courts offer a packet with the form used to answer a complaint; check with your local district court for more information.

There is no fee to file an Answer.

## **TALKING DIRECTLY TO A JUDGE, HEARING OFFICER, OR THEIR STAFF**

Communicating with a judge or hearing officer without the opposing party being present is not allowed. This is why a judge or hearing officer cannot read your letters or answer your calls.

The judge’s or hearing officer’s personal staff – the Trial Court Administrative Assistant – can answer questions about scheduling but cannot give legal advice or tell you how a judge will rule on your case.

## **MONITORING THE PROGRESS OR STATUS OF YOUR CASE**

The clerk’s office maintains a computerized “register of actions” for each court case. Every time something happens in your court case, whether you file a pleading, have a court hearing, or the court enters an order, it is added to the register of actions in your case. You can look up the register of actions at any time at [www.nmcourts.gov](http://www.nmcourts.gov). Select “On-Line Case Lookup” and follow the directions.

## **FILING MOTIONS**

Asking the judge to take a specific action in your case requires filing a “motion.” A motion is the pleading you use to tell the judge your problem and to explain what action you want the judge to take. Some courts offer a packet of forms needed to file a motion. Check with your local district court for more information. Additionally, you must send a copy of any motion you file to all other parties (or their lawyer, if they have one). It may also be necessary for you to send a copy of the motion directly to the judge so the judge will know it has been filed. Read the local rules for your district carefully to determine how and when to send the motion to the judge.

## **TRIAL**

You are entitled to a jury trial in many, but not all, types of lawsuits. If you are entitled to a jury trial, you must ask for one in writing and pay a jury fee. Read [Rule 1-038 NMRA](#) for more information about asking for a jury trial.

## **HEARINGS**

How to ask for a Hearing:

- Asking a judge to schedule a hearing requires filing a pleading called a “Request for Hearing.” It is also called a “Request for Setting.”
- There are rules you must follow when you file a Request for Hearing. For example, when you file the request, you also deliver a copy to all other parties (or their lawyer, if they have one). Read more at [Rule 1-005 NMRA](#).

- Some courts require you to provide addressed-stamped envelopes with your request for hearing. Check the Local Rules or with your local district court for more information.
- Always check the Local Rules or with the court to see if you are required to turn in other forms in addition to the Request for Hearing.

#### Rescheduling a Hearing:

- Asking a judge to reschedule a hearing is called asking for a “continuance.” It means continuing the hearing to another date and time.
- Asking a judge for a continuance requires filing a motion. Some courts offer a packet of forms needed to file a motion; some even have a packet specifically designed to ask for a continuance. Check with your local district court for more information.

#### What happens at a hearing:

- At the hearing, each party will have a chance to tell the judge their side of the issue.
- It is important to bring your evidence, witnesses, and anything else that will help you prove your case. Because there are specific rules about presenting your evidence to the judge, you may wish to consult with a lawyer about how to present your case.

#### Helpful hints about hearings:

- **SHOW UP** – it is always important to show up to court. **If you are not in the courtroom when your case is announced, you may lose your case.**
- **BE ON TIME** – plan to be at the courthouse **early**. Remember that you will need to park, clear the security check, and find the courtroom. **If you are not in the courtroom when your case is announced, you may lose your case.**
- **Practice** – go to the court on a day before your hearing. Practice how long it takes you to get to the court, park, and find the courtroom. Go and see what the courtroom looks like. Go to a court hearing to see what happens.
- **How to dress** – dress neat and clean. Each court has a dress code. The judge can order you to be removed from the courtroom if you violate the dress code; **if you are not in the courtroom, you may lose your case.**
- **How to act** – court hearings are not like TV. Be respectful to the judge and to the opposing party at all times.
- **Talking to the judge** – stand when talking to the judge. Call the judge “your Honor.” Speak clearly and loudly enough to be heard. Do not interrupt the judge. Stay calm.
- **Cell phones** – each court has a cell phone policy. Check with your local district court about cell phones.
- **Children** – do not bring children into the courtroom unless the judge has given you permission to do so. Courts do not have a place where children can wait unattended.
- **Take notes** – bring a pad of paper and a pen to the hearing. Write down any orders the judge makes.

## ORDERS AND JUDGMENTS

A “court order or judgment” is the judge’s instructions telling someone what they can or cannot do.

Creating an order or judgment – usually, at the end of a hearing, the judge will say who is to create the court order or judgment. Most courts do not create this paperwork for you. If you are instructed to create the court order or judgment, you may need to hire a lawyer to create one for you.

Enforcing an order – some courts offer a packet of forms needed to ask a judge to enforce a court order. Check with your local district court for more information.

## IF YOU HAVE A DISABILITY

If you have a disability and need assistance, notify the court as soon as possible before any hearing or trial.

### **IF YOU NEED AN INTERPRETER**

The court provides an interpreter in any language for free at court hearings or trials.

You are responsible for notifying the court that you need an interpreter, so make sure you reserve an interpreter in advance of any hearing or trial.

Use [Form 4-115 NMRA](#) to **reserve** an interpreter.

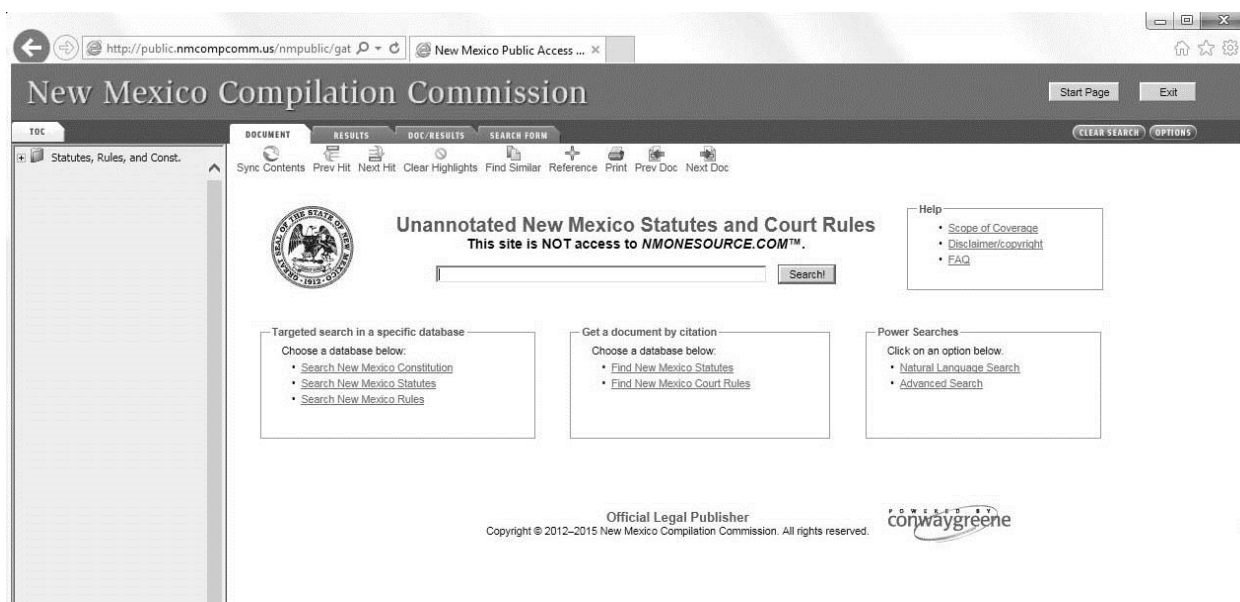
If you reserved an interpreter and then find out you don't need one (for example, if a hearing or trial was rescheduled), be sure to **cancel** the interpreter. Use [Form 4-116 NMRA](#) to **cancel** an interpreter.

## HOW TO FIND STATUTES, COURT RULES AND FORMS ON THE PUBLIC ACCESS SITE PUBLISHED BY THE NEW MEXICO COMPILATION COMMISSION

The New Mexico Compilation Commission publishes the statutes, court rules and forms online for public use at the public access site located at: <http://public.nmcompcomm.us/nmnxtadmin/NMPublic.aspx>



Select **Desktop** or **Tablet/Smartphone** and click **OK** to enter the public access site.



This is the Start Page where you will begin the retrieval of statutes, court rules and forms. For step-by-step directions from the Start Page, consult the Help section in the upper right hand corner of the Start Page for the “Self Help Guide: How to Find Statutes, Court Rules and Forms.”