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**LAW CENTER**

**BUILDING GENERATIONAL WEALTH WEBCAST:**  
**THE PROBATE PROCESS**  
**AND DECEASED RELATIVES' DEBTS**

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# BUILDING GENERATIONAL WEALTH WEBINARS

- Part of **Generational Poverty Law Project**, a partnership between Atlanta Legal Aid Society, Georgia Heirs Property Law Center, and Pro Bono Partnership of Atlanta.
- **Project Goals:**
  - Utilize joint resources to create **pathways out of generational poverty** for low-income families in metro-Atlanta.
  - Provide **free and vital legal services** to help multigenerational families in Atlanta:
    - Retain ownership of their homes;
    - Ensure they are living in safe and habitable environments;
    - Avoid predatory practices; and
    - Leverage their homes to create generational wealth, reduce neighborhood blights and transform underserved communities.
  - Conduct **outreach and education to metro-Atlanta families** living in poverty and the **nonprofits serving them** by providing tools to help families remain housing stable and transform underserved communities.
  - Generational Poverty Law Project is funded by **The Junior League of Atlanta**



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# GEORGIA HEIRS PROPERTY LAW CENTER

*The Georgia Heirs Property Law Center's mission is to increase generational wealth, social justice and community stability by securing and preserving property rights.*

- 6 attorneys, 1 social worker, 2 community advocates, a network of pro bono volunteers, and grassroots organizational partners.



- State-wide work with geographic focus and outreach in **Atlanta and Southwest Georgia.**

- Offices in **Atlanta, Athens, Fitzgerald and Macon.**



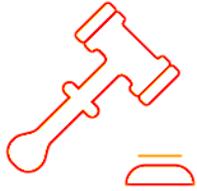
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# WHAT DOES THE CENTER DO?



## Legal support for families, individuals, nonprofits and municipalities through:

- Title audits;
- Title clearing; and
- Remediation of fractured title.



## Land loss prevention services to help slow down land loss and secure property assets through:

- Legal and mediation counsel; and
- Development of estate plans and assistance with financial planning.



## Asset education through:

- Education of community members and stakeholders about heirs property and potential impact on owners and their communities; and
- Education of landowners about ways to increase the value of their property and generate wealth now and for future generations.

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# **DYING WITHOUT A LAST WILL AND TESTAMENT**



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# WHAT HAPPENS WHEN SOMEONE DIES WITHOUT A LAST WILL AND TESTAMENT?

- If someone dies without a valid last will and testament providing instructions for the distribution of property, he or she has **died intestate**.
- When someone dies intestate:
  - Heirs are determined according to a **hierarchy** established by **Georgia law**.
  - A **probate judge chooses** the **administrator** of the estate.
  - A **probate judge decides** who becomes the **guardian** of minor children or the conservator for incapacitated adults.





# RULES OF INTESTATE SUCCESSION

1. If you are **married with no children**, your entire estate goes to your **spouse**. This is true even if you are separated or have a divorce action that is pending but not yet final.
2. If you are **married and have children**, your estate is shared equally among your **spouse and your children**, with your spouse never receiving less than 1/3 of your estate. If one of your children dies before you, the child's decedents take *per stirpes* the share he or she would have received if alive.
3. If you have **children but are not married**, your estate is shared equally among your **children**. If one of your children dies before you, the child's decedents take *per stirpes* the share he or she would have received if alive.
4. If you are not survived by a spouse, child or other decedents, your estate is shared equally among your **surviving parents**.
5. If you have no surviving parents, then your estate is shared equally by your **siblings**. If one of your siblings dies before you, his or her descendants take *per stirpes* the share he or she would have received if alive.





# RULES OF INTESTATE SUCCESSION

6. If you have no surviving siblings, then your estate is shared equally by your **nieces and nephews**. If one of your nieces or nephews has predeceased you, his or her decedents take *per stirpes* the share he or she would have received if alive.
7. If you have no surviving siblings, nieces, nephews or closer relatives, your estate is shared equally between your **surviving grandparents**.
8. If you have no surviving grandparents or closer relatives, then your estate is shared equally by your **aunts and uncles**. If one of your aunts or uncles dies before you, his or her descendants take *per stirpes* the share he or she would have received if alive.
9. If you have no surviving aunts, uncles or closer relatives, then your estate is shared equally by your **first cousins**. If one of your first cousins dies before you, his or her descendants take *per stirpes* the share he or she would have received if alive.
10. If you have **no surviving relatives**, then your estate becomes the property of the **State of Georgia**.





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# WHY IS DYING WITHOUT A LAST WILL AND TESTAMENT A PROBLEM?

- **Georgia decides** who inherits your property – and they may not be who you would have chosen.
- Your property is **divided equally**, without regard for whether an heir wants or needs the property.
- Intestate succession creates an increased risk of **family discord and disputes**.
- If the property is inherited by more than one person, it becomes **heirs property**.



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# **DYING WITH A LAST WILL AND TESTAMENT**



# LAST WILL AND TESTAMENT

- A last will and testament is **legal declaration of testator's intentions** regarding the distribution of property upon his or her death.
  - Person making the last will and testament is called **testator or testatrix**.
  - Last will and testament takes effect only upon **testator's death**.



- **4 major functions:**

1. Allows testator to **give property to others** upon his or her death;
2. Allows testator to appoint an **executor** to oversee his or her estate;
3. Allows testator to **establish a testamentary trust** and appoint a trustee to hold and protect property passing to a minor child or incapacitated adult; and
4. Allows testator to **appoint a guardian and conservator** to protect the interests of minor children or incapacitated adults.



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# REQUIREMENTS FOR LAST WILL AND TESTAMENT

- Anyone **14 or older** can have a last will and testament.
- **To be valid, a last will and testament must:**
  1. Be a written document;
  2. Be freely and voluntarily signed by testator or a disinterested person in his or her presence and at his or her direction;
  3. Be signed in the presence of 2 disinterested witnesses; and
  4. Transfer property upon death.
- **No particular form or words** are necessary so long as the document makes the testator's intentions clear.
- Georgia **does not recognize oral or unwitnessed** last wills and testaments.



# PROPERTY THAT CAN BE DISTRIBUTED THROUGH LAST WILL AND TESTAMENT

- **Most property** can be easily distributed directly through a last will and testament:
  - Home or other real estate if sole owner or tenant in common;
  - Vehicles;
  - Personal property (jewelry, furniture, keepsakes, etc.); and
  - Money from bank and investment accounts.
- A last will and testament **cannot distribute**:
  - Home or other real estate owned as joint tenants with rights of survivorship;
  - Life insurance policies;
  - Retirement accounts, pension plans, and 401Ks;
  - Joint bank accounts or payable on death accounts or securities; or
  - Property held in a living trust.





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# IMPORTANT TERMS USED IN LAST WILL AND TESTAMENT

- **Decedent**: a person who has died.
- **Estate**: all of the property and other possessions belonging to a deceased person.
- **Beneficiary**: a person who receives a benefit under last will and testament.
- **Descendent**: a lineal descendent of a beneficiary.
  - Includes child and grandchild (biological and adopted) but not spouse.
- **Executor**: a person named in last will and testament to handle the estate.
- **Per Stirpes**: distribution of estate when a beneficiary dies before the decedent – the beneficiary's share is distributed among his or her descendants in equal shares.





# WHO NEEDS A LAST WILL AND TESTAMENT?

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- Most people don't want to think about what happens when they pass away.
  - Only **35%** of Americans have a last will and testament.
- But **everyone** needs a last will and testament, even if they don't currently own a home, have significant monetary assets, or have minor children.
  - Misconception that last wills and testaments are only for the wealthy.
  - Individuals with small or modest estates benefit equally or more from having a last will and testament.
  - **Low-income individuals and seniors are vulnerable** after a loved one dies.





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# WHY DOES EVERYONE NEED A LAST WILL AND TESTAMENT?

- Having a last will and testament:
  - Ensures the testator's **wishes are carried out** exactly as he or she wants them **by chosen executor**.
  - Allows the testator to **choose someone trustworthy to care for minor children**.
  - Protects the **financial interests of the testator's family**, especially surviving spouses and minor children.
  - Allows **testator's family to be part of the decision-making process** as the will is prepared.
  - Gives family members **time to grieve** without having to argue with lawyers and each other over what testator would have wanted or who should become guardian of minor children.



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# LAST WILLS AND TESTAMENTS MAY CHANGE OVER TIME

- Last wills and testaments should be **reviewed annually** and **updated as circumstances change**:
  - Birth or death of family member;
  - Divorce;
  - Illness; or
  - Changes in community or economy.
- **Individuals should never change their last wills and testaments by writing on them.**
  - Writing on a last will and testament will void the document.
  - Changes can only be made by preparing a new will or executing a codicil to the existing one.





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## WHERE SHOULD LAST WILLS AND TESTAMENTS BE KEPT?

- Original last will and testament should be stored in a **safe and accessible place**.
  - Options: fireproof/waterproof safe or box in home; executor's safety deposit box; or on file with probate court.
- Executor should **know where to find last will and testament** upon testator's death.
- Last wills and testaments **should not be stored in testator's safety deposit boxes**.
  - Court order usually required to open deceased person's safety deposit box.





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# **WHEN A LOVED ONE PASSES AWAY**



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# THE PROBATE PROCESS

**Probate** is the process of:



- Proving the validity of a last will and testament (if applicable);
  - Appointing a personal representative to represent the estate;
  - Paying estate debts; and
  - Distributing estate property.
- 
- A decedent's last will and testament **must be probated** before it goes into effect or transfers title.
    - Probate process should be **initiated as soon as practicable** after testator's death.
      - Additional complications can arise if family members or executors pass away before testator's estate is probated.



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# INITIATING THE PROBATE PROCESS

- The probate process is overseen by county **probate courts**.



- If decedent was a **resident of Georgia**, the estate is probated in the county of his or her last residence.
- If decedent was **not a resident of Georgia**, the estate is probated in the county where his or her property is located.

- **Lawyers are not required** to initiate the probate process.
  - Forms with instructions are available online and at county probate courts.
  - Fulton and DeKalb offer **Probate Information Centers** that provide free assistance to families starting the probate process.
  - Probate court **fees can be waived** for qualifying low-income families.



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# UNDERSTANDING PROBATE TERMINOLOGY

## Person Dies With a Will

- **Executor**: personal representative named in deceased person's will to handle his or her estate.
- **Beneficiary**: person who receives benefit under will.
- **Letters Testamentary**: document issued to executor showing formal appointment by the court to handle property under terms of will.

## Person Dies Without a Will

- **Administrator**: personal representative appointed by probate court to handle estate of person who died without a will.
- **Heir**: relative who is entitled to inherit property if there is no will.
- **Letters of Administration**: document issued to administrator showing formal appointment to handle property.



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# IF DECEDENT DIED WITH A LAST WILL AND TESTAMENT

- If a decedent dies with a last will and testament, a **petition to probate the last will and testament** in solemn or common form is filed with the probate court.
  - Petition to Probate in Solemn Form: requires notice to all heirs and is immediately binding on all parties upon entry of final order.
  - Petition to Probate in Common Form: notice to all heirs is not required, but will contests and objections can be raised for up to 4 years.
- Person named as **executor has right to offer the last will and testament for probate**.
  - If executor fails to offer the will for probate with reasonable promptness, any interested person may do so by filing a petition for letters of administration with will annexed.
- There is generally **no time limit** for probating a last will and testament.
  - Exception: it has been more than 5 years since an estate was opened or a court entered an order stating that no administration was necessary.
- If executor does not plan to probate the last will and testament, he or she is **required to file the will with the probate court** within a reasonable time.



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## IF DECEDENT DIED WITH A LAST WILL AND TESTAMENT

- **Purpose of probate proceeding is to establish the document as decedent's valid last will and testament.**
  - Last will and testament is not legally recognized until accepted by the probate court.
- A last will and testament can be **challenged by filing a caveat:**
  - Grounds: forgery, duress, lack of capacity to make will
  - Only individuals with interest in the estate may file a caveat – usually beneficiaries or heirs at law receiving nothing under will.
  - Must provide evidence to support claims.
  - If challenges are anticipated, some wills include provision disinheriting anyone who files a caveat.
- Beneficiaries can agree to distribution of property contrary to terms of will through a **settlement agreement.**
  - Requires unanimous agreement and signature of all beneficiaries.
  - In some instances, probate court approval is required.



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# IF DECEDENT DIED WITHOUT A LAST WILL AND TESTAMENT

- Options for when decedent dies without a last will and testament:
  1. Family member can file a **petition for letters of administration** with the probate court.
    - Petition requests that the probate court confirm that the decedent died intestate and appoint an administrator to represent the estate.
    - Administrator is appointed after notice to all heirs, with final court determination binding on all heirs.
    - If all heirs consent, administrator can be given broad powers with limited oversight; otherwise administrator must seek court approval before taking major actions.
  2. Heirs at law can unanimously agree on how estate assets should be distributed and file a **petition for an order that no administration is necessary**.
    - Petition asks the probate court to find that no administrator is needed because all debts have been paid, heirs have agreed to division of estate, and there is no need for formal administration.
    - Best option for small and moderate estates with limited debts.
- There is **no time limit** for filing a petition when decedent died without a last will and testament.



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# APPOINTMENT OF PERSONAL REPRESENTATIVE

- After the decedent's estate is opened, a **personal representative is appointed**.
  - Anyone over 18 can serve as personal representative of an estate.
- If there is a last will and testament, the probate court will appoint the named **executor** and issues **letters testamentary**.
- If there is no will and heirs cannot reach a unanimous agreement, then the probate court appoints an **administrator** and issues **letters of administration**.
  - If multiple individuals seek appointment as administrator, the court will use the **following hierarchy in choosing who to appoint**:
    1. Surviving spouse unless divorce is pending;
    2. Heir at law selected by majority of heirs;
    3. Any other eligible person;
    4. Any creditor of the estate; or
    5. The county administrator.



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# ROLE OF PERSONAL REPRESENTATIVES

- Personal representative's **role is to settle the estate** as quickly as possible.
- **Responsibilities:**
  - Take oath and, if required, post bond;
  - Account for and collect decedent's assets;
  - Pay off the remaining debts;
  - Distribute assets to beneficiaries/heirs; and
  - Submit inventories and annual returns to court, if required.
- Once all responsibilities have been completed, the personal representative can **petition for a discharge** from his or her duties.
  - Discharge terminates personal representative's liability with respect to the estate and effectively closes the estate.
- Personal representatives are entitled to **compensation** and **reimbursement** of expenses unless there is will stating otherwise.





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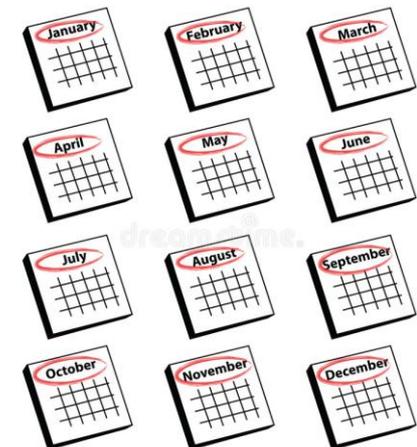
# **PROTECTIONS FOR SURVIVING SPOUSES AND MINOR CHILDREN**



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# YEAR'S SUPPORT FOR SURVIVING SPOUSES AND MINOR CHILDREN

- Surviving spouses and minor children are entitled to a special financial protection called **year's support**.
  - Entitlement to receive a permanent award of estate assets **sufficient to support and maintain** spouse and/or minor children **for 12 months**.
- Year's support award can **include real property or personal property with values equivalent to a monetary award** of year's support.
- Year's support award also allows real property to be transferred to surviving spouse and/or minor children **free of all debt except mortgages** on real estate.
  - **Property taxes and outstanding tax liens are also divested** even if property was jointly owned with the decedent.
- Surviving spouse and/or minor children are entitled to year's support **regardless of what is written in any last will and testament**.





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# PETITION FOR YEAR'S SUPPORT

- To obtain the protections, spouse or parent/guardian of minor children must file a **petition for year's support** with the probate court **within 2 years** of decedent's death.
  - Right to year's support **can be lost** if:
    - Surviving spouse remarries or dies before receiving award.
    - Minor child turns 18 or dies before receiving award.
  - Probate court **fees can be waived** for qualifying low-income spouses and/or guardians.
- In petition, surviving spouse and/or guardian **describes the property being requested** in the year's support award.
  - Can request cash or cash equivalents, real property, personal property and/or other estate assets.
  - Can request separate awards for surviving spouse and minor children.
  - Petitioner **does not have to give breakdown of expenses or justify the type or amount of property** being sought in petition.



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# PETITION FOR YEAR'S SUPPORT

- After petition for year's support is filed, the probate court gives all **beneficiaries, heirs at law and creditors of the estate notice of the request** and a deadline to file objections.
- If **no objections are filed**, the probate court awards surviving spouse and/or minor children all property identified in petition without looking into how much is actually needed for 12 months support and maintenance.
  - As a result, surviving spouses and parents/guardians will frequently request more property than needed for 12 months in hopes that no one will object.
- If **objections are filed**, the probate court will hold a hearing to determine how much property, if any, will be awarded as year's support.
  - Court will look at cost to support and maintain petitioner(s) for 12 months and award property of equivalent value.
- If all estate assets are distributed through the year's support award, there is **no need for further probate proceedings**.



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# **LIABILITY FOR DECEASED RELATIVES' DEBTS**



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## WHAT HAPPENS TO A RELATIVE'S DEBTS WHEN HE OR SHE DIES?

- Debt generally **cannot be inherited** from a deceased family member.
- When a relative dies with debts, those debts do not disappear.
  - Deceased relative's **debts become debts of his or her estate.**
  - Executor or administrator appointed by probate court is solely responsible for paying estate debts.
    - Paying debts may require the liquidation or sale of estate assets.
  - If there isn't enough money or property in the estate to pay those debts, **they will go unpaid.**



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# ARE ANY FAMILY MEMBERS RESPONSIBLE FOR RELATIVES' DEBTS?

- Surviving spouses and other family members are responsible for a deceased relative's debts only if they are a **joint account holder, co-signer, or joint debtor**.
  - Authorized users on credit cards are generally not obligated to pay the debt.
- Surviving spouses living in **community property states** (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, Wisconsin) may be liable for deceased spouse's debts.
- **Other family members have no obligation** to pay a deceased relative's debts.
- Creditors cannot report deceased relatives' debts on family members' credit reports if they have no legal responsibilities for those them.





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# WHAT HAPPENS WHEN SOMEONE DIES BEFORE PAYING OFF MORTGAGE?

- When a deceased relative dies before paying off a mortgage on a home or land, the **mortgage company still has a right to repayment.**
  - Security lien attaches to property and must be repaid regardless of who now owns it.
- Heirs are **not required to keep the mortgage** when they inherit the property.
  - They can refinance the loan or pay it off in full.
  - If the mortgage is not assumed or paid off, the property may need to be sold.
- The house or land serves as security for the mortgage and **can be sold at foreclosure** if payments are not timely received.
  - It is important for someone to keep making monthly payments, especially if they are living in the deceased relative's property.





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# BEWARE OF DEBT COLLECTORS

- Debt collectors frequently **badger, harass and intimidate vulnerable relatives** of deceased family members to collect debts.
  - Debt collectors will try to exploit family members who feel a moral obligation to pay their deceased relatives' debts.

- **Con artists** will also check obituaries and probate notices and contact relatives of deceased family members posing as debt collectors.



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# STEPS TO TAKE IMMEDIATELY WHEN A RELATIVE DIES WITH DEBTS

- **Stop using any credits cards** where the family member using the card is only an authorized signer or cardholder.
  - Authorized users can request that a card be issued in their own name.
- **Contact the holders of deceased relative’s loans, credit card accounts and other debts** to inform them of his or her death.
  - Notification will close the account and inform the creditor that debts should be handled through the probate process.
- Submit request to **credit reporting agencies to add “deceased: do not issue credit” flag** to accounts.
- If contacted by a debt collector, **direct him or her to the deceased relative’s executor or administrator.**



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# DEALING WITH DEBT COLLECTORS

- **Debt collectors can contact the deceased debtor's surviving spouse, guardian, parent (if debtor was minor), and executor/administrator to discuss debts unless they are instructed in writing not to do so.**
  - Debt collectors cannot represent that anyone other than the deceased relative's estate is obligated to pay the debt (unless he or she is a joint debtor with the deceased).
- Debt collectors are **prohibited from discussing debts with the deceased debtor's children, siblings, and other families members.**
  - However, debt collectors may contact these family members to request contact information for surviving spouses, guardians, parents, and executors/administrators.
- **Relatives who are being harassed** by debt collectors can:
  - Send written cease and desist letters to debt collectors prohibiting further contact about the deceased relative's debts.
  - File complaints with the Federal Trade Commission.



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## **QUESTIONS?**

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