

PROBATE 101

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The Probate Basics

Introduction

The legal process of transferring of property upon a person's death is known as "probate." Although probate customs and laws have changed over time, the purpose has remained much the same: people formalize their intentions as to the transfer of their property at the time of their death (typically in a will), their property is collected, certain debts are paid from the estate, and the property is distributed.

Probate Administration

Today the probate process is a court-supervised process that is designed to sort out the transfer of a person's property at death. Property subject to the probate process is that owned by a person at death, which does not pass to others by designation or ownership (i.e. life insurance policies and "payable on death" bank accounts). A common expression you may have heard is "probating a will." This describes the process by which a person shows the court that the decedent (the person who died) followed all legal formalities in drafting his or her will. What is often taught about the probate process is how to avoid it. The movement to avoid probate is primarily motivated by the desire to avoid probate fees. It is, in fact, quite possible to avoid the probate process completely. There are three primary ways to avoid probate and its protections: joint ownership with the right of survivorship, gifts, and revocable trusts. The probate system, however, exists for the protection of all the parties involved and the focus of this article is what occurs in probate.

What Happens in Probate?

The probate process may be contested or uncontested. Most contested issues generally arise in the probate process because a disgruntled heir is seeking a larger share of the decedent's property than that he or she actually received. Arguments often raised include: the decedent may have been improperly influenced in making gifts, the decedent did not know what they were doing (insufficient mental capacity) at the time the will was executed, and the decedent did not follow the necessary legal formalities in drafting his or her will. The majority of probated estates, however, are uncontested. The basic process of probating an estate includes:

* Collecting all probate property of the decedent;

- * Paying all debts, claims and taxes owed by the estate;
- * Collecting all rights to income, dividends, etc.;
- * Settling any disputes; and
- * Distributing or transferring the remaining property to the heirs.

Usually, the decedent names a person (executor) to take over the management of his or her affairs upon death. If the decedent fails to name an executor, the court will appoint a personal representative, or administrator, to settle the estate. The administrator will fulfill many of the same duties listed above.

Typically, people may leave property to any person they wish, and may make such designations in their will. However, in certain situations, depending on the relationship to the decedent and the laws of the state, the decedent's wishes may have to be overridden by the court. For example, in most states, a spouse is entitled to a certain amount of property. Furthermore, creditors may have a claim on the property of the estate. Each jurisdiction usually prescribes how long an estate must be open to give creditors an adequate time frame in which to present claims to the estate. The more complex and sizable the estate, the longer and more time-consuming this process can be.

The probate process itself also carries with it a number of costs that are usually paid out of estate assets. These costs include:

- * Fees of the personal representative;
- * Attorneys' fees; and
- * Court costs.

Why Do I Need a Will?

A will is simply a formal way of setting forth your wishes regarding how you would like your property distributed upon your death. You should consider a will whether you are single, married, have minor children, or own even a small amount of personal assets or property. In fact, every adult should have a will or other means to control the disposition of their assets. If you have not formalized your intentions, your estate may meet with unnecessary and costly litigation, adding to the grief experienced by your survivors. Avoiding the financial and emotional turmoil of will contests and other legal wrangling starts with choosing an experienced estate planning attorney .

Kinds of Probate

* Supervised: The most formal and expensive method. The court plays an active role in approving each transaction. In states where it's optional, supervised administration is used for contested estates, when an interested party requests it, or when the executor's ability is questioned.

* Unsupervised or independent: A simpler, cheaper method in which the number of duties and procedures is reduced and the court's role is diminished or eliminated. It's used for estates that exceed the asset limit for small-estate administration (see below) but don't require heavy court supervision. It often requires consent of all beneficiaries, unless the will specifically requests unsupervised administration.

* Small estate: The simplest and fastest probate, it's not available in every state and where it is only for small estates, ranging from \$1,000 to \$100,000, depending on state law. Property is often transferred by affidavit. Small estate administration often lasts only a few weeks.

Avoiding Probate

The probate process serves the vital purpose of ensuring that an individual's estate is properly distributed to his or her creditors, heirs and beneficiaries. But, the probate process can be slow and can often tie up estate property for several months. Probate may also be costly, with certain fees being paid out of the estate and reducing the amount left for distribution. For these reasons, many people may wish to arrange their affairs so that their loved ones do not have to go through the probate process, and can receive assets from the estate more efficiently.

There are several methods that can be used to avoid the probate process, and to distribute assets immediately at the time of the decedent's death. Among these methods are:

- * Joint Ownership with Rights of Survivorship;
- * Beneficiary Designation; and
- * Revocable Living Trusts.

Joint Ownership with Rights of Survivorship

Property owned in joint tenancy with rights of survivorship automatically passes, without probate, to the surviving owner or owners when one owner dies. Joint tenancy is simply a type of property ownership involving more than one owner, leaving each owner with the right to a larger share of the property should any individual owner die. This model often works well when couples (married or not) acquire real estate, vehicles, bank accounts, securities, or other valuable property together. To take joint

title with someone usually only requires that joint ownership is stated on the paper that shows ownership (i.e., car title, a real estate deed, or other document). But since each joint tenant has control over the property, you should be careful when committing to this type of ownership.

Beneficiary Designations

Beneficiary designations can be made under several different types of accounts. Funds from life insurance policies, retirement funds, and IRAs pass directly to the beneficiary because they are considered contractual obligations to pay out a death benefit. These designations prevent the accounts from needing probate consideration.

Payable-on-death (POD) bank accounts are also an effective way to avoid probate. Any money in the POD account passes directly to the named beneficiary upon the account holder's death. The added benefit of a POD account is that the account holder retains exclusive rights to the account while he or she is alive, and retains the right to change the beneficiary to the account.

Transfer-on-death (TOD) securities allow a person to name someone to inherit stocks, bonds, or brokerage accounts without probate. This model works very much like a POD bank account. After a person has registered ownership this way, that person retains exclusive ownership to the stock and, like the POD account, retains the right to change the beneficiary.

A few states offer car owners the option of naming a beneficiary for their vehicle. This transfer-on-death registration for vehicles also provides car owners the same exclusive ownership rights as POD accounts and TOD securities accounts.

Revocable Living Trusts

A revocable living trust can hold title to property for the benefit of an individual. Since title is held in the name of the trustee (usually the person who set up the trust) and a beneficiary is named for the property, the property is not part of the estate for probate purposes. Similar to a will, a trust document directs the trustee how to distribute the trust property at the time of death, and to whom.

Getting Legal Help to Avoid the Probate Process

Sheltering assets from probate or avoiding probate altogether requires advance planning and expert guidance. If you are considering ways to avoid probate, contact an experienced estate planning attorney in your area to discuss your options and get the estate planning process started.

Estate Planning & Probate Dictionary

AB Trust - A trust designed to make sure the personal estate tax exemption of each spouse (currently \$1.5 million) is used to the fullest extent possible, while allowing the surviving spouse to have use of the assets of the deceased spouse during the remainder of the surviving spouse's lifetime.

Administrator - A court-appointed person who manages the estate of a deceased person who has died without a will.

Attorney-in-Fact - An individual designated in a power of attorney to act as the agent of the person who executed the document.

Basic Will - A will that distributes everything to your spouse, if living, otherwise to your children when they reach the age of majority (18 years old).

Beneficiary - A person who receives funds, property, or other benefits from a will, contract, or insurance policy.

Durable Power of Attorney for Health Care - A written document in which an individual designates another person to make health care and health-related decisions in the event that the individual becomes incapacitated.

Durable Power of Attorney for Property - A written document in which an individual designates another person to make his or her property and property-related decisions in the event that the individual becomes incapacitated and is unable to do so.

Estate - An individual's property and assets -- including real estate, bank accounts, life insurance policies, stocks, and personal property such as automobiles and jewelry.

Estate Tax - A tax that is imposed at a person's death, on the transfers of some types of property from their estate to heirs and beneficiaries.

Executor - A person named in a will who is authorized to manage the estate of the deceased person. The executor will collect the property, pay off any debts, and distribute property and assets according to the terms of the will.

Fiduciary - A person or institution that is legally responsible for the management, investment, and distribution of funds; i.e. the trustee identified in a trust.

Grantor - A person who transfers assets to another, usually into a trust.

Guardian - An individual with the legal authority to care for another, usually a minor child.

Incapacity - A person's inability to act on his or her own behalf, i.e. the "sound mind" requirement for drafting a valid will. A court makes a finding of incapacity.

Inter vivos trust - A trust that is created during a person's lifetime, which holds property for the benefit of another.

Intestate - A term used when a person dies without a will.

Joint Tenancy With Right of Survivorship - A title that is often placed on co-owned property. At the death of one owner, the other owner will be legally entitled to sole possession of the property, regardless of what provisions are made in a will. A husband and wife often use this form of ownership.

Living Trust - A revocable trust established during a grantor's lifetime that is used for the placement of some or all of the grantor's property. In a situation involving a married couple, a basic living trust does not effectively use the personal estate tax exemption of either spouse (the amount of a deceased person's estate that may pass to his or her heirs without estate taxes, currently \$1.5 million). Because of this deficiency of a basic living trust, an AB Trust (discussed above) is often recommended instead to married couples with substantial assets.

Living Will - A binding legal document that sets forth a person's wishes regarding the use of life-sustaining treatment in the event that he or she becomes terminally ill or permanently unconscious.

Marital Deduction - A federal tax deduction that allows one spouse to pass his or her estate to the other spouse without having to pay estate or gift taxes.

No Will - A decedent dies without a valid will, so that his or her estate passes to heirs based on the laws of descent and distribution of his or her state.

Pour-Over Will - A will that distributes everything to a trust.

Power of Appointment - A legal right given to a person in order to allow him or her to decide how to distribute a deceased person's property. A "general" power of appointment places no restrictions on the named person, while a "limited" or "special" power of appointment places restrictions on who may receive distributions.

Power of Attorney - A written document that gives one person the legal authority to act on behalf of another person.

Probate - A process whereby a court reviews a will to make sure that it is authentic, and allows others to make legal challenges to the will.

QTIP Trust - A trust designed to permit a spouse to transfer assets to his/her trust while still maintaining control over the ultimate disposition of those assets at the spouse's death. QTIP Trusts are particularly popular in situations where a person is married for a second time but has children from a first marriage for whom he/she wants to reserve assets.

State Death or Inheritance Taxes - Taxes that may be imposed by the state where a deceased person lived, or where his or her property is located after death.

Trust - A written document providing that property be held by one (the "trustee") for the benefit of another (the "beneficiary"). A trust may be created during the grantor's lifetime or after his or her death.

Trustee - A person named in a trust document who will manage property owned by the trust, and distribute the trust income or property according to the terms of the trust document. A trustee may be an individual or a business.

Will - A document that directs how property shall be distributed upon a deceased persons death.