

Help Me Avoid Probate—Whatever That Is

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One of the first questions I ask clients in an estate planning conference is “What is your primary goal?” I am surprised at the number of clients who answer: “I want to avoid probate” -- but then admit that they don’t really know what “probate” is. Recently, a client told me she had heard that if you go through probate, the government will take half of your assets. It appears that some accurate education* about the process of probating an estate would help a lot of people. So, if you learn anything from the following, spread the rumor.

What is Probate?

When a person passes away, she or he may leave behind assets that must be sold, distributed, or otherwise taken care of. The job of the Probate Court is to assist in that process, including appointing a personal representative that has the power to properly distribute the deceased’s assets. “Going through probate” is the process of conducting a decedent’s estate matter with the Probate Court. If the deceased left a will, the will is the “map” that guides the personal representative and the Probate Court in this process. The Probate Court would typically appoint the personal representative that is named in the will. The personal representative then essentially stands in the shoes of the deceased, and takes care of the deceased’s affairs, including filing tax returns, notifying and paying creditors, selling property, and distributing assets to the persons designated by the deceased in the will. (If the person did not have a will, the personal representative distributes the assets as dictated by the state’s intestate statutes. In general, those statutes distribute excess estate property first to a spouse, then to children, then parents, and then to siblings.) The personal representative reports the actions taken on behalf of the deceased to the Probate Court, and when the Court is satisfied that everything has been handled properly, the estate is closed and the personal representative is discharged.

How expensive is Probate?

One of the personal representative’s first duties is to file an inventory of the estate’s assets with the Probate Court. The Probate Court assesses an inventory fee based on the amount of assets in the estate. That fee is not as high as many of my clients fear. A few examples will illustrate: the estate inventory fee for an estate valued at \$100,000 is currently approximately \$360. The fee for a \$800,000 estate is approximately \$1000.

How Do I Avoid Probate?

When a client asks how to avoid probate, my general answer is: “Make sure that a personal representative would be superfluous.” This means that you should make sure

that everything you own in an individual capacity passes to someone else automatically, so that after your death, a personal representative standing in your shoes would have nothing to do.

Many assets pass automatically to someone else by operation of contract or by operation of law, so those assets would not need to be handled by a personal representative. If an estate contains only those kinds of assets, probate is not necessary.

For example, if the deceased had a life insurance policy that named a son as the sole beneficiary, that son is the owner of that asset at the parent's death. A personal representative is not necessary for distribution of that asset. Similarly, if an investment account or bank account contained a "pay on death" or other beneficiary designation, that asset would pass to that named beneficiary at the death of the owner. A personal representative is not necessary.

Another example is an asset that is owned jointly. If, for example, a bank account has two owners, the assets in that account are owned by the second owner at the death of the first. Those assets do not need to go through the probate process. Also, real estate that is owned by a husband and wife, or with others as joint tenants, passes by law to the survivor(s), so would not need to go through the probate process.

If all assets are owned by the deceased's trust, there also is no need for the probate process. The trust is the owner of the trust assets, not the individual. The trustee named in the trust is the person who will pay creditors and manage or distribute the trust's assets. A personal representative is not necessary, so the Probate Court will not be involved.

So, for those clients who wish to avoid probate, I help them make sure that every single one of their assets is either owned by their revocable living trust, is owned jointly with a right of survivorship, or has a beneficiary designation. Then, they can "avoid probate." And they know what it is.

*Education through a brief article always includes the risk of possible misunderstanding. Estate planning should be done only with the advice of an attorney that knows your specific financial situation in detail. Please use the information in this article only to help you make decisions about how you want to conduct your estate planning. Then, please discuss those personal decisions with your estate planning attorney.