



REDUCE YOUR COSTS
OR EVEN AVOID IT

Probate

Disclosure: We are not attorneys; we have gathered this information from numerous sources. We suggest you consult a licensed and authorized professional before making any important or final decisions.

IN AMERICAN CULTURE, THE WORD "PROBATE" IS FEARED AND AVOIDED.

why?

First, let's look at a little history.

Probate first originated in England during the 14th century. In 1857 the first court, The Probate Act of 1857, helped establish rules and procedures. This court had authority over wills and other documents left by a decedent. In those early years, most wills were oral, and the beneficiaries from the estate would testify to their right to inherit the assets. If a disagreement arose, the court had the final say in the decision.

In America, the early use of a Probate court was first recorded in Philadelphia in 1805. During Benjamin Franklin's era, he often spoke of the need for a system to transfer assets from one generation to another. As American Juris Prudence developed over time, the foundation of the court system was an active and accurate Probate court. One of the more famous cases had to do with Charles Samuel Wilkinson, who left his home in Maryland to his slave Clarence. Mr. Wilkinson had no living heirs, and his choice of Clarence was considered an outrage. Neighbors and other citizens complained and marched against Clarence owning any real property, and finally, the Supreme Court agreed and denied the transfer to him. The Presbyterian Church eventually claimed the property, and Clarence was out as an owner. The church minister had been the driving force in the outrage and personally led the march in protest.

What is Probate? How does it work?

Simply put, Probate is the re-titling (change of ownership) of assets that require a paper transfer. These assets could include real estate, automobiles, bank accounts, invested assets, pension plans, etc.

When a person dies, the legal process begins to affect the direction of a will, either left by the deceased or directed by the courts in the absence of a written will.

Probate is a process that identifies the deceased person's assets and provides for legal transfer to the intended beneficiaries. The process can identify debts, value property, and pay debts and taxes.

Probate involves filing paperwork, public notices, and court appearances by lawyers. Attorneys are paid a fee from the estate to provide legal services, and the extent determines the amount of these fees and often the value of the estate.

The normal process would begin with the person named as the "personal representative" as directed by the will of the deceased. The court will appoint a representative if a person dies without a will. The personal representative typically hires an attorney to help direct them through the legal process. The court and the public are notified of the decedent's passing and put on notice that the probate case is open. The will is validated, and the list of assets is presented to the court along with any debts and unpaid taxes. Known creditors and beneficiaries of the estate are notified.

The representative must manage the assets during this process and make sure that the assets are secure. If instructed by the courts, the representative may be required to sell or make a change in an asset. This instruction may be from details listed in the will and may need to be done to comply with any specific bequests, such as a cash gift or disbursement.

Once the court has determined the estate is ready to close, the Probate judge provides the documents to transfer inherited assets to the correct ownership legally, and the estate is transferred. The court then will close Probate, and the estate will be finished. The personal representative will file the final tax return for the decedent, and the Probate process will come to an end. In most cases, Probate can last for 9 months to a number of years, depending on the complexity of the estate.



Probate SHOULD IT BE AVOIDED?

Most people generally fear Probate, which is often based on publicity or misunderstood information. The press and numerous articles explain the hazard of Probate and the underlying expenses which could wipe out an estate. Are these real or imagined concerns? The answer is quite simple; it all depends. It depends on the size and complexity of the estate. It depends on instructions from the will of the decedent. It depends on the state of residence of the decedent. It depends on where the assets are located. It all depends, etc., etc., etc.



If you have experienced firsthand the complexities of Probate, you will have an opinion that makes the point that Probate should be avoided.

A few points of concern about Probate can be summarized:

- Probate can be an unnecessary waste of time. The time it takes to go through the process can be affected by court schedules and the notification process. Often, an estate beneficiary will receive no access to the assets until the process is completed.
- Probate is a public issue. Anyone can access public records, which means your situation is open to anyone who wants to look. This puts your financial and personal life under public scrutiny.
- Probate can be an unnecessary waste of money. Due to the complexity of the process for most people, there is no choice but to put the handling of the estate into an attorney's hands. The legal fees come off the estate's top and can be more than expected. The cost to Probate an estate can often be 5-10% of the estate's total value. Like all complicated issues, it all depends on the circumstances.
- States require court hearings: All states require an open court appearance because of the nature of a decedent's last will. These appearances can delay Probate due to schedules and disclosures.

JOINT OWNERSHIP: DOES IT MAKE SENSE FOR YOU?

Joint ownership of assets is a way for two or more people to own shares in an asset. The asset generally is real estate but can be other property such as a brokerage account, insurance company products, or any other valuable property. The concept of joint tenancy is the transfer of the asset to the survivor or survivors. When one person dies, the asset immediately becomes the surviving owner's or owners' owner. These assets may or may not be transferred without a will or any Probate action.

Many forms of joint ownership are available, but the most common use is "joint ownership with right of survivorship." This could be effective for spouses or could also be used for transfer between a parent and a child or children.

Property owned in joint tenancy automatically passes without any need for Probate to the surviving owner or owners when death occurs to one of the owners. There is no cost to set up joint tenancy other than forms or a small legal expense if an attorney is used. Also, joint tenancy is considered a private issue, and the transfer is made without public notice.

Numerous pros and cons of joint tenancy decisions exist. Adding a child to a real estate asset may change the step-up in tax basis for the portion of the asset's value. This may have a future tax issue for the survivor. Also, adding another person to the ownership of an asset is a gift, and once given, it cannot be taken back. The gift's value could also violate gifting laws, and it is important to understand your gifting options. Understanding the gifting options will offer you more choices in planning.



Wills and Trusts

TYPES AND DESCRIPTIONS

Many varieties of trusts exist, and it is important to understand how each may affect your desired goals.

The Basic Will - This document is simple and basic. It generally provides everything to be transferred from one spouse to another in the event of death. This is often referred to as a "sweetheart will."

The Pour-Over Will - This will is used in conjunction with a "living trust." This allows any specific asset not mentioned in the will to "pour over" into the Trust and be distributed as the Trust dictates.

The Will and Contingent Trust - A common approach is for spouses to leave assets to one another, and in the event of no surviving spouse, the Trust steps up and gains control of the assets. This approach may benefit the situation where minor children are the survivors

A-B, Credit Shelter Trust Will - This will allow for the creation of a trust to eliminate taxation on the first death of a married couple. The beneficiaries of the Trust are generally the heirs of the marriage. The assets are placed in a credit shelter trust and are still available for the surviving spouse's use.

Testamentary Trust - This Trust is established at the death of the person who created the will. This type of Trust can be used to care for minor children or to establish a gifting scenario. The Trust does not begin until the will is enacted.

QTIP Trust - This type of Trust (qualified terminable interest property) is used primarily in a second marriage situation. It is used to create income for a period of time (lifetime) and then is dissolved to the beneficiaries of the Trust at death.

ILIT Trust - An irrevocable life insurance trust is used as a receptacle for creating a life insurance policy and proceeds. At death, the funds from the insurance policy are paid to the Trust and then distributed to the beneficiaries of the Trust tax-free. Normally the ILIT trust is outside of the estate of the grantor and thus not includable in the calculation of overall estate tax liability.

Living Trust - These vehicles allow for advance asset transfer planning for anything requiring a new deed or title. Assets held in the Trust are pre-signed and held until the death of an originator of the Trust. At that time, the deeds and titles are simply recorded. A living trust will normally avoid any need for Probate.

AVOID PROBATE USING THESE EASY OPTIONS:

If you own a brokerage account or directly own stock certificates, consider using the "transfer on death" option to avoid Probate. This option is also known as the "Uniform transfer on death securities resignation."

This option allows you to name a beneficiary who will inherit bonds, brokerage accounts, or individual stocks without the need for Probate. Much like the method used by banks, this option is a form supplied by the holder of the securities or individual stocks and, once signed, will only become effective at your death. You are not signing over any rights to your assets; they are still under your 100% ownership. All you are doing with this form is allowing the assets to be reissued to the named beneficiary at your death.

To claim these assets, all that is required is proof of the decedent's death and proof of the beneficiary's identity.

In some states, the same type of beneficiary arrangement can be made on automobiles, boats, and motor homes. These states allow for a transfer on the death registration form to re-title a vehicle at the original owner's death. The same rules apply; you still own the car and have not signed away any rights until death. The beneficiary will show proof of death and proof of identity, and the title is transferred. Many states are now considering this, with California, Ohio, and Kansas already in place. The forms are usually available at the county tax auditor's office.

AVOID PROBATE WITH BANK AND RETIREMENT ACCOUNTS:

If you own bank accounts and want to reduce your exposure to Probate with these assets, the "payable on death" option may help you.

This option offers an easy method to keep a bank account out of Probate court. The process is simple, at your death, the beneficiary simply goes to the bank with proof of your death and claims the funds in the account. All that is required is a form that most banks can supply naming whomever you want to inherit the money in your account at your death.

Nothing happens while you are alive, and you have not signed away any rights. You are not giving anyone access to your funds while you are alive. The payable at death (POD) only allows access at your death. The Probate court has no jurisdiction or says how this account is transferred. In the event of joint ownership between spouses, the POD will not become effective until the death of the last remaining spouse. This simple and easy-to-use step in avoiding Probate requires no fee or charge, simply a form to sign.

You will be asked to name a beneficiary if you own an IRA, 401(k), or another type of retirement account. Suppose a named beneficiary inherits the account at your death. In that case, it also avoids Probate and is transferred immediately and without delay. Naming a beneficiary through a will may cause the need for a probate decision and can cause delay. Single people are allowed to name anyone they desire, but married couples could be required to name their spouse as beneficiary. Suppose planning for heirs is to transfer funds to a child or other beneficiary other than the spouse. In that case, permission may be needed to make that designation. Community property states may also have requirements for the surviving spouse, who may not be designated as a beneficiary.



ARE REVOCABLE LIVING TRUSTS FOR YOU?

A revocable living trust is a legal device that can help protect assets. Revocable living trusts are promoted as an alternative to Probate. They can be used to manage your property during your lifetime and distribute it quickly after your death. Any competent adult can establish a revocable living trust.

How is the Trust established?

A revocable living trust is established by a written agreement or declaration of Trust which appoints a "trustee" to administer the property legally transferred to the Trust. It gives detailed instructions on how property is to be managed and distributed upon death.

Can Assets Be Included in the Trust?

Assets can include property, deeds, stock, bank accounts, life insurance, and certain pension accounts. Assets not formally transferred to the Trust might still be subject to Probate.

How About Trustees?

With a revocable living trust, more than one trustee can be appointed. Each trustee can be delegated different duties.

What are the Advantages of a Revocable Living Trust?

There are many advantages of a revocable living trust. Avoiding Probate is a revocable living trust's most significant and valuable feature.

What are the Negatives of a Revocable Living Trust?

A revocable living trust does have some drawbacks. Revocable living trusts can be expensive and do not eliminate the need for attorneys and accountants. They are usually longer and sometimes more complicated to draft than a will. The exact cost of a revocable living trust depends on how complicated your assets and your estate planning goals are. It is smart to compare estimates of how much a revocable living trust will cost to draft, how much writing a will would cost, and how much probating your estate would cost. You should also consider any fees you might want to pay the trustee.



Revocable living trusts can also require attention and management for an indefinite period.

There is also an element of inconvenience to a revocable living trust. Once the Trust is established, trust books must be maintained to ensure that all assets continue to be registered to the trustee. There can also be unforeseen problems. A revocable living trust can raise a variety of new problems regarding title insurance coverage, real estate in other countries, Subchapter S stock, certain pension distributions, and other issues.

A revocable living trust is not a good idea to save taxes. By itself, a revocable living trust does not avoid income, estate, or gift taxes. Provisions for saving estate and gift taxes can be included in a revocable living trust or a will. Even if your assets are held in a trust, a state estate tax return must be filed after you die if your property exceeds \$1,000,000 in value for the year 2006 and beyond, and a federal estate tax return must be filed after you die if your property exceeds \$2,000,000 in value for the year 2006 and 2007.

Given this information, you must decide if a revocable living trust is right for you.

QUESTIONS REGARDING *Probate*

Who is in charge of the Probate process?

The will names a personal representative responsible for overseeing an estate's Probate. A personal representative or executor may be a family member, friend, business associate, financial institution, or trust company. If the will designates no personal representative, the court appoints one. The representative's primary duties are to identify and collect the decedent's assets and manage those assets during the Probate process. They pay debts, taxes, and probate expenses. Once the Probate is completed, the representative helps in the distribution of the remaining assets to the beneficiaries named in the will.

Do I need to hire an attorney to go through Probate?

A lawyer must represent the estate's representative for formal Probate proceedings. The representative may wish to hire an attorney for legal advice related to the Probate process. The personal representative is free to hire an attorney they choose. It can be advisable for the attorney to attend administrative hearings, and the attorney's fees are paid from the estate of the decedent.

What's does formal and informal administration mean?

A Probate judge presides in formal administration; in an informal administration, the duties are handled by a county register. A formal administration is used if any contested issues arise because only a judge can rule on these disputes. Informal administration can be less costly than formal administration. Not all states offer informal and formal options for settling probate issues.

How much does Probate cost? How do I control costs and expenses?

The major Probate expenses include court costs and fees paid to the personal representative and the attorney. These funds come from the estate of the decedent. The value of the estate's assets can determine the court filing fees. Attorney fees can vary based on the difficulty of the decedent's estate. Many attorneys will "specialize" in Probate, and often times a negotiated fee in advance can be arranged. Always ensure the fee estimate and structure are fully disclosed and understood before hiring an attorney. Most states do not allow an attorney to charge fees based on the overall evaluation of the decedent's estate. Also, most states allow for the representative to be reimbursed for expenses pertaining to their duties.

How long does Probate take?

Depending on the state and the size or difficulty of the assets, Probate can take 1-2 years. Some large estates can take longer, depending on the circumstances of the assets. Some states require Probate to be closed within a fixed period of time, but it can vary from state to state. Time must be made available for creditors and other claims to be filed against the estate. Also, the final tax return must be filed with the IRS within nine months of the decedent's death.



These links may provide additional information about the process of Probate.

[Probate - State Laws | US Law | LII / Legal Information Institute \(cornell.edu\)](#)

[Probate Process \(americanbar.org\)](#)

[Probate: What It Is, How It Works, How to Avoid - NerdWallet](#)

[Probate - What Is Probate & How To Avoid It | Trust & Will \(trustandwill.com\)](#)

[Avoiding Unnecessary Probate Costs \(investopedia.com\)](#)

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