

What is Probate, and How to Avoid it

When a loved one passes away, you anticipate some amount of grief and sadness. What perhaps is not anticipated, is the, at times, overwhelming process of settling your loved one's estate. The tasks involved in settling an estate tend to fall on our closest family members and friends and they can make what is already a very difficult time, even harder. Not only will there be funeral/memorial services to plan, there will also be the task of going through your loved one's assets and making sure that the property is passed on in accordance with your loved one's wishes. Settling the estate often involves a time-consuming court process known as "probate." Below you will find some basic information about the probate process and some tips for avoiding probate on your own death. With proper planning during your life, you can aim to make the administration of your own estate a smooth process, rather than an unnecessarily trying experience for your family and friends.

What is probate?

Probate is the court process of administering your estate and transferring your assets to your heirs or beneficiaries. Generally, going through probate will be required when a person dies with assets in his or her individual name. This could include both personal property (such as bank accounts) and real estate (such as a primary residence).

When a person passes away, one of the first things to determine is if the person died "testate" or "intestate." Testate means that you died with a will. Intestate means that you died without a will. If you die testate, your assets will pass through probate and to the beneficiaries named in your will. If you die intestate, your assets will pass through probate and to your "heirs-at-law." Heirs-at-law are the persons entitled to receive your estate under the intestacy laws of the state where you reside.

To initiate a probate proceeding, a petition will be filed with the probate court in the county where you resided at your death. The petition may request that the court, among other things, appoint a Personal Representative of your estate (formerly known as an Executor under Massachusetts law). The role of the Personal Representative is extremely important and thought should be given when selecting a Personal Representative under your will. Most people name a trusted family member or a professional (such as an attorney or financial advisor) to serve in this capacity. If a person dies without naming a Personal Representative, the law generally provides for a priority ladder to determine who may serve. Once appointed, the Personal Representative is charged with collecting, managing, safeguarding and distributing the estate and with paying the estate's debts, taxes and administrative expenses.

What is included in probate?

As mentioned above, only property that is held in your individual name at the time of your death will be subject to the court-supervised probate proceedings. Certain types of "non-probate property," will pass outside of your probate estate and will not pass in accordance with the terms of a will, including (1) assets previously transferred to a trust, (2) assets having a named beneficiary (such as retirement accounts and life insurance), and (3) jointly owned assets (more on this below).

It is important to note that your probate estate is different from your taxable estate. While your probate estate includes only assets in your individual name at the time of death, your taxable estate (i.e., assets subject to estate tax) is broader. The estate tax is a tax on the transfer of property at death. The estate tax applies to the transfer of everything you own or have certain interests in at the time of your death, regardless of whether it is a probate or non-probate asset.

Why avoid probate?

There are several very good reasons to avoid probate, including: (1) time, (2) expense, and (3) privacy.

Time

The court process can take a significant amount of time. In Massachusetts, even if everything is in good order, it is not uncommon for the court to take 3 months (and sometimes longer) just to appoint a Personal Representative. While the estate waits for the court to appoint the Personal Representative, any individual assets are essentially frozen and cannot be used to help pay funeral expenses/final bills or to provide financial support for a surviving spouse or family members.

By contrast, non-probate assets (such as assets transferred to a revocable trust during your lifetime), are immediately available to pay expenses and support your loved ones.

Expense

Not only will there be court fees involved with probating an estate, but many people will need to hire a lawyer. Depending on the complexity of the estate, the probate process could become very expensive.

Privacy

Probate court records are open to the public. Just about anyone can walk into a courthouse and request copies of a probate court proceeding. This often includes a copy of the will, an inventory of the estate's probate assets, and an account of the distributions made to heirs and beneficiaries.

By contrast, non-probate assets do not need to be reported to the court.

How to avoid probate

As Probate avoidance can be achieved through proper estate planning during life. Because only assets in your individual name will pass through probate, one goal is to not have any assets in your individual name at the time of your death. This does not mean that you have to give away all of your assets, but it does mean that your assets should be held in the name of a revocable trust or in another arrangement that avoids probate, as described in more detail below.

Use of a revocable trust

The best way to avoid probate, generally, is to fund a revocable trust during your lifetime. A revocable trust, sometimes referred to as a "living trust" or an "inter-vivos trust", is a basic trust that can be used to hold assets during your life and dispose of them upon your death. Although a revocable trust operates like a will, you should still have a will in place to catch any assets that have not been transferred to your trust during your life. If you do not have a will to catch these assets, your state's "intestacy laws" will govern their disposition on your death, and these laws may not reflect your wishes for who would like to receive your property.

A revocable trust can be changed or altered at any time while you are alive and competent, and there are no additional accounting requirements or tax returns associated with a revocable trust during your lifetime. Funding your revocable trust is the process of retitling assets from your individual name into the name of your trust, which is, generally, a straightforward process. Property held in a revocable trust will not be subject to probate upon death.

If you own real estate outside of your primary state of residence (i.e., your state of “domicile”), it is particularly beneficial to transfer that property to a revocable trust. When you die owning real estate outside of your state of domicile, your estate will need to conduct an additional probate proceeding in the state where the property is located in order to sell the property or transfer it to your heirs or beneficiaries on your death. This second probate proceeding in the other state is known as “ancillary probate” and will result in further expense and delay for the recipients of the property. Further, if you own real estate outside of the United States, it is important to understand how the laws of the foreign jurisdiction will play into its disposition at death.

Assets having a named beneficiary

Assets that have a named beneficiary will pass outside of probate and in accordance with the beneficiary designation. This applies primarily to retirement accounts and life insurance policies. However, it is also possible to name a “transfer on death” beneficiary for certain types of financial accounts.

You should review the beneficiary designations for your retirement accounts and life insurance policies to ensure that they are in line with your wishes and that they do not pass in a manner that would subject them to probate.

Jointly owned property

Finally, any property owned as joint tenants (such as a joint bank account) will automatically pass to the surviving joint owner and will, therefore, avoid probate on the death of the first owner to die. Upon the death of the surviving owner, the asset will pass in accordance with the survivor’s own estate plan.

Conclusion

Remember, your will and revocable trust can be changed at any time while you are living and competent. You should review your estate plan on a regular basis to ensure that it is still in line with your wishes. If you would like to review your estate plan or discuss strategies for avoiding probate, please contact a member of your Choate Wealth Management team.