

Probate, and how to avoid it

“Probate” is a word with two meanings. Specifically, it means proving to a court that a will is valid. More generally, “probate” refers to the whole process of settling an estate disposed of by will—assembling assets, notifying creditors, paying taxes, distributing bequests and so on.

When people talk about “avoiding probate,” they’re seeking to reduce the legal costs associated with estate settlement. Over the generations, procedures that some states adopted to protect estates and heirs tended to fossilize into expensive red tape. Reforms in recent decades have improved matters. Still, legal fees and related expenses, as well as the time involved, do vary from state to state.

How much emphasis should you place on avoiding probate? Much depends upon personal circumstances.

To some extent, you may be avoiding probate already. Married couples often own their property jointly, which means that the survivor will inherit the property without the supervision of the probate court. Life insurance policies and employer-provided retirement plans have beneficiaries, and these also avoid probate with no special efforts.

The better way

Revocable living trusts are highly flexible arrangements for the now-and-future management of securities, real estate and other assets. After you set up such a trust, you remain in control. You may put in additional assets, make withdrawals or change your mind and revoke the trust. And you’re free to alter the terms of the trust—add new beneficiaries, for instance—at any time.

Despite all this flexibility, a revocable living trust is recognized as a separate legal entity. As a result, at your death the assets held in your trust would not count as part of your probate estate. However, the trust assets would receive a fully stepped-up income tax basis for purposes of computing capital gain or loss if they were later sold.

Because living trusts aren’t subject to estate-settlement delays, you can provide immediate income and support for your spouse, your children or other beneficiaries. And unlike the provisions of a probated will, the terms of a living trust generally remain private. (The recent publicity over Michael Jackson’s estate bears this out; the will is publicly available, but the terms

of his family trust are not.) For some people, these advantages prove more important than the reduction in estate settlement costs.

As a trust institution, we're a staunch advocate of living trusts. At the same time, we recognize that no single approach to estate planning is right for everyone. Together with your tax and legal advisors, our trust officers will be glad to help you develop a practical plan for carrying out your own intentions, with maximum benefit to your heirs and minimum estate shrinkage.

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Any developments occurring after January 1, 2010, are not reflected in this article.