

To Probate, or Not to Probate: That is the Question

Please allow me to interrupt your quarantine gratitude journaling and victory gardening to demystify a topic apt for these unfortunate times: probate. I have found in my legal practice that most consider probate to be a dirty word. I have also found widespread misunderstanding of what that dirty word really means. What better time than during a pandemic to learn about the legal process surrounding death.

What, then, is probate? It is a process to appoint someone to be in charge of your probate assets after you die, and to distribute those assets according to your wishes. You ask, one eyebrow raised, "What are probate assets?" Excellent question--I can tell that you are a close listener. Probate assets are property (e.g., real estate, bank accounts, cars, investment accounts, retirement funds) that you own in your name alone at your death. These assets do not have a joint owner (like a joint bank account you might have with a spouse). These assets do not have a designated beneficiary (like on an IRA or a life insurance policy that lists a child as beneficiary). In order for anyone to be able to access these assets after your death--to pay bills, to make distributions to loved ones--the assets must go through the probate process.

"I have a Will!" you proclaim with confidence, "So there won't be any probate." But you are wrong, my friend. It is not the existence of a Will that prevents probate; it is the absence of probate assets that prevents probate. It is how you own something that dictates whether that process must be undertaken, not whether you have a Will. "Then I shall tear up my Will!" you cry out. Please, no. Your Will makes this process easier, in part, by telling the Court who you want to be in charge of those assets. In the old days, when we shook hands with gusto and gathered at bars to buy overpriced cocktails, we called this person the Executor or Executrix. Today, really since 2012, the Personal Representative fills this role. Same job--different name. Your Will also informs the Probate Court who will get your probate assets. Additionally, if appropriate, your Will names your desired guardian of your children, in the event you die leaving minors behind. (Please wash your hands and stop touching your face.)

"Probate is the Fourth Circle of Hell," you sigh with resignation, "And I will take great pains to avoid it." Here's the dirty word bit, and what so many believe: probate is complicated, takes forever, and costs tons of money. This is not, however, necessarily true, and it is often not true at all. Of course it depends upon the nature of your assets--perhaps you own many properties in different states, or a family business. Probate's difficulty depends, too, upon your family circumstances--maybe you don't have highly valued assets, but your children do not get along and there is a high likelihood of challenge over your collection of red hawk tail feathers. For most people, probate is simply a process with clearly defined steps and a timeline. Getting help from an attorney can make the process even easier.

You now know, because you're a quick study, two ways to avoid probate (Ok, ok: add a joint owner, designate a beneficiary). But here's something radical to consider: you might not want to avoid it. There are situations in which it makes good sense to force your assets (some or all) through the probate process. Your Will can serve as a master plan for what happens to all you leave behind. That document allows you to spread your wealth (whether millions in cash or a trunkful of hand-sewn face masks) among all of your loved ones equally, or unequally. Your Will can even create a Trust that can hold assets for minors, for those with poor spending habits, or for a disabled family member.

If you name your children as beneficiaries of your life insurance policy and die while they are still minors, a Conservator will need to be appointed to receive, hold, and manage those funds for the benefit of your children--kids can't just inherit money. The Conservatorship process, another Probate Court endeavor, also takes time and money--often more than probate itself. If you instead name your estate as beneficiary of your life insurance, ("Such madness!" you gasp. But bear with me.) those funds will be handled according to the master plan: your Will. You can avoid the necessity of a Conservatorship by directing those funds into a custodial account at a bank, or by including a Trust in your Will that will hold the money for the benefit of your children. This is just one example of many.

I work with clients regularly to avoid probate and still achieve their desired goals. But sometimes I recommend that they embrace the process because it makes the most sense for their situation. Probate doesn't have to be a dirty word. Working with an estate planning attorney, and perhaps a financial advisor, you may find this is true for you. It's important that everyone have a plan in place, but let's all try to stay alive for a good, long while.

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