

The Truth About Probate

By Paula F. Montoya, Attorney

Understanding probate can be beneficial when managing your estate.

No doubt you have heard that probate is bad and should always be avoided because it takes a long time, ties up assets and is expensive. While in some cases probate may be problematic and inefficient, the truth is that it is not necessarily the process of probate that is the cause of problems, but rather the facts and circumstances involved.

What is probate?

Probate is the legal process through which the court ensures that when you die your debts are paid and your assets are distributed according to your will. If you don't have a valid will, your assets are distributed according to state law called "intestate succession." With or without a will, the probate court appoints a personal representative ("executor") to administer your estate, pay your debts and transfer your assets to your beneficiaries. If you create a living trust and transfer your assets to the trust during your lifetime, the trust owns your assets, which enables your successor trustee to administer your estate without seeking authority from the probate court and with little or no legal assistance. In addition, unlike a will being probated, there is no public record of the contents of the trust estate or how they are to be distributed.

Time and Cost

Probate does take time, usually nine months to two years, but for complex estates, often longer. Sometimes, the time it takes to distribute assets through the probate process is about the same as distribution time from a living trust. However, both living trusts and wills can involve complicated facts, circumstances and personalities, which can slow down the distribution of assets substantially. For example, if a beneficiary challenges the validity of your will, probate will require substantial supervision by the court and be much slower than if the validity of the will was not challenged. Similarly, if a beneficiary challenges the validity of your living trust, the distribution of the assets held in trust will also be substantially slowed because of court proceedings associated with the challenge.

Probate can also be expensive. Legal and personal representative fees, court costs and other costs must

be paid before your assets can be fully distributed to your heirs. If you own property in other states, your family could face multiple probates, each one according to the laws in that state, and these costs can vary widely. When a person, called a grantor, settlor or trustor, creates a living trust, most of the cost is paid at the time of creation. If a will is used as opposed to a living trust, the probate costs will be paid after death from the remaining assets.

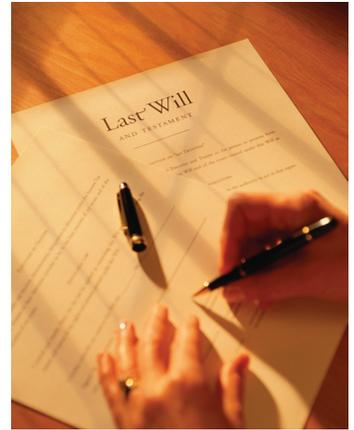
Probate May Be Beneficial

Although you may have heard you should try to avoid probate, the probate process may be useful in certain situations. For example, if you fail to transfer assets into your living trust, probate may be necessary following your death to transfer the assets into the name of the successor trustee of the living trust.

Some families, due to feuding or other dynamics, may prefer the court supervision of the probate process. Also, the probate process contains family protections, such as homestead and family allowance exemptions from creditors. The homestead exemption preserves your family home for the benefit of your surviving spouse and certain other dependents, including minor children. The family allowance safeguards the welfare of your surviving family by exempting certain personal assets from claims of other beneficiaries or creditors.

Lastly, state law limits the time that creditors have to make claims against your estate to a three-month period through the probate proceeding instead of two years for estates that are not probated. Living trusts do not provide the statutory bar to creditors after three months that probate provides, therefore, it may be beneficial to open a probate proceeding solely to limit creditor claims even if you have a living trust.

While both living trusts and wills are good estate planning devices, you should consider your specific situation and needs before making a decision about your estate plan. An experienced estate planning and probate attorney can explain the probate process and assist you in implementing the right plan for you and your family. **L**



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