

The Dreaded Probate Process

Many people hear the word probate and immediately think of negative connotations. However, the decision to purposely avoid probate has become more complex in recent years due to the establishment of a Uniform Probate Code and there are many factors, some positive and some negative, to consider when deciding whether to structure your estate to entirely avoid probate.

Probate has come to mean the entire court process by which the state supervises the orderly distribution of a decedent's probate property. Many people choose to avoid the drawbacks of probate through the use of joint tenancy or a living trust. Let's look at some of the advantages and disadvantages of the probate process.

One benefit of probate is court supervision which can promote fairness through the process. Judges and official clerks are called on to approve major estate activities. Probate also allows for an orderly administration of assets (important for the large number of people who die without a will) and greater protection from creditors. Probate procedures typically require creditors to formally file their claims against probate assets within a certain period of time, such as four months from date of issuance of letters testamentary. Failure to timely file a creditor's claim can forever bar collection from those assets.

There are several drawbacks to probate that must be carefully considered. First, probate can be a complex process requiring petitions, accountings, hearings, and other complicated legal procedures. Most people do not understand their purpose or their operation, and are forced to hire specialists to meet their requirements. The cost of legal supervision under probate can be high. Studies have found that total probate administration expenses range between about 2 and 10% of gross estate assets. These expenses include personal representatives' fees and attorneys' fees. However, contrary to popular belief, probate does not increase estate taxes.

Next, as most of us have heard, probate entails a lack of privacy. Probate is a public process and all probate proceedings are subject to public scrutiny. This is a major concern for many people who wish to keep their affairs private. And lastly, even for smaller estates, probate administration takes considerable time, ranging from nine months to several years before final distribution is made. However, you should know that there has been a trend in recent years for states to use the Uniform Probate Code (UPC). If you live in a state using the UPC, your probate costs and time delays may be significantly reduced.

Of course, this brief article is no substitute for a careful consideration of how to best structure your estate with an experienced estate planning attorney and your financial planner.

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