



A primer on probate

By [Merrell Bailey](#)

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Question: What is probate?

Answer: Probate is a court-based title transfer system. Changing ownership of assets requires paperwork. After your death, when you no longer are here to sign your own name to transfer your assets to your heirs, the court steps in and appoints someone to be the paperwork person to sign documents on your behalf—known as Executor or Personal Representative. The court then oversees the paperwork to make sure that the Executor paid your creditors and transferred title of the remaining assets to the appropriate person.

Question: Why should people plan to avoid probate?

Answer:

- **Privacy!** Wills are public record. Do you really want strangers to know the details of who is inheriting your wealth and the terms of their inheritance? Note James Gandolfini. I am appalled that I know that his daughter will have control of the wealth he left her at age 21, or that he left his sisters more than he left his daughter and his wife in his will. Do you want people gossiping about your last wishes, or targeting your vulnerable beneficiaries?
- **Cost.** Depending on the state, probate can be expensive.
- **Time.** Depending on the state, probate can take a long time.
- **Court involvement.** It is not everyone's cup of tea to be tied to a court proceeding.

Question: What are the best ways to avoid probate?

Answer: As mentioned above, the court makes sure that the Executor has paid creditors and transferred title of the remaining assets to the appropriate individual(s). Assets are of three varieties.

- **Operation of law assets.** These assets transfer title magically at the moment of death without probate. Examples would be homestead in Florida, or an account titled as joint tenants with rights of survivorship.
- **Contract assets.** These assets have a beneficiary designation that appoint the person to whom the money will be transferred at death. Examples would be life insurance or retirement plans.
- **Estate plan assets.** These are assets that will not transfer title via operation of law or contract. Examples would be a piece of real estate solely in the name of the person who died. There are three choices with estate plan assets.
 - A will-based estate plan transfers title of these assets after death via the probate court.
 - A trust-based estate plan transfers title of these assets privately after death through the terms of the trust.
 - No plan at all means that these assets will transfer title via the probate court according to the intestacy statutes of the state of residency of the decedent.

If all of your assets are operation of law or contract, you have avoided probate. If you have a trust-based estate plan, you may avoid probate.

Question: Are there cases when it makes sense not to avoid probate?

Answer: Yes. Probate makes very clear which are valid creditors and beneficiaries and which are not. Sometimes, it is really nice to have the court's imprimatur on something.

Question: What are some ways for people to minimize discord among beneficiaries?

Answer:

- **Communication.** Lots and lots and lots of communication prior to death is a big help in minimizing discord among the beneficiaries. I advise my clients that I would rather them announce their plans before they die so the children may voice their displeasure while the parents are still around to referee. But not everyone is willing to confront the discord in advance.
- **Name a professional.** Don't name a family member to be the Executor or Successor Trustee because it can be emotionally grueling to be the child put in charge of his/her siblings' inheritance. Consider naming a third party instead. Then all the children can bond in their hatred of the third party who is telling them "no" and doing things the way things are supposed to be done instead of the way the children would like them to be done.
- **Expect discord.** Discord happens. Not all families get along. A little bit of money and a death brings out horrifying behavior that otherwise never would exhibit. Plan for it.

Question: What are some ways for people to protect children from mismanaging their inheritances?

Answer:

- Raise them to be financially capable.
- Set a good example for them with your own finances.
- Train them into the role of having an ongoing team of advisers by introducing them to your advisers at an early age.
- Parent from the grave by leaving the money to them in trust with thoughtful constraints on their access to this inherited wealth.
- For example, one of my clients who has a spendthrift adult child with substantial student loan debt requested a provision be written into the trust that the cash distributions from the trust must first go to pay off the balance of the child's student loan debt. The parent's concern was that the child would be tempted to spend the inheritance on other needs without realizing that paying off debt is the financially responsible thing to do.
- Given the fact that the nation's student loan debt crisis is one of the major issues dominating today's headlines, I anticipate that many estate planners will be dealing with this very issue in the years ahead.
- Commonly, clients add pre- or postnuptial language to the trusts for the benefit of their children, requiring as a condition of getting distributions from the trust that the beneficiary have his/her spouse sign a pre- or postnuptial agreement that agrees that this inherited wealth is family wealth—and not subject to attachment pursuant to a divorce or inheritance pursuant to death.
- Also very common: The parents allow the child to be the beneficiary of the trust with the right to support at the trustee's discretion, but no right to demand distributions until age 40 or later.
- Appoint a professional trustee to administer the trust, not the beneficiary.

About the author: Merrell Bailey is a recovering CPA who crossed over to the dark side to practice solely as an attorney in the areas of estate planning, business succession planning and asset protection planning as the Managing Partner at Your Caring Law Firm PLC. She recently penned this article: [The Shift from Estate Planning to Estate Probating: How the aging population will Impact the way estate attorneys practice in the future.](#)

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