

# The Role of the Will in Estate Planning

Discusses the need for a Will to direct the disposition of the probate estate, as well as the reasons to avoid probate (expense, delay, publicity) and ways to do so (beneficiary designations, joint ownership, revocable trust).

Financial and Estate Planning Department  
Baird Private Wealth Management

## THE MOST BASIC TOOL OF ESTATE PLANNING IS THE SIMPLE WILL

A will is a legal document that the court perceives as being intended as the final expression of the testator's wishes as to the disposition of his/her property to take effect upon his/her death.

A will has no legal effect until death and can be canceled or changed up until that time. An executor or personal representative is usually appointed to make sure that the property passes under the terms of the will.

## PROBATE IS THE COURT PROCEDURE BY WHICH A WILL IS PROVEN TO BE VALID OR INVALID

In current usage, however, the term "probate" is usually expanded to cover all aspects of administration of estates and, in some states, the administration of guardianships.

Many people insist that you should "avoid probate at all costs." What they are really suggesting is that you should arrange your estate planning affairs so that a local court would not need to be involved in the administration of your estate or the process of transferring your assets at your death.

## REASONS TO AVOID PROBATE

There are good reasons to avoid probate. The top three are cost, time and privacy.

1. **Cost** - Cost can be a major issue, though this will vary from state to state. Each court charges a fee to process probate cases in their jurisdiction. Court costs and attorney fees may be as high as 8% in some states. This alone may be enough reason to avoid probate. The decision to avoid probate must be made on a case-by-case basis and attorneys should be asked about their fees. Some attorneys will only charge by the hour and costs may not be as great as you might assume. Also keep in mind that taxes and payment of your debts are not part of probate expenses and will be due whether or not probate is necessary.
2. **Time** - There can be delays in using the court system for the administration of your estate. Getting court approval to sell assets, approve distributions, and assure that creditors are paid can be time consuming. In some states, however, simplified or unsupervised administration procedures could eliminate much of the court delay, especially for smaller estates.
3. **Privacy** - The probate process creates a public record as a matter of law. For many people, the idea that a probate estate will be made public in court records and possibly the local newspaper is a great deterrent to using the

probate process. Most of us do not want our neighbors to know about our personal financial affairs and family matters.

### WAYS TO AVOID PROBATE

There are four primary ways that your assets will avoid the probate process.

1. **Beneficiary Designation** - Some type of assets, including IRAs, 401(k)s, other qualified benefit plans, annuities and insurance policies, can pass to your family or beneficiaries by a designation in the account contract or policy. These assets will pass to your designated beneficiaries without going through probate.
2. **Transfer on Death** - Transfer on Death A TOD account (known as Payable on Death in some states) creates a survivorship right in your designated beneficiary. This form of non-probate transfer can be used if you want the benefits of individual ownership during lifetime, but wish to designate beneficiaries to receive your accounts automatically upon your death.
3. **Joint Ownership** - In most states, joint ownership in various forms (JTWROS and Tenants by the Entirety) is a means of creating a survivorship right in a co-owner. This is a common form of ownership of real property between spouses. When one joint-owner dies, the survivor will own the property outright. If you are single, problems with joint ownership may occur during your lifetime that may make this form of avoiding probate less than desirable.
4. **Revocable Living Trust** - For many, the revocable living trust is an effective way to avoid probate. It provides a means to manage assets during your lifetime and maintain the continuity of investment management and the distribution of assets after your death.

### REASONS TO USE PROBATE

In spite of all that has been written about probate avoidance, there may be valid reasons for you to consider having a probate estate.

1. **Creditors** - Many of us fail to realize that the probate process can control creditor claims against your estate. This process gives creditors a set time to bring claims.

After that time period expires, no further claims against the estate can be brought. The court helps determine which claims are valid, much as a bankruptcy court would. Avoiding probate allows creditors an extended time period during which they can bring claims against your estate and your beneficiaries who receive funds through alternate estate planning measures.

2. **Family Disputes** - Even with revocable trusts, joint accounts and beneficiary designations, some families will not agree on your choices regarding asset distribution. If you believe your family members are likely to be disagreeable, it may be beneficial to start the process as a probate proceeding, rather than waiting for family members to file lawsuits after the assets are distributed.

### WEIGHING THE COSTS: PROBATE VS. PROBATE AVOIDANCE

We have already discussed the possible costs of probate. However, as you can see, probate avoidance may have hidden costs. You must determine whether or not your estate would best be managed with court supervision. In some cases, this determination should be made post-mortem by your attorney.

You may recognize some of these concerns as you are planning your estate. Consider the pros and cons to help you make appropriate decisions that fit your estate planning needs. Please call your Financial Advisor for further discussion of estate planning and the issues of probate avoidance.

## **YOUR FORUM: QUESTIONS AND ANSWERS**

***I have a vacation home in Florida, but I am a resident of another state. When I die, will the Florida property be transferred to the probate estate in the state where I reside?***

No. Real estate must go through a probate estate in the state in which it is located. All other property will pass through the probate court where the decedent resided. The personal representative or executor for your estate will need to open an ancillary estate in Florida to which the vacation home must be transferred. By establishing a revocable trust the Florida property would avoid probate and may have other possible advantages.

***I have a revocable living trust correctly funded with accounts re-registered at Baird and elsewhere. Someone recently asked me whether I had a pour-over will. What is this, and why might I need one?***

A pour-over will is a will that instructs a personal representative or executor to transfer all property into your trust that might be titled in your individual name at the time of your death. Assets accidentally outside of trust ownership can then be transferred by will to your trust and then pass according to the terms of the trust rather than following intestate succession laws.

***If I die without having a will, trust or any other estate plan, what happens to the property I own in individual name?***

That property is distributed under the laws of intestate succession in the state in which you reside at the time of your death. The court will appoint an administrator for the estate and the state laws will determine who among your family members receives the assets. It is far more desirable to make your own determination of who will receive your assets in a will, a trust, or one of several forms of non-probate transfer.

***What is “community property” and how will it affect my will?***

Community property is the designation of co-ownership between married spouses in several states including: Arizona, California, Washington, Texas, New Mexico, Louisiana, Nevada and Idaho. Wisconsin has adopted a Marital Property system that is similar in many ways to community property. These laws differ from ownership laws for married couples in other “common law” states. Community property states have different rules regarding what property passes to a surviving spouse by operation of law, what passes as joint property, and what can be controlled by a decedent’s will or trust. These issues may affect your estate plan and federal estate tax planning. Each state’s law may vary and your attorney should inform you about possible consequences.