Understanding Probate

An important question is getting lost in the talk of health care reform, advanced directives, and living wills: why would someone even want to tool such as an advanced directive or living will? A common answer is that such planning tools can help you "avoid probate." However, few people actually understand what it is that they are trying to avoid. What what exactly is probate?

In its most basic sense, probate is the court-supervised legal procedure that determines the validity of a will. probate isn't necessarily a bad thing, and it can fulfill an important role when it comes to estate planning and distributing property after someone's death.

As a verb, probate is also used to mean the process of settling an estate (e.g., "probating the estate"). In this sense, probate is the process by which assets are gathered up, applied to pay debts, taxes and expenses of administration, and then distributed to those designated as beneficiaries in the will.

Even more than most laws, probate laws vary by state—but which state's law applies? If you have a second home, your will would be probated in the state of your primary residence. But any real estate you own in another state must go through probate in that state unless its jointly owned or held in a trust. If it is jointly owned, the property passes immediately to the co-owner(s), avoiding probate entirely.

To Avoid or Not to Avoid

A long-standing legal myth has been that one should always try to avoid probate. however, in recent years, simplified procedures in some states have reduced or eliminated many of the hassles and charges once associated with probate. Though delays remain possible, the average estate completes the probate process in six to nine months, depending on state laws. And the reformed probate procedures in many states now make it possible for your spouse, minor children, and disabled children to obtain the money they need to live on almost immediately, without waiting for the entire estate to clear probate.

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Let's talk some more.

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Despite its sometimes cumbersome nature, probate does help assure that those—and only those—entitled to receive part of your estate do so, even if it takes them a year to get their shares. it reduced the time for creditors to present claims against the estate, True, it is a public proceeding, but how many of us are really worried about someone going through our estate records? Probate privacy, through highly touted by living trust salespeople, is usually more the concern of celebrities and the ultra-rich than the majority of us.

If you do plan to avoid probate, however, or at least would like to reduce the amount of your property that goes through it, you should work with a lawyer. Don't make the mistake so many people eager to avoid probate have made: using a one-size-fits-all-estates form from a book or computer program that doesn't take into account all of your estate planning needs (such as providing for your family) and the peculiarities of your individual situation.

It is important to note that you can't simply avoid probate by not having a will. Even if you don't write a will (which means you die "intestate"), you'll still have one—the one that the state will write for you.

Probate isn't necessarily bad, but if you can minimize the court's involvement, you should. Probate avoidance tools include living trusts, joint tenancy, and a life insurance. These tools allow some of your assets to be distributed (Insert chart B) outside of the probate process. Even though you still need a will, it will likely be so simple and dispose of so little property that the cost and time it takes to see it through probate will be minimal.

Avoiding probate may be a cost and time saving goal for you, but before you make any estate planning decisions, it is best to talk with an attorney. Any decisions you make shouldn't be settled upon only the avoid probate. rather, they should come about as part of a complete, thoughtful estate plan. You cannot simply "avoid probate" without turning to something else.

Chart B
Property that Avoids Probate
Not all property needs to go through probate. Here's a partial list of things that don't:

1. Property in trust
2. Property that's jointly held (but not common property)
3. Death benefits from insurance policies (unless they are payable to your estate), the government, employers, and other benefits controlled by contract
4. Property given away by gift before you die
5. Money in a pay-on-death account
6. Retirement accounts with a named beneficiary
7. Transfer-on-date beneficiary deeds

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