

Non-Probate Estate Options

Can Probate be Avoided?

Yes. If the decedent executed an estate plan specifically designed to avoid probate, this court action can be avoided.

What Tools Do Estate Planners Use to Avoid Probate?

Generally, all assets that are just in the decedent's own name, only, and anything that is made payable to the decedent's estate must go through the court process. So, the trick is to ensure that no property remains in the decedent's name alone or is left to the decedent's estate. The following are just a handful of the tools employed by skilled estate planners to avoid probate:

Living Trusts (also known as Revocable Trusts or Loving Trust).

You may have heard of this type of trust. At death, this type of trust functions very similarly to a Will except there is no necessity of probate court supervision. The individual who creates this type of trust is called a grantor (also known as a trustor or settlor). In addition to creating the trust, the grantor must be careful to transfer the grantor's appropriate assets to the trust or name the trust as the beneficiary of the asset (for example, life insurance). If this is not done, probate has to occur in order to take the title to the asset out of the name of the decedent and transfer it into the name of the intended beneficiary. HOWEVER, it is critical to understand that there are some assets that it is a tax disaster to name the trust as the beneficiary (for example IRAs and 401(k)s).

Payable-on-Death and Transfer-on-Death.

These are other tools used by estate planners to avoid probate. These tools allow an individual to name a beneficiary who will automatically gain title to the property upon that individual's death without the need for probate court action.

Beneficiary Designation.

Designation forms should always be used with retirement accounts, life insurance, annuities and other assets by contract to designate whom or what receives the account proceeds upon the owner's death. If the decedent fails to file a beneficiary designation with the administrator of these assets or the designation fails (for example, whoever was named dies before the decedent) the proceeds will often be treated as payable to the decedent's estate. This causes probate and often, negative tax consequences.

Joint Tenancy with Rights of Survivorship.

This a form of ownership with multiple people. It allows the title to the property to pass to the surviving joint tenant(s) without probate when one of the owners dies. I call this the "last person standing" rule, because that is the person who will inherit the asset. This can be a dangerous form of ownership, because it will give current ownership rights to the joint tenant who may have contributed nothing to the asset. In that case, if the joint tenant were to go bankrupt, get divorced or simply abscond with the asset, the original owner may have difficulty recovering the property.

Tenancy by the Entirety.

This is similar to joint tenancy except it is a form of ownership that only exists between husband and wife.