

Common Misconceptions in Estate Planning: Wills Avoid Probate

Article

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It is a common misconception believed by many that having a will avoids probate. Not only is it false, it really could not be further from the truth. Rather, a will is a tool that is often used during the probate process and has no power outside of it. For those who seek to avoid probate, it is important to understand these two related concepts—and the planning tools that exist to distribute your assets as you see most fitting.

What Is a Will?

A will is a document used after your death to control the distribution of your assets namely, who is to receive those assets and who is in charge of distributing them. If you have minor children, a will can also nominate a guardian to care for them. However, this document is **only** effective within the context of probate. The court ensures that the instructions left in the will are followed by the appointed personal representative.

It is also only effective after death. A will does not allow for control of assets if you are incapacitated, so there is additional planning required beyond only creating a will.

What Is Probate?

Probate is the legal process by which title to property is transferred to heirs by the court. In short, when you die, your assets need to go somewhere. If a titled asset has a living beneficiary named to receive it via a payable-on-death designation, that asset passes to the beneficiary without the need for probate. If it does not have a living beneficiary listed, that asset needs to be probated in order to change the title to the beneficiaries.

Probate is a process that requires notice of your passing to be published in the newspaper to allow creditors to file claims and the court to oversee the distribution of your assets. If you have a will, your assets will be distributed according to your instructions. If you do not have a will, your assets will be distributed according to state statute. In other words, your will controls those pieces within the arena known as probate.

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A will is certainly better than relying on your state's legal code to distribute your assets, but do you want your assets to go through probate? That is an issue that would be best discussed with an attorney, but generally the time and expense of probate is something most people want to avoid. The good news is that it's avoidable with proper planning, and with tools besides a will.

How to Avoid Probate

The most robust method for distributing assets to your intended beneficiaries without requiring probate is by creating a revocable living trust. This type of trust allows you to maintain total control over your assets while you are alive and well. You can control how your assets are used if you are incapacitated as well.

As with a will, a trust allows for the distribution of your assets to your intended beneficiaries. It differs in that any property held in the trust is not subject to probate, as the title of the property does not need to be changed. It is more efficient to administer in terms of cost and time., It can also offer additional protections for your beneficiaries, shielding those assets from creditors or divorce settlements.

Another aspect of trust-based planning that is appealing, particularly to business owners, is that trusts are administered in total privacy. No one besides your trustee and beneficiaries has any right to know the contents of your trust. This differs from the administration of a will, as probate proceedings are public record and anyone can purchase a copy of your will from the courthouse if they want. This makes business owners particularly uneasy, as their competitors could gain information about their business.

A will certainly has its uses, but if one of the goals of your estate plan is to avoid probate, it does not accomplish that goal. You should consult with an attorney to find a solution that accomplishes your goals.

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