

# Why Probate is Not a Four Letter Word

*By Barbara W. Reynolds*

You've seen the articles, flyers, advertisements, TV talk shows – all telling you that you **MUST** have a living trust so you can avoid that dreaded *probate*!! Does it make you wonder exactly what *is* probate and why it is so important to avoid it?

The Probate Court supervises the orderly transfer of assets from a decedent to his or her heirs or beneficiaries and it also supervises the handling of an incompetent person's circumstances and financial matters. The Court also makes certain that all bills are paid for the decedent or incompetent person.

The Probate process for estates involves only certain assets: those solely owned without a named beneficiary or joint owner. Assets with named beneficiaries and joint owners pass by operation of law directly to the named beneficiary or joint owner. Assets held in a living trust are not legally "owned" by the person who established the trust so when that person dies, those assets do not pass through the probate process. A trust does not die. It can go on for many years and for many different people's benefit.

Following are some of the frequently asked questions regarding Probate.

## **Q. Isn't Probate Expensive?**

**A.** In Connecticut, there is a statute which sets the Probate fee based upon the total value of the assets held by the decedent – whether the assets require Probate or not! A Connecticut estate tax form must be filed for all people who die in Connecticut, who reside in Connecticut or who own real property in Connecticut regardless of whether any tax is due or not. This tax form is submitted to the Probate Court which, in turn, assesses the statutory fee based upon the gross taxable estate on the return. Unlike a few other states, the statutory fee is a very small percentage – not more than 1% on the first \$100,000 and less on amounts over that. For example, on an estate of \$300,000 for a single person, the fee would be \$1,165, so it is often less than people think.

## **Q. Doesn't Probate Take a Long Time?**

**A.** The probate process is based upon various statutory time requirements. An estate cannot close until there is tax clearance from the State and federal government (for larger estates). Both tax returns are due within 9 months of the date of death although an automatic extension of 6 months can be granted for both. There is a 5 month claims period which runs to ensure that bills of the estate are paid, but the settlement process proceeds during that time. If you believe that an estate you are involved with is "taking too long," it may be that there are estate tax issues or it may be difficult for the executor or trustee to obtain necessary information or someone involved may be inattentive to the estate.

**Q. Aren't Assets Frozen During Probate?**

**A.** No. Assets which were jointly owned or had named beneficiaries are immediately available to the joint owner or named beneficiary. Assets which were solely owned will require the appointment of an Executor or Administrator to take charge of these. Once this happens (usually with 2-3 weeks), the Executor or Administrator may use the assets to pay bills of the decedent. Partial distribution of assets to beneficiaries may begin as soon as the Executor knows that there are more assets than debts.

**Q. Are there times when I may want to have my estate probated?**

**A.** If assets are held in a living trust, the same tax returns must be filed, debts must be paid and assets must be held or distributed according to the terms of the trust. If you have a living trust, there is no supervision of that process. If you are concerned that the trustee may not follow your wishes or that beneficiaries may be mistrustful of each other, having Probate court supervision may be a good idea. The Probate Court is a disinterested third party with the ability to ensure that your instructions are carried out properly. Since you are paying the Probate Court anyway, you may wish to utilize its services for supervision.

**Q. How do I decide whether to have a living trust to avoid probate?**

**A.** You need to look at your various assets to see what would actually happen upon your death. Retirement accounts, annuities and life insurance policies generally have named beneficiaries and pass directly to named beneficiaries. If most of your assets are jointly owned or have named beneficiaries, there may not be a probate (the process of transferring solely owned assets to heirs) upon your death anyway. Do you have real property in more than one state? If so, a living trust may be desirable to avoid probate in 2 states! Consider your heirs and beneficiaries. Are there reasons for wanting supervision or an outside party involved?

There is no "one size fits all" answer to whether you should have a will or a living trust. Furthermore, for some people the probate process may be helpful, while for others it may make sense to designate beneficiaries for all assets. A consultation with an attorney who spends a significant amount of her time on estate planning will help determine what is best for you and that attorney can then help you put a plan that's right for you in place. Remember, the best plan is one that works for you and your loved ones!

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