Demystifying probate when it comes to estates, trusts

By Linda T. Cammuso

We hear a lot these days about probate, usually in the context of avoiding it. New clients working with an estate planning attorney usually start the conversation by saying, "No matter what it takes, I want to stay away from probate." Probate avoidance is a common and appropriate goal in the estate planning process.

Legal Briefs

However, in order to understand the how, why and when of avoiding probate, we must first understand what probate is.

Probate refers to the process of getting authority and permission from the Massachusetts Probate and Family Courts. Each county in Massachusetts has its own Probate and Family Court (usually referred to as Probate Court).

Probate Courts oversee matters including estates and trusts, guardianships and conservatorships, and divorce and family law. In the estate planning context, when we refer to probate avoidance we usually mean trying to avoid the involvement of the Probate Court in settling the estate of a person who has passed away.

When you pass away with assets in your name alone, without a joint owner or listed beneficiary, the asset must go through probate. By definition, these assets are considered probate assets because they were in your name only. Consequently, there is no way to get the asset to the person who is entitled to inherit it except to go through the Probate Court.

Common examples of probate assets are a house or bank account that you own in your name alone. In order for such assets to be transferred to your heirs/beneficiaries following your death, the Probate Court must appoint an executor (or administrator, when there is no will). This is the person who the court places in charge of your probate assets and gives the authority to transfer such assets to your heirs/beneficiaries.

Fundamentally, the probate process is about getting court permission to deal with these assets.

You should understand that probate assets must go through probate whether or not you have a will. Many people mistakenly believe that signing a will avoids probate; in fact, the will serves only to provide who will inherit the asset, but by definition, a will only applies to probate assets.

The common perception of probating an estate is that it takes a long time, costs a lot of money and leads to fighting and legal battles among heirs and beneficiaries. Whether or not these beliefs are accurate, the reality is that the idea of probate frightens many people. In an effort to avoid probate, people often resort to tactics such as adding someone's name to a bank account, house or other asset, or just giving the asset to someone altogether before they die.

This phenomenon creates a frying pan to fire situation, where in an effort to avoid probate, people end up incurring unintended consequences. These include unnecessary income taxes, gift taxes and capital gains taxes, exposure of assets to a child or other relative's creditors, loss of financial aid benefits for a child or grandchild in college, and exposure of assets to the nursing home.

In my next column, I will continue the probate discussion by considering alternatives to joint ownership that afford more protection and tax savings while still avoiding probate. I'll also clarify some common probate myths, and identify situations where probate might even be preferable.

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