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Probate: What is it and why to avoid it

Most people have heard the term “probate,” but don’t really know what it means. Probate is a process through which title to assets is transferred from a deceased owner to the individuals he or she designated to receive them. Probate involves going to a probate court to have someone formally appointed as Personal Representative of the estate and to have the will (if there is one) approved. Once so appointed, the Personal Representative transfers the assets from the deceased owner to those designated in the will to receive them. If there is no will, the assets are transferred in accordance with the intestacy law.

Probate can be a cumbersome, time consuming, and costly process. Moreover, the probate courts in Massachusetts are underfunded and overworked and therefore not terribly efficient. For these reasons, it is good to avoid probate where possible.

There are several commonly used strategies to avoid probate at the first death. Included among them are holding title to assets jointly with another, placing beneficiary designations on assets and placing assets into a trust.

Assets owned jointly with another do not need to go through probate. They pass automatically to the surviving joint owner. However, you should exercise extreme caution before placing anyone’s name on an asset as a joint owner because doing so is a gift to them and exposes the assets to their creditors.

You can place transfer on death (TOD) designations on brokerage accounts, and beneficiary designations on qualified retirement accounts and life insurance policies. If there is a proper TOD or beneficiary designation on the account or policy these assets do not need to pass through probate. You should periodically review all such accounts and insurance to make sure they have beneficiary designations, and that those designations read in accordance with your wishes.

Funding a revocable trust is another way to avoid probate. You can place assets, such as real estate, bank or brokerage accounts, into a Revocable Trust. The assets remain yours for the balance of your life. However, at your passing they can be distributed to the people designated in the trust to receive them without having to go through probate. The assets can also stay in trust for the beneficiaries if appropriate for asset management or creditor protection reasons.

Probate avoidance is an important goal. However, many clients find the steps they need to take to avoid probate completely add more complexity to their lives than they want. For example, all real estate and bank accounts need to be maintained in trust to avoid probate. Depending on one’s health and age, these efforts may or may not be worth it. Please feel free to contact us if you would like to discuss your situation and whether there are any probate avoidance steps that are appropriate and practical for you to consider.



Reviewing and Updating Your Estate Planning Documents

We counsel our clients to review their estate planning documents every 4 or 5 years and after any major life change (addition to the family, change in financial circumstances, etc.). When reviewing your documents, you should first look at the fiduciaries (executors, trustees, agents) you have named to carry out your plan. Is someone now too old to fill a particular role, or has a child reached an age at which he or she is a better candidate for certain responsibilities than a more distant relative named when the child was young? Next, you should look at the dispositive provisions of your documents (i.e., who gets what). Does the division of your assets still make sense? Have you made a large gift to a child which should be accounted for as part of his or her inheritance?

As part of your review, you should consider checking in with your estate planner. Should your adult children meet the attorney to establish a relationship and become familiar with what role they may be asked to play in the future? Have there been any changes to the law that necessitate updates to your documents? For example, as part of any estate plan update, we now generally recommend that our clients make certain technical changes to their wills and trusts to be consistent with the new, comprehensive Massachusetts Uniform Probate Code and Massachusetts Uniform Trust Code.

While an older estate plan may (or may not) be better than nothing at all, by dusting off your plan every so often and updating provisions as necessary, you can ensure a streamlined and efficient process for your family when you are gone.

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One of the largest estate planning firms in New England, our attorneys have been recognized for their exceptional experience in the field. The firm carries the highest professional rating in the national Martindale-Hubbell Law Directory and is listed in the Bar Register of Preeminent Lawyers. Many individual attorneys are listed in the Best Lawyers in America and New England, Massachusetts and Rhode Island Super Lawyer lists.

Please feel free to contact the firm if you would like to discuss the matters highlighted in this newsletter, or any other legal matters.

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