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What You Should Know About Probate, Trusts, and Beneficiary Designations

It pays to plan ahead.

By Nanci Hellmich

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Creating an estate plan that avoids probate is an extra gift you can leave your beneficiaries. It can save them time and trouble, reduce costs, and protect everyone's privacy, says attorney David A. Burns, a board-certified specialist in estate planning and probate law in Raleigh, North Carolina.

Most of his clients don't want their estates to go through *probate* — the court-supervised process that validates wills and appoints someone to manage estates and distribution of assets to beneficiaries. They know it can be complex, expensive, and time-consuming. "In North Carolina, the probate process usually takes about a year to complete, but it could be longer if there are complex assets and issues involved or if beneficiaries disagree," says Burns, a partner at Wyrick Robbins. He is working on a case right now that has been in probate for almost three years because the deceased had no will or trust.

Probate is more complicated in some states than others, but even in states that don't have a complex process, it's too much for the average person, says University of Missouri law professor David M. English, co-author of two books on wills, trusts, and estate planning.

English, also vice chair of the trust and estate division of the American Bar Association Section of Real Property, Trust, and Estate Law, explains how probate works:

- The attorney files the will with the court, where it becomes a matter of public record. "Some clients don't

like this because it means their private business becomes public after their death,” he says. “They may have been prominent people in the community, and they don’t want their assets and financial information available to everyone.”

- After filing the will, the attorney applies to the court to have it approved and to appoint a manager or personal representative. Also called an *executor*, that person pays the deceased person’s bills, sorts out the assets, and distributes what’s left to beneficiaries.
- At the conclusion, most states require some kind of accounting or financial report that may be made public. Probate records are public to at least some extent everywhere. “The issue is how much and whether the general public has access to sensitive information,” English says.
- The size and complexity of the estate determines the cost. For instance, selling real estate or a business can be time consuming and expensive. The larger and more complex the estate, the greater the benefits of avoiding probate.

There are several ways to bypass this process. One way is to create a *revocable* or *living trust*, which is a method of distributing assets after death. Revocable trusts are popular with people who want more control over how their assets will be distributed, including those who want to protect the interests of children from a prior marriage, those who are making arrangements for underage children, folks who have a family business, and people with large estates who want a reduction in federal and state death taxes.

“It’s important to make sure all assets subject to probate, including homes, other real estate, investments, and businesses, are in the trust,” English says. “The revocable trust requires some diligence and lifetime attention, but if you do the work now, it makes it much easier on the family after your death than probate.”

“With a revocable trust, there is usually no need for the court to get involved in the administration of the deceased’s assets,” Burns says. The successor trustee can distribute the assets to the trust’s beneficiaries. Those assets are known only to the recipients and not the public.

As a safeguard, people should also sign a *pour-over will*, which directs any assets held outside the trust — that would otherwise be subject to probate — to go into the trust after their death.

After the trust is set up, the costs to administer it are minimal. The trustees control the assets, and they don’t need the ongoing involvement of an attorney.

“Some people choose to establish an *irrevocable trust* for reasons other than probate avoidance, such as creditor protection and tax advantages,” Burns says. “In this case, people are really giving away assets,” he says. Generally speaking, once an irrevocable trust is established and funded, the *grantor*, the person who transfers ownership of property to the trust, can no longer get the assets back, and the terms cannot be changed.

On average, it costs about \$3,000 to set up an estate plan, including funding of the trust. “The price tag varies based on the area of the country and complexity of the estate,” English says. Besides a trust and will, an estate plan usually includes power of attorney and medical directives.

Another way to steer clear of probate is through beneficiary designations and titling of assets. Married couples can avoid the probate process by designating their spouse as joint owner or survivor beneficiary of all their assets. People can also set up payable-on-death or transfer-on-death bank or brokerage accounts. For this type of account, the owner names a survivor beneficiary on the signature card or brokerage agreement. Beneficiaries receive these assets without going through probate.

Plus, insurance policies and retirement accounts, including 401(k)s, 403(b)s, and individual retirement accounts (IRAs), pass to beneficiaries outside of probate if the owner has signed the appropriate beneficiary designation forms. “People need to periodically update these. They should look at them during major life events, including marriage, divorce, death of a spouse, and the birth of a child. It’s prudent to look at them at least every five

years,” Burns says.

Kyle Tucker, a CAPTRUST financial advisor in Raleigh, North Carolina, agrees that people should make sure they have listed beneficiaries on their retirement accounts, life insurance policies, annuities, and other investments. Sometimes when checking their accounts, they realize their beneficiaries are incorrect. “People have a lot going on. When they have to cover every detail, things can fall through the cracks.”

Many of Tucker’s clients opt for a revocable trust because it reduces the hassles for their beneficiaries and protects their privacy. Although setting it up can be more expensive than a simple will, “You have to pay the piper at some point, so do it on the front end with a trust and save your family from probate,” he says. “Not only will you be confident that your assets will be distributed according to your desires, but you’ll save them a lot of time and stress during what can be a difficult period.”

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