

Big Bad Probate

What's so bad about probate? To hear some folks talk, you'd think that probate was worse than death. Probate has the undeserved reputation of causing delays and being expensive, among other concerns. Usually avoiding probate means creating a living trust and transferring title of your assets to the trust. There is nothing wrong with this and there can be good reasons to do so. However, just avoiding the probate process is not a sufficient reason to go this route.

Whether a decedent dies with a will or a trust, whether the estate is subject to probate or not subject to probate, much of the same work must be done. All assets must be valued and appraised. Debts and expenses must be determined and settled. Federal and state death tax returns must be prepared and filed. The decedent's final income tax return must be filed. Consideration must be given to the various tax elections that are available to the Executor or Trustee. The income tax returns for the estate or for the trust must be prepared and filed. Bequests and specific dispositions directed in the will or trust must be carried out. The executor or the trustee must account to the beneficiaries for all activity and transactions. Finally, the directions for distribution of the property given in the will or the trust must be carried out.

Most executors and trustees need help. The legal, tax and accounting issues can be complex - even in what you might think is a simple estate. The executor or trustee must understand and be able to compute and file state inheritance tax returns, state estate tax returns, federal estate tax returns, and fiduciary income tax returns. They must know the due dates and time table, how to interpret the words of the governing documents, how to notify beneficiaries, how to value assets for tax purposes, what items are permissible deductions, the list goes on and on. Usually the executor hires an attorney to help, sometimes an accountant as well.

Most of the cost for estate settlement comes from these activities, which are required whether or not the estate is subject to probate. The actual probate procedure itself does not add much to the cost. In fact, probate fees, themselves, are quite modest. Each county has a schedule of fees which vary according to the action requested and the value of the estate. For example, in Lancaster County, a will for a decedent with a \$ 1 million probate estate can be admitted to probate for less than \$300. Notice must be published in two newspapers, each costing cost about \$60.

Avoiding probate will not cause the estate to be settled faster. Most of the time involved has to do with tax filings, waiting for acceptance letters from the IRS and the Department of Revenue, and perhaps going through tax audits (which are quite common in estates). The time-frame is the same for a probate estate or a trust.

Avoiding probate does offer some privacy. A will when probated becomes a public record which can be viewed by anyone. Similarly, the inventory of the estate assets and the accounting, if any, are matters of public record. However, even where there is no probate property, the inheritance tax return is filed with the Register of Wills, so much of the financial information may be available to the public. County practices differ on how these returns are handled. In Lancaster County, inheritance tax returns are available for public inspection, whether or not the estate was probated.

Some lawyers think that a trust is less likely to be contested than a will. This may be so, although both can be challenged on the grounds that the decedent did not have sufficient capacity when the document was executed, or that the decedent was under undue influence. In the probate process beneficiaries are notified and asked to come forward with objections, if any. Trust beneficiaries receive no such invitation, but are free to contest the trust in the same way.

Avoiding probate in multiple states can also be a good idea. A decedent's will must be probated in every state in which the decedent owned real estate. It is often wise to avoid these multiple proceedings by transferring the real estate to a form of title that will avoid probate.

In large part, probate gets its bad reputation from the professional fees that are charged. The procedure itself is not expensive; but the professional fees charged are sometimes out of kilter with the amount of work involved.

The problem is that, with probate, executors and attorneys for estates may charge fees based on the value of the estate's assets. This often results in an excessive fee. Charging 5% of an estate that consists entirely of \$800,000 in easily-probated Certificates of Deposit is obviously not in proportion to the amount of work involved. In a case like this it is possible for the executor and the attorney to each demand \$40,000.

It is up to the executor or trustee to be an educated consumer. Interview several lawyers and several accountants. Determine their experience level. Ask what their fees will be. How are they computed? Are they on a percentage basis or will they charge by the hour? If you want to do some of the work yourself, will they accommodate you?