WHERE THERE'S A WILL, THERE'S PROBATE

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Would you like to know the intimate details of Jacqueline Kennedy Onassis' life? You don't have to read her story in the tabloids or wait for the latest unauthorized biography. You can peruse the details of her financial affairs and her last wishes for her loved ones in the public records of the state of New York. And thousands have. You can also find her will posted on several Internet websites along with those of other celebrities.

Can you imagine anything more ironic? The most private public figure of the 20th century, Mrs. Onassis jealously guarded her own and her family's privacy throughout her life. For years she refused to speak to the media and she went to great lengths to avoid the paparazzi's intrusive cameras. And in the end, for what? Because she used a will to dispose of her assets, she ensured that many of the details of her $200 million estate and the terms of her final wishes would be made public.

WHY YOU DON'T WANT TO BE CAUGHT DEAD WITH ONLY A WILL

Even if celebrity status hasn't thrust you into the public eye as it did Jacqueline Kennedy Onassis, you can still learn from her mistakes. Few of us would welcome the glare of public scrutiny that a will demands. And that's just one of the problems wills create.

Throughout the centuries, property holders have used wills to bestow their worldly goods to their loved ones after their deaths. But in modern times, an entire legal process has risen up to govern the disposition of wills. It's called probate, and it was created to assure that your wishes are carried out. That's the theory at least. In practice, probate is often a long, drawn-out process that seems to serve the needs of everyone but you and your loved ones.

HOW PROBATE WORKS

Many Americans think that passing on their worldly goods is a simple proposition: they write out their final wishes, then, when they die, someone ensures that their wishes are carried out. Unfortunately, wills require probate, and in many states, there's nothing simple about probate. It's usually a highly technical, complicated and bureaucratic process that can drown your heirs in a sea of red tape. There are exceptions, however. In some states, small estates may be eligible for short-form probate. See your estate planning attorney to learn how your state's probate rules will affect your estate.

Roughly speaking, the process begins with the filing of your will and a petition to the courts to begin probate. The probate court will either approve your choice of executor (the person who will oversee the disposition of your estate) that you may have named in your will, or will appoint someone else to act as executor. Unless your estate is fairly simple, your executor may also hire an attorney to help with the process. (You may stipulate that your attorney also serves as your executor, for a modest savings in administration fees.)

At some point, your executor will have to present your will to the court and obtain its ruling on the validity of this document. Your executor must publish notification of your death and contact all your creditors so that they can submit their claims against your estate.

And we're just getting started. Someone will have to inventory the valuables you've left behind, and appraisers may be called in to establish their value.

Depending on the state in which you lived, your heirs may be denied access to your assets until the final disposition of your estate. And in most states, a contest over the validity of your will virtually guarantees that your assets will be placed off limits until the will contest is decided.

Here is another aspect of probate that can cost your heirs dearly. Your executor must adhere to stringent rules governing your investments during the probate process. These rules limit your executor's ability to buy, sell, or take other action to preserve the value of fluctuating investments—such as stocks, bonds, and real estate in your portfolio. So, if in the midst of your probate, a bull market turns bearish, the bond market goes south, or the real estate market plunges, your heirs could be left with assets that have depreciated substantially.

At best, your heirs may be inconvenienced by their lack of access to and control over your assets during probate; at worst, they may endure financial hardship. So, if they breathe a sigh of relief as your probate begins to wind down, they may be in for a disappointment.

Before your heirs receive their full legacy from your estate, your creditors will be paid off, estate taxes will be paid, your executor and administrator will receive their fees for handling your probate, and all court fees will have to be settled. After these expenses have been paid, your heirs will divvy up what's left—and it's often considerably less after probate than before.

That's a quick overview of the probate process. At best, it's a bureaucratic nightmare. At worst, it exposes your heirs to the following problems:

IN THE PUBLIC EYE

Thanks to Mrs. Onassis' unfortunate example, we've already seen how probate can thrust your personal life into the unwelcomed limelight. But invasion of privacy is a minor inconvenience compared to the more serious threat this publicity engenders.

Your probate proceedings will usually be published in a general circulation newspaper in your community. This unwelcomed publicity goes well beyond turning your life into an open book: it can also expose your loved ones to the abuse of opportunists. Con artists, creditors, overly aggressive sales people, and those eager to exploit any financial weaknesses in an estate, routinely avail themselves of probate records. They may simply be looking to buy

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your personal effects at a heavy discount, or they may wish to prey on your loved ones for more sinister reasons. Regardless of their motives, they pose a threat you'll want to shelter your loved ones from. And you can't do that if your estate goes through probate.

THE WAITING GAME

The good news is that probate usually ensures that your wishes for your loved ones probably will be carried out as you've directed. The bad news is that it will take time, and in the intervening months—or even years—your family may have precious little access to your assets.

The average length of time for probate varies from state to state. But in general, you can expect your probate can take 1 to 3 years[1], and that's if your affairs are relatively straightforward. It isn't uncommon for probate to take several years.

PAYING THE PIPER—AND THE REST OF THE BAND

It goes without saying that a process this bureaucratic and time-consuming, with such a large cast of characters, exacts a considerable price. Everyone gets paid: the attorney, your executor, the appraisers, the courts, the taxing authorities, and your creditors. Only after they've gotten their cut will your heirs be able to take their share out of what's left.

How much of your estate remains will vary considerably. If yours is a complex estate, or if there is litigation, such as a will contest, the expense of probate can seriously erode what's left for your loved ones. But having a simple estate and a well-drafted will doesn't protect you from probate's expenses.

Whether they get paid a flat fee or fees based on a percentage of the value of your estate, the services of an attorney, executor and appraisers will reduce the assets your loved ones inherit. Probate fees vary from state to state, but here are the national averages: attorney's fees alone will range from 2% to 4% [1] of the value of your estate, with a median of 3%[1]; your executor's fees will range anywhere from 1% to 5%[1] (if your attorney also serves as your executor, the total fees likely will be reduced somewhat); add to their fees such expenses

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[1] https://www.legalmatch.com/law-library/article/how-long-does-probate-take-a-state-comparison.html?intakeredesigned=1

Legal Match, *How Long Does Probate Take? A State Comparison (2018)*

as the appraisers' fees and court costs, and your estate's value could be reduced by as much as 15%, or more.

If you are married and you and your spouse have based your estate planning on a Simple Will, in some states you can expect your estate to go through probate twice—once after the death of each spouse. So, you may have to double the impact of all probate's expenses on the value of your estate.

TAXES AND OTHER PROBLEMS

The estate tax has been the subject of a great deal of fluctuation in the last two decades. The amount that could be passed free of estate tax changed nearly every year. However, in search for ways to reduce the federal deficit, Congress will likely continue to make changes in the future. A married person can transfer an unlimited amount to their spouse through the use of the Unlimited Marital Deduction. However, the surviving spouse would have to pay tax on all the assets at their death. Unless "portability" was elected at the death of the first spouse, the surviving spouse would only have his or her own exclusion to use.

While "portability" simplifies things and can be useful in some circumstances, it does not necessitate an estate tax return to be filed at the first death, even if it would not be otherwise required. A Living Trust can be a great way to minimize estate taxes and other problems. There are many reasons that a couple might plan their Living Trust to have the first spouse leave their assets in a separate "Family" or "B" Trust for the benefit of the survivor and children, rather than relying on portability. A Family Trust not only locks in the deceased spouse's exclusion amount, even growth of the trust would be excluded from the survivor's estate. Further, the trust could be exempt from tax even in the estate of the children. Portability does not allow for this.

A separate Family Trust allows for many protections that portability does not provide. The trust can provide creditor protection, both in the event of the survivor's remarriage and subsequent divorce, and even from other creditors. Also, a Family Trust can lock in the ultimate beneficiaries of the assets. This can be important, especially in blended families.

INVITING SPOILERS TO THE PARTY

Simply making out a will doesn't mean things will go as you planned. Disgruntled family members, creditors, "predators," and other would-be spoilers can throw a monkey wrench into the works.

Probate is a vulnerable time for your loved ones. Just about any disgruntled relative can contest a will, with potentially devastating consequences. Defending against a will contest is a costly process that can delay the disposition of your estate considerably. That's why spoilers employ it. They know the threat of these additional expenses and delays is often

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enough to intimidate heirs into a settlement they may not be entitled to. Even if your heirs decide to fight a will contest and ultimately prevail in court, they may find they've won the battle and lost the war.

AVOIDING PROBATE

Is it any wonder the only fans of probate are probate lawyers? In contrast, most Americans who know what probate entails try to avoid it at all costs.

In case you're thinking you can spare your heirs the hassles of probate by dying intestate, without a will, forget it. The creaky wheels of probate are set in motion whether you have a will or not. And if anything, probate becomes more complicated, not less so, when you die intestate.

So, if you've decided that probate is the last thing you want to bequeath your loved ones, how do you avoid it?

Instead, you could turn to a handful of strategies for circumventing the probate process. There's no probate, for example, on assets such as IRAs, life insurance policies, and pension plans for which you name a beneficiary. Also, any assets you hold in "joint tenancy with rights of survivorship" pass immediately to your joint tenant. And, of course, you can simply give away your assets while living. While these methods avoid the pitfalls of probate, they have plenty of shortcomings of their own, and should be used carefully and only in certain circumstances. (For more information on joint tenancy, see our Academy Report titled, *The Trouble with Joint Tenancy*.)

THE SOLUTION: THE REVOCABLE LIVING TRUST

For many reasons—avoiding probate being just one of them—the Revocable Living Trust is widely considered the most effective and versatile estate planning tool.

The first discovery you'll make about the Living Trust is that it avoids probate. So, you're immediately avoiding problems that come with it:

- Publicity
- Delays
- Expenses
- Opportunities for Spoilers

In contrast, with a Living Trust, you safeguard your privacy, dramatically expedite the disposition of your estate, significantly reduce costs, and greatly diminish opportunities for spoilers to upset your plans. Those advantages alone are enough to make Living Trusts the estate planning tool of choice for many Americans. But consider these additional benefits that Living Trusts provide as well:

- You can use a Living Trust to take care of your healthcare and financial needs should you become disabled. Considering that for most of our lives we face a much greater likelihood of becoming disabled than dying, a Living Trust can provide considerable peace of mind.
- A Living Trust can help you maximize estate tax planning.
- A Living Trust gives you maximum control over the disposition of your assets. For instance, if you have children from a previous marriage, you can ensure that your spouse and your children receive fair treatment.
- A Living Trust dramatically reduces the threat of "spoilers." In most states, your trust can also include a 'no-contest' clause which deters greedy claimants from attacking your estate plan.
- As long as your Living Trust owns your assets, it protects them from your heirs' creditors and "predators." So, a daughter won't see the legacy you've left her become the spoils of a divorce settlement. Or a son won't find the assets you bequeathed him depleted by his creditors.
- A Living Trust will allow you to control your assets long after you're gone. That's especially important if you've left behind minor children or young adults who may need time to grow into their financial responsibilities.

HOW A LIVING TRUST WORKS

With a Living Trust, you own nothing, and your trust owns everything. But not to worry. Since you are your trust's trustee and beneficiary, you retain complete control of your assets. You can derive income from your trust, sell assets, acquire new assets, and do anything you need to with the property in your trust. And rest assured, as its name implies, you can amend or revoke your trust at any time. In every practical sense, having a Living Trust is almost identical to owning all your property directly.

The difference occurs when you die. Since you technically owned nothing, there's no property that needs to go through probate. Instead, your property is quickly distributed according to the precise instructions written into your trust. Carrying out your instructions is your handpicked agent—your successor trustee—who will follow your directions to the letter. There's no need to obtain the approval of a court, no additional expenses, and no details of your Living Trust are made public.

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These advantages are so important they bear repeating: with a Living Trust, your estate completely avoids the publicity, expense, delay, and other disadvantages of probate.

YOUR FIRST STEP IN DESIGNING YOUR LIVING TRUST

Creating a Living Trust tailored to your unique needs, reflecting the laws in your state, and delivering the greatest benefit to you and your family requires expert help—and that means an attorney, preferably one who concentrates his or her practice on estate planning.

But not just any estate planning attorney. If you go to one who has built a practice around probate, don't be surprised if what you get is a will. In fact, many attorneys offer substantial discounts on will preparation, counting on the substantial fees they will earn when your estate goes through probate. Instead, look for an attorney who emphasizes Living Trusts.

Once a prospective attorney demonstrates sufficient expertise in Living Trusts, make sure he or she passes the next most important test: Does the attorney listen well? If not, move on to the next candidate. Why? Because no two clients have the same circumstances, financial profiles, and family situations. So listening carefully to you will be the only way your attorney can ensure he or she is providing you with a Living Trust that meets your needs.

Next, consider how well the attorney will be able to work with your family. It will be a great comfort to them to have on hand a professional who was not only familiar with your wishes, but who also has the expertise and people skills to help them through what may be an emotionally difficult time.

Finally, choose an attorney with whom you can feel comfortable sharing your hopes, dreams and fears. Creating a Living Trust is an intensely personal experience, during which we consider our own mortality, take a hard look at our life's work, deal with family dynamics, and decide how we'll provide for our loved ones. Your attorney should have the professionalism, tact, and humanity to help you explore all these issues, and resolve them in a way that leaves you feeling satisfied, with lasting peace of mind.

ABOUT THE ACADEMY

This report reflects the opinion of the American Academy of Estate Planning Attorneys. It is based on our understanding of national trends and procedures, and is intended only as a simple overview of the basic estate planning issues. We recommend you do not base your own estate planning on the contents of this Academy Report alone. Review your estate planning goals with a qualified estate planning attorney.

The Academy is a national organization dedicated to promoting excellence in estate planning by providing its exclusive Membership of attorneys with up-to-date research on estate and tax planning, educational materials, and other important resources to empower them to provide superior estate planning services.

The Academy expects Members to have at least 36 hours of legal education each year specifically in estate, tax, probate and/or elder law subjects. To ensure this goal is met, the Academy provides over 40 hours of continuing legal education each year. The Academy has also been recognized as a consumer legal source by *Money Magazine*, *Consumer Reports Money Adviser* and Suze Orman in her book, *9 Steps to Financial Freedom*.

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