

WHY YOU SHOULD PLAN YOUR ESTATE TO AVOID PROBATE

BY BEN KINIRY, ESQ.

When I started practicing law I really didn't understand what all the fuss was about avoiding "Probate," a term often utilized to represent probate courts overseeing the administration of estates (be sure not to confuse the term Probate with the term probation, which is altogether a different area of the law). After years of working with clients on probate matters, I now advocate for setting up a client's estate to avoid "Probate."

Alright, so what is Probate? The first thing to know is that probate courts deal with various matters to include establishing guardianships, adoptions, name changes, partitions of real estate and administration of estates.

This article concentrates on the administration of estates, which is the process of the probate court holding proceedings to transfer a decedent's (dead person) property, known as the "estate," to his or her heirs and legatees (people named in the Last Will & Testament) who are designated to receive them. This is also an opportunity for the court to make sure all creditors, including the state and federal government, have been paid. That's it, Probate in a nutshell. Well, Probating sounds easy enough, right? The process is simple in concept, but in reality it's rather time consuming.

The probate estate includes all property held in the decedent's name alone. If property is owned jointly by the decedent and another person, such as bank accounts (just about any account held by a financial institution) and automobiles, they are not part of the probate estate and are therefore not subject to the Probate process. Also, assets having named beneficiaries (as opposed to joint ownership) are not part of the probate estate, such as life insurance, transfer on death accounts and retirement benefits. Assets held in trust avoid probate (and you already know how I feel about trusts).

The Probate process is started by filing a Petition for Estate Administration with the probate court (much of it is done electronically these days), along with the original Last Will and Testament and a death certificate. Letters must be mailed to all of the decedent's heirs at law (usually



the surviving spouse, children, and grandchildren of any predeceased child), to those named as beneficiaries in the Last Will and Testament, and to any charity named as a beneficiary of your estate. Also, the New Hampshire Department of Health and Human Services (DHHS) Estate Recovery Unit will be notified (DHHS reviews their records to see if the decedent has a debt with the State for any public benefits received and if so, will make a claim against the estate). Notice must also be published in a local newspaper in large part for the purpose of informing creditors of your death. If no one objects, the personal representative (executor) named in the Last Will and Testament is appointed by the court.

Thereafter the personal representative is responsible for collecting (taking charge of legally) the probate estate and for paying any debts of the estate. The personal representative must file an itemized list, known as an "inventory," of the probate property, including the value (some items will need to be appraised), with the probate court. The personal representative must file an estate tax return within nine months of the date of death and the final income tax return needs to be filed as well. This is true even if no estate tax is owed, if the decedent owned real estate or the personal representative wants his or her final accounting (see below) allowed by the probate court. Creditors of the estate have approximately six months to bring claims against the estate. Personal representatives generally wait until this claim period has expired to complete distribution of the estate according to the terms of the Last Will and Testament. As his or her final responsibility, the personal representative must file an accounting with the probate court showing the income and expenditures of the estate admin-

istration. The entire process generally takes about a year (many are quicker, others take, well you can imagine).

As stated previously, I now advocate for setting up a client's estate to avoid Probate. Why?

This is about what is best for your family. You may have just thought, "sure, but attorneys make more money by taking this position." I can see how one might make this assumption, however, in most instances your gut instinct would be incorrect. From my experience, working with a family to set up their affairs to avoid Probate is relatively inexpensive. The process is also not all that time consuming. Contrast this with going through the probate process, which is documentation intensive, riddled with forms and deadlines, the potential for multiple court hearings, and not to mention the fees charged by lawyers and other professionals who are generally involved in aiding families with navigating the probate process. In simplistic terms, it just takes more time and money to Probate than to plan to avoid the process altogether.

Well, how much does it cost? I have jokingly stated to many of my Probate avoidance resistant clients (who perhaps have the belief that I'm in it for the money) "I look forward to the significantly larger fee I will earn in helping

your children navigate the probate process." The point is this, yes attorneys do charge fees to work with families to set up their affairs to avoid probate, however, experience shows such fees pale in comparison to the fees, and other costs, of going through the probate process.

In addition to the money and time Probate can consume, stress is another factor not to be ignored. Those who are living when you are gone will be responsible for getting through the probate court maze, which is a largely unknown entity and a process having many hoops and hurdles. Some who have been through the process have found it to be rather frustrating (yes, this is an understatement).

This may sound like self-serving doom and gloom, and yes, many families go through the process without issue (there is still the time and money aspects). So don't go by my opinion alone. I encourage you to talk with your friends, you will likely find one who has experienced Probate and there is no doubt they will work tirelessly to convince you to plan ahead (unless they want to read your probate file which is public) as there is a clear winner in this race. Enough said.

The information provided in this article does not constitute legal advice.

Established 1924
grappone
AUTOMOTIVE GROUP

Integrity,
 Kindness,
 & Respect

www.grappone.com
 800.528.8993

We Deliver.