

~Discussion Draft Only~

Probate – Are there any advantages?
...and how does this work?

I have suggested that the negative things you hear about probate are false, misleading or overstated. I am suggesting that in most cases, there is no real benefit to avoiding probate (and that living trusts can be a hassle). But, you might ask if there are any inherent advantages to probate itself.

Probate is a simple way to give title of, and authority over, a decedent's assets to a Personal Representative and then provide an orderly methodology to take care of estate business, distribute and close. A simple application form advising the Court of the death, heirs and beneficiaries (and enclosing the Will if there is one) is filed with the Court. "Letters of Personal Representative" are then issued. Letters of Personal Representative from a probate estate are honored by financial institutions everywhere as your authority to handle a decedent's assets. You then arrange to publish notice that the estate is open including notice to creditors that they have 60 days to file claims and mail a copy to heirs and beneficiaries.

That's it. The Personal Representative is in place and can gather assets, pay liabilities, handle tax reporting, and do all of the administrative work (which is the same in a probate estate or a living trust). In our office, we can usually get enough information ahead of time so that, in the first meeting with the named Personal Representative after the death, the opening Application can be signed. We then mail or deliver it the Court. The client never needs to go to the courthouse. Letters of Personal Representative are universally honored and accepted by transfer agents, financial institutions and title companies.

If the decedent has a living trust, it is necessary for the named Successor Trustee to establish his or her authority with each financial institution, etc. This is fairly simple, just as opening a probate is fairly simple, but it needs to be done and done correctly. From that point until closing, the administration and reporting responsibility of a Personal Representative in a probate estate and a Successor Trustee of a living trust are the same. The work to be done is the same. The tax and inventory reporting is the same. The liability to taxing entities, creditors and beneficiaries is the same.

Oh, there is one difference. A Personal Representative can send a copy of the published notice to estate creditors. If that is done, those

creditors have 60 days to file a claim or have their claim barred. There is no such procedure when closing out a living trust so the time a creditor has is longer and less clear. Now, I don't want to make a big deal out of this because, in most estates, we don't have a problem with creditors and are simply going to get them paid.

If a Personal Representative or a Successor Trustee has plenty of cash of the decedent and is not concerned about unknown liabilities, he or she can authorize a partial distribution so beneficiaries can enjoy some of their inheritance while the estate continues its administration.

A Personal Representative in a probate estate and a Successor Trustee of a living trust must file a Petition for Determination of Inheritance Tax and an Inventory of estate or trust assets. An Inheritance Tax Worksheet must be approved by the County Attorney and the computation of inheritance tax must be approved and ordered by the county court.

Both administrators are responsible for the decedent's final tax return and for a separate tax return (Form 1041) for the estate or trust. Both must be prepared to account to beneficiaries for assets, income and expenditures – to the penny. Because a Personal Representative or a Successor Trustee can have personal liability, it is virtually a given they will hire counsel so that when it is time to distribute and close the accounts they will not have to worry about continued liability.

When it is time to close the estate, a Personal Representative provides beneficiaries with an accounting of the funds and files a Schedule of Distribution and a Verified Statement representing to the Court that the work is done and distributions made. In closing out a living trust, a Successor Trustee would also account and provide a proposal for distribution. Both will take steps to be sure they have properly administered and reported and will be very cautious about the final distribution. And for all of this work, there are probably a couple of billable hours that are different because of "probate" but that does not mean there are more billable hours because of probate. Everything else is the same.

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Note: There is usually little or no work to be done when a person leaving a surviving spouse dies because assets are customarily held in joint tenancy and married people name each other as beneficiaries of their retirement and life insurance assets. Cases involving second marriages, children of different relationships, children with special needs, or no children at all, require special handling. Be sure your planner is informed.