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How to Avoid Probate

Probate is the process through which a court (e.g., the probate court) approves a deceased person's will (if he had one) and appoints a representative of the deceased person's estate to collect the deceased's assets, pay debts, taxes, and expenses, and distribute the assets according to the Will, or if none, according to state law. Reports of all this activity are submitted to the court and when approved (and all parties consent), the estate can be closed. Not surprisingly, in most states (including Massachusetts) this procedure is public, time consuming, vulnerable to attack, and expensive, which is why many seek to avoid it. A similar probate procedure becomes necessary when a person becomes incompetent and requires a representative to care for him and deal with his property.

Property (meaning all types of assets) held in a certain way can avoid the probate process. Perhaps the most common of these variations of title is jointly held property. For instance, if a couple owns their home in joint names, when one dies, the other owns the entire property "automatically," without the need for probate. Similarly, assets that have a beneficiary designation on death of the owner will also avoid the probate process, so long as the owner's "estate" is not the designated beneficiary. These assets commonly include life insurance and annuities, retirement plans and certain other company benefit plans, savings bonds, some bank accounts, and some securities accounts.

Living trusts are also a very common and desirable way of avoiding probate as to assets titled in the name of the trust. It is generally agreed by estate planners that living trusts are probably the best way to avoid probate, because, unlike all of the foregoing mentioned ways of avoiding probate, living trusts can be drafted to deal with every possible contingency or given situation.

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These might include, for example, the death of a named beneficiary before you, or the disability or divorce of a beneficiary, or lawsuits against a beneficiary which could cause the loss of the asset(s) you gave him or her, and will contests. And of course, living trusts are very commonly used to save taxes in your estate and in the estates of your beneficiaries for some time to come.

To sum up, in our opinion, avoiding probate is an excellent idea, but there are risky ways and a right way to do it. Although the risky ways may work if there are no problems, we feel that in most cases, it is not necessary or wise to take the risks when the use of a well-drafted living trust can virtually eliminate them.

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