

William R. Wieringa, P.C.

How to Avoid Probate

Probate, the legal process of settling the estate of a deceased person, takes place in a probate court located in the county of the deceased residence. Probate is only necessary, however, when the deceased person owned assets solely in his or her own name at the time of death. Therefore, the way to avoid the probate process is to not own anything at the time of your death. There are many ways to accomplish this. Some ways are more effective than others.

The first thing people usually think of is Joint Tenancy with Rights of Survivorship. This is where an asset, usually real estate, is owned by more than one person. At the time of death of the first to die, the property belongs solely to the survivor. The transfer of ownership is automatic and avoids probate of the asset.

There are dangers involved with this however. The owners (husband and wife for instance) could die at the same time. Also, every joint owner must agree to sell or even mortgage the asset. (Mom and Dad would have to get Junior's permission to sell the house.) Finally, the joint asset can be attached to settle an award in a legal case of one of the owners. (Mom and Dad might have to sell the house to satisfy a property settlement in Junior's divorce.)

The next thing people contemplate is gifts. You can transfer up to \$13,000 a year (in 2010) to any number of persons, free of gift tax. A husband and wife each are entitled to this exemption, so up to \$26,000 a year can be gifted to each child of the couple per year. So long as these requirements are met, the person receiving the gift does not have to pay taxes on the gift. As you might suspect, this can be risky too. Who know when you will die, and it is hard to calculate a plan to give away your last dollar with your last breath. And you may need those funds near the end of your life for increased living and medical expenses.

Life Insurance is another method of avoiding probate. A decedent's life insurance proceeds generally are paid, outside of probate, to the beneficiary named in the life insurance policy. Life insurance not only remains a very popular and viable probate avoidance tool, but also provides a method with which to pay estate taxes without liquidating assets, such as a family business. Life insurance is only a part of an effective estate plan.

Perhaps the best and most flexible method for avoiding probate is to establish a Living Trust. (also called a Inter Vivos or Revocable Grantor Trust) You title all your assets into the trust, which survives your death. Because you legally own nothing, there is no probate to be done. Ask an attorney who specializes in estate planning to explain the details.