What Every Senior Should Know About Probate

Want to see two groups who make the Republicans and Democrats look like one big, happy family? Then put into one room those attorneys who believe in probate and those who prefer their clients manage their affairs with a Revocable Living Trust. You'll get as contentious an assembly as you could possibly hope for.

For seniors, the debate has special meaning because the vast majority of probate cases revolve around the affairs of those Americans age 60 and over. This report from the American Academy of Estate Planning Attorneys explores the reasons for the debate and offers guidelines to help seniors steer clear of the fray.

WHAT PROBATE DOES

Just what is probate? First, it's important to note that it comes in two "flavors." Living probate is a legal process that determines your fate when you cannot, generally because you've been disabled by injury, illness, or mental incapacity.

Death probate is the process that disposes of your estate after you die. Having a will virtually guarantees that your estate will go through probate. But then again, so will dying without any estate plan at all. (See the Academy Free Reports, *Where There's a Will, There's Probate,* and *The Nightmare of Living Probate*.) While probate attorneys might be happy with these definitions, trust attorneys would draw your attention to all the problems that come with probate: red tape, expense, publicity, delay, loss of control, and in the case of living probate, potential for personal humiliation.

THE IMPACT ON SENIORS

In 1989, the American Association of Retired Persons (AARP) decided to look carefully at probate and its impact on seniors. As the organization reported in its study, *Probate: Consumer Perspectives and Concerns*, probate is a special concern for older Americans.

The study found that 90% of all probate cases involved the disposition of property owned by people 60 years of age or older. Because the chances of becoming incapacitated increase dramatically as we age, living probate is also much more likely to involve seniors.

AARP went on to reveal that consumers nationally spend as much as $2 billion or more each year on all probate-related expenses, with attorneys' fees alone representing more than $1.5 billion of that amount. The study noted that attorneys' and executors' fees could consume as much as 20% of small estates, and as much as 10% of even uncomplicated estates. And that's only the beginning. Add to these fees such expenses as court costs and appraisers' fees, and your heirs could end up with a legacy that's considerably less than you intended.

HOW PROBATE AFFECTS SENIORS' FAMILIES

AARP found that probate usually comes into play after the surviving spouse of marriage dies. Most couples own property jointly. So, at the first death, much if not all of their property immediately becomes the sole possession of the survivor. When the survivor dies, however, their property will have to go through probate before it can pass on to their heirs. Since few couples take into consideration probate costs, many would be saddened to learn how big a dent it will make in their intended gifts.

Seniors aren't the only ones who may be blind-sided by probate. Their children and grandchildren may feel the bite as well. A study by American Demographics Magazine revealed that many Baby Boomers are so financially strapped today that they are deferring an important financial goal: saving for retirement. Instead, they are counting on their inheritance from Mom and Dad to help pad their meager retirement funds.

So, the higher the probate fees, the less of a legacy they will receive, and the harder it will be for them to retire.

WHAT THE AARP HAS TO SAY ABOUT PROBATE

Unreasonable expenses aren't probate's only drawbacks. There's also the time involved.

AARP's study found that probate frequently lasts longer than a year. Having a will seemed to make no difference in the time required. In fact, it could drag the process out even longer.

Now, add to the expenses and delays of probate these problems: a loss of control over one's affairs and the publicity it requires. You can see why AARP declared that:

Probate as it is generally practiced in the United States is anachronism… and, to the extent that the probate system is unreasonable, attorney's fees in connection with the probate work are unreasonable. (Probate: Consumer Perspectives and Concerns, Page 43.)

WHY ATTORNEYS DISAGREE ABOUT PROBATE

AARP's edict sums up the reason for so much rancor between pro-probate and pro-trust attorneys. It's a matter of money, and lots of it. The AARP study noted that attorneys often build lucrative practices focused solely on probate. Many use cheap wills as a "loss leader." According to AARP:

This marketing practice may set a costly trap for consumers. Attorneys lay the groundwork for their probate practice by writing wills. Some write wills cheaply as a way to generate other

business, prompting the companion to loss leader discounts in retail trade. When the client dies, the same attorney, or other member of the firm, probates the will at a high fee enough to recover any money lost on the earlier discount. (Probate: Consumer Perspectives and Concerns, Page 51.)

But not all attorneys have been happy with the status quo and escalating consumer dissatisfaction with probate. A growing number, such as the members of the American Academy of Estate Planning Attorneys, would rather spare their clients the expense, delay, publicity, inconvenience and potential for public humiliation that can be such an integral part of the probate process.

IS PROBATE EVEN NECESSARY?

"Death Probate" has these primary functions:

- It verifies the validity of your will.
- It inventories and establishes the value of your significant assets.
- It provides your creditors with the opportunity to make claims against your estate.
- It gives disgruntled family members a forum for challenging your will.
- Lastly, when all these steps have been completed, it transfers the title to your property to your heirs, as you've instructed in your will.

Do you really need probate to accomplish these tasks? AARP says no. Instead, it recommends alternatives such as the Revocable Living Trust.

HOW TO AVOID PROBATE WITH A LIVING TRUST

Whether you die with a will or without one, probate will be required if you owned any property in your own name.

A Living Trust makes probate unnecessary by changing the way you own your property. Although you still have absolute control over all your assets, just as if you owned them directly, you do not own property in your own name. Instead, your Living Trust owns your property. And you own your Living Trust.

At first blush, that can sound like a scary proposition. But it isn't, because you are the trust maker, the trust owner and trust beneficiary. So you and you alone control your trust and the assets it owns. You can buy, sell, trade, derive income from, mortgage and give away your trust assets, just as before. You can change your trust, add to it, or even revoke it any time you want. Bottom line: the fact that your trust owns your property has little, if any, impact on the way you live and conduct business each day.

But what a difference the trust makes when you die. Then, the person you've chosen to take charge of your trust, your successor trustee, steps in and follows your direction for the disposition of your estate. Because you owned no property in your own name, there's no need for probate. So there's no publicity and, compared to probate, very little expense, delay or inconvenience for your family.

Living Trusts are also indispensable for avoiding the indignity of living probate, the court proceedings that determine who will oversee your affairs in the event of your disability. A Living Trust helps you ensure that your physical and financial needs are handled as you would want them to be.

The Living Trust isn't exactly a new idea. Its origins date back hundreds of years. More importantly for Americans, the concept has been used in the U.S. since 1765 when Patrick Henry drafted a trust for Robert Morris, governor of the Colony of Virginia. During this century its many proponents have included John F. Kennedy, William Waldorf Astor, John D. Rockefeller, H. L. Hunt, Bing Crosby and Frank Sinatra. As consumers become better educated about the pitfalls of probate, all signs point to Living Trusts becoming even more popular in the years ahead.

JUST FOR THE WEALTHY?

Now that you know all the problems that probate entails, it's probably the last thing you'd want to bequeath your loved ones. But is it a strategy worth pursuing only if you're a Rockefeller or Vanderbilt?

Absolutely not. Even if your estate is valued at no more than $100,000, you should probably have a Living Trust to avoid death probate. And regardless of how much your estate is worth, you should definitely have a Living Trust if you want to avoid living probate.

Who should you turn to for help with your Living Trust? The American Academy of Estate Planning Attorneys recommends that you start with an attorney who concentrates on this area of the law. That's the best way to ensure that your legal professional has invested the time and energy to providing you with the most current estate planning techniques.

But be wary. Remember that wills and probate are also estate planning tools. So make sure your attorney focuses on the Living Trust, rather than wills.

GETTING THE MOST FROM YOUR LIVING TRUST

Once you've worked with your estate planning attorney to draw up your Living Trust, don't stop there. Taking advantage of everything this powerful estate planning tool has to offer requires these final steps:

- Make sure you fund your Living Trust. Remember that it only works if the title to your property has been transferred to the trust. If you keep your property in your own name, you've defeated its purpose. These days, most financial advisors are experienced in funding Living Trusts, so be sure to turn to your advisor for help if you need it.

- Keep your Living Trust current. As you acquire new property, be sure that you transfer title to these assets to your Living Trust.

- Ideally, a Living Trust is a living, breathing document, and a plan that will serve you for many years to come. That means, however, that you've got to take the time to have it updated as your family's situation, your goals, and your needs change. A good estate planning attorney will stay in touch with you over the years to ensure your Living Trust continues to serve you well.

PENNY WISE, POUND FOOLISH

Yes, it is true that a Living Trust will cost you more up front than a "discount" will. But in estate plans, as in all other areas, you get what you pay for. The bargain you buy today might just cost you or your heirs a fortune – your fortune – down the road.