

EVANS & ASSOCIATES

SHANNON L. EVANS
LL.M., TAXATION
LICENSED IN NEVADA & CALIFORNIA

A PROFESSIONAL LAW CORPORATION
3230 S. BUFFALO, SUITE 108
LAS VEGAS, NEVADA 89117
TELEPHONE: (702) 699-7333
FACSIMILE: (702) 699-7377

SATELLITE OFFICE:
11201 S. EASTERN AVE.
Suite 100
Henderson, NV 89052

OF COUNSEL:
ROBERT L. UNDERWOOD, III
LICENSED IN D.C. & FLORIDA

OF COUNSEL:
EDWARD INOUE
LICENSED IN CALIFORNIA

BASICS ABOUT PROBATE

Probate is a process in which the probate court ensures that your assets are distributed to your heirs. If you have no will at all, your heirs are determined by a state statute. This is called “intestate”. If you have a will, the Court will supervise the distribution of your assets to your heirs named in the will.

Probate can be useful if there is a possibility of disagreement between heirs. The court supervision is often helpful in such situations.

Many people prefer to avoid probate for the following reasons:

1. The probate process can take a lengthy period of time - from 6 months to several years.
2. Your will is filed with the court clerk and becomes public record for anyone to read.
3. Legal fees range up to 5% of the value of the assets being probated.
4. People can contest wills and tie up the probate process.
5. A probate will be required in every state in which the deceased person owned property. For instance, if I own a house in Nevada and a condo in California, besides the main probate in Nevada, an ancillary probate would need to be opened in California. This means more legal fees.
6. If the deceased owned a house in his or her individual name (not in a trust, or as joint tenants), you will not be able to sell the house until a probate has been opened. This can be a surprise for the family member who is trying to sell the house.
7. The probate process treats all heirs the same with outright distributions. In reality, some heirs may need special consideration or payouts over time. This can only be done with a trust.
8. A will only comes into effect if you die. A trust, on the other hand, can allow the successor trustee to step in without court intervention, if you are incapacitated.

Some assets are not subject to probate.

1. Life Insurance: passes directly to the named beneficiaries.
2. IRAs and Retirement Plans: pass directly to the named beneficiaries. A common mistake is to name “my estate” as the beneficiary. This causes a perfectly good asset to be subject to probate! Bad idea.
3. Joint Tenancy property: Title passes automatically to the remaining joint tenant(s). It is only necessary to file a simple affidavit terminating the joint tenancy if one joint tenant dies.

Caveat: often, spouses hold their house as joint tenants. This can result in a probate if both spouses die in a car accident.

Caveat: Inheriting an asset via probate or a trust is much better than getting the same asset as a surviving joint tenant. This is because a surviving joint tenant does not get a “step-up in basis”. Alternatively, if you inherit an asset (by will, trust, or intestate), the heir gets a “stepped-up basis” in the asset. This means that the heir can sell the asset for any amount up to the fair market value as of the date of death (“DOD”) and not pay any income taxes on the sale. If the heir sells the asset for greater than DOD fair market value, he or she will only pay tax (regular income tax or capital gains tax) on the portion of the sales price that is above fair market value. This can mean significant tax savings.

4. Assets titled in a trust as of DOD: If you have a Revocable Living Trust and correctly title assets in the name of that trust, probate is not necessary. Instead, the successor trustee will distribute or hold the trust assets according to the trust terms. The trust terms can be much more detailed than a will and can treat different heirs differently, depending on their situation. Children with special needs, creditor issues, or substance abuse issues can be dealt with according to your wishes.

Caveat: A common mistake people make is to sign a trust and forget to change title to their assets. Houses and other real property must have a new deed in the name of your trust recorded. Likewise, bank accounts and investment accounts must also be changed to your trust. If this has happened, your monthly statements will have your trust name on it.

Caveat: Except for very unusual circumstances, do not name your trust as the beneficiary for IRAs and Retirement Plans. Retirement assets have very special rules which usually do not work well with normal trust language. This can be a big mistake and may result in greater income taxation of this asset for your beneficiaries. Seek professional legal help if you still think a trust may be appropriate for your retirement assets.

If you want to avoid probate for your own estate, or have a relative who has passed away with an estate subject to probate, the following information checklist may prove helpful. We have not provided the actual legal forms because the content may vary depending on your specific facts.

If you would like more information, feel free to call Shannon Evans at 702-699-7333.