

Probate: Myths, Monsters, and Reality

By Craig H. Wisnom

The mysterious “probate” process has long been a legal boogeyman to scare individuals. There have been best-selling books on how to avoid probate, companies selling trusts to individuals over the phone, and neighbors sharing nightmare stories about Aunt Glenda's probate lasting 10 years. All this has resulted in misunderstanding and lack of knowledge about this now pejorative term. As part of their estate planning, individuals need to understand what probate actually is so they can make effective decisions.

WHAT IS PROBATE?

Technically, probate is “proving” the Will of an individual in court after death, but more generally, it describes the court appointing someone as Personal Representative (Executor) for a deceased individual to administer that individual's “estate.” That estate is limited to assets in the individual's own name, without any other mechanism of transfer. Therefore, assets with a beneficiary designation, held in joint tenancy, or in a revocable trust are not subject to probate, and that is why people can try to set up all their assets in one or more of these arrangements to avoid our mythical beast.

Put simply, imagine Uncle Charles is dead, and he owned a house in his own name. Since he is dead, there's no one who can sign the Deed to sell or transfer the house, so the probate process appoints the Personal Representative, who now has the power to sign things like this Deed for Uncle Charles.

One big misperception is that a Will avoids probate. Probate is in fact the court recognition of that Will and the Personal Representative it nominates, so the Will gives directions for the probate, not avoids it.

WHAT ARE THE DISADVANTAGES?

In Arizona, probate is a relatively simple process, and unless there are complicating factors, like family disagreements, it doesn't greatly delay anything. The real disadvantages are



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the legal fees and costs that are attributed to the probate process itself, starting at approximately \$3,000. While fees can go upwards to infinity, those are based on complicating factors and litigation, not the simple requirement of a probate. If families are going to zealously fight with each other, the delays and expenses are going to be incredible, whether or not there was a probate filed. Still, it may make sense for people to consider if a Revocable Trust or beneficiary designations are an appropriate way to avoid several thousand dollars in fees, but they should just be aware of how much is really at stake.

ARE THERE ADVANTAGES TO A PROBATE?

Sometimes there are advantages to a probate, because it provides a straightforward, organized way to wind up the decedent's affairs. There are procedures for barring creditor's claims after a short period, for instance. More importantly, sometimes people try to take shortcuts to avoid probate that cause far more expensive problems, like the wrong person getting assets under a beneficiary designation, or money passing directly to a minor child who legally cannot receive it. In some cases, the problems or costs of someone taking the short cut to avoid probate can be far, far worse than the mythical monster itself.

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