

Practical Probate

Taking the Mystery Out of Trusts Part 4: Avoiding Probate

Hon. Domenick N. Calabrese
Calabrese Law PLLC

The Mystery

Is it really possible to avoid Probate Court? Many articles and books have been written about it. I've been a probate judge since 2003, and a trusts and estates attorney since 1995. With my very unique perspective and experience in thousands of probate cases, I'm able to explain why it's important to plan to avoid probate court intervention, and, more importantly, how it can be accomplished. In my law practice, a key objective of my estate plans is to greatly reduce the likelihood that my clients may be subject to probate proceedings during their lifetime and even after death.

Why Avoid Probate?

Of course, probate serves important purposes: to ensure the assets in a decedent's estate are transferred to the legal owner or owners; to help those who are incapacitated manage their finances and personal affairs; and to protect minors who, through inheritance or some other process become owners of substantial assets. Probate Courts perform many other important functions as well.

The vast majority of matters in Probate Court are public record. There is very little privacy in probate proceedings. There is also the inherent delay in even the most efficient courts. By preparing a complete estate plan, including the use of trusts, it's possible in most cases to avoid or minimize Probate Court involvement, saving valuable time and keeping important personal information out of the public eye. The rest of this article will examine the role of trusts in a few of these situations.

Trust Advantages

Revocable inter vivos trusts, commonly known as "living trusts" have many advantages. A few of the most important are outlined below.

Trusts Increase Control

One of the most important objectives of a comprehensive estate plan is to increase control of assets. When I meet with a new client, they are often under the erroneous impression that a trust will reduce their control over what they own, such as real estate, bank accounts, investments and other assets. A properly structured trust will actually increase control over assets.

Incapacity Planning: Avoiding Probate Court

If someone becomes incapacitated and is unable to manage their finances, they may be subject to a guardianship in Florida or New York, or a conservatorship in Connecticut. In these proceedings, some of the rights of the person for whom the guardianship or conservatorship is sought may be taken away by the court and given to someone else. The guardian or conservator may be a family member, an attorney, or a "professional" guardian. Such court proceedings are inherently adversarial, time-consuming, and stressful. Recent publicity about a California conservatorship involving a famous singer has increased attention about the potential for abuse and failed safeguards in these matters. All such proceedings and documents (with a few exceptions) are part of the public record.

Assets transferred into a revocable inter vivos trust are managed during the grantor's (the person who created the trust) incapacity without court involvement. If someone becomes incapacitated without a trust, court intervention may be needed to manage the asset (such as accounts in financial institutions or real estate). When these assets are transferred into a trust before incapacity strikes, trust assets are managed by the successor trustee in strict accordance to the provisions of the trust. Assets in the trust will be managed without court involvement. The trust remains private, and all trust matters - assets, income, beneficiaries, etc. - remain confidential and out of the view of the courts and the public. Let's examine how trust can increase control over your assets and keep you out of Probate Court.

Example: Jane White creates a revocable living trust for her benefit. She places all her assets in the trust. Jane is the initial trustee. She names her son, Brendan White, to be successor trustee if Jane is unwilling or unable to serve as trustee. Four years later, Jane becomes incapacitated. At that time, Brendan becomes the trustee of the trust with no court proceedings. As successor trustee, Brendan ensures that trust assets are used only for the benefit of his mother Jane. Brendan manages trust assets and income, pays bills, and files tax returns, all for the benefit of Jane. Court intervention is unnecessary.

Example: Jeremy Ivan has no trust. Jeremy takes care of his financial matters – paying bills, managing his house, and taking care of his investments himself. Unfortunately, Jeremy suffers a stroke and becomes incapable of managing his finances. Court intervention will be necessary so that a guardian or conservator may be appointed to handle Jeremy's finances, ensure his bills (such as groceries, utilities, insurance, and taxes) are paid and his income and assets are protected.

Keeping Your Family Out of Court After Death

Assets in a trust at the time of the grantor's death are not subject to court proceedings. They are transferred and managed more efficiently and out of the public's view. This is why trusts are sometimes referred to as a will substitute. However, that statement is not entirely correct, and I do not recommend that someone who has a trust need not have a will. A will and a trust work in conjunction with each other in an estate plan. If assets are not transferred into a trust while the grantor is alive, the will serves an important role. Without a will, the estate plan could fail.

The next example is a situation where there is a funded trust in place at the time of death.

Trust example: Rita Reliable creates and funds the Rita Reliable Trust. Rita is the sole trust beneficiary as long as she is alive. In the trust, Rita names her 3 adult children as beneficiaries of the trust after she passes away. Upon Rita's death, all assets in the trust pass to Rita's three children with no court proceedings. There is no delay in the process of transferring trust assets to Rita's children. There will be no public record of the trust, the identity of the beneficiaries, or the amount of their inheritance. The trust may be structured to prevent the creditors of Rita's beneficiaries from receiving any portion of the trust assets intended for Rita's children.

The next example is a situation where there is a will but no trust in place at the time of death.

Will without a trust example: Marion Merriweather has a will, but no trust. Her will provides that her 2 adult children receive her property upon her death. When Marion dies, her will must be presented for admission to the Probate Court. The court will appoint an executor if the executor named in Marion's will is willing and able to serve, and, in Florida, qualifies to be an executor. Depending on

the value and type of assets Marion owned at her death, probate proceedings may take 6-18 months to complete. All of Marion's solely-owned assets (those assets that the will controls) become public record, along with all of the debts that Marion owed at the time of her death. The identity of her beneficiaries and the amount of their inheritances will also be public record. Any public assistance (such as Medicaid) Marion or any of her beneficiaries received during their lifetimes will also be part of the public record and all or a portion of that assistance will need to be paid out of the estate. If the beneficiaries owed money to creditors, their inheritance may be subject to creditor claims.

The example below is a situation where there is a trust but no will. Note how the lack of a will combined with the mistake of not transferring all assets into the trust causes the estate plan to fail.

Example: Bridgett Bleak has a trust but no will. Bridgett has four adult children. One of them, Beth, is disabled and receives public assistance. Bridgett's oldest son, Evan, is estranged from her. When Bridgett dies, she wants her estate divided into 3 equal shares: one for each of her children, with Evan getting nothing, which is how her trust is structured. Her trust also provides that Beth's share of inheritance goes to a supplemental needs trust (also known as a special needs trust) so that Beth's eligibility for public assistance will not be jeopardized because of her inheritance. After creating her trust, Bridgett transfers nearly all of her assets to her trust. However, she neglects to transfer her brokerage account with a date of death value of \$750,000 to her trust. When Bridgett dies, her brokerage account passes in equal shares to each of her four children. This results in Beth losing eligibility for public benefits, and Evan receiving a 25% share of the brokerage account, something Bridgett wanted to avoid. If Bridgett had a will in addition to her trust, this situation with Beth and Evan could have been avoided.

The example below shows how a trust along with a pour over will operates to ensure a smooth transition and transfer at death even though not all assets were transferred to the trust during Don Addams' lifetime.

Example: Don Addams is a widower with two adult children. One of them, Richard, is disabled and receives public assistance. Don's estate planning attorney prepare an estate plan. The estate plan includes a trust and a will. The trust directs that Don's assets be divided into 2 equal shares, one of each of his children. Richard's share will be transferred to a supplemental needs trust so that Richard's eligibility for public assistance won't be jeopardized. Don's will directs his probate assets be transferred to his trust. Upon Don's death, his brokerage account, which was never transferred to his trust, passes to his trust under Don's will. Known as a "pour over will" because it "pours over" or transfers probate assets to a living trust. This approach effectively deals with any assets that are not transferred to the trust before death – a situation that occurs frequently.

About the Author

A Connecticut Probate Judge since 2003, and a trusts and estates attorney since 1995, Dom Calabrese is admitted to the practice of law in Connecticut, Florida, and New York. Judge Calabrese has given hundreds of presentations on probate and estate planning to the general public, bar associations, the University of Connecticut Income Tax School, the Connecticut Society of Certified Public Accountants, and the Connecticut Probate Assembly. Calabrese Law PLLC has offices in Palm Beach Gardens, Florida, and Watertown and Stamford, Connecticut devoted to estate planning, asset protection, and business counsel.

THIS ARTICLE IS FOR INFORMATIONAL PURPOSES ONLY. IT IS NOT INTENDED TO BE, NOR SHOULD IT BE RELIED UPON AS LEGAL ADVICE. CONSULT A QUALIFIED ATTORNEY FOR ADVICE AS TO YOUR SPECIFIC SITUATION.

Copyright © 2022 Calabrese Law, PLLC. All rights reserved. This article may not be used, copied, reproduced, or distributed without express written permission.