General Information and FAQs on Probate - Learn the Who, What, When, Where, and Why!

What is Probate?

Probate is the court-supervised administration of a decedent's estate. It is a process created by state law to transfer assets from the decedent's name to his or her beneficiaries.

A personal representative is appointed to handle the estate administration. The probate process ensures that creditors, taxes and expenses are paid before distribution of the estate to the beneficiaries. The personal representative is accountable to the court as well as the estate beneficiaries for his or her actions during the administration.
For the probate of certain estates with a modest amount of assets a simplified probate procedure, (small estate probate, summary administration) may be available.

Do I Benefit by Avoiding Probate?

Avoiding probate may lower the cost of administering your estate and reduce the time delays associated with the probate process.
Avoiding probate in multiple states is a definite benefit. Because of the nature of real estate, probate is usually required in every state in which you own real estate. This can usually be avoided by transferring ownership of the real estate to your trust during your lifetime.

How Does a Revocable Trust Avoid Probate?

A revocable trust avoids probate by effecting the transfer of assets during your lifetime to the trustee. This avoids the need to use the probate process to make the transfer after your death. The trustee has immediate authority to manage the trust assets at your death; appointment by the court is not necessary.

The "funding" of a revocable trust is critical to successfully avoid probate. Those persons who do not fully fund their trusts often need both a probate administration for the non-trust assets as well as a trust administration to completely distribute the assets. Because the revocable trust may not completely avoid probate, a simple "pour over" will is needed to transfer any probate assets to the trust after death.

How Do I Know if My Assets Are Properly Titled to My Revocable Trust

The account statement, stock certificate, title or deed will make some reference to the trust or to you as trustee. You might also elect to fund your trust by naming the trust as a beneficiary of life insurance or other similar arrangements. Your financial advisor may assist you with the transfer of assets to your trust.
If your trust will own real estate, then it is important to complete any required deed transfers after considering the impact of existing mortgages, title issues, and homestead restrictions when the deed is prepared. (Note- this does not mean you will lose your homestead exemption. You may have to reapply or provide additional information regarding the trust after its execution.)

Are All Assets Subject to Probate?

No. Usually, only assets owned by a decedent in his or her individual name require probate. Assets owned jointly as "tenants by the entirety" with a spouse, or "with rights of survivorship" with a spouse or any other person will pass to the surviving owner without probate. This is also true for assets with designated beneficiaries, such as life insurance, retirement accounts, annuities, and bank accounts and investments designated as "pay on death" or "in trust for" a named beneficiary. Assets held in trust will also avoid probate.

Can The Trust Hold Title to My Homestead?

Most homestead property can be transferred to your trust. Some counties have special requirements to maintain the homestead tax exemption, and special language may be required in the trust agreement and the deed. Our state-specific documents include this language.

Does The Trust Provide Protection from Creditor Claims?

The trust does not directly protect your assets from the claims of your creditors. During your lifetime, the assets in a revocable trust are treated as owned by you and subject to the claims of your creditor as if you owned them in your personal name. If the trust assets remain in trust after your death, the interests of the beneficiaries may be protected from their creditors by a "spendthrift" provision in the trust agreement. Some states provide special protection for many types of assets, including assets owned by a husband and wife as "tenants by the entirety." Consideration should be given to these assets when you decide how to fund your revocable trust.

Does The Trust Provide Protection From The Elective Share?

Some states provide that a surviving spouse is entitled to a minimum portion of the decedent’s estate. This elective share is equal to a percentage of the estate, including certain assets passing outside of probate. Generally, assets held in a revocable trust will be subject to the elective share. There are some exceptions to the elective share, and the right to receive an elective share can be waived by the spouse.

Who Pays Federal Income Tax on Trust Income?

In most instances, the revocable trust is ignored for federal income tax purposes during the grantor’s lifetime. The income and deductions are reported directly on your individual income tax return. The trust will use your social security number as its tax identification number.
A revocable trust becomes a separate entity for federal income tax purposes when it becomes irrevocable, or stops reporting income under your social security number for any other reason. The trustee is then required to file an annual fiduciary income tax return. Taxable income, deductions and credits are determined in much the same way as for an individual. Trusts are also allowed a deduction for distributions to beneficiaries. In this way, the trust passes on income and deductions to the beneficiaries to be taxed on their personal income tax returns. Income that is not distributed to the beneficiaries is taxable to the trust.

Does a Revocable Trust Save Estate Taxes?

Revocable trusts are often credited with saving estate taxes, but this is not entirely accurate. The trust should be drafted to minimize the effect of estate taxes. Your retained interest and power over the trust assets will cause the trust to be included in your taxable estate at death.

Common Terms used when discussing probate:

Claim- A liability of the decedent before death and/or a liability of the estate after the decedent’s death (e.g., funeral costs, costs of administration).
Codicil- A legal instrument that modifies a Will.
Creditor- A person or party to whom a debt is owed.
Decedent- A person who has died.
Descendant- All of the decedent’s descendants of all generations.
Devise- Disposition of property by Will.
Estate- The total of assets and liabilities of a decedent
Family Allowance- An amount exempt from creditors and devises that is paid to spouse and children.
Fiduciary- Includes personal representative, guardian, conservator and trustee.

Heirs- Persons entitled to the property of the decedent under law absent a Will
Interested Person- A person whose rights or property interests may be affected in probate proceedings; including heirs, devisees, children, spouse, creditors, and any others having a property right or claim to the decedent's estate
Intestate/Testate- An estate where a decedent left no Will is intestate; an estate with a Will is estate.
Non-Probate Assets- Assets owned by the decedent not requiring probate to affect a transfer of ownership (i.e., assets held in a trust, assets naming a beneficiary, and/or assets held as joint tenants).
Personal Property- Physical possessions of the decedent; not money or real estate. A certain amount of personal property and money is exempt from creditors.
Personal Representative- A party (individual, organization, or other legal entity), appointed by a judicial officer or probate registrar to administer an estate.
Per Stirpes- An Estate or Asset is split evenly among the descendants of the same generation. If a member of a generation predeceases, that share is split among the deceased's descendants of the next generation.
Probate- The legal process of settling an estate after a person dies. It often includes processes to: (1) prove the validity of a decedent's Will, (2) determine heirs, and (3) appoint a personal representative.
Probate Assets- Assets owned solely by the decedent in the decedent's individual name.
Property- Includes both real and personal property or any interest therein and means anything that may be the subject of ownership.
Summary Administration- If the gross probate assets of an estate do not exceed the amount and conditions set in a specific state, the estate may qualify for a Summary Administration. (aka small estate probate)

This information was sourced from:

- Cornell Law's Legal Information Institute
- WEX Free Legal Dictionary and Encyclopedia
- Florida Bar Consumer Pamphlets
- American Bar Association
- Minnesota Judicial Branch