



# The Pros and Cons of Probate

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**P**robate is your state's method of transferring the property of someone who has died to its new rightful owners. If you have no estate plan, your assets will go through the probate process. If you have a will, your assets will go through the probate process. If you have a revocable living trust and you have placed your assets into that trust, they will not go through probate.

## PROBATE IS A PUBLIC PROCESS

Probate gives relatives and friends a forum to bring suits against those who claim your property.

**PRO:** This can be advantageous if there has been elder abuse or if your will was changed when you were subject to undue influence, fraud, or dementia.

**CON:** Probate increases the likelihood of conflict after your death. Your estate could be consumed by legal fees as relatives battle each other over a wide variety of issues. They can argue about the validity of your will. They can argue about whether they are entitled to a monthly allowance from your estate. They can argue about your debts and whether they are valid.

Everything about your estate — from the value of your jewelry to the age of your beneficiaries — is made public. This is particularly unfortunate for young beneficiaries who may not have the maturity to handle incoming solicitations.

## PROBATE IS COURT-SUPERVISED

**PRO:** You don't have to select your Executor as carefully as you select a Trustee of a Revocable Living Trust because everything an Executor does is supervised by the court. If you don't select an Executor, the court will select one for you. Because that person may not be a good choice for the job, court supervision can give your beneficiaries some safety and protection.

**CON:** Your Executor has much less flexibility to administer your estate in probate. Probate is controlled by your state's probate code, a thick book of laws, and by the probate cases that have been tried in your state, many more thick volumes. Your Executor is bound by these laws, which are designed to restrict the Executor and avoid mistakes, not to maximize the ease of administering your estate. Your

Executor will have to seek court permission for most transactions on behalf of your estate and will not be able to invest your funds in a well-diversified stock portfolio. In fact, in most probates, assets are managed as little as possible and stock losses are not uncommon.

Most people find the courtroom stressful. Probate forces your loved ones to go through a court process, an unpleasant experience even with the best attorney.

## **PROBATE IS INSURED**

The Executor in a probate typically must get a bond. A bond is an insurance policy that will pay your beneficiaries if your Executor commits wrongdoing. Many wills waive bond.

**PRO:** Your beneficiaries are protected with a bond.

**CON:** Bond is another cost your estate will have to pay. Typically, bond is about  $\frac{1}{4}$  of 1% of your estate each year.

## **PROBATE DOES NOT REQUIRE ADVANCE PLANNING**

Probate is available to anyone and requires no will or trust.

**PRO:** Probate requires no effort on your behalf.

**CON:** Because no advance planning is required, you never have the opportunity to think about and care for your loved ones in a way that expresses your values and your love.

## **WITHOUT A WILL, PROBATE RELIES UPON THE LAWS OF INTESTACY**

**PRO:** The laws of intestacy are designed to mimic what most people would put into their wills if they had done planning. In most cases, the spouse inherits one-half to all of the estate and the children inherit the rest. Where there is no spouse or children, assets typically go to parents and siblings, then to nieces and nephews, then to cousins.

### **CONS:**

**Your next of kin may not be your chosen heirs.** The law makes assumptions about whom you would wish to inherit your estate. Those assumptions may not be correct. Perhaps you don't want to leave assets equally to children from different marriages. Or perhaps you do not want your brother or sister to inherit. Without a will, your wishes will not be followed.

**Your divorcing spouse gets everything.** If you die in the midst of a divorce and you have not created a will disinheriting your spouse, your spouse will typically inherit one-half to all of your estate.

**Your loved ones inherit because of the law, not because you made provisions for them.** When provisions have not been made for people, that is, when they inherit because of the law and not because you chose them, the inheritance is not a gift. It is a right under law. This changes the feeling the heirs have about you and changes how they treat the inheritance (more like “found money” than an inheritance that must be stewarded).

Young people get full control of their entire inheritance at age 18. When you fail to create a trust for young people, their inheritance is controlled by guardians, who must invest it very conservatively. Then, at age 18, they receive whatever is left — no strings attached. I say whatever is left, because spending the inheritance is up to the guardian until the children turn 18. Because you did not choose the guardian, you have no way of assuring the money will be spent wisely.

## **PROBATE CAN BE EXPENSIVE**

**PRO:** Your estate’s attorney and Executor are nicely rewarded for their hard work.

**CON:** In some states, probate can consume as much as 8% of your estate, leaving less for heirs. And that 8% is based on the gross value of your estate, not the net value. In other words, if you have a \$500,000 home with a \$450,000 mortgage, your heirs pay for probate based on its \$500,000 value, and after fees and costs, may inherit nothing. Even if your state’s fees are more reasonable, a revocable living trust will almost always cost less to administer than a probate. In some states, the filing fee to open a probate (paid to the court) is a percentage of the estate.

## **PROBATE CAN BE TIME-CONSUMING**

Most probates take six to eighteen months to complete.

**PRO:** The probate process provides plenty of time for heirs to adjust to the idea of their inheritance. It also provides plenty of time for challenges to be brought.

**CON:** Your beneficiaries must wait to receive their inheritance. Your Executor must work on your estate throughout the process, completing form upon form.

While probate has been reformed in a few states, it remains an unpleasant and expensive process for most. If you find yourself in the midst of a probate, be sure to retain an experienced attorney and to follow the probate court’s rules closely.

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