

Probate and Estate Planning Explained
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Committee on Families, Children, and Seniors
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What is Probate?

Probate is the process by which the Probate Court appoints a person or institution, such as a bank, (the “**Personal**

Representative,” traditionally called the “**Executor**”) to manage a deceased person’s assets (the “**Probate Estate**”), pay the deceased’s debts, and distribute the remaining assets to his or her beneficiaries. This process is called “**Probate Administration**.”

Probate in Michigan is governed by the Estates and Protected Individuals Code (EPIC), MCL 700.1101 through MCL 700.8206, which was based on the Uniform Probate Code and the Uniform Trust Code.

When is Probate necessary?

A Probate Estate is generally only required when the deceased owned property in his or her name alone and there was no beneficiary designated. Probate is the means by which legal title passes to the beneficiaries.

If only a small amount of property was in the deceased's name alone (currently less than \$23,000) the property can be distributed through what is commonly called a "**Small Estate**" (through a Petition and Order for Assignment). Vehicles can be distributed by the Secretary of State to heirs by an affidavit.

What is an "Estate"?

The term "Estate" broadly means all assets owned by the deceased at the time of his or her death. It includes both real estate and personal property (stocks and bonds, jewelry, artwork, etc.).

The term "**Probate Estate**" means all assets owned by the deceased at his or her death that require Probate Administration.

Key Steps in the Probate Process

- File **Application (or Petition) for Probate and Appointment of Personal Representative** and obtain **Letters of Authority**
- Publish **Notice to Creditors**
- Collect Assets
- File Inventory
- Pay Claims and Taxes
- Provide Accounting to Beneficiaries
- Make Distributions
- File **Sworn Statement to Close** (or Petition for Complete Estate Settlement).

Should I avoid probate?

- Probate is usually not as bad as some make it out to be.
- It is often more cumbersome in larger communities with busier probate court dockets, especially Wayne County.
- There are typically no court hearings unless there is a dispute (Informal Probate).
- That said, there are costs and inconveniences associated with Probate that can be avoided. It is also a public process.
- There are several ways to “Avoid Probate.” Not all are appropriate for every person.
- Estate planning decisions should not be based solely on fears about probate, taxes, or concerns that the State will take a home for repayment of Medicaid expenses (“Estate Recovery”).

What are the costs of probate?

Cost of a Probate Estate with \$100,000 in assets

Filing Fee:	\$175.00
Certified Letters	\$10.00
Publication of Notice to Creditors:	\$53.00
Inventory Fee (a sliding scale fee based on the value of the estate):	<u>\$362.50</u>
Total	\$600.50

Plus attorneys fees, which are typically billed on an hourly basis.

5 ways property can pass at death:

1. According to intestacy law (the Will the State has written for you (an "Intestate Estate");
2. By your Will a "Testate Estate");
3. According to the terms of your Trust;
4. By a beneficiary (**Pay on Death** "POD" or **Transfer on Death** "TOD") designation; and
5. As joint property (the "**Right of Survivorship**"). There is typically no Probate required at the death of the first spouse to die because property is owned jointly.

Probate Myths

1. Having a Will avoids probate.
2. Everyone (or no one) needs a Revocable (“Living”) Trust.
3. If I have a Trust, I don’t need a Will.
4. If I die without a Will, the State will take my entire Estate.
5. If I put my kids on my property, I don’t need a Will.



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Your Last Will and Testament

Your Will is your directions to the Probate Court regarding how you want the property in your probate estate distributed when you die and who you want to do the work.

After your death your Will is “**Admitted to Probate**” by the Court and the Court then gives your Personal Representative the authority and responsibility to pay your debts and distribute your property to those you choose.

The Will is only binding when the Court admits it to Probate. The Personal Representative only has authority when appointed by the Court.



What happens to my Will if I do “Avoid Probate”?

If there is no need to open a Probate Estate (you successfully
“Avoid Probate”) your Will is merely a suggestion to your heirs. It
is not legally binding. Beneficiary Designations, joint ownership,
and Trust ownership all trump your Will.

Whoever is in possession of your original Will is required to file it
with the Probate Court in the county of your residence, but if no
Probate Estate is necessary, it simply sits in the Court's vault
forever.

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If I should die before I *write a Will...*

If you die without a Will, your property will pass according to the laws of intestacy, which is essentially the default Will written for you by the Legislature in EPIC. The State will only inherit your estate if you leave only very remote heirs.

It is important to have a Will so that your expressed wishes go into effect, especially if your plan is different than the default plans provided by the State (you wish stepchildren to inherit from you, for example), or if you have someone in mind to serve as guardian and conservator for a minor child, who are not given statutory priority in EPIC.

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What's *Trust* got to do with it?

Revocable trusts are often used to “Avoid Probate” because the Trustee is responsible for paying debts and distributing assets instead of a court-appointed Personal Representative. In many ways Trust Administration is private Probate.

What is a Trust and what is it for?

A Trust is a relationship between a **Trustee** (who holds an assets for the benefit of another) and a **Beneficiary** (the person for whom the asset is held). A Trust is technically not an entity, like a corporation, although we routinely refer to “the Trust” as a thing.

In a typical Revocable Trust Agreement (also called a “Living Trust”) the owner of property holds his or her property for his or her own benefit during his lifetime and upon death a Successor Trustee holds the property for the benefit of his children or other beneficiaries.

Revocable Trusts are often used to “avoid probate” because the Successor Trustee is responsible for paying debts and distributing assets instead of a court-appointed Personal Representative.

... but I heard *everyone* needs a Trust?

Some people argue that everyone needs a Trust to avoid Probate. Some use scare tactics to frighten people about the prospect of Probate.

Some people with modest estates and straightforward plans, however, do not get much of a benefit from the additional cost of a Revocable Trust.



So who does need a Trust?

A Revocable Trust can be a flexible estate planning tool, but is not for everyone. Here are a few factors that might make a Revocable Trust the better option for you:

When a Revocable Trust makes sense...

- Privacy is important to you. Probate is a public process, while Trust Administration is largely a private affair.
- Your Estate is large enough to be concerned with Federal Estate Taxes (More than \$1,000,000 in 2020, if you haven't made any taxable gifts before).
- You own real estate in another state. Putting out-of-state property in your trust can avoid having to open Probate Estates in more than one state. Florida Probate, for example is typically more expensive than Michigan Probate.

When a Revocable Trust makes sense...

- You don't want your property distributed immediately at your death. If you want property held for a child or grandchild's college education, for example, you need a Trust. Young parents often include Trust provisions in their Wills (a "**Testamentary Trust**").
- You have a disabled heir and you don't want an inheritance to cause them to become ineligible for Social Security (SSI) and Medicaid (a "**Special Needs Trust**").

When a Revocable Trust makes sense...

- You have a child or grandchild who is irresponsible with money, has a spouse who is irresponsible with money, has a substance abuse problem, or has been incarcerated.

- You brought children from a prior marriage or relationship to your marriage and you want to make sure that they receive property after your death.



When a “Simple Will” makes sense . . .

- You have a relatively modest estate.
- Your plan for your assets is simple.
- None of the factors above apply to you.



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Pourover Will

Everyone with a Revocable Trust should also have a Will. Any property that is not held in Trust will be distributed according to the terms of your Will so it is important to have a “**Pourover Will**” that “pours over” any assets in your Probate Estate into the Trust at your death. The “Pourover Will” acts as a stopgap to make sure that your assets pass according to your wishes as stated in the Trust Agreement.



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Dangers of Joint Ownership

People often try to avoid Probate by adding their children to property as joint owners. While you may be able to avoid Probate this way, there are many risks to adding your children to your property. These risks include:

Dangers of Joint Ownership

- Losing control of your property (What do you mean Johnny has to sign off? It's my house!).
- Exposing your property to your children's creditors (including ex-spouses).
- Causing unnecessary conflict among your children at your death.
- Problems with Medicaid if you need to go to a nursing home.

What is Estate Planning?

Estate planning is the formation and execution of a plan for your assets to reach the following goals:

- The efficient distribution of your assets to your beneficiaries according to your desires.
- The avoidance of taxes.
- The effective management of your assets in the event of your incapacity.

Estate planning typically involves the preparation of documents (Wills, Trusts, Powers of Attorney) by an attorney in cooperation with other professionals.

Warning Signs

- Travelling salesmen or attorneys with no local office offering local seminars (“Chicken Dinner Seminars”).
- Companies who want to sell a financial product along with estate planning documents (e.g. annuity).
- Trusts that cost several thousands of dollars when your estate is relatively simple. A competent local attorney will typically do a better job and charge much less.
- Companies who tell you their product will make it easier for you to become eligible for Medicaid. There are very specialized tools used for Medicaid planning. They are not sold at seminars or door-to-door.



Questions and Answers and *Thank You*

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