

Demystifying probate part III: rumors and reality

By Linda T. Cammuso

Last month, I discussed the use of living trusts as an effective technique for probate avoidance and contrasted trusts with some of the risky or unfavorable techniques people often use to avoid probate (such as titling assets in children's names). People's efforts to avoid probate are often motivated by fear of the probate process, and it's no wonder with the myths and stories surrounding probate.

Consider some common probate rumors, and read on to find out the reality.



Legal Briefs

If your assets go through probate, the state will take everything. This rumor is just plain false. Assets that go through probate will be distributed accord-

ing to your will, or if you don't have a will, the law dictates who your heirs are and in what percentage they would take — spouse, children, parents, siblings, etc.

Probate court and attorney fees will consume all your assets, leaving nothing for your heirs. This is a severe exaggeration. The probate court charges various filing and copying fees, but in a typical case it amounts to several hundred dollars. Since estate attorneys usually bill by the hour, the complexity of the estate will dictate the cost. Where this rumor has some truth is when there is fighting among the beneficiaries/interested parties, which can result in substantial legal fees.

The probate process takes several years and the assets are tied up during that period. This is more of a misstatement. The court appointment of the executor or administrator usually takes a couple months, after which the executor/administrator can begin administering the estate (i.e. gathering/selling assets, paying debts, filing tax returns and making

distributions to beneficiaries).

General creditors of the decedent (such as credit card companies) have one year from date of death to claim against the probate assets, so a prudent executor/administrator usually escrows a portion of the assets in case an unanticipated creditor appears. Funds should also be set aside for payment of income taxes or estate taxes. Also, disputes among beneficiaries and other parties can delay the process.

Understanding the reality of these and other myths should dispel much of the unwarranted panic about probate. Still, there are some undeniable downsides to probate. First, dealing with a slow-moving bureaucratic entity is never fun. The process is also public, and requires a full disclosure of all probate assets and their values. Additionally, assets that go through probate are exposed to certain creditors, including Medicaid estate recovery, which is the process by which assets are paid to the state for any Medicaid/MassHealth benefits

the decedent received.

In contrast to these downsides, there is one specific scenario where assets that go through probate court can be *better protected*. Spouses who establish a so-called supplemental needs trust through their wills for each other's benefits can protect their own probate assets for their spouse's benefit, so that upon the first spouse's death, the assets that go through probate and into the supplemental needs trust for the surviving spouse's benefit are instantly protected from the surviving spouse's long-term care/the nursing home expenses.

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