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# Public Information

## Section of Real Property, Probate, and Trust Law

### Public Information Web Site

The Public Information Web Site of the American Bar Association's  
Section of Real Property, Probate and Trust Law

### Estate Planning Answers

#### The Probate Process

##### What is Probate?

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At death, your will goes through **probate**. Probate simply means the process by which your last will is determined to be your final dispositive statement and which confirms the appointment of the person or institution you have named to administer your estate. The term **probate** is also used in the larger sense of probating your estate. In this sense, probate means the process by which assets are gathered, applied to pay debts, taxes and expenses of administration, and distributed to those designated as beneficiaries in the will. The **executor** or **personal representative** named in the will is in charge of this process, and probate provides an orderly method for administration of the estate. The executor is held accountable by the beneficiaries (and sometimes is supervised formally by a probate court). The executor is entitled to a reasonable fee or commission. Probate law generally encourages or provides for partial distribution during the period of administration; assets may generally be distributed in kind rather than sold during this time. The tax laws generally focus the responsibility for death tax filings and payments on the executor under a will. Thus, the choice of an executor is an important one.



The basic job of administration and accounting for assets must be done whether the estate is handled by an executor in probate or probate is avoided. In the recent past, lawyers and other professionals have advocated the use of probate avoidance techniques (including revocable trusts) in states where the probate process was perceived as being too slow and too costly. Many states have simplified or streamlined their probate processes over the years. In such states there is now less reason to employ such probate avoidance techniques.

##### Should You Avoid Probate?

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The living trust is often marketed as a vehicle that allows you to "avoid probate" upon your death. Probate is the court-supervised process of transferring property at death pursuant to the terms of a will. Many types of property routinely pass outside of the probate process. These include:

- life insurance or retirement plan proceeds which pass to a named beneficiary rather than your estate
- real estate or bank or brokerage accounts held in joint names with right of survivorship

While it is true that the property passing under the terms of a living trust upon the death of the maker of the trust will "avoid probate," it should be noted that there may or may not be actual value in that result. Probate laws are different in every state. In some states there are statutorily mandated court or attorney fees while in others those fees may be minimal. Many states have expedited or simplified court proceedings that are efficient and inexpensive for small or simple estates. A properly drafted will in many states can eliminate some of the steps otherwise required in the probate proceedings. In addition much of the delay and red tape customarily associated with probate is a result of the tax laws and tax filing requirements, which can not be eliminated through a living trust and the avoidance of probate.

A living trust can almost never totally avoid probate and a simple will is needed to "pour over" to the trust any property that has not been transferred to the trust during life.

Property that passes at death through a revocable living trust must first be transferred to the trust, administered by a trustee who may or may not charge fees, and then transferred out of the trust to the beneficiary. These costs and the costs associated with tax filings are often ignored by living trust

marketers. There may be other costs as well depending upon the jurisdiction, such as real estate transfer taxes. The comparison of cost between probate and a living trust should be made on a case by case basis.

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