

# WHAT EVERY SENIOR SHOULD KNOW ABOUT PROBATE





Want to see two groups who make the Republicans and Democrats look like one big, happy family? Then put into one room those attorneys who believe in probate and those who prefer their clients manage their affairs with a Revocable Living Trust. You'll get as contentious an assembly as you could possibly hope for.

For seniors, the debate has special meaning because the vast majority of probate cases revolve around the affairs of those Americans age 60 and over. This report from the American Academy of Estate Planning Attorneys explores the reasons for the debate and offers guidelines to help seniors steer clear of the fray.

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## WHAT IS PROBATE?

Just what is probate? First, it's important to note that it comes in two "flavors." Living probate is a legal process that determines your fate when you cannot, generally because you've been disabled by injury, illness, or mental incapacity.

But, the more common form of probate is death probate...Death probate is the process that disposes of your estate after you die. Relying on a will as your primary dispositive plan virtually guarantees that your estate will go through probate. But then again, so will dying without any estate plan at all.

Probate is designed to create a "final accounting" upon death. Now, this is not the same as when one stands before the pearly gates, but is intended to wrap up one's earthly affairs. Probate, the legal process of "proving up" a will, or verifying that a will is valid, takes place in one of two instances. First, if a person dies leaving behind a will, or second, if the deceased has died intestate, that is, has not left behind a will or estate plan of any type or the will cannot be found. In both of these instances, state law governs the actions taken by those left behind. In the first case, the probate process will verify the existence and validity of the decedent's will, provide for the appointment of an executor, or personal representative, who will then carry out an inventory of the estate and pay any claims and estate taxes due against the estate. Then the executor will manage the distribution of any remaining assets.

If no will is left behind or the will cannot be found, each state has its own laws covering distribution of assets, and the probate process will ensure that creditors are paid and distribution takes place according to these laws.

Many attorneys would draw your attention to the problems that come with probate: red tape, expense, publicity, delay, loss of control, and in the case of living probate, potential for personal humiliation.

## IS PROBATE EVEN NECESSARY?

“Death Probate” has these primary functions:

- It verifies the validity of your will.
- It inventories and establishes the value of your significant assets.
- It provides your creditors with the opportunity to make claims against your estate.
- It gives disgruntled family members a forum for challenging your will.
- Lastly, when all these steps have been completed, it transfers the title to your property to your heirs, as you’ve instructed in your will.

Do you really need probate to accomplish these tasks? No. There are alternatives such as the Revocable Living Trust.

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## HOW TO AVOID PROBATE WITH A LIVING TRUST

Whether you die with a will or without one, probate will be required if you owned any property in your own name.

A Living Trust makes probate unnecessary by changing the way you own your property. Although you still have absolute control over all your assets, just as if you owned them directly, you do not own property in your own name. Instead, your Living Trust owns your property. And you own your Living Trust.

At first blush, that can sound like a scary proposition. But it isn’t, because you are the trust maker, the trust owner and trust beneficiary. So you and you alone control your trust and the assets it owns. You can buy, sell, trade, derive income from, mortgage and give away your trust assets, just as before. You can change your trust, add to it, or even revoke it any time you want. Bottom line: the fact that your trust owns your property has little, if any, impact on the way you live and conduct business each day.

But what a difference the trust makes when you die. Then, the person you’ve chosen to take charge of your trust, your successor trustee, steps in and follows your direction for the disposition of your estate. Because you owned no property in your own name, there’s no need for probate. So there’s no publicity and, compared to probate, very little expense, delay or inconvenience for your family.

Living Trusts are also indispensable for avoiding the indignity of living probate, the court proceedings that determine who will oversee your affairs in the event of your disability. A Living Trust helps you ensure that your physical and financial needs are handled as you would want them to be.

The Living Trust isn't exactly a new idea. Its origins date back hundreds of years. More importantly for Americans, the concept has been used in the U.S. since 1765 when Patrick Henry drafted a trust for Robert Morris, governor of the Colony of Virginia. During this century its many proponents have included John F. Kennedy, William Waldorf Astor, John D. Rockefeller, H. L. Hunt, Bing Crosby and Frank Sinatra. As consumers become better educated about the pitfalls of probate, all signs point to Living Trusts becoming even more popular in the years ahead.

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## JUST FOR THE WEALTHY?

Now that you know all the problems that probate entails, it's probably the last thing you'd want to bequeath your loved ones. But is it a strategy worth pursuing only if you're a Rockefeller or Vanderbilt?

Absolutely not. Even if your estate is valued at no more than \$100,000, you should probably have a Living Trust to avoid death probate. And regardless of how much your estate is worth, you should definitely have a Living Trust if you want to avoid living probate.

Who should you turn to for help with your Living Trust? The American Academy of Estate Planning Attorneys recommends that you start with an attorney who concentrates on this area of the law. That's the best way to ensure that your legal professional has invested the time and energy to providing you with the most current estate planning techniques.

But be wary. Remember that wills and probate are also estate planning tools. So make sure your attorney focuses on the Living Trust, rather than wills.

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## GETTING THE MOST FROM YOUR LIVING TRUST

Once you've worked with your estate planning attorney to draw up your Living Trust, don't stop there. Taking advantage of everything this powerful estate planning tool has to offer requires these final steps:

- Make sure you fund your Living Trust. Remember that it only works if the title to your property has been transferred to the trust. If you keep your property in your own name, you've defeated its purpose. These days, most financial advisors are experienced in funding Living Trusts, so be sure to turn to your advisor for help if you need it.
- Keep your Living Trust current. As you acquire new property, be sure that you transfer title to these assets to your Living Trust.
- Ideally, a Living Trust is a living, breathing document, and a plan that will serve you for many years to come. That means, however, that you've got to take the time to have it updated as

your family's situation, your goals, and your needs change. A good estate planning attorney will stay in touch with you over the years to ensure your Living Trust continues to serve you well.

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## **PENNY WISE, POUND FOOLISH**

Yes, it is true that a Living Trust will cost you more up front than a “discount” will. But in estate plans, as in all other areas, you get what you pay for. The bargain you buy today might just cost you or your heirs a fortune – your fortune – down the road.

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## ABOUT THE ACADEMY

This report reflects the opinion of the American Academy of Estate Planning Attorneys. It is based on our understanding of national trends and procedures, and is intended only as a simple overview of the basic estate planning issues. We

recommend you do not base your own estate planning on the contents of this Academy Report alone. Review your estate planning goals with a qualified estate planning attorney.



The Academy is a national organization dedicated to promoting excellence in estate planning by providing its exclusive Membership of attorneys with up-to-date research on estate and tax planning, educational materials, and other important resources to empower them to provide superior estate planning services.

The Academy expects Members to have at least 36 hours of legal education each year specifically in estate, tax, probate and/or elder law subjects. To ensure this goal is met, the Academy provides over 40 hours of continuing legal education each year. The Academy has also been recognized as a consumer legal source by *Money Magazine*, *Consumer Reports Money Adviser* and Suze Orman in her book, *9 Steps to Financial Freedom*.