

Do You Need to Avoid Probate?

What is Probate?

It is the legal process of presenting your Will to the Court, after your death to authenticate it, and appoint your Executor. Your Will nominates the Executor, that Executor must be appointed by the Court in order to collect and distribute your assets as stated in your Will. However, because it is a legal process, there are many steps that must be followed before your Executor can be court-appointed.

- A Personal Representative is the person nominated by the Will to perform probate under the court's supervision before any beneficiary can receive their inheritance.
- Probate can be a complicated process even if all beneficiaries agree with the terms of the Will. In the case of a contested Will, matters become even more complicated. One of the reasons your Will might be contested is because in Virginia, the court requires that all heirs at law be notified that they might be a beneficiary even if that person is not named in the Will. Understandably, this requirement can lead to misunderstandings and hurt feelings. Wills can be even more difficult to probate in cases which involve blended families as in second-marriage situations; if you have minor children; or, if a beneficiary's whereabouts is unknown. If a beneficiary is under the age of 18, the court will need to appoint a separate attorney known as a guardian ad litem to represent them. The same is true if any of your heirs are legally incapacitated, such as a special needs child or spouse with Alzheimer's.
- The Personal Representative will have to submit the original Will, a family tree, filing fees, an inventory of the decedent's assets, a death certificate and, if the Will is not drafted with "self-proving" signatures by the witnesses, affidavits from the individuals who witnessed the Will must be produced. Only then does the Personal Representative receive the court's appointment to serve in this fiduciary capacity.
- After your Personal Representative is appointed, estate administration begins. It is that period of time the law requires the Personal Representative use in order to accumulate the assets and then report to the Court how he/she intends to distribute them. These reports to the court are known as "accountings" and they must be approved by the Commissioner of Accounts who is appointed by the court to serve as their agent. This period of administration is a minimum of nine months after the Personal Representative is appointed. In most cases, however, this process takes a year or more. If you die without a will, the probate process is similar, but the state's statutes determine who gets your assets.

Other than the sheer mind-numbing bureaucracy of probate, most clients are concerned with the costs, and length of time and the publicity of probate. We encourage clients to also consider other possible scenarios at their death. Yet there are those for whom a Will is the best plan. This could certainly be true in a case in which your heirs all will agree and your assets are centralized and there is no chance that your estate might be subjected to estate taxes. In some cases, such as planning for married couples where one spouse is incapacitated, a Will can serve as the only effect tool to meet their goals and objectives.