

**PJG**

Patrick J. Gibbs, P.C.  
Attorney at Law  
Roswell, Georgia

**Wills, Trusts and Estates  
Corporate and Business Law**



## **Who's Afraid of Probate?**

Over thirty years ago, when I first studied estate planning in law school, the professor graded us on the basis of a very long memorandum we each wrote answering specific questions drawn from his experience in private practice. One task was to respond to the hypothetical client who came in after reading the book, "How to Avoid Probate."

Today people are still selling books, and even seminars, which avowedly solve the problem presented by using a last will and testament to wind up the affairs of a deceased person. They all share the defect of over generalizing with a one-size-fits-all approach.

Strictly defined, "probate" is the process of proving that a written document is the properly executed last will and testament of the decedent. When there is no dispute as to the genuineness of the document, or the "testamentary capacity" of the person making it, the people who are the "legal heirs" will usually agree in writing to its admission into probate.

The legal heirs in this context are those persons who are most closely related by marriage or blood to the deceased according to state law. They are to be distinguished from the beneficiaries of the will, who are the persons who actually receive property from the estate because of the dispositive provisions of the will.

In those cases where there is no controversy, the person named to serve as executor of the will files a probate petition, and the written consent from the heirs, at the Probate Court and is sworn in without any delay or even a hearing. The probate of the will is done.

What most people connect to the term "probate" is actually the settlement of the decedent's affairs. That includes safeguarding assets, paying debts, collecting money owed the estate, filing tax returns and distributing the property in accordance with priorities set by law and the instructions of the decedent (expressed in his will or a trust agreement).

For many years we have been told, often by people who have something to sell, that a written trust agreement, made while living, will avoid all this trouble and expense. But regardless of whether there is a will or a trust controlling a person's property at death, the same work must be done by the executor and/or the trustee.

Payment of debts and taxes, the assembly and distribution of assets — all this must be done. Even worse, if the decedent established a trust and did not put his assets in the name of the trust, the trust document is not enough. There has to be an up-to-date will to cover the assets that are not owned by the trust, or payable to the trust, at the time of the death. Otherwise, the decedent's intentions are likely to be frustrated.

I have seen reports of people paying \$2,000 to \$3,000 to multi-state "trust mills." The Federal Trade Commission has been investigating these scams since 1997 because the worst of them involved no personal consultation with an attorney and no effort to move assets into the trust. The irony is that a

local attorney can prepare a complete set of estate planning documents, tailored to the individual client, for less than half that cost. As far as the do-it-yourself kits, one question suffices: If it was that easy, why would law students need two semesters (usually after two years of legal studies) on wills, trusts and estate planning?

Some people have sufficiently complex family relationships or property arrangements that a revocable trust agreement could be useful for them. Owning real estate in two different states is a classic fact pattern that often necessitates such a trust, as long as the land is deeded into it. When there is no one in the family qualified to serve as executor or trustee over a very large estate, a trust agreement with a corporate trustee might be appropriate.

If you want a more expansive discussion of estate planning than the space available here permits, you can contact a mutual fund company, such as The Vanguard Group (800 662-7447), and ask for brochures on that subject and the investment services often needed while implementing an estate plan.

Obviously I do not recommend reading "How to Avoid Probate." If you go to the bookstore, or online to Amazon.com, look for such books as "The New Book of Trusts" by Steve Leimberg, which tell you the pros and cons of different estate planning tools. Be thankful that you live in Georgia, a state where the legal system is so user-friendly that you need a particular reason, individual to you, to worry about avoiding probate.

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Patrick J. Gibbs, P.C.

Patrick J. Gibbs practices law in Roswell, Georgia with a concentration on Wills, Trusts and Estates. This article is intended to be educational. Legal advice should be obtained as to individual needs before taking any action.