

Ask the Probate Judge—Not All Wills Need to be Probated

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Q1: I just encountered a woman who insisted that she avoids probate by having a will, even though all of her assets are in her sole name without beneficiary designations. I know you've discussed this before, but it might be helpful to explain that a will (or lack of a will) does not avoid probate. M.G.L., Albuquerque

Q2: In a couple of your past columns, you alluded to the fact that all wills do not have to be submitted for probate. I was under the impression that all wills other than a pourover will associated with a living trust had to be submitted for probate. What are the circumstances under which a will does, or does not, have to be submitted for probate? Are your columns available on-line? I live outside of Angel Fire and frequently do not get to town to purchase a paper. Thank you. J.S.

Since these two questions are related, I am answering them together. I'm going back to the basics with this column.

First, let's define a few terms. A "will" is a legal document that contains instructions about who should serve as your personal representative and who should receive your property after your death.

Technically, "probate" is a court proceeding to "prove" a will is valid. But in reality the term "probate" is used more loosely to describe a court proceeding to appoint a personal representative and to probate a will, if any. Once the court appoints a personal representative, he or she pays creditors and taxes and distributes a decedent's assets according to the will or the laws of intestate succession, if there is no will.

A will alone does not avoid probate. HOW YOUR PROPERTY IS TITLED determines whether your heirs or devisees can avoid probate. HOW YOUR PROPERTY IS TITLED determines whether your will must be submitted to a court for probate.

Despite my repeated assertions, some people believe that if you have a will, your estate does not need to be probated. Will or no will, if your estate contains assets worth more than \$30,000 that are titled in your *sole name* or as *tenants in common*, those assets require a court proceeding after your death to pass them to your heirs or devisees. If you have a will, it directs who receives the property that is held in your sole name or tenants in common. If you have no will, the laws of intestacy specify who receives your assets.

Previous columns have stated that assets held in joint tenancy, payment on death (POD) accounts, transfer on death (TOD) accounts, other beneficiary accounts, transfer on death deeds (TODDs), and trust property pass directly to the surviving joint tenant or named beneficiaries. These assets pass irrespective of the will and without a court proceeding.

To summarize, in Question 1 the woman is incorrect. You do not avoid probate by having a will. You avoid probate by using joint tenancies, POD accounts, TOD accounts, other beneficiary accounts, TODDs, and trusts. (Warning: avoid making minor children joint tenants or beneficiaries.)

Regarding Question 2, not all wills have to be submitted for probate. If everything a decedent owns at the time of death is titled in joint tenancy, POD, TOD, TODDs or

trusts, there should be no assets that require a probate. All of the decedent's assets should transfer without a court proceeding to the surviving joint tenant or POD, TOD, TODD or trust beneficiaries. The will would stay in a drawer, gather dust, and eventually become a historical document unless you needed to probate it to obtain authority to acquire a decedent's medical records or file a final income or estate tax return.

Past columns are available for free on line at www.bernco.gov/probate_judge (see columns listed by topic on right side of page).

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