

FIVE REASONS TO AVOID PROBATE, AND THREE REASONS NOT TO.

Five reasons to avoid probate by using a living trust.

First, it requires frustrating intrusion by the court, lawyers, and the public into a very emotional, private, family time. A judge will determine who is a legitimate creditor, and will rule on distributions to children and other beneficiaries. Your estate may have to hire a lawyer to shepherd the executor through the legal maze.

Second, all of your affairs will become public knowledge. The contents of your will would be on file in the courthouse, for all to read -- and wills are read. They are read by salesmen, by newspaper reporters, and by the morbidly curious, all seeking in one way or another to take advantage of the publicity required by the probate process.

Third, probate takes time. Unless your executor can certify that there are no debts owed by the estate (a rare occurrence, since almost everyone leaves some small debts behind) and are willing to sign a personal guarantee of your debts, the probate laws mandate that your assets generally may not be distributed for six months after you die, to allow creditors time to petition the court for full payment. Any assets distributed before that time come with a heavy cost for your executor. He or she is personally liable for the repayment of all of this amount, even if the beneficiaries to whom distribution is made have already spent the amount distributed. Thus, your executor will likely be very hesitant to distribute before all debts and taxes are paid. The court, not your family, will supervise and authorize the settling of all debts and the payment of inheritances, in its time and with its delays.

Fourth, on a national average the probate process takes from five to eight percent of your family estate out of the hands of your beneficiaries and gives it to the courts and other outside individuals. In Maryland, this can be higher, but is usually somewhat lower.

Fifth, if you are not competent at any time before your death, the trustee of your living trust can serve as the guardian of your property. This can avoid the expensive and embarrassing public guardianship proceeding, where your children have to prove that you are not able to manage your own affairs. A living trust combined with a power of attorney can provide the most complete protection available.

Three reasons not to avoid probate.

First, probate shortens the “statute of limitations” for presentation of debts. A debt of or claim against you must be presented within certain time limitations in order to be enforceable. These time limits run up to twelve years. By the filing of probate, your executor will shorten that statute to six months from the date of your death. Your creditors are charged with the knowledge of your affairs, and if they do not file in time, their claims will not be honored.

Second, probate can provide needed supervision and protection of your estate plan if your family or creditors are likely to be contentious, overbearing, or unscrupulous. If you know that your children hate each other, it is a recipe for disaster to name one the trustee of a revocable trust without court supervision. Naming all of them as co-trustees in such a situation can be even worse, as the administration of the trust becomes embroiled in family strife. Better to set up a will, with the attendant disadvantages, and allow a dispassionate court to supervise administration of the estate, and even better, appoint a professional executor. If you need to use a trust for other reasons, use a professional trustee in this circumstance.

Third, a will is the only mechanism whereby you can name a guardian for your children in the State of Maryland. The appointment of the guardian named in your will be presumed to be in the best interests of your children, and anyone contesting this appointment must overcome high hurdles to defeat your selection. If you plan with only a living trust, you forego this important opportunity to care for your children.

How to achieve the best of both worlds: Use a will for shortening the statute and for guardianship, and use a trust for asset management and distribution.