

## Techniques for Avoiding Probate

You've probably seen the headlines: "Come Learn How to Avoid Probate!" Probate is a process for determining if a decedent left a valid will, and for distributing the decedent's assets to the beneficiaries named in the will; or if the decedent had no will, to the heirs prescribed in the state's intestacy laws. Probate can be lengthy and costly, and thus the admonition to avoid probate is not frivolous.

Techniques that exclude property from probate are called *will substitutes*. They fulfill the main function of a will by designating persons to receive a decedent's property, without the need to consult a will or state intestacy laws. Will substitutes work in two ways: by right of survivorship and by beneficiary designation.

The most widely used will substitute, for both real and personal property, is a form of property ownership called joint tenants with right of survivorship (JTWROS). When one joint tenant dies, the surviving joint tenant becomes the sole owner of the property, regardless of any provisions in the deceased tenant's will. Only a death certificate and affidavit by the surviving tenant need be recorded. However, while JTWROS is inexpensive to establish, it has two potential drawbacks when the tenants are spouses.

First, if the spouses own property in excess of \$1.5 million in 2005, placing all property in JTWROS could cause payment of more estate tax than necessary. The estate of the first spouse to die pays no estate tax because the marital deduction allows one spouse to leave everything to the survivor tax-free. However, when the second spouse dies, his or her estate will pay tax on the excess above \$1.5 million. This tax can be avoided by proper planning in a will.

A second situation in which property held in JTWROS is not effective is in a second marriage, where one or both spouses desire to leave assets to children from a first marriage. Under JTWROS, only the children of the surviving spouse in the second marriage may ultimately receive the property. However, a properly drawn will that establishes a qualified terminable interest property (QTIP) trust will ensure that certain assets will pass to children from a prior marriage.

Another popular will substitute that works by beneficiary designation is the *living revocable trust*. (This trust may often be what is suggested in seminars on how to avoid probate.) A living revocable trust is funded with the grantor's assets when the trust is established, and the grantor's will (known as a pour over will) often adds other assets to the trust after death. The grantor maintains control during life by means of the ability to amend or revoke the trust. The trust designates beneficiaries to receive the trust assets at the grantor's death. Just like a will, beneficiary designations can accomplish estate tax and distribution objectives. (However, these objectives cannot be met with property held in JTWRROS.) A living revocable trust must be drafted by an attorney, and is therefore more expensive than merely titling property as JTWRROS.

**Additional resources:**

A short primer on probate can be found at: <http://freeadvice.com/law/539us.htm>

Read more about living trusts at: <http://www.turbotax.com/articles/FAQonLivingTrusts.html>

Learn more about joint tenancy at: <http://www.finance.cch.com/text/c10s10d360.asp>