



www.stanzialaw.com

ESTATE OF THE UNION

A Newsletter from the team at Stanziola Estate Law

Probate: To Avoid or Not to Avoid



Probate avoidance is one of the primary motivating factors for our estate planning clients. They have either experienced the probate process as a result of the death of a loved one or have heard horror stories from friends and family members. This article discusses the pros and cons of the probate process. While some may argue there are advantages, the costs, delays, and public nature of the probate process outweigh any advantages associated with this process in our opinion.

Probate Defined.

So, what is Probate exactly? It is the legal process of proving the validity of a will and ensuring the assets of the deceased are properly distributed to beneficiaries or heirs through the personal representative of that will. If no will exists (also known as passing intestate), the assets are distributed according to state law via a court appointed administrator.

The probate process contains basically 5 steps: 1) assessing the validity of the will (if there is one); 2) identifying the property in the estate; 3) valuation of the estate property; 4) payment of the estates taxes and debts; and 5) distribution of property to the appropriate beneficiaries/heirs.



Don't have an estate plan in place? Are you wondering if your current estate plan is subjecting any of your assets to probate? Are you unsure of the next steps? Please contact us at Stanziola Estate Law for a complimentary estate evaluation so we can help determine what options are right for you!



Probate Positives

Probate is generally viewed as a negative consequence to ineffective planning. However, there are instances when having an estate go through the probate process may be beneficial:

Cost and Time

In a nutshell, there will be more money and time spent by the client to implement an estate plan than to not. So, it comes down to whether the client would prefer to spend less time and money up front or if they prefer to defer that cost to their beneficiaries and heirs. If the latter holds true, the client can have a Last Will and Testament drawn up, or simply let the assets pass by way of intestate succession.

Estates with More Debt than Assets

Prior to any assets being distributed to beneficiaries and heirs, creditors have the right to make a claim on the estate for any outstanding debts left behind by the decedent. If there is more outstanding debt than there are assets, priority and order of payment of debts must be established. The Probate process can provide that priority. If a fiduciary attempts to handle this on their own, they could be held liable if the debts aren't resolved correctly.

Creditor Claim Time Limits

As discussed above, creditors are given the right to make a claim against the estate for any outstanding debts. For any assets going through probate, notification must be made, in writing, to creditors that their debtor has become deceased, thus allowing the creditor to make a claim on the estate. Once written notification is given, the clock starts on the claims process. Creditors generally have a few months to correctly make a claim on an estate that has been probated. If an estate has not been probated however, creditors could come after the debts for years after the debtor has died. This will be discussed further in the Negatives section.

Reduce Administration Errors

A Trustee of a Trust and a Personal Representative of a Will take on the role of a fiduciary when they accept the position. As such, they can be held liable by multiple entities if mistakes are made in administering the estate. In addition to being personally liable for the decedent's unpaid taxes and government debts, they could also be held liable for violations of fiduciary duty to the beneficiaries of the will or trust.

As described above, there are some instances in which having an estate probated can be beneficial. However, for most estates it is unnecessary and not recommended. With a relatively small investment of time and cash, you can save your loved ones a lot of time, money and, most importantly, stress, after your death.



Probate Negatives

There are instances where having an estate probated is beneficial. However, the following cons to the process are why most clients want to avoid it.

Cost

Above, we discussed the fact that there is generally more of a cost and time commitment in implementing an estate plan to avoid probate than to not. While this concept is true, it does not tell the whole story. By having the estate pass by will or intestate, the decedent is avoiding the up front, out of pocket cost. However, the amount the estate will have to pay for the probate process will (most likely) be more than the cost to implement an effective probate avoidance estate plan.

An estate going through probate will be subject to fees for bond premiums, publication costs, court costs, attorney fees, etc. The largest cost of those will be the attorney fees. In Kansas, there is no fee set by state law, the rule is the fee must be reasonable for the work performed. In Missouri the fees are set by statute; the attorneys can charge a percentage, based on the value of the estate. By allowing the estate to pass through probate, you are exposing beneficiaries and heirs to exponentially more cost than if the client had implemented a probate avoidance estate plan.

Time

If the cost of a probated estate does not raise a red flag, the time it takes to resolve a probated estate should. If your estate is small enough, it may avoid probate all together. Most states have a minimum value threshold, in Kansas it is \$25,000; if your estate value does not exceed that, then it bypasses probate entirely.

However, if the value of your estate exceeds that threshold, and is passing by will or intestate succession, it must be probated. For a smaller estate that is uncontested, it could be resolved in as little as six months. For a more complex estate or for a will that is being contested, it could take years!

Probate is a Public Process

Probate is an entirely public process. The upside to this was discussed above with regard to the decreased timeframe in which creditors can file claims for debts against the decedent's estate, which can protect beneficiaries and heirs from claims later down the line. The downside is that everyone can now access information regarding the assets in the estate.

Most clients will not have to worry about avoiding creditors as most want the outstanding debts paid immediately, whether probate is involved or not. However, as a practical matter, avoiding probate may provide more protection from creditors for those clients that list creditor protection as a primary concern. Avoiding probate keeps your estate private and no written notice is required to be sent to creditors. Not being required to send notice means that creditors may not know of the decedent's death for years after the fact. Creditors will have a longer timeframe to recoup the debt. But, if the outstanding property is difficult to locate, or the debt is small, it may not be worthwhile for the creditor to track down the new owners to try and collect.



Did you know...

Missouri is one of a handful of states that allow a probate attorney to charge a fee based on the value of the estate? According to MO Rev Stat § 473.153, the minimum compensation for an attorney is as follows:

- Less than \$5000 = 5% of the estate value;
- \$5001 - \$25,000 = \$250 + 4% of estate over \$5000;
- \$25,000 - \$100,000 = \$1,050 + 3% of estate over \$25000;
- 100,001 - \$400,000 = \$3,300 + 2.75 % of estate over \$100,000;
- \$400,001 - \$1,000,000 = \$11,550 + 2.5% of estate over \$400,000;
- Over \$1,000,000 = \$26,550 + 2% of estate over \$1,000,000.

Please note that these are only the minimums, if an attorney can show the court that a higher fee is reasonable, they may charge it.

Questions or comments? Jim Stanziola (jim@stanzialalaw.com) or Nick Adams (nick@stanzialalaw.com)

Note: The contents of this newsletter are intended to be informational; under no circumstances should this be interpreted as legal advice.