Avoiding Probate is Not Always Beneficial

When is the last time you have ever heard someone talk about the benefits of probate? Probably, most of you never have. Typically, people who are in the business of selling various estate planning documents and services allege three general negatives about probate: it is a cumbersome process, takes a long time, and has high costs. And what are these people typically selling? They usually are selling estate planning documents and services that help you avoid probate, e.g., typically revocable living trusts.

But have you ever sat back and asked yourself: What is probate? What is the purpose of probate? What are the usual details of the process? What are the typical reasons for time delays? What commonly generates costs during probate? And even if we choose an estate plan to avoid probate, can a general process, a typical time-frame, and common costs be avoided? Before we avoid something like the plague, we must understand if it has been diagnosed correctly as the plague. Throughout this legal essay, I will compare the probate of a Will with the administration of a once-revocable trust, in terms of the general process, some of the time delays, and typical costs.

What is Probate?

Please note that this legal essay explains general rules for probate in Indiana, and as with most rules of law, there are exceptions. In Indiana, for instance, the general rule is that probate property must be administered by the local county probate court; however, estates with probate property (less liens and encumbrances) not exceeding $50,000 can be administered without the appointment of an executor utilizing a small estate affidavit (Indiana Code § 29-1-8-1). As a general rule, “probate property” refers to the property you own which does not transfer at your death by a beneficiary designation (except if your estate is the beneficiary) and is not owned at your death as either a payable on death (POD) account at a banking institution, a transfer on death (TOD) account at a financial institution, a joint owner with right of survivorship, or a properly drafted, executed, and funded revocable living trust. It is always important, of course, to contact a qualified attorney regarding these intricate matters.

In common vernacular, “probate” essentially refers to the whole process of:

1. filing and proving the decedent’s Will with the local county probate court,
2. appointing an executor to administer the decedent’s estate, with the issuance of “letters testamentary” or “letters of general administration” providing conclusive evidence of the executor’s authority,
3. providing notice to known or reasonably ascertainable creditors that administration of the decedent’s estate has begun,
4. obtaining a federal tax identification number for the estate, collecting the decedent’s assets, determining their date-of-death values, and preparing an inventory,
5. re-titling and possibly liquidating some of the decedent’s assets,
6. paying expenses, allowed creditor claims, and taxes,
7. distributing to heirs or legatees their inheritances, and
8. preparing a final account for the heirs and filing a closing statement.

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[The Indiana Probate Code refers to “probate” as merely filing and proving the decedent’s Will in the local county probate court and refers everything else in the process as estate “administration.” In this legal essay, I sometimes use the term estate “administration” for what is in common vernacular referred to as “probate.”] Please note that typically steps one, two, three, four, and eight require petitions to be filed with the local county probate court. For maintaining privacy regarding the details of the actual inventory, a verified “Certification of Preparation of Inventory” may usually be filed instead of the actual inventory for step four; but if a local probate court rule requires the actual inventory to be filed, then one can petition to have it sealed for privacy.

Before we proceed, let us take a moment to ponder the general process of probate. The overall process makes sense if you think about it. After someone passes away, a particular person should be in charge of collecting and inventorying the date-of-death values of the decedent’s assets, paying all of the decedent’s creditors who are determined to have legitimate claims, ensuring income and transfer tax compliance, and distributing to heirs or legatees their inheritances, which are cleared of debts and encumbrances. The particular person in charge should prepare a final accounting and make it available to the heirs, at least for what they have received.

Whenever anyone passes away, this general process must be accomplished. Even if the decedent had a fully funded revocable living trust when she passed away, the successor trustee must follow the general process in the preceding paragraph to properly administer the trust. Now, it is true that with a trust the successor trustee is not required to file any petitions with the local county probate court (assets titled in the trust are non-probate) and the trust does not become public record because it is not filed with the probate court. But whether you have a Will or a revocable living trust, the overall general process of administration is essentially the same. And yet, some sales people who are critical of probate may still allege: “It’s the specific timeline and costs associated with the probate court that make it worthy to be avoided, not the general process itself.”

What are the Typical Reasons for Time Delays during Probate?

First, after the executor is appointed by the probate court, he or she must publish notice in a local newspaper of estate administration and mail specific notices to known or reasonably ascertainable creditors. From the date of first publication of notice of estate administration, most creditors have a 3-month period during which they can file claims or otherwise be barred forever from collecting what they allege the decedent owed them. This 3-month delay from the date of the first publication of notice of estate administration is unavoidable. It is mandated by the Indiana Probate Code. Typically, a partial distribution of specific bequests to heirs or legatees can occur in probate after the 3-month period for creditor claims ends.

Interestingly, according to the Indiana Code § 32-17-13-2 and 3 (recently added to the Indiana Code in 2002), if the decedent’s probate estate is insufficient to satisfy both allowed creditor claims and statutory allowances of the decedent’s spouse and children, then the successor trustee of a trust (revocable at the settlor’s death) is then liable for these creditor claims and statutory allowances. Moreover, because of Indiana Code § 30-4-6-14(b) (recently added to the Indiana Code in 2005), the successor trustee of a trust (revocable at the settlor’s
death) should wait more than 120 days after the settlor’s death before distributing trust property in accordance with the terms of the trust to prevent himself or herself as the successor trustee from being personally liable for a distribution subject to creditor claims; and even then, to receive the statutory protection from liability for a distribution, the successor trustee must not be aware of a pending or imminent trust contest. Significantly, to prevent being time-barred from collecting a claim, a creditor must initiate a proceeding against the successor trustee within 9 months after the decedent passed away or within 60 days after the allowance of his or her statutory claim; the proceeding can even be in a separate civil action against the successor trustee of the trust. Thus, a successor trustee who has any doubt regarding the existence of creditor’s claims should not make a complete distribution of assets to trust beneficiaries until 9 months (yes, 9 months) after the decedent’s death. Therefore, the successor trustee typically makes only a partial distribution after the 120-day time period to ensure that he or she is not personally liable to creditors for allowed claims.

Second, a surviving spouse has a right to elect to “take against the Will.” If the surviving spouse was for good cause dissatisfied with the amount of property left to him or her under the provisions of the deceased spouse’s Will, the surviving spouse may be able under the Indiana Probate Code to file a statutory election to “take against the Will” and then would be entitled to receive a share of the deceased spouse’s net probate estate equal to a certain amount of money listed in the Indiana Code § 29-1-3-1, depending on whether or not this was a first marriage and if they had children together. The underlying statutory purpose is to prohibit a spouse from completely or predominantly disinheriting his or her surviving spouse. The surviving spouse has a 3-month period from the date of the court order admitting the Will to probate to file a statutory election to “take against the Will.” The date of the court order admitting the Will to probate typically is right before the date of first publication of notice of estate administration. Again, this 3-month delay is mandated by the Indiana Probate Code. Interestingly, for trusts (revocable at the settlor’s death), the Indiana Code § 30-4-2-16 implies and Indiana case law has held that the surviving spouse may have elective share rights against the trust depending on the circumstances surrounding the creation of the trust. Thus, a time delay for exercising statutory elective share rights may also apply to the administration of once-revocable trusts.

Third, an interested party has a 3-month period from the date of the court order admitting the Will to probate to initiate a proceeding in the probate court to contest the Will’s validity. Interestingly, according to the Indiana Code § 30-4-6-14(a) (recently added to the Indiana Code in 2005), a person may contest the validity of a trust (revocable at the settlor’s death) within the earlier of (a) 90 days after the person receives from the successor trustee a certification of the trust and a statutorily prescribed notice from the successor trustee or (b) 3 years after the settlor’s death. Again, these time delays for contesting the validity of either a Will or a once-revocable trust are fairly similar and unavoidable. They are mandated by the Indiana Code.

Finally, income and transfer tax compliance work probably causes the greatest time delays in probate. In terms of income taxes, the decedent’s final 1040 and IT-40 returns must be prepared and filed for the personal income earned during the beginning of the year of his or her death, and fiduciary income tax returns (Forms 1041 and IT-41) may need to be prepared and filed if the decedent’s estate generated enough income from the time of death to final distribution to heirs when the estate is closed. In terms of transfer taxes, first, the federal estate tax return
(Form 706) may need to be prepared and filed if the decedent’s gross estate (the date-of-death value of all probate and non-probate property plus the decedent’s post-1976 lifetime taxable gifts) is greater than the decedent’s lifetime applicable exemption amount ($2 million for decedents dying in 2006 – 2008). Please note: when one must file an estate tax return is different than when one must pay estate taxes. Second, the Indiana inheritance tax return (Form IH-6) may need to be prepared and filed if Indiana inheritance taxes are due, which is a tax on receiving property (heirs are put into classes depending on how closely they are related to the decedent and the classes have different exemption levels and progressive tax rates). If no Indiana inheritance taxes are due, then an inheritance tax exemption affidavit (IH-Exem) must be prepared and filed with the County Assessor and a petition may also be prepared for an order from the probate court to confirm that no inheritance tax is due (a protection for the executor against tax liability). Third, consents to transfer (Forms IH-14) may need to be prepared to have corporate and banking entities either re-title or release certain intangible assets passing at death. In sum: if an estate, whether large or small, is neither complicated nor has any asset valuation problems, then most of the time delay amounts to waiting for transfer tax closing letters from the federal Internal Revenue Service and/or the Indiana Department of Revenue. And these time delays apply whether or not probate is avoided.

Interestingly, the successor trustee of a trust (revocable at the settlor’s death) must also ensure income and transfer tax compliance. Moreover, the only way to completely avoid transfer tax compliance work (and the corresponding delays in administration) is if all of the decedent’s assets pass to the surviving spouse in ways that qualify for the unlimited marital deduction or pass to 501(c)(3) organizations in ways that qualify for the charitable deduction; and these deductions can happen whether you avoid probate or not. In other words, probate avoidance techniques in Indiana are transfer tax neutral.

In summary, the primary time delays for both probate and trust administration are fairly similar and unavoidable. The executor and successor trustee must patiently wait out the time periods allotted to see if: creditors have claims, a spouse takes an elective share, or interested parties contest the validity of either the Will or trust being administered. Moreover, the executor and successor trustee must ensure income and transfer tax compliance, which causes time delays.

**What Services Commonly Generate Costs during Probate?**

Some cost is involved, of course, when executors file petitions at the local county probate court with the assistance of a qualified attorney. But one must remember that in Indiana there are two types of probate: supervised and unsupervised. Supervised administration involves extensive court oversight, in which most actions of the executor require prior approval by court order. As one might expect, if supervised administration involves numerous petitions, hearings, and court orders before the executor may act, then the cost increases proportionally. But if the heirs are quite contentious, supervised administration by the probate court may be preferred to protect the executor from liability and assist in settling numerous squabbles. However, if the heirs get along well, unsupervised administration may work best, in which there is little probate court oversight and only a few petitions are filed with the probate court. And as you might expect, the cost decreases proportionally. Most estates probated in Indiana today undergo
unsupervised administration and the estate can be converted to supervised administration at anytime in the process, if the need arises.

Interestingly, the successor trustee of a trust (revocable at the settlor’s death) may be a corporate fiduciary that charges a fee for trust administration relative to the size of the trust. If the successor trustee is not a corporate fiduciary, he or she typically hires an attorney and/or Certified Public Accountant to assist in trust administration. Administering, settling, and properly distributing trust assets are not always easy tasks, depending on the type of assets in the trust and the size of the trust. Moreover, if the trust document has some ambiguity because it was poorly drafted, the successor trustee in Indiana can “docket” the ambiguous trust provision in the local county probate court for assistance in interpreting it and to protect himself or herself from liability for the interpretation eventually acted upon. In addition, it typically costs more to have a revocable living trust initially drafted and funded relative to the initial drafting of a Will; therefore, some argue that in all practical terms one is paying for at least some of the costs of probate up-front when one initiates a revocable living trust-based estate plan instead of a Will-based estate plan.

But nothing generates more cost in probate than income and transfer tax compliance. And has been noted several times already, the successor trustee of a trust (revocable at the settlor’s death) must also ensure income and transfer tax compliance. Most of the professional fees and time delays in administering either an estate in probate or a once-revocable trust are caused by mandatory income and transfer tax compliance. For instance:

• Obtaining the date-of-death values for assets the heirs or legatees inherit is important, not only for preparing an inventory, a federal estate tax return, and an Indiana inheritance tax return, but also to provide the heirs with the new stepped-basis of capital property they inherit. **Whether or not probate is avoided**, if the heirs at a later date sell the capital property inherited, they need to know what the basis of the property was at the date of the decedent’s death to compute capital gains or losses at the date of sale for their income taxes.
• **Whether or not probate is avoided**, a federal estate tax return (Form 706) may need to be prepared and filed (as stated already herein).
• **Whether or not probate is avoided**, an Indiana inheritance tax return (IH-6) may need to be filed. And even if no inheritance taxes are due, then an Indiana inheritance tax exemption affidavit (Form IH-Exem) should be prepared and filed with the County Assessor to confirm that no inheritance taxes are due (as stated already herein).
• **Whether or not probate is avoided**, after an Indiana inheritance tax return is filed, the Indiana Department of Revenue has 120 days to seek a redetermination of the inheritance tax.
• **Whether or not probate is avoided**, consents to transfer (Form IH-14) may need to be prepared for Indiana inheritance tax compliance. Unless permitted by statute, most of the intangible assets of the decedent (probate or non-probate) held by corporate and banking entities may not be re-titled or distributed to heirs/beneficiaries until the entities receive a completed consent to transfer approved by the County Assessor (as stated already herein).
• **Whether or not probate is avoided**, the executor of the probate estate or the successor trustee of a once-revocable trust cannot consider the inheritance tax liability of the decedent to be
completely closed until after the Indiana Department of Revenue issues an inheritance tax closing letter.

- **Whether or not probate is avoided**, the Indiana Department of Revenue will not issue an inheritance tax closing letter until after they receive a federal estate tax closing letter from the Internal Revenue Service, if a federal estate tax return was filed.

### Conclusion

Snyder & Snyder hopes that this legal essay has introduced you to the notion that not everything in estate planning is black and white. That is, whether one should use a revocable living trust or a Will truly depends on the circumstances. There are advantages and disadvantages to both. If there are a lot of potential creditors, for example, then a Will-based estate plan may work best to utilize probate’s shorter 3-month time period for creditor claims. Certainly, a revocable living trust is the most flexible way to hold non-probate property; but avoiding probate may not be beneficial, depending on the circumstances. The main point, however, is that it is important for you to be fully informed about the advantages and disadvantages of various estate planning alternatives so that you can make an informed decision that meets your estate planning goals.

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