Many estate planning strategies are designed to avoid probate. When you start with this priority, there are certain steps that make sense to help you achieve that goal, along with other objectives.

But before assuming that probate avoidance should be your priority, it is helpful to consider whether probate is something that needs to be avoided in your particular situation, and if so, why that is the case. If you contact us for a free consultation, we can discuss the issue and find the right starting point for your estate plan. It's not possible to give that type of personal analysis in a blog like this.

However, here we can provide some general background information to get you started thinking about whether you would want to consider planning to avoid the need for probate.

Your Probate is Something Other People Will Have to Deal With

The first thing to understand about avoiding probate is that you will never need to deal with probating your own estate, regardless of whether you plan meticulously or leave everything to chance. The probate process is a legal process that other people need to deal with after you have passed away. Usually, those other people are your closest family members, but if you have set up plans to pass your property through someone else or you have named a professional to manage your estate after you pass away, then whoever you have designated will have the job of managing your estate during the probate process.

When people engage in strategies to avoid probate, they are generally trying to save

time, headaches, and money for their loved ones. Estate planning for probate-avoidance is a selfless task that is designed to benefit others rather than yourself.

Overview of Probate

We use the term “probate” in a broad sense to refer to the legal process of managing someone’s estate after they pass away. The estate is property that is not set up to transfer to someone directly. For instance, if you have added a transfer-on-death clause to your bank account, then when you die, the funds in the account go directly to the person you’ve named. But if your account doesn’t have a transfer on death clause or some other provision, then it becomes part of your estate.

The State of Texas has established different processes for managing estates. Some of these processes are referred to as probate, and others have different names. The more property in the estate, the more complex the process may need to be. The process is also more complex when people are fighting about who should be in charge or how property should be distributed.

Generally, whatever process is used, the laws are set up to ensure that the debts of the deceased person are paid before any heirs or beneficiaries receive any of the deceased person’s property. Priority goes to paying funeral expenses. Taxes also need to be calculated and paid.

In some cases, an attorney will ask the court to award a family allowance to family members to provide for their needs during the probate process, which can take up to a year or more to complete. Without special permission, loved ones cannot use property in the estate for their own purposes until that property has been officially distributed to them.

Different Types of Probate

One reason that there's no one-size-fits-all answer to the question about whether you need to avoid probate is that the probate process can be vastly different in various situations. Here we will explore some variations in the probate process, but the specifics of the situation will determine what probate is like in a particular case. Some of the issues that affect the type of process used include the type and value of property in the estate and the degree of conflict anticipated in the administration process.

The process and outcome differ when the deceased person did not leave a will, but the existence or lack of a will is usually not the deciding factor in determining what type of probate process will be used.

Small Estates Affidavit

The greatest amount of flexibility exists for estates considered "small." Someone with a great deal of property can still leave a small estate if they have set up most of their property to transfer directly and not become part of an estate.

Under Section 205.001 of the Texas Estates Code, if someone dies leaving an estate valued at no more than $75,000 (not counting the value of the family home) and there is no will, then, so long as there are enough assets to cover the person's debts, it may be possible to use a Small Estate Affidavit to settle the estate. There are several requirements that must be satisfied to use this process, in addition to the requirements regarding the value of the estate.

At least 30 days must have passed since the date of death
No one has filed a petition to be named the personal representative of the estate

Every heir (or their legal guardian) signs the affidavit agreeing to use this process to settle the estate

Other requirements may also apply. If this process is used, the affidavit will need to be prepared to meet the legal requirements of the local court, and it must be approved by the court.

Muniment of Title

When a deceased person left a will and only simple assets, then it may be possible to settle the estate using a Muniment of Title. This is a simplified form of probate. The court can admit the will as a Muniment of Title if the judge agrees that the estate does not owe any unsecured debts and there are no complicating factors that require the estate to be formally administered.

With the Muniment of Title process, no one is appointed personal representative or executor, so no one has authority to act for the estate. The process is used to certify that the will is valid and to pass title to real estate or cash accounts to the beneficiaries who were named in the will. If a deceased person owned stock or other assets that require complex procedures for transfer, then a more formal probate process may be necessary.

Independent Administration

When an estate is too large or complex for simplified probate procedures, it can be probated either through independent administration or court-supervised dependent administration. Both processes require some court approval because the court must approve the choice of administration and authorize someone to administer the estate.

That person receives documents giving them authority to act on behalf of the estate, which includes the interests of the heirs and beneficiaries. There is also an obligation to ensure that creditors get paid appropriately.

In the independent administration process, once the court grants initial authority, the estate representative is obligated to follow appropriate procedures for paying debts, managing assets, and ultimately distributing assets. The administrator does not need to seek court approval before acting on behalf of the estate, but if the administrator makes a mistake, they can be held personally liable. It is generally advisable to work with an attorney during the process to ensure that all legal requirements are fulfilled in the correct order.

Court-Supervised Dependent Administration

When an estate is contested, it is often necessary to use a court-supervised dependent administration process. The estate representative will need to request court approval before paying debts, selling estate property, paying probate expenses and professional fees, and taking other significant actions. This makes the process slower and more complex, but it prevents heirs and creditors from filing a legal complaint later alleging that the estate representative acted wrongfully and should be held liable.

Determining Whether You Need to Avoid Probate

Deciding whether probate is something you want to avoid for your heirs or beneficiaries is a matter of personal opinion. Some strategies for avoiding probate can be implemented simply and at little expense, saving loved ones considerable headaches in

the future. For instance, you can change the ownership or use beneficiary clauses so that many types of property will pass to others directly and never form part of an estate.

It is wise to work with an attorney when establishing a strategy for probate avoidance, because if something is left out, loved ones may still need to deal with probate. Even worse, if the mechanism for transferring property is not set up correctly, the transfer could take additional time and money to resolve or trigger unnecessary tax burdens.

Talk to the Nordhaus Firm About Avoiding Probate

At the Nordhaus Firm, we work with both sides of the issue, so we are well-equipped to explain what can happen if you work to avoid probate and what will happen if you do not, based on your specific circumstances. We can help you develop a simple yet effective plan to save your loved ones from the necessity of dealing with complex legal requirements after your death. We can also help your loved ones find and complete the least burdensome method of property transfer if probate becomes necessary.

It can be a complex process, so we would be happy to talk to you about your options. Just schedule a free consultation with us by calling 214-726-1450 or by contacting us online now.