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What Does "Probate" Mean?

The term "probate" is associated with estate planning and describes the legal process by which a decedent's will is processed by a special court. An executor of the estate is named to handle the decedent's affairs and administer the estate throughout the probate process. Assets that are distributed under a will (or all assets in the absence of a will or other ownership forms) go through this process and are "subject to probate." Assets, distributions of which do not pass through a will, such as jointly owned property, life insurance (with properly selected beneficiaries) or those owned through a properly established revocable living trust, are usually not subject to probate.

Why is this important?
Probate court records are public documents meaning that others can learn about your family's finances by reviewing these public records. Probate usually requires the services of an attorney, which costs money. Depending on the complexity of the estate, probate costs can range up to 5% of the value of the estate. Probate can also take time, often six months or more. During this time, the distribution of assets to heirs may be delayed.

What should you do about probate?
Planning for your estate can be confusing, complex and is often a topic that most people want to avoid. However, sooner or later, we all are going to have an estate and planning ahead can reduce the stress and anxiety surrounding the death of a loved one.

There are some ways to minimize the portion of your estate subject to probate through the ownership form you choose for certain assets. For example, if you own real estate jointly with the right of survivorship, on your death the title passes to the survivor directly, avoiding probate. The beneficiary designations of your retirement plan and IRAs can also be used to keep those assets out of the probate process by naming a person (or persons) instead of your estate as beneficiary.

Another way to avoid probate is by owning assets in a "revocable living trust." As the name implies, these trusts are established when the grantor is still alive and since they are revocable, the grantor retains the power to revoke or amend the trust as he or she wishes. A trust document establishes the trust, names the trustee (usually the grantor), names a successor trustee (someone to take control if the trustee becomes disabled), often a trusted family member, and describes how assets are to be managed and ultimately distributed from the trust.

After the trust is established, assets are transferred into the trust by the grantor and the grantor continues to manage them. The grantor reports the taxable income from those assets on his or her individual tax return. The assets are owned by the trust but there is no change in the control or tax treatment of the assets. When the grantor dies, the assets in the trust are distributed under the terms of the trust document in a way similar to how a will describes how assets in an estate are distributed, only without going through the probate process.

Avoiding probate is just one of the issues associated with planning for an estate. The services of a qualified estate planning professional are essential, especially if your estate is large or complex.