

Protecting your future



AVOIDING PROBATE

PRESENTED BY
THE GRAHAM NUCKOLLS CONNER LAW FIRM

gnclawfirm.com

Avoiding Probate

by David Silver

You may have heard that you should try to avoid [probate](#). While this is generally a good idea, probate isn't nearly as costly or burdensome in North Carolina as it is in some other states. In any case, it would be easier to avoid probate if you had a good understanding of it.

Think of a probate asset as something you need the court's help to transfer. If there is an uncashed check written to a dead person, no one can legally endorse that check without court authority, as a surviving spouse could get in trouble for forging their name and a power of attorney dies with the person. If a car title is still in the deceased person's name, the DMV won't transfer the title into someone else's name without authority from the court. A bank won't divulge any information about someone else's account, let alone allowing a withdrawal. These are examples of probate assets, assets in which we need the court's assistance to obtain and transfer. Probate assets get distributed according to the directions left in your Will (if you don't have a Will, the state of North Carolina has created one for you).

Some types of property are automatically transferred at death without the need for

assistance from the court. These types of assets are called non-probate assets. The most common types include a life insurance policy or an IRA in which you have designated a beneficiary to receive after your death. Non-probate assets also include most joint bank/investment accounts and bank/investment accounts that have a TOD (Transfer on Death) or a POD (Payable on Death) beneficiary designations. While a joint bank account will usually automatically be owned by the survivor, a vehicle titled to more than one person will not automatically go to the survivor unless the vehicle is a mobile home or unless the title specifically states that it is owned "jointly with right of survivorship."

Beware, these non-probate assets get distributed to the people or entities to whom you have designated with the holder of the asset even if you have contrary instructions in your Will. If you signed a beneficiary designation naming your sister as the beneficiary when you bought a life insurance policy, then the life insurance company will write the check to your sister even if you subsequently get married and create a Will stating, "I want my life insurance policy to go to my spouse."

Real estate (i.e. land and buildings) is usually a probate asset, but it is often converted into a non-probate asset. Real estate owned by spouses as Tenants By The Entireties (basically, this means the house was purchased during the marriage in both names) and real estate in which the deed

specifically designates as being owned jointly-with-right-of-survivorship, transfers automatically at the death of the spouse or the joint owner. Another way of making real estate a non-probate asset is to record a life estate deed or to transfer the real estate into a trust.

There is a probate fee in North Carolina: 0.4% of the value of all non-real-estate probate assets with a maximum fee of \$6,000.00. While this probate fee isn't nearly as prohibitive as in other states, the real advantage of avoiding probate is often to make things easier on your heirs. If all of your assets are non-probate, then there would be no reason to file your Will, put an ad in the paper, and do the other items associated with probating an estate. Avoiding probate is easier to accomplish if you have a simple [estate plan](#) (i.e. all to spouse or all to kids) and all your heirs get along, but be careful not to forget something (in my experience, it is usually the car).

David Silver teaches The Legal Environment of Business in ECU's Department of Finance. Dave is also a Partner with The Graham.Nuckolls.Conner Law Firm in Greenville, specializing in Elder Law.