

## **I have a Will so My Estate Won't have to be Probated, Right?**

By Kathleen Kienitz, Esq.

This is one of those questions that I am asked so often that I am left scratching my head wondering just how widespread this myth is. This article will explain the purpose of a last will and testament and describe what is involved in probating a will in Maine.

A last will and testament is a legal instrument in which a person sets out who should get his or her property upon death and who will be responsible as the personal representative to see that this is done. A will is not a probate avoidance tool; rather, a will is made in anticipation of probate and is intended to guide the probate process.

Probate is initiated by filing of the will along with a petition to probate the will and some other required paperwork in the Probate Court. Generally, no hearings will be necessary, unless the will is contested. If the paperwork is in order, all the beneficiaries in the will and legal heirs of the decedent will be notified that probate has been initiated, and the personal representative named in the will is then appointed by the issuance of letters of authority.

With the letters of authority, the personal representative has the power to consolidate and sell assets, pay debts of the decedent and distribute assets to the beneficiaries under the will. Certain procedures must be followed in carrying out these duties properly, such as waiting out a four month creditor period before distributing the estate assets, preparing a complete inventory of the estate, making sure that income taxes of the decedent and the estate and any estate taxes are paid and when the estate is ready to be closed, preparing a complete accounting from date of death to the closing of the estate. The estate cannot be formally closed until nine months after date of death.

It is, indeed, possible to avoid probate, but making a will does not accomplish this. One mechanism to keep assets out of probate, and which very often comes to play in the estates of a married couple is jointly titled property which passes automatically to the survivor by right of survivorship. Another mechanism is through assets that allow one to designate a beneficiary, such as insurance policies, IRA accounts and annuities. Finally, there is indeed a legal estate planning document that can be used to avoid probate: A living trust.

A living trust is an instrument which creates a legal entity into which property is transferred during the lifetime of the grantor. The trust document will name beneficiaries of the assets placed in the trust, both during and after the grantor's life, and it will also name a trustee to manage the trust assets which is often the grantor with an alternate person to take over upon the grantor's death. If all of one's assets are transferred into a living trust during one's lifetime, then the trustee is empowered to distribute the trust assets after the death of the grantor according to the trust document and without having to probate the estate. To sum it up and put simply, wills are for probate, and living trusts are to avoid probate.

*Kathleen Kienitz is a certified elder law attorney who practices elder law in Lewiston. Article last updated June, 2019. Laws and regulations are subject to change. The information presented here is for general use and does not constitute legal advice. If you have legal issues, you are encouraged to consult an attorney to obtain legal advice that is relevant to your specific situation. Call us at 207-783-8500 or visit: [www.elderlawmaine.com](http://www.elderlawmaine.com)*