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plotting against probate

Efforts by estate planners, courts and legislatures to minimize probate haven't killed it yet

Lawrence Moretti spent his last years lonely and afraid. Crippling arthritis kept him from leaving his apartment in Boston's North End. As he became unable to care for himself, Moretti, in his late 70s, feared he would wind up in a nursing home. He had no close relatives to turn to. Then his friends stopped visiting him, and he didn't understand why. There was only his live-in caregiver, Roman Pagliarani.

In December 1991, about a year after Pagliarani moved in with Moretti, the old man signed a will that left his principal asset—a six-unit apartment building worth well over $1 million—to his new companion.

Moretti died in 1993, at age 82. Pagliarani submitted the will for probate. But then two close friends of Moretti's, who had cared for him before Pagliarani moved in, asked the court to throw out the 1991 will and to probate instead a will executed by Moretti in 1989 that left the building to them.

The legal battle raged for 14 years, going from probate court to appellate court back to probate court and then up again on appeal. The legal fees for just one of the parties ran into the mid-six figures.

It's just the kind of case that causes nightmares about probate among lawyers and clients alike.

More than ever before, clients want to do whatever they can to avoid the possibility that their estates will be probated, says Christopher Gagic, an estate planning attorney at Buckingham, Doolittle & Burroughs in Boca Raton, Fla. "I see clients insisting on a revocable living trust just because they want to avoid probate," he says. "They all want to avoid probate, which seems to be a dirty word."

Many state legislatures, too, seem to take a dim view of probate. They have enacted laws that authorize new techniques for avoiding probate, make more estates exempt from probate and streamline the probate process.

But the efforts of attorneys, clients and legislatures to limit probate may not always produce the desired results. The volume of trust and estate litigation is growing rapidly, with no end in sight. Moreover, avoiding probate means there is less outside supervision of asset transfers, making it easier for fraudulent schemes or family disputes to keep assets away from beneficiaries and creditors who are entitled to them.

"Avoiding probate is a legitimate goal, but people don't know about the risks," says Brian D. Bixby, who chairs the probate and trust litigation group at Burns & Levinson in Boston. "They don't think [problems] can happen in their family, and they are often embarrassed when it happens to them."

A LIST OF FLAWS

There are a number of reasons to be wary of probate, say lawyers in the trusts and estates field.

Probate can be expensive. "The legal fees can eat up a chunk of the estate, and the costs can go up significantly for larger estates," says Jessica A. Uzcategui, an associate at Sacks Glazier Franklin & Lodise in Los Angeles who is a vice-chair of the Probate and Fiduciary Litigation Committee in the ABA Section of Real Property, Trust and Estate Law (the section recently dropped *probate* from its name).

Probate can tie up an estate. "The length of time depends on how complicated the case is and whether anyone is objecting," Uzcategui says. "If there are no big problems, probate is typically done within a year. If the case is messy, it can go on for years, for decades."

But even a short delay in distributing assets can hurt beneficiaries. "I've seen situations where no assets are available until the estate is opened for probate and an executor is appointed—and that may only take a month—but if the beneficiaries are the surviving spouse and her young kids, that could be a real problem," says Thomas W. Abendroth, a trusts and estates attorney at Schiff Hardin in Chicago. "That's why we recommend married couples have a joint bank account, so at least that money will be available immediately."

Probate also raises privacy concerns because it puts the will into the public record. "Some people may not want the public to know to whom they left their assets," says Steven K. Mignogna, a trusts and estates litigator at Archer & Greiner in Haddonfield, N.J., who chairs the Probate and Fiduciary Litigation Committee in the ABA's Real Property, Trust and Estate Law Sec tion. "Some people may want the nature and value of their assets to be kept private."

Responding to these concerns, many states have enacted streamlined probate procedures, at least for smaller estates. In Florida, for instance, estates under $75,000 are eligible for summary administration, which requires no executor and can be completed within a month. In Illinois, an estate valued at less than $100,000 may be distributed outside of probate once a small estate affidavit is executed.

States also have enacted other alternatives to probate. The Uniform Probate Code, which has been adopted in 18 states, provides for many estates to be administered outside of probate court supervision if the testator requests it or if all the beneficiaries agree to it.

Many state legislatures and courts have made the probate process itself faster and cheaper.

"Probate in Illinois is relatively painless, so long as there is no litigation associated with it," says James R. Carey, an attorney at Levin & Schreder in Chicago whose practice focuses on contested trust and estate matters. "Probate requires only two court appearances, and the decision-making does not require court approval, so long as there is no litigation or upset heirs interfering with the administration of the estate."

OUT OF PROBATE'S REACH

Nevertheless, more people are transferring their assets outside of wills, and thus beyond the reach of probate.

There is, for instance, a boom in revocable living trusts. "Living trusts have become more and more common," Gagic says. "They are really coming to the fore in estate planning."

There are good reasons for the popularity of these trusts. The grantor retains full ownership of the subject assets and may continue to use them as he or she pleases. Because the trust is revocable, the grantor can revise the trust's terms whenever he or she would like to do so. And, of course, the assets of the trust pass outside the grantor's will and thus are not subject to probate.

"Twenty years ago, living trusts were used only by the wealthy. Now they are being used by ordinary people," Uzcategui says.

These trusts aren't cheap, however. Attorney fees to draw one up average some $1,500, estimates Thomas W. Tuohy, a trusts and estates attorney in Chicago. It's not a huge amount of money, but it raises the question of whether these trusts are suitable for smaller estates or estates with relatively few assets. "If there's only a bank account and a condo, I may come up with an estate plan that is cheaper than a revocable living trust," says Alan B. Cohn, a trusts and estates attorney at Greenspoon Marder in Fort Lauderdale, Fla.

The grantors themselves pose another problem for revocable living trusts because they often fail to put significant assets into the trust, and those assets wind up being probated. "That's the major downside: the legwork that needs to be done in the beginning to put the assets into the trust," Cohn says.

Even when clients fully fund their trusts initially, they may subsequently obtain additional assets and forget to put these new assets into their trusts. Estate planning attorneys should thus periodically contact their clients to check whether any additional assets need to be put into trust, Tuohy says.

But despite the growing popularity of living trusts, the most common method for avoiding probate still is joint ownership.

Joint ownership is a simple principle: When a joint owner dies, the property passes directly to the surviving owner, without being subject to probate. It's fast, simple and inexpensive. But joint ownership also has some major drawbacks.

"It is often not consistent with the decedent's wishes," Carey says. The problem arises when an infirm individual puts financial accounts into joint ownership with a trusted person, and the sole purpose is to enable the healthy person to use the money to pay the invalid's routine bills. "It is often unclear that joint titling was intended to pass assets on death, rather than just help the decedent pay his bills during his life," Carey says.

Even when joint ownership is intended to serve estate planning purposes, it is an inflexible device that can't be easily adapted to changed circumstances. Consider, for instance, unexpected deaths. "If you and your three kids are listed as joint owners of your bank account, what happens if one of your kids dies before you?" says Cohn. "When you die, the surviving owners will own the money, and the children of the predeceased individual will get nothing."

Revising a joint ownership arrangement can be tricky because putting something into joint ownership is an irrevocable transfer that can be altered only if all the joint owners agree. So if the original owner wants to revise his estate plan, the change cannot be made unless there is consent from all the joint owners—and such consent might not be so easy to get if the planned change would leave fewer assets to one or more of the joint owners.

Another problem is that a joint owner may sell his or her interest or squander the assets. Moreover, the assets can be subject to a joint owner's creditors.

"Why anybody would want to make an irrevocable transfer when they don't have to is beyond me," Gagic says. "I really discourage anyone from using this."

Increasingly, there are other alternatives to joint ownership and revocable living trusts as vehicles for transferring assets outside the jurisdiction of probate. It is easier than ever for customers of banks, mutual funds and securities brokers to directly transfer their financial assets upon death.

"All the financial institutions have come up with ways to designate beneficiaries on accounts," Gagic says. "You see things like 'pay on death' accounts or 'in trust for' accounts."

Such accounts are fast, simple ways to transfer financial assets outside of probate. And they are revocable, unlike joint ownership accounts.

PHOTOGRAPH BY ED CARREON

melinda johnson

A RETIRED JUDGE, NOW A MEDIATOR IN LOS ANGELES

THE LATEST TREND

In addition, 10 states have approved the use of transfer-on-death deeds, which allow real property to pass directly to the named transferee(s) upon the property owner's death. Because the deed transfers property outside of a will, the property is not subject to probate.

After Missouri became the first state to recognize transfer-on-death deeds in 1989, eight years elapsed until another state, Kansas, enacted a similar law. Since 2000, however, Arizona, Arkansas, Colorado, Montana, Nevada, New Mexico, Ohio and Wisconsin have adopted laws authorizing transfer-on-death deeds, and other states, including California, Minnesota and Oregon, are considering their own versions.

In addition, the Uniform Law Commission is writing a Uniform Real Property Transfer on Death Act.

"Once the [uniform] act is approved, it is likely that statute will be adopted very widely," says Susan N. Gary, a professor at the University of Oregon School of Law who serves as an adviser to the commission's drafting committee for the ABA's Real Property, Trust and Es tate Law Section. "I think in another year, you will have a lot of states looking at this."

Transfer-on-death deeds offer some key advantages: They are less costly than revocable living trusts. They are revocable, unlike joint ownership. They can pro vide alternative beneficiaries in case one or more of the named transferees predeceases the property's current owner.

There are concerns, however, that transfer-on-death deeds will hurt the ability of decedents' creditors to recover what is due them. Unlike probate, in which creditors receive notice and the opportunity to file claims against the estate, transfer-on-death deeds give creditors no notice of property transfers. Thus, there is a risk that creditors will learn of a debtor's death too late to seek recoveries out of the estate's assets.

States that recognize transfer-on-death deeds have attempted to minimize this problem by giving creditors more time to initiate debt recovery proceedings against estates, although some experts note that this problem isn't unique to transfer-on-death deeds. "There are a lot of other provisions for passing property where creditors aren't notified," says Gary.

Transfer-on-death deeds may also create difficulties for title insurers. Unlike probate, which transfers a testator's real property only after creditors have been paid and there is a clear determination of who owns the property, transfer-on-death deeds convey real estate immediately upon death—even though claims against the property may subsequently be filed by the decedent's creditors. Until the claims period has expired, therefore, it is difficult for a company to issue title insurance on the conveyed property.

But this should not be a major problem either, according to Gary, who sees two simple solutions for title insurers. "They may not be able to issue title insurance until after the creditors' claims period has run, or they can issue the insurance with a reservation," she says.

Once attorneys, creditors and title companies become more familiar with transfer-on-death deeds, any wariness about them should dissipate, says Gary. "I think it is just a question of people getting used to the deed," she says.

ON SECOND THOUGHT

The alternatives to probate have created a new concern: It may now be too easy to avoid probate.

"Avoiding probate is not necessarily a good thing," says Boston attorney Bixby. "In many cases, probate is a protection to ensure that assets go to the right people."

Without strict oversight from probate courts, it is too easy for assets to be misappropriated, says Bixby, whose firm represented one of Moretti's old friends who challenged the validity of the will he executed after Pagliarani became his caregiver—and primary beneficiary.

The Massachusetts Appeals Court finally decided the case in 2007. The court found that Pagliarani had taken advantage of a scared, sick old man. Pagliarani had isolated Moretti from his friends, fired Moretti's attorney, and hired a new attorney who drew up, under his watchful eye, the 1991 will that left Moretti's apartment building to him. Moretti also signed a power of attorney in favor of Pagliarani, who started using the old man's money, according to evidence presented in court, for his own personal expenses, including gym memberships, hair coloring, clothes, liquor and dining. *In re Estate of Moretti*, 69 Mass. App. Ct. 642.

The court found that, in the spring of 1993, Moretti's old friend Teresa Antonelli responded to his call after he fell at home while unattended. Antonelli testified that, while she was assisting Moretti, he asked why no one visited him anymore. He told her that Pagliarani had threatened to put him in a nursing home if he didn't do what Pagliarani said, and that Pagliarani made him sign things that he did not always understand. Moretti died a few months later.

The court concluded that Pagliarani had exercised undue influence over Moretti by isolating him and manipulating him into executing the power of attorney and the 1991 will that benefited Pagliarani. The court threw out that will and ordered, pursuant to the terms of Moretti's prior will, that his apartment building go to Antonelli and another friend, Rita Casoni.

Bixby, whose firm represented Casoni in the probate contest, says Pagliarani was foiled because Moretti's will was probated under tough, old-fashioned standards.

"Query whether today in states where the probate requirements are very simple, this ever would have been caught or dealt with," Bixby says. "The real estate could have been sold and the caregiver gone back to Italy with the money before anyone knew what had happened. That is an example of why strict requirements for probate oversight are not necessarily a bad thing, despite the theme often heard about avoiding probate."

Some might maintain that the lengthy legal battle over Moretti's estate provides a good argument for using alternative methods of transferring assets, but avoiding probate doesn't necessarily avoid estate contests. Experts say that even though fewer wills are being contested in probate court, litigation in the trusts and estates field overall has boomed because parties are fighting increasingly about trusts, durable powers of attorney, joint tenancies—the full range of estate planning devices.

"There are more and more disputes," says Melinda A. Johnson, a retired judge in California's Ventura County Superior Court who now serves as a mediator in the Los Angeles office of JAMS, a firm that provides alternative dispute resolution services. "It seems to be a more litigious area than it was 10 to 20 years ago."

The legal battles over estate assets can start surprisingly early. "If assets go into a trust, sometimes the fight starts before the grantor's death," says Johnson, whose mediation work focuses on estate matters. "I have seen lots of them where the trustee is getting older, maybe he's no longer competent, and the parties fight over the trustee's competency and who should take over as successor trustee."

There is even a trend for courts to allow will contests prior to the testator's demise. "The traditional rule is that a will can't be contested until a testator has died, on the theory that the testator might still change his will," says New Jersey litigator Mignogna. "But with the growing trend of pre-death transfers, courts are allowing [will contests] because they are already addressing related questions regarding the pre-death transfers. More and more courts are saying, 'If I'm going to hear all this evidence about undue influence, I might as well hear about the validity of the will.'"

In response to the flood of trusts and estates litigation, courts around the United States are directing parties to mediation.

Johnson says it is important for lawyers and mediators to recognize that legal battles over estates are frequently about more than just the money and other assets. The disputes also touch the raw nerves of complex family relationships and emotions.

"While ostensibly fighting about money, they are really fighting about other things," Johnson says. "They have a lot of old feelings they want to vent, and they will never be allowed to do that in court. In mediation, they will be allowed to get that off their chest, and it's a good use of time for themselves and their attorneys. Once they get a chance to vent, they can be much more creative about compromising. Often they come up with compromises that a court would never come up with, because there are so many moving parts."

That's why lawyers in these mediations need to be unusually patient and restrained, says Johnson. "Be prepared to let the emotional ride go, and don't make it any bumpier than you have to," she says. "You can make your points without inflaming the other side. Particularly if the mediator is experienced in probate, you don't have to spell things out in inflammatory detail as if you were in court and making your case to a jury."

Ultimately, family may be more important than forum in determining how smoothly and quickly assets from estates are distributed, suggests Chicago attorney Abendroth. "Advances in estate planning and the simplification of the probate process in many states reduces the costs of transferring assets, assuming there is a cooperative family situation," he says. "If the situation is not cooperative, the same disputes will arise whether there is probate or not."

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