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MINI-CHAPTER 1: INTRODUCTION

Many people want to know how to avoid probate in Florida. Often they have been told by someone (perhaps a living trust promoter) that all kinds of bad things will happen if they do not take steps to avoid probate. I will discuss the various tools that people use to avoid probate in Florida (including a Florida Lady Bird deed or living trust) and let you know the pros and cons of each of them. But before I do, let me take a minute to explain what probate is and why you might want to avoid it.

WHAT IS PROBATE?

Probate is a court-supervised process for transferring the assets of a deceased person (called a decedent) to the people or organizations that are entitled to the assets. The process can vary depending on whether or not you have a valid Last Will and Testament.

- If you do not have a valid Last Will and Testament, your assets will be distributed among a group of your relatives as determined by state law. In that case, you will be said to have died intestate (without a Will) and the people who receive your assets are called heirs at law.
- If you have a Last Will and Testament (you should), the people or organizations named in the Will are entitled to the assets. Those people or organizations are called beneficiaries and you will be said to have died testate (with a Will).

Note: Many people are under the mistaken impression that having a Will avoids probate. That is not the case. In fact, the term probate comes from a Latin word meaning “to prove” (or establish the validity of) a Last Will and Testament. There are many reasons why you should have a Will, but having a Will does not avoid probate.

Depending on your state, probate can be a long process involving complicated legal issues. Some states (such as Florida) require you to hire an attorney to help navigate the process. But even in states that do not legally require you to hire an attorney, the process is usually too complex for most laypeople to handle.

WHY WOULD ANYONE WANT TO AVOID PROBATE?

There are many reasons why people want to avoid probate. Some of the most common are:

1. Saving Money. Probate can be expensive, often costing thousands of dollars in legal fees. The larger and more complex the estate, the higher the legal fees.
2. **Minimizing Hassle.** Probate is time-consuming. Your executor must inventory estate assets, file accountings with the court, notify (and possibly negotiate with) creditors of the estate, open estate bank accounts, and transfer assets to your heirs or beneficiaries. This can be quite a burden on the friend or family member who is handling the estate.

3. **Avoiding Delay.** Probate ties up your assets in court. Courts are reluctant to allow assets to be transferred until the estate is closed. At a minimum, the executor must wait until all creditors have had a chance to submit claims, a process which could take several months. This delays the distribution of your assets to your heirs or beneficiaries.

4. **Protecting Privacy.** Once your estate is opened with the Court, it becomes a matter of public record. Anyone who wishes can go to the courthouse and obtain a copy of your Will. Some people would prefer to keep the final disposition of their assets private.

These are all valid reasons for avoiding probate. But not all of them apply in every case. Before you ask how to avoid probate, be sure that it’s something you need to do. The truth is that probate avoidance is not for everyone. To make an informed decision, you need accurate information. Consider:

- **It Costs Money to Avoid Probate.** To avoid probate, you will most likely need a living trust and a handful of related documents. Depending on whether you use an attorney or an online form provider, these documents can be expensive to prepare. If you are basing your decision on cost alone, you should compare these costs with the cost of probate in your state.

- **Probate Avoidance Can Itself Be a Hassle.** Probate avoidance requires a careful examination of how each of your assets is titled. At least some of your assets will need to be re-titled to work with your estate plan. This requires some work on your end. Of course, the work that you do now is work that the executor will not have to do later. But don’t look past the work required to set up the living trust.

That being said, many people believe that the benefits of avoiding probate far outweigh these drawbacks. It’s usually a matter of deciding whether to pay now or pay later. You can either go through the expense and hassle of arranging your affairs while you are still alive so that you avoid probate, making things easy on your loved ones, or you can let them sort it all out through the court system after your death. Most people prefer to handle things in advance.
**THE PROBATE AVOIDANCE PRINCIPLE**

There are several techniques that can be used to avoid probate, but all of them rely on one simple principle:

> Probate can only be avoided by arranging your assets so that there is nothing in your name that does not automatically pass to someone else at your death.

All the probate avoidance tools that we will discuss depend on this single principle. For example:

1. Joint tenancies avoid probate by automatically passing the asset to the surviving joint tenant at your death.
2. Life estates avoid probate by automatically passing the asset to the surviving remainderman at your death. Florida is one of few states that recognizes the use of enhanced life estate deeds (often referred to as Lady Bird deeds) to avoid probate without sacrificing control during your lifetime.
3. Beneficiary designations avoid probate by automatically passing the asset to the designated transfer-on-death or payable-on-death beneficiary at your death.
4. Living trusts avoid probate because you do not legally own the assets that are in the trust at your death.

Assets that are titled in one of these ways (joint tenancy, life estate/Lady Bird deed, beneficiary designation, or living trust) are called non-probate assets. They pass automatically at death, without the need for court involvement. If all of your assets are non-probate assets, your entire estate will pass automatically at your death, leaving no assets to probate.

So why doesn’t everyone just title their assets this way? Because these techniques (other than a living trust and/or a Lady Bird deed) usually come with their own set of problems. These problems may include bad tax consequences, loss of control, or putting the asset outside of reach if it is needed to pay for your care during incapacity. **The living trust is often a best-of-both-worlds solution. It avoids probate without causing the problems that some of these other techniques can cause.**
MINI-CHAPTER 2: HOW TO AVOID PROBATE USING JOINT TENANCIES

Joint tenancies are often used by people looking for an inexpensive way to avoid probate of real estate. A joint tenancy is way of titling an asset in the name of more than one owner. At the death of one of the owners, the real estate passes automatically to the surviving owner (or owners), without the need for probate. This feature is known as a right of survivorship.

Joint Tenants vs. Tenants in Common: There is more than one form of co-ownership. Multiple owners can also hold title as tenants in common. In this form of ownership, each tenant’s interest will pass at death through his or her estate instead of passing to the surviving owners. Tenancies in common do not avoid probate because they lack the right of survivorship feature of joint tenancies.

Joint tenancies are often used to hold title to real estate owned by a married couple. This allows the property to pass to the surviving spouse on the death of the first spouse. The surviving spouse will need to file the deceased spouse’s death certificate in the land records, but probate is not required to clear title to the real estate.

Most real estate attorneys assume that a husband and wife intend to take title as joint tenants with right of survivorship and will deed the property that way by default. But this may not match the intent of the married couples, especially if the spouses have children from a prior marriage. This can have the unintended effect of disinheriting the children from the prior marriage.

DANGERS OF USING JOINT TENANCIES TO AVOID PROBATE

Joint tenancies are relatively inexpensive. Most attorneys would charge a few hundred dollars to prepare a deed to joint tenants. For do-it-yourselfers, online deeds may cost a little less. But, as is the case with many situations, the cheapest route isn’t always the best. In fact, it can be dangerous to rely on co-ownership alone to avoid probate. Here’s why:

- Each owner has immediate rights to the jointly-owned assets. For example, each owner of a co-owned bank account can withdraw the entire account. This doubles the risk to the account.
- Titling the assets jointly opens the door to claims of co-owners, their creditors, and, in the event of a divorce, spouses of the co-owners. In places the assets in jeopardy if one of the owners incurs significant debts or is involved in a lawsuit.
Joint tenancies can make it hard to coordinate a person’s affairs at death. If most of the assets pass automatically to the surviving owner(s), there may not be enough left over to pay taxes or debts or settle the affairs of the deceased owner.

Joint tenancies can have bad tax consequences. The act of naming another owner is usually considered a gift if the tenancy is not revocable. Unless the other owner is a spouse, this gift is potentially taxable. For personal residences, adding someone other than a spouse as a co-owner can forfeit income tax exclusions that are available upon the sale of the home.

Titling an asset as a joint tenancy can cause you to forfeit state and local homestead exemptions.

If you live in a community property state, joint tenancies with someone other than a spouse can cause you to lose your tax basis step-up at death, resulting in a built-in tax liability attaching you're your asset.

Joint tenancies can make it difficult to deal with real estate in the future. Because the signatures of all joint tenants are generally required to transfer real estate, an uncooperative or incapacitated joint tenant can make it difficult to sell or mortgage the real estate.

Joint tenancies don’t avoid probate as much as postpone it. Probate is postponed at the first owner’s death because there is a surviving joint tenant. But the last joint tenant to survive will hold the property in his or her name alone. Unless something is done to change this arrangement, probate is usually required after the death of the surviving joint tenant.

For these reasons, joint tenancies are usually not the best tool for avoiding probate. Because a living trust provides the probate avoidance benefit while avoiding these pitfalls, it is usually a better choice for avoiding probate.
MINI-CHAPTER 3: AVOIDING PROBATE USING BENEFICIARY DESIGNATIONS

A beneficiary designation is a contractual arrangement that allows you to designate who will receive certain benefits at your death. Beneficiary designations can only be used to transfer certain types of assets. Beneficiary designations are often used with life insurance policies, retirement plans (including pension-sharing, profit, and 401(k) plans), and IRAs.

Like other probate avoidance techniques, beneficiary designations work because they pass title automatically at your death, without any need for probate. For example, if you have named a beneficiary on your life insurance policy, there is no need for the probate court to validate the transfer to the beneficiary. You have made your wishes known in the beneficiary designation, and the insurance company is contractually obligated to follow them.

Many states allow the designation of “payable on death” (POD) or “transfer on death” (TOD) beneficiaries on banking, savings and loan, and other financial accounts. You may change the POD designations at any time and name alternate beneficiaries in case you are predeceased by a beneficiary.

Since a beneficiary designation does not give the beneficiary access to the asset until your death, it can be a better alternative than a joint tenancy in some situations. But beneficiary designations are only available for certain type of assets, such as financial accounts. For example, beneficiary designations cannot effectively dispose of real estate and many other types of assets. This limits the benefit of beneficiary designations in your overall estate plan.

Beneficiary designations also suffer from a major deficiency: they do not provide incapacity planning opportunities. The person named to receive the assets will get them at your death (which solves the issue of how to avoid probate), but they cannot access the funds during your lifetime (which doesn’t help you if you become incapacitated).

In other words, the beneficiary will not be able to access the funds for your benefit if you become incapacitated (e.g., through dementia or Alzheimer’s). Because living trust both avoid probate and provide for incapacity, many clients incorporate living trusts or powers of attorney into their estate plan instead of relying on beneficiary designations alone.
MINI-CHAPTER 4: AVOIDING PROBATE WITH LIFE ESTATES

A life estate is a legal arrangement to transfer property automatically upon a person's death. One person is given an interest in the property for his or her lifetime. This person is called a life tenant (LT). At the death of the life tenant, property will pass automatically to one or more other individuals or organizations. The people or organizations that receive the property at death are called remaindermen. Life estates are sometimes used as a device to avoid probate (but see below).

Note: This chapter discusses traditional life estate deeds. Many of the pitfalls discussed below can be avoided with a Florida lady bird deed (enhanced life estate), a special form of life estate deed that allows the transferor to maintain complete control over the property. See below for more information.

It is important to understand that a life estate is a form of co-ownership. Both the LT and the remaindermen have real interests in the property. But unlike other forms of co-ownership, the co-owners do not have rights to the property at the same time. Instead, their interests are stacked in time, with only the LT having a right to current possession of the property. The remainderman's interest does not kick in until the death of the LT.

DANGERS OF USING LIFE ESTATES TO AVOID PROBATE

Most people use life estates because they want to avoid probate. There is a better way, which I will discuss below (hint: it involves a living trust coupled with a deed to the living trust). But before we get there, let me tell you why I don't usually recommend life estates as a primary probate avoidance tool:

1. Impaired Ability to Deal With the Property. Because life estates give the remaindermen a real interest in the property, the LT cannot deal with the property without involving the remaindermen. What if the LT needs to sell the property but the remaindermen refuse? The LT could be trapped in a situation that is not in his or her best interest. This is probably the most important reason for caution in the use of life estates.

2. Conflicts Between Remaindermen and Life Tenants. State law typically allocates the expenses associated with the property between the life tenant and the remaindermen. The LT is responsible for the interest portion of the mortgage, property taxes, insurance, and ordinary upkeep and repairs. The remaindermen are responsible for the principal portion of mortgage payments and extraordinary repairs. Often the LT cannot afford (or simply doesn't pay) the expenses associated with the life estate. Or the remaindermen do not pay their share of the mortgage.
or extraordinary repairs. Or there is a dispute as to whether a repair is ordinary (the responsibility of the LT) or extraordinary (the responsibility of the remaindermen). This creates the potential for ongoing conflict.

3. **No-Win Situation for Life Tenant.** Because the LT has only a lifetime interest in the property, he or she has a duty to the remaindermen to maintain the property. But what if the LT cannot afford to do so? As we saw above, a sale is only possible if all parties agree. If they cannot, the LT may be trapped in no-win situation where she cannot afford to meet her duty to the remaindermen.

4. **Valuation Issues.** Suppose that the property needs to be sold and the life tenant and remaindermen can agree on a sale price. Who gets what? The life tenant may think that the life estate is valuable and that he or she should get most of the sale proceeds. The remaindermen may argue that the life tenant’s interest is worth little (since the life tenant could die any minute) and that the bulk of the sale proceeds should go to them. And even if they work out the allocation of the proceeds, the IRS will typically apply an arbitrary set of actuarial tables for tax purposes that may not match the true economic situation.

5. **Estate and Gift Tax Issues.** Life estates given to a person’s spouse generally qualify for the federal marital deduction. This allows postponement of the estate tax until the death of the surviving spouse, depending on whether the election is made to qualify the property for the marital deduction. If the election has been made but the spouse later sells the home and divides the proceeds with the remaindermen, the spouse may be considered to have made a taxable gift of a portion of the proceeds. The gift tax may also apply if the election is not made but the proceeds are split in some manner other than according to the IRS’s actuarial tables.

6. **No Escape.** Partition is a judicial procedure that allows co-owners who have current possessory rights in property to either divide or sell the property and go their separate ways. But because the interests of the life tenant and the remaindermen are not possessory at the same time, the remedy of partition is not available. This can lock the life tenant and remaindermen into the forced partnership without any judicial means of escape.

All of the benefits of a life estate can be achieved through a living trust without these drawbacks.
MINI-CHAPTER 5: AVOIDING PROBATE WITH LADY BIRD DEEDS

A Lady Bird deed (called an enhanced life estate deed in Florida) is a relatively new form of deed that, like a traditional life estate deed, allows property to pass automatically to one or more designated recipients at death, without the need for Florida probate. Florida is one of only a handful of states that recognize Lady Bird deeds.

HOW A LADY BIRD DEED WORKS

Lady Bird deeds are used to avoid probate. Here’s how it works:

- You sign a deed transferring your real estate to a person or group of people (called the remaindermen or remainder beneficiaries) at your death, but retaining the right to sell, use, and otherwise deal with the property during your lifetime.
- If you decide to sell, mortgage, or otherwise deal with the property during your lifetime, you are able to do so without the consent of the remaindermen (this is the difference between a life estate deed and a Lady Bird deed).
- Upon your death, your remainder beneficiaries simply file your death certificate in the land records. This serves as proof of your death and allows the property to be transferred to the remaindermen without the need for probate.

Note: The issue of whether or not a deed is a Lady Bird deed is independent from warranties of title being conveyed. In other words, a Lady Bird deed could be a quitclaim deed, warranty deed, or special warranty deed.

ADVANTAGES OF LADY BIRD DEEDS OVER TRADITIONAL LIFE ESTATE DEEDS

We’ve discussed the problems with traditional life estate deeds at length in our discussion of life estate deeds. Perhaps the biggest drawback is the inability of the person who deeds the property to change his or her mind. Once a traditional life estate deed is signed, the grantor cannot sell, mortgage, convey, gift, or otherwise terminate the remainder interest during his or her lifetime without the consent of the remainder beneficiaries.

Lady Bird deeds are intended to avoid this problem. Like a traditional life estate deed, a Lady Bird deed allows you to name someone to receive the property at your death while reserving the right to use the property during your lifetime. But unlike a traditional life estate deed, you are able to deal with the property during your lifetime, without the consent of the remainder beneficiaries.
Lady Bird deeds can allow you to:

- Keep complete control of the property during your lifetime without requiring consent of the remainder beneficiaries;
- Retain the right to use, profit from, or sell the property during your lifetime;
- Avoid triggering the Federal gift tax on the transfer during your lifetime; and
- Avoid probate of the property at your death.

**APPLICATION OF FLORIDA DOCUMENTARY STAMP TAX**

The Florida documentary stamp tax applies to transfers of real estate by deed. The Florida Department of Revenue does not assess a full documentary stamp tax if the person who transfers the property is the same person that retains the life interest. Instead, the deed is only assessed a minimum documentary stamp tax at the time that the property is first conveyed. If the property is not sold by the date of the grantor's death, it becomes subject to full documentary stamp tax at that point.

**COMMON PITFALLS OF LADY BIRD DEEDS**

Lady Bird deeds are easy to mess up. Here are a few pitfalls to watch out for:

It is important that the document be drafted by a knowledgeable attorney. If a mistake is made, the Lady Bird deed will not satisfy the Florida title insurance companies and will still require probate. The deed needs to be drafted so as not to allow the property to end up back in your estate through lapse (prior death of a named remainderman) or otherwise.

Lady Bird deeds require special consideration if the property is subject to a mortgage. The cost of Florida's mortgage taxes should be taken into account when considering whether the Lady Bird deed is the most cost-effective alternative.

Lady Bird deeds must still meet the formalities required under Florida law for a deed to be valid. Otherwise, the deed will not achieve your goals of transferring the property without probate.

Florida’s complicated homestead laws, including the restraint on alienation of a homestead, should be considered when dealing with Lady Bird deeds.

Note: We prepare Florida Lady Bird deeds for all Florida counties on an affordable, flat fee basis. Feel free to contact our office for assistance.
Mini-Chapter 6: Avoiding Probate with Living Trusts

Living trusts are popular choices for people who want to know how to avoid probate. A living trust provides the same benefits as other probate avoidance tools (such as beneficiary designations, joint ownership, and life estates), but without many of the drawbacks. Living trusts are the cornerstone of most estate plans that are designed to avoid probate.

Note: This is not to suggest that a living trust is the only or even the best alternative for avoiding probate. Other techniques may be a better fit in your circumstances. There is no substitute for consulting with an estate planning attorney about your specific situation. See our discussion of Why Living Trusts Don’t Always Avoid Probate in Florida.

What is a Living Trust

A living trust is a relationship in which one party holds property for the benefit of someone else. Any living trust arrangement involves a relationship between the following three parties:

- **Grantor** – A grantor (also known as a settlor) is the person that transfers property to the trustee to place it into the trust.
- **Trustee** – A trustee is the person who holds legal title to the property placed into the trust. The trustee is responsible for using the trust property for the benefit of the beneficiary.
- **Beneficiary** – The beneficiary is the person who has beneficial title to the property. Although the trustee maintains legal title, the beneficiary has the true economic interest in the property.

The relationship between the parties is governed by a document called a trust agreement. The trust agreement identifies the people that will serve in each of these three roles. It also tells the trustee how to manage the assets that are transferred into the trust.

The terms “grantor,” “trustee,” and “beneficiary” refer to roles involved in the trust relationship. One person can play more than one role. In the typical living trust scenario, the person who establishes the trust (the grantor) also maintains control of the trust (as trustee) and the trust assets are used for his benefit (as beneficiary).

In other words, one person can be the grantor, trustee, and current beneficiary of the trust. This is attractive to most people because it allows them to establish the trust without losing control or use of the trust property.
The roles involved in the trust arrangement can be played by different people at different points in time. For example, a trust can provide for one beneficiary during the life of that beneficiary, then provide for a different beneficiary or class of beneficiaries. It is not uncommon for a living trust to:

- Provide for the grantor during his life;
- Provide for the grantor’s spouse after his death; and
- Distribute assets to the grantor’s children after the death of the grantor and his spouse.

In this sort of arrangement, the first beneficiary would be the grantor; the second beneficiary would be the grantor’s spouse; and the final class of beneficiaries would be the grantor’s children. The role of “beneficiary” will have been played by different individuals at different points in time.

It is also common for the role of “trustee” to change over time. The person who creates the trust (grantor) usually serves as the first trustee. This allows the grantor to transfer assets to the trust without losing any control over the assets. When the grantor dies (or loses the mental ability to manage the trust), a successor trustee will step in to manage the trust in accordance with the grantor’s instructions. The successor trustee is usually someone named by the grantor in the trust agreement.

Once the trust agreement is signed, it becomes a legal entity that can own property (similar to a corporation or LLC). The living trust usually serves as the alter ego of the person who establishes it (the grantor). Because the grantor is the trustee, he or she can transfer assets into the trust without losing control over the assets. The grantor can still sell, gift, or otherwise deal with the asset as though he owned it outright. The grantor can also amend the trust if he changes his mind about anything. He can even unwind the entire trust arrangement by revoking the trust.

Note: Living trusts are called “living” to distinguish them from testamentary trusts, which are established in a Will and only become effective when a person dies. Unlike testamentary trusts, living trusts are effective when you create them and can remain in force throughout your lifetime and after your death.

**HOW LIVING TRUSTS AVOID PROBATE**

Living trusts are a great way to avoid probate. Like the other probate avoidance tools (joint tenancies, life estates, beneficiary designations), the key is not having any assets in your own name at your death. Here’s how it works:
• A trust agreement is prepared to establish the trust. It is best if an attorney prepare the trust agreement. There are several online options for people who want to try it themselves, but keep in mind that the cheapest route isn’t always the best. An improperly drafted and funded trust can be disastrous.
• In the typical situation, the trust agreement names you to serve as the first trustee and beneficiary of the trust. This allows you to keep complete control over your assets, as though you still owned them outright.
• All of your assets are transferred into the living trust during your lifetime or otherwise titled to pass automatically at your death (through beneficiary designations or joint ownership). This could require the preparation of deeds to real estate and re-titling of your financial accounts.
• If you become incapacitated, the person you have named to serve as successor trustee steps in to manage the assets for your benefit in accordance with the terms of the trust.
• At your death, all of your assets will have already been transferred into your trust or otherwise titled as non-probate assets. On paper, you will not own anything at your death (even though you had the same rights of ownership throughout your lifetime). Because you have no probate assets, there is no need to probate your estate.
• After your death, the successor trustee handles your assets in accordance with your wishes. The trust can last for a period of time (such as throughout a spouse’s lifetime or until children reach a certain age), or it can terminate immediately at your death.

The beauty of this arrangement is that it avoids probate without sacrificing control of your assets—a win-win situation for many clients.

THE IMPORTANCE OF FUNDING THE LIVING TRUST

As mentioned above, the trust becomes a legal entity when the trust agreement is signed. At that point, it is just a shell. The only assets it holds will be the initial assets used to set up the trust (usually a nominal amount such as ten dollars). You will need to transfer assets into the trust, a process known as funding.

It is important to remember that a living trust only governs assets that are transferred into the trust. The best living trust in the world will not avoid probate you die with probate assets that are still in your name alone. In other words, an unfunded or improperly funded living trust does not avoid probate.
It is important to review your asset profile to be sure that every titled asset (like financial accounts or real estate) is either titled in the name of the trust or otherwise qualifies as a non-probate asset. Non-titled assets should be transferred to the trust using an assignment of personal property or similar document. If you do not title your assets to work with your trust, probate will still be required even though you have set up a living trust.

Note: The failure to properly fund a living trust is the most common error of estate plans incorporating living trusts.

**WHY A LIVING TRUST IS OFTEN THE BEST TOOL FOR AVOIDING PROBATE**

As I’ve mentioned, the key to avoiding probate is arranging your assets so that there is nothing in your name that does not automatically pass to someone else at your death. In other words, probate is avoided if all of your assets are titled as non-probate assets.

Living trusts are not the only way to create non-probate assets. We have discussed other tools, including joint tenancies, life estates, and beneficiary designations. But each of these tools (with the exception of a Lady Bird deed in some situations) has significant drawbacks. A living trust avoids many of the drawbacks of these other probate avoidance techniques. For example:

- A living trust does not require you to share control of the assets during your lifetime.
- A living trust does not open up the asset to the potential claims of any creditors of other owners.
- A living trust is accessible during your lifetime if you become unable to manage your assets on your own (stronger incapacity planning).
- A transfer to a revocable living trust can be structured as a non-event for federal purposes, avoiding any federal and/or state gift taxes for the transfer.
- A living trust does not cause adverse basis consequences.
- Depending on your state laws, your living trust may be set up to retain any homestead exemptions that you currently qualify for.
- A living trust provides seamless transfer of control to the person that you choose. On the earlier of your death or incapacity, that person simply assumes control of the trust, without court involvement.
- Because you retain control of the living trust during your lifetime, you can sell or otherwise deal with the assets of the trust without involving anyone else.
Living trusts can avoid probate in more than one estate. For example, a husband’s living trust can be set up to provide for his wife during lifetime, then transfer the assets to their children after his wife’s death. This avoids probate in both the husband’s and the wife’s estate.

Because living trusts achieve the benefits of probate avoidance and incapacity planning without any of the drawbacks of other probate avoidance techniques, they form the cornerstone of most estate plans that are designed to avoid probate.

Note: While living trust can be structured to minimize taxes, the same tax benefits can be achieved through a will-based estate plan that incorporates testamentary trusts. This is because your taxable estate does not always match your probate estate.
CHAPTER 6: WHY LIVING TRUSTS DON’T ALWAYS AVOID PROBATE IN FLORIDA

Living trusts are popular tools for avoiding probate. As discussed above, living trusts work by creating an artificial entity (the trust) to hold title to a person’s assets. The person who creates the trust usually serves as trustee, giving him or her complete control over the assets. Upon his or her death, a successor trustee can step in and deal with the assets outside of the probate process.

This planning technique works fine in Florida from an asset transfer standpoint. Assets owned by a valid living trust are not part of the Florida probate process. But even though probate may not be required to transfer assets, the trustee may want to probate the deceased person’s estate for another reason: to deal with creditors.

The creditors of a deceased person can be a problem for his or her living trust. If the decedent had creditors and there are no assets in the estate to pay the creditors, Florida law provides that the living trust is responsible for the creditor claims.

When a person with a living trust dies, the trustee of the trust is required to file a notice of trust with the court. The purpose of the notice of trust is to let the decedent’s creditors know about the trust and of their rights to enforce claims against the trust assets.

Creditors have two years from the decedent’s death to assert their claims against the trust. This means that the living trust is potentially liable for claims against the decedent’s estate for two years. If the trustee distributes all of the assets within that two year period and a creditor submits a claim, the trustee could be liable to the creditors for the premature distribution.

Because of this rule, some trustees are reluctant to distribute assets within the two-year creditor period. This means that the beneficiaries will need to wait two years before they receive distributions from the trust. If the trust doesn’t call for distributions within a two year period, this may not be an issue. But two years can be a long time to wait. In most situations, beneficiaries will want to receive at least some (if not all) of the trust assets shortly after the decedent’s death.

Fortunately, there is a way to shorten the period during which creditors can submit claims: probate. As part of the Florida probate process, creditors are formally notified and given three months to submit a claim. Any claims that are not submitted within that three month period are barred.

In other words, even though it may not be required by law if all assets are in a living trust, probate has the practical benefit of shortening the creditor claims period. In some
situations, trustees may probate the estate to take advantage of this three month period (and avoid the two-year period generally required).

Whether or not Florida probate will be advisable depends on the circumstances. Would the assets in the trust be exempt from creditor claims? Is the trustee also the sole beneficiary? Does the trust require assets to be held for two years anyway? Is the trustee confident that all creditor claims have been paid (or otherwise risk tolerant)? Questions like these can help determine whether Florida probate is a good idea.

Of course, there are other reasons for setting up living trusts (such as incapacity protection). There are also other ways of avoiding probate in Florida, such as using jointly titled bank accounts and deeds (like a Lady Bird deed) to transfer real estate outside of probate. Some of these techniques also have important asset protection consequences. All of this should be considered as part of the estate planning process.

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