In Plain English: Probate vs. Non-Probate Assets

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If you've given some thought to your estate plan, chances are you know that assets can be divided into two categories: "probate" and "non-probate." Knowing the difference between these two types of assets is crucial and can have a profound impact on how you decide to distribute your property to your loved ones after you are gone. This article will guide you through the basics – in plain English.

What is probate?

Probate is the process by which a court determines whether a person's Last Will and Testament is valid. Many people also use the term to refer to the process of administering someone's estate after the validity of the Will has been proven. Administering the estate generally includes gathering and taking control of estate assets, paying any debts owed by the estate, paying any taxes that are due, and distributing assets to the beneficiaries of the estate.

What are probate assets?

Probate assets are those assets belonging to a deceased person ("decedent") which pass to the beneficiaries named in the decedent's Will (or, if there is no Will, to the decedent's heirs as determined by law) as part of the probate process. These assets do not have a survivorship feature or beneficiary designation to control who receives the property when the decedent dies. Some examples of probate assets are:

- personal property;
- bank or brokerage accounts that have no beneficiary designation or that name the decedent's estate as the beneficiary;
- proceeds from a life insurance policy owned by the decedent on his or her life that are payable to the decedent's estate; and
- real property owned entirely by the decedent or the decedent's interest in real property as a tenant in common.

What are non-probate assets?

Non-probate assets are those assets that do have a survivorship feature or a beneficiary designation. Upon a decedent's death, his or her non-probate assets pass directly to the joint owner or the designated beneficiary and are not subject to the probate process. However, non-probate assets can become probate assets if there is no named beneficiary or the beneficiary is the decedent's estate. Some examples of non-probate assets are:

- property owned by the decedent in joint tenancy with a right of survivorship;
- bank or brokerage accounts with POD (payable on death) or TOD (transfer on death) beneficiaries;
- retirement benefits with beneficiary designations;
- proceeds from a life insurance policy on the decedent's life; and
- property owned by the decedent's revocable living trust.

Three important ways this distinction can affect your estate:

1. A person's Will does NOT control the distribution of non-probate assets. Instead, non-probate assets are distributed to a joint tenant with survivorship rights or according to the

beneficiary designation. It is important to identify which of your assets are held in joint tenancy or have beneficiary designations so you can coordinate the distribution of these assets with the provisions of your Will.

2. Non-probate assets, by definition, are distributed outside of probate. This can be very advantageous if you own property in multiple states, if your beneficiaries need to have access to your assets immediately upon your death, or if you have reason to think someone might contest your Will.

3. Certain non-probate assets have protection from a decedent's creditors. For example, life insurance proceeds paid to third party beneficiaries are generally not subject to claims against the decedent's estate. However, if the decedent's estate is the beneficiary on the policy, the proceeds become probate assets and are exposed to creditors.

Can you identify your probate and non-probate assets? Do you know who will receive your property, and how?