

Ways to Avoid Probate

An introduction to the most popular methods.

Payable-on-Death Bank Accounts

Payable-on-death bank accounts offer one of the easiest ways to keep money -- even large sums of it -- out of [probate](#). All you need to do is fill out a simple form, provided by the bank, naming the person you want to inherit the money in the account at your death.

As long as you are alive, the person you named to inherit the money in a payable-on-death (P.O.D.) account has no rights to it. You can spend the money, name a different beneficiary, or close the account.

At your death, the beneficiary just goes to the bank, shows proof of the death and of his or her identity, and collects whatever funds are in the account. The probate court is never involved.

If you and your spouse have a joint account, when the first spouse dies, the funds in the account will probably become the property of the survivor, without probate. If you add a P.O.D. designation, it will take effect only when the second spouse dies.

Retirement Accounts

When you open a retirement account such as an IRA or 401(k), the forms you fill out will ask you to name a beneficiary for the account. After your death, whatever funds are left in the account will not have to go through probate; instead, the beneficiary you named can claim the money directly from the account custodian.

If you're single, you're free to choose whomever you want as the beneficiary.

If you're married, your spouse may have rights to some or all of the money:

- If you have a 401(k) account, your spouse is entitled to inherit the money unless he or she agrees, in writing, to your choice of someone else.
- If you live in a community property state, chances are your spouse owns half of what you have socked away in a retirement account. (Community property states are Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, Washington, and Wisconsin; in Alaska, couples can sign an agreement making some or all of their property community property.) If any of the money you contributed was earned while you were married, that money remains "community property," and your spouse owns half.

Transfer-on-Death Registration of Securities

Almost every state has adopted a law (the Uniform Transfer-on-Death Securities Registration Act) that lets you name someone to inherit your stocks, bonds or brokerage accounts without probate. It works very much like a payable-on-death bank account. When you register your ownership, either with the stockbroker or the company itself, you make a request to take ownership in what's called "beneficiary form." When the papers that show your ownership are issued, they will also show the name of your beneficiary.

After you have registered ownership this way, the beneficiary has no rights to the stock as long as you are alive. You are free to sell it, give it away, or name a different beneficiary. But on your death, the beneficiary can claim the securities without probate, simply by providing proof of death and some identification to the broker or transfer agent. (A transfer agent is a business that is authorized by a corporation to transfer ownership of its stock from one person to another.)

Transfer-on-Death Registration for Vehicles

So far, only California, Connecticut, Kansas, Missouri, and Ohio offer car owners the sensible option of naming a beneficiary, right on their certificate of title or title application, to inherit a vehicle. If you do this, the beneficiary you name has no rights as long as you are alive. You are free to sell or give away the car, or name someone else as the beneficiary.

To name a transfer-on-death beneficiary, all you do is apply for a certificate of car ownership (title) in "beneficiary form." The new certificate lists the name of the beneficiary, who will automatically own the vehicle after your death. You can find more information on your state's motor vehicles department website.

Joint Ownership


Several forms of joint ownership -- joint tenancy, for example -- provide an easy way to avoid probate when the first owner dies.

Many couples conclude that holding title to their major assets in a form of joint ownership that avoids probate is all the estate planning they want to engage in, at least while they are younger. The most attractive features of this strategy are its simplicity and economy. To take title with someone else in a way that will avoid probate, you usually don't have to prepare any additional documents. All you do is state, on the paper that shows your ownership (a real estate deed, for example), how you want to hold title.

Joint tenancy with right of survivorship

Property owned in joint tenancy automatically passes, without probate, to the surviving owner(s) when one owner dies. Joint tenancy often works well when couples (married or

not) acquire real estate, vehicles, bank accounts, securities, or other valuable property together. Setting up a joint tenancy is easy, and it doesn't cost a penny.

 **In Texas, you need a separate written agreement.** To set up a joint tenancy in Texas, all joint tenants must sign an agreement. For example, if you want to create a joint tenancy bank account, specifying your arrangement on the bank's signature card isn't enough. A bank or real estate office should be able to give you a fill-in-the-blank form that will do the trick.

After one joint owner dies, generally all the new owner has to do is fill out a straightforward form and present it, with a death certificate, to the keeper of ownership records: a bank, state motor vehicle department, or county real estate records office.

Joint tenancy is usually a poor estate planning choice when an older person, seeking only to avoid probate, is tempted to put solely owned property into joint tenancy with someone else. Adding another owner this way creates several potential headaches:

- You're giving away part ownership of the property. The new owner has rights that you can't take back. For example, the new owner can sell or mortgage his or her share -- or lose it to creditors.
- You may have to file a gift tax return. If the value of the interest you give to a new co-owner (except your spouse) exceeds \$11,000 in one year, you must file a gift tax return with the IRS (unless you're adding a joint tenant to a bank account to which you deposited the money; in that case, no gift is made until the other person withdraws money). No tax is actually due, however, until you leave or give away a very large amount (currently, more than \$1 million) in taxable gifts.
- It may spawn disputes after your death. Many older people make the mistake of adding someone as a joint tenant to a bank account just for "convenience." They want someone to help them out by depositing checks and paying bills. But after the original owner dies, the co-owner may claim that he or she is entitled, as a surviving joint tenant, to keep the funds remaining in the account. In some instances, maybe that's what the deceased person really intended -- it's too late to ask. (If you want to give someone authority to use your money on your behalf, use a power of attorney. See [Do You Need a Financial Power of Attorney?](#))

Tenancy by the entirety

In some states, married couples often take title not in joint tenancy, but in "tenancy by the entirety" instead. It's very similar to joint tenancy, but can be used only by married couples. Both avoid probate in exactly the same way.

Community property with right of survivorship

If you are married and live or own property in Alaska, Arizona, California, Nevada, or Wisconsin, another way to co-own property with your spouse is available to you: community property with the right of survivorship. If you hold title to property in this way, when one spouse dies, the other automatically owns the asset. Transferring title to the surviving spouse is simple and doesn't require court proceedings.

Revocable Living Trusts

Living trusts were invented to let people make an end-run around probate. The advantage of holding your valuable property in trust is that after your death, the trust property is not part of your estate for probate purposes. (It is, however, counted as part of your estate for federal estate tax purposes.) That's because a trustee -- not you as an individual -- owns the trust property. After your death, the trustee can easily and quickly transfer the trust property to the family or friends you left it to, without probate. You specify in the trust document, which is similar to a will, who you want to inherit the property.

These trusts are explained in greater detail in the [Living Trusts and Avoiding Probate](#) area of Nolo's website.

Gifts

Giving away property while you're alive helps you avoid probate for a very simple reason: if you don't own it when you die, it doesn't have to go through probate. That lowers probate costs because, as a general rule, the higher the monetary value of the assets that go through probate, the higher the expense. If you give away enough assets, your estate might even qualify for a streamlined "small estate" probate procedure after your death. (These procedures are discussed below.)

If you are considering making lots of large gifts, you should know that giving more than \$11,000 to any one recipient in one calendar year will require filing a federal gift tax return. You won't actually have to pay any tax now.

For more information about making gifts, see the [Estate Taxes](#) area of Nolo's website.

Simplified Procedures for Small Estates

Almost every state now offers shortcuts through probate -- or a way around it completely -- for "small estates." Each state defines that term differently. Because of the way the laws are written, however, many large estates, worth hundreds of thousands of dollars, are eligible for special transfer procedures that speed property to inheritors.

There are two basic kinds of probate shortcuts for small estates:

Claiming property with affidavits -- no court required

If the total value of all the assets you leave behind is less than a certain amount, the people who inherit your personal property -- that's anything except real estate -- may be able to skip probate entirely. The exact amount depends on state law, and varies hugely. If the estate qualifies, an inheritor can prepare a short document stating that he or she is entitled to a certain item of property under a will or state law. This paper, signed under oath, is called an affidavit. When the person or institution holding the property -- for example, a bank where the deceased person had an account -- receives the affidavit and a copy of the death certificate, it releases the money or other property.

Simplified court procedures

Another option for small estates (again, as defined by state law) is a quicker, simpler version of probate. The probate court is still involved, but it exerts far less control over the settling of the estate. In many states, these procedures are straightforward enough to handle without a lawyer, so they save money as well as time.

Probate-Avoidance Method	Summary
Beneficiary designations for bank accounts, retirement accounts, and securities	Easy to create, using a form provided by the bank, broker or agency. Not available for securities in a few states.
Beneficiary designation for motor vehicles	Easy to do, on a form provided by the state Motor Vehicles Department. Available only in California, Connecticut, Kansas, Missouri, and Ohio.
Joint tenancy with right of survivorship	Easy to create. If you don't already own property in joint tenancy, you may not want to add another owner, who could sell his share. For larger estates, there are negative gift tax consequences, too. Can be a problem if a co-owner becomes incapacitated. No probate avoidance if all joint owners die at once.
Tenancy by the entirety	Easy to create. Available only in some states; limited to married couples. Can be a problem if one spouse becomes incapacitated.
Community property with right of survivorship	All the benefits of community property ownership plus probate-avoidance when one spouse dies. Available only to married couples in Alaska, Arizona, California, Nevada, and Wisconsin.
Revocable living trust	Flexible private Easy to create You keep

	control over property during your life. Some paperwork involved. May need attorney if your estate is complicated.
Gifts of property made while you're alive	Reduces amount of property in your estate, which avoids both probate and estate taxes. You lose control over property given away. Large gifts use up part of your federal gift/estate tax exemption.
State laws that allow simplified probate proceedings	These apply only to small estates; you may still need an attorney to explain your state's laws.