

HOW TO KEEP THE ESTATE OUT OF PROBATE
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HOW TO KEEP THE ESTATE OUT OF PROBATE

Charles J. Andres and Stephen M. Johnson¹

A. The Pros and Cons of the Probate Proceedings

What is probate?

When a person dies, all her assets become a decedent's estate. This article examines probate law's contours through the complex lens of estate planning, so attorneys can best counsel clients wishing to avoid probate. Estate planning helps clients design and build their financial legacy and see wealth's end from its beginning.² The Probate law facilitates distributing a decedent's estate to the heirs. The Kansas Probate Code, Chapter 59 of the Kansas statutes, governs probate cases.³ Any attorney practicing probate law should consult the Probate Code, the Kansas Probate Handbook, the Kansas Judicial Council Forms, and the seminal Kansas probate treatise by Samuel Bartlett, the Kansas Probate Code's author.⁴ Many probate law issues are resolved by consulting these sources, and guidance may be found on open issues to reduce the embroiling time and expense of probate litigation. Probate comes from the Latin word *probare*, meaning "to prove" or "to admit [a will] to proof."⁵ A Kansas probate case involves proving (1) a Kansas resident died, (2) owning certain property, (3) with particular heirs, and (4) obtaining a court order distributing the property to the rightful heirs. The Probate Court has venue in the county where the decedent died or her property was located.⁶ The Probate Court is part of the District Court and hears decedent's estates (the most common "probate case") and a few other case types.⁷

¹ Copyright 2013, Charles J. Andres and Stephen M. Johnson. The authors are members of the Kansas and Missouri Bars. The authors dedicate this article to Ron Hinkle, a distinguished Olathe attorney, and thank him for the pleasure of his friendship, mentoring, and wise counsel over the years. The authors welcome correspondence at charlesjandres@cs.com and steve@johnsonlawkc.com.

² A celebrated poet put it well: "What we call the beginning is often the end/And to make an end is to make a beginning/The end is where we start from." T.S. Eliot, *The Four Quartets*, "Little Gidding," (No. 4), V.

³ Kansas Probate Code references are "K.S.A. 59-_____." IRS Code references, codified at 26 U.S.C., are "I.R.C. _____." For Missouri probate law queries, consult the Missouri Probate Code, V.A.M.S. 472.005 et seq., and the Missouri Practice Series, Vols. 3-5D. The probate attorney files a series of probate petitions and sets the petitions for hearing. Each petition set for hearing is a probate proceeding. K.S.A. 59-2204.

⁴ Charles J. Andres and D. Michael Dwyer, eds., *Probate and Trust Administration After Death* (7th ed. 2008) ("Kansas Probate Handbook"); the Kansas Judicial Council Forms (3rd ed. 2011) (available at http://www.kansasjudicialcouncil.org/publications/probate_forms3d.shtml) ("KJC Form"); and Samuel E. Bartlett, *Kansas Probate Law and Practice* (5 vols., 1953 rev. ed.) ("Bartlett").

⁵ See *Black's Law Dictionary*, 1239 (8th ed., 2004).

⁶ K.S.A. 59-2203. The Probate Court's venue can be a probate litigation issue.

⁷ Kansas probate and civil courts have been unified in the District Court since 1977. See *McKibben v. Chubb*, 840 F.2d 1525, 1530, n.7 (10th Cir., 1988) ("Kansas probate courts were abolished in 1977 and probate proceedings transferred to the district courts ... exclusive probate jurisdiction over ... a decedent's estate should be applied in post-unification proceedings") (internal citations omitted); *Quinlan v. Leech*, 5 Kan. App.2d 706 (Kan. App. 1981), 709 ("When the probate courts were abolished on January 10, 1977, the probate records were transferred to the district courts in the counties where the probate courts had been located ... probate proceedings are brought in the district court, K.S.A. 59-102, with venue determined under K.S.A. 59-2203 for probate or administration actions and under K.S.A. 59-2207 for actions against fiduciaries. Since court unification ... a district court has subject matter jurisdiction of probate proceedings."). The Probate Code also governs guardianships and conservatorships, care and treatment cases, and adoptions. See K.S.A. 59-3050 et seq. and Bartlett, Vol. 2, Ch. 43 (guardianships and

Is probate required?

Since Norman Dacey's book *How to Avoid Probate* was published, many Kansans have tried to avoid probate proceedings by owning non-probate assets and using probate avoidance devices.⁸ Whether probate is required depends on (1) how an Estate's assets are titled and (2) how extensive the probate assets are.⁹

Probate pros

Probate's advantages include fiduciary accountability to the Court, obtaining a final and enforceable court order distributing assets, a statutory deadline for creditors and protection from emerging creditors in the future, a reliable historic institution whose roots lie in ecclesiastical courts and British common law, and having a neutral 3rd party to adjudicate potential family disputes. Probate also reduces the chances of protracted trust litigation that may accompany trust administration.

Probate cons

Probate can be a lengthy, public, expensive process that may air a family's private affairs in the public eye while enriching attorneys. A family may not want to account to the Court for its handling of an estate, to file an inventory, or to receive permission for things like burying a loved one and paying the funeral and other last expenses. Probate can be expensive, time consuming, and make private family and financial matters public.

Abridged probate options

Various abridged probate options are available: a determination of descent, a valid settlement agreement, a 59-618a affidavit, a summary proceeding, a refusal of administration, a simplified estate administration, an informal administration, or a special administration. If the Estate is not opened for administration (K.S.A. 59-2219) or probate (K.S.A. 59-2220) within 6 months of the decedent's death, creditors are barred.¹⁰ Kansas probate law allows various abridged probate options to use this 6 month automatic bar on creditor claims: determination of descent, refusal to grant letters, informal administration, and summary administration.¹¹

- A determination of descent is used to confirm the heirs and distribute the estate to the heirs.¹²
- A valid or family settlement agreement is used in an intestate estate to facilitate distribution to heirs, and may also be used with a will if the heirs agree to a Will modification.¹³
- A 59-618a affidavit is used for an insolvent personal property estate.¹⁴

conservatorships); K.S.A. 59-2945 et seq. and Bartlett, Vol. 2, Ch. 46 (care and treatment cases); and K.S.A. 59-2111 et seq. and Bartlett, Vol. 2, Ch. 47 (adoptions).

⁸ See Kansas Probate Handbook, §1.2.1; see Norman Dacey, *How to Avoid Probate* (1965).

⁹ Probate is required to pass assets under a Will. K.S.A. 59-616. If the Estate has no assets, the attorney should file the Will and a 59-618a affidavit. See Kansas Probate Handbook, §1.4.3.

¹⁰ K.S.A. 59-2239(1) and see Kansas Probate Handbook, §3.2.3.

¹¹ See Kansas Probate Handbook, §3.2.3.

¹² K.S.A. 59-2250 and see Bartlett, Vol. 3, §§ 1353, 1356 (a decree of descent "declare[s] the title [to property] which accrues under the law of intestate succession" by "declar[ing] who has acquired the title of the decedent").

¹³ K.S.A. 59-102(8). While Kansas law favors family settlement agreements, Estate of Thompson, 226 Kan. 437 (1979), a family settlement agreement cannot be used (1) to avoid probating the decedent's Will, Estate of Petty, 227 Kan. 697 (1980), (2) to defeat a trust or asset distribution restrictions in the decedent's Will, Estate of Harper, 202 Kan. 150 (1968), or (3) to defeat creditors or other parties' rights, Estate of Harper, Estate of Sowers, 1 Kan. App.2d 675 (Kan. App. 1977).

- A summary proceeding is used to close an insolvent estate.¹⁵
- A refusal of letters may be used for a small estate where most assets have passed outside of probate.¹⁶
- Simplified estate administration can be used to obtain a court order when an estate consists of minimal assets and everyone agrees as to the estate's disposition.¹⁷
- Informal administration allows a simple court order to distribute a simple estate among the heirs.¹⁸
- Special administration can be used where assets emerge that may need to be dealt with before an administrator can be appointed, or assets are outside of the administrator's authority for some reason. A special administrator can (1) become an administrator, (2) be appointed in the interim before an administrator is appointed, or (3) serve in tandem with an administrator.¹⁹

B. Joint Tenancy and Shared Bank Accounts

Joint Property

Many husbands and wives, business partners, or other individuals want to own property jointly. Kansas has two types of joint property: (1) tenancy in common ("tenants in common") and (2) joint tenancy with rights of survivorship ("joint tenants" or "JTWROS"), but Kansas law does not recognize tenancy by the entirety.²⁰ Tenants in common is Kansas' default joint property ownership form, but Kansans can elect to be joint tenants.²¹

Joint Tenants with Rights of Survivorship

○ *Real Estate*

Joint tenants have a right of survivorship in the property, so the property passes automatically to the surviving joint tenant upon the first joint tenant's death.²² So if John and Jane Smith own their Overland Park home as joint tenants, upon John's death, Jane owns the property automatically by operation of law.

¹⁴ K.S.A. 59-618a.

¹⁵ K.S.A. 59-1507 and see Bartlett, Vol. 2, §§ 885-886.

¹⁶ K.S.A. 59-2287.

¹⁷ K.S.A. 59-3202 et seq.

¹⁸ K.S.A. 59-3301 et seq.

¹⁹ K.S.A. 59-710; see Kansas Probate Handbook, §4.1.3; and see Bartlett, Vol. 2, §§ 643-644 (a special administration has no authority to "enter into an agreement," "pay claims," "make a distribution of funds," or file an inventory without a Court order).

²⁰ K.S.A. 58-501 and see Kansas Probate Handbook, §1.4.2(a). See Black's Law Dictionary, 1506 (tenancy by the entirety). At common law, tenants in common have no survivorship rights, but only unity of possession among the tenants is required. A tenant in common may devise property by will or intestate succession, alienate, or transfer property without co-tenants' consent, by deed, lease, or mortgage. Joint tenants have a survivorship right in property, but joint tenancy requires 4 unities: (1) time, (2) title, (3) interest, and (4) possession. The surviving joint tenant becomes the sole owner of the property interest upon the deceased joint tenant's death. See Roger A. Cunningham, William B. Stoebuck, and Dale A. Whitman, *The Law of Property* (2nd ed. 1993), §§5.2, 5.3, and 5.5.

²¹ K.S.A. 58-501 (a "real or personal property" grant or devise "shall create" "a tenancy in common" "unless the language used" "makes it clear that a joint tenancy was intended to be created"). To create a Kansas joint tenancy, the language should read "as joint tenants with rights of survivorship and not as tenants in common." See Black's Law Dictionary, 1502-3 (tenants in common) and 1505 (joint tenants).

²² K.S.A. 58-501 and see Kansas Probate Handbook, § 1.4.2(a).

- *Personal Property and Intellectual Property*

Personal and intangible or intellectual property can also be held in joint tenancy.²³ So Bob and Mary can own a bank account or their stock portfolio as joint tenants. A copyright, trademark, or patent can also be held in joint tenancy, a valuable estate planning technique for authors, artists, musicians, and inventors who wish to avoid probate.

- *Other shared bank accounts/safe deposit boxes*

Banks and other financial institutions may have other forms of shared bank accounts that are similar to joint tenancy. A client interested in a shared account should consult with the bank and her attorney to ensure the account is titled in joint tenancy to avoid probate. Safe deposit boxes may also be held in joint tenancy.²⁴ Kansas law appears to treat multiple signees of a safe deposit box contract as joint tenants, including access to and ownership of safe deposit box contents.²⁵ Where ambiguity exists, the client would be well advised to make their intentions and the account's title clear.

- *Using joint tenancy to avoid probate*

Joint tenancy property is not probate property so it is not listed on the probate estate's inventory. While probate property passes by the Probate Court's order, joint tenancy property passes to the surviving joint tenant's upon the decedent's death (and filing a death certificate with the bank or Register of Deeds).

- *Small estate affidavit*

If all or almost all the Estate's property is titled as JTWROS, a small estate affidavit may be used to handle the Estate's remaining assets, if they are less than \$40,000.²⁶

- *Adding joint tenants to existing property*

Joint tenancy is a great way to avoid probate. How can a client's estate plan use joint tenancy for existing assets to avoid probate? Real estate and personal property can be re-titled as joint tenancy with rights of survivorship. A quit claim or warranty deed can be executed making the property joint tenancy. So a husband and wife who own a home as tenants in common can execute a deed conveying the home to themselves as joint tenants. Statutory language is required to elect joint tenancy over tenancy in common: "as joint tenants with rights of survivorship and not as tenants in common."²⁷

- *Terminating joint tenancy*

The Probate Code has a rarely used joint tenancy termination procedure.²⁸

C. Beneficiary Designations

Like joint tenancy, beneficiary designations avoid probate, but while joint tenants co-own a present property interest, a beneficiary designation indicates a future property interest, so the beneficiary does not currently own the property. Beneficiary designations are a popular way to leave insurance and retirement assets to a surviving spouse, children, charity, or other individual or entity.

²³ POD/TOD do not work for intangible or intellectual property. See Kansas Probate Handbook, § 1.4.2(b).

²⁴ K.S.A. 9-1503 and see Kansas Probate Handbook § 1.2.6(b).

²⁵ K.S.A. 9-1503.

²⁶ K.S.A. 59-1507b (2012 Supp.) and see KJC Form 41.

²⁷ K.S.A. 58-501.

²⁸ K.S.A. 59-2286 and see Kansas Probate Handbook, § 1.4.2(a).

Life Insurance

Life insurance pays a sum of money upon the insured's death, so a beneficiary must be designated. The beneficiary could be the insured's probate estate, a trust (often an irrevocable life insurance trust (ILIT)), a surviving spouse, child, or charitable organization.²⁹

IRAs

IRAs also must have a designated beneficiary.³⁰ Depending on the decedent's age, the beneficiary may be able to postpone taking required minimum distributions (RMD) and achieve a so-called stretch effect on the IRA (maintaining the tax deferred benefits longer), or the beneficiary may have to take the RMD if the decedent had received RMDs before death.³¹ A trust can also be designated as the beneficiary of an insurance policy or IRA plan.³² Kansas law treats an IRA like a revocable trust.³³ Kansas law allows a surviving spouse to elect to receive ½ of the deceased spouse's IRA.³⁴

Annuities

Annuities and similar investment income contracts may involve a designated beneficiary. A client should consult their financial advisor to ensure the annuities or other investments are properly titled.

Securities

A stock portfolio or other securities with an investment broker can be held in joint tenancy or a different beneficiary designation. For clients who own small businesses, stock in a closely held corporation, partnership, or LLC, or entrepreneurs, the attorney should advise the client on how best to title the stock certificate to promote the client's estate and business succession planning. Kansas law requires the beneficiary designation to be indicated in writing on the stock certificate.³⁵ A combination of designations is permitted: e.g. "John and Jane Doe, as joints tenants with rights of survivorship and not as tenants in common, transfer upon the death of the survivor to Jack Doe."

To individual or to trust?

A beneficiary designation can be to an individual in her own name (e.g. "to Jane Doe"), or to a trust for an individual's benefit (e.g. "to the John and Jane Doe Revocable Trust UTD 12/20/2012"). 2 related questions come into play: (1) is it advantageous to hold the asset in trust or in some other probate avoidance method or device rather than individually (a multi-generational estate planning consideration) and (2) is asset protection or an asset freeze desirable.³⁶ If appreciating property is held outright over generations, rather than in trust, large estate, gift, and GST taxes may be owed.

²⁹ See e.g. John R. Price and Samuel A. Donaldson, *Price on Contemporary Estate Planning* (2013), Ch. 6.

³⁰ See Natalie B. Choate, *Life and Death Planning for Retirement Benefits* (7th ed. 2011), Ch. 6 (trusts as IRA beneficiaries) and her book more generally for how best to handle IRAs in different situations.

³¹ See Choate, *Life and Death Planning*, Ch. 1 (IRA RMD rules).

³² See Kansas Probate Handbook, §§ 1.3.7(d) and 1.4.2(b).

³³ *McCarty v. State Bank of Fredonia*, 14 Kan. App. 2d 552 (1990), and see Kansas Probate Handbook, § 1.3.7(d).

³⁴ *Taliafero v. Taliafero*, 252 Kan. 192 (1992), and see Kansas Probate Handbook, § 1.3.7(d) (discussing the K.S.A. 59-603 surviving spouse election).

³⁵ K.S.A. 17-6408 and 17-6426.

³⁶ Multi-generational estate planning and dynasty trusts are beyond this article's scope. See e.g. Price on *Contemporary Estate Planning*.

D. Transfer on Death Deeds

Real estate

A transfer on death (TOD) deed, once filed with the County's Register of Deeds, works automatically by operation of law to transfer real estate to a surviving beneficiary.³⁷ So Jane could record a transfer on death deed to her home for the beneficiary of her son, Jack, and upon her death, Jack would file Jane's death certificate with the Register of Deeds, and the real estate would be automatically transferred to his name.

Personal property

While TOD deeds are commonly used for real estate, TOD deeds also work for passing personal and intellectual property outside of probate. The Kansas Probate Handbook wisely observes that while these "devices are used primarily to leave certain designated assets to desired beneficiaries," they can "be used globally to avoid probate altogether."³⁸ TOD is ideally suited to stock or bank account holdings, cars or other vehicles. Personal property can be designated in a personal property list with the decedent's Will or in the decedent's trust, naming the property with sufficient clarity and precision to allow someone walking through the decedent's home to easily identify the asset (e.g. "to my daughter, Emily, the antique grandfather clock near the family room fireplace" or "to my son, Winston, the vintage fountain pen in the top desk drawer in the study and the carved wood pipe").³⁹

Pre-death estate planning

Pre-death planning is crucial for any TOD designation. For real estate, the TOD deed must be executed and recorded before the decedent's death to be effective.⁴⁰ For personal property, the TOD designation must also be made before the decedent's death.

Post-death estate curation

The personal representative's role in the estate after the decedent dies is akin to a museum curator's role. Post-death estate curation describes the estate's personal representative's duty upon the decedent's death in handling different TOD assets. The TOD assets pass outside of probate, so they need not be listed on the estate's inventory filed with the Probate Court. But for TOD assets to be distributed to the rightful heirs, death certificates have to be presented to the Recorder of Deeds and banks, since the TOD mechanism requires proof of death to transfer the assets under operation of law to the heirs. So the personal representative serves as the estate's curator after the decedent's death, marshaling assets, presenting death certificates as needed, preparing an inventory, and preparing to distribute assets to the heirs.

E. Other Pay-on-Death Accounts

POD

Pay on Death ("POD") accounts are often used at banks and other financial institutions to effectuate a personal property transfer similar to a real estate transfer on death deed.⁴¹

³⁷ K.S.A. 59-3501 et seq. and see Kansas Probate Handbook, § 1.3.7(c).

³⁸ See Kansas Probate Handbook, § 1.4.2(b).

³⁹ K.S.A. 59-623.

⁴⁰ If an attorney in fact has been named for the ailing client under a durable financial power of attorney, the attorney in fact may visit different banks and other institutions to re-title accounts and record real estate TOD deeds before the client passes.

⁴¹ See Kansas Probate Handbook, § 1.4.2(b) list and accompanying cites.

POD vis-à-vis TOD

Again, the Kansas Probate Handbook notes that while these “devices are used primarily to leave certain designated assets to desired beneficiaries,” they can “be used globally to avoid probate altogether.”⁴² How do POD and TOD differ? TOD works for real estate and certain personal property.⁴³ POD only works for personal property, specifically for financial accounts where (as the name implies) something can be paid to someone else upon a person’s death.⁴⁴ TOD should be used for illiquid assets, like art, stocks, bonds, securities, and cars, while POD works for liquid financial assets where something can be paid to someone, like a checking or savings account, a certificate of deposit, a mutual fund account, or a brokerage account with cash.⁴⁵

Pre-death estate planning

As with a TOD designation, pre-death planning is crucial for any POD designation. To avoid probate, an asset must be titled during a person’s lifetime as POD to the recipient. Any asset in the decedent’s name that is not titled POD or TOD becomes part of the probate estate upon the decedent’s death.

Post-death estate curation

Post-death estate curation describes the contours of the estate’s personal representative’s duty upon the decedent’s death in handling different POD assets. The POD assets pass outside of probate, so they need not be listed on the estate’s inventory filed with the Probate Court. But for POD assets to be distributed to the rightful heirs, death certificates have to be presented to the recorder of deeds and banks, since the POD mechanism requires proof of death to transfer the assets under operation of law to the heirs. So the personal representative serves as the estate’s curator after the decedent’s death, marshaling assets, presenting death certificates as needed, preparing an inventory, and preparing to distribute assets to the heirs.

F. Gifts

Elements

A complete gift has 3 elements: (1) intent to give up control, (2) delivery of the gift to the recipient, and (3) acceptance of the gift by the recipient. State common law defines gift elements, while tax consequences are the federal law’s domain. Gifts can be made outright to an adult or held in trust for an individual’s benefit.⁴⁶ A client’s gifts must be completed before the client’s death, as “incomplete gifts” are included in their estate upon death, causing a myriad of tax liability issues.⁴⁷

Annual Exclusions

A person can give \$14,000 per year to each individual without incurring gift tax.⁴⁸ Using the gift splitting technique, a married couple can give \$28,000 per year to each

⁴² See Kansas Probate Handbook, § 1.4.2(b).

⁴³ K.S.A. 59-3501 (TOD real estate) and e.g. 17-49a01 et seq. (Uniform TOD Security Registration Act).

⁴⁴ Kansas law treats TOD and POD designations interchangeably. K.S.A. 17-49a05.

⁴⁵ See e.g. K.S.A. 19-49a09 (non-testamentary TOD for securities).

⁴⁶ Many estate planning attorneys counsel making gifts in trust to protect the recipient from potential creditors or divorcing spouse liability, give the trustee more control over an asset, or to freeze an appreciating asset’s value and keep it off the recipient’s and donor’s balance sheets for tax purposes. A gift to a minor must be held in trust until the minor becomes an adult.

⁴⁷ See e.g. I.R.C. 2036-2038.

⁴⁸ I.R.C. §2503(b)(1). The IRS published the annual gift tax exclusion, \$14,000. See Rev. Proc. 2012-41.

individual.⁴⁹ Married couples splitting gifts to give \$28,000 to each recipient must file a federal gift tax return, Form 709.⁵⁰

Lifetime Exemptions

The lifetime gift tax exemption - the maximum amount a person can give away to other people without incurring tax liability - is \$5.25 million.⁵¹ Unlike the federal estate tax exemption, the gift tax exemption is not portable between spouses, so any unused lifetime gift tax exemption expires with the decedent.⁵²

GST

Gifts to grandchildren or others across generations in trust may be subject to generation-skipping tax.⁵³

Disclaimers

Sometimes a disclaimer of property may be advantageous for estate planning or tax purposes. Attorneys should examine the federal and state disclaimer statutes.⁵⁴ Kansas disclaimers must be done by a signed and notarized writing, filed and recorded with the Probate Court handling the estate within 9 months of the decedent's death.⁵⁵

Gift tax returns

Any individual gifts over \$14,000 per year, married couples' gifts over \$28,000 per year, married couples splitting gifts to reach the \$28,000 per recipient annual exclusion, or lifetime gifts of over \$5.25 million require filing a federal gift tax return, Form 709.⁵⁶

G. Pros and Cons of Will vs. Trust

"Should I go for a will or trust," the client asks. "Which is better? Do I still need a will if you are preparing a trust for me?" she wonders. Wills and trusts each have their unique advantages and disadvantages and make sense in different situations for various clients.⁵⁷ Every adult client needs 4 basic estate planning documents: (1) a will or trust, (2) a living will, (3) a medical durable power of attorney, and (4) a financial durable power of attorney. But as attorneys build the foundations of the client's estate plan, should the capstone be a will or trust? The authors prepare wills for all clients and pour-over wills for trust clients as a safeguard to ensure a smooth probate journey.

Various advantages and disadvantages of wills and trusts should be considered⁵⁸:

⁴⁹ I.R.C. §2513(a)(1), (2).

⁵⁰ The federal gift tax is 50% of any gift over the annual per donee exclusion and lifetime exemption. A qualified CPA should be retained to file federal estate, gift, and/or generation-skipping transfer tax returns.

⁵¹ I.R.C. §2505. The lifetime gift tax exemption is indexed for inflation.

⁵² Portability provides that upon filing a Form 706 (federal estate tax return), a surviving spouse retains the deceased spousal unused exclusion amount (DSUEA), I.R.C. § 2010(c)(4).

⁵³ The generation-skipping transfer tax (GST) is beyond this article's scope. See Carol A. Harrington, Lloyd Leva Plaine, and Howard M. Zaritsky, *Generation Skipping Transfer Tax* (2001, 2nd ed.). Each individual has a \$5.25 million inflation-indexed lifetime GST exemption before the GST applies.

⁵⁴ See K.S.A. 59-2291 et seq. and see Kansas Probate Handbook, § 1.3.9(g).

⁵⁵ K.S.A. 59-2291 and 59-2292.

⁵⁶ The federal gift tax is 50% on amounts over the annual per donee exclusion or lifetime exemption. A qualified CPA should be retained to file federal estate, gift, and/or generation-skipping transfer tax returns.

⁵⁷ See e.g. Dennis M. Patrick, "Living Trusts: Snake Oil or Better than Sliced Bread?," 27 *William Mitchell Law Review* (2000), 1083, 1092-1102. Available at (<http://www.tn-law.com/Articles/living-trusts-dmp.pdf>), accessed 19 April 2013.

⁵⁸ See e.g. Price, *Contemporary Estate Planning*, §§ 10.12-10.13.

Will Pros:

- * Less expensive
- * Shorter and simpler
- * Faster to execute

- * More traditional
- * More definite with probate

Will Cons:

- * Lengthy (months or years) probate process
- * Public documents
- * Original must be found and filed with court
- * Needs 2 disinterested witnesses to execute
- * Revoked by marriage, divorce, or having a child

Trust Pros:

- * Avoids probate, especially for large, complex estates or estates with property in multiple states
- * Private legal document
- * Asset protection
- * Build family wealth with minimal taxes
- * Trustee testing opportunity
- * Protects against will contests

- * Avoid guardianship and conservatorships
- * Professional management by trustee

Trust Cons:

- * Expensive

- * Long and complex
- * May need tax law patches over time
- * “Dead hand control” of assets
- * Must be funded to work
- * Avoiding probate avoids the 59-2239 creditor bar
- * Administrative can be cumbersome
- * Trustee’s fees

An attorney summed up the will and trust debate well: “The living trust is a valuable estate planning tool for clients with larger estates and property in many different states or clients that live in states that have complicated probate procedures. A living trust may not be appropriate for clients with simple or smaller estates, due to its costs and complexity. Clients will not always save money by using the living trust, and estate taxes can be reduced or eliminated without using the living trust. The probate process is not always lengthy, complicated and expensive, and need not always be avoided.”⁵⁹

H. Trusts: Living vs. Testamentary, Revocable vs. Irrevocable

If the client chooses a trust, should the attorney prepare a living revocable trust or a testamentary trust? Does it matter if the trust is revocable or irrevocable?⁶⁰ A living or revocable trust is a stand-alone estate planning document, usually executed in tandem with a pour-over will.⁶¹ The trust may be minimally funded during the decedent’s lifetime and then receive an inheritance for the benefit of surviving family members upon the decedent’s death from the pour-over will. By contrast, a testamentary trust is contained within a will and only established upon a decedent’s death when the will is probated.

A revocable trust can be changed or amended over time as circumstances and a client’s needs change.⁶² Estate planning attorneys often amend or revoke revocable trusts established years ago, when the tax thresholds were much lower, to reflect the higher tax

⁵⁹ Id., 1104.

⁶⁰ See Kansas Probate Handbook, §2.1.1(a).

⁶¹ See Kansas Probate Handbook, §1.4.2(c).

⁶² K.S.A. 58a-601, 602.

exemption levels.⁶³ A revocable trust becomes irrevocable upon the settlor or grantor's death.⁶⁴ By comparison, an irrevocable trust typically cannot be changed or amended, although some exceptions, including "decanting" exist.⁶⁵ An irrevocable trust must also file a federal fiduciary income tax return (Form 1041) if income exceeds \$600 for a fiscal year, and pay a higher income tax rate than an individual on a compressed tax schedule.⁶⁶ Trust taxation and irrevocable trust administration are complex topics beyond this article's scope.⁶⁷

Conclusion

Kansas law provides many good ways to avoid probate. Depending on the client's financial situation, family dynamics, and the feasibility of various probate options and abridged probate methods, an estate planning attorney's wise counsel can guide a client to avoid probate entirely, or minimize its expense, delay and publicity minimized as the attorney works with the client's family to curate and shepherd the estate.

⁶³ See e.g. K.S.A. 58a-416.

⁶⁴ K.S.A. 58a-813(b)(3).

⁶⁵ "Popping the cork," as wine connoisseurs might say, on decanting and irrevocable trust amendments are beyond this article's scope. See e.g. Robert A. Esperti, Renno L. Peterson, and Robert S. Keebler, *Irrevocable Trusts* (2006).

⁶⁶ Rev. Proc. 2013-15 (the trust income tax rate of 39.6% on annual income over \$11,950) and see Jonathan G. Blattmachr and F. Ladson Boyle, *Blattmachr on Income Taxation of Estates and Trusts* (2012) and Boris I. Bittker and Lawrence Lokken, *Federal Taxation of Estates, Trusts and Gifts* (3rd ed. 1999).

⁶⁷ See *Kansas Probate Handbook*, §1.2.11.