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# UNDERSTANDING THE DIFFERENCES BETWEEN PROBATE AND NON-PROBATE PROPERTY

When preparing an estate plan; specifically, when determining how property is to be distributed in an estate plan, it's important for you to understand the differences between probate and non-probate property.

In its simplest terms, any property that is considered non-probate provides for its own beneficiary (ies) and therefore doesn't pass on to anyone under the directives of a Will. As a matter of fact, if a Will provides for the designation of a beneficiary to receive non probate assets, it is considered void.

So which property is considered probate and non-probate? Well, the following list is non-exclusive and contains the most common types of property.

Probate property:

1. Real property owned outright or as tenancy in common. In one of my previous columns I discussed the differences and consequences between of the different types of real property ownership. For the purposes of this column you should know that any real property owned by the decedent only or that is held as tenants in common is considered a probate asset because there is no designation by law that would allow the property to immediately flow to another person or entity upon death.
2. Bank accounts that are owned outright without a beneficiary (payable-on-death) designation or that are not held in joint tenancy.
3. Interests in partnerships, corporations, or limited liability companies.
4. Tangible personal property such as jewelry and automobiles.

Non-probate property:

1. Real property held as joint tenants or tenants by the entirety. With a joint tenancy, the ownership rights of the decedent terminated upon his/her death leaving the outright ownership interest to the survivor. Tenancy by the entirety is a less often used tenancy reserved solely for married couples owning real property.



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2. Life insurance is not included in the estate as a probate asset because it is basically a contract with the insurance company to pay a death benefit to someone else upon your death. The beneficiary of the policy gets paid outright the entire face value of the policy. Hence, the life insurance proceeds are not included in the estate, unless, the decedent or the decedent's estate is named as the beneficiary.
3. Qualified retirement accounts are not included in the decedent's estate primarily because they usually provide for an alternate beneficiary. These accounts include IRA's, pension plans, Keogh Plans, profit sharing plans, SEP's, 403(b) and 401(k).
4. Totten Trusts, which are not really Trusts but savings accounts in the decedents name as Trustee for someone else. Upon death, the balance in the account is immediately owned by the person the funds were being held "In Trust" for.
5. Payable on death accounts (POD) such as brokerage accounts, securities and mutual funds, again because they typically have a named beneficiary on the accounts.
6. A beneficial interest in a Trust. This only applies if the decedent's interest in the trust is a lifetime interest which expires upon his/her death. If the interest in a Trust provides for benefits beyond the decedent's death then it will be included in his/her estate.

When planning your estate, it's important to have a solid knowledge of the assets you own and the type of ownership interest you have in those assets. Why? Because it bears greatly on the type of estate plan you need to prepare and to determine just how much or how many of your assets will be included in your estate at the time of death. More importantly, which assets will NOT be included in your estate at the time of death. Remember that one of the key elements of estate planning is to minimize the amount and value of the assets in your estate.

**Anthony J. Medico, Esq.,** has practiced law for over 22 years. To ask a question for this column, or to receive Medico's free Estate Planning Survival Guide, visit his website at [www.medicoandassociates.com](http://www.medicoandassociates.com), send an e-mail to [Amedico@medicoandassociates.com](mailto:Amedico@medicoandassociates.com) or call (203) 661-8151. You can read most of his previous columns on his Greenwich Time estate planning blog on the internet. Just go to <http://www.greenwichtime.com/blogs> and scroll down until you find him under the business section. Enjoy.