2
The Agony of Probate

When most people die, their estates are settled via the frustrating and agonizing process of probate—a costly legal procedure that usually consumes at least a year or more. However, with proper estate planning, estates can be settled in less than an hour at little or no cost!

The question "Why should I have a Living Trust?" can best be answered first by showing you what can happen to your estate—the agony through which your heirs must suffer and the monetary consequences that can befall even the most meager estates—if you do not have a Living Trust. Then it will be much easier for you to understand the many tangible advantages that can accrue to your estate if you have a Living Trust. Later chapters will introduce you to several additional advantages a Living Trust can provide for your peace of mind. A well-written Trust will handle many contingencies that may occur during your lifetime. A Living Trust is just that—a Trust that is a living document providing many advantages to you while yoil are living as well as after you pass away.

THE MOST IMPORTANT ADVANTAGE OF A LIVING TRUST

The single most important reason for having a Living Trust is to *avoid probate.* Some years ago, the American Bar Association (ABA) strongly recommended that every state revise its probate code because these codes had become bureaucratic and abusive. A few states gave only lip service to the ABA's admonishment, and the rest of the states simply rejected outright the association's recommendation.

In the United States today, probate is one of the most agonizing and expensive experiences in which an individual can participate. To name someone as the executor of your Will (which means that the individual will eventually take part in the probate process) is to place an incredibly painful burden upon that individual. I would not wish that experience on my worst enemy.

The single most important reason to have a Living Trust is to avoid the cost and agony of probate.

Upon the death of a spouse or a parent, the surviving spouse and/or children, in effect, have to leave the past and start their lives anew. However, those people enduring the eighteen months to two years of probate remain suspended in the never-never land of their past. Only after the probate process is complete can the survivors really make a fresh start.

In contrast, the estates of clients who have established Living Trusts are settled within less than an hour. Within a week to ten days following the death of a spouse or parent, these people can stop mourning and realize that they can return to an active, productive way of life. Typically, the surviving spouse or children return to our office some four or five months after the estate is settled to reposition their assets (for example, change their stock portfolio from growth stocks to income stocks). By this time, the survivors' lives are usually back in order.

Our clients contrast sharply with people going through probate with their lives on hold—which is part of the agony of probate. Avoiding the probate process is the most important reason why the Living Trust is the best way to hold assets.

THE OLD WAY VS. THE NEW

In days gone by, almost everyone thought it was a good idea to have a Will, but now more and more people are becoming aware of the advantages of having a Living Trust rather than a Will. The following examples illustrate some startling differences between having a Will and having a Living Trust:

> Laura Haines left an estate of $130,000 in cash. A year and a half later, the estate was finally settled and funds were released. Settlement of the estate cost $8,500. Howard Murphy, a grown man, broke down in tears over the sheer frustration of administering his father's estate of $600,000. Robert Courtland had to leave medical school while the administrators haggled over his father's estate of $8 million, which included funds for Robert's tuition.
>
> In contrast, Mary Carson's estate of $180,000, Donald Scott's estate of $350,000, and Jim Boswell's estate of $1.4 million were each settled in less than an hour—and cost nothing to settle.

The estates in the second group were no less complex than the estates in the first group. The difference between the sets of examples is that each of the people in the second group had his or her assets in a Living Trust—and each estate was organized.

Most people spend their lifetimes putting assets together, but these people give little thought to how, upon their death, their assets will be transferred to their heirs. People assume that all of their personal assets, personal effects, business assets, insurance, and government benefits will go to their heirs. However, this presumption is not so, according to a study by the Estate Research Institute, an organization well known for its extensive research and professional publications in the area of estate planning. As shown in Figure 2-1, this study indicates that 10 percent to 70 percent of a deceased person's assets will be siphoned off by probate fees, federal estate taxes, state inheritance taxes, and other costs!

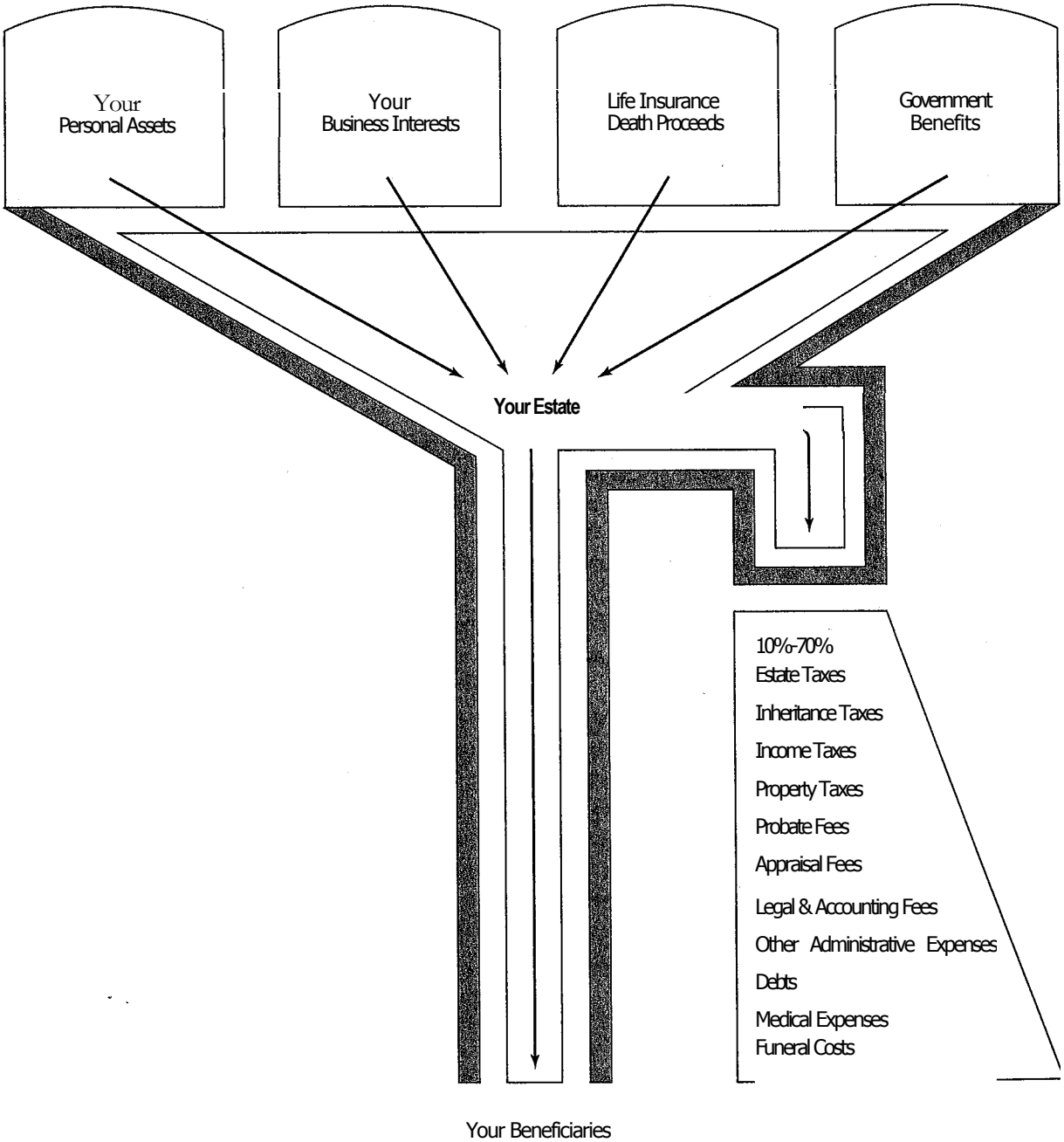
Unfortunately, the topic of probate results in more misinformation, myths, and just plain old wives' tales than any other subject I know. In fact, most people do not even have Wills. However, those people who do have Wills usually have outdated ones. Conversely, if a Living Trust is properly written (and covers the multitude of contingencies that could arise), it should not need to be updated except to meet changing personal situations, such as different successor trustees, a change in beneficiaries, or modifications to allocation and distribution of assets.

Everyone should know that the process of settling an estate can be incredibly costly, time-consuming, and frustrating. I have watched grown men cry over the sheer frustration of probate. I have watched stock values deteriorate while the legal process moved forward with laborious and painful slowness. I have watched valuable businesses, built through years of hard work, falter and die in the probate process. I have watched small estates be almost entirely consumed by legal fees. The tragedy is that none of this frustrating process is necessary—with proper estate planning.

The time and expense of preplanning—that is, creating a Living Trust—are minuscule in relation to the results of no planning. For example, having a Living Trust drawn up properly usually costs anywhere from $1,200 to $1,800, and occasionally as much as $3,500.

However, the probate cost of settling an estate even as small as $100,000 for a married couple would typically be $12,000 ($4,000 on the first person to die and $8,000 on the second person to die). These figures assume a probate cost of 8 percent, which is reasonably conservative. The probate cost for larger estates would be proportionately greater. Yet, regard-

FIGURE 2-1
PERCENTAGE OF ESTATE CONSUMED BY PROBATE



less of the amount of money involved in setting up a Trust, it is *insignificant* in relation to the human trauma of going through the probate process.

By 1974, I had been through enough probate with my own family and clients that I swore I never wanted my wife and children to suffer that same fate. Consequently, our family created a Living Trust and organized our estate.

The loss of a loved one can be a shattering experience. Why make it even more so by requiring the intervention of attorneys and accountants (in using the probate process), when none is needed (with a Living Trust)?

Most important, a revocable Living Trust eliminates the need to seek legal help, unless the survivor(s) or trustee(s) would feel better by doing so. In fact, there is no need to have anyone get involved during this very personal and trying time, except those people whom the deceased would have wanted to be there.

THE PURPOSE OF PROBATE

The stated legal purpose of probate is to establish clear title to, or ownership of, an asset. Typically, when people buy homes, they also buy "title insurance," which promises to pay them if their land is lost to an unknown but rightful claimant. Before issuing such an insurance policy, the title insurance company conducts a title search to assure that there are no other claimants—and that the title can clearly pass to the new owners.

Upon your death, before title to your assets can pass to your heirs, all potential claimants to those assets must be eliminated. The process of eliminating all potential claimants is called probate, a process that can be costly, time-consuming, and agonizing.

If you have a Will, your estate does not go directly to your heirs but instead must pass through probate.

Used as a protective process for creditors, the probate process is overkill You may say, "I have no debts." However, whether an estate has any debts or not, each estate goes through the same probate process—to determine whether unknown claims could exist against the estate.

THE PROCESS OF PROBATE

The size of an estate determines whether an estate must be probated. For most states, if real estate holdings exceed $10,000 or if the total estate, including personal effects, exceeds $30,000 to $60,000, the estate will go through probate. If your gross estate is less than the amount shown for your state in Table 2-1, you are eligible for an informal or administrative probate process. In all other states, and the District of Columbia, every dollar of your estate is subject to probate! If your estate is within the allowable limits and therefore qualifies for avoiding probate, a simple affidavit procedure may be substituted for the lengthy and costly probate process. However, since most people have assets that exceed the maximum limits, few people are spared the probate process.

The tremendously complex probate process is well illustrated by the Estate Research Institute's chart shown in Figure 2-2. Probate is not only incredibly complex, but it is also psychologically destructive at a time when people are least prepared for the mental stress.

THE HISTORY OF PROBATE

The probate process came to the United States from English law, which is the basis for all constitutional and common law in this country. Unfortunately, the founding fathers adopted the most complex of the English probate systems. In medieval England, land was probated in the king's courts, called "common law courts." Proceedings were complex, time-consuming, and costly. The system was vastly improved with the establishment of "ecclesiastical courts" to handle personal property simply and expeditiously. "Equity courts" were later established to expedite title transfer of fiduciary property, such as stocks and bank accounts. England eventually modernized its entire probate system.

Instead of adopting England's three-court system (common law, ecclesiastical, and equity courts), the American founding fathers heaped the entire process together into the more complex, time-consuming, and costly common law system and called it the "probate court." Unfortunately, the passage of time has complicated, rather than simplified, the probate process. Our system of probate in the United States today

TABLE 2-1
MAXIMUM ESTATE VALUE
TO AVOID PROBATE

	All Assets	Real Estate	Spouse		All Assets	Real Estate	Spouse
Alabama	$ 3,000			Montana	$ 7,500		
Alaska	$ 15,000			Nebraska	$ 10,000		
Arizona	$ 30,000	$50,000		Nevada	$ 25,000		
Arkansas	$ 50,000			New Hampshire	$ 10,000		
California	$100,000			New Jersey	$ 5,000		
Colorado	$ 27,000			New Mexico	$ 30,000		$30,000
Connecticut	$ 20,000						+ homestead
Delaware	$ 20,000			New York	$ 10,000		
D.C.	$ 15,000			North Carolina	$ 10,000		$20,000
Florida	$ 20,000			North Dakota	$ 15,000		
Georgia	$ 2,500			Ohio	$ 35,000		$85,000
Hawaii	$ 20,000			Oklahoma	$ 60,000		
Idaho	$ 25,000			Oregon	$140,000	$90,000	
Illinois	$ 50,000			Pennsylvania	$ 25,000		
Indiana	$ 15,000			Rhode Island	$ 10,000		
Iowa	$ 15,000			South Carolina	$ 10,000		
Kansas	$ 10,000			South Dakota	$ 10,000		
Kentucky	$ 10,000			Tennessee	$ 10,000		
Louisiana	$ 50,000	no real estate		Texas	$ 50,000		
Maine	$ 10,000			Utah	$ 25,000		
Maryland	$ 20,000			Vermont	$ 10,000		
Massachusetts	$ 15,000			Virginia	$ 10,000		
Michigan	$ 15,000			Washington	$ 60,000		
Minnesota	$ 20,000			West Virginia	$ 50,000		
Mississippi	$ 20,000			Wisconsin	$ 10,000		
Missouri	$ 40,000			Wyoming	$ 70,000		

takes seventeen times longer and costs one hundred times more to transfer a deceased person's wealth to survivors than the currently revised system in England.

In the mid-1960s, efforts to modernize the probate system through adoption of the so-called Uniform Probate Code were conceived as joint projects of the American Bar Association and the National Conference of Commissioners on .Uniform State Laws. The project attempted to bring some order to a system that was so archaic and complex that few, if any, of the country's scholars of jurisprudence could find any redeeming value in it at all.

Unfortunately, the Uniform Probate Code ran into such universal opposition that it was either rejected outright or, where adopted by certain states, watered down to such an extent that one legal scholar said, "One wonders whether the original writers of the model code would recognize their own work."

THE COST OF PROBATE

As one legal scholar expressed it so well, "The cost of probate expands to consume the money available." Although said with tongue in cheek, the remark was also an attempt to encourage the legal profession to reform a system that has become scandalously consumptive.

A nationwide survey of probate and administrative costs was published in 1977 by the Estate Research Institute. Table 2-2 shows the relative consistency of the probate cost-as a percentage of the estate. Note that the fees are

FIGURE 2-2
ESTATE EXECUTOR'S DUTIES DURING THE PROBATE PROCESS

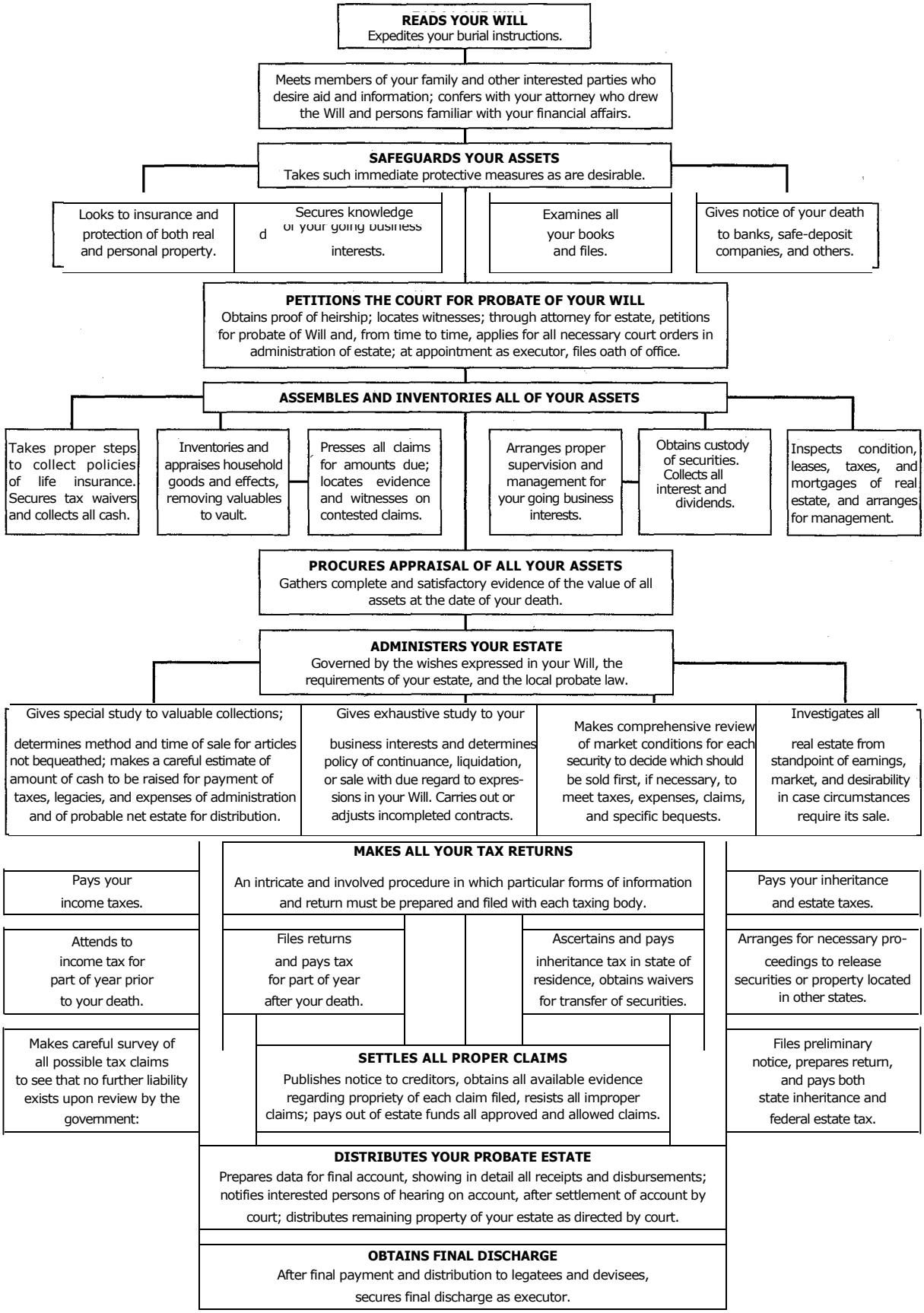


TABLE 2-2
PROBATE AND ADMINISTRATIVE COSTS

Gross Estate	Probate and Administrative Expenses
$ 50,000	8.6%
$ 100,000	8.2
$ 200,000	7.7
$ 300,000	7.4
$ 400,000	7.2
$ 500,000	7.0
$ 600,000	6.8
$ 700,000	6.7
$ 800,000	6.6
$ 900,000	6.5
$ 1,000,000	6.4
$ 1,500,000	6.1
$ 2,000,000	6.0
$ 2,500,000	5.9
$ 5,000,000	5.8
$10,000,000	5.7

based on the *gross* estate, before any debts owed by the estate to other parties are deducted.

One of the leading county bar associations surveyed its membership of more than 23,000 attorneys about probate costs. The association, which published the survey results in its own journal, found that the cost of probate ranged from 8 percent to 10 percent of the gross estate.

Components of the Probate Fee

There may be two parts to the probate fee: *statutory fees* and *extraordinary fees*. Statutory fees are those fees established by a state legislature and readily referred to when someone asks an attorney about probate costs. Extraordinary fees are those fees charged for additional services—and approved by the probate court. It is common practice for attorneys to charge both statutory and extraordinary fees, and it is equally common for attorneys to receive approval, without question from the court, for these often outlandish fees. In legal jargon, the combination of these two types of fees is called *reasonable fees*. Some states allow attorneys to charge only reasonable fees. States that do not provide statutory fees allow attorneys to charge by the hour. Unfortunately, it is very difficult to determine in advance the hours that an attorney may consume. In these cases, probate fees are unknown until it is too late. One scholar of the system reported that, in his fifteen years of active participation with the probate courts, he witnessed the reduction of only one extraordinary fee considered to be excessive—and that fee was reduced by only 25 percent!

All too often an attorney will downplay the cost of probate to a client. The attorney will show the client the statutory fees established by the state legislature and imply that these fees are the "maximum" fees. In actual practice, however, these statutory fees tend to serve as the "minimum" fees charged—with the unmentioned extraordinary fees added on to the total probate cost.

In addition, if a person happens to have a Testamentary Trust with a financial institution named as executor, the statutory fees apply both to the financial institution as executor and to the attorney who drew the Trust. In other words, the person gets to pay twice!

Basis for Computing Probate Cost

Actual costs of probate vary drastically. Costs run from 4 percent to 10 percent of the *gross* estate before any liabilities (such as mortgage or other debts) are subtracted. This cost of probate is substantiated by two nationwide studies, as well as interviews with numerous estate planners, probate attorneys, and trust officials. As a rule of thumb, many organizations simply use a flat fee of 5 percent of the estate. In calculating probate expenses, however, most authorities consider the 5 percent figure to be too conservative. Whether the probate fee is 4 percent, 8 percent, or 10 percent of the *gross* estate, such a probate cost is excessive.

The value of a gross estate and a net estate can differ significantly. Let me illustrate the difference between the two values.

> Some years ago I did an estate analysis for the treasurer of a large corporation. As an executive benefit, the company provided investment opportunities for its key employees. The following example shows this particular individual's estate:

Gross estate	$5,000,000
Less: Loans outstanding	($4,500,000)
Net estate	$ 500,000

The income from the individual's investments would pay off the notes for the loans outstanding in five years—when his "net" estate would be worth $5 million. However, if the individual died before the loans were paid, a 10 percent probate fee would wipe out his entire estate ($5 million x 10 percent = $500,000)!

During the estate-planning process it was discovered that the individual had a previously unknown serious heart disease. A Living Trust was quickly established to eliminate the necessity of probate—a process that could have left this successful businessman's family destitute.

Enormity of Probate Fees

A California court recently found that $23 million was *not* an excessive probate fee! The heirs challenged the fee as excessive; however, the court ruled that it could find no "intent of malice towards the heirs" and let the probate fee stand. (Even though the estate was $1.4 billion, I still wonder how $23 million of legal expenses can possibly be justified.) Many people would thus believe the previously cited comment that the cost of probate expands to consume the funds available.

LENGTH OF PROBATE

Probate is time-consuming. Although this complex process usually takes at least one and a half to two years to complete, many cases take as long as three or four years and more. Most people assume that their individual estates are simple and therefore will pass through probate quickly. This assumption is simply false.

Some time ago an attorney and friend who had heard my frequent complaints about the probate system called to illustrate a typical case. The attorney had just left the courtroom where he had settled a widow's very simple estate worth $110,000. The estate consisted entirely of cash instruments such as savings accounts, but settling the estate had taken eighteen months, and the attorney's fee was $8,500-8 percent of the estate.

Remember that, regardless of how simple an estate appears to be, it is almost impossible to close an estate through the probate system in less than a year. Even though I occasionally do hear of an estate where probate closed in less time, far more often I hear of probates extending well beyond two years.

The main reason probate takes so long is that it is such a complex process. Summarizing the steps shown in Figure 2-3, the process can be broken down into the following sequence:

- Gathering material and filing petition
- Publishing notice to creditors
- Inventorying assets and obtaining appraisals
- Preparing accounting of assets and expenditures and filing petition for distribution and accounting
- Filing closing petition

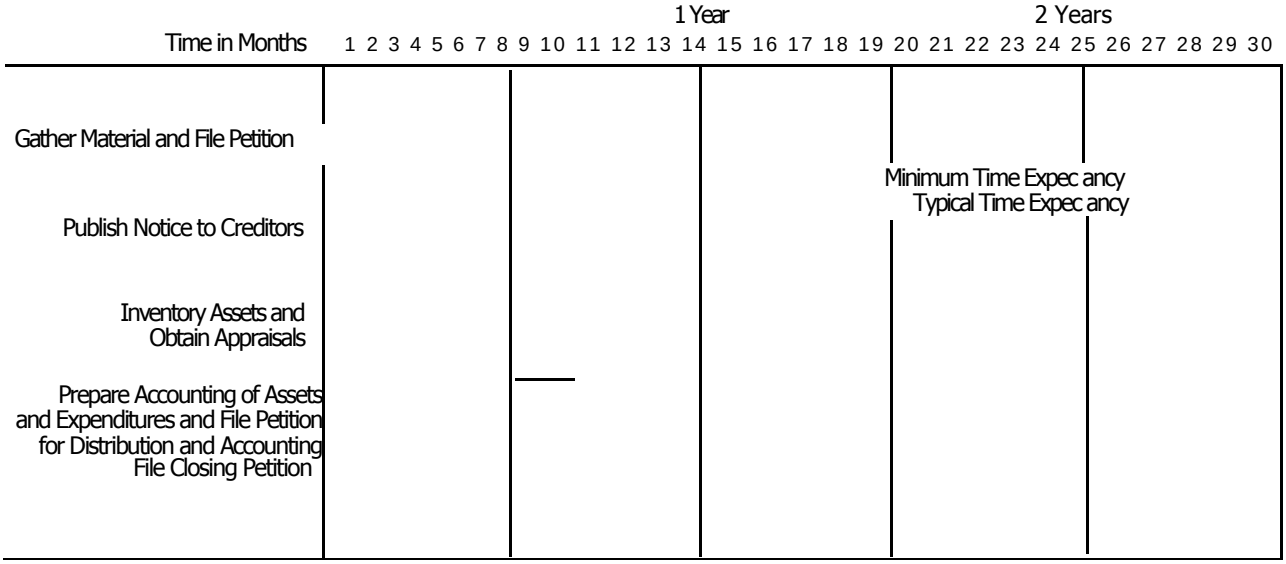
Figure 2-3 indicates minimum and typical time periods required to accomplish each step in this sequence.

There are two other major reasons for the lengthy probate delays. First, attorneys have a natural inclination to procrastinate—put off until tomorrow what need not be done today. Many a client calls his or her attorney for a probate progress report only to hear that "it's moving along"—knowing full well that the attorney has set the case aside and is not actively working on it.

The second reason for delays in completing the probate process is more common than people would like to believe: the dishonesty of probate attorneys.

Following a television appearance, a desperate woman called me seeking any means to terminate her father's probate. The woman's father had died six years earlier, leaving her an estate of several million dollars. Sadly, the woman had yet to receive even a penny! The first attorney whom the woman had engaged

FIGURE 2-3
PROBATE PROCESS TIME



had charged enormous fees, paid from the estate, but had come nowhere close to settling the estate. The woman replaced the first attorney with another attorney, who proceeded to sue the first attorney for charging excessive fees. Six years had passed, the estate was no closer to settlement, and the woman was so frustrated with the whole process that she claimed she would gladly give up her inheritance—if only she could just extract herself from the probate process.

In this same vein, at one of my seminars a retired FBI officer told me that he had spent two years as a federal referee, investigating estates that were being exhausted of their assets by attorneys. By the time the investigations were completed, the estates were stripped bare—with nothing left for the heirs. The FBI agent saw the Living Trust as the legal means to prevent estates from being similarly drained in the future.

OTHER PROBLEMS ASSOCIATED WITH PROBATE

Besides being cumbersome and time-consuming, the entire process of probate causes other, related problems for individuals who must endure it.

Probate Cannot Be Stopped Once Begun
Once the probate process has started, there is no turning back. The process churns on with seemingly no end in sight. Similar to a Rube Goldberg invention, probate is a system that has grown topsy-turvy, makes little logical sense, creates work for many in the profession, and drones on without end.

Time and again I have been asked—in that special tone of anguish now so readily recognizable—whether there is any way that an individual can be extracted from the probate process. Can probate be shortened or even terminated? At seminar after seminar, I have asked hundreds of people who have gone through probate whether they would be willing to do so again, and I have always received an adamant "no!"

Probate Causes Discord
The probate process engenders contention among the family members involved. The longer the probate period continues, the greater the stress on the surviving spouse. In

addition, as probate drags on relentlessly, the greater is the chance of developing sibling rivalry—often resulting in irreparable wounds to the surviving family members.

Probate Results in Loss of Privacy

Most people religiously guard their right to be free from invasion of their privacy—whether it be protection from someone entering their homes uninvited or from someone looking at their financial documents. How much a person earns or the size of a person's estate is personal information and is considered sacrosanct. Yet, each individual sits on a time bomb set to go off upon his or her death or the death of his or her spouse—because part of the probate process is to make the estate known to the public. Anyone may go down to the local hall of records and review the assets of a deceased person's estate. Examples of typical public notices of probate are shown in Figure 2-4.

The Internet provides immediate access to some of the most famous Wills. We all remember how well Jacqueline Kennedy Onassis guarded her privacy, yet her Will is readily available on the Internet. Or how about Jerry Garcia's Will? The list goes on.

The estates of celebrities receive extensive news coverage. For example, the death in 1952 of Dixie Lee Crosby, Bing Crosby's first wife, resulted in the public's knowing about the estate. Everyone learned the size of the estate, the debts, and the cash available—as well as the cost to settle the estate. The public also learned that Bing had to sell his interest in the Del Mar racetrack, as well as his horses, in order to settle the estate and pay all of the resultant costs.

However, Mr. Crosby had learned a valuable lesson from his experience with the probate process: Within a few days of Bing's death, his legal firm in Beverly Hills announced that he had a Living Trust and that there would be no further comment. Consequently, no details of his estate have ever been made public. As a result of his Living Trust—which avoided probate—the public will never know the size of Bing Crosby's estate or who received what. Bing had learned how to preserve his privacy.

FIGURE 2-4

PUBLIC NOTICES OF PROBATE

NOTICE OF DEATH OF FRANCES L. HURLEY AND OF PETITION TO ADMINISTER ESTATE
Case No. P64967

To all heirs, beneficiaries, creditors and contingent creditors of FRANCES L. HURLEY and persons who may be otherwise interested in the will and/or estate:

A petition has been filed by Cheryl W. Graham in the Superior Court of Ventura County requesting that Cheryl W. Graham be appointed as personal representative(s) to administer the estate of FRANCES L. HURLEY.

The petition requests authority to administer the estate under the Independent Administration of Estates Act with limited authority.

The petition is set for hearing in Dept. No. 42 at 800 S. Victoria Ave., Ventura, CA 93009 on June 6, 1988, at 10:00.

IF YOU OBJECT to the granting of the petition, you should either appear at the hearing and state your objections or file written objections with the court before the hearing. Your appearance may be in person or by your attorney.

IF YOU ARE A CREDITOR or a contingent creditor of the deceased, you must file your claim with the court or present it to the personal representative appointed by the court within four months from the date of first issuance of letters as provided in Section 700 of the Probate Code of California. The time for filing claims will not expire prior to four months from the date of the hearing noticed above.

YOU MAY EXAMINE the file kept by the court. If you are Interested In the estate, you may serve upon the executor or administrator, or upon the attorney for the executor or administrator, and file with the court with proof of service, a written request stating that you desire special notice of the filing of an inventory and appraisement of estate **assets** or of the petitions or accounts mentioned In sections 1200 and 1200.5 of the California Probate Code.

Cheryl W. Graham, Pelftioner(s)
IRWIN D. GOLDRING, Esq.
Attorney(s) for Petitioner (s)
1888 Century Park East, 6350
Los Angeles, CA 90067
81367
PUBLISH: May 27, 28, June 2, 1988
DV1.376476-0-9

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF VENTURA

In rethe Estate of JOYCE D. DOBBIN, Deceased.)

Casa No. P64394

NOTICE OF SALE OF REAL PRROPERTY

NOTICE IS HEREBY GIVEN that RANDY MILLER DOBBIN, as the personal representative of the estate of JOYCE D. -DOBBIN, Deceased, will sell at private sale to the highest and best bidder, under the terms and conditions herein mentioned, and subject to confirmation by the Superior Court, on June 6, 1988, at 10 AM, In Courtroom 42, of the Ventura County Superior Court located at 800 S. Vicki-Ma Ave., Ventura, CA 93009, all the right, title, interest and estate of the Estate of Joyce D. Dobbin, deceased, in and to the following described real property: 626 Kendaie Lane, Thousand Oaks, California.

The terms and conditions of sale are: cash, in lawful money of the United States of America. Ten percent of the amount bid to acrompany the offer and the balance to be paid on confirmation of sale by the court. Bids or offers are invited for this property and must be in writing and will be received at the office of Pamela M. Hanover, attorney for the personal representative, at 141 Duesenberg Dr., *06*, Westlake Village, CA 91362, or may be filed with the clerk of the Superior Court, at any time after first publication of this notice and before making thesale.

For further information and bid forms apply at the office of said attorney for the personal representative.

The first is reserved to reject *any* and all bids.

DATED: May 19, 1988.
/s/ Randy Miller Dobbin, Personal Representative of the Estate of Joyce D. Dobbin, Deceased
/s/ Pamela M. Hanover, Attorney for Personal **Representative**
141 Duesenberg Dr., #6
Westlake Village, CA 91362
PUBLISH: May 25, *29* June 1, 1988
DV1-376198-0.6

Probate Must Be Conducted in Every Jurisdiction Where You Own Real Estate

An area of potential frustration arises in owning real estate in more than one state. If you have property in more than one state or country, recognize that an *independent* probate will be conducted in each site on the portion of your estate that is located in that jurisdiction. If probate is costly, complex, and agonizing in your resident state, imagine what it is like in one or more absentee states or countries!

THE AGONY OF PROBATE

After seeing our audiovisual seminar on the Living Trust, an attorney said, in a manner of criticism, that he objected to the continual use of the phrase *the agony of probate*. In contrast, another attorney who participated in one of our seminars came away so moved by the intense anger expressed by so many people who had gone through probate that he summarized his feelings on paper and asked that he be given the opportunity to continue participating in the seminars. Even though the attorney professionally handled many probate cases, his attendance at the seminar was the first occasion where he had experienced being on the other side and had witnessed the sheer frustration and anger of so many people.

I have seen once-thriving businesses shrivel up and die as they were held in limbo by the probate process. I have watched large stock portfolios disintegrate to the point of being almost worthless. I have seen savings accounts remain locked in at 4 percent interest when the market rate (in 1979) was 16 percent to 20 percent. I have witnessed homes literally being given away in distress sales after standing unattended for two or more years. I have observed liquid assets being drained away by legal fees. Everything stands still—nothing can be sold—as the process of probate drones slowly on toward establishing clear title.

I watched as a widow was required to pay $6,000 for a bond in order to act as executor of her (and her deceased husband's) jewelry business. I watched as a son, a sole heir, almost had apoplexy as the court required him to purchase a bond in order to act as executor of his parents' estate.

Unfortunately, all of the mental trauma associated with probate happens during the worst period of an individual's life—following the loss of a beloved companion or parent.

> For example, I remember a mother of seven young children who had recently lost her spouse. She not only had to be both mother and father, but she also had to return to college in order to complete her education, so that she could provide for her family. By day's end, the young woman was exhausted, lonely, and very frustrated over the legal paperwork of probate and over delay after frustrating delay. Too often, I found the young mother in tears. As if the loss of the woman's beloved companion were not enough, she continuously had to try to cope with an unreasonable legal system.

When a loved one dies, the survivor or survivors tend to put their lives on hold until the entire probate process is completed. However, when the probate lasts from one to two years, the process becomes excruciating.

In a study of people's perceptions of probate, 50 percent of the people interviewed, who had Wills, believed that *because they had a Will, they would avoid probate*. There is nothing further from the truth! The words *Will* and *probate* are synonymous: If thou has a Will, thou shall go through probate.

THE MYTH OF AVOIDING PROBATE

Even though probate is essentially unavoidable unless a person has a Living Trust, people are constantly relating stories about acquaintances who have avoided probate. However, such purported occurrences are almost always false. Probate *can be delayed*, but the process is inevitable.

Some Estates Avoid Probate

Occasionally, someone will mention that a parent or spouse died and the survivors did not have to go through probate. This circumstance usually means either that the estate was small—generally under $10,000 to $60,000, depending on the particular state—or that the assets were held in joint tenancy. However,

even when the assets are held in joint tenancy, the estate will inevitably go through probate upon the death of the survivor. Therefore, if you are a surviving spouse, you need to create a Living Trust in order to prevent your entire estate from going through probate upon your death.

The next chapter will discuss the pitfalls of trying to use joint tenancy as a way to avoid probate.

Probate Is Not Required—
Until an Asset Is to Be Sold

I am often asked whether there is a "Big Brother" standing over people to ensure that an estate goes through probate. The answer is no. No one *has* to go through probate—as long as the person does not want (or need) to sell an asset.

Many a widow or widower has come into our office to say that she or he has never gone through probate.

> A widower once told me that his wife had died seven years earlier, and he had never gone through probate. The man went on to say, "My attorney said that I didn't have to do anything." Then he asked, "Why does my tax bill still arrive with my wife's name on it?" (Obviously, his wife's name is still on the deed.)

All too often, the survivor does not realize that title to the assets still must be transferred into his or her name—until the survivor attempts to sell an asset. He or she will then quickly discover that the sale must remain on hold until completion of the lengthy process of probate—the steps of clearing title, clearing creditors, and transferring the cleared title in the name of the new owner.

MISGUIDED ADVICE

Our clients invariably ask, "Why didn't my attorney tell me about the Living Trust?" I used to believe that the reason was that the attorney would not get his or her probate fee. Attorneys talk among themselves about their "accumulated Wills," much as you and I would speak about retirement plans. The attorneys will comment to each other with pride, "I've got ten drawers of Wills," or "I've got seventeen drawers of Wills," or "I've got twenty-three drawers of Wills." Such Wills are an attorney's "retirement plan"!

However, after having given numerous three-day workshops on the Living Trust to attorneys, I have watched them become ecstatic by the third day, as they recognize the tremendous potential of the Living Trust. Most of the attorneys then admit that they had never been taught about the Living Trust in law school. Unlike the typical legal courses, which include Wills and torts, the Living Trust is included only in the extracurricular courses taught for attorneys who wish to specialize in estate planning. Consequently, even though human greed is a predominant reason why many attorneys do not steer clients away from probate, lack of knowledge or familiarity with the Living Trust can also be a major factor.

Occasionally, a client will turn to his or her certified public accountant (CPA) for confirmation about the advisability of having a Living Trust. Invariably, the CPA will respond that, since the client's estate is under $600,000, the client does not need a Living Trust. However, the CPA is talking about federal estate taxes, not about the probate process. Recognize also that a CPA's function is to account for the estate after death. In more than twenty years of practice, I have found very few CPAs who either were knowledgeable of or participated in estate planning—which is the function of reducing estate taxes and probate costs in the future. To be fair to the CPAs, however, I acknowledge that estate planning is not a normal function of a CPA.

Please remember this word of advice: If your attorney or CPA tells you that your estate will not have to go through probate or gives you a specific probate cost, ask him or her to put the statement in writing.

THE CONTESTED CREDITOR CLAIM

The probate court offers the estate a method to dispose of contested creditor claims—abnor-

mal, frivolous, or false claims and lawsuits brought against an estate whose creditor is no longer alive to challenge them. Rather than subject the estate to a costly and long civil suit that will be heard by a jury, the probate judge, who is charged with protecting the estate, has the power to dismiss or settle such claims in only four months. However, contested creditor claims are rarely used. In fact, the AARP study stated the ". . . complicating factors, . . . such as contested creditor claims, occur in fewer than 2 percent of the cases."

To handle the rare occurrence of the contested creditor situation, a properly written Living Trust includes a provision that authorizes the trustees to withdraw any appropriate assets needed to satisfy such contested creditor claims and run them through the probate process. In this way, the probate process can be used, *but only if needed.* (In the thousands of Trusts written by The Estate Plan, we have yet to see this option exercised.)

Notice to Creditors A New Concept

The California state legislature pioneered a new law that authorizes the trustee of a Living Trust to file a simple affidavit with the probate court and to file a notice to creditors in the newspaper to discharge any creditor claim. This law thus absolutely eliminates the need for probate, even under the possibility of a contested creditor claim. This legislation is quickly being adopted throughout the country. If you have a Living Trust and one of the parties to the Trust dies, either the husband or the wife, I suggest you contact your local probate court to see if such notice to creditors should be filed in your state. Remember, this is a major plus for a Living Trust.

THE GOOD NEWS

After having read about some of the many people who suffer so much, you can understand why I refer to the lengthy time delays, mental frustration, and costly process of establishing clear title to assets as "the agony of probate." However, the key message I wish to convey is that:

Probate is unnecessary!

With a Living Trust, upon the death of a spouse or loved one, the process of settling an estate is so simple that it may easily be done by the heirs without the intervention of attorneys or CPAs.

Every experienced estate-planning attorney I have ever met recommends the revocable Living Trust as the solution to avoiding the probate process. The following examples illustrate this point:

- George Turner, in his book *Revocable Trusts,* written for attorneys and published by McGraw-Hill, states, "[T]he most viable alternative presently available is the use of the revocable living trust."
- William Seligman wrote in the *Los Angeles Times,* "In most estates, the only one justification for not having a [living] trust is because the attorney will not get his probate fee."
- Max **B.** Lewis wrote in the *Reader's Digest,* "The living trust is the finest gift a husband can give his wife."
- One highly experienced estate-planning attorney feels quite strongly that attorneys who draw Wills for clients, and thus subject them to probate, should be sued for malpractice.

With these endorsements of the Living Trust in mind, I can only leave to your imagination the *real* motivation of the Will and Probate attorneys who insist that everyone should have a Will—rather than a Living Trust.

Remember: Probate is a family affair, because not only will the members of your family suffer the agony and time of probate (usually more than a year), but also the heirs will forfeit a substantial share of their inheritance—your hard-earned money—to the Will and Probate attorneys.

However, if the only purpose of probate is to pay the creditors, and the creditors do not use the process to collect debts owed them, then

there really is no need for probate. Yet, unless you take action to create a Living Trust, your family will indeed go through probate. Consider my own experience: My father, who had a Will (but had no Living Trust), did not go through probate, but *I* did—for *his* estate. Similarly, if you have a Will rather than a Living Trust, you will not go through probate for your own estate, but your children will—an agonizing process that no loving parent should force on his or her children, and one that will cause your children to forfeit to the probate attorney a substantial share of what is rightfully theirs.