

“Probate Assets” and “Non-Probate Assets” under Indiana Law

When a person dies, not all of his or her assets pass under the person’s Will (if there is one) or under the state law of *intestate succession* (if the person dies “intestate,” *i.e.*, without a Will). Attorneys and other estate planning professionals frequently speak of “probate assets,” to distinguish assets that pass under the Will or intestate succession from assets that pass outside the Will and automatically, “without probate.”

“Probate” is often used by non-lawyers to refer to the entire legal process by which an estate is (1) formally opened in court for a deceased person (“Decedent”) *and* (2) administered by a court-appointed executor or administrator (personal representative) to pay debts and expenses, to file required tax returns, to sell assets that need to be sold, and to distribute all the remaining assets in accordance with the law or the Will, if any. “Probate” also involves filing the Will (if any) with the court at the beginning of the process and proving that the Will is the last Will of the Decedent (This is the true technical meaning of “probate”).

The last page of this summary contains a “flow chart” adapted from one developed by Raymond Good. The flow chart illustrates the different paths that probate and non-probate assets can travel to heirs or loved ones.

“Probate assets” are those assets that pass under the Decedent’s Will, and which usually require the personal representative of the estate to sign a paper or take some other action in order to re-title the asset from the Decedent’s name into the estate’s name or to transfer ownership of such assets to the heirs or beneficiaries. “Non-probate assets” are all other assets of the Decedent. Transfer of non-probate assets to some successor owner normally occurs “by operation of law,” without any action by the personal representative. Examples of both types of assets appear below.

PROBATE ASSETS

Type of Asset	Comment or Background Facts	Action Required to Transfer Title or Ownership
“Tangible personal property” (furniture, household goods, jewelry, antiques, etc.) that does not have a title certificate	If owned by an unmarried Decedent, always a probate asset. <i>However</i> , if his or her total “probate assets” of all kinds (but excluding real estate) are \leq \$25,000 in value net of all liens, then . . .	Heirs or beneficiaries entitled to the property under the Will or intestacy statute can sign and present affidavit 45+ days after death, without opening an estate (“without probate”)
“Tangible personal property” that does not have a title certificate	If owned by an unmarried Decedent, always a probate asset. If total “probate assets” of all kinds (but excluding real estate) exceed \$25,000 in value after deducting all liens, then an estate must be opened, and . . .	If heirs or beneficiaries have physical possession of or access to the property, they can divide or receive the property after the personal representative has obtained all necessary appraisals

Type of Asset	Comment or Background Facts	Action Required to Transfer Title or Ownership
Bank accounts listed in Decedent’s name as sole owner or depositor	Always a probate asset. If total “probate assets” are ≤ \$25,000, accounts can be collected by affidavit without opening an estate	Personal rep collects <i>or</i> beneficiary or heir signs affidavit if no estate open
Stocks, other securities, or mutual funds listed solely in the Decedent’s name	Always a probate asset. <i>However</i> , if total probate assets’ value (net of liens and excluding real estate) is \$25,000 or less, can re-title or transfer these assets by affidavit without opening an estate	If an estate is opened, personal rep signs transfer instructions and other papers to re-title or transfer; if no estate open, rightful beneficiary or heir can submit affidavit and sign necessary papers for transfer
Real estate titled solely in the Decedent’s name	Always a probate asset; <i>however</i> , if value of total probate assets <i>other</i> than real estate ≤ \$25,000, the real estate is treated as automatically passing to the rightful heirs or beneficiaries, and the personal representative has the power to sell the real estate if necessary to pay debts, taxes, etc.	If an estate need not be opened because the other probate assets have a value ≤ \$25,000, heir or beneficiary records Affidavit with County Recorder; otherwise, personal rep signs “fiduciary deed” to distribute or sell real estate
Life insurance policy or annuity contract with <i>no named beneficiary who is alive</i> , or with “estate” named as the beneficiary	Unless the policy or contract states a different rule, the policy proceeds or death benefit are payable to the “estate” of the Decedent	If an estate is open, personal rep submits claim form & proof of death; if an estate need not be opened, heir or beneficiary submits claim
Jointly-titled bank accounts, securities or other assets where all the other joint owner(s) are dead, <i>or</i> where both joint owners die simultaneously	Treated exactly the same as an account or security titled solely in the Decedent’s name Under Indiana law, unless the Wills state a different presumption, where both joint owners die simultaneously, half of the jointly-owned asset is treated as passing in each joint owner’s estate	<i>See</i> explanation above regarding bank accounts and securities

NON-PROBATE ASSETS

The essence of every non-probate asset is that the *form* in which the asset is created or titled contains an instruction or rule that tells the world who the new owner of the asset will be upon the death of the original owner or joint owner. The new owner or owner(s) receive *legal ownership* of the non-probate asset automatically, without the need for a personal representative or probate court to authorize a transfer or sign a transfer document. In most cases, it is still necessary to notify the institution or its agent (*e.g.*, bank, stock transfer agent or registrar, life insurance company, IRA custodian, retirement plan administrator, etc.) that the original owner or a joint owner has died, so that the *record ownership* for the non-probate asset can be updated to match the automatic change in legal ownership that occurred at death. It is also usually necessary to provide the institution or agent with proof that applicable death taxes (if any) have been paid or that the government agency responsible for collecting death taxes has consented to the transfer or re-titling of the asset. These steps usually have to be taken with respect to the transfer of probate assets, as well, but they can be accomplished as soon after the death as the necessary information is available.

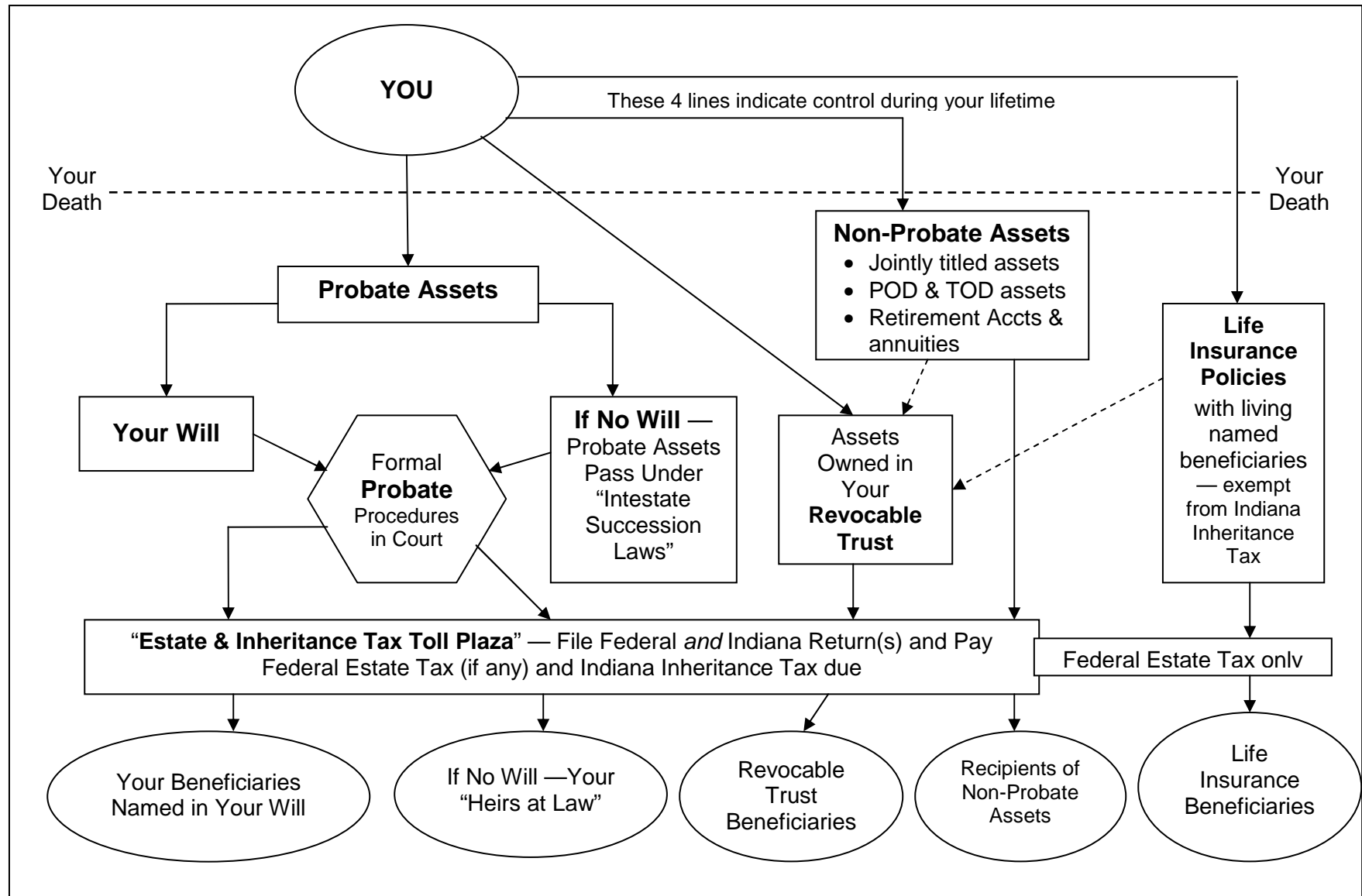
The following are the most common types of non-probate assets:

Type of Non-Probate Asset	Description or Comments
<i>Bank accounts, savings certificates, or motor vehicles titled in “joint or survivor” form</i>	Title certificate or signature card usually reads “[owner name] OR [owner name].” As long as one joint owner is still alive, the asset is a non-probate asset and the surviving joint owner(s) will automatically receive full ownership. For joint accounts, each joint owner immediately has a right to withdraw his or her undivided fractional portion of the account balance, even before the death of the joint owner who created the account
<i>Stocks, securities, mutual funds, or brokerage accounts titled in JTWRROS or joint form</i>	“JTWRROS” means “joint tenants with right of survivorship”; two or more names on a brokerage statement usually indicate JTWRROS ownership of the account; as long as one named joint owner is living, the asset is a non-probate asset and passes to the surviving joint owner(s)
<i>Bank accounts or C.D.s titled in “pay on death” form</i>	The acronym “POD” appears on the signature card or on statements for the account, in the form “[account owner name] POD [name(s) of 1 or more beneficiaries]”; account owner remains the owner and can change or remove the POD titling; the named beneficiaries become the owners after the death of the account owner

Type of Non-Probate Asset	Description or Comments
<i>Stocks, securities, or mutual funds titled in “transfer on death” form</i>	Same concept as POD bank accounts, except that the security or mutual fund is titled with the acronym “TOD” followed by the name(s) of one or more TOD beneficiaries
<i>Real estate titled as “joint tenants” or “husband and wife,” where 1 spouse or at least 1 joint owner remains living</i>	The deed giving or transferring title must describe the owners’ interest as “joint tenants” or “husband and wife” or “tenants by the entireties”; the surviving joint tenant(s) automatically become the owner(s); an affidavit of survivorship should be signed and recorded
<i>Retirement accounts, IRAs, or annuities where a named beneficiary is living after the account owner dies</i>	If the primary beneficiary is also dead and if one or more secondary beneficiaries have been properly named, the assets remaining in the account belong to the living secondary beneficiaries
<i>Property held in a trust where the trust agreement names one or more beneficiaries to receive the property or distributions from the trust</i>	The property (or an interest in the property that is less than full ownership, such as the right to receive income) will pass automatically to the named beneficiary or beneficiaries; the property remains a non-probate asset so long as the administration of the trust continues
<i>Life insurance policies where at least one named beneficiary is living after the insured dies</i>	If the primary beneficiary is also dead and if one or more secondary beneficiaries have been properly named, the insurance policy proceeds belong to the living secondary beneficiaries

The information in this summary is not intended to be a substitute for advice from your own attorney, tailored to your own situation.

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