

ESTATE PLANNING



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Avoiding Probate: How Far Should I Go?

Probate is the process by which a will is formally admitted to judicial supervision. This is not the same as filing a will with the local circuit clerk, which is always required after a person has died.

Probate generally involves the filing of a petition, and a hearing in front of a judge to “open the estate”. Once this is done, the court will issue “Letters of Office” which authorize the representative to carry out administration (including collecting property, paying bills, and distributing to heirs). The probate process is guided by the Probate Act.

In this issue, we will describe techniques available to avoid probate of a decedent’s will, as well as when the judicial administration of an estate is more desirable

Techniques Which Avoid Probate

These are some of the common methods used to avoid probate:

A. Living Revocable Trust

This trust is executed during your lifetime. It is typically revocable (meaning that you can change or modify it) but there are situations in which it may be desirable to make it totally irrevocable. For example, Medicaid planning,

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than avoiding probate.

Your estate plan must be viewed comprehensively: creating a trust may not help you avoid probate if, for example, you do not transfer your assets into it during your lifetime. ■

ESTATE TAX UPDATE

The 2017 Tax Cuts and Jobs Act increased the federal estate tax exemption to \$11,200,000.00 per person effective January 1, 2018. The Illinois tax exemption remains \$4,000,000.00 per person. Our next newsletter will address new planning issues.

undue influence concerns and second marriages more frequently use irrevocable trusts. During your lifetime, assets are transferred into the trust. Because the trust is revocable it can be amended as circumstances change. Third parties may at times require a certification that the trust is still in existence, who the current trustee is, and that the trustee has the authority to enter into the

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transaction.

B. Joint Tenancy With Right of Survivorship

This typically works well between spouses but may create issues when children are added with the expectation that the parent's wishes will be carried out. It may expose the asset to the joint owners' creditors or marital disputes.

C. Payable on Death/Transfer on Death (POD/TOD)

This form of designation creates no immediate rights in the beneficiary and is activated by the owner's death. It avoids many of the joint tenancy problems but is subject to the same issues as a beneficiary designation.

D. Beneficiary Designation

Life insurance and retirement accounts typically are distributed in accordance with beneficiary designations lodged with insurance companies or retirement plan administrators.

Issues arise if a beneficiary predeceases and the beneficiary designation doesn't address the issue, or the beneficiary designation is not changed. If a minor is a beneficiary, a court proceeding to appoint a guardian may be needed, and the minor may obtain control of proceeds at age 21,

which in many cases is too young.

E. Small Estate Affidavit

Under Illinois law up to \$100,000.00 of a decedent's personal property can be transferred in accordance with the Will, or a Living Trust (if not fully funded), pursuant to an affidavit specifying that creditors are paid and who is entitled to the asset. Depending on the type of property and where it is located, the transfer agent may require extensive correspondence and explanation before accepting the affidavit. ■

Tips

- *Try to review your plan at regular intervals, or if there has been a birth, death, marriage or divorce among your beneficiaries or family.*
- *When reviewing or updating your estate plan, take a broad view. For example, changing a beneficiary designation may dramatically alter your overall plan of distribution. Coordination is key.*
- *Do not make plans based on a sense of obligation. Appointing your children in order of age rather than ability can cause more problems than it solves.*

Comparing the Costs: Probate versus Living Revocable Trusts

A primary objection to probate is its perceived higher cost. This was true forty years ago but may not be true today. Lawyers no longer use uniform percentage fees, but instead charge based on actual hours and time spent on the file. Most lawyers today, including Hynds, Yohnka, Bzdill & McInerney, LLC, bill exclusively based on amount of time involved at an hourly rate.

In 1975 Illinois adopted independent administration. Prior to 1975, the Court supervised the administration of the estate, which required frequent court appearances. Today the Court only becomes involved if there is a dispute. Under the present system, if there are no inter-family disputes, there are only two court appearances, and the expenses are fees for preparation of the documents, court costs, and publication fees for notice to creditors.

With both a Will or a Trust, creditors must be paid, income tax returns filed and the assets distributed in accordance with the Will or Trust. With probate, creditors have a short six month period in which to file claims before they are cut off, which is not available to Trusts.

A Revocable Living Trust requires preparation of the documents, the lifetime

funding of the Trust with all of the assets, and the administration of the Living Trust until death. The use of a Living Trust may be more expensive than the probate of the Will if there are extensive lifetime transactions, or if the Living Trust is not fully funded.

The issue of whether an estate should be probated or administered without probate through the use of non-testamentary techniques involves many factors, and is a key part of estate planning at Hynds, Yohnka, Bzdill & McInerney, LLC. There are good reasons for a Living Trust: lifetime administration of the assets of an elderly person, sheltering family issues from the public, property in more than one state. Probate, however, is desirable where the lifetime transfer of assets and trust management is cumbersome, when third parties may question the Trustee's authority but accept the court-appointed Executor's authority, when after death administration issues may be complex, or when there is potential conflict between the heirs.

These issues require sophisticated legal expertise and experience which is provided by Hynds, Yohnka, Bzdill & McInerney, LLC. ■

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Coming Up:

1. Tax Cuts and Jobs Act Update
2. New Techniques: Digital Asset Planning
3. Trust Administration: Trustee selection, liability concerns, and moving assets
4. Elder Law Issues: Planning for Medicaid, terminal illness, or dementia

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