Minimizing Probate When Setting Up Your Estate

What can you do to lessen its impact for your heirs?

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Probate subtly reduces the value of many estates. It can take more than a year in some cases, and attorney's fees, appraiser's fees, and court costs may eat up as much as 5% of a decedent's assets. Probating a "routine" estate valued at $400,000 could cost as much as $20,000.[1]

What do those fees pay for? In many instances, routine clerical work. Few estates require more than that. Heirs of small, five-figure estates may be allowed to claim property through affidavit, but this convenience isn't extended for larger estates.

So, how can you exempt more of your assets from probate and its costs? Here are some ideas.

Joint accounts. Married couples may hold property as a joint tenancy. Jointly titled property includes a right of survivorship and is not subject to probate. It simply goes to the surviving spouse when one spouse passes. Some states allow a variation called tenancy by the entirety, in which married spouses each own an undivided interest in property with the right of survivorship (they need consent from the other spouse to transfer their ownership interest in the property). A few states allow community property with right of survivorship; assets titled in this way also skip the probate process.[2,3]

Joint accounts can still face legal challenges. A potential heir to assets in a jointly held bank account may claim that it is not a "true" joint account, but a "convenience account" where a second accountholder was added just for financial expediency. Also, a joint account arrangement with right of survivorship may be found inconsistent with an estate plan.[4]

POD & TOD accounts. Payable-on-death and transfer-on-death forms are used to permit easy transfer of bank accounts and securities (and even motor vehicles, in a few states). As long as the original owner lives, the named beneficiary has no rights to claim the account funds or the security. When the original owner passes away, all the named beneficiary has to do is bring his or her I.D. and valid proof of the original owner's death to claim the assets or securities.[5]

Gifts. For 2018, the I.R.S. allows you to give up to $15,000 each to as many different people as you like, tax free. By doing so, you reduce the size of your taxable estate. Gifts over $15,000 may be subject to federal gift tax (which tops out at 40%) and count against the lifetime gift tax exclusion. The lifetime individual gift tax exemption is currently set at $11.18 million. For a married couple, the lifetime exemption is now $22.36 million.[6,7]

Revocable living trusts. In a sense, these estate planning vehicles allow people to do much of their own probate while living. The grantor – the person who establishes the trust – funds it while alive with up to 100% of his or her assets, designating the beneficiaries of those assets at his or her death. (A pour-over will can be used to add subsequently accumulated assets to the trust at your death; yet, those assets "poured into" the trust at that time will still be probated.)[8]

The trust owns assets that the grantor once did, yet the grantor can invest, spend, and manage these assets while living. When the grantor dies, the trust lives on – it becomes irrevocable, and its assets should be able to be distributed by a successor trustee without having to be probated. The distribution is private (as opposed to the completely public process of probate), and it can save heirs court costs and time.[8]

Are there assets probate doesn't touch? Yes, there are all kinds of non-probate assets. The common denominator of a non-probate asset is a beneficiary designation, which allows these assets to pass either to a designated beneficiary or a joint tenant, regardless of what a will states. Examples: assets jointly owned with right of survivorship, trusts and assets held within trusts, TOD accounts, proceeds from life insurance policies, and IRA and 401(k) accounts.[9]

Make sure to list/update retirement account beneficiaries. When you open a retirement savings account (such as an IRA), you are asked to designate eventual beneficiaries of that account on a form. This beneficiary form stipulates where these assets will go when you die. A beneficiary form commonly takes precedence over a will.[7]

Your beneficiary designations need to be reviewed, and they may need to be updated. You don't want your IRA assets, for example, going to someone you no longer trust or love.

If you are married and have a workplace retirement plan account, your spouse is the default beneficiary of the account under federal law, unless he or she declines to be in writing. Your spouse is automatically entitled to receive 50% of the account assets should you die, even if you designate another person as the account's primary beneficiary. In contrast, a married IRA owner may name anyone as a primary or secondary beneficiary, without spousal consent.[10]

To learn more about strategies to avoid probate, consult an attorney or a financial professional with solid knowledge of estate planning.

Citations.

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