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ESTATE PLANNING THAT MAKES SENSE
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PROBATE: WHAT IS IT AND HOW DO I AVOID IT?

BY JIM SCHLEIFFARTH, ESQ.*



What is Probate? Probate is, stated simply, a court-supervised process for transferring property to its intended recipients, following the death of the owner. The goal of probate is to re-title and otherwise transfer a decedent's property to his or her heirs or other intended recipients, after paying all debts

of the estate. The probate process typically involves the following general steps:

1. Hiring of an attorney
2. Opening of the estate with the probate court
3. Submission of the will (if there is one) to the court
4. Appointment, by the court, of a personal representative of the estate
5. Taking and reporting of the inventory of assets of the estate
6. Payment of debts of the estate and settlement of similar matters
7. Distribution of the assets of the estate to intended or legally entitled recipients
8. Order of discharge from the court; closing of the estate
9. Various forms of published and mailed notices to interested parties



What Property Must Go Through Probate? As a general rule, *all property owned by a decedent at his/her time of death is part of the “probate estate”* and is subject to administration by the probate court, in order to be legally transferred to a new owner. This includes all of the following items:

1. All property not indicated in a valid will
2. All property transferred by a valid will (please note: having a will does *not* avoid probate)
3. All proceeds from accounts or insurance policies transferred to “the estate of”



Why Would You Want to Avoid Probate? Much emphasis has been placed on probate avoidance in recent years, and for good reason. Probate is both costly and time-consuming, while also representing a difficult procedural headache for many families. Nonetheless, in some instances probate presents

some meaningful benefits. On the whole, it is typically advisable to take the necessary steps to avoid probate, but the following represent the advantages and disadvantages of probate:

Some Limited Advantages of Probate:

No planning: does not require any advance planning

Public Record: in some limited instances, an individual may desire a public record of the distribution of their assets

Family Disputes: probate represents a formal adjudicatory process which may be desirable when family members are at odds with one another over assets of the estate

Major Disadvantages of Probate:

Length: typically 7-12 months from death to discharge of the estate

Cost: usually between 4% and 10% of the gross estate

Hassle: length/cost, but also procedure and court filings require ongoing attention

Privacy: probate is public record, accessible to any and all



How Do You Avoid Probate? Fortunately, with proper advance planning, probate can be readily avoided. Several methods of asset transfer and titling can remove an individual's property from the probate estate.

Typically, a combination of these methods can be implemented to prepare a plan that (a) meets the needs of the individual, (b) addresses other goals and intentions of their family legacy and (c) wholly avoids probate administration. The following represent the major methods of probate avoidance:

- 1. Trust Formation.* By forming a revocable living trust or a testamentary trust, the transfer of assets can avoid probate. When a trust is formed, all assets are transferred to the trustee of the trust (which is typically the owner/individual) for the benefit of that same owner/individual. The key benefit of a trust is what occurs upon the death of the individual establishing the trust: the trustee's rights and responsibilities are transferred to a new pre-determined individual and the assets of the trust are distributed (or retained for the benefit of successor beneficiaries) in whatever fashion has been laid out in the trust document. Because the assets were held by the trust and not the now-deceased individual, probate is entirely avoided.
- 2. Joint Ownership with Right of Survivorship.* Certain assets (particularly real estate) can be held as "joint" property. In such an instance (which is very typical in marriage relationships), when one of the joint-owners dies, the property is transferred in whole automatically to the surviving owner. No probate required. However, if both joint-owners die, with no additional joint-owner, then the property becomes subject to probate.
- 3. Beneficiary Designations.* Certain assets can be transferred by a "beneficiary designation." Such assets typically include life insurance policies, independent retirement accounts (IRAs) and employee benefit plans (401k plans, etc.). With these assets, benefits can be transferred automatically to a named beneficiary—a process that can usually be accomplished by a simple form. The intended beneficiary (typically an individual or a trust) should be named specifically. It should be noted that naming "the estate of Robert Jones" as the beneficiary will explicitly cause those proceeds to be subject to the probate process.
- 4. Beneficiary Form of Ownership.* Similar to beneficiary designations, certain assets can be transferred to an intended beneficiary upon the death of the owner, without passing through probate. Referred to as "payable on death" or "transfer on death" designations, this can be readily accomplished with respect to securities accounts, promissory notes, bank accounts and vehicle titles. Similarly, real estate can be transferred by a "beneficiary deed" which transfers the property to the named recipient automatically upon the death of the grantor. With each of these transfer methods, probate is not required.

5. *Corporate Entities.* Assets owned by a corporation or an LLC are not subject to probate. Understandably, the business entity does not “die,” but rather its ownership or control is transferred pursuant to the company’s operating documents. It should be noted that instruments representing company ownership interests (i.e. stock) can indeed be subject to probate and such matters should be addressed by other probate-avoidance mechanisms.

6. *Life Insurance.* Life insurance proceeds are typically not subject to probate administration. Naming a beneficiary of life insurance proceeds will result in the proceeds being transferred to such individual directly, completely bypassing the probate. However, naming “the estate of Robert Jones” as the beneficiary will cause the proceeds to indeed become part of the probate estate. Such practice should almost always be avoided.

7. *Very Small Estates are Subject to Minimal Probate.* Small estates can generally bypass the lengthy probate process. If the total assets of the decedent do not exceed \$40,000, an “affidavit of small estate” is filed with the probate court, much of probate’s formality is dispensed and its administration is largely dispensed.

Summary

Probate is an entirely avoidable event. While some limited circumstances may favor probate administration, the process is typically undesirable due its time, expense and administrative requirements. Proper planning, through various methods, can remove all assets from the probate estate, allow for a smooth transfer of a decedent’s property and assure that family goals and intentions are squarely met.

**Jim Schleiffarth practices in the areas of life and estate planning for individuals and families. Mr. Schleiffarth’s practice emphasizes superior client service, straightforward legal counsel and reasonable legal fees. Schleiffarth Law Firm LLC represents estate planning clients of all income and wealth levels.*

This article is for informational purposes only and should not be construed as legal advice with respect to any particular circumstance or life and estate plan. For additional information, please contact Jim Schleiffarth, Schleiffarth Law Firm LLC, St. Louis, MO, (314) 315-4117, jks@sch-law.com.

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