

Estate Planning Getting your House in order

In light of recent events, we have been receiving a steady stream of calls regarding estate planning. In addition to the typical year-end tax planning issues, there is a distinctive, "It's time to get my house in order" ring to the inquiries. For those of you who have been thinking about getting your house in order, here is a short list of what a basic estate plan ought to include and things to think about during the process...

Revocable Living Trust. In most cases, dying without a will, or with a simple will, requires that your estate go through probate, a costly and often lengthy court supervised proceeding. A revocable living trust, allows for a cost effective and less cumbersome non-probate administration of your estate after death, allows you to control how and when assets are distributed, provides creditor protection planning opportunities for heirs, and allows for estate and generation skipping transfer tax planning.

Durable Power of Attorney for Asset Management.

This document names an attorney-in-fact to perform financial transactions for you if you become incapacitated or unavailable to handle your own financial affairs.

Durable Power of Attorney for Health Care.

This document names one or more health care agents who will have the power to make healthcare decisions for you if you are unable to make them for yourself. The document should contain your wishes regarding life sustaining treatment, nutrition and hydration, pain relief, autopsy, organ donation, and disposition of remains.

Property Agreement.

A significant tax advantage can be obtained by an agreement between spouses stating that all of their property is community property. This type of agreement is not right for every situation and you should consult with appropriate advisors regarding the pros and cons of such an agreement.

A Checklist of Things to Consider:

- Guardians for minor children.
- Who gets what and when? (Should children finish college or reach a certain age prior to receiving an outright distribution of property and cash? Should distributions be conditioned upon a child attaining a certain level of income on his or her own? Should distributions to children or other beneficiaries be conditioned on testing free of controlled substances?)
- Who should manage your assets if you become incapacitated?
- How should the family business be passed on, sold, and/or protected for your heirs?
- Will there be enough liquidity in the estate to pay for debts, taxes, and expenses?
- Have I investigated what techniques are available to minimize estate and generation skipping transfer tax?

What is Probate?

Probate is the court supervised legal process that includes determining the validity of your will, gathering your assets, paying your debts, taxes, and the expenses of will administration, and then distributing the remaining assets to those persons entitled to them.

To make sure that your property is distributed according to your wishes, your survivors must submit your Will to probate court. The main advantage of probate is that the probate court is supervising the entire proceedings, and the probate laws are being followed. This is especially beneficial if there are claims of creditors, challenges to the will, or disputes that arise from the will. However, the probate process can be time consuming and costly. The probate process is also criticized for the loss of privacy surrounding the will maker's financial affairs.

Probate with a Will

Without a doubt, things can proceed in an orderly and legal fashion if you have a will at the time of your death. The person you name as the executor (or executrix) of your will becomes the central figure in the probate proceedings. Your executor will carry out the many duties specified by law, and the Will you leave will provide the guidelines for the probate process.

The legal term for probate proceedings with a will is testate proceedings.

Initial Proceedings

Upon your death, your survivors will determine whether it is necessary and appropriate to probate your estate.

- A. An Estate is subject to probate for any individual who dies with gross assets in excess of \$100,000 and without a trust holding title to those assets.

If so, then usually the person you have nominated to be your executor will include information about you, your death and your Will.

The petition will request that the court accept the Will as valid and appoint the executor so designated in the Will. The court may also review the executor's residency and bond requirements.

Heirs, beneficiaries, and creditors must be notified of the admission of the Will and the opening of the estate, after which they have a limited amount of time to challenge the Will and/or submit claims to the estate. Usually the estate will then obtain a federal identification number for tax purposes because it is considered a separate taxpayer. The executor will also open a bank account in the name of the estate in which to deposit income and receipts of the estate, and out of which to pay expenses, and make distributions to the beneficiaries.

The initial proceedings will also be when the court takes into consideration any challenges to the Will.

Executor Duties

The executor plays the key role in the probate proceedings from the very beginning. After residency and bond issues are reviewed, and the court officially appoints him or her as the executor, it is up to him or her to collect any inventory the assets of the estate, pay all debts and expenses of the estate, and then distribute the property to the beneficiaries and establish any trusts, if directed by the Will.

It is the executor's responsibility to notify heirs, beneficiaries and creditors, obtain a federal identification number for tax purposes, and open a checking account in the name of the estate.

The executor must review all records to determine all of the assets of your estate, and physically take custody of all assets which are subject to probate. After taking custody, the executor must determine the fair market value of the estate property, pay any debts still outstanding, resolve any claims by creditors, and pay the costs of all expenses incurred in administering the estate. The executor may have to sell some of the estate's assets to pay debts and expenses.

The executor is also responsible for preparing and filing death tax returns. This can include the federal estate tax return and the state inheritance and estate tax returns. He or she will also be responsible for filing your final individual income tax return, the estate income tax returns, and any necessary gift tax returns.

Finally, it is the responsibility of the executor to distribute the remaining estate assets to be beneficiaries, and to establish and fund any trust specified in the Will.

Closing the Estate

When all of the distributions to the beneficiaries have been made or are nearing completion, a final accounting report must be filed with the probate court which summarizes all of the receipts and disbursements of the estate and summarizes all other acts taken by the executor. A copy is provided to the beneficiaries who have the opportunity to object to any items in the report

If the beneficiaries have no objections, the court will typically approve the closing of the estate, the beneficiaries will sign receipts indicating that they have received their distributions, the executor will file these receipts, the court will discharge the executor from duty, and close the estate.

Cost of Probate

There can be substantial costs involved in probating an estate, thus it makes sense to avoid or curtail full probate where possible and appropriate. If it is not necessary to deal with possible claims against the estate or challenges to the Will, if it's not necessary for the court to supervise the activities of the executor, court supervision and its related costs can be dramatically reduced, or eliminated altogether.

Probate also involves executor and attorney fees, which, however, are subject to state law limitations. Although such limits vary from state to state, executor fees often *range from 2 to 4 percent* of the assets that are subject to probate. Of course, many executors who are friends of family

members of the deceased agree to serve without a fee.

An attorney's fees will vary depending on the amount of work spent on the probate process, but they are usually based on the same guidelines as the executor fees.

Time Spent in Probate

Probate proceedings are lengthy. Many estates can take a year or two to complete, and if it's necessary to file federal estate tax returns, the proceedings can last well into a third year. The size of the estate and state laws affect the length of the probate process.

The time it takes for distributions to reach beneficiaries also varies. The usual time frame for the first distribution is from four to eight months from the time of death, although most states have provisions for spouses and minor children to receive distributions almost immediately.

Privacy Issues

When a Will is admitted to probate, it becomes public record. Not only does the Will itself become public, but all documents involved in the proceedings become public record and can be viewed by anyone desiring access. Some people have legitimate reasons for viewing this loss of privacy as a negative aspect of probate proceedings.

Probate Without a Will

If you do not leave a Will, then the courts will take over the distribution of your property. The probate court will first appoint an administrator, whose duties will include the same asset gathering, debt paying and distributing task as an executor would do who is designated by a Will. However, a court-appointed administrator will usually have to post a bond. The cost of the bond will be paid from your estate, using available cash or else the proceeds from the sale of some property. Because there is no direction from a Will to choose beneficiaries, the courts will distribute the remaining assets according to state law. Most states give top priority to the spouse, followed by surviving children.

The legal term for dying without a will and having your estate go through probate is intestate proceedings, and the laws that govern estate distribution are called intestacy laws.

Avoiding Probate

There are circumstances in which you can avoid the probate process altogether. A very common way is through the establishment of a living trust and the transfer to the trust, while you are alive, of substantially all of your assets. Living trusts are governed by their own provisions and they need not end immediately at your death. Therefore, if the trust is the titleholder to your property, there is no need to go through probate to retitle those assets out of your name. Instead, the successor trustee merely distributes the trust assets to the beneficiaries that you have specified in the trust document according to the instruments made by you in your trust instrument. Similarly, life insurance, pension plans, and retirement accounts are payable directly to a named beneficiary, and therefore are neither

governed by the Will nor require probate. Finally, property owned jointly with survivorship rights passes automatically to the survivor, and is not subject to the Will or probate proceedings.

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