Three Ways to Avoid Probate

December 2014

One of the most frequently asked estate planning questions we get from clients is, "How can we avoid probate?" Probate, though often not as burdensome as feared, can delay the transfer of assets for months, be expensive, and make many aspects of a deceased's finances part of the public court records.

What is Probate?

According to the Florida Bar, "Probate is a court-supervised process for identifying and gathering the assets of a deceased person (decedent), paying the decedent's debts, and distributing the decedent's assets to his or her beneficiaries." Most of the time, it is a paperwork exercise with none of the conflicts normally associated with a court proceeding.[i]

Both the attorney and your Personal Representative (Florida's version of an executor) can collect fees from your estate. Most people name a family member as Personal Representative (PR). Many such PRs will waive fees when the personal representative inherits a substantial amount of your property. Attorneys' fees are typically what the court deems "reasonable." Clearly, that term is open to interpretation and we have seen a wide range of fees over the years.

Florida is one of the few states which defines attorney fees in its statutes. The fee is based on the value of the assets (except homestead property) that go through probate, plus any income those assets earned during the probate proceeding. The standard fee on a $1,000,000 estate is $30,000.[ii] In addition, there are court costs, appraiser's fees, and sometimes other expenses.

Most states have a form of simplified probate for "small estates" as defined by each state which can lower the costs.

Avoiding Probate

Keeping assets out of probate can decrease costs, reduce time delays, and maintain privacy. Three of the most common ways are relatively simple but each have some disadvantages too.

1. Joint ownership

Joint ownership comes in three basic forms. Joint ownership with the right of survivorship (JTWROS) may be the most frequently used titling to avoid probate. In Florida and some other states, married couples can title assets as "tenancy by the entirety" (TBE) instead. There is creditor protection in TBE titling (more on creditors in a moment) that does not exist with JTWROS. If you are married *and* live or own property in Alaska, Arizona, California, Idaho, Nevada, Texas or Wisconsin, you could own assets as community property with the right of survivorship.

ORLANDO OFFICE: 200 S. ORANGE AVENUE, SUITE 2025 | ORLANDO, FLORIDA 32801 | P: 407.869.6228 F: 407.869.6558
MELBOURNE OFFICE: 6767 N. WICKHAM ROAD, SUITE 215 | MELBOURNE, FLORIDA 32940 | P: 321.253.5400 F: 407.869.6558

With all three types of joint ownership, when one of the owners dies, the property automatically goes to the other joint owner as an operation of law. There is no probate involved and very little paperwork. It is simple, easy, fast, and private.

However in some cases, joint tenancy is not always a good option. A common scenario occurs when an elderly person puts solely owned property and other assets into joint tenancy with another person for convenience. We often see this when a child is put on a checking account to make bill paying easier. This can cause several issues:

- Part ownership of the property and all the rights that come with ownership are being given away. You cannot remove the joint owner without the joint owner's consent.
- If the joint owner is not your spouse, gift tax rules can apply.
- A family squabble may ensue after your death. Adding someone as a joint tenant to a bank account may be convenient, but upon your death the joint owner is the sole owner regardless of what is written in your will, trust, or other estate related documents. The joint tenant does not have to share the assets with your other heirs and even if they do, transferring valuable property can again trigger gift and other tax implications. A power of attorney or trust ownership is often a better option if you want to give someone authority to use your money on your behalf.
- If your joint owner has creditors from a lawsuit, bankruptcy, or divorce, then the assets titled jointly could be subject to collection or sale. Assets titled TBE typically avoid this issue as long as the spouse being sued is alive.
- Unlike trustees, joint owners do not have a fiduciary duty to the other joint owners. If an owner loses assets, the other joint owners are out of luck.
- If the joint owners die in a common disaster such as an accident, the asset will go through probate.
- Upon the death of a joint owner, surviving joint owners do not get to utilize a full "step-up" in cost basis on the assets. We will explain this in detail another time but the usual result is capital gain taxes that could have been avoided.

2. Beneficiary designations and transfer-on-death registrations

Beneficiary designations can be established on life insurance policies, retirement accounts, and annuities. Upon death, the money goes directly to the beneficiary without going through probate. The same can be done for security (stock) registrations, bank accounts, and in some states, vehicle registrations by using a pay-on-death or transfer-on-death registration.

Beneficiary designations are fast and easy. However, the beneficiary designation supersedes what is decreed your will, trust or other estate documents. Thus, it is important to name beneficiaries correctly and keep them updated. If you have no beneficiary designated or designate your "estate" as beneficiary, the assets affected will go through probate.

In addition, many beneficiary designations do not allow customization. So if you wish for someone to get your assets over time or at a certain age as you might for a minor child, a spendthrift heir, or an heir that is not likely to handle a lump sum well, then a trust may be better.

3. Revocable living trusts

Probate applies to assets titled in your name only. A revocable living trust makes a trustee -- not you as an individual – the owner of property in the trust, thus avoiding probate. Note that to get the probate avoidance benefit of a trust, the assets must be titled in the name of the trust. For instance, "John Doe as Trustee of the John Doe Trust dated Jan. 8, 2013."

Typically, you are trustee of your trust. Because you can revoke or amend the trust at any time while trustee, the assets are treated as though they were owned by you individually for income tax purposes. In addition, should you become incapacitated, the successor trustee you designated will be able to take over management of the trust assets. Outside of a trust, having someone take over requires a proper power of attorney or costly guardianship proceeding.

As is the case in a will, the trust document specifies who should inherit what property, when it should be inherited, and how the assets are to be paid. The payout instructions can be very simple but the capacity to customize a trust is vast. For instance, if your daughter married someone you don't like and you fear they will divorce, her share can be retained in the trust until that marriage is officially over.

With flexibility can come complexity. The more intricate your instructions, the longer it will take to create the trust document and the more it will cost. We have found the price of a simple trust to be a bargain when done by skilled attorneys.

Clearly, probate is avoidable by several methods, all with pros and cons. Which method is best depends on the particular circumstances. We would be happy to discuss options with you further.

---

[i] Details can be found in the Florida Probate Code (Chapters 731-735 of the Florida Statutes) and the Florida Probate Rules, Part I and Part II (Rules 5.010-5.530).

[ii] Fla. Stat. Ann. § 733.6171

Moisand Fitzgerald Tamayo, LLC

ORLANDO OFFICE: 200 S. ORANGE AVENUE, SUITE 2025 | ORLANDO, FLORIDA 32801 | P: 407.869.6228 F: 407.869.6558
MELBOURNE OFFICE: 6767 N. WICKHAM ROAD, SUITE 215 | MELBOURNE, FLORIDA 32940 | P: 321.253.5400 F: 407.869.6558