How to Avoid Probate

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Most of us work very hard to live comfortably and provide a legacy for our children and grandchildren. Some of us start saving for retirement the moment we enter the workforce. However, despite decades of running the rat race, many Americans fail to think about what to do when the inevitable occurs: what happens to your assets when you die?

In most states, upon death, your assets are distributed pursuant to the probate process. **Probate is the court-supervised process of administering a person's will. If there isn't a valid will, the deceased person's property still goes through the probate process, and is distributed according to the "laws of intestate succession", or simply "intestacy."** Intestate-succession laws vary from state to state, but typically your close family members get everything. The most likely recipients are your spouse, children, parents and siblings.

During the probate process, the deceased person's "estate" collects the deceased's assets, then pays valid debts, and then distributes the remaining assets per their will or per the intestacy laws (if applicable). While this process sounds easy, it usually takes a lot of time and money. In addition to being expensive, the probate process can tie up property (especially real estate) for months or years. However, there are ways to avoid the probate process, or at least make it a lot easier. This article will explore some of the more common approaches.

Transfer on Death Deed

On September 1, 2015, Texas started allowing property owners to transfer real estate to their heirs outside of the probate process. The mechanism to accomplish this is called the 'Transfer on Death Deed'. Texas isn't the only state with such a law. The deed works like a beneficiary designation on a bank account or an insurance policy by naming a primary and contingent beneficiary who will inherit your real property after you die. To be effective, the Transfer on Death Deed must contain the essential elements and formalities of a recordable deed in Texas; namely, the deed must be in writing, contain a valid legal description of the real property, contain the name and address of the primary beneficiary and any contingent beneficiaries, be signed by the real-property owner (the "grantor") and be properly notarized. The deed must also state that the transfer to the beneficiary will not occur until the grantor's death, and the deed must be properly recorded before the grantor dies in the county where the property is located. The grantor does not have to provide notice to the beneficiary.

The Transfer on Death Deed can name more than one beneficiary; however, each beneficiary must receive an undivided share of the real property. In other words, if you name four beneficiaries, each one gets an unspecified 25% interest in the property. This could lead to complications because now all four beneficiaries are liable for the property – they must pay taxes, maintain insurance, keep up with repairs and maintenance, and the like. All four beneficiaries must also unanimously consent to any sale, lease or mortgage. The Transfer on Death Deed statute does not allow for a "right of survivorship" (discussed below). The Transfer on Death Deed may be revoked or revised while the grantor is still alive. This can be accomplished by signing a new Transfer on Death Deed that expressly revokes the prior deed, or by signing another separate agreement that expressly revokes the original Transfer of Death

Deed. However, **you cannot revoke a Transfer of Death Deed by a contrary provision in a will**. Any new Transfer on death Deed or agreement seeking to revoke or revise an existing Transfer on Death Deed must be signed and recorded with the same formalities as the original Transfer on Death Deed. Once the grantor passes away, the beneficiaries take title to the real property by filing a certified copy of the deceased's death certificate in the clerk's office of the county where the Transfer of Death Deed was recorded. Filing the death certificate connects the chain of title between the Transfer on Death Deed and the grantor's death, and shows the real estate has been transferred to the beneficiary(ies).

Creditors of the deceased need to be aware that the Transfer on Death Deed may affect their ability to recover monies owed to them. So, if the deceased's estate is not sufficient to satisfy their debts, then the representative of the estate can enforce liability against the property as if it were part of the deceased's estate. The estate representatives have 90 days after receiving a creditor's demand to initiate a proceeding to enforce liability against the subject property, and if the representative does not timely do so, then a creditor of the estate may enforce liability against the property. This means that title to the property could be held up until the claims period expires. The Texas Access to Justice Commission created a do-it-yourself Transfer on Death Deed Kit that includes forms and instructions, as well as a revocation form in the event that someone wants to cancel or change the transfer on death deed, and an affidavit of death that must be filed when the property owner dies. The kit is available on TexasLawHelp.org.

Revocable & Irrevocable Living Trusts:

A revocable living trust is created by a written agreement, which must be created before death. The trust agreement contemplates that an owner of assets (either real property or personal property) transfers property to a third party, called a "trustee", to hold it for your benefit while you are still alive. However, you reserve the right to revoke the trust during your lifetime. In this case, the property in question is owned by the trustee for your benefit (or for the benefit of any other beneficiaries named in the trust agreement). A revocable living trust does not, however, protect your assets from your creditors. This is because a revocable living trust, by its terms, can be changed or terminated. Therefore, a creditor could force the owner of a revocable living trust to terminate the trust and surrender the assets to satisfy the creditor's claims. However, in lieu of a revocable living trust, you can create an irrevocable living trust. Assets in an irrevocable living trust are no longer yours, and you cannot revoke or terminate the trust. Therefore, creditors cannot typically come after the assets in an irrevocable living trust. All trust agreements must be created with a certain degree of formality and particularity in order to be legally valid and binding. Also, the trust agreement will typically contain restrictions, limitations, or conditions on your ability to use the property held in trust. A properly drafted trust agreement will direct the trustee, upon your death, to distribute the trust's property to your heirs as you direct. Accordingly, once you pass away, the trust property it is no longer part of your estate and not subject to the probate process.

Gifts

One of the most common ways to avoid probate is to give your property away before you die. However, due to the tax implications, this requires a lot of planning. In the U.S., a federal "gift tax" may be imposed on a person who gives a gift, and the amount of tax due is based on the gift's value. The gift tax was implemented to stop people from dodging the estate tax by giving away all of their money before death. However, if the donor does not pay the gift tax, the donee may have to pay it – even if the donee is a family member. You do not have to pay tax on gifts that are less than the annual exclusion limit, which generally changes every year. In 2017, the exclusion amount is $14,000 per recipient. In other words, you can give up to $14,000 to each child this year without having to pay gift tax. Spouses can each give up to $14,000 to the same recipient without being taxed. Together, a married couple can give $28,000 to each donee without incurring the gift tax.

In addition to the annual exclusion limit, you must also be mindful of the "lifetime exemption", which refers to the total amount you can give away during your lifetime. If your gift exceeds the $14,000 annual threshold, it must be reported to the IRS as a taxable gift; however, that doesn't necessarily mean you'll have to pay the gift tax. Instead, you can apply the gift towards your lifetime exclusion from the Federal estate tax. The "basic exclusion" represents both the lifetime gift tax exemption and the estate tax exclusion, which is $5.49 million in 2017. In 2017, individuals can give away up to $5.49 million over their lifetime without having to pay gift or estate taxes. But keep in mind that any portion that's used to avoid the gift tax reduces the amount that will be exempt from estate tax. For example, if you used $1 million of the exemption to make taxable gifts during your lifetime, you will only be able to exclude $4.49 million from the estate tax if you die in 2017. If you surpass the $5.49 million limit, you (or your heirs) will have to pay up to 40% tax.

<u>**You can give someone $14,000 per year and it won't affect your lifetime exemption because gifts below the annual threshold are not considered taxable.**</u> However, if you exceed the $14,000 annual gift tax threshold, you must report to the IRS the amount that counts against your lifetime exemption. You must keep very good records of when you gave any gift, to whom you gave the gift, and the amount. The records need to be made available to your heirs, too.

Joint Property Ownership & Death Beneficiaries

Jointly owned property with the "right of survivorship" avoids the probate process because, upon death, the deceased owner no longer owns the property and it passes automatically to the living joint owner. Typically, a written document that sets out the joint ownership relationship, the property that is jointly held, and the right of survivorship must be executed for the surviving joint owner to take title to the property upon the other owner's death. This applies to real and personal property, but is more frequently used for real property. Jointly owned real estate can be held in a few ways. For example, property held as "joint tenants with a right of survivorship" means that the co-owners are "joint tenants" while they are all alive, but the surviving tenant(s) take the deceased tenant's ownership when she passes away. Another common example found in Texas is community property. In community-property states, married couples hold property as community property with the right of survivorship, and when one spouse dies, the surviving spouse takes full ownership of the property. By comparison, many financial accounts and instruments allow you to designate a beneficiary upon your death, whereupon the assets become the property of your designee. Therefore, the accounts or instruments are no longer part of your estate and not part of the probate process.

Nothing Is Certain Except … This Can Get Complicated!

Although it is a good idea to avoid probate, there are some caveats. First, not all of the methods described above may be complete substitutes for a will and for probate, because there may be other issues that must be handled in a will or probate. Second, the issues addressed above – such as transferring real property, protecting against creditors' demands, and tax planning, can get challenging. There is rarely a one-size-fits-all solution. Although it is tempting to do-it-yourself, you should never let this article, or any pre-arranged forms, be a substitute for sound legal advice – especially when your legacy is at stake.