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What You Need to Know to Avoid Probate

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Probate is the court-supervised process by which a deceased individual's assets are transferred after death. Assets that are titled in an individual's sole name at death without an appropriate beneficiary designation become part of that decedent's probate estate and must make their way through probate. The goal of the probate process is to protect the rights of heirs, beneficiaries and creditors.

Probate can be costly and time consuming, making it an undesirable process. Because it is court-supervised, documents filed with the court (such as the decedent's will and an inventory of the decedent's probate property) become public record. Expenses generally include court costs, personal representative fees and reimbursements, and attorney fees. With respect to duration, probate of a large or contested estate can drag on for years. Probate of a smaller estate, even if uncomplicated, may last six months or longer, depending on the types of assets owned, the complexity of creditors' claims, associated tax issues and whether a business is involved. However, with proper planning, probate can be avoided entirely.

Individuals may take advantage of numerous strategies and techniques to avoid probate, such as living revocable trusts, beneficiary designations, transfer-on-death and payable-on-death designations, transfer-on-death deeds for real property, marital property agreements and joint ownership of assets.

Living Revocable Trusts

A living revocable trust is created by an individual (the grantor) during the grantor's lifetime. The grantor can transfer assets to the trust during the grantor's lifetime or at the grantor's death. The grantor often acts as trustee of the trust, retaining control of and managing the trust assets for his or her own benefit during life. Further, a living revocable trust is revocable, meaning its provisions can be changed or amended by the grantor at any time until death. If assets are transferred to the trust during the grantor's lifetime, probate of the trust assets is avoided. The trust instrument also describes how and to whom the trust assets are distributed after the grantor's death.

Beneficiary Designations

A simple and effective way to avoid probate for assets like life insurance policies and retirement accounts is to complete a beneficiary designation for the asset, naming one or more individuals, charities and/or trusts as a beneficiary. Upon the

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death of the asset owner, the proceeds of the policy or account are distributed to the named beneficiaries. It is important that the owner's estate not be designated as the beneficiary. Doing so will subject the asset to probate. It is also important to note that beneficiary designations will override the terms of the owner's will and living revocable trust. As such, beneficiary designation coordination is essential.

Transfer-On-Death and Payable-On-Death Designations

Similarly, to avoid probate of financial accounts and stock, some states, including Wisconsin, allow for the completion of a transfer-on-death (TOD) or payable-on-death (POD) designation for the asset. By completing a TOD or POD designation, the owner of the asset can designate a beneficiary who will receive the asset upon the owner's death. TOD and POD designations are advantageous because there is little to no cost associated with designating a beneficiary and distribution to the beneficiary occurs relatively quickly. This allows a prompt transfer of the account. It is important to know if the institution that holds your account allows for such a designation and if there are limits to such a designation, such as the number of designated beneficiaries allowed. Due to these restrictions, TOD and POD designations by themselves may not allow you to achieve an equitable or desired distribution of your assets. Again, it is important that the owner's estate not be designated as the TOD or POD beneficiary and that there be proper beneficiary coordination.

Transfer-On-Death Deeds for Real Property

Much like the TOD and POD designations utilized to avoid probate of financial accounts and stock, an individual may utilize a transfer-on-death deed to designate the beneficiary of his or her Wisconsin real property upon death. An owner or owners of real property may designate both a primary and secondary beneficiary and may also designate a contingent beneficiary if a primary beneficiary does not survive. In order to be effective, the transfer-on-death deed and associated recording fees must be filed with the register of deeds for the county in which the real property is located before the owner's death.

Marital Property Agreements

Through a marital property agreement, spouses domiciled in Wisconsin may agree that upon the death of either spouse, the property of the deceased spouse will pass to a designated person, trust or other entity without probate. Such a provision, more commonly known as a "Washington Will," is unique to the states of Wisconsin and Washington. As such, it may have limited effectiveness for

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assets located in other states.

Joint Ownership of Assets

An individual can also avoid probate by titling assets in the name of more than one individual owner. Instead of titling an asset in an individual's sole name, an asset can be owned by multiple individuals as joint tenants or, if married, as survivorship marital property.

As joint tenants, each person has an equal interest in the whole property during the joint tenancy. On the death of any joint tenant, the surviving owners continue to own the property. Similarly, on the death of a spouse, survivorship marital property vests solely in the surviving spouse.

Note that joint owners can also own property as tenants in common or, if married, as marital property. However, owning property as tenants in common or marital property does not remove the property from probate. Instead, at the death of each owner, the deceased owner's share will be subject to probate (in the absence of any beneficiary designation or TOD/POD designation).

Also note that there can be disadvantages to joint ownership of assets. For example, if a parent adds a child to a bank account as a joint owner, the child could remove the assets from the account, the account is exposed to the child's creditors, and the account will pass to the child at the parent's death.

Consider Your Plan as a Whole

While all of these probate avoidance tools are effective in various circumstances, it is important to consider your objectives and estate plan as a whole. In addition, changes and updates to your estate plan should involve a careful review of all components, including those listed above, to ensure that your estate plan reflects your goals.

If you have any questions regarding your estate plan, please contact your Reinhart attorney or a member of Reinhart's Trusts and Estates Practice.

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