

SO YOU WANT TO AVOID PROBATE?

[Transfer On Death Deeds – Your Latest Means To Do So]

Why Avoid Probate?

“Do I need a Will?” is one of the most frequent questions we are asked by our clients. Those folks who ask the question typically assume that their Will controls the disposition of all their property upon their death. They usually have a vague sense of what the probate process is all about, know that it takes time, and costs money for attorneys’ fees and court costs. Then they will follow up by asking about ways to avoid probate.

Historically, probate of a Will has been a very common method to pass assets to the next generation upon death. This court process, referred to as probate, involves the appointment of a Personal Representative who provides services equivalent to a “business manager”. The “PR” pays debts and final expenses of the deceased, takes care of filing final income tax returns, and ultimately distributes the assets to those beneficiaries mentioned in the Will.

As with most any type of court proceeding, probate takes time and involves payment of expenses -- I will usually tell people the process takes eight to twelve months to complete, and costs several thousand dollars in attorneys’ fees, court costs, publication fees and other expenses. Clients don’t relish the prospect of either the time or expense, and then when you also point out that all of the court files (including the inventories of what the deceased person owned, and how much it was worth), are public, the client will ask if there is a method to avoid all of that.

The answer is “Yes” -- and when I tell the Client that they probably *already* own some of their property in a way that will mean it will never be distributed in accordance with whatever their Will says, most times, the Client sits up in their chair, their eyes widen, and they ask me to go on with a fuller explanation. They like the idea of avoiding that time and expense.

I go on, then, to explain that state legislatures have developed ways to help individuals minimize, or avoid entirely, the probate process when they transfer assets on their death. At the same time, I caution that although probate can be expensive, avoiding probate can be complicated.

My clients report initially that really their only assets consist of a modest home, and a small checking account, which they want to see go to their daughter. Upon further questioning, I find out that my clients own more than just a house and a checking account. They have several different categories of property. In addition to the home (with furniture), they have clothing, jewelry, two automobiles, two bank accounts (checking and savings), a life insurance policy on the husband’s life, and the wife has retirement money in her 401(k) account at work.

They ask about whether I can work it so that they could avoid probate on all of that. Our discussion then got more interesting, as we delved into the different ways these properties can be titled to affect how they will be treated under the law, upon the death of their owners.

Probate Avoidance Tools

The challenge has always been to fashion flexible estate planning documents to allow individuals to transfer each of these property types on death, without probate, while preserving the individual's right to change his or her mind during life. Specific assets that routinely pass outside of probate include stocks or other securities registered in transfer on death ("TOD") form, bank accounts held in pay-on-death ("POD") accounts, as well as any assets titled in a joint tenancy, or survivorship marital property with right of survivorship, form of ownership.

In addition, I point out to my clients that many other categories of assets can pass directly to a named beneficiary -- through contracts. These include life insurance policies, promissory notes, IRA or 401(k) account agreements, custodial agreements, employment compensation plans, pension plans, and, especially in Wisconsin, marital property agreements.

Revocable Living Trusts

The revocable living trust is a more comprehensive tool for estate planning. Through the use of a revocable living trust, I explain to my clients that they can make arrangements for the transfer on death of all of their assets in one document, while preserving the right to control the assets and amend the revocable living trust during their lifetimes. While the revocable living trust does not require a probate proceeding on death, it generally costs a couple thousand dollars to prepare, and the clients have to discipline themselves by agreeing to title all of their assets in their names "as trustees under their Revocable Living Trust" because if they do not, then the assets will not be distributed through the trust, and probate will not have been avoided.

For individuals who have small estates, the use of a trust to avoid probate may be self-defeating, in that the cost of setting up the trust may exceed the cost of a simple probate where the primary asset in the estate is the home.

Joint Tenancy/Survivorship Marital Property

Instead of using a revocable living trust, the property owners could see to a transfer of title to their home, or bank accounts, by making sure the property is held into a form of joint ownership, with the right of survivorship. The most common such form is a joint tenancy, but Wisconsin also allows spouses to hold their property as "survivorship marital property".

Upon the death of one of the owners, the survivor(s) automatically succeeds to ownership without probate. Adding their daughter's name to the title to their home would mean, then, that presumably she would take sole title, automatically, upon the deaths of her parents.

Even though this alternative may sound like an easy choice for my clients, joint ownership is tricky, and may lead to undesirable consequences. The transfer creates an irrevocable gift from the original owner to the new co-owner, and the gift is irrevocable even if the original owner later changes his or her mind. I have my own “horror” stories of children mistreating their parents, after the parents have already completed gifting their property to their ungrateful children. Not at all a good outcome.

Second, the transfer will be a completed gift for gift tax purposes and may require the payment of gift taxes.

Finally, the person added to the title has rights in the property, while the original owner is alive. Thus, the creditors of the person added to the title may be able to reach the asset, or income produced by the asset.

The New Transfer On Death Deed

Into this mix, arrived the advent of the Transfer on Death Deed (“TOD Deed”). In 2005, Wisconsin enacted Section 705.15, Wis. Stats., providing an *additional* means to effect non-probate transfers of real property on death. The emphasis here is on the word “additional” – inasmuch as prior to 2005 all of the ways that we just discussed above to avoid probate were available, including creating life estates in real property, taking title to real property as joint tenants, or as survivorship marital property, with rights of survivorship, or creating Revocable Living Trusts and placing title to the real estate in the Trust.

A TOD Deed allows the owner of real property to convey the property, through use of a deed, to a beneficiary who will succeed to ownership at the owner’s death. ***Because the TOD Deed creates no rights in the beneficiary until the owner dies, unlike joint tenancy, the owner can change his or her mind during life, and the beneficiary’s creditors cannot attach the beneficiary’s interest in the property during the owner’s life. The recordation of the TOD Deed also does not create a completed gift for gift tax purposes because no transfer of ownership takes place until the owner dies.*** In essence, the TOD Deed serves the same purpose as a POD designation on a bank account.

For the remainder of the owner’s life, he or she continues to own the full property interest and retains all management and decision-making powers. The owner can sell, mortgage, or otherwise convey the property interest without the consent of the beneficiary. If the owner wants to change the beneficiary, the law allows for revocation of the TOD Deed, or execution and recording of a new TOD Deed naming a new beneficiary.

When Should TOD Deeds Be Considered?

Suppose that one of my clients owns a house valued at \$200,000, and the house is their sole asset that has any significant value. When my client dies, he would like to leave the house to his son,

John. There are a couple of options: My client can leave the house to John through his Will, or through a Revocable Living Trust, or he can transfer title to the house to himself and to John as joint tenants with the right of survivorship.

If he transfers the house by Will, his son, John, will have to probate the estate when his father dies. If my client wants to use a Trust, he will have to pay me to draft the Trust and then deed the house to himself as Trustee under the Revocable Living Trust.

But if my client transfers title to himself and John as joint tenants with right of survivorship, he may need to worry about his son's creditors. If his son, John, gets into financial trouble, his creditors may be able to attach John's interest in the house. Another potential complication is that if my client needs to sell the house, and move into an assisted care facility, or take out a mortgage using the house as collateral, he will not be able to do so without John's consent, because John will own an interest in the house.

On the other hand, since my client lives in Wisconsin, he could accomplish his goal by having me draft a TOD Deed, and then having me record it with the local Register of Deeds. My charges to create and record the deed would be relatively inexpensive. There is no present gift by having my client execute and record the deed, and his son's creditors could not attach the property. I point out to my client that if he were to change his mind, he could revoke the TOD Deed. And, until he died, when the TOD Deed would take effect, the house is still his to use, mortgage, finance, or sell, as he chooses.

So, by using the TOD Deed, my client can accomplish his goal of transferring his house to his son without probate, at minimal cost, and without the unintended consequences of the joint tenancy.

Final Thoughts

As you can see, for my client, the use of a TOD Deed is indeed a good alternative, but careful consideration needs to be taken to determine if a TOD Deed is appropriate for your particular circumstances.

I would be happy to discuss your estate planning goals and together we can figure out the best, and most economical way, to achieve them.

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