

Avoiding Probate

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When an individual dies owning property solely in his or her name, a formal procedure (“probate”) is usually needed to determine to whom the property should pass. If there is a valid Will, the property will pass according to its terms. If there is no will, the property will pass to the individual’s heirs at law. The intestacy laws of Massachusetts will determine who the individual’s heirs are and what they receive. It may not be to whom you would expect.

However, it is possible to legally pass property to another person without going through probate. The following are examples of some probate avoidance devices. Keep in mind that although it is often beneficial to avoid probate because the process can be costly and time consuming, these devices have pitfalls. Additionally, probate is sometimes the best option depending on the situation. The following

are examples of probate avoidance devices:

Joint Tenancy – Adding another person to your assets as a joint owner or “joint tenant with rights of survivorship” will allow your property to pass to the other individual upon your death without the need for a probate proceeding. The obvious pitfall to this is that while you are alive the other owner has access to 100% of that asset and the asset is subject to any claims of the owner and/or any of their creditors.

Beneficiary Designations – Adding a Transfer on Death (TOD) Beneficiary to your investment account; Pay on Death

beneficiaries (POD) on bank accounts. Unlike joint tenancy, adding beneficiary designations to your property allows you to name an individual to inherit your property at your death without giving them any current ownership. The property will pass to the individual of your choice without going through a probate proceeding. One of the problems associated with beneficiary designations is that often the TOD/POD asset is not divided equally among the family as may have been intended by the deceased.

A Revocable Living Trust – Revocable trust is a document wherein an individual “Grantor” creates a trust instrument and names an individual (usually themselves) as “Trustee.” The Grantor then transfers property into the trust and the Trustee manages the property and distributes the property according to the terms of the trust. Unlike the addition of joint tenants or beneficiaries on your accounts, which may lead to conflict among family members, a Revocable Living Trust allows you to specify how you wish your property to pass. A Revocable Living Trust also avoids some of the adverse tax consequences associated with joint titling and beneficiary designations, while accomplishing the same goal of avoiding probate.

Other considerations:

Last Will and Testament: It is VERY important to understand that if you have beneficiaries listed on your assets, upon your death, your assets will be distributed to those beneficiaries you have listed. They WILL NOT be distributed according to your Last Will and Testament.

Incompetency: What happens if an individual is deemed incompetent? If you have a well-drafted power of attorney in place that specifically states you can create a trust or add/change a beneficiary on the individuals account, you may do so. Keep in mind that the power of attorney has a fiduciary duty to act in the principal’s best interest, which includes following their testamentary wishes.

Spousal Elective Share: If you are married, before titling/adding beneficiaries to your assets, you need to account for your partner's spousal elective share (the amount they are entitled to inherit from you by law).

Additionally, if you or your spouse are applying for/receiving Medicaid/MassHealth, the state may consider the applicant's/recipient's failure to receive the spousal elective share as a transfer of assets, which would disqualify your spouse for benefits.

The above information is general. Before taking action to avoid probate, you should consult a qualified estate planning attorney who can examine your specific situation and advise you accordingly.

Do you have a suggestion for a future article topic for Attorney Walecka? Reach out to him directly with a question or topic you think would be helpful to readers.

The information contained in this article is not intended to make you an expert on estate planning nor is this article intended to replace the need for the advice of a professional. Rather, this article is simply intended to provide a basic understanding of why estate planning is important for everybody and a basic understanding of some of the more common estate planning tools. This article does not constitute legal advice.