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LIVING TRUSTS AND AVOIDING PROBATE

INTRODUCTION

You may have seen newspaper or television advertisements offering to sell forms for wills, living wills, and powers of attorney. These forms usually sell for between \$5 and \$30 and are said to be good in any state and not to require the assistance of an attorney. The following information has been developed in response to questions asked by people who have seen these advertisements or who are interested in knowing about a living trust as a way of avoiding probate.

These exact same forms can be obtained from a law library or form printer for between **ten cents** and **one dollar each**. Under all circumstances, it is unwise to purchase these forms through mass advertising. Even if the forms suit your needs, they are grossly overpriced.

Secondly, questions of estate planning require professional assistance, even if you have only a modest amount of property. Preparing your own legal documents makes about as much sense as providing your own medical care. Often there will be no problem, but other times you will overlook something major that can cause you or your family serious problems down the road.

IS THERE ANY BENEFIT TO PROBATE?

There are some distinct benefits of probate, which are not usually recognized. First, through

AVOIDING PROBATE

Many people come to an attorney wanting to "avoid probate", but they are not clear on why it is advisable to "avoid probate."

Probate is the legal procedure in court whereby the property of a person who has died is transferred to the people who survive either under a will or through a statutory formula developed by the legislature. Not all estates require probate action and probate is not dependent upon the existence of a will. It can even occur when there is a living trust.

However, the only property that passes through probate is that property which the decedent owned in his/her own name at the time of death. Property that is not held solely by the decedent at the time of death does not pass through probate, but passes in other ways which will be outlined below.

Why would someone want to avoid probate? The answers are **time** and **money**. A full probate of an estate worth more than \$50,000 in Illinois can often take one year or longer and can require attorney and court costs of between \$500 and \$1,000, even in a relatively simple case. The main reasons people want to avoid probate are to get around the delay and the attorney and court costs.

probate a judge in court will determine how the property is to be divided, based on the decedent's will or the statutory formula if there is no will. There will be no misunderstandings or questions

regarding the desires of the decedent. There will be a court order entered, which must be followed by the survivors.

Secondly, with probate, creditors have a dramatically shorter time in which to collect debts due from the decedent's estate. This means that businesses and people having claims against the person who has died must file their claims within six months of notice published in the local newspaper.

If they do not file their claims within that period, they cannot thereafter seek to collect from those who have inherited property pursuant to an order of the Probate Court. Otherwise, the statute of limitations to collect such debts may be much longer. Thus, one primary advantage of the probate process is cutting off creditors' rights to make their claim.

Finally, it should be recognized that the probate of your estate would only take place after your death. Thus, avoiding probate may be of interest to your survivors, but will not directly benefit you. In fact, your survivors may desire probate to control the division of your property and limit creditors' claims.

HOW TO AVOID PROBATE

Do not own anything at your death. The easiest way to avoid having your estate probated is to not own anything when you die. Sometimes your children may suggest that you transfer ownership of your real estate, bank accounts, and other assets for exactly this purpose. While this will avoid probate, there are many distinct disadvantages to giving away everything you own. Most obviously, you cannot

Joint tenancy. The most common way of avoiding probate is to hold property in joint tenancy.

This means that you and some other person have joint ownership of the property, and at the death of one of you the other automatically acquires complete ownership without the necessity of going through probate in court. It is quite common for a husband and wife to own their home and bank accounts in joint tenancy. Thus, when the first spouse dies the other one immediately becomes owner without the necessity of a probate procedure. For this reason,

use what you do not own. If you give your bank accounts to your children, you may not have use of the money, except as they allow. If you transfer your real estate to someone else, they can sell it out from under you. While you may not think that your loved ones will do this, it does happen. What also happens is that the creditors of your relatives can assert a claim against property that you have transferred to your loved ones, and they may lose the property through legal procedures.

Moreover, there may be certain tax advantages to retaining ownership of real estate that are not achieved if you transfer ownership to your children or other persons without retaining some legal interest in the property.

As a general rule it is a bad idea to transfer ownership of things you own to anyone else unless you are absolutely certain that you will not need or want to use that property for the rest of your life.

Increasingly, older people are remarrying late in life and may have a dramatic change of living circumstances.

While today you may not think that you will want to move or use your funds for travel, you may change your mind based on unforeseen events.

Additionally, transferring your property to someone else may have unintended implications if you need to apply for medical assistance to assist you in paying your medical bills. This is a particular problem if Medicaid is necessary to pay for long term care in a nursing home.

it is often possible to avoid doing a probate of the estate of the first spouse to die.

Sometimes people put the names of their children on bank accounts or other property as joint tenants. While this will avoid probate, it also creates some problems. Here too, the creditors of your children can assert a claim against the property that you hold jointly with them. While you might not think that your children have any creditors, the unfortunate fact is that business reversals or liability

arising from automobile accidents can subject your children to unanticipated liability of thousands of dollars. If this happens, property you have transferred into joint tenancy with your children can be reached by your children's creditors. Similarly, if any of your children should be required to pay spouse or child support and not have adequate resources to do so, the property could be reached by your child's {(ex) spouse and children}.

Real estate held in joint tenancy cannot thereafter be transferred unless all of the joint tenants concur. This means that if you transfer your home into joint tenancy with your children, you all must agree before you can sell or mortgage the house in the future. Again, this is an important consideration because you do not know what your needs or desires will be in the future. Additionally, one unreasonable child can cause very substantial hardships to the family by refusing to concur, thus precluding the sale or mortgage of the property or necessitating complex and expensive legal procedures to divide the property.

Bank accounts held in joint tenancy, on the other hand, can be reached by each of the joint tenants independently, generally without the consent or knowledge of the other. What this means is that if you place your child's name on a bank account in joint tenancy with you today, your child can go to the bank tomorrow and withdraw all the money and keep it, and not give you any. While there are legal procedures that can sometimes be pursued to get your money back, it is difficult to win such a case,

It is important to understand what a living trust is and what it is not. A living trust is a legal instrument whereby you transfer present ownership of your property to a trustee who holds the property for your benefit. The trustee may be a loved one, a bank or a savings institution, or even you. The trustee, during your lifetime, utilizes your property for your benefit. If you become disabled, the trust instrument will provide that the trustee will spend your money for your benefit. At your death, the trustee is directed to dispose of the property as you desire, in much the same way as you would in a will. In most cases, the individual who sets up the trust will be the trustee himself/herself, and

and in any event most people are not enthusiastic about beginning legal action against their children to obtain a return of money.

Thus, while joint tenancy is the most common way of avoiding probate, there are problems that need to be considered. In Illinois one way of avoiding some of these problems is holding bank accounts or certificates of deposit in "**Payable on Death**" (POD) accounts. POD accounts allow you to retain complete control and ownership of your money while you are living, but immediately transfer ownership of the funds at your death. Unlike accounts held in joint tenancy, someone named as the beneficiary of a POD account has no present ownership rights to the account. For this reason, a POD account cannot be used to allow someone to pay your bills while you are still alive. POD accounts only have an advantage at your death.

Living Trusts. In the last 20 years a number of authors have become rich by writing books on "**how to avoid probate**" by urging people to execute living trusts. Similarly, publications and television programs targeted to older people have extolled the virtues of living trusts and have provided trust forms, usually for about \$20 a piece. As noted above, these forms can usually be obtained from other sources for much less than \$20.

provisions will be included in the trust document to provide for successor trustees in the event of your disability or death.

Unlike a will, however, a living trust document is not self-executing and requires that you transfer ownership for all items of property during your lifetime from yourself to the trustee, even if you are going to act as the trustee. This means that you must deed all of your property to the trustee, change all of your bank accounts, and get a stock broker to change ownership of all the stocks and bonds that you own. Many people do not understand that you must actually transfer

ownership of the property in order for the living trust to be effective. Having a lawyer draft the trust document and signing it does not have any effect whatsoever unless and until you transfer property into the trust.

There are several advantages to a living trust. Most obviously, a living trust will avoid probate in most situations. Since the property held in trust at your death is not technically owned by you, the trust assets are not subject to disposition through the probate process in court. On the other hand, it is literally impossible to transfer all of your property into the trust. For example, personal property, including an automobile, may not be part of the trust. While most of such personal property can be transferred through relatively simple probate procedures, it is unusual to have an estate which is literally all in the trust.

The other advantage of a living trust is that it provides for your maintenance if you should become disabled. This should be done in conjunction with a Durable Power of Attorney for Health care to assure that you are provided for in the event of disability.

A living trust has no tax benefits whatsoever either for income tax or death taxes. Indeed, under some circumstances the trust will be a separate taxpayer for IRS purposes and may actually require the payment of additional taxes. Other estate planning advantages may also be lost.

If you are not the trustee, a fiduciary income tax

Streamlined Probate Procedures. If you own no real estate (other than in joint tenancy), have an estate whose total value is \$50,000 or less, and have no debts, no in-court probate is required to transfer property at your death. Rather, property can pass upon the execution of a signed affidavit. These Small Estate Affidavits can be done quickly by an attorney at nominal costs. In addition, if the estate has a value of \$50,000 or less (even with real estate) a summary administration can be obtained quickly with relatively little judicial process. For these reasons, it is usually inappropriate for someone with an estate of less than \$50,000 to consider a living trust. Moreover, the legal fees incurred to properly

return will have to be filed with the IRS. If the trustee is someone other than you, the creation of the trust may mean that you will lose certain tax advantages for owner occupied and homestead real estate.

If you fail to transfer any of your property into the trust, such property will not pass as you have indicated in the trust document. In fact, the property may be inherited by someone entirely different than that indicated in your trust. If you pay a private attorney to prepare the trust for you, you will find that this is a much more expensive type of legal service than the writing of a simple will. In fact, the cost of legal fees for a living trust may actually be as great as the cost of doing a simple probate. When the yearly costs of maintaining the trust, filing fiduciary tax returns, etc. are taken into consideration, the life-time costs for a living trust generally will **far** exceed the cost of a will and a moderately complex probate procedure.

It should also be recognized that if you are not acting as your own trustee, there may be difficulty in getting property out of the trust should you desire to utilize it in the future. While the trustee is generally obligated to use property for your benefit, there can sometimes be differences of opinion about what exactly is in your benefit. Additionally, a trustee can seek and obtain a fee for services which will be paid out of your assets.

draft a trust usually dictate that only persons with substantial estates (in excess of \$250,000) establish a living trust.

THE BEST ADVICE - GET ADVICE

Estate planning and deciding on your legal needs is an individualized process that requires professional assistance and consultation. There is no substitute for meeting with an attorney or other professional financial counselor to discuss your particular situation and needs. It is not prudent to rely on generic information in newspaper ads or magazine articles or the advice of friends or

acquaintances, no matter how good their intentions. Even information provided by reputable organizations concerned about older people often speak only in generalities. Thus, the best advice is for you to sit down with an attorney or a professional financial counselor in whom you have trust to assist you in your estate planning needs.

AVAILABILITY FOR LEGAL SERVICES

There is no substitute for individual legal advice. The preceding information speaks only in general terms. Each individual situation must be independently analyzed by an attorney knowledgeable of these issues. If you have a private attorney, you should certainly discuss these matters with him or her. If you do not have a private attorney, the Illinois State Bar Association (ISBA) maintains a lawyer referral service which you can contact for the name of a lawyer in your area. The current number for ISBA is 1-800-252-8916. The Legal Clinic at Southern Illinois University at Carbondale (SIUC) School of Law provides legal assistance to persons 60 years of age and over who live in the thirteen southernmost counties of Illinois. The program sees clients at nineteen sites throughout Southern Illinois. This program can provide you with legal services. To find out about the Legal Clinic's services, contact the senior citizen nutrition site closest to your home or contact the SIUC Legal Clinic as 618-536-4423.