Avoiding Probate

The probating of a will permits a court of law to supervise the transfer of assets from the decedent to his or her heirs. A typical probate lasts about one year, with six months generally being a minimum time if everything proceeds according to schedule.

Because of high attorney's fees, executor's commissions and court costs, and the often-unwanted publicity and the time delay involved in probating an estate, many people attempt to avoid probate administration. Some of the methods of avoidance are listed below.

Joint Tenancy

Joint tenancy is a form of title arrangement, usually between spouses. The joint tenancy is dissolved after one tenant dies, with title passing automatically to the surviving joint tenant. There may be income tax disadvantages to this arrangement. Creditors of either joint tenant can attach the asset. It may also frustrate estate tax savings which are anticipated from carefully drafted wills and trusts.

Community Property with Rights of Survivorship

Title passes automatically to the surviving spouse with no income tax disadvantages as with joint tenancy.

Totten Trust

A Totten trust is a vehicle for passing savings accounts to heirs. Passbook accounts are held in trust for another. Typical wording would be: "John Doe, in trust for Johnny Doe."

Life Insurance

The proceeds of life insurance are rarely subject to probate administration, unless the insured's estate is the beneficiary or all of the named beneficiaries pre-decease the insured.

Lifetime Gifts

Even gifts made shortly prior to death will avoid probate. However, they may be brought back into the estate for death tax purposes. Also, gifts carry the donor's basis to the donee, whereas appreciated assets in the decedent's estate will generally get a new or stepped-up basis.

Revocable Living Trust

The revocable living trust is an effective method of avoiding probate. It has the additional advantage of providing management of the funds for the heirs for some time after the decedent's demise. Also, in the event the person setting up the living trust (also called an inter-vivos trust) becomes mentally incompetent or otherwise incapacitated, a successor trustee can take over management of the estate. Generally, this type of trust will not produce any estate tax savings.

Transfer on Death (TOD)

Many states have adopted the provisions of the Uniform TOD Security Registration Act, which permits securities and securities accounts to be registered so that ownership automatically passes to named beneficiaries at the death of the owner(s).