

How to Avoid Probate and Other Problems Death Causes

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Agenda





What is Probate

What is Probate

- The administration of assets of a decedent that are:
 - solely in the individual's name,
 - do not have a beneficiary designated, or
 - do not have title.
- Chancery Court has jurisdiction over the probate of wills and administration of estates unless a county has a special court for probate created by private act.

What is Probate - Small Estate Procedure

- Estates of less than \$25,000.00 may be administered under the Small Estates Act.
 - Excluded in determining the value of personal property is property held jointly with the right of survivorship and also life insurance proceeds payable other than to the decedent's estate.
 - By definition real property is also not taken into account in arriving at the \$25,000.00 limitation.
- If the decedent left only a small bank account and no significant debts, for example, the Small Estates Act could be useful in collecting assets with the least possible expenses.

What is Probate – Small Bank Accounts

- Small Bank Account Exception – TCA 45-2-708
 - No executor or administrator appointed
 - More than 30 days after death of decedent
 - Account has less than \$15,000
 - First pays to a creditor for funeral expenses, second to a creditor for expenses of last illness, third to surviving spouse and fourth to next of kin.
- The language in the statute is permissive and doesn't require the bank to make the distribution.

What is Probate – Court Process

- Basic Steps
 - Did the Decedent leave a valid Will?
 - Testate – Died With a Will
 - Intestate – Died Without a Will
 - If a Will, pay expenses and then distribute pursuant to the Will.
 - If no Will, pay expenses and then distribute to heirs.

What is Probate – Court Process

- What if the Decedent Did Not Have a Will?
 - In Tennessee, the spouse takes 1/2 of the estate if the decedent is survived by one child (or the issue of one child) and 1/3 of the estate if the decedent is survived by more than one child (or the issue of more than one child).
 - Alternatively, the surviving spouse could take an elective share.
 - If married less than three (3) years the surviving spouse can take 10% of the net estate
 - If married between three (3) to six (6) years, the surviving spouse can take 20% of the net estate
 - If married six (6) to nine years, the surviving spouse can take 30% of the net estate
 - If married more than nine (9) years, the surviving spouse can take 40% of the net estate.

What is Probate – Court Process

- Affidavit of Attesting Witnesses
 - In order to be admitted to probate, a typed Will must have an affidavit attesting that the statutory requirements concerning the validity of a Will were complied with when the Will was executed.
 - Ordinarily, attorneys prepare Wills with affidavits attached to the Will which are completed when the Will is signed to comply with this requirement.
 - If the affidavit is not signed when the Will is executed, the attorney has to track down the witnesses to the Will and get them to sign affidavits before the Will will be admitted to probate.

What is Probate – Court Process

- Administration of the Estate
 - A person cannot take charge of the assets of an estate until Letters Testamentary/Letters of Administration are issued.
 - There is a practical gap in time after the death of the Decedent and when the Estate is actually opened and Letters issued.
 - This gap in time can cause practical problems
 - Loss in value of stocks
 - Loss of control of business
 - Rental income/mortgage payments

What is Probate – Court Supervision

- Administration of the Estate
 - The appropriate place to open probate is any county in which the Decedent was a resident or has real property.
 - No person may enter upon the administration of a deceased person's estate until they have procured an authorizing letter (Letters Testamentary (w/will) or Letters of Administration (w/out will)).

What is Probate – Court Supervision

- Accounting
 - Within fifteen months from the date of qualification, the personal representative must make an accounting with the clerk of the court to establish probate jurisdiction in that county.
 - After the first accounting the personal representative must make annual accountings, recording all receipts, disbursements, and distributions of principal and income and the remaining assets held in the Estate shall be verified by oath of the personal representative.
 - Once the estate is fully administered, the final accounting will state that the personal representative has mailed to the creditors of the Decedent who were known to or reasonably ascertainable by the personal representative.

What is Probate – Court Supervision

- Accounting
 - Detailed accountings of solvent estates may be waived if the requirements for the personal representative, by will, to make court accountings or if all of the distributees of the residue file with the clerk of the court waivers excusing the personal representative from filing all court accountings.
- Probate cannot be closed until:
 - All court accountings are waived by the Decedent's Will or by the distributees,
 - All legitimate claims against the Estate have been satisfied, and
 - The period for creditors to file claims against the Estate has expired.

What is Probate – Court Supervision

- Inventory
 - The personal representative, within sixty days after entering on the administration of a testate or intestate estate, shall make a complete and accurate inventory of the probate Estate of the Deceased and return the same to the Clerk of the Court, verified by his/her oath.
 - Inventory may be excused by the will or all distributees or legatees.
 - If any residuary beneficiary refuses to agree to the waiver or later revokes his agreement, the requirement of an inventory is reinstated.

What is Probate – Court Supervision

- Inventory
 - The personal representative, within sixty days after entering on the administration shall notify:
 - Each legatee, devisee or entity by sending, by first class mail or personal delivery, a complete copy of the paragraph(s) of the will containing such bequests to those beneficiaries only receiving bequests; and a complete copy of the will to those beneficiaries sharing in the residue of the estate.
 - Each residuary distributee of the deceased for an intestate estate by sending such persons a copy of letters of administration.
 - A trustee, if any portion is distributable to a trustee, by sending a copy of the will.
 - Within the sixty-day period, the personal representative shall also execute and file with the clerk an affidavit that the required copies have been mailed or delivered to the beneficiaries or distributees, and explanation of effort to identify and locate any to whom copies have not been sent.
 - The court will then record the inventory if it is regular.

What is Probate – Court Supervision - Claims

- Claims
 - For a notice to creditors, the Clerk of the court must give public notice or the personal representative's qualification within 30 days of the issuance of letters testamentary/administration by two consecutive weekly notices published in a county newspaper or if no county newspaper than in three public county places.
 - The personal representative must notify any creditors, by personal delivery or mail, of whom the personal representative has actual knowledge, or who are reasonably ascertainable.
 - An affidavit that the Notice to creditors was sent must be filed with the court.

What is Probate – Court Supervision - Claims

- Claims
 - Claims must be filed with the clerk within the earlier of four (4) months from the date of the first publication (or of the posting, as the case may be) of said notice or twelve (12) months from the decedent's date of death.
 - This notice, however, is not sufficient when a creditor is known or is reasonably ascertainable, and the personal representative is required to give actual notice in person or by mail to any creditor whose address is known or reasonably ascertainable.
 - The personal representative must notify any creditors, by personal delivery or mail, of whom the personal representative has actual knowledge, or who are reasonably ascertainable.

What is Probate – Court Supervision - Claims

- Receipt
 - In order to make one final settlement upon the first accounting to the clerk, the personal representative may ask the “interested persons” to waive notice, give receipt for their distributive share, and approve the final accounting to be filed with the clerk.
 - A receipt is required from every creditor and every beneficiary, unless you get a receipt from the Unclaimed Property Division.
 - **BE CAREFUL WHO IS A BENEFICIARY AND WOULD SIGN A RECEIPT.**

What is Probate – Business

- Business
 - Businesses have a particular problem.
 - The Decedent could have multiple roles in the business, whether as owner, officer, employee, independent contractor, consultant or otherwise.
 - Probate leaves in limbo the Decedent's responsibilities and obligations until an Estate is opened.
 - Letters of Administration/Letters Testamentary control the Decedent's ownership in the Business.

What is Probate – Business

- Shareholder Agreements and Operating/Partnership Agreements
 - Ownership may be bought out pursuant to a Buy-Sell Agreement, Shareholder Agreement, Operating Agreement and/or Partnership Agreement.
 - Concern is whether the buyout price is an appropriate price for the Decedent's ownership.
 - Is this a cash-poor business?
 - Do you want the widow/widower and/or children to remain and own the Decedent's ownership instead of being bought out?
 - Swapping a partner for the partner's heirs... good or bad?

What is Probate – Business

- Special Issues for a Sole Proprietorship
 - Sole proprietorship (for legal purposes) does not have any documentation governing the ownership.
 - There is no legal documentation or bank documentation that make transition easier or puts someone in place upon the death of the owner.
 - There is an immediate gap that can perhaps only be filled by a spouse/joint owner of a bank account/asset.

What is Probate – Real Estate

- Real Estate
 - Real property vests in intestate or testate heirs at the moment of death, subject to insolvency of the Estate.
 - Often, probate is not required to transfer real estate to a Decedent's heirs after death.
 - Technically, a personal representative has limited authority to deal with real estate after a Decedent's death.
 - The type of real property left behind is therefore very important

What is Probate – Real Estate

- Tenants in common
 - Tenants in common jointly own the whole estate, and each have an equal right of entry and possession, can own a different undivided interest in the property, and shares the benefits and burdens of ownership.
 - Tenants in Common may have a Right of Survivorship, but do not by default.
 - Inherited property often takes the form of TIC.
 - TIC is subject to division by a partition action

What is Probate – Real Estate

- Joint tenants with right of survivorship
 - Conveyance must explicitly say, “joint tenants with right of survivorship.” Must have 4 unities (time, interest, possession and title).
 - A party to a joint tenancy with right of survivorship (even one created expressly in the instrument) may sever the joint tenancy and eliminate the right of survivorship by unilateral action and thereby convert a joint tenancy with right of survivorship to a tenancy in common.

What is Probate – Real Estate

- Life Estate
 - A life estate grants a person an interest in property for the duration of their life, or for the duration of someone else's life.
 - After the person who the life estate's interest is measured by dies, the property interest either shifts back to the grantor or springs to a new person/party.
 - For example, parents may give their family home to their child via a deed, but reserve a life estate for themselves so that the parents can live in the house for the rest of their lives.
 - Problems with Life Estate – SALE OF PROPERTY

What is Probate – Real Estate

- Tenants by the entirety
 - Only for married couples, conveyance (in which the 5 unities exist – interest, title, time, possession, and person) to a married couple results in tenancy by the entirety, unless the instrument expressly states that the married couple take ownership by a different form.
 - Married couple are considered one person. Upon the death of one spouse, the survivor owns the whole.
 - 1 spouse cannot transfer that spouse's interest in the real estate without the consent of the other.
 - Great creditor protection for marital property.

What is Probate – Real Estate

- Muniment of title
 - A will may be admitted to probate for the limited purpose of establishing a muniment of title to real estate if there is no personal estate to be administered.
 - This process avoids the need to appoint a personal representative of the estate or letters.
 - The petition should contain all the required under T.C.A. 30-1-117, such as names of the witnesses, that the petitioner believes the document is the decedent's last will and testament, etc.
 - No personal representative is appointed.

What is Probate – Minors

- Minors
 - A minor is anyone less than 18 years of age.
 - If a minor inherits more than \$25,000, then a legal guardianship must be established to safeguard the funds until the minor turns 18.
 - Guardianship requires bond, inventory and annual accountings unless they are waived pursuant to statutory exceptions.
 - If a child is left a significant amount of money or assets in a guardianship, they stand to receive all of them when they turn 18 regardless of whether they are prepared for them.

What is Probate – Bond

- Bond
 - A bond is required for each fiduciary to serve, whether a guardian, personal representative, or conservator.
 - The bond can be a practical problem. If there are significant assets or the proposed person needing a bond has “problems”, then obtaining a bond may be tough and could extend the process for opening probate.
 - Bond is generally waived in most attorney-drafted Wills (but exceptions).
 - All residuary beneficiaries can also waive if not waived in the Will or it is an intestate estate.

What is Probate – Bond

- Bond – How does it work practically?
 - Petition to open estates must have, unless bond is waived by the document offered for probate or in writing by all interested parties as authorized by statute, an estimate of the fair market value of the non-real estate assets.
 - Bond premiums are typically less than one percent of the total estate.
 - Individuals must qualify via net-worth and credit score to receive a bond, or an attorney can maintain control of the estate account.
 - Probate court sets bond on a case by case basis.



Wills

Wills – Requirements for Attested Wills

- Wills – Technical requirements
 - To execute an attested will, the will must be in writing and signed by the testator (or proxy) in the presence of at least two attesting witnesses, in the presence of the testator, and in the presence of each other and allows the acknowledgment of the testator's signature if it has been already made.
 - The testator must also publish the will by word, sign, motion or conduct.

Wills – Revocation by Statute

- Wills – What Revokes a prior Will?
 - A divorce works to revoke any disposition to the ex-spouse. TCA 32-1-202
 - Subsequent Will revokes a prior Will.
 - A revocation executed with Will formalities.
 - Being burned, torn, obliterated or destroyed with the intent and purpose of revoking it, by the testator.
 - Combination of marriage and birth of a child of a testator revokes the prior Will.
 - Lost Will is **PRESUMED REVOKED BY TESTATOR.**

Wills – Holographic Wills

- Wills – Holographic Wills requirements
 - No witnesses required
 - All material provisions must be in the handwriting of the testator and must be signed by the testator.
 - Handwriting must be proven by two (2) witnesses.
 - Landmines await for those who draft holographic wills – just ask the author.



Non-Probate Transfers/ Ownership

Non-Probate – Beneficiary Designation

- Beneficiary Designation
 - Contractually determines the ownership or distribution of assets upon death.
 - Wills or Trusts do not apply to beneficiary-designated property or jointly-owned property.
 - If no beneficiary designation, then Estate receives the assets.
 - Unless a Trust is a beneficiary, using beneficiary designations to transfer assets means that the distributions will be made outright and not overtime.

Non-Probate – Joint Ownership

- Joint ownership can avoid probate
 - Joint Tenancy with Right of Survivorship
 - Property is owned by multiple people and automatically passes to surviving owner(s) when one owner dies.
 - Tenancy by the Entirety
 - Property is owned by a married couple. Property passes to spouse upon the death of one spouse.
 - Tenant in common ownership does not have a survivorship feature.



Trusts

Trusts – Requirements

- Basics of a Trust
 - Requirements of a Trust
 - Trustee
 - Grantor
 - Beneficiary
 - Res***

Trusts – Common Trusts - Joint

- Joint Revocable Trust
 - Trust controlled by spouses, that is revocable until both of their deaths.
 - Trust provides guidelines for asset distribution upon both of their deaths.
 - Can be made into a CPT.
 - Can include credit shelter trust to include an amount to be exempted from federal estate tax; where upon the death of the first spouse a testamentary general power of appointment exists to make assets available to fund the credit shelter trust.

Trusts – Common Trusts – MAP Trust

- Marital Asset Protection Trust
 - Revocable.
 - For married couples who hold assets as Tenants by the Entirety, must be revocable by either or both settlors and both settlors can be current beneficiaries of the trust while living.
 - Spouses individually, nor debtors, may sever tenancy.
 - Creditors can reach trust assets only to the extent that the surviving spouse remains a beneficiary of the trust and possesses a non-fiduciary power to vest title to property in themselves individually.

Trusts – Common Trusts – CP Trust

- Community Property Trust
 - Revocable.
 - Married Couples only.
 - Community property is assets and debts acquired during the marriage and interest in the property is considered to be equally owned by both spouses.
 - The goal is to minimize capital gains tax for assets that have appreciated.
 - Basis in property completely steps-up upon the first death of a spouse.

Trusts – Common Trusts – Irrevocable Trust

- Irrevocable Trust
 - Can either be while a grantor is alive or become irrevocable upon death.
 - Irrevocable Trusts are generally used for life insurance proceeds or for estate tax planning.
 - Irrevocable Trusts have limitations on amending or changing the trust once it is created.
 - Intentionally defective grantor trust and spousal lifetime access trusts are some of the author's favorite types of irrevocable trusts.
 - Tennessee Investment Services Trust – TN's asset protection trust.

Meet our team



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Questions?

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