Pro Seniors

Helping Older Persons With Legal & Long-Term Care Problems

Avoiding Probate

1. What Is Probate?

Probate is the legal process of administering the estate of a deceased person in Probate Court, resolving all claims and distributing the deceased person's property under a will or if no will, per Ohio's statute of descent and distribution. [1]

2. Why Avoid Probate?

For small estates, probate is not always difficult or expensive. There are simplified forms of probate, called Release from Administration and Summary Release from Administration, which are relatively inexpensive and easy to carry out, sometimes even without an attorney. [2] However, for larger estates, establishing guardianship of minors and creating testamentary trusts to transfer property by will through probate may be a good idea even though there will be probate costs and attorney fees. [3]

If a person has a small estate with just a few basic assets or wants to avoid probate for some other reason, there are a number of ways a person can transfer property to beneficiaries upon death without going through probate. Such property passes by operation of law or by contract, rather than by will. Some of these techniques may be simpler and less expensive than transferring the property through probate. It is a good idea for anyone who wants to consider even simple estate planning to consult an attorney who practices in that area of law.

The question of whether property passes outside of probate or through probate is separate from the tax-treatment of the property.

3. What Are Survivorship Deeds?

When two or more people own a home together, the deed can state that upon the death of one of the owners, the property will belong to the surviving owner or owners. This transfer occurs because of the language in the deed and without the need to open a probate estate. In other words, the deed itself rather than a will determines who inherits the property upon an owner's death. If your deed, after naming the owners, contains the words "remainder to the survivor of them", then it is a survivorship deed.

To legally establish the transfer of the property upon an owner's death, it is necessary to draft and file with the county recorder an affidavit of survivorship and a death certificate. It is advisable to consult an attorney to make sure the process is carried out properly. [4]

4. What Is A Transfer On Death (TOD) Designation Affidavit?

A TOD designation affidavit is a way to transfer real property such as a home to a non-owner beneficiary outside of probate. The affidavit itself designates who will get the property upon the owner's death. The TOD affidavit does not limit the owner's right to sell, mortgage or use the property during her life. It only designates who will own the property if the present owner dies owning the property. [6] [7] The designation of a TOD affidavit beneficiary does not protect property in the event the owner ever needs to go to a nursing home and apply for Medicaid. [5] [8]

5. Can Title To A Motor Vehicle Be Transferred Outside Of Probate?

Title to a motor vehicle can be held in the form of joint ownership with right of survivorship. Then, when one owner dies, ownership passes to the survivor outside probate upon transfer of title. The title can also designate a death beneficiary in the same manner as a TOD affidavit discussed above. Also, a spouse can transfer title to up to two vehicles outside of probate, if no other death beneficiaries are named in the title or by will. See your local Bureau of Motor Vehicles office for details. [9] [10]

6. What Is A Payable On Death (POD) Account?

A person can go to a bank and fill out paperwork to designate who will receive the funds in checking, savings and other accounts including certificates of deposit, upon their death. This designation permits the transfer of the assets as a matter of contract and outside of probate upon the owner's death. [11] This does not affect the owner's right to withdraw funds or even close the account during the owner's life. Joint accounts are different in that they give both joint owners a right to the property immediately, whereas the POD beneficiary has no rights until the owner dies. [12]

7. Can I Use POD Designations For Retirement Funds?

A person can also designate who will receive retirement funds upon the owner's death. This will result in a transfer outside of probate and is governed by the rules applicable to the different forms of retirement accounts, such as pensions, 401(k)'s, and IRAs. Consult the administrator of your retirement funds for specific requirements. [13]

8. What About A Death Beneficiary Of Stock And Similar Investment Property?

A person who owns stock or other investment property can designate who will own the stock upon the death of the owner. This property would then pass to the death beneficiary without going through probate. [14] [15] [16]

9. What Is The Effect Of Naming A Life Insurance Beneficiary?

If a person purchases a life insurance policy and names a death beneficiary, that beneficiary will also receive the life insurance proceeds outside probate. [17]

10. What Is The Effect Of A Living Trust?

The term "living trust" or "revocable trust" usually refers to a kind of trust in which a person, called a settlor, places assets into a trust but retains the right to take the property out of the trust. The trust document can also name who will own the property upon the settlor's death. This avoids the need to go through probate. There are costs to set up and maintain the living trust and if the settlor decides to take the property out of the trust, for example, to sell or give away the property, title to the property will have to be changed, resulting in more costs.

Also, while such trusts may be a good idea to avoid probate, the trust may cause problems in other situations. For example, such trusts do not protect the property if the settlor has to go into a nursing home and needs to apply for Medicaid. Nor do such trusts protect against obligations to pay estate taxes. [18]

11. What About Other Types Of Trusts?

There are many types of trusts and many possible reasons to set up a trust, such as to provide for a disabled child. Some trusts are irrevocable, which means once established the person setting up the trust cannot take the property out of the trust. In order to make an informed decision about whether a trust is advisable for a particular person and what type of trust will accomplish the desired goals without creating unexpected negative results, it is advisable to speak to an attorney experienced in trust law. [19]

12. What About Giving Things Away During One's Life?

Certainly one way to avoid probate is to give things away during one's life. Of course, if a person gives something away, it is no longer theirs, and they have no right to get the property back. Also, such gifts can raise a number of concerns. For example, the tax consequences might include a need to pay higher taxes on the sale of the property, the need to file an informational tax return or, if large enough, to pay federal gift taxes. [20] [21]

If the gifts are made within five years of the date a person goes into a nursing home and applies for Medicaid, problems with Medicaid eligibility can arise because of Medicaid's prohibition against making gifts to qualify for Medicaid. [22]

Pro Seniors' Legal Hotline for Older Ohioans provides free legal information and advice by toll-free telephone to all residents of Ohio age 60 or older. If you have a concern that cannot be resolved over the phone, then the hotline will try to match you with an attorney who will handle your problem at a fee you can afford.

In southwest Ohio, Pro Seniors' staff attorneys and long-term care ombudsmen handle matters that private attorneys do not, such as nursing facility, adult care facility, home care, Medicare, Medicaid, Social Security, protective services, insurance and landlord/tenant problems.

This pamphlet provides general information and not legal advice. The law is complex and changes frequently. Before you apply this information to a particular situation, call Pro Seniors' free Legal Hotline or consult an attorney in elder law.

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Endnotes: *[Click the endnote number "[1]" to return to the text]*

[1] Wikipedia Article on Probate; O.R.C. § 2105.06 (Statute of Descent and Distribution)

[2] Pro Seniors Pamphlet on Small Estates

[3] Pro Seniors Pamphlet on Probate and Estate Taxes

[4] O.R.C. § 5302.22 (Transfer on Death Designation Affidavit)

[5] O.R.C. § 5302.221 (Medicaid Estate Recovery Form)

[6] O.R.C. § 5302.222 (Recording a Transfer on Death)

[7] O.R.C. § 5302.23 (Designating a Beneficiary)

[8] Pro Seniors Pamphlet on Institutional Medicaid

[9] O.R.C. § 2131.13 (Designating a TOD beneficiary for Certificates of Title for Motor Vehicle, Watercraft, or Outboard Motor)

[10] O.R.C. § 2106.18 (Transferring Auto Titles)

[11] O.R.C. §1109.07 (Deposits Payable on Death)

[12] O.R.C. §2131.10 (Payable on Death Accounts)

[13] O.R.C. §2131.10 (Payable on Death Accounts)

[14] O.R.C. §1709.04 (Designating a Beneficiary)

[15] O.R.C. §1709.07 (Passing of Ownership)

[16] O.R.C. §1709.09 (Transfers not Testamentary)

[17] O.R.C. §3911.14 (Policy Proceeds)

[18] OSBA Pamphlet on Revocable (Living) Trusts

[19] OSBA Pamphlet on Revocable (Living) Trusts

[20] 26 U.S.C. §1014 (Internal Revenue Code on Property from a Decedent)

[21] 26 U.S.C. §1015 (Internal Revenue Code on Gifted Property)

[22] Pro Seniors Pamphlet on Institutional Medicaid