Cornetet, Meyer,
Rush & Kirzner
ATTORNEYS AT LAW

123 Boggs Lane
Cincinnati, Ohio 45246
www.cmrklaw.com
Phone (513) 771-2444
Fax (513) 771-2447

jcornetet@cmrklaw.com
8/23/2012

WHY AND HOW TO AVOID PROBATE

Probate is the process of court supervision of the administration of one's Last Will & Testament once they have passed away. Probate also applies if you die without a Will. There are three major steps in the probate process.

The Probate Process

Admittance of the Will and Appointment of the Executor - The court will accept the Will as valid and appoint the Executor. The court will issue Letters of Authority which give the Executor the power to act. When the Executor goes to a bank to close an account the bank will make use of the Letter of Authority as proof that the Executor has the power to close the Account.

Preparation and Filing of the Inventory – The Executor must make a complete list of all of the assets owned by the decedent at the time of death. Accurate values must be put on the assets. Thus, appraisals must be obtained. The Inventory is sent to the people list in the Will who then have the power of object as to the ownership of an asset or as to its value. Any objections are heard at a hearing before the court.

Final Account – The executor goes before the court with all of the bank records, closing statements for the sale of real estate, proof of payment of the estate taxes, and funeral bill and other receipts. The court examines that all of the estate assets have been properly distributed and bill paid. The estate is then closed and the Executor is relieved of their duties.

Additionally, there are arbitrary time periods that must be followed in probate. Once the Will is admitted, the heirs at law and the people listed in the Will have three months to file a Will contest. Creditors may make claims against the estate for a period of six months. Estate tax returns are due in nine months.

Why go through Probate

There are some estates that should go through probate to get court resolution over problems. Will contest and declaratory actions can interpret an ambiguous provision of their Will. Bankrupt estates can be resolved by probate and the outstanding debts can be formally discharged by the court. Real estate with a cloud on its title or an EPA problem can be resolved by the court. Thus the court can be used to efficiently resolve problem cases.

Why Try to Avoid Probate

There are three negative consequences associated with the probate process.

Cost – Local Probate Courts and the State of Ohio sets the Executor fee and will establish guidelines for the Attorneys fee in a probate matter. As an example, if a person died with $1,000,000 in assets, all passing through probate, the executor fee would be $25,000 and the Attorney fee would be $27,500, a cost to the estate of $52,500 or 5.25%. If that same estate was in a Trust, there would not be an executor fee and the Attorney fee could be $10,000. Thus, the savings to the family by avoiding probate would be $42,500.

Time – It takes about one year to go through the process.

Public record – All Probate matters are open to public inspection. Some counties have the files on the internet. To see Marge Schotts entire probate file see: http://www.probatect.org/case_search/CaseNumber/case_frames.asp?case_id=1206377

How to Avoid Probate

There are several ways to avoid probate. The main issue is how your assets are titled. If your assets are in your name alone, then the Will controls and those assets must go through the probate process. There are a number of assets that do not go through probate to pass to the designated heirs. The way to avoid probate is to re-title assets into a form that does not go through probate. However, there are watch outs that must be observed by each technique as noted below. The assets that avoid probate are:

Assets with a beneficiary designation. These include Retirement Plans, 401Ks, IRAs, Life Insurance, Annuities and Pensions. The company or employer has a form that you can fill out to name a beneficiary. It is called a beneficiary designation for.

Watch out

The biggest mistakes here is naming the wrong beneficiary or failing to update the beneficiary after a divorce or death, and failing to name contingent beneficiaries in the event the primary beneficiary is no longer alive.

Jointly held assets – Assets in two names avoid probate. If an account is titled John and Mary Smith, and John dies, the account passes by property law. However, there are two different types of joint account. You need to be aware of the differences and obtain the right title based on your goal.

Joint tenants with a right of survivorship. This is ownership between A and B. If A dies then the assets goes to B and visa versa. The general rule is that any bank account or investment account is assumed to be survivorship unless you indicate otherwise. Real estate is just the opposite in that specific words must be included in the deed for it to be survivorship. A deed that reads “John and Mary Smith” is tenants in common. If John dies, his half goes through probate. This is true whether Mary is his wife or sister. To have the deed follow the survivorship path the deed must read John and Mary Smith, joint tenants with a right of survivorship.

Tenants in common – This is ownership between A and B. If A dies, his half of the assets passes by his Will and goes through probate. This might be the desired way to own an asset with a brother, sister or a friend. For example, my friend and I own a farm together where we like to camp with our families. However, if I die first I want my half to go to my family not my friend. Thus, ownership as tenants in common is correct. However, my half would go through probate if I died. In order to keep my half outside of probate, I would need to put my half in my Trust. Thus the deed would read Joe Friend and John B. Cornetet Trustee U/A 6/26/2000 f/b/o the John B. Cornetet Trust as tenants in common. Thus if I died, my half is in my Trust and passes to my family outside of probate.

Watch out

The co-owner has the power to take your money. If you open an account with your son as a joint owner, he can close the account without your knowledge. Further, if he gets sued, one half of the account can be exposed to his creditor's claims.

Payable on Death (POD) and Transfer on Death (TOD) assets. Ohio and many other state allow you to add a beneficiary to assets that otherwise traditionally went through probate. Banks use POD. Everyone else uses TOD, Investments, real estate, and Cars. Not all states allow a POD or TOD. It is a state by state question. There are limitations that can be imposed by law and by the entity. For example in Ohio the real estate rule requires you to have identical interest with no contingent beneficiaries. I can not leave 60% of my house to my daughter and 40% to my son. Ownership must be 50/50. Further, if my son dies then my daughter gets it all as the surviving beneficiary. If I use a Trust I can give the assets 60%/40%. Further, I can say that if my son dies, his share passes to his children. Procter and Gamble imposes a limitation on theism Shareholder Investment Accounts in that you may only name one TOD beneficiary per account. Thus, I would have to set up two accounts one TOD to my son and one TOD to my daughter.

Watch out

Living Trust – Assets titled to a living Trust prior to death avoid probate process. Probate controls Wills not Trusts. A Living Trust can own virtually every type of asset. Personal property, cars, real estate deed and timeshares, stocks and bonds, mutual funds and business interest can all be owned by a Trust. Once you have a Trust set up there is no additional risk or burden to title your assets in it. You are in full control over the assets as the Trust. The Trust is revocable and amendable, if you change your mind or want to change the terms. You do not have to file an income tax return for the Trust so everything is reported on your Form 1040 as before. Of the various approaches to avoid probate the use of a Trust is the most flexible and best. For example, as described above, I can use a Trust to leave my house 60%/40%. I can name secondary beneficiaries if one of my primary beneficiaries dies first. Additionally, I can put limitations and conditions on the distribution. I could have the Trust distribute my house 60% to my daughter and 40% to my son when each reaches the age of 25. If an asset is owned jointly with another and both people die in a common accident, the assets will go through probate and the identity of the ultimate beneficiary can change. For

example, an asset is owned by Jim and Barb. This is their second marriage. Jim has a son and Barb has a daughter. It is their intent for the assets to go 50% to each child when both are gone. To avoid probate between them, they set up the asset as joint tenants with rights of survivorship. There is a car accident. Jim dies at the scene and Barb dies five days later. She survived. Thus the assets would pass from Jim to her outside of probate. However, the assets are now in single name and would go through probate. Worse yet, her daughter inherit the entire asset as Barb's sole heir. Jim's son gets nothing. If you reverse the order of death, Jim's son gets the assets and Barb's daughter gets nothing. While it appeared as if joint assets solved the probate problem, it failed in the event of a common accident. Much worse, the sole beneficiary of the assets depends on the order of death. Such a severe result was not contemplated by the couple.

Watch out

Out of State Probate

Any out of state interest in real estate must be probated in that state. If you own a vacation home in Michigan and a time share in Florida, an ancillary administration will have to be opened in probate court in those states to resolve the issues with the real estate. Thus, it is very important to make sure your out of state real estate interest are in a form that avoids probate or titled to your Trust.

I hope this helps you with your retirement planning, estate planning, tax planning, and financial planning journey. Let me know if I can be of assistance. I welcome the opportunity to be a part of your team.

John B. Cornetet