ESTATE PLANNING - TRANSFERS ON DEATH

Probate

Probate usually conjures up visions of dark court buildings with devilish black-robed judges and greedy lawyers hell bent on bleeding the estate for every last penny. This fear is generally based upon horror stories passed down through the years and are either untrue or are based on misunderstandings as to the actual process.

Probate is nothing more than the administration of your estate by a court in accordance with the terms of your will (or the statutes if you do not have a will - See intestate succession below). The two primary concerns voiced about probate are:

- ❑ Cost - usually ranges between 2% and 5% of the estate in attorney fees, executor fees, surety and bonds, appraisals and court costs. Additional costs such as accounting costs for estate and income taxes and estate taxes are incurred in both probate as well as where the estate is handled outside of probate with a trust or other planning.
- ❑ Delays - it can seldom takes less than 5 months and can take as long as several years to probate an estate.

Intestate Succession

If you die intestate (without a will) the court will direct the distribution of an estate in accordance with state law. This is estate planning by default. The statutes of each state establish who should inherit, which often are contrary to what most families desire. For example, most people want their surviving spouse to receive the assets, yet most states (including Oklahoma) split the estate between the spouse and the children, even if they are minors. The statutes generally give no consideration to the needs or circumstances of the individual heirs.

The court will appoint an administrator for the estate and will decide who will be the guardians of any minor children and the conditions of their care. The guardianship will remain under court supervision until the child reaches 18. They may or may not be the ones you would have chosen to handle your affairs and raise your children.

The cost of administration of an estate without a will can often be more expensive since probate is required, surety bonds are required (which can be and often are waived under a will) and a will can reduce the amount the probate court is required to intervene in the running of an estate.

Intestate succession often assures that the maximum federal and estate taxes will be paid on the estate and the spouse's estate when the second dies.

Not infrequently, contests and disputes arise between family members in an intestate succession — some call it a legacy of greed, where loved ones are fighting in court over how your estate should be administered and who is entitled to what.

Joint Tenancy

Joint tenancy with right of survivorship is a way for two or more people to hold property while they are alive. When one of the joint tenant dies his or her interest passes to the remaining tenants. The deceased party's interest is not subject to probate but is included in their estate for tax purposes.

Joint tenancy is a useful method to transfer property outside of a will — usually between and husband and wife — but it is no substitute for a will. It may not provide the tax savings that a will does and it might be more difficult to change if there is a change of plans. It may also produce unexpected results if the "wrong" joint tenant dies first or if there is a common disaster.

Joint tenancy can create problems if it is with someone other than a spouse since transferring an asset to joint tenancy is an immediate gift of ½ of the value of the asset. Gift tax might be due if the gifted value is more than $10,000. The property can be sold, mortgaged and taken by judgment creditors or for taxes due by either party. A party can make themselves vulnerable to the financial difficulties of the other party. The holder will also lose the step-up in basis for ½ of the property transferred in joint tenancy when the other party dies.

Joint tenancy has also led to protracted litigation between the heirs under a will and the surviving joint tenant as to whether there was an intention of avoiding the will through a gift or it was done merely as a convenience for management of the asset.

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