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Elder Law Today

AVOIDING PROBATE

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When an individual dies owning property solely in his or her name, without a beneficiary designation, a formal procedure ("probate") is usually needed to determine to whom the property should pass. If there is a valid will, the property will pass according to its terms. If there is no will, the property will pass to the individual's heirs at law. The intestacy laws of your state will determine who the individual's heirs are and what they receive.

However, it is possible to legally pass property to another person without going through probate. The following are examples of some probate avoidance devices. Keep in mind that although it is often beneficial to avoid probate, because it can be costly and time consuming, these devices have pitfalls. Additionally, probate is sometimes the best option depending on the situation. The following are examples of probate avoidance devices:

Joint Tenancy – Adding another person to your assets as a joint owner of "joint tenant with rights of survivorship" will allow your property to pass to the other individual upon your death without the need for a probate proceeding. The obvious pitfall is that while you are alive the other owner has access to 100% of that asset and the asset is subject to any claims of the co-owner and/or creditor of the co-owner.

Beneficiary Designations – Pay

on Death beneficiaries (POD) on bank accounts: Unlike joint tenancy, adding beneficiary designations to your property allows you to name an individual to inherit your property at your death without giving them any current ownership. The property will pass to the individual of your choice without going through a probate proceeding. One of the problems associated with beneficiary designations is that often times, the estate is not divided equally among the family as was intended by the individual.

Revocable Living Trust – Revocable trusts are documents wherein an individual "Grantor" creates a trust instrument and names an individual (usually themselves) or a bank "Trustee." The Grantor then transfers property into the trust and the Trustee manages the property and distributes the property according to the terms of the trust. Unlike the addition of joint tenants or beneficiaries on your accounts, which may lead to conflict among family members, a Revocable Living Trust allows you to specify how you wish your property to pass. A Revocable Living Trust also avoids some of the adverse tax consequences associated with joint titling and beneficiary designations, while accomplishing the same goal of avoiding probate.

Other considerations: *Last Will and Testament*: It is **VERY** important to understand that if you have beneficiaries listed on your assets, upon your death your assets

will be distributed to those beneficiaries you have listed. They **WILL NOT** be distributed according to your Last Will and Testament.

The above information is general. Before taking action to avoid probate, you should consult an estate planning attorney who can examine your specific situation and advise you accordingly.



Jason Sutton is an Elder Care Attorney serving seniors throughout North Carolina.

He advises seniors on methods, procedures, and techniques to legally preserve and protect their estate.

This is achieved by minimizing their estate tax burden, protecting their assets from high costs associated with estate administration and protecting their life savings and their family home from the cost of nursing home care.

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