

ELDER LAW TODAY

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Avoiding Probate

When an individual dies owning property solely in his or her name, without a beneficiary designation, a formal court procedure called "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 will 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 the creditors of the co-owner.

Beneficiary Designations – Adding Transfer on Death (TOD) beneficiary to your motor vehicle; Pay on Death beneficiaries (POD) on bank accounts; **Transfer on Death Deeds** to real estate: 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 a beneficiary listed on an asset, upon your death that asset will be distributed to the beneficiary you have listed. It WILL NOT be distributed according to your Last Will and Testament.** For example, the beneficiaries named in life insurance policies, IRAs, and certain pensions will receive those monies – the Last Will and Testament has no effect on the distribution of these funds.

Incompetency: What happens if an individual is incompetent? If a well drafted power of attorney is in place that specifically states that the agent can create a trust or add/change a beneficiary on the individual's account, then that can be done. Keep in mind, the agent appointed by the power of attorney has a fiduciary duty to act in the principal's best interest, which includes following their testamentary wishes.

Spousal Elective Share: If you are married, before titling/adding beneficiaries to your assets, you need to take into account your husband or wife's spousal elective share (the amount they are entitled to inherit from you by law). The spousal elective share varies from state to state. Additionally, if you or your spouse are applying for/receiving Medicaid, the state may consider the applicant's/recipient's failure to receive the spousal elective share as a transfer of assets which will disqualify your spouse from receiving benefits.

The above information is general and does not constitute legal advice. Before taking action to avoid probate, you should consult an estate planning attorney who can examine your specific situation and advise you accordingly.