

ELDER LAW TODAY

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Transferring Property upon Your Death

There are essentially five ways an individual can transfer property to their loved ones upon their death. Depending on the age of the persons who will be receiving property or the dynamics among family members who are receiving the property, it is important to choose your method of transfer very carefully.

Leave Property Titled Solely in Your Name (i.e. do nothing to plan for property after your death) - If you do absolutely nothing to pre-plan for the transfer of your assets and your property is titled solely in your name at the time of your death, your property will need to be “probated.” This means that a court will order your property to be divided equally among your surviving relatives according to the probate laws of your state. Basically, the courts, via state statutes, decide who your property will pass to upon your death. It usually takes about nine months or longer before all of your assets are distributed (obviously the length of the proceedings varies greatly depending on the circumstances).

Establish a Last Will and Testament - Establishing a Last Will and Testament allows you to provide written instructions on how your property is to be divided upon your death. In your Will, you designate an “executor” of your estate, who opens a probate estate. With the close supervision of the court, your executor will distribute your property as you have outlined in your Will. The process of probating your Will usually takes about nine months (again, the length of probate proceedings varies greatly). A Will can be advantageous as a court becomes involved in the distribution of your assets to ensure family dynamics do not affect your testamentary wishes.

Add a Joint Owner with Right of Survivorship to Your Property - Adding a joint owner with the right of survivorship to your property (a joint tenant) will pass 100% of that property to the joint owner upon your death. There is no probate necessary. This is often the way spouses choose to title their property. Joint tenancy can, however, be a problem. For instance, if a child is added to an account and that child is later sued (divorce, car accident, etc.), 100% of that account may be subject to the lawsuit and the parent may be left with no recourse. Joint tenancy “overrides” any Last Will and Testament you may have executed.

Add Beneficiary Designations to Your Property - Adding a beneficiary designation (pay-on-death or transfer-on-death) to your real or personal property is

another way to avoid probate. This is same method is available for life insurance policies and pensions. Again, 100% of your property passes to the person(s) you have designated as beneficiary. Unlike a joint owner, however, the beneficiary has no access to your property until you have passed away, thus avoiding any attachments of your assets by the beneficiary’s creditors. Like joint tenancy, however, the beneficiary designations “override” any Last Will and Testament you have executed.

Establish a Revocable Living Trust - A Revocable Living Trust is an estate planning document which allows an individual to direct another person (the Trustee) to distribute property upon their death, according to specific wishes. Unlike a Will, however, a Revocable Living Trust is not probated. In addition to avoiding the time and expense of a court proceeding, the benefits of a revocable living trust are numerous: they ensure your financial affairs remain private (as court records are open to the public); they allow an individual to retain control over their property while they are alive; they can incorporate planning for your potential incapacity; and they sometimes result in estate tax savings.

Before adding anyone to your accounts or drafting any estate planning documents, you should contact an experienced elder law attorney who can advise you on the advantages and the pitfalls of the various methods of transferring your property at death (including the requirements under Medicaid law).

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