
Attorney at Law

Manish C. Bhatia

Estate Planning | Wills & Trusts

Newsletter #36 • April 2013

Phone: (773) 991-8423 • E-mail: manish@mcb-law.com • Web: www.mcb-law.com

Probate—What It Is and How to Avoid It

Most people first encounter probate when a loved one passes away (the “decedent”) and his or her assets need to be transferred. Probate is the process by which the county court validates an individual’s Will, if he or she left one, and approves the distribution of the decedent’s assets in accordance with that Will. If a decedent died without a Will—referred to as dying “intestate”—then the assets are distributed in accordance with state law instead.

After that first experience, people dread the thought of having to go through probate again and seek out ways to circumvent it. Probate is a long, expensive process that can open the door to public disputes over assets and significantly delay the distribution of assets to beneficiaries of the estate. However, with proper planning, the process can be avoided.

Why is Probate Necessary?

Probate is necessary because no bank or institution will transfer an asset without confirmation from the court or an affidavit from the executor that the asset is being transferred in accordance with the decedent’s Will or state law, thus relieving the transferring institution of responsibility. Until probate is commenced and letters of office are issued by the court, appointing an Executor of the estate, assets may not be transferred to the decedent’s beneficiaries.

The Probate Process

When an individual passes away, his or her Will must be filed with the probate court within thirty days of death. Once filed, the Will is a public document which can be viewed by anyone. Any person who is in possession of a decedent’s original Will but fails to file the Will with the court may be convicted of a felony. Upon filing, a probate estate must be opened if the decedent’s assets that are subject to probate exceed \$100,000. If the decedent did not leave a Will, then an intestate probate estate must be opened. Upon the opening of a probate estate, a notice of death must be published in the newspaper, informing creditors of the death, probate estate and legal representation.

After the estate is opened, assets may be transferred in accordance with the Will or state law. The estate must remain open for a minimum of six months in order to allow any creditors of the decedent to file a claim against the estate. After the six-month period has passed and all of the assets have been transferred, the estate may be closed. Keep in mind, that this timeline represents an estate that is free of any creditor issues, minor beneficiaries or beneficiary disputes. Any such issues will result in increased time, court appearances and cost to the estate and its beneficiaries.

Avoiding Probate

There are several types of assets that do not have to go through the probate process. Assets that are owned jointly with right of survivorship are automatically transferred to the survivor upon the death of an owner. A couple's primary residence is frequently owned this way. However, if there are no living joint owners—such as at the death of the surviving spouse or in the event of a simultaneous death—the account or asset will have to pass through probate.

Assets and accounts with valid beneficiary designations also transfer to those beneficiaries automatically and do not have to pass through probate. Retirement accounts and life insurance policies often fall into this category.

It is crucial that such designations be current because joint ownership and beneficiary designations supersede the provisions of a Will. In addition to outdated designations and forgotten assets or accounts, there are additional issues that arise when joint ownership or beneficiary designations are used as the primary asset transfer techniques, some of which are discussed below. Therefore, such techniques should not be used as a substitute for proper estate planning.

Joint Accounts

Joint accounts present significant issues regarding ownership, inheritance and asset protection. First, when an account is jointly owned, it is exposed to the liabilities of all owners. Many people mistakenly believe that adding an owner to an account will secure the asset, but instead it simply multiplies the exposure.

Second, adding a joint owner for the purpose of allowing access to pay bills or withdraw cash on behalf of the primary owner creates significant inheritance issues. Often, an elderly parent will add a child to his or her account to assist in paying bills. However, it is important to recognize that upon the death of the parent, the child will own the entire account and any other children or beneficiaries will have no rights to the account. This is usually not the intended result and frequently results in lengthy family disputes and animosity.

In addition to the issues of increased liability and unintended inheritance, there is always the possibility of abuse. A joint owner has the ability to withdraw all of the assets of an account. Therefore, adding a child or caretaker on an account allows him or her to sell or withdraw all of the account assets for his or her own use. Again, this is rarely the original owner's intention but must be recognized as a possibility.

By issuing a Property Power of Attorney to the child rather than adding him or her as a joint owner, the parent can allow access for the parent's benefit without relinquishing ownership, controlling the inheritance and retaining legal recourse in case of abuse. For a detailed discussion of this topic, please see "Issues to Be Considered Regarding Joint Accounts" in the March 2012 Newsletter.

Leaving the Surviving Spouse to Plan

Another shortcut approach with unfortunate consequences is the "wait and see" method. Couples often believe that since most of their assets are jointly owned or have the spouse named as beneficiary, a proper estate plan is unnecessary.

However, it is important to recognize that after the first death, the surviving spouse will be left to complete his or her estate planning without the support of the deceased spouse. This places an incredible burden on the survivor when he or she is already overwhelmed. If such planning is not completed in a timely manner or in the event of a simultaneous death, the entire estate will be subject to probate. It is far more efficient to plan while both spouses are healthy and have each other's support in making decisions regarding their future.

Avoiding Probate

The most effective and failsafe method for avoiding probate is by establishing and funding a Revocable Living Trust. The reason that a Revocable Living Trust is the most efficient planning tool is because the trust (a) is effective immediately, (b) can and should be funded during the life of the individual who establishes the trust (the "grantor") and (c) survives the grantor. Upon the grantor's death, the trust assets continue to be held or distributed for the benefit of the trust beneficiaries, as provided by the trust document, without having to go through probate, thus keeping the terms of the trust private. Additionally, a properly drafted Revocable Living Trust provides for successor beneficiaries, thus ensuring that its assets will avoid probate under almost any possible circumstance.

Contrary to popular belief, the need for planning with a Revocable Living Trust is not limited to the super-wealthy and establishing and funding a Revocable Living Trust does not result in increased taxes during the grantor's life. Establishing a proper estate plan with a Revocable Living Trust, Will and Powers of Attorney is necessary for anyone who wishes to pass the maximum amount of assets to his or

her loved ones with minimal cost and hassle. Additionally, doing so does not cost much more than an estate plan consisting of only a Will and Powers of Attorney.

While estate planning is often delayed due to cost or the belief that is a painful process, proper estate planning can provide significant savings in terms of taxes and estate administration and can be completed in a painless manner. The cost of a single probate estate far exceeds the cost of a proper estate plan for a couple. Once completed, a proper estate plan will provide the peace of mind that comes with knowing that your loved ones will be taken care of in the most efficient way possible and that your wishes will be honored.

For a detailed discussion of the estate planning process, please see “Painless Estate Planning” in the September 2011 Newsletter.



Manish C. Bhatia is an Illinois attorney focusing his practice in the area of Estate Planning. Manish has focused his education and practice on Tax Planning, Estate Planning and Business Succession Planning since the first year of law school. He has also added Asset Protection, Elder Law and Nonprofit Organizations/Charitable Giving to his fields of practice. Manish is Vice President of Professional Development for the Indian American Bar Association and a board member of the Young Professionals of Evanston.

Manish C. Bhatia
1222 Chicago Ave., #305
Evanston, IL 60202

Phone: (773) 991-8423
Email: manish@mcb-law.com
Web: www.mcb-law.com

Disclaimer

The information provided in this newsletter is provided as a courtesy and is not, nor is it intended to be, legal advice. You should consult an attorney for advice regarding your individual circumstances. I invite you to contact me and welcome your inquiries. Contacting me does not create an “attorney-client” relationship. Please do not send any confidential information to me until such time as an “attorney-client” relationship has been established.

Circular 230 Disclosure

I am required by Treasury Regulations (Circular 230) to inform the readers of this newsletter that, to the extent that the information contained herein concerns federal or state tax issues, such information was not written or intended to be used, and cannot be used, for (1) avoiding federal or state tax penalties or (2) promoting, marketing or recommending to another party any transaction or matter addressed herein.

This newsletter is written by and property of Manish C. Bhatia, Attorney at Law. Copyright © 2013 Manish C. Bhatia. All rights reserved.