INTRODUCTION

In recent years, people have been inundated with advertisements about “Living Trusts” and the word “probate” has become a word that strikes terror in the hearts of senior citizens. Many clients come to me with questions about trusts, probate, and methods of transferring property upon death. This booklet is intended to help you sort through and understand the different options and methods of estate planning that are common today.

I hope that this booklet will help you understand your estate planning options and prompt you to a course of action to complete your estate plan.

My kind regards,

Don B. Dickman, J.D.
Attorney at Law
Member National Academy of Elder Law Attorneys

Why Should I Worry About Estate Planning?

Great question! The short and simple answer is that death is inevitable, whether we die next week or in 100 years. When we die, the majority of us have property of some type that is passed on to spouses, children, relatives, etc. In most cases, there is a natural order of succession between spouses, children, brothers and sisters, etc. These are known as "natural heirs." If you die without a will, your property will pass to your natural heirs according to the laws of the state. In cases where there are no relatives, the property of the deceased person may pass to the State of Oregon!

WILL BASICS

The Purpose of a Will

A will is nothing more than a written list of instructions on how you would like your property distributed after your death. It provides your survivors with detailed instructions as to the manner in which you would like to have the business affairs of your life concluded. However, a will must meet certain legal requirements and must be signed and witnessed in a manner prescribed by law, or it is not valid (which is the same as having no will at all). Writing your wishes on a sheet of paper and signing it probably isn't going to create a valid will as defined by the courts. A will should be enacted with the assistance of a competent attorney.

Death Without a Will — "It Might Not Make a Lot of Difference"

If you die without a will, it might not make a lot of difference, or it might create a big problem for your survivors, depending upon your life situation. For example, if you are married and all of your property is jointly titled in your name and the name of your spouse with rights of survivorship, everything goes to your spouse upon your death and a will doesn't make a bit of difference, because if you die before your spouse, your spouse will automatically assume ownership of the joint property, and if your spouse dies first, you automatically assume ownership of the joint property.

But let's follow this example further. Regardless of which spouse dies first, the question to ponder is "what happens to the marital property upon the second death?" If there is no will for either spouse, the property is going to be distributed according to the laws of *intestate succession*, or put another way, your property is going to pass to your "natural heirs." For example, if you have 2 children, the 2 children would each get 50% of the total amount of the estate. If the surviving spouse owned a house and a bank account, your children, in most cases, would need a court order to transfer the ownership of the house and bank account to their names. The court order to allow the transfer of the property is obtained through the probate process, which will be explained later in this booklet.

Not having a will makes the probate process more complicated, but the marital property still passes to your children in this particular example. Yet if you wish to leave any property to any persons who are not your “natural heirs” falling in the correct line of succession, you absolutely must have a will.

Providing for Minor Children

In the rare case where both a mother and father die leaving children under the age of 18, a will (or a trust document) can state a preference for the appointment of a guardian and conservator for minor children. A will may also contain provisions for preserving the inheritance of a minor child, or a young adult, ensuring that the children will have money for college and living expenses, while distributing the bulk of the inheritance at a later time.

“Stepchildren are Not Included”

Many people have blended families and want stepchildren to be included in an inheritance. However, a stepchild must have been legally adopted to be included as one of the “natural heirs” of a person. If either or both husband and wife bring a child or children into a marriage and there have been no adoptions, the stepchildren would have to be named specifically in the Will to qualify for an inheritance. Both may intend that the children share equally, but upon first death the marital property passes to the surviving spouse. Upon second death without a will, all of the property goes to the natural children, and the stepchildren get nothing!

Domestic Partners and “non-relatives” must be named

Domestic partners and non-relatives must be named in a will or a trust in order for them to receive an inheritance from your estate. If you wish to leave an inheritance to any person who is not legally considered a spouse or natural heir, you must have a will (or a trust instrument, as discussed later). There are countless sad stories of couples who have lived together without being legally married, and the survivor is shocked to find out that he/she has no inheritance rights whatsoever. The state of Oregon does not recognize common-law marriage, and it doesn’t matter if the couple has been together for 50 years. Without the benefit of a legal marriage, there are no inheritance rights for the surviving partner.

Many people have longstanding friends and companions who have taken the place of family members, and they want to leave an inheritance to these friends. As well, many people have favorite charities, churches, and other organizations that they would like to support and leave a legacy. A will or a trust instrument is the only way to do this, other than a gift while one is still living, to make sure that the inheritance goes to the persons or organizations intended.

Wills and Probate - Does a Will Prevent Probate?

The quick answer is no. A very common misconception is that having a valid will eliminates the need for probate. The existence of a will has no effect upon whether or not an estate must go through probate, as explained in the next section. A properly executed will usually makes the probate process easier, but does not eliminate the legal requirements for a probate proceeding. The best way to think of a will is as a document that tells the world how you want your property distributed after your death, but it generally requires the oversight of a court to ensure the appropriate transfer of your real and personal property.

PROBATE BASICS

"Probate in a Nutshell"

Probate is a common court procedure where the court determines who should receive the assets of a person who has died. The probate process is intended to finalize all of the "business" of a person's life, and to distribute the assets according to the deceased person's will, or according to state law if there is no will.

The Mechanics of Probate

The mechanics of probate are usually not complicated, but it is a very detail-oriented process:

1. The attorney for the estate files a petition for probate with the court;
2. The person appointed as personal representative (either in the will or by the court) gathers all the property of the deceased and makes an inventory of assets and liabilities;
3. All of the heirs are notified of the court proceeding;
4. A notice of the probate proceeding is published in the local paper;

5. All of the debts of the deceased are paid, if funds allow;
6. The property of the deceased is distributed in accordance with the will; or, if there is no will, by the laws of the state of Oregon.
7. Depending on the size of the estate, the filing of estate tax returns may be required. All taxes have to be paid and a full accounting made to the court before the estate is closed.

This process takes no less than four months by law, and can take considerably longer depending upon the size and complexity of the estate.

Probate is <u>not</u> always necessary.

It doesn't matter if an estate is worth $10,000 or $10,000,000; if the assets are held in a manner which allows automatic transfer to a designated person or persons, a probate proceeding is not required.

In fact, the only reason to start a probate proceeding is when there is an asset, such as a house or bank account, which is held in the name of the deceased person and cannot be transferred without a court order.

> For example, I had a recent case where a client came to me after her mother's death. Dad had died years before and all of the marital assets consisting of a house and bank accounts were held in joint names with right of survivorship. Since the house and bank accounts automatically passed to my client's mother upon her father's death, her father's

estate did not require a probate proceeding. When Mom died, she left bank accounts in excess of $150,000, and a house worth about $250,000. My client is an only child, the sole heir to her parents' estate. Both Mom and Dad left wills naming her as the sole heir of the estate. She took the wills to the bank and requested that the bank transfer the bank accounts into her name, in accordance with the parents' wills. She learned that the bank cannot release the funds to her without a court order directing them to do so, despite the existence of perfectly valid wills. As well, she discovered that transferring the title to the real property would require a court order if she wanted to obtain title insurance and later sell the property.

By contrast, I have counseled numerous persons who have consulted with me after the death of a parent or loved one, and happily informed them that no probate proceeding would be required. This is because the decedent had left property in a form of ownership that passed to a survivor by operation of law and avoided the need for probate.

Forms of Ownership That Avoid Probate

Joint Tenancy

The most common form of ownership is joint tenancy. Financial accounts and real property can generally be held between joint tenants with rights of survivorship. Upon the first death the assets automatically pass to the survivor. In the majority of marriages, all marital assets are held as joint tenants and pass to the surviving spouse automatically. Potential probate issues arise upon the second death, as the surviving spouse is the sole owner of the property and a court order is usually required for transfer.

Caution! Dangers of Joint Tenancy!

Joint tenancy is most appropriate between married persons or stable domestic partners. Many people have added the name of a child or other relative to a bank account or house deed as a intended method of passing property without probate. Doing so generally creates an immediate legal ownership interest in the bank account or real property. The new joint tenant can empty the bank account. Or, the new joint tenant may be involved in a traffic accident and subsequently sued by the other driver. Suddenly, the bank account or real property may be at risk because it was held in joint tenancy with the person being sued, and appears to be an asset which could be used to satisfy a claim against the new joint tenant.

Please remember that these are general examples and that every situation is different. Yet, as a general rule, I very seldom advise the use of joint tenancy as a transfer device, unless the particular situation is appropriate. It is important to get competent legal advice before making any sort of joint tenancy designation with a person other than your spouse!

<u>Beneficiary Designation or "Pay on Death"</u>

Most financial accounts allow for some type of survivor beneficiary designation or "pay on death" provision which allows for the transfer of the account funds upon the death of the account owner. Every financial institution seems to have different rules and a different policy about the use of a beneficiary designation, but the principle is the same. A word of caution is in order in that once a beneficiary is named, that named beneficiary (or beneficiaries) become the legal owners of the account funds after your death. If you are expecting the funds to be shared between siblings or for the beneficiary to take care of other obligations after your death, there is no legal requirement for them to do so.

Gifting Before Death

Many people start the estate transfer process while they are still alive by making gifts of money and property. There can be many reasons for doing this. If an estate has a high value and is subject to state or federal estate tax, gifting is used as a strategy for transferring funds and lowering the potential value of the estate, thus lowering any estate tax liability. Anyone may gift up to $13,000 (as of 2009) to any individual person per year without incurring estate or gift tax consequences. Some people make gifts as they grow older simply because they feel they do not need the money or property. Sometimes gifts are made in anticipation of an impending death. A gift can be an excellent transfer method in the appropriate situation.

Caution! A Gift is a Gift!!

A gift is just that—once money has been gifted to another, it cannot be restored to your estate. Also, a gift of property has the potential for causing problems if a person requires future assisted living or nursing home care as it may be possible to qualify for Medicaid assistance to pay for that care. Some gift transfers may disqualify a person from Medicaid eligibility. This potential should always be considered by an estate planning attorney.

Trusts

Trusts have been used for centuries as a way for property owners to safeguard their assets and pass the assets to heirs without probate. There are many types of trusts and there are many different purposes for using them. The most common is the “Revocable Living Trust”, which is discussed in detail in the next section.

TRUST BASICS

Use of a Living Trust in Your Estate Plan

A living trust is one of the most popular methods for transferring assets upon death while avoiding probate and retaining full control of the assets while living. A living trust may be the right estate plan for you, or it may be completely unnecessary, depending upon your individual situation.

Transfer and Control of Assets

A trust may be described as a contract between the person placing their assets in a trust (trustor) and the person who agrees to hold and manage those assets (trustee). In the majority of living trusts, the trustor and trustee are the same person. In other words, a person makes an agreement to transfer the legal ownership of certain assets to the trust, and in a true legal sense, the individual person no longer legally owns the assets. However, the person still retains control over the trust as “trustee”. They may even terminate the trust if they desire, and regain individual ownership of the trust assets.

Once the trust is created and the assets are legally owned by the trust, the death or disability of the person who made the trust doesn’t affect the trust. A new trustee or “successor trustee” takes over the operation and administration of the trust. No probate or court involvement is necessary for continuation of the trust or for later transfers of assets or distribution from the trust.

> A good example would be my client from page 7 in the probate section of this booklet. If you recall, when the husband/father died, everything passed to Mom because of the joint tenancy with rights of survivorship. Upon death of Mom, probate was required to transfer the assets to daughter. If a revocable living trust had been established, the trust would have held the legal ownership of the assets and daughter would have taken over control of the trust without court involvement. Since daughter was the ultimate beneficiary of the trust, she would have simply transferred the trust property to herself, after finalizing any business of her mother’s estate. Unfortunately, the probate proceeding that did arise took more than 4 months to complete and cost substantially more in professional legal fees than the cost of establishing a living trust.

Delayed or Controlled Distribution of Assets

In some instances there is a substantial amount of money or property that may be inherited by a minor child or a person who doesn't possess good financial skills. There are cases of mental illness or other disability where receipt and control of a large amount of money is not sensible. A trust can be structured to provide for controlled distribution of funds in order to protect the person and preserve the legacy. A trust may allow for a delayed distribution of a minor child's inheritance.

> For example, the child could get the bulk of the inheritance when they reach 25, but still receive adequate funds for education and living expenses before the final distribution at age 25. The person making the trust may impose a variety of conditions of eligibility for distribution to a beneficiary.

Special Needs Trusts

A trust can be structured to provide for the care and comfort of a disabled person. You may wish to leave an inheritance to a child or other relative with disabilities. If that person is receiving any type of public assistance, the receipt of any type of inheritance may disqualify that person from continued receipt of the public assistance. It is possible to leave an inheritance to that disabled person in the form of a special needs trust which will provide additional life comforts (such as entertainment, vacation travel expenses, therapies or treatments not covered under the person's public assistance) while preserving the receipt of public benefits.

Blended Families and Remarriage

Thoughtful estate planning is essential in the case of a blended family or for protecting an inheritance after the death of a spouse. If a couple decide to marry after each have been previously divorced, and children are involved, legal complications can arise.

> By way of illustration, consider a blended family where husband and wife each have a child from a previous marriage. Each spouse may have brought significant assets to the marriage, but wish to preserve those assets for his or her own child after death. As a general rule, spouses usually pass their entire estates to each other. Upon the second death, all of the marital estate could pass to the children of the second to die, effectively disinheriting the first spouse's children. If careful estate planning does not occur, a child may lose his or her intended inheritance.

A living trust can be drafted to allow the surviving spouse the access to and the use of marital assets during his or her lifetime if they are needed, while providing that the proper distribution to the children will occur after the death of the surviving spouse. As well, a trust may be used to protect the inheritance of a couple's joint children. I have had a number of people express concerns that their spouse might remarry after their death, exposing the children's inheritance to loss through a new marriage, possible later divorce, etc. A trust can place restrictions on how marital assets are administered and distributed after the first death, with provisions to protect the inheritance of the children, and still allow full use of the assets by the surviving spouse.

Planning for Old Age and Disability

With aging, there is always the possibility of future disability or incapacity, which could require court intervention for the management of your financial affairs. With proper planning, a living trust may avoid the need for a court-appointed guardian or conservator. If you should become incapacitated, your successor trustee has the authority to assume control of your living trust and may continue to pay your bills and take care of the business of your life without the need for assistance from the court. In the event that you become incapacitated and court intervention *is* required, your living trust may contain provisions that tell the court how you want your life managed, such as your preference to remain in your home and not to be placed in a nursing facility.

Living Trusts and Estate Taxes

There is a popular misconception that the use of a trust will automatically avoid estate taxes. This is a complicated area, and should be discussed in depth with a qualified attorney or CPA. The simple answer is that the use of a living trust generally has no effect upon estate tax liability. However, there are various types of marital bypass trusts and other forms of trusts which can be utilized to avoid potential estate tax liability. In those situations, the trust is used to remove ownership of property from the estate and, as such, lowers or eliminates any potential estate tax liability.

If an estate has a total value higher than the current individual estate tax exemption allowance, it will be necessary to file an Estate Tax Return and there may be some estate taxes which will have to be paid, regardless of the existence of a trust. This is an ever changing field and estate planning for tax avoidance must be done with the assistance of a qualified attorney. Once a plan is in place it should be reviewed every few years to be sure that the plan is still appropriate.

OTHER ESTATE PLANNING CONSIDERATIONS

Durable Power of Attorney

A durable power of attorney (POA) is a document that authorizes another person to act as your agent and to legally sign your name to checks, deeds and other important documents. Having a POA is a lot like having an insurance policy — you probably won't need it and you usually don't intent to use it, but when you need it you are happy you have it!

A complete estate planning package includes a Durable Power of Attorney granting another person legal authority to act on your behalf if you are unable to do so. In most cases, each spouse will enact a POA granting the other spouse the power to act as their legal agent in the event of incapacity. Often, a child or other trusted person is named as an alternate agent, making the POA useful even if one spouse dies before the other. The potential problem in not having a durable POA is that if a person becomes incapacitated and cannot sign a document or make a decision for him or herself, and no other person has been granted the legal authority to act on their behalf, a court ordered guardian or conservator may be required.

Advance Medical Directive or "Living Will"

Oregon law allows a person who is at least 18 years of age to sign a document known as an Advance Directive, which gives instructions about administration of life support measures, and the appointment of a health care representative. Simply put, most people sign this document because they do not wish to prolong their life through artificial support means if they are in a terminal condition and close to death. Moreover, you may appoint a trusted person as your Health Care Representative who agrees to advocate for you in making sure that your instructions are carried out by medical personnel when you are close to death.

Without an Advance Directive, issues may arise concerning your last wishes, and life support and other life saving measures will continue, despite your wishes. This document may save your family a great deal of grief and stress, and is the best way to make your final wishes known.

Life Insurance

Life insurance has been called the "gift of love." Everyone should consider the purchase of life insurance as part of their overall estate plan. For younger people with fewer assets, life insurance proceeds can make the difference between living comfortably or living in poverty after the death of a family member. For older people, especially those with significant assets, life insurance can be a very useful tool for protection of the surviving spouse, protection of an inheritance intended for the next generation, and transfer of wealth to heirs.

The life insurance market has changed considerably in this modern information age. Because of the availability of mortality information, underwriters are able to more accurately predict life expectancies. This results in lower premiums for consumers and increased profits for insurance companies, and in some cases also allows insurance coverage for certain individuals who had previously been denied insurance coverage, due to a medical condition or other risk factors.

To illustrate a use of life insurance which may be a bit non-traditional, consider the following example. I became involved in a case where a 70 year old man (who was in average health) had an IRA of approximately $100,000 that he didn't need for income, and he wished to leave to his son. Since an IRA is an income tax-deferred account, all withdrawals from an IRA are considered taxable income. After consulting with his tax advisor, he realized that his son would pay at least 1/3 of the value of the IRA for income taxes, if his son took that money in a lump sum after the father's death. (Caution - don't confuse income tax with estate tax!)

A very smart insurance agent was able to convert the IRA into an annuity which paid a set amount of cash for the rest of the father's life, and purchase a term life insurance policy with a fixed premium equal to the annuity payment. The best part to this situation was that the death benefit was $200,000, which would pass to the son without any liability for income tax! He doubled his legacy and avoided income taxes! Of course, this was a unique situation and would not work for everyone, but I am using this example to encourage you to “think outside of the box” with regard to your estate planning.

Long Term Care Insurance

The use of long term care or "nursing home" insurance has become increasingly popular in the past decade. If you own a home or have other significant assets you should strongly consider the purchase of long term care insurance. There are many types and varieties of long term care insurance, and they offer a wide range of benefits. Your income and assets are the key to determining if it makes sense for you to purchase a long term care policy. Your estate planning attorney and a qualified insurance agent can advise you as to your particular needs. You must medically qualify for long term care insurance so it must be purchased prior to the onset of ill health or extreme old age. Long term care insurance is an important part of a complete estate plan and an excellent way to ensure the preservation of your assets.

Medicaid Issues

If you or your spouse are struck with a catastrophic illness which requires long term placement in a nursing home or assisted care facility, you may be faced with expenses which currently average over $5,000 per month for care. If you have limited financial resources and meet certain Medicaid eligibility criteria, you may qualify for Medicaid assistance for long term care. If you have significant assets and other financial resources, you may be required to pay for all of the costs of the long term care provided to you or your spouse, until you exhaust your financial resources. Fortunately, there are a number of options that may be available to you for the purpose of obtaining Medicaid assistance while retaining all or part of your assets. Before taking any action or accepting the opinions of friends, family members, (or even Medicaid workers) consult a qualified elder law attorney about your particular situation.

Funeral/Final Expense Plans

As people enter into their retirement years, many will purchase a "pre-need" funeral or final expense plan as a final aspect of their estate planning. This type of pre-planning can save your loved ones from a great deal of distress after your passing. There are a variety of available plans, but the basic principle is that by purchasing now, you are selecting the details of your funeral arrangement, and you are funding your funeral expenses. Some plans are a straight type of pre-payment plan, where you make a purchase today at today's prices, which can be good protection against inflation, especially if you live for a considerable period of time. Other plans are usually funded with a smaller life insurance policy, which generally provides a greater financial return than the actual amount paid toward the plan. Either a qualified insurance agent or a reputable funeral director can assist you in selecting a plan which is right for you.

Which Estate Plan *Is* Right for You?

The most important thing to remember is that if you don't have a plan for the distribution of your estate, the State of Oregon has one for you. It's your choice about how your assets should be distributed.

For many people, a simple will is adequate as it expresses how they want their property distributed after death. Probate may be avoided by a proper ownership or survivorship designation. A short interview with an estate planning attorney will answer your specific questions about wills and survivorship designations.

The easiest way to approach your estate planning is to make a list of your assets. Include your personal property, financial and bank accounts, cars, real property, etc. Go through the list and ask "What would happen to this property if I died today?" If you are not sure what would happen, seek expert advice.

Please feel free to call me if you have questions about any aspect of your estate planning. I am committed to listening to you and helping you find the estate plan that is right for you.

Our Mission is to provide high quality professional legal services by giving close personal attention to the individual needs of our clients.