

PROBATE AVOIDANCE TECHNIQUES

Rev 10-06

Many books, the media, some financial planners and attorneys may lead you to believe that the only way to avoid probate administration after your death is to invest, during your lifetime, in a Revocable Living Trust (RLT), also called a Joint Living Trust (JLT) or a Living Trust (LT). There are circumstances, both legal and personal, which can mandate the use of an RLT, one of these being if you own real property outside of your home state, but in most cases, there are other viable and less expensive means of avoiding probate after your death.

In Wisconsin, probate is required only if the decedent (person who dies) owns property which would be subject to a probate administration, **in his or her sole name**, in excess of \$50,000.00. This includes property such as real estate (ex: owning ½ of an interest in a house as a tenant in common or on a Deed which does not designate the couple as husband and wife, or wherein two people are living together but not married and own the house ½ and ½), bank accounts or mutual funds, vehicles, boats, or annuities or retirement accounts or life insurance policies without naming an individual as direct beneficiary on a beneficiary designation form. Probate is the court supervised process allowing property to be transferred from the decedent to the next of kin (according to a schedule in the Statutes, if you die intestate, or without a Will or Trust document, or testate, to whomever your Will or Trust designates). If you die with less in value in your sole name than \$50,000.00, there may be a summary probate proceeding required (ex: summary assignment or summary settlement) and there is required paperwork for those proceedings as well. An informal (no court appearances required; papers are filed with and reviewed by the Registrar in Probate) or formal (court appearances are required in front of a Judge) probate proceeding typically takes 6-12 months to complete, and consists of the following fees: Inventory filing fee to the Court (\$2.00 per thousand dollars of value subject to the probate administration); publication fee (required by Statute, ranging from \$60-\$100.00); accountant's fees (for preparing required tax returns in order to close the file with the Court) which depend upon the complexity of the estate but can range from \$150-\$500 for smaller sized estates) and attorney's fees (which, although they cannot charge a percentage, the fees tend to average, in this area of Wisconsin, approximately 2-4% of the Inventory value of the estate—the Inventory consists of all of the assets subject to the probate administration valued as of the date of death). The Personal Representative of the Estate, formerly called “the executor”, is allowed by statute to take a fee, considered taxable income in the year taken, of 2% of the inventoried assets value.

Assets which are typically **not** subject to probate are: Jointly owned accounts (such as joint bank and mutual funds between husband and wife or parent and children); assets containing a beneficiary designation (such as life insurance, retirement, annuity and IRA accounts unless the designation is “my estate” and in such case, the assets **are** subject to a probate administration); Payable on Death (POD) (for cash accounts) and Transferrable on Death (TOD) accounts (such as mutual funds or Quit Claim Deeds for real estate). Thus, it is possible to avoid probate by owning assets jointly with your spouse or other people, designating your accounts as “POD” or “TOD”, establishing any Deeds to your properties as transferrable upon death (TOD), and designating specific individuals as beneficiaries on assets containing beneficiary designations (except that if you have minor children under the age of 21, it is not advisable to name them as direct beneficiaries on any such assets until after they have attained the age you believe they would be able to economically and in a mature fashion manage the monies paid to them under such a large retirement or life insurance or annuity asset. Rather, “my estate” should be the beneficiary, and your Will or Trust document should create restrictions on payment of the funds until your children have reached the age you believe they can handle the principal.)

Tax rules should always be consulted before you make any final decisions with regard to your overall estate and long term care planning. This is especially true because if you (or you and your spouse) own an estate which would be taxable under federal or state death tax rules (currently, no death tax in Wisconsin and \$2.0 million federally for years 2007-2008; \$3.5 million in years 2009-2010), it may not be wise to own all of your assets jointly and leave the entire estate subject to death taxes at the death of the surviving spouse, since children must pay those taxes within nine (9) months of the death of the decedent and there are no extensions available. Also, Wisconsin's Marital Property Laws affect estate planning and tax issues, and an experienced estate planning attorney should be consulted who deals regularly with these issues. Many people do not understand that assets which may not be subject to probate (such as life insurance or retirement funds) **are** subject to the death tax rules and thus are included as part of your "estate."

Finally, long term care planning plays a role in your estate plan as well. What you may be prompted to do for long term care planning may not be what you would do for estate planning. The advantages and disadvantages and risks of any planning must be carefully analyzed and a plan tailored to your family's economic needs should be created.

Remember that the well educated client makes the most informed choices and is able to play a larger role in his or her estate and long term care plan.