

Many attorneys feel that the transfer of property by will and the subsequent need for probate should be avoided at all costs. While this is a consideration in an estate plan, anyone contemplating a probate-avoidance technique needs to be aware of all of possible options before pursuing any particular one.

Obviously, the best choice depends on the individual and the situation he or she faces. What works best for one person in one situation may be unsuitable in another. For example, some techniques may be implemented before the person dies, others only afterwards. So timing is always an issue.

The following outlines briefly six ways to avoid probate. Anyone contemplating using any particular one should contact an attorney for more details.

Six Ways to Avoid Probate

become a problem. Unless the surviving spouse can reduce the estate below this amount before death, a severe tax problem will be encountered.

grantor dies, the property still goes to the remainderman.

Suppose a widow has 200 acres or a home that she wants her daughter to have when she dies but wants to avoid probate. She can do so by deeding (conveying) the property to the daughter and retaining a life estate. The widow becomes the life tenant, the daughter the remainderman. When the widow dies, the daughter automatically receives title to the property without the need of probate.

The primary problem with this technique is when the daughter (remainderman) predeceases the life tenant. The property then passes at the life tenant's death according to the remainderman's wishes, which may not necessarily correspond with the grantor's desires.

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The first technique is a statutory procedure created in Texas on Nov. 3, 1987, with the passage of an amendment to the Texas Constitution (Article 16, Section 15). The amendment permits spouses to agree in writing that all or a part of their community property belongs to the survivor when the first spouse dies. If implemented, the property then passes automatically without the need of probate when the first spouse dies. Section 112.052 of the Texas Estates Code contains the requirements for creating the right of survivorship in community property.

The primary problem with the method is that it combines (or stacks) the two spouse's estates in the surviving spouse. When the combined value exceeds \$5 million, federal gift and estate taxes

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The second probate-avoidance technique involves the creation of a life estate in real property. A life estate cannot be created in personal property. A life estate is a unique form of ownership whereby the owner of the real property (the estate planner) conveys title to another person, but retains a life estate.

In this situation, the grantor, better known as the life tenant, continues to have exclusive possession with rights to all income derived from the property until his or her death. The person receiving the life estate, better known as the remainderman, gets possession and full ownership when the grantor dies. No probate is needed. The life tenant can convey his or her rights to a third party subject to the life estate. So, when the

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The third way to avoid probate is perhaps the most complex. It involves the creation and use of a living trust. A living trust is one created while the property owner (estate planner) is alive, as opposed to a testamentary trust created when the owner dies. A testamentary trust cannot be used to avoid probate; only a living trust (sometimes called an intervivos trust) can do this.

A trust, like a corporation, is recognized as a separate legal entity that can continue after a person dies. Unlike a corporation, it does not have an unlimited life. It cannot last more than one life in being plus 21 years. This is sometimes referred to as the rule against perpetuity.

Basically, the property owner (the settlor) conveys all or part of

his or her property to the trust to be managed by a designated trustee. The trust holds legal title, and the trustee manages it for the benefit of the settlor or some other designated beneficiary or beneficiaries.

When the settlor dies, the trust may or may not continue, depending on the terms of the trust instrument. Either way, no probate is needed for the trust assets because the settlor no longer owned the property. One note of caution, though. Trusts face one of the highest federal income tax rates and substantial annual administrative costs especially when an institution such as a bank or financial institution serves as the trustee.

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The fourth technique is one that can be implemented only after an estate planner dies, not before. It involves drafting and filing a form in the deed records better known as an Affidavit of Heirship. It is used primarily when someone dies intestate (without a will), but it can be used when someone dies with a will (testate) when the beneficiaries of the will believe the technique has advantages over probating. The technique is more of an afterthought than a preplanned strategy.

When the owner dies, the heirs do not go to court to administer the deceased's estate. Instead, they file an Affidavit of Heirship of record executed and sworn to by a knowledgeable person or persons known as an affiant. The affiant discloses in the affidavit, among other things, the deceased's: (1) relationship to or association with the affiant, (2)

birth and death dates, (3) marital history, (4) surviving heirs, (5) place of residency, and (6) property. The inventory of the deceased's property needs to include whether it was separate or community.

The technique has its drawbacks. The property passes to the deceased's survivors according to their degree of kinship. This, in turn, is predetermined according to Texas statutory rules found in the Estates Code. (See publication 2019 entitled "Where There's No Will. . ." for more details.) Likewise, the affidavit is not effective until it has been of record for five years. However, title companies generally rely on the affidavit immediately once it is filed of record when the estate is relatively small.

Those who purchase property from an heir relying on an Affidavit of Heirship may wish to scrutinize Section 201.053 of the Texas Estates Code. It is entitled Effect of Reliance on Affidavit of Heirship. The statute protects those who tender good and valuable consideration for property when relying on an Affidavit of Heirship to prove ownership. The statute protects the purchaser when the affidavit misses or overlooks a possible heir (child) at the time of the sale.

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The fifth way to avoid probate is similar to filing an Affidavit of Heirship because is not a planned strategy but one seized when the opportunity arises. When entering an estate plan, the planner usually signs a durable power of attorney. With married couples, this involves each spouse granting the other the power to manage his or her affairs should he or she

become incompetent. The judicial appointment of a guardian is thereby avoided. (See End of Life Documents, publication 2044 for more details.)

Should one spouse become incompetent or comatose, the surviving spouse may use the durable power of attorney to remove all or a part of the real property from the other's estate before death. No probate is needed because the deceased no longer owned the property at the time of death. If the deceased has a will, the division of property by the surviving spouse should correspond to that dispensation.

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The sixth and final way to avoid probate arose by statute effective September 1, 2015, with the addition of Chapter 114 to the Texas Estates Code. The statute recognizes a new type of deed in Texas known as Transfer on Death Deed or TODD. A TODD is basically the same as any other deed except the transfer does not take effect until the grantor dies, and then it does so without the need of probate. In the meantime, the grantor is free to revoke the deed, or sell or mortgage the property without the grantee's consent.

For more details, see Center publications 2116, "2012 Legislative Changes" and 2125, "Glad You Asked."

For specific advice, a tax accountant or attorney should be consulted. ♣

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