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By Judon Fambrough

According to some writers, the disposition of property by will and the subsequent need for probate should be avoided at all costs. While this may be a consideration, anyone contemplating a probate-avoidance technique should be aware of all options.

Obviously, the best choice depends on each situation. What is best for one person may not suit another. The need to avoid (or minimize) federal gift and estate taxes, the cost of implementing and administering the technique and the recipients' ability to manage the property are factors bearing on the decision.

1

Probably the newest way to avoid probate in Texas comes from a Nov. 3, 1987, amendment to the Texas Constitution (Article 16, Section 15). The amendment permits spouses to agree that all or a part of their community property belongs to the survivor when the first spouse dies. The property passes automatically without the need of probate. The Texas Probate Code elaborates on the process (Chapter XI, Part 3).

The creation of spousal right-of-survivorship, as it is sometimes called, has associated problems. First, only community property can be used. Second, federal gift and estate taxes become a problem when the second spouse dies. Every person is given a lifetime exemption that varies frequently but is generally \$1 million or more, free and clear of gift and estate taxes. Once a person's

estate exceeds this amount, the excess is subject to a progressive tax. Unless the surviving spouse can reduce the combined estates to less than the lifetime exemption before death, a severe tax problem may be encountered.

2

Another probate-avoidance technique involves life estates. A life

tenant, the daughter the remainderman. When the widow dies, the daughter automatically receives title to the property without probate.

3

A more complex process of avoiding probate involves living trusts. A living trust is one implemented while the owner of the property is alive, as opposed to a

testamentary trust implemented by will at the owner's death.

A trust, like a corporation, is 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 property to the trust. The trustee of the trust holds legal title and manages the property for the benefit of the settlor or

some other designated beneficiary.

When the settlor dies, the trust may or may not terminate, depending on the terms of the trust instrument. Either way, no probate is required because the settlor owns no property at death. All the property belongs to the trust. The settlor must be sure to transfer all property to the trust before death. Otherwise probate can not be avoided. One note of caution, however. Trusts face the highest federal income tax rate and substantial annual administrative costs may be charged.

# Five Ways to Avoid Probate

estate is a unique form of ownership whereby one person, known as the life tenant, maintains exclusive possession and use of the property for life. Another person, known as the remainderman, receives ownership of the property immediately upon the life tenant's death. No probate is needed for the transfer.

Suppose a widow has 200 acres or a home that she wants her daughter to have when she dies. She can deed the property to the daughter and retain a life estate. The widow becomes the life

# 4

The fourth technique involves drafting and filing an affidavit of heirship when someone dies intestate (without a will). The technique is more an afterthought than a preplanned strategy.

When the owner dies, the heirs do not administer the deceased's estate but rather file an affidavit of heirship executed and sworn to by a knowledgeable person or persons. The affidavit discloses, among other things, the deceased's: (1) relationship to the affiant and the affiant's name, (2) birth and death dates, (3) marital

history, (4) history of surviving heirs, (5) history of residency and (6) inventory of the estate.

The technique has its drawbacks. According to Texas statutes, the affidavit is not effective until it has been of record for five years. However, title companies generally will rely on the affidavit immediately once it is filed of record if the estate is relatively small.

# 5

The final way to avoid probate, similar to the affidavit of heirship, is not a planned strategy but one seized when the opportunity arises. When entering an estate plan,

one document generally drafted and signed is a durable power of attorney. Each spouse grants (or clothes) the other with the power to manage the affairs of the other should he or she become incompetent. The judicial appointment of a guardian is avoided.

Should one spouse become incompetent or comatose, the surviving spouse, using the durable power of attorney, may remove all the property from the other's estate before death. No probate is needed because the individual dies without property.

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

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