Elder Law Today

Douglas R. Jones & Associates, P.A. – Elder Law, Estate Planning & Special Needs

MEMBER

National Academy of Elder Law Attorneys

200 N. Jackson • Cabot, Arkansas 72023 • Phone: (501) 843-9014 Vol. 11, 2006

Estate Planning Basics 102 - Probate

After having practiced in the area of estate planning and elder law for 20+ years, I have found nothing that is so widely misunderstood as probate. The paradox is that everyone thinks they understand it. Most people understand that there is a thing called 'probate' and that some people have to do it, but they a pretty sure that they are not the one!

Countless times, after a seminar, I have had someone come up to me and say something like, "I've got two kids and they're not going to fight (*which is a separate story*) and I want to leave everything to them 50 – 50, so **I** won't have to go through probate will I ??

Let me explain how this works. Usually a married couple holds assets jointly. When one dies, everything goes to the other by operation of law. Bank accounts, land, home, brokerage accounts – everything – is usually held this way. Therefore, when the first spouse dies, there is no probate, because everything went automatically to the surviving spouse. The catch is, what happens when the second spouse dies? All assets were titled in his / her name and when they die, all assets are still titled in that name.

For example, say Dad dies first and leaves his interest in everything to Mom - no problem. However, when Mom dies, all assets are still in her name. The kids then say, "But we have Mom's will in which she left everything to us". The catch is that Mom's will has to be probated to make the transfer happen. Let's say that Mom & Dad owned a house in their names jointly. Dad died – now Mom owns the house. Now Mom dies and leaves the house to you in her will. You want to sell the house to me, but there is one catch. When you go to the Courthouse and look at the deed, whose name is on it? Mom & Dad's right?? Why can't Mom & Dad sign over the deed to me? They're dead…. So why, can't you sign it? Because your name is not on the deed. Mom & Dad's name is on it. Now, we're stuck. How do we get unstuck?

Probate. Probate is the process of legally changing title to assets. To greatly over simplify, the Court will review Mom & Dad's Last Will & Testament; will make sure all their final debts had been paid; and will oversee the distribution of their assets as specified in their will.

Probate usually takes from 9 – 24 months on the average and costs (in Arkansas) about 3% of the gross value of the estate for the attorney and another 3% for the executor. You may, of course, name one of the kids as the executor and avoid the executor fees. Also, you should know that probate fees are set by statute (ACA 28-4-197 if you care to look it up). An attorney is free to charge more or less than the statute allows, but the amount stated in the statute is a good rule of thumb of what the probate will cost.

Why, you might ask, would anyone want to put themselves through all this? Good question. If a person had a particularly messy estate and needed the services of a Court to help untangle the mess after their death, a probate may be worth it.

Otherwise, it often is a waste of money and time and a drain on our otherwise overworked Court system.

Most people do not go through probate voluntarily (and as explained earlier, thought they were exempt anyway) and go kicking and screaming through the process after their parents die because they find out that, since no one planed to avoid probate, they have to do it.

At this point, I see a light bulb come on - Dad or Mom says, "We'll just hold title to everything jointly with the kids. When we die, it will go directly to them. We'll avoid probate, Right???

Yes, but there are several potential consequences. A few "what ifs":

1. Kid are sued. If you, for example, have a bank account with one of your kids, which one of you could go to the teller window right now (assuming that it's during business hours, and demand ALL of the money. That's right – either one of you could get all the money. So you can't say ½ of the money is yours and ½ belongs to your child. Actually, all of it belongs to each of you – that's what we call a legal fiction – sounds impossible, but it is trust.

   At common law, if a creditor sued either of you, he could 'step in your shoes' to get what you could have gotten had you wanted it. Since either you or your child could have gotten all of the money, your creditor (by stepping in your shoes) could get all of it as well. Now, the case law is not 'settled' on this point (meaning there are cases that go both ways depending on the facts), but one would be well served not to risk putting all of your eggs in a basket jointly held with your children.

2. Kids file bankruptcy – once again, can your children's creditors get access to your money by 'stepping in your shoes'. Depends on current case law, but why take the risk?

3. Kids die before you do. If your children that you wanted to inherit your assets die before you do, and you do not change your 'plan' (which here is a joint checking, savings or brokerage account) your plan would be thwarted.

4. Kids get divorced – Say for example that you die, leave it to your son; then he dies, after having co-mingled it with his wife (maybe by putting it in a joint checking account with her). Guess who gets your money???

5. You don't die (at least for a while). You are incapacitated. This is the one that people don't think about. When I ask in seminars, "What concerns you more? Dying? OR Being incapacitated for a period of time before you die? People always say being incapacitated before they die concerns them much more. They know how much this will cost and what a drain it will be on their family.

   So, if your 'plan' consists of jointly titling all assets with your kids, what happens if you have a stroke or develop Alzheimer's or any number of other dread diseases? You can't go to the bank to get money to pay your bills (because you are incapacitated) and you have no control over how your money is handled by your joint tenant. Sometimes in situations like this, accounts are frozen where the bank becomes aware that the primary account holder is incapacitated.

   Some people tried a modified version of the above by having the accounts payable upon death (POD) or transferable upon death (TOD) to their kids.

   With POD accounts, the money may be protected from probate. But if you are incapacitated before you die, you can't get the money to pay your bills because you are incapacitated (stroke, etc.) AND your kids can't get it because you are not dead yet. (payable upon death).

   As you can see, all of these do-it-yourself methods are fraught with risk. .