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ESTATE PLANNING BASICS **Frequently Asked Questions**

WHAT IS PROBATE? Probate is the legal procedure by which property of a deceased person is passed to others. If the decedent left a will, the will determines who will take the property at death. If the decedent died without a will, Oregon law determines how assets are distributed.

When a death occurs, the personal representative named in the decedent's Will has the following obligations to the Court and the estate beneficiaries:

- Discover and value all assets of the decedent;
- Notify all interested persons of the personal representative's appointment and commencement of administration of the estate;
- Pay all obligations and taxes of the decedent and the estate;
- Properly account to the court and to those persons interested in the estate for all funds and property received and disbursed by the personal representative; and,
- After obtaining court approval, distribute the estate assets to those entitled to the property and close the estate.

WHAT ARE THE DISADVANTAGES OF PROBATE? The criticism of the probate process is that it is expensive and time consuming.

Cost and Fees. Currently, probate costs consist of: 1) administration expenses, such as court filing fees and publication costs; 2) the fees for the personal representative, who has legal responsibility and personal liability for the payment of all tax returns and distribution of the estate; and 3) the fee for the attorney who represents the personal representative and assists that person or entity in carrying out those tasks.

The statutory fee of the personal representative is approximately 2% of the value of the estate. In addition, the court may allow extraordinary fees for unusual services performed by the personal representative. *NOTE: Since the fee is taxable income when paid to the personal representative, it is occasionally advantageous to waive this fee, especially if the personal representative is a spouse or other family member who will receive an inheritance from the estate.*

Attorney fees are not set by a formula but are based on the following factors: the attorney's experience in probate matters; the skill displayed; the time invested; the amount of responsibility assumed by counsel considering the total value of the estate; and customary fees in the community for like services. We generally estimate our fees will be comparable to the fee earned by the personal representative.

Neither the personal representative's fee nor the attorney's fee may be paid until approved by the court at the time the estate is ready for distribution. Court oversight ensures that the decedent's assets are properly identified, valued and accounted for, that creditors are notified and paid and that the estate is properly distributed.

Timeframe to Administer an Estate. The probate process generally takes a minimum of six months and frequently longer in large estates. Because the personal representative (and the trustee of a living trust) has personal liability for payment of estate taxes from the estate or trust assets, distribution of the estate (or some portion of estate assets) may be delayed until the IRS approves the tax returns as filed. This may take considerable additional time (18-24 months following the filing of the federal estate tax return, which is due nine months from the date of death), whether one is distributing assets through the probate court or through a living trust.

CAN PROBATE BE AVOIDED? There are a number of ways in which probate can be avoided.

- Assets held by a decedent and another person with right of survivorship will not be subject to probate because the surviving owner automatically inherits all of the survivorship property.
- Probate is not required for small estates. A small estate is one in which personal property is valued at not more than \$50,000 and real property is valued at not more than \$150,000. These estates can be handled by filing an affidavit with the court.
- Life insurance, annuities and retirement accounts are payable on death to designated beneficiaries, separate from the probate process.
- A living trust, if properly funded, is an effective alternative to probate.

WHAT IS A LIVING TRUST? A living trust is a legal device established during a person's lifetime to handle and manage assets. Title and possession of a person's assets are transferred to a trustee to manage during lifetime and to distribute after death. Since all assets are held in the name of the trustee, there are no assets owned by the decedent that require a probate administration, which will save time and costs, including attorney fees, to transfer assets at death. A living trust has the additional advantage of providing for an individual's incapacity by the trustor's designation of a successor trustee, who would step in and manage the affairs of the trustor in that event.

ARE THERE ANY DISADVANTAGES IN USING A LIVING TRUST? A living trust is somewhat more complicated than a will. Assets must be retitled into the name of the trustee of the living trust at the time the trust is created. These asset transfers can result in additional costs.

Setting up a revocable living trust will not eliminate the need for professional legal and tax advice in the future. Specifically, some professional fees and administrative expenses will likely be incurred for preparation of the decedent's final income tax return; collection and valuation of assets; filing of a federal estate tax return and Oregon inheritance tax return, if necessary; payment of all decedent's liabilities existing as of the date of death; and distribution of the trust assets in accordance with the trust terms.

SHOULD I HAVE A LIVING TRUST?

- Do I have assets that would be governed by the probate process?
- Do I own probate assets in other states, requiring ancillary probate proceedings?
- What is the estimated cost of probating my estate?
- Do I want to reduce administrative expenses as much as possible at the time my estate is distributed?
- Do I want to simplify the distribution of my estate by taking on some of the complexities myself during my lifetime by setting up and managing a living trust?
- What is the cost of a living trust, including asset transfer costs?
- Do I need court oversight through the probate process or do I want privacy?
- Do I want to plan for my incapacity by designating a successor trustee to manage my affairs if I am unable to or will a Durable Power of Attorney be adequate?
- Do I have a trusted family member or friend who could serve as successor trustee who can administer my trust for my benefit during my lifetime if I become incapacitated and for my family's benefit at the time of my death, without court oversight?
- I understand that I must "fund" my trust and manage my living trust during my lifetime in order to avoid probate.

DO I NEED A POWER OF ATTORNEY? Yes. A Durable Power of Attorney is a document in which a person nominates another to carry on legal and business affairs. It is less detailed than a living trust and the power terminates at the time of the grantor's death. A Power of Attorney is desirable, however, to permit the "attorney-in-fact" to deal with a person's assets in the event of incapacity.

WHAT IS A "LIVING WILL?" A living will has been designed by our legislature and is now designated an "Advance Directive for Health Care." The Advance Directive does two things:

- It designates someone to make health care decisions if illness or incapacity prevents a person from making his or her own health care decisions; and

- It permits a person to designate the level of care desired in certain life threatening situations. For example, a person may decline artificial life support in the event of a terminal illness.

WHAT IS THE ADVANTAGE OF ESTATE PLANNING? There are a number of advantages to proper estate planning, including:

- Having a will in which you designate the person to bring your affairs to a close at death.
- Authorizing your personal representative to serve without the expense of a surety bond.
- Designating a guardian and a trustee for minor children.
- Minimizing estate and inheritance taxes.
- Evaluating the merits of a living trust for probate avoidance and for management of property in the event of a disability.
- Providing for orderly management and distribution of your assets in the event of incapacity of death.
- Peace of mind.

IS ESTATE PLANNING EXPENSIVE? The cost of estate planning will vary depending upon a client's needs. The cost is based upon the complexity of the estate, the degree of tax planning involved, whether or not a living trust is used and, of course, the lawyer's time in preparing appropriate estate planning documents. At the end of an initial conference, we can provide you with an estimate of the professional fee to complete an estate plan tailored to meet your estate planning needs.

HOW DO I PROCEED WITH ESTATE PLANNING? The first step is to *prepare a personal financial statement listing all of your assets, including life insurance and retirement benefits, together with your estimate of current values.* Your personal financial statement should disclose whether your assets are jointly owned or owned individually. In addition, the names of family members and others who are to share in your estate must be determined. Parents of minor children should determine who will serve as guardian in the event of premature death.

With this information and approximately an hour of your time, we can outline your options for estate planning and project the cost of these various options. When you have made your initial decision as to your estate plan, we will prepare appropriate documents and schedule a time for review. The process may be completed in two to six weeks depending upon the complexity of your estate plan. If we can be of help to you in planning your estate, we invite you to call our office to schedule an appointment.