

This periodic publication highlights developments and trends in trusts and estates from a practical viewpoint based on IPB's experience. This issue focuses on planning for probate and estate administration. Our goal is to share our insights with wealth and philanthropy advisors, corporate fiduciaries, accountants and other advisors in a way that is accessible and actionable. We welcome feedback and additions to our mailing list ([ipb@ipbtax.com](mailto:ipb@ipbtax.com)).

## TIPS TO AVOID PROBATE

BY DOUGLAS ANDRE

The probate process is designed to facilitate the settlement of estates. Administered by a probate court where the decedent lived, the goal of the probate process is to settle claims and supervise the distribution of assets to the decedent's heirs. Unfortunately, many families find the probate process expensive, cumbersome and an unnecessary intrusion into what otherwise should be a private, family-focused affair.

A common technique to avoid probate is to create a revocable trust and transfer assets to the trust during the settlor's lifetime. Property held in a revocable trust is not subject to the administrative procedures affecting probate property. A revocable trust is particularly helpful when transferring real or tangible personal property, especially for assets located in other states, to avoid ancillary administration.

Avoiding probate has several benefits. First, use of a revocable trust that is created and funded during the decedent's life can enable a client to escape the publicity associated with probate. Revocable trust terms are not typically made part of the public record as are wills after the testator's death. Thus, a revocable trust may be desirable for an individual who values his or her privacy and wishes to preserve it after death.

The probate court may require the estate fiduciary to file a detailed inventory of probate assets and periodic estate accountings. A client who owns an asset for which accountings may be difficult, such as a closely-held business, may benefit from avoiding probate. The trustee of a funded revocable trust is not required to submit inventories or accountings to the probate court.

Real estate titled in the decedent's name but located outside his or her domicile will be subject to ancillary probate in the jurisdiction where the property is located. Ancillary probate may require hiring local counsel and will typically involve additional fees and delay. Ancillary administration may be avoided by holding the assets that are outside of the domiciliary state in a funded revocable trust.

In addition to use of a revocable trust, there are several ways to avoid probate. Where a husband and wife own assets together, owning property as tenants-by-the-entirety or as joint tenancy with rights of survivorship are the easiest and simplest forms of probate avoidance. Ownership of property through limited partnerships or limited liability companies can also be an effective way to negate the need for probate (in particular, ancillary probate).

Another approach is to designate beneficiaries or transferees for certain assets where possible. Among the assets where this method is applicable include bank accounts, brokerage accounts (in the form of transfer on death accounts), life insurance policies and retirement accounts.

While the probate process may be appropriate in some cases, such as when disputes over inheritance are expected between family members, it is often undesirable. For many of our clients, we recommend employing the above techniques to avoid a probate process that can be an unnecessary burden on the decedent's family.

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## PLANNING WHEN DEATH SEEMS IMMINENT BY H. CARTER HOOD AND LINDA KOTIS

**Overview:** Conventional wisdom is that estate planning is best done while the client is healthy and able to engage fully in the planning process. In certain circumstances, however, a family may augment an existing estate plan during the last days of someone's life.

**Authorizations under Trust and DPA:** The first step required to make deathbed planning a possibility is to ensure that the dying individual's revocable trust and durable power of attorney (DPA) are properly drafted. The trust should permit her successor Trustees to make gifts from trust assets, including: (i) annual exclusion gifts to any person; (ii) gifts to her descendants, without limits, consistent with her wishes regarding benefits to be provided to each child's family branch; (iii) gifts to charity consistent with her general donative history; and (iv) payment of educational and medical expenses as authorized under Section 2503(e) of the Code. The trust should have a digital assets clause, allowing the Trustees to access her digital devices and financial accounts.

The DPA should authorize the individual's agents to make gifts, pay expenses, and manage her digital assets, similar to the Trustees' powers. The agents should have power to change beneficiary designations of the individual's retirement accounts, in accordance with her intentions regarding the identity of beneficiaries and gifts to charity. Agents should also be authorized to convert a traditional IRA to a Roth IRA. Care should be taken that an individual refrains from giving any of these powers to an agent or Trustee in whom she does not have absolute trust and confidence (even when she has appointed her children as agents or Trustees because no one else is available to serve in those roles).

**Notification of Deathbed Intentions:** An individual who believes that deathbed estate planning might one day be appropriate should write a letter now to her financial advisors. She should acknowledge that the following is likely to occur upon her disability: (i) her agents under a DPA will take actions to use account assets to make gifts and pay expenses; and (ii) her successor Trustees will exercise their powers to transfer assets from personal accounts to her revocable trust and make "deathbed" gifts as authorized under the trust provisions.

**Discretion for Payment Form:** The Trustees and agents should be permitted to make gifts outright, to a trust, to any legal guardian, or to a custodian under the Uniform Transfers to Minors Act. The Trustees should also be authorized to make distributions to the agents, in the amounts such agents state in writing is necessary to make transfers provided for under the DPA.

**If Time is Plentiful:** The dying individual's successor Trustees or agents could pay a private elementary or secondary school, college, university, or professional school (including a culinary school) for a grandchild's tuition. Another option is a prepaid tuition program to purchase multiple years of tuition, or a contract for a specific number of credit hours at a locked-in price. These programs also qualify for an exclusion from gift tax. Investments that have a built-in tax loss could be sold. The tax loss may be used on the individual's final income tax return to offset any capital gains and to offset up to \$3,000 of other (non-capital gain) income. A traditional IRA could be converted to a Roth IRA.

**If Time is Fleeting:** Because non-charitable gifts by personal check should be delivered in time to be deposited and clear (at least one week), consider a cashier's check, a certified check, or wire transfer instead. Another option is to issue a check in exchange for some action requested by the individual or her agents. The gift-in-exchange-for-an-action transforms the check from a gratuitous promise to pay when it clears, to a payment in satisfaction of a contract, and the gift becomes complete immediately. Charitable contributions by check need only be in the mail at time of death. Contributions to charities charged to a credit card are deductible as of the date such charge is made. Changing the beneficiary of an IRA to a charity may be often be done online.

**Tax Implications:** Making deathbed gifts up to the amount of the annual exclusion from gift tax or gifts for medical or educational expenses will remove assets from the individual's federal taxable estate with no tax consequences. Larger gifts will use her federal gift tax exemption and therefore reduce her estate tax exemption remaining at death. In states with an estate tax but no gift tax, gifts can save state estate tax by reducing the size of her state taxable estate. Naming a charity as IRA beneficiary will generate federal and state estate tax deductions. Gifts to charity by checks or credit card will generate federal and state charitable deductions on the decedent's final income tax returns. A deathbed conversion of a regular IRA to a Roth IRA triggers income taxes and thereby reduces the owner's taxable estate. This allows the owner to prepay the income tax with pre-estate tax dollars, reducing the future income taxes of her heirs. One potential disadvantage of making deathbed gifts of appreciated property is that the individual's cost basis in the gifted property will not receive a step-up in basis. This is not an issue for cash gifts, however.

## NOT ALL PROBATE IS CREATED EQUAL

### BY KASEY A. PLACE

The probate process has a bad reputation for being lengthy, expensive and unnecessarily complicated. However, probate varies significantly by state and in some states the reputation is not deserved. As discussed below, some states offer alternatives to the traditional probate process that can make the experience simpler, quicker and less painful.

**Unsupervised Administration:** A significant number of states now offer the option of unsupervised administration (also sometimes referred to as “independent administration”). With unsupervised administration the court’s role is limited. It does not monitor the Personal Representative’s activities or provide significant oversight.

The Uniform Probate Code, which has been adopted by 22 states, including Massachusetts, Pennsylvania and Maine, allows unsupervised administration in many circumstances. This procedure generally permits real property to be sold without court approval, allows distributions to beneficiaries without court order, permits Personal Representatives to decide their own fees and attorneys’ compensation and does not require that accountings be filed with the court.

The avoidance of judicial accountings is perhaps the biggest benefit of unsupervised administration. Although judicial accountings are sometimes desirable because they provide the Personal Representative with liability protection, they can also be time-consuming and onerous. The court will expect a detailed description of all funds and assets going in or out of the estate and will typically require receipts, canceled checks, account statements and other documents to substantiate the entries.

**Statement in Lieu:** Even in states that don’t offer unsupervised administration, there may be an abbreviated accounting procedure (sometimes referred to as a “statement in lieu”) available in situations where there is overlap between the beneficiaries of the estate and the Personal Representatives. In Virginia, for example, if all residuary beneficiaries of the Will are Personal Representatives, instead of an accounting they can file a statement with the court that all known charges against the estate have been paid, that six months have elapsed since the personal representatives qualified and that the residue of the estate has been delivered to the beneficiaries. Va. Code Ann. § 26-20.1.

Similarly, Maryland offers a modified administration procedure that dispenses with the requirement to account to the court. Md. Est. & Tr. Code § 5-702. To be eligible for modified administration, all residuary beneficiaries of the estate must be (i) Personal Representatives, (ii) exempt from inheritance tax or (iii) trusts under which each person with a current interest is exempt from inheritance tax. *Id.*

**Small Estate Administration:** Most states (even those without unsupervised administration) offer a quicker, more streamlined probate procedure for small estates. In the District of Columbia small estate proceedings generally take no more than 120 days from the date of filing of the Petition for Administration of Small Estate to the issuance of the final order. See, [DC Probate Courts Small Estates \(SEB\)](#).

The definition of a “small” estate varies widely. In California the threshold is \$150,000. Cal. Prob. Code § 13100. In New York it is \$30,000. NY SCPA § 1301. These thresholds only apply to probate property. Therefore, even wealthy individuals can qualify for the small estate exception if the bulk of their assets is held in trust, jointly owned or payable on death through a beneficiary designation.

**Conclusion:** Probate may not live up to its bad reputation in situations where unsupervised administration, a statement in lieu or the small estate administration exception is available. In other situations, it is imperative that clients take steps during life to remove assets from their probate estate. For a discussion of probate avoidance techniques, see the article above titled “Tips to Avoid Probate”.

## SIMPLIFYING ESTATE VALUATION

Determining the value of an estate is a necessary step of every estate administration regardless of whether the filing of a state or federal estate tax return is required. Generally, probate courts require, at minimum, an estimate of an estate's value to initiate the probate process. Therefore, the first step should be to identify all of the assets of the estate. Assets that must be valued include not only real estate, bank and brokerage accounts, business interests, mineral and oil interests and royalties, but also such common items as jewelry, china, artwork, and other family heirlooms -- referred to as tangible personal property ("TPP"). Such assets should be valued by a professional who is qualified to evaluate the particular item or property interest being appraised. In addition, when filing a federal estate tax return, items of TPP worth more than \$3,000 must be accompanied by a fair market value appraisal made under oath that states the expert's disinterested character and qualifications in accordance with Treas. Reg. §20.2031-6.

Real estate, whether commercial or residential, should be appraised by a qualified real estate appraiser who is knowledgeable and familiar with the market where the real estate is located. Having an accurate valuation of the decedent's real estate is necessary for tracking the heirs' adjusted basis in the property under IRC §1014 for future transactions. Works of art should be appraised by a reputable local art dealer or auction houses such as Christie's or Sotheby's. When a federal estate and/or gift tax return (for the year of death) is to be filed, business interests should be valued by a member of the National Association of Certified Valuators and Analysts, and the valuator or analyst should be familiar with the particular industry or sector of the business interest.

The Internal Revenue Service is keen to audit returns with appraisals that lack sufficient substantiating information or were performed by less than qualified professionals. Employing qualified appraisers who are experienced in preparing valuations for estate tax purposes will avoid the additional costs of an audit and also potential penalties for underpayment of estate tax due to valuation understatements. For any underpayment which exceeds \$5,000 and where the understatement of value is 65% or less of the actual value of the property, IRC §6662 provides for application of a 20% penalty upon the underpayment as determined by audit. The penalty increases to 40% for a gross valuation understatement when the asset as listed on the tax return is valued at 40% or less than the value determined at audit.

Taxpayers should be aware of the option to use either the date of death ("DOD") or alternate valuation date ("AVD") to determine the value of a decedent's estate for federal estate tax purposes. Using DOD means assets will be valued as of the date of the decedent's death, whereas, if the executor of an estate elects AVD, assets may be valued at a date up to six months subsequent to date of death, provided that both the value of the gross estate is reduced as of the AVD as well as the amount of federal estate tax owed after reduction for all allowable credits. When using alternate valuation, assets are valued as follows: (i) any property disposed of within the six-month period is valued as of the date of the disposition; (ii) any asset affected simply by a lapse of time and not any changing external condition will be valued as of DOD; and (iii) all other assets not disposed of will be valued as of AVD. Disadvantages of using alternate valuation are the lower step-up in basis for beneficiaries of assets valued as of AVD and the fact that not all states allow the use of AVD.

Administering an estate can be a long, burdensome process. Our firm is adept at guiding our clients through each step of the process, from assisting with identifying estate assets to commissioning appraisals, to filing and, if necessary, defending the estate tax return.

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### IPB IN THE NEWS ...

- ◆ [Spencer Walters Talks to \*Nonprofit World\* about the Impact of the 4960 Excise Tax \(June 4, 2019\)](#)
- ◆ [Lemons to Lemonade: Making Use of the Delaware Tax Trap, Panelist: Kasey Place, \*ABA Section of Taxation 2019 May Tax Meeting\* \(May 11, 2019\)](#)
- ◆ [Doug Andre Interviewed by \*CNBC\* on Royal Baby Archie's Future Tax Bills \(May 10, 2019\)](#)
- ◆ [Doug Andre Quoted in \*Politico\* on Royal Baby's Potential Tax Headaches \(May 9, 2019\)](#)

### Past Issues of IPB Tax, Trusts & Estates

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