

Poor estate planning can prove costly

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Just over a year ago, a wealthy friend in her 80s died unexpectedly of heart failure. When I saw her son last month (he is her estate's executor), I asked if he had closed the estate yet. He said it is nowhere near being closed because his mother left real estate in three states and there must be probate proceedings with costly probate lawyers in each state. To complicate matters even further, she left stocks and bonds that are being mismanaged by a bank trust department. I could go on, but you get the idea. Virtually all this mess could have been avoided.

After my friend's husband died few years ago and she inherited his considerable property, we discussed the merits of a living trust. But her high-priced lawyers talked her out of it, probably so they could enjoy lucrative statutory probate fees on her multimillion-dollar estate when she died. Now her children are paying the high price of poor estate planning with unnecessary probate costs and delays in three states.

What is probate?

Probate is a state court procedure to distribute a deceased's assets either according to his or her will or, if no will was found, according to the state's law of intestate succession. This procedure makes certain the deceased's debts are paid, heirs are identified and found, and the estate executor or administrator manages and distributes the assets. The procedure assures that the court, attorney and executor or administrator are paid from the estate's assets.

Probate costs vary widely, depending

on the size of the estate, complications and whether the parties involved insist on receiving the fees allowed by state law or if they negotiate or waive their fees. An extreme example is the more than \$40 million of probate fees paid to attorneys so far from the J. Paul Getty estate. After Marilyn Monroe died in 1962, probate costs took over \$1 million, leaving just \$101,000 for her heirs when the estate was finally closed 18 years later.

Avoiding probate

When the assets of a deceased must go through probate, the process usually takes at least six to 12 months. Probate attorneys love this profitable and easy work because of the statutory fees. The estate's executor, appointed in the will, or a court-appointed administrator, also receive statutory fees, unless waived.

There are two primary ways to avoid probate. One method is to hold title to major assets in joint tenancy with the person who will ultimately receive them. However, this can lead to trouble if that person won't cooperate, or if the original owner wants to sell or refinance those assets. All that is usually required for a joint tenancy survivor to transfer title after a joint tenant's death is to record a certified copy of the death certificate and an affidavit of survivorship.

The other method of avoiding probate is to hold title to major assets such as your home and other real estate, stocks, bonds, mutual funds, and bank accounts in a living trust. Probate of assets held in a living trust is not required. They are promptly distributed after the trust creator dies.

There are three parties to a living trust: (1) the trustor who creates the living trust, (2) the trustee who holds legal title to the trust assets and manages them and (3) the beneficiary for whose benefit the trust is created. An additional party who steps in after the trustor dies or becomes incapacitated is called the successor or alternate trustee. Husband and wife can be co-trustors, co-trustees and co-beneficiaries.

When a living trust is created and major assets are transferred into the living trust, the trustor, trustee and beneficiary are the same person(s). The trust assets can be bought, sold, refinanced and managed as before.

The living trust is revocable, so it can be changed or canceled at any time. However, it becomes irrevocable when the trustor dies or becomes incapacitated.

Advantages

The primary advantage is avoidance of probate costs and delays. Privacy is another major advantage since the living trust never becomes public knowledge, as does a deceased's will. For example, when Bing Crosby died in 1977, nobody learned the exact extent of his wealth or who received his real estate because all his assets were in his living trust.

If you own property in more than one state, probate is not needed for out-of-state properties that have been deeded into your living trust. The successor trustee can easily distribute them to heirs specified in the living trust.

Avoidance of a court-appointed conservator is another major living trust advantage. This little-known benefit is

important if the trustor becomes incompetent, perhaps due to Alzheimer's disease. Without a living trust, a conservator is needed to manage the incompetent's affairs, such as selling real estate.

Disadvantages

The initial paperwork of creating a living trust usually does not cost more than \$1,000, often less. The hardest part is transferring title to real estate, stocks, bonds and mutual funds into the living trust. A bill of sale is used to transfer personal property. However, retirement accounts should usually be left outside a living trust to avoid a taxable distribution. Check with the local tax collector to be sure a realty transfer will not trigger a transfer tax or property tax reassessment.

A few old-fashioned mortgage lenders still refuse to allow refinancing of real estate held in a living trust. If that happens, just take the title out of your living trust, record the new mortgage and put the title back into the living trust. Creditor claims are not cut off against a living trust as they are with assets subject to probate court proceedings. Living trust assets are subject to creditor claims. Obviously, the successor trustee should pay the deceased's creditors before distributing living trust assets to the heirs. If this is an issue, probate proceedings should be considered.

SUMMARY. The best way to avoid probate court costs and delays is to have a living trust for major assets. The advantages far outweigh the slight disadvantages.