

Demystifying probate part II: avoiding court

By Linda T. Cammuso

Last month, I discussed the probate process and people's efforts to avoid probate, which often results in needless exposure of their assets and loss of significant income tax benefits. For those who wish to steer clear of probate court, there are many alternatives to joint ownership (adding someone else's name to your accounts or house) and lifetime gifting (putting the asset in someone else's name) which are safer from an asset protection standpoint and more tax-efficient.



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Living trusts, either revocable or irrevocable, have become the preferred technique of estate planning attorneys to help clients avoid probate, manage assets during their lifetime, achieve optimum tax

results and distribute assets to heirs at death.

Consider the outcome with a typical "revocable" living trust as compared to joint ownership or removing your name from an asset altogether:

- Control — with a trust, you can continue to control your assets as the "trustee" (person who manages the assets), "grantor" (person who establishes the trust) and "beneficiary" (person who benefits from the assets), all as provided in your trust document.

With joint ownership, your co-owner has equal access to and control of your assets, or worse, in the case of assets that you put in someone else's name altogether, that person has all the control.

- Exposure to someone else's creditors/liabilities — unlike with joint ownership or gifts, a trust allows someone, such as a child, to help you pay bills and manage



the assets (as a co-trustee, for example) without having the child's name on the assets during your lifetime. That protects the assets from the child's debt/creditors, bankruptcy, lawsuits, divorces and grandchildren's financial aid eligibility.

- Income/capital gains taxes — Unlike joint ownership or gifts, a trust allows your assets to receive a fully "stepped-up" cost basis, meaning that the date-of-death market value (rather than your original purchase price) will be the cost basis for capital gains purposes when the assets are later sold by your heirs.

- Gift Taxes — when you add someone's name as co-owner of certain assets or when you put an asset in someone else's name, you are required to file a Federal Gift Tax Return with the IRS. However, assets owned in a revocable trust do not trigger this

requirement.

The use of a properly-structured irrevocable trust will achieve many of these objectives while also protecting your assets if you ever need long-term nursing home care.

Another technique that is particularly effective for bank and investment accounts is a TOD, or transfer on death designation. This allows you to own an asset in your name alone yet have it pass automatically upon your death, outside of probate, to specified beneficiaries. Certain accounts may not be eligible for TOD designations, so it is important to check with your financial institution.

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