

15. Living Trusts and Other Transfers of Property That Avoid Probate

When you die, all of your property will be transferred to others. In your Will, you can select the new owners and give instructions about how and when they will receive the property. (See related article on Wills.) You can also transfer property to others by structuring its ownership in certain legal forms. Property that is transferred on death through its form of ownership is called nonprobate property. Owning property in these forms (intentionally or unintentionally) can actually override instructions in your Will and cause property to pass to the new owners outside of the probate process. To assure that your goals are met, it's important for you to coordinate both property transfers that will be controlled by your Will and by applicable nonprobate property laws.

Probate and Nonprobate Property

At your death your estate will consist of probate and nonprobate property, perhaps all of one and none of the other. If you have probate property, a Superior Court proceeding (called the "probate" of your estate) will likely be started after your death. (See related article on probate.) The court has jurisdiction to supervise the administration of your property that is subject to probate and will determine how and when your probate property should pass.

Disposition of Probate Property

Under normal circumstances, the court will simply direct that your probate property be transferred according to your last Will. If you do not have a Will, then your probate property will pass according to certain Washington statutes that specify the recipients of property from people who die without a Will. These statutes provide for what is called "intestate succession" or "intestacy." Thus, the state provides a Will for people who haven't written one for themselves.

Probate Property

Except when subject to certain legal agreements, your probate property will include:

- Property in your name alone.
- Property in the name of you and your spouse (other than in “joint tenancy with rights of survivorship”).
- Property in your name and another’s or others’ as tenants in common.
- Property payable to you or to your estate on account of your death, including your interest in any partnership that is not otherwise disposed of in the partnership documents.
- Community property held in the name of your spouse alone or jointly with anyone other than you.

Nonprobate Property

Any property you own at your death that is not probate property is “nonprobate property.” Transfer of your nonprobate property is not controlled by your Will (except in rare circumstances) or by the rules of intestate succession. Rather, it is controlled by the operation of certain property laws. You can arrange with your spouse or others to create nonprobate property, but you must be careful to avoid unintended results.

The first thing you need to do to accomplish this is to make sure that your Will clearly express your wishes as to the disposition of your probate property. The second thing you need to do is make sure that your nonprobate property arrangements either complement the provisions in your Will or clearly show that you intended your nonprobate transfers to be inconsistent with your Will and not controlled by it. Without this coordination, your nonprobate transfers (even if inadvertent) can, at best, defeat your true intentions, and, at worst, cause litigation if your beneficiaries don’t like how they have been treated.

The Benefits of Nonprobate Transfers

The benefits of nonprobate property include:

- Nonprobate transfers of property usually can be completed more quickly than transfers in a probate proceeding.
- Nonprobate transfers usually occur without court proceedings and involve little or no publicity.
- Challenges to your Will have no effect on your nonprobate property.
- Nonprobate property is not subject to fees of the personal representatives of the probate estate.
- Possibly lower attorneys' fees will be incurred with the transfer of nonprobate property.

There are several commonly used devices to create and dispose of nonprobate property. These include community property agreements, joint tenancy with the right of survivorship, contractual payout arrangements (such as bank accounts, life insurance, annuities, pension and profit sharing plans, individual retirement accounts), and living trusts.

Two Kinds of Property for Married Persons: Community and Separate

Washington has a property system for married persons called community property. (See related article on community property.) Each spouse is generally presumed to have an equal interest in every item of property owned by one or both, except for items that are deemed the separate property of one spouse. Separate property is generally property owned by a spouse prior to marriage or received during marriage by gift or inheritance. Separate property also includes the income from, or other property acquired with, separate property.

Community Property Agreements

A married person in Washington can enter into a contract with his or her spouse called a community property agreement.

The most common form of community property agreement declares that all present and future property of either spouse will be community property and directs that when one spouse dies, this community property will be owned by the surviving spouse. The agreement thus both converts to community property any property owned by a spouse (that otherwise would be separate) and provides for a nonprobate transfer of that property at death.

Joint Tenancy With Rights of Survivorship

The primary feature of joint tenancy “with rights of survivorship” is that when one joint tenant dies, the surviving joint tenant (or tenants) automatically become the owner(s) of the joint tenancy property. Joint tenancy ownership can be used with nearly all types of property and is commonly used with bank accounts, and stocks and bonds. It is infrequently used with real estate in Washington.

Death Benefits Payable Under Certain Contracts

A variety of contracts, such as deferred compensation agreements, permit an estate owner to designate who should get the owner’s interest in specific assets at the owner’s death.

Bank Accounts, U.S. Savings Bonds and Securities

You can deposit money in a bank or buy United States Savings Bonds and other securities and designate to whom the deposited funds, bonds, or securities should be paid when you die. You may change the designation at any time.

Life Insurance, Annuities, Retirement Benefits

Life insurance and annuity contracts, retirement plans, and individual retirement accounts all permit you to designate a beneficiary who receives these assets when you die (if the beneficiary survives you). The assets then do not go to your estate for administration by your personal representative as a probate asset (although they would be probate assets if you designated your estate as beneficiary).

However, these contracts provide little or no flexibility as to the payout method. In some cases your inability to structure the payout creates no problem; in other cases, the lack of flexibility can create adverse tax consequences or can cause the beneficiary to get more property than he or she can handle due to age, lack of experience, or disability.

When it's important to you to control the payout, you can designate that benefits are to be paid to the trustee named in your Will or in a separate trust agreement. The death benefits can then be added to your other assets in trust and administered by the trustee in the manner you have selected.

Avoid Mistakes: Be Sure to Consider Contingent Beneficiaries and Death Taxes

Often married people designate their spouses as the primary beneficiary of insurance policies, annuities, or retirement plans, with their children named as contingent beneficiaries. If you have made this kind of arrangement, and your spouse dies before you do, then at your death all the assets will be paid outright to your children (delayed to age 18 if a minor). This could be a severe problem if, for example, you had carefully planned a trust to manage your assets for your children until a later age. A more effective contingent beneficiary designation in this situation would be to designate the trust to receive the assets if your spouse predeceases you.

Avoiding probate does not avoid death taxes. Nonprobate property is as much a part of your taxable estate as probate property. The "simple" solution of avoiding probate by making insurance policies payable to your spouse may substantially increase the estate tax liability on your spouse's later death. (See related article on estate taxes.) Making the benefits payable to a trust designed to minimize death taxes is a better solution. This is true especially if the surviving spouse is not a United States citizen.

Typical Living Trust Arrangement

In Washington a typical living trust might involve a husband and wife as trustors and trustees of a revocable living trust that they establish for their own benefit while alive and for their children after their death. The spouses act as trustees while they are both living. After one spouse dies, the surviving spouse may act alone as the trustee or a new co-trustee may act with the surviving spouse. After the death of the surviving spouse, a new trustee will serve (or the existing co-trustee may continue as the sole trustee) for the benefit of the spouses' children until the youngest child reaches a specified age, such as 25 years.

Because property in the trust is controlled by the trust agreement, it is not subject to probate. One or more family members, including the children of the trustors, could act as trustees, as could banks and trust companies that are authorized to exercise trust powers. Individuals outside the family also could act as trustees. (See related article on trustees.)

Your assets avoid probate through the living trust only if they have been transferred to the trustee during your lifetime and the trust is not payable to your probate estate when you die. Legal title to the assets must be in the name of the trustee and not in your name, individually. If you, as *the trustee*, are the legal owner of the trust assets, the trust assets will remain subject to the trust at your death and won't be a part of your probate estate.

As a probate avoidance device, living trusts are more popular in other states than they are in Washington. There are two reasons for this:

1. Washington state has a better, more streamlined probate system than almost any other state, perhaps the best probate system in the country. The usual reasons for avoiding probate in other states, such as a statutory executor's fee schedule, a standard or statutory attorneys' fee schedule, court appointed appraisers, and a cumbersome settlement procedure requiring multiple court appearances by lawyers are not present in Washington.
2. Washington allows community property to be transferred at death by community property agreements. In estates where death taxes are not a concern, you can use community property agreements to achieve the same result of avoiding probate when the first spouse dies as you can with a more expensive living trust agreement.

Coordinating Your Estate Plan

Your estate plan can avoid probate. A *coordinated estate plan*, however, is more important than probate avoidance. Inconsistencies in your plan between the disposition of probate and nonprobate property may create doubt as to what you intended. In some instances, the resolution of those doubts can involve expensive litigation. The failure to create a coordinated estate plan can also cause unexpected, harsh, and inappropriate dispositions of property that may have an adverse impact on a family for generations. *The best way to coordinate your estate plan is to review with your lawyer how you hold title to your assets.* Have your lawyer check your title holdings and property registrations in light of your estate planning goals and documents to make sure that all aspects of your plan work as intended. Repeat this review process as often as your lawyer recommends or sooner if there is a change in your financial or personal circumstances or in how you hold title to assets.