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The Probate Process in Virginia

Probate is the process through which title to the decedent's assets is transferred to her beneficiaries. Probate also provides an opportunity for creditors to claim payment and individuals to contest a will. A person's estate will be probated whether he dies with or without a will where he owned assets in his own name which do not pass by beneficiary designation or otherwise by operation of law.

Probate can be a very time-consuming and expensive process. A probate estate will normally be open for a minimum of one year but can remain open for much longer depending on the complexity of the estate and the responsiveness of the executor. The expenses include the probate tax, court fees, bonding fees, legal fees, accounting fees, appraisal fees, and fiduciary fees. These fees are in addition to debts and taxes owed by the decedent at the time of death and can be as much as ten to fifteen percent of the entire estate. And, if the estate includes property located in more than one state, the probate process becomes even more complex and expensive because probate is required in every state where the decedent owned property.

Probate is also a public process. All probate documents are filed among the court records which are accessible by the public at large. Such documents include the will itself, names and addresses of all beneficiaries, a complete inventory of the decedent's assets, and one or more accountings showing income received by the estate and debts and expenses paid, including taxes. Actually, this is one of the most common reasons people seek ways of avoiding the probate process.

There are several ways to avoid probate, some of which are more effective than others. These include:

- Payable-on-Death account designations;
- Transfer-on-Death registration of securities;
- Naming beneficiaries for retirement accounts and life insurance policies;
- Giving away assets before death;
- Holding property jointly with another person with the “right of survivorship;” and/or
- Setting up a trust to hold title to property

Joint ownership is easy and inexpensive to establish. However, the decedent’s interest automatically passes to survivor(s) by operation of law, leaving the decedent absolutely no control over the disposition of the assets. Thus, the assets are difficult (or impossible) to access in order to satisfy debts, taxes and expenses of administration or to pay bequests. The same is true of pay on death or transfer on death beneficiary designations. Gifting involves the transfer of property to others prior to death. The problem is that most people don’t know when they are going to die and thus are usually unwilling to give up control over assets during life. Revocable “living” trusts have quickly become the most popular estate planning tool because they allow families to avoid probate, lower taxes, maximize flexibility and control over assets, and protect privacy.

Whether a trust is right for you is a discussion to have with an experienced estate planning attorney who can help you develop a plan that’s right for you and your family.