

Probate and Alternatives: Estate Planning for Illinois Elder Clients

I.

II. INTRODUCTION

Many Illinois lawyers concentrate their practices in the area of estate planning; i.e. the drafting of Wills, Trusts and other documents to transfer assets after one's death. Historically, estate planning attorneys have primarily drafted wills and testamentary trusts (trusts that are funded after the Grantor's death) to create simple to complex estate plans that go through Probate. However, in recent years, there has been a marked increase in the number of attorneys who draft estate plans with the specific intent of avoiding Probate. Probate is not the only method of transferring assets of a deceased individual to others after death. Living trusts, transfer on death instruments, joint tenancies, and beneficiary designations are alternative estate planning tools that can be used to transfer a decedent's assets without the need for Probate.¹

This article will provide a brief overview of the Illinois Probate process. It will also discuss the advantages and disadvantages of Probate in the State of Illinois. In addition, the article will describe Probate alternatives including (i) living trusts; (ii) transfer on death instruments for real estate; (iii) joint tenancy; and (iv) beneficiary designations on retirement accounts, life insurance policies, investment and bank accounts. Finally, the article will provide this author's suggestions as to when Probate may be preferred to one of the Probate alternatives and when the alternatives are preferable to Probate.²

¹ Depending on the value of a decedent's estate, his or her marital status and the type of assets owned, there may be tax consequences (including income, estate, gift and/or generation-skipping transfer taxes) for some or all of the estate planning methods discussed herein. This article does not address such tax ramifications.

² Many times, Decedents die without valid Wills, Trusts or alternative estate planning of any kind, and their estates must be probated as intestate estates. Since this article is intended for attorneys and clients who are actively planning their estates, intestate probate will not be discussed.

II. PROBATE PROCESS

A. Overview of Probate Process

Probate is often portrayed as a long and tedious public process, with delays and costs that must be avoided. Much of this “bad rap” is attributable to the probate process from decades ago - before independent administration was enacted in Illinois.³ Not surprisingly, the folks that describe Probate in this way tend to be those who are selling Probate alternatives such as living trusts.⁴ But, Probate has some distinct advantages that should not be overlooked in estate planning lawyers’ haste to draft revocable living trusts for all of their clients.

Pursuant to the *Illinois Probate Act of 1975*, 755 ILCS 5/1 et seq. (2010), when an individual dies, his or her real and personal property is passed on to persons or organizations in accordance with his or her Will through a process known as Probate.⁵ Probate is aptly defined as the “judicial procedure by which a testamentary document is established to be a valid will; the proving of a will to the satisfaction of the court.”⁶ Whether or not a Probate proceeding is initiated, a decedent’s will is required to be filed with the Clerk of Circuit Court in the county in which he or she died within three (3) months of death.⁷

Probate begins when a petition to admit a Will and have an executor appointed is filed with the Probate Court.⁸ Notice of the Petition must be given to or waived by all heirs and legatees.⁹ After the Probate case is opened, the executor gathers and manages the Probate assets of the decedent. The executor also publishes a notice to the creditors of the decedent that they

³ Sahlas Colleen L., *A Baker’s Dozen Considerations Before Probating Small or Insolvent Decedents’ Estates*. ISBA Trusts and Estates Newsletter, Vol 62, Issue 9 (March 2016)

⁴ *Id.*

⁵ 755 ILCS 5/ et seq. (2010)

⁶ Black’s Law Dictionary, (10th Ed. 2014) available at Westlaw BLACKS

⁷ 755 ILCS 5/6-1(a)

⁸ 755 ILCS 5/6-2

⁹ 755 ILCS 5/6-10

must file any and all claims within a certain time frame (3-6 months) or such claims will be barred.¹⁰ Eventually, the Executor distributes the Probate assets in accordance with the provisions of the Will. After the claims period has passed and the assets are distributed, the Probate estate can be closed. Under Illinois law, most probate is done via “independent administration.”¹¹ This means that the court does not involve itself in the details of the administration process unless an issue arises that is brought to the court’s attention by an interested party.¹² For the majority uncontested probate cases, there are two (2) court appearances and many Probate cases are closed within six months to one year.

B. Advantages of Probate

Probate provides an orderly transfer of assets from a Decedent to his or her heirs or legatees in a court proceeding. This is beneficial because it gives a level of comfort to executors, heirs and legatees. If any disputes related to the Will or distribution of estate assets arise, they can be resolved under court supervision. One of the most significant benefits of Probate is that, in most cases, Will contests and creditors’ claims against the estate must be filed within 6 months or they are barred.¹³ Lastly, with independent administration, Probate is often quick and simple with costs that are relatively low. In Illinois, many uncontested Probate cases can be completed within 6-12 months of the date of death at a reasonable cost (\$5,000 or less) regardless of the value of the estate.¹⁴

B. Disadvantages of Probate

The primary disadvantage of Probate is that it is a public proceeding as opposed to a private matter. Like all courts in this country, Probate courts are public, so anyone can, if so

¹⁰ 755 ILCS 5/18-2

¹¹ 755 ILCS 5/28-2

¹² *Id.*

¹³ 755 ILCS 5/18-3

¹⁴The Executor may distribute Probate assets at any time during the 6-12 month period; he or she need not wait until the Probate is concluded.

inclined, review a Decedent's Probate file (including his or her Will) to ascertain the value of the estate and the terms for disposition thereof. Occasionally, when a celebrity dies, his or her will is sought out and published.¹⁵ However, in the vast majority of routine Probate cases, this does not occur.

Another disadvantage of Probate is that it can take 30 days or more to get a Probate estate opened and executor appointed due the need for signatures from all heirs and legatees. A further disadvantage of Probate is that, when an heir or legatee contests a Will, Probate will take longer and have significantly higher costs.¹⁶ Finally, the Illinois Probate process is fairly straightforward, but it is not particularly flexible. The Illinois Probate Act has precise statutory requirements that must be followed in order to open and close a Decedent's Probate estate. Strict compliance with the statutory provisions is required and there are no shortcuts to the process.

III. ALTERNATIVES TO PROBATE

A. Living Trusts

1. Overview of Living Trusts

Although Probate is an efficient and effective means of transferring assets after death, there are estate planning attorneys who strongly prefer Living Trusts for their estate planning clients. Living Trusts are written agreements between the individual creating the trust ("Grantor") and the person or entity that will manage the assets held in trust ("Trustee").¹⁷ In Illinois, Living Trusts are governed by the *Illinois Trusts and Trustees Act*.¹⁸ Living Trusts are typically established to provide assets for the lifetime benefit of the Grantor, and include

¹⁵ The terms of Leona Helmsley's Will which famously left a \$12 million trust for her dog, was widely published in newspapers throughout the world.

¹⁶ Delays and added costs would also occur in the alternatives to Probate if an interested person contests or otherwise objects to the procedure.

¹⁷ 760 ILCS 5/2 et seq.

¹⁸ *Id.*

instructions to the Trustee as to the distribution of the trust to other beneficiaries after the Grantor's death. In most cases, Living Trusts can be amended or revoked by the Grantor during his or her lifetime.

One commonly cited reason for establishing a Living Trust is to avoid Probate. This is not necessarily an advantage; it is merely a fact that Property held in a Living Trust is not subject to Probate. However, in order for the trust assets to avoid Probate, the legal titles to all of a Grantor's assets must be changed from his or her name into the name of the Living Trust. This is known as "funding" the Trust and it is essential to the effectiveness of a Living Trust. Skipping this step will cause the Living Trust to remain entirely or partially unfunded, and Probate will likely be required for assets not transferred to the Trust.

2. Advantages of Living Trusts

Advantages of Living Trusts include the ability to hold and transfer assets with privacy. Wealthy clients tend to prefer that their estate planning matters are private to the extent possible and Living Trusts provide that privacy. In addition, there is typically not a delay in accessing assets held in the Trust after the death of the Grantor. And, trust assets are not subject to renunciation by the decedent's spouse. Finally, as is the case for Testamentary Trusts, Living Trusts can be drafted in ways that minimize or eliminate Federal and State estate and generation skipping taxes.¹⁹

3. Disadvantages of Living Trusts

Disadvantages of Living Trusts include the fact that they are typically much more expensive to set up and maintain than Wills. Much of the higher cost is attributable to the work necessary to re-title or transfer assets into the Living Trust once it is drafted. This raises another

¹⁹ Living Trusts alone are insufficient to reduce or avoid estate, gift and generation-skipping transfer taxes. Tax planning is also necessary. See also note 1.

potential disadvantage: failure to transfer all assets into the trust including assets that are acquired after the Trust is initially funded. Another major disadvantage is that there is a longer period for claims or disputes to be filed; i.e. a claim on a written contract could be brought as many as 10 years after the alleged breach.²⁰ Finally, assets held in Revocable Living Trusts are subject to income tax and they are counted for purposes of determining eligibility for Medicaid or other governmental benefits as if the grantor owned the assets personally.²¹

B. Transfer on Death Instruments (TODIs)

1. Overview of TODIs

The *Illinois Residential Real Property Transfer on Death Instrument Act*, which was passed in 2012, allows individuals to transfer residential real estate without Probate using a prerecorded “Transfer on Death Instrument” (“TODI”).²² This terminology is used to avoid confusing TODIs with the deeds.²³ Transfer of ownership to residential property under a TODI is triggered upon the owner's death.²⁴ Natural persons are the only category of property owner that are eligible to use TODIs, but beneficiaries of TODIs can be individuals, trusts, associations, corporations, limited liability companies, partnerships, joint ventures or governmental entities.²⁵ Only residential property as defined by the statute may be transferred via a TODI.²⁶

2. Advantages of TODIs

TODIs are still fairly new in Illinois, but they offer several advantages over other methods of transferring residential property at death without the need for Probate. One

²⁰ 735 ICLS 5/13-206 (2007)

²¹ 89 Ill. Admin. Cod 120.347(f)

²² 755 ILCS 27/1 (2012)

²³ 755 ILCS 27/5 (2012)

²⁴ 755 ILCS 27/65 (2012)

²⁵ 755 ILCS 27/1 (2012)

²⁶ *Id.*

advantage is that they are efficient tools to effectuate the transfer of residential property. According to the statute there is no requirement that the designated beneficiary of a TODI be given notice, receive delivery of or accept a TODI during the owner's lifetime, nor is there any requirement for consideration for the TODI to be effective²⁷ If a TODI is properly signed, attested and recorded, the transfer of property occurs by operation of law upon the owner's death without any further action on the part of the beneficiary.²⁸ In addition, TODIs are fully revocable by the property owner during life,²⁹ and owners have the option to name multiple beneficiaries and/or successor beneficiaries in the TODI.³⁰ Lastly, the cost for preparation and recording of a TODI is minimal.

3. Disadvantages of TODIs

There are several drawbacks to using TODIs. The most obvious is that they can only be used for residential property.³¹ For estates that contain other assets such as investments, bank accounts, or commercial property, the TODI alone will not be an effective estate planning tool. Another disadvantage is that TODIs must be recorded with the Recorder of Deeds to be effective.³² This means TODIs are public documents capable of being viewed during the owner's lifetime. In addition, the use of a TODI could lead to an unequal distribution of the Decedent's estate to his or her heirs. Finally, TODIs must be executed in strict compliance with the TODI statute. If an error is made, the TODI will fail, and Probate may become necessary.

²⁷ 755 ILCS 27/50(2012)

²⁸ 755 ILCS 27/65(2012)

²⁹ 755 ILCS 27/25(2012)

³⁰ 755 ILCS 27/20(2012)

³¹ 755 ILCS 27/1(2012)

³² 755 ILCS 27/40(a)(3)(2012)

C. Joint Tenancy

1. Overview of Joint Tenancy

Joint tenancy is another method for individuals to transfer property at death without Probate. Under the *Illinois Joint Tenancy Act*, two or more persons may own real or personal property as joint tenants with right of survivorship.³³ Assets including real estate, bank accounts, investment accounts and other property may be owned by individuals as joint tenants.³⁴ Joint tenants have a right to equal use and enjoyment of joint tenancy property during their lives. Upon the death of one joint tenant, the deceased joint tenant's share passes automatically to the other joint tenant(s) by operation of law.

2. Advantages of Joint Tenancy

Joint tenancy is a very low cost but effective way to hold and transfer property to the surviving joint tenant upon death, particularly for married couples. Preparation and recording of a deed is generally the only legal work needed to create a joint tenancy for real estate. Bank accounts or other personal property held in joint tenancy are similarly easy to create by simply titling the asset in the names of the joint tenants.

3. Disadvantages of Joint Tenancy

Because joint tenancy property does not pass to the heirs or legatees of a deceased joint tenant, it may cause unintended issues. For example, assume a parent and child own real estate or a bank account as joint tenants. If the parent dies, the child becomes the sole owner of the real

³³ 765 ILCS 1005/1 et. seq.

³⁴ *Id.*

estate or bank account under the terms of joint tenancy. If there are other children, they will not receive a share of the asset. Another disadvantage is that ownership under joint tenancy is effective immediately upon its creation. Thus, any one joint tenant can sell, transfer, assign, pledge or otherwise encumber the property to the detriment of the other joint tenants. In addition, the asset is at risk to claims of creditors of any of the joint tenants as soon as it is created.

D. Beneficiary Designations

1. Overview of Beneficiary Designations

Individuals whose estates include pensions, annuities, individual retirement accounts, life insurance policies and/or bank accounts have the option to designate one or more beneficiaries to receive those assets upon the owners' death. Beneficiary designations for pensions, annuities and retirement accounts are governed by the *Internal Revenue Code*.³⁵ In Illinois, the *Illinois Trust and Payable on Death Accounts Act* regulates “payable on death” (POD) or “transfer on death” (TOD) designations on bank or investment accounts, which are also forms of beneficiary designations.³⁶

2. Advantages of Beneficiary Designations

Designating beneficiaries is typically as simple as completing and submitting a beneficiary designation form to the institution holding the asset. There is generally no cost to designate a beneficiary for such assets, unless the advice of an attorney or accountant is needed. This allows clients to update their beneficiary designations as often as is desirable.

³⁵ IRC § 401(a)(9)

³⁶ 205 ILCS 625/1, et seq.

3. Disadvantages of Beneficiary Designations

Like TODIs and joint tenancy, beneficiary designations operate outside of Probate and supersede the Will and Trust of a Decedent. This can lead to unintended consequences where assets intended for all of a Decedent's surviving children are passed by beneficiary designation to only one. Another issue that can arise is the failure of beneficiaries in which case, the asset will pass to the Decedent's estate and Probate may be required.

IV. CONCLUSION

Like most things in life, there is not a "one-size fits all" approach to estate planning. Clients who have family conflicts or potential creditor claims may benefit from having their estates go through Probate where such claims can be resolved by a judge. Others may benefit from one or more of the alternatives to Probate. High net worth clients will likely prefer the privacy that a Living Trust affords and will be willing to pay the extra cost to gain that benefit. Less affluent clients may appreciate the minimal cost of using beneficiary designations and joint tenancy to transfer their estates to surviving spouses or children without spending thousands of dollars on Wills and/or Trusts. Clients whose only asset is their residence may prefer using a TODI to ensure that it is transferred to their selected beneficiary (ies) upon their death. With so many estate planning options out there, it is the job of an effective estate planning attorney to understand the options and utilize those that best fits the client's needs.