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Planning Your Estate - Probate

Planning Your Estate:

How To Give Your Property To Others After You Die

(Probate Law in Utah)

What is an estate? What is probate?

When you die, you leave behind an estate. Your estate consists of all property of any kind that was in your name only, with no provision on the title of ownership for others to own it. Some estates must go through a probate. Probate is a court-supervised process for paying your bills and distributing your property as you want after your death. Probate law in Utah was revised in 1977, and the process now is neither expensive, nor complicated, nor time-consuming. A "probate" estate is one that must be probated to distribute the property; a "taxable" estate is one that must pay an "estate tax" or "inheritance tax" to either the state or federal government. Your estate may be taxable even if it need not be probated. If your heirs and/or beneficiaries get more than \$1,000,000 (this amount is subject to annual change), there is a tax to be paid.

Do I need probate?

There must be a probate if the estate contains an interest in land, or if the total value of the estate exceeds \$100,000.

What if I don't need probate?

Money owed to, or personal property of, a person who has died (a "decedent") must be paid to or delivered to "a person claiming to be the successor of the decedent" upon presentation of an affidavit. Such an affidavit cannot be used to transfer any property if the net value of the decedent's entire estate (not counting motor vehicles) is more than \$100,000, nor can an affidavit be used to transfer ownership of real estate. To transfer the title of not more than four motor vehicles, such as automobiles, trailers, semi-trailers, or boats, the Utah Division of Motor Vehicles can assist a successor with the proper affidavit. "Money owed to" the decedent includes, for example, bank or credit union accounts that are held in the name of the decedent only, or proceeds of an insurance policy payable to the estate. "Personal property" of a decedent includes, for example, clothing, jewelry, and furniture, held by any person. The person holding the property can be directed to deliver the property to the successor by an affidavit. A "successor" is any person you have named as a beneficiary in your will; if you have no will, your successors are the persons who will inherit under the law of intestate succession, discussed later.

Can I avoid probate?

If you don't own any land, and your estate is less than \$100,000, no probate is required. It is possible to arrange your affairs so there is no estate to probate upon your death. For example, you can give all your property away the day before you die.

You might also arrange that you own everything jointly with someone who you expect will survive you. "Joint tenancy with rights of survivorship" means simply that every person named on the title as your joint tenant who survives you will own the property without it becoming part of your estate. If you and your spouse own your home as "joint tenants", upon your death (if you die first) your spouse will own the home without probate to transfer ownership. The same rule applies to ownership of all things you own, although the law does not usually include the power of joint ownership for such items of property as furniture or clothing or jewelry.

Joint tenancy has disadvantages. If your child owns your bank account with you jointly, the child could take the money and spend it for herself. If a creditor gets a judgment against your child, the creditor could claim the account. If your child dies before you or gets divorced, the child's spouse might become a part owner.

If your child is a joint owner of your home, she could block you from selling it. There are also tax problems: if you give property away, you may be required to file a gift tax return; and if your child (to whom you deeded a joint tenancy) sells your home after your death, the child may have to pay capital gains tax. Probate of your estate including your home avoids the capital gains tax. Using a trust also avoids this tax.

A safer method than joint ownership of monetary/depositary accounts is to designate the accounts to be "Paid on Death" (POD) to named beneficiaries. For example, you can make your spouse a co-owner of your accounts, and designate your children as POD beneficiaries on the account record. After your and your spouse's deaths, any balance in the account will be paid to your children (who need only prove your death and their identities). Your children are not "owners" of the account while you are alive, so none of the children can make withdrawals, nor can their creditors.

Another option is to give all your property to a trust that manages the property for your benefit while you are alive and distributes the property as you direct when you die. Such a trust is often called a "living trust" because you establish it while you are alive. It is also called "revocable" because you ordinarily retain the right to revoke the trust.

If you give your property to a trust, here are some things to think about:

- If the person who manages your trust is also one of your beneficiaries, that person may have conflicting interests. For example, your trust may have to pay for your medical care, which the trustee might not want to do because her inheritance would therefore be smaller.
- A trust does not receive the benefit of the statute of limitations created by publishing a notice to creditors in the same way a probated estate does. Such notices inform all your creditors to file claims within three months or be forever barred.
- If any of your property is not properly given to the trust, there may be an estate that must be probated anyway. Arranging a trust requires careful drafting of all necessary documents. It is helpful to have an attorney prepare the papers. This cost would come out of your pocket, while the cost of a probate is paid by your estate after your death.

Trusts are more useful in some circumstances than others. For instance, if you own real estate in more than one state, probate may be required in each state, so a trust might save money. If your estate is large enough to be taxable, a trust might be used to avoid some or all of the tax.

Dying without making arrangements. What would happen if you die leaving property that requires a probate, but you have no will?

The law of "intestate succession" determines who gets the property of someone who has no testament. Here is what the legislature has provided:

- If only your spouse survives you, your spouse gets the entire estate.
- If only your children (issue) survive you, they get entire estate, split equally among them.
- If both spouse and children survive you:
 - if all your children are children of your surviving spouse, your surviving spouse gets your entire estate. OR
 - if any of your children are children of a person other than your surviving spouse, your surviving spouse gets the first \$75,000 of your estate plus half of the remainder; all your children split the other half.
- If only your parent(s) survive you, your parent(s) get your entire estate.
- If neither spouse, nor issue, nor parents survive you, your estate goes (in the order listed) to: (1) your brother(s) & sister(s) or their issue; (2) your grandparents or their issue.

I want a will but don't want to pay a lawyer to draft one.

If you do not have a will prepared by a lawyer, you can handwrite your own. A will in your own handwriting is valid in Utah on two conditions: (1) the material portions are in your handwriting and (2) you sign it. It is also helpful (but not required) to date the will. A handwritten will should contain: (1) your name (including all other names you have used), (2) your age, (3) your place of residence, (4) a statement that the document is your will, and (5) sentences describing marital status, naming your present spouse, if any, and naming all your children, whether alive, deceased, or

adopted. It is important to name even those children or that child to whom nothing will be left if you want to "leave someone out". To leave someone out, name the person and write: "I leave nothing to [person's name]." Then, simply write who should get what.

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