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Probate and Post-Death Asset Transfers

1. **Probate**

- a. When Probate is **required**:
 - (1) Deceased owned real property with gross value of \$50,000, or more, OR
 - (2) Deceased owned real property and personal property with gross value of \$180,000, or more
 - (3) AND there was No Will, or a Will but no Trust, then probate is necessary
 - (4) If a Trust is not properly funded, probate may be necessary
- b. Advantages of Probate:
 - (1) Probate court supervises administration of assets
 - (2) Protection of:
 - (a) Deceased's heirs
 - (b) Deceased's creditors
 - (c) Federal and state taxing authorities
- c. Disadvantages of Probate:
 - (1) Fees and expenses
 - (a) Attorney fees
 - (b) Executor / Administrator fees
 - (c) Probate Bond fees
 - (d) Probate Referee fees
 - (e) Court costs
 - (2) Delays in distribution and lack of availability of assets to heirs
 - (3) Concern about assets being wasted; possible forced sale of assets
 - (4) Inconvenience of dealing with the court and bureaucracy
 - (5) Probate proceedings are open to the public; not private

2. **Procedures Available to Avoid Probate - Summary**

- a. Community property left outright to spouse
- b. Joint tenancy property left to surviving joint tenant
- c. Employee benefit plans, including pension plans
- d. Irrevocable Trusts
- e. Individual Retirement Account (IRA)
- f. Life insurance
- g. Private Annuities and commercial annuities
- h. Pre-nuptial agreements and Post-nuptial agreements
- i. Powers of appointment, exercised through Will or Trust
- j. Lifetime Gifts to charity or to individuals
- k. Revocable Living Trusts
- l. U.S. Treasury Savings Bonds

- m. Stock brokerage accounts
- n. Totten trusts / TOD and POD beneficiaries
- o. Uniform Gift to Minors Act

3. **Joint Tenancy**

- a. Frequently used for following assets:
 - (1) Bank accounts
 - (2) Securities (stocks and bonds)
 - (3) Residence or other real property (joint tenancy usually between spouses)

CAVEAT: Same effect accomplished with community property with right of survivorship. Joint tenancy has practical problems, and tax disadvantages.
- b. Advantages:
 - (1) Simple for survivor to have property transferred
 - (2) Creditors of deceased joint tenant generally have no claim against deceased joint tenant's interest
 - (3) Available for use by non-married people
 - (4) Useful if asset will decline in value when owned by husband and wife. Survivor's one-half does not get reduced tax basis on valuation date.
- c. Disadvantages:
 - (1) Inflexibility. Joint tenant's rights are determined immediately on signing of instrument. No modification without consent of all joint tenants, or litigation.
 - (2) Independence of new joint tenant is instantaneous. Joint tenant has vested right to sell, mortgage, partition, donate, or transfer joint tenancy interest without consent of donor joint tenant. This destroys the joint tenancy.
 - (3) Incompetency of joint tenant may require conservatorship (inconvenience in sale or transfer).
 - (4) Disputes about management or decision to sell must be resolved by litigation.
 - (5) Will or Trust has no effect on the property held in joint tenancy.
 - (6) The surviving joint tenant must make a plan to pass the asset upon their death
- d. Tax consequences:
 - (1) Between spouses, no present gift on creation of joint tenancy.
 - (2) Joint bank accounts and U.S. savings bonds. On creation of joint tenancy, no gift until noncontributing joint tenant withdraws money or cashes bonds.
 - (3) On death of first joint tenant, only decedent's one-half gets step-up in tax basis for income tax purposes.

CAVEAT: If property is put into joint tenancy for purpose of avoiding probate, a Will or Trust should be used to prevent intestacy and unforeseen acquisitions of property upon termination of a joint tenancy.

4. **Community Property with Right of Survivorship**

- a. Only transfers asset to surviving spouse
- b. Surviving spouse must make a plan to pass the asset as desired upon death
- c. Provides a tax advantage that is not obtained through a joint tenancy – step-up in tax basis

5. **Employee benefits**

- a. Social security
- b. Deferred compensation plans
- c. Employer's Group Life insurance

- d. Qualified profit-sharing plan (watch out for lump-sum distribution)
 - e. Qualified pension plan (watch out for lump-sum distribution)
 - f. Qualified stock bonus plan
 - g. 401(k) plan, 403B, 423 plan (teachers), Keogh plan, SIMPLE plan, SEP-IRA
 - h. Roll-overs into IRAs
 - i. Payments are made to designated beneficiaries
 - j. Added benefit: protected from judgment creditors
6. **Private annuities**
- a. Ordinarily, among family members only
 - b. Risky for economic and tax reasons
 - c. Requires sophisticated legal draftsmanship and evaluation
7. **Pre-nuptial and post-nuptial agreements**
- a. May be appropriate in second and third marriages to protect heirs from prior marriages
 - b. Record keeping required to avoid commingling community and separate property
 - c. Drafting and disclosure – sensitive, often emotional issues
 - d. Transfers of property before death may create gift and estate tax consequences (present interest gift)
8. **Totten trusts**
- a. Definition: A savings or bank account with depositor (Trustor) naming himself as "Trustee for the benefit of [name of beneficiary]"
 - b. Payable of Death ("P.O.D.") accounts
 - c. Depositor owns the account. Beneficiary has no rights while depositor is alive, but receives the money on death of depositor
 - d. Tax effects:
 - (1) Federal Estate Tax: account value is taxed to depositor
 - (2) Gift tax: none
 - (3) Income tax: interest income is taxed to depositor unless the trust is not a Totten trust but one in which the beneficiary has a true equitable interest and is entitled to the income.
 - e. Useful in a small estate, or in an estate consisting entirely of bank accounts
 - f. CAVEATS:
 - (1) Many individual establish such trustee accounts with the idea that this kind of trustee account enables the depositor to get additional federal savings account insurance not otherwise available. Not so.
 - (2) Totten trust may frustrate the depositor's gifting plan, permitting the money in the account to go to an unintended beneficiary, if named beneficiary dies before depositor.
9. **Life insurance**
- a. Life insurance benefits are paid to the designated beneficiary, or beneficiaries
 - b. Use: liquidity for beneficiaries; fund to pay Estate Tax
 - c. Potential problems:
 - (1) Insurance benefit paid increases size of taxable estate for Estate Tax purposes
 - (2) Subsequent marital dissolution--spouse not insurable
 - (3) Lack of insurability
 - (4) Gift of life insurance within three years of death: includable in taxable estate

10. **Power of appointment.** A beneficiary of a will or trust is given power to appoint a different beneficiary.
11. **Power of withdrawal.** Often used in place of automatic distribution to beneficiary of trust. Under these circumstances, the beneficiary may not wish to or may be unable to exercise the power for various reasons, including:
 - a. Experiencing marital difficulties
 - b. Imprudent financial decisions
 - c. Physical or mental incapacity
12. **Trusts (Revocable / Living / Inter Vivos).** Established by Trustor; managed by Trustee
 - a. Advantages:
 - (1) Eliminates probate costs; reduces administration costs
 - (2) Allows easy trust asset management during Trustor's lifetime
 - (3) Assets are usually more rapidly available to beneficiaries
 - (4) Trusts can be used to reduce or eliminate **estate taxes** by allocating assets to 2 separate (A-B) trusts, or to multiple trusts (See Estate Tax System, below)
 - (5) Control distribution of assets (e.g., by age, sobriety/drugs, creditor protection)
 - (6) Reduces legal contest on dispositive (distribution) provisions
 - (7) Eliminates public disclosure of family finances
 - (8) Forced sale of assets is less likely than in Probate
 - (9) Annual Gift Tax exclusion may be used even if Trustor is incapacitated
 - (10) Qualified Domestic Trust (QDOT) extends tax benefits to non-citizen spouse
 - (11) Court supervision available for disputes and for instructions to trustee
 - (12) A professional fiduciary or an institution may be appointed as trustee
 - (13) Should help avoid Court Conservatorship for assets of person who becomes incapacitated; successor trustee steps in during Trustor's lifetime
 - b. Disadvantages:
 - (1) Start-up cost
 - (2) Tax filings if trust becomes partially or totally irrevocable and has income
 - (3) Expense of trustee if trustee is an institutional or professional trustee
 - (4) Asset segregation and avoidance of commingling may be required
 - (5) Failure to properly fund the trust can increase expense or defeat the plan
 - c. Advantages almost always out-weigh disadvantages
 - d. Revocable Living Trust is usually the foundation of an estate plan for individuals and married persons who own real property or have asset of \$150,000 or more
13. **Trust Funding**
 - a. A Trust without assets is of no value
 - b. Procedures to fund a Trust:
 - (1) Real property – deed
 - (2) Corporate stock – change stock title or assign ownership
 - (3) Bank and financial institution accounts – change title with institution
 - (4) Individual investment accounts & annuities - change title with institution
 - (5) Partnership, LLC, REIT, tenants in common – change title or assign
 - c. Common funding problems
 - d. Role of “pour-over” Will
 - e. Assets that typically are NOT transferred to Trust

- (1) Life Insurance
- (2) Tax-Qualified Plans (IRA, 401K, 403B, TSA)
- (3) Pension Plans
- (4) Automobiles

14. **Responsibilities of Successor Trustees**

- a. Incapacitated Trustor:
 - (1) Review Trust and seek professional advice as needed
 - (2) Accept responsibility as Trustee in writing
 - (3) Protect Trust assets
 - (4) Notify banks and other institutions as needed
 - (4) Apply for disability or other benefits
 - (5) Pay Trustor's bills and handle necessary transactions
 - (6) Maintain separate accounts and do not commingle personal funds
 - (7) Keep accurate records and provide accounting if required
- b. Deceased Trustor:
 - (1) Review Trust and seek professional advice as needed
 - (2) Accept responsibility as Trustee in writing
 - (3) Protect Trust assets
 - (4) Obtain EIN/TIN for proper tax reporting
 - (5) Notify banks and other institutions and change titles, or transfer assets
 - (6) Apply for any death benefits
 - (7) Inventory Trust assets and determine values
 - (8) Pay Trustor's bills, administration expenses, and handle necessary transactions
 - (9) Provide notice to beneficiaries and heirs, and keep beneficiaries informed
 - (10) Maintain separate accounts and do not commingle personal funds
 - (11) Keep accurate records and provide accounting to beneficiaries
 - (12) Sell assets as necessary
 - (13) Prepare any necessary tax returns
 - (14) Distribute assets to beneficiaries as instructed in Trust

15. **Common Trusts other than Revocable Living Trusts**

- a. Types:
 - (1) Irrevocable Life Insurance Trust (ILIT), frequently to provide fund separate from estate, especially for payment of estate taxes.
 - (2) Special Needs Trust (SNT), to preserve government benefits for disabled beneficiary
 - (3) Separate Property Trusts
 - (4) Qualified Personal Residence Trust (QPRT) for tax-beneficial gift of home
 - (5) Minor's Trust, usually for support
 - (6) Charitable Trusts, for charitable gifts and tax benefits
 - (7) Grantor Retained Interest Trust (GRIT), Grantor Retained Annuity Trust (GRAT), to minimize taxes
- b. Possible disadvantage if Trust is *irrevocable*: Trust assets cannot be controlled by grantor even if desired due to change in circumstances, whether economic, family, marital, etc.

16. **Charitable Transfers**

- a. Charitable Gift Annuity

- (1) “Gift” of asset to charity in exchange for annuity payments for life
 - (2) Asset may be cash, stocks, real estate
 - (3) Provides donor with immediate charitable income tax deduction
 - (4) Provides partially tax-free payments, usually with higher payment amounts
 - (5) Capital gains tax avoided on appreciated assets
- b. Charitable Remainder Trust
 - (1) “Gift” of asset to charity (remainder interest to charity)
 - (2) Lifetime income options (variable state date, payment percentages, term)
 - (3) Benefits: Bypass capital gain, increased income, tax deduction, flexibility
 - c. Charitable Lead Trust
 - (1) “Gift” of asset to charity reverts back to donor (or family) after term
 - (2) Income from asset during term goes to the charity
 - (3) Benefits: charitable tax deduction and/or estate tax deduction
17. **Lifetime Gifting**
- a. Immediate gifts to charities
 - (1) Are unlimited
 - (2) Charitable tax deduction available up to certain level
 - (3) Reduces value of estate for estate tax purposes
 - b. Immediate gifts to individuals
 - (1) Reduces value of estate for estate tax purposes
 - (2) \$19,000 per person, per year - no tax consequence (annual gift exclusion)
 - (3) Gift of greater than \$19,000 per person, per year – Gift Tax Return required
 - c. Uniform Gift (Transfer) to Minors Act – Bank account for child/grandchild
 - d. 529 Plan – Tax qualified education benefit plan
18. **Estate Tax System**
- a. Tax on value of all assets owned and under person’s control at date of death (real property, personal property, cash, employment benefits, life insurance, etc.)
 - b. Estate Tax exemption amount
 - (1) Currently exemption amount is approximately \$14 million per person
 - (2) Exemption amount is now indexed for inflation
 - c. Tax rate: 40%
 - d. Tax minimizing options:
 - (1) Trust with tax credit shelter provisions (A-B Trust)
 - (2) Irrevocable life insurance trust, and other trusts and planning tools
19. **Asset Protection from Creditors**
- a. Certain assets are exempt from judgments (e.g., employment benefits, life insurance)
 - b. Use of business entities (corporations and LLCs) to manage assets
20. **Avoiding a Conservatorship**
- a. Conservatorship – Court Order; Court supervised process to control:
 - (1) Person – living arrangements, medical care
 - (2) Estate – property and assets owned by the Conservatee.
 - b. Avoid Conservatorship of Person: Advance Health Care Directive
 - c. Avoid Conservatorship of Estate: Power of Attorney, and Living Trust