UPDATE SINCE THIS ARTICLE WAS WRITTEN: ILLINOIS LAW NOW ALLOWS BENEFICIARY DEEDS FOR CERTAIN RESIDENTIAL REAL ESTATE.

Steps to Avoid Probate

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I discussed probate in a previous column. While probate is not the worst thing that will ever happen to a family, and while the process has become easier over the years in some states, probate is still something to avoid if you can.

As I stated in the earlier column, probate is essentially a title-clearing process. Assets that are titled in a person's name at death go through probate in order to be retitled and distributed to other people.

There are two main reasons to avoid probate: it takes time and money. So what can you do to avoid probate?

The answer depends on where you live and the types of assets you own. For example, Missouri recognizes a type of deed called a beneficiary deed, but these deeds are not used in Illinois. Beneficiary deeds allow you to name beneficiaries for your real estate, just like you name beneficiaries for your life insurance policies. The beneficiaries do not have any interest in the real estate while you are alive, but upon your death the real estate passes to them without going through probate. As Martha Stewart might say, "This is a good thing."

In addition to naming beneficiaries for assets that allow you to do so, you can put POD (payable on death) or TOD (transfer on death) designations on some accounts. For example, if a bank allows you to title your account this way, you would be the owner of the account during your life, but upon your death it would pass to the persons you name in the POD or TOD designation without going through probate.

While beneficiary and POD and TOD designations are a good way to avoid probate, they must be carefully used. These designations override what is in your will, so you must be diligent in keeping these designations current. For example, if you divorce, you must be sure to remove your ex-spouse from any of these designations.

Owning property jointly with someone else is another way to avoid probate. Joint tenancy is different than a beneficiary or POD or TOD designation, because the joint tenant owns the property with you and has at least some measure of control over it. I caution parents against naming their children as joint tenants on the parents' financial accounts and real estate. There can be adverse tax ramifications to joint tenancy, but more importantly, the child's creditors (such as a divorcing spouse, a business creditor, or an accident victim) can reach your property. In addition, when all the joint tenants have died, the property is subject to probate.

The best way to avoid probate is to take an inventory of your assets and then determine which are suitable for beneficiary, POD, TOD, or joint tenancy designations. As always, planning ahead will save time and expense in the long run.

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