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QUESTIONS AND ANSWERS ABOUT WILLS AND PROBATE

1. **What is probate administration?**

   The court supervised process of collecting the assets of a decedent, paying his debts, and distributing his assets to his heirs at law or to the beneficiaries of his will.

2. **How does probate affect bank accounts and certificates of deposit held in joint names payable to the survivor?**

   It doesn't. Neither does it affect designations of beneficiaries in life insurance policies, pay-on-death designations, and other contractual arrangements for disposition of property at death. Those assets become the property of the designated payee.

3. **Who is the personal representative?**

   The person appointed by the court to administer the estate. If there is no will, all of the persons entitled to inherit from the decedent have a co-equal right to administer. If there is a will, the decedent usually designates persons or a person to be appointed as personal representative. The term "personal representative" includes "executor" and "administrator."

4. **What property is affected by the probate process?**

   Property and rights to property owned by the decedent not passing to another at death by operation of law or by contractual arrangement.

5. **Does probate require a will?**

   No. Persons dying without a will are said to be "intestate." Their estate is administered in substantially the same way as those of persons who die leaving wills. In such cases, state statutes prescribe how the estate will be distributed.

Reviewed 1/15/2024

6. **Must all wills be probated?**

No. By statute, the person in possession of a will at the testator's death **must** deliver it to the probate court. However, the probate process may not be initiated if there is no property requiring probate. If the property in the estate, less liens and encumbrances (such as mortgages) is less than $40,000, the will may be admitted to probate to establish the validity of the will, but distribution may be by the "Affidavit in Small Estate" procedure rather than by formal administration.

7. **How long does probate take?**

At least 6 months from the date the first notice is published in the newspaper. That is because creditors have six months from that date to file claims against the estate and, if there is a will, persons wishing to contest the will have this period in which to file a will contest. Following the "claims and contest" period, the process **can** be completed very quickly. The actual time required will depend primarily on whether assets must be sold to pay bills or to divide the estate and how quickly that can be done. If all assets that are to be sold have been sold and all bills paid within the initial six-month period, then the final accounting and distribution of assets can usually be accomplished within 30 days to 120 days after expiration of the claims period. On the other hand, it is not unusual for the process to take a year or more.

8. **What are the disadvantages of probate?**

(a) Your estate plan becomes public knowledge;

(b) Administrative costs can be higher;

(c) Distribution usually cannot take place within the first six months;

9. **What are the advantages of probate?**

(a) Court supervision of the sale of property, allowance of claims, and distribution;

(b) Well-established law applies which can guide the responsible party in handling the decedent's affairs;

(c) The Probate Code provides an orderly process for resolving disputed matters;

(d) The Probate Code prescribes priorities for payment of claims, if assets are not sufficient to pay all debts.

10. **How much does probate cost?**

Costs which are unique to probate consist primarily of personal representative's fees, attorney's fees and court costs. The personal representative **and** the attorney for the estate **each** receive a minimum fee equal to the following percentages of the value of personal property administered **and** real estate sole under order of the court:

First $5,000	5 percent ($250)
Next $20,000	4 percent ($800)
Next $75,000	3 percent ($2,250)
Next $300,000	2.75 percent ($8,250)
Next $600,000	2.50 percent ($15,000)
Next $1,000,000	2 percent ($20,000)

If the attorney is also the personal representative, then only **one** minimum fee is paid. If the minimum fee is insufficient, then either the attorney or the personal representative may petition the court for an additional fee. Generally, the **minimum** attorney's fee will be $2,000. Court costs are nominal. Some costs of administration such as brokerage fees, accounting costs, taxes, etc., are not unique to probate.

11. **What property is subject to *inheritance* taxes?**

None in Missouri. Missouri has abolished its inheritance tax and the Missouri estate tax. Property owned by the decedent in other states may be subject to that state's inheritance tax.

12. **What property is included in the taxable estate for purposes of the federal *estate* tax?**

All property passing to another by reason of the death of a decedent. This includes life insurance benefits, property distributed through probate, pay-on-death benefits, property passing through trusts, and property in which the **decedent** retained a life estate. Most of the common methods of avoiding probate do **not** avoid federal estate tax.

However, each taxpayer has a tax credit equal to the tax on an estate of $12,920,000. In addition, all property received by a spouse is sheltered by the marital deduction. If proper steps are taken a surviving spouse can carry the deceased spouses tax credit forward to be added to the surviving spouses tax credit at their death, thereby doubling the exempt amount to $25,840,000. Thus, for most people, federal estate taxes are not a concern.

13. **Who may make a will?**

Any person of 18 years or older.

14. **What constitutes a valid will?**

(a) A writing;

(b) Signed by the person making the will (the testator);

(c) Attested to by two witnesses **in the presence** of the testator.

15. **Is a will, made in Missouri, valid in other states?**

Yes, if it meets the requirements of that state. In addition, Missouri and many other states have statutes which recognize wills that do **not** meet the requirements for wills made in their state if the will was:

(a) Valid in the place where executed;

(b) Valid in the place where the testator was domiciled either at his death or when the will was executed.

However, laws of property, taxation, guardianship and trusts vary from state to state. Therefore, if you change your state of residence or acquire substantial property in another state, it is wise to have your will reviewed by an attorney in that state.

16. **If a testator has more children after making a will, does the will need to be modified?**

Maybe. Most wills are drafted to provide for this possibility and treat afterborn children in the same manner as children living when the will was made. If the will does not have such a provision, Missouri law will, subject to certain exceptions, give the child the same share that the child would have received if the testator had died leaving no will. However, your will should be **reviewed** each time there is an addition to the family.

17. **Must each child be left something in a will?**

No. Not since 1954 in Missouri. Prior Missouri law required naming or providing for all children. Some draftsmen prefer to make a positive statement of intent to omit a child to prevent the argument that the omission was a mistake.

18. **Must a spouse be left something in a will?**

Not necessarily. However, a spouse is entitled to a minimum share of the probate estate equal to one-half of the estate if there are no lineal descendants of the testator or one-third if there **are** lineal descendants.

The "estate" for this purpose is the probate estate, plus all property otherwise derived from the decedent, such as property owned as joint tenants for which the survivor provided no

consideration. The spouse's forced share is offset, however, by the property derived from the estate.

Example: Surviving spouse with lineal descendants who also survive:

Property owned jointly with spouse	$100,000
Probate estate	80,000
Total Estate	$180,000
Forced share = ½ =	$ 90,000
Less offset for property "derived from the decedent"	(100,000)
Forced share =	$0

19. **Does everyone need a will?**

No. Persons who may not need a will are those who meet ALL of the following criteria:

(a) Who have no minor children;

(b) Whose children are all children of the spouse to whom they are presently married; and

(c) Who know what the intestacy statute provides and would be satisfied with that result in all events; and

(d) Who do not wish to make bequests of specific items of property; and

(e) Who have no preferences regarding the type of administration or who performs it.

Those who DO need a will are those:

(a) With minor children;
(b) With stepchildren;
(c) Who wish to make bequests of specific property;
(d) Who wish to name a personal representative;
(e) Who wish to name the guardians of minor children;
(f) Who wish to provide testamentary trusts for minor children or grandchildren;
(g) Who wish to skip generations;
(h) Who would **not** be satisfied with the results of the intestacy statute in all events.

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20. **If I do not make a will, who gets my probate estate at my death?**

Your heirs-at-law. They are determined by the intestacy statute. In **Missouri**, that statute provides that:

(a) The surviving spouse shall receive the entire estate if there are no children of the decedent;

(b) If the decedent is survived by parents or children all of whom are also children of the surviving spouse, the surviving spouse receives the first $20,000 plus one-half of the balance;

(c) If there are surviving children, one or more of whom are not children of the surviving spouse, then the spouse receives one-half of the estate and the children receive one-half of the estate;

(d) If there is no surviving spouse the estate is distributed:

(i) To children or their descendants in equal shares;

(ii) If there are no children, then to father, mother, brothers and sisters and their descendants in equal shares;

(iii) If none of these persons survive, more complicated rules apply.

The intestacy statute of the state where real estate is located will determine the disposition of that real estate. The disposition of all other property will be determined by the laws of the state where the decedent resided at his death.

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QUESTIONS AND ANSWERS ABOUT REVOCABLE TRUSTS

Q: What is a trust?

A: A trust is an arrangement whereby property is held by one party for the benefit of another. The property may be transferred to another person, or the property may continue to be held by the Settlor after declaring it to be held in trust. The person creating the trust is called the "GRANTOR", "SETTLOR" or "TRUSTOR." The person holding the property for the other is called "TRUSTEE." The Settlor may also be a trustee of the trust he has created. If so, the trustees are known as "CO-TRUSTEES." The instrument creating the trust tells the trustee how he is to manage the property being held, and what to do with the property upon the happening of specified events or upon the occurrence of specified conditions.

A trust created in a will is known as a "TESTAMENTARY TRUST." A trust created while the Settlor is living is known as a "LIVING TRUST" or "INTERVIVOS TRUST."

Q: What is a revocable trust?

A: Trusts created after January 1, 2005, that do not provide that the trust is <u>irrevocable</u> may be revoked or amended by the Settlor (creator of the trust). Very few living trusts are made irrevocable. Ideally the trust instrument should specify that the trust is revocable and amendable if that is the Settlor's intention. Most trusts used for estate planning purposes are revocable and amendable by their terms.

Q: Why should a revocable trust be created?

A: The most common use of a revocable trust is to avoid probate. Property placed in a revocable trust during your lifetime is not subject to probate at your death. The trustee owns the "legal" interest in the estate, and title in the trustee survives the death of the Settlor. The death of the Settlor is simply an event requiring certain action by the trustee. Though the directions may be more complex, typical directions require the trustee, or surviving co-trustee to pay all expenses of last illness and death and any other unpaid expenses remaining after the Settlor's death, and to then distribute the balance of the trust property to the beneficiaries that you have designated. In this respect, a revocable trust works much like a will. The difference is the avoidance of some of the costs and formality of probate.
Another benefit of a revocable trust is that it provides a method for management of your business affairs while you are living,if you are disabled or incapacitated. In such circumstances, if most of a person's property is in such a trust, the appointment of a conservator by the probate court can be avoided, along with the attendant cost, publicity, and inflexibility of administration.

Q: Why not just create concurrent estates with right of survivorship, such as joint tenancy?

A: The most common estate plan is creation of concurrent or joint interests with persons whom you wish to receive your property at your death. This arrangement does have the advantage of avoiding probate, in that if the estate is a joint tenancy or tenancy by the entirety, property will pass to the surviving joint tenant at the death of the other joint tenant. The disadvantage, however, is that if the person to whom you wish the property to pass at your death predeceases you, the property will be subject to probate at your death unless another tenant is subsequently added. If you and a joint tenant were to be killed in a simultaneous occurrence, the property would be distributed pro rata to the respective probate estates of each of you. There would be no alternative disposition specified. The survivorship feature can result in property being vested in minors and in duplicate probate. Furthermore, the creation of a concurrent estate is presumed to create a gift. Thus, if you wish to withdraw or revoke the gift, you could be prevented from doing so by lack of cooperation by the other joint tenant.

Q: Why not use pay-on-death or transfer-on-death arrangements for personal property or beneficiary deeds for real estate?

A: These arrangements do avoid probate. However, they do not address the problem of management of your property during periods of incapacity prior to your death. Furthermore, these methods do not offer a convenient method of prescribing alternate beneficiaries or distribution methods in the event of a change in circumstances. For example, a P.O.D. bank account naming an adult child as a beneficiary would not provide a trust for the grandchildren if the adult child predeceased you or was killed in a common accident.

Q: Why not use a Durable Power of Attorney for management of assets during my life?

A: A Durable Power of Attorney is a valuable tool and is a part of many estate plans. However, it cannot provide as complete directions concerning lifetime management as can be provided in a trust, and its authority terminates at death. Only a trust can provide thorough directions regarding management of your assets and expenditures during your life and provide for post-death distributions without probate.

Q: How is a revocable trust taxed for income tax purposes?

A: The income from a revocable trust is taxed to the Settlor. If a Settlor is also a trustee or co-trustee, the trust is disregarded entirely as an income tax entity, and no separate tax identification number is obtained for the trust. All items of income, deduction and credit are simply reported on the individual Settlor's Form 1040. The tax identification number used for trust assets, such as bank accounts, is the social security number of the Settlor.

At the Settlor's death (or at the death of both Settlors if the trust is created by two Settlors), the trust usually becomes a separate tax entity, and a tax identification number is obtained then.

Q: What property is included in a living trust?

A: Only the property that the Settlor specifically includes in the trust, either by describing it in the trust instrument when the trust is created, or by making a proper conveyance into the trust, or by otherwise designating the property as trust property. The trust does not "sweep up" all of the property which you owned at your death.

Q: Will I need a will, too?

A: Yes, a will is needed to direct the disposition of all of the property which you have not placed in trust or which is not passing to other people by reason of survivorship rights or contractual rights or by designation of beneficiaries. If you want all of your probate property to be distributed in the same manner as prescribed in your revocable trust, you should execute a will which directs all of your probate estate to be distributed by the personal representative of your probate estate to the trustee of your revocable trust, who would then distribute your net probate estate along with the property that had originally been placed in trust. This is known as a "POUR-OVER" will, because it "pours over" your probate estate into the trust. The reason for such a will is to insure that your probate estate and your trust property are distributed to survivors in a consistent manner. However, a revocable trust may be established with **different** provisions than provided for in your will. Property passing into the trust through a pour-over will **will** be subject to probate.

Q: How is property put into the trust?

A: Property can be placed in the trust by describing it in the instrument creating the trust, or by any other proper form of conveyance. Real estate can be conveyed to the property by deed from the Settlor to the trustees. Tangible personal property may be conveyed by a bill of sale. Bank accounts may be made a part of your trust by titling them in the correct manner. Your trust may also be made the designated beneficiary of an insurance policy, qualified retirement plan or any other contract right.

For example, the correct title of a trust in which there were two co-trustees might be as follows:

> **"Joe Smith and Bill Smith, Co-trustees under Trust Agreement of Joe Smith dated January 1, 2022**

This might be abbreviated as follows:

> **"Joe Smith and Bill Smith, T'ees u/t/a 01/01/22"**

Any reasonable abbreviation of these forms giving the names of the trustees, making it clear that they hold property as trustees, and sufficiently identifying the trust, would be sufficient, though the longer form is preferred where practical.

Q: What happens to the property held in trust at the Settlor's death?

A: At the death of the Settlor or Settlors, the trust usually becomes irrevocable. The disposition made of the property after that time depends on the terms of the trust. The typical living trust drawn with the primary purpose of avoiding probate would simply provide that the trust continues until all claims against the estate of the Settlor or Settlors had been settled, and all expenses paid, and would then direct the distribution of the remaining trust estate and accumulated income to such persons or other beneficiaries as you might have designated and upon such terms and conditions as might be prescribed.

Q: Who gets the income and principal from the trust while the Settlors are living?

A: Though the income could be paid to anyone that you as Settlor have directed it be paid to, the Settlor of a revocable trust typically directs that all income from the trust is to be paid to him or her in quarterly or more frequent installments. Because the trust is revocable, the income will be taxed to the Settlor whether he takes the income from the trust or not. Furthermore, most revocable trusts give the Settlor the right to withdraw any amounts of principal or any property from the trust at any time upon demand. The trustee or co-trustees may also be authorized to use income or principal for the benefit of the Settlor if the Settlor is unable to spend the income for themselves due to disability, sickness, etc.

Q: What if I want to change my trust?

A: Your revocable trust may be changed at any time. The trust usually prescribes the method of amendment or revocation. The usual requirements would be the execution of a written amendment or revocation which should be delivered to all trustees.

Upon revocation, the property is returned to the Settlor or Settlors. If the trust is simply amended, the trust continues, subject to the amendments. Under Missouri law, your will does not need to be amended just because you amend your revocable trust, even if the will is a "pour-over" will.

Q: Do the trustees get paid for their services?

A: Trustees are entitled to "reasonable fees." The trust instrument should prescribe the fee to be given to the trustee if you expect the trustee to receive a fee. The typical revocable trust does not call for any trustee's fees to be paid even after the trust becomes irrevocable by reason of the Settlor's death. If a bank is serving as trustee, they will expect a trustee's fee. They regularly publish schedules of their trust fees. If you are contemplating the use of a bank trustee, you should inquire of the bank as to their schedule of trustee's fees. They are usually very reasonable considering the services performed.

Q: Who should be trustee?

A: In order to obtain the simplicity desired for income tax purposes and to give the Settlor more control, the Settlor or Settlors should be trustees. In addition, a co-trustee should be appointed who would be able to serve as successor trustee at the death of the Settlor, or who would be able to serve in the event of the disability or incapacity of the Settlors while the Settlors are living. The best choice for a co-trustee would be a bank or trust company because of their professional management services and because they have perpetual existence. However, many people choose a trusted family member of a younger generation to serve as co-trustee. You should remember that a trustee does have considerable powers over your property and will be entrusted with its management in the event of your incapacity, disability, or death. Therefore, you should choose a trustee who is sufficiently trustworthy and who has sufficient managerial talents to handle the job.

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