Estate Planning

Frequently Asked Questions (FAQ's)

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What is probate?

If a deceased person's assets are significant enough and have no surviving joint owner or direct beneficiary, then a court needs to ensure that: (1) those assets get transferred to the appropriate beneficiaries, and (2) any debts that the deceased person had are paid. Therefore, probate is the legal process for transferring a deceased person's assets to their beneficiaries.

The "probate" process requires a probate court proceeding in the county in which the deceased person resided at death or in the case of an ancillary estate, filed in the county and state where the assets are held. It includes tasks such as confirming the validity of a will, identifying heirs, and appointing an executor or administrator who manages the estate on the court's behalf. The appointed person's duties include collecting assets, settling debts and paying claims, and distributing assets to the beneficiaries.

Typically, the Probate Court grants the executor or administrator significant autonomy. However, if disputes or issues arise, the court may provide closer supervision. Probate is the mechanism for the orderly transfer of a decedent's assets to their intended recipients, and it can be streamlined or more complex depending on the nature of the assets, the liabilities, the people, and the level of the court's involvement in the process.

What property is subject to probate? What are non-probate assets?

Probate assets include those assets owned solely by the deceased at death or payable to their estate at death. Probate assets are distributed according to the terms of a will or the rules of intestate succession for people who die without a will. Non-probate assets, like joint tenancy property, beneficiary-designated assets (e.g., retirement accounts and life insurance policies), and trust-owned property, pass to others outside of probate. A will cannot control these non-probate assets unless the deceased person's estate is the default or sole beneficiary. Trust-owned property follows the trust's terms, not the will's instructions. Non-probate assets have their own designated methods of distribution, typically specified in beneficiary designations or trust documents

What is a will?

A will is a legal document that details a person's plans for the distribution of their assets and the care for any dependents post-death. A will typically names an executor, who will be responsible for ensuring that the instructions in the will are conducted as written. Details contained in a will may include instructions for the distribution of all assets subject to probate; the identities of individuals, charities and trusts entitled to distributions post-death; and the appointment of guardians for minor children. A will should also contain instructions for the payment of debts, expenses and taxes following the death.

What are the requirements to make a will?

In Illinois, any person who has attained age 18 and is of sound mind and memory can make a will. In Illinois, a will must be in writing, signed by the testator (or at the direction of the testator by another person in the testator's presence) and attested to in the presence of the testator by two or more credible and disinterested witnesses who must also sign the will.

What is an executor?

An "executor" is an individual or institution named in a will and appointed by the court after a person's death to administer the probate estate. More than one individual or entity can function as co-executors. In some states the executor is called the "personal representative." If a person does not name a personal representative in his or her will, or dies without a will, a representative can still seek to be appointed by the probate court, but Illinois law establishes who has priority in seeking appointment. When the will does not nominate an executor or personal representative, or if there is no will, the person appointed by the court is called an "administrator." In common parlance, the term "executor" may refer to an executor, a personal representative, or an administrator, all of whom have similar duties.

What are the duties of an executor?

An executor's role involves managing various aspects of a deceased person's estate. This includes identifying, securing, valuing, and gathering the assets; managing the assets during the post-death administration period; arranging for the payment of debts, expenses, and taxes; filing any necessary tax returns; accounting to the beneficiaries and other parties with financial interests in the estate; and ultimately distributing assets to the beneficiaries in accordance with the terms of the will. Executors must be appointed by the probate court and then discharged by the probate court upon the completion of their duties. Depending upon the size of the estate, the complexity of the estate plan and the parties involved, it can take anywhere from 1 to 3 years for an executor to complete the administration of an estate. An executor has a fiduciary duty to act in the best interests of the beneficiaries.

What happens when a person dies without a will?

When a person dies without a will ("intestate"), the assets in their estate are distributed pursuant to the "default rules" of intestate succession in the state in which the person resided at death. The rules of intestate succession typically result in the deceased person's assets passing to their surviving spouse and children (including minors) at death, even if that is not consistent with their wishes.

For people who are not legally married and do not have children, the rules of intestate succession provide for the distribution of the assets among surviving family members of the deceased person based on the blood relationship of those family members to the deceased person. If there are no living relatives of a deceased person, their assets may pass to the state. Because the rules of intestate succession follow a predetermined legal hierarchy, they are often inconsistent with the deceased person's wishes. This is especially true for people in committed intimate relationships who are not legally married, people who would prefer to leave assets to some (but not all) of their family members, and individuals who may wish to leave assets to charity when they die.

Without a will, there can also be no nomination of an executor. Instead, an administrator will be appointed by the court in consultation with the individuals entitled to receive assets from the intestate estate. Typically, a surviving spouse will have priority to nominate and/or serve as the administrator. However, if there is no surviving spouse, the responsibility for seeking the appointment of an administrator are shared by those individual family members entitled to a share of the assets with priority given to those entitled to the largest shares.

Who can prepare a will?

A will should be prepared by a qualified attorney whose practice includes estate planning, probate, and trust administration, and who is familiar with the formal execution requirements necessary to ensure the validity of the will. There is no prohibition on preparing one's own will or using an attorney with little or no estate planning experience. However, using an attorney whose practice includes drafting wills and trusts and administering estates and trusts post-death will go a long way toward preventing costly mistakes such as facts or circumstances that could invalidate the will, producing outcomes that are inconsistent with one's wishes, and causing situations that result in additional post-death expenses that could have been avoided.

What is a trust?

A trust is a legal arrangement in which a person (the grantor or settlor) transfers assets to a trustee for the benefit of one or more beneficiaries. Often the grantor of a revocable trust is also the initial trustee and beneficiary. Transferring assets to a revocable trust during life can help prevent those assets from being subject to probate when the grantor dies. The trustee holds and manages the assets for the benefit of the beneficiaries according to the terms specified in the trust document and in accordance with the laws of the state that governs the trust. Trusts can be used to enhance the privacy of a person's estate plan, provide for a more seamless transfer of assets upon disability or death, and allow for more control and flexibility in the post-death administration process. The most common types of trusts used in estate planning are revocable living trusts, irrevocable trusts, and trusts established under the terms of a will ("testamentary trusts").

What is a trustee?

A trustee is a person or entity (such as a bank or trust company) appointed to manage and administer a trust. The trustee is responsible for holding and safeguarding the trust's assets, investing or distributing them pursuant to the terms outlined in the trust document, and ensuring that the wishes of the grantor (the person who established the trust) are carried out for the benefit of the beneficiaries. Trustees play a critical role in overseeing the trust assets and making financial decisions. Trustees must act in the best interests of the current and future beneficiaries of the trust.

What are the duties of a trustee?

Trustees have several important fiduciary duties that they must fulfill in managing and administering trusts. These duties are rooted in a high standard of care and loyalty to ensure that the interests of the beneficiaries and the terms of the trust are properly protected. Among the most critical fiduciary duties of trustees are the following:

- Duty to Administer Trust by its Terms. Trustees must adhere to the specific instructions and terms outlined in the trust document. This includes distributing assets to beneficiaries as directed, managing investments according to specified guidelines, and fulfilling any other conditions specified by the grantor.
- Duty of Loyalty. Trustees must act in the best interests of the beneficiaries and the trust, prioritizing their needs above their own. They should avoid conflicts of interest and make
- Duty of Prudent Administration. Trustees must manage the trust assets with reasonable care, skill, and caution.

This includes making prudent investment decisions and considering the overall goals and circumstances of the trust.

- Duty of Impartiality. If a trust has multiple beneficiaries, the trustee must treat all beneficiaries fairly and impartially. This includes considering the needs and interests of each beneficiary, including future beneficiaries, when making decisions.
- Duty to Keep Trust Property Separate. Trustees must keep trust assets separate from their personal assets and the assets of other trusts. This separation ensures proper accounting and prevents commingling of funds.
- Duty to Inform and Account. Trustees must keep beneficiaries informed about the administration of the trust. This includes providing regular updates, responding to beneficiary inquiries, and providing an annual account of trust activities.

What is the difference between revocable trusts and irrevocable trusts?

With revocable trusts, the grantor (the person who creates the trust) retains the ability to modify, amend, or revoke the trust during their lifetime. The grantor can also add assets to a revocable trust after its creation or remove assets from the trust if they so choose. Assets held in revocable trusts remain a part of the grantor's estate for federal and state estate tax purposes. However, revocable trusts can provide an efficient structure to minimize estate taxes after the grantor's death.

Irrevocable trusts can be funded with gifts of cash or other assets and typically cannot be amended or changed by the grantor or anyone else except under limited circumstances. The grantor also relinquishes control over assets placed in an irrevocable trust because the trustee is required to manage those assets exclusively for the benefit of the beneficiaries. Irrevocable trusts may offer potential gift and estate tax advantages, especially if structured appropriately, as the assets in irrevocable trusts may be exempt from estate tax upon the grantor's death. However, the creation of an irrevocable trust or annual gifts that may be required to pay premiums may require the grantor to file a federal gift tax return in the year in which the irrevocable trust is created and funded or in a subsequent year when gifts are made, if the premiums require a gift larger than the annual exclusion amount in any given year and the withdrawal rights in the trust are limited to the donor's annual exclusion amount. Irrevocable trusts can also protect assets from the claims of the creditors of the trust beneficiaries.

What is a guardian?

There are two types of guardians: a Guardian of the Estate, and a Guardian of the Person. The same person can serve as both types of guardians, or a different guardian can be appointed for each purpose.

A Guardian of the Estate is a person or entity appointed by a court to be responsible for managing and making decisions related to the financial affairs and assets of a minor or a person with a disability. This may include managing investments, paying bills, and ensuring the individual's financial needs are met.

A Guardian of the Person makes decisions concerning the personal and healthcare needs of the minor or person with a disability. This includes decisions related to medical care, education, and general well-being.

The appointment of a guardian is often necessary when a minor inherits assets or when a person with a disability lacks the legal capacity to manage their own affairs. The guardian's role is to act in the best interests of the individual they are appointed to protect, making decisions that promote their welfare and financial security.

What is a Durable Power of Attorney for Property?

A Durable Power of Attorney for Property is a legal document that grants someone the authority to manage the financial and property affairs of the person creating the document, often referred to as the "principal." The term "durable" indicates that the power of attorney remains in effect even if the principal becomes incapacitated. The person appointed by the principal to act on their behalf is known as the "agent" or attorney-in-fact. The agent has the authority to make financial decisions, manage property transactions, and manage other related matters. The document may also outline the specific powers granted to the agent. The principal can tailor the scope of authority based on their preferences and needs, and the principal can also revoke or amend the power of attorney if the principal has the mental capacity to do so. A Durable Power of Attorney for Property is an essential component of comprehensive estate planning as it provides a mechanism for the management of financial affairs in the event of the principal's incapacity. It also offers a practical way to ensure that someone trusted is authorized to oversee important financial matters on behalf of the principal when needed.

What is a Durable Power of Attorney for Health Care?

A Durable Power of Attorney for Health Care, also known as a health care proxy or a medical power of attorney, is a legal document that allows an individual (the "principal") to appoint another person (the "agent" or "health care proxy") to make medical decisions on their behalf if they become unable to do so due to incapacity. The primary purpose of a medical power of attorney is to grant the agent the authority to make health care decisions for the principal when the principal is unable to communicate or make decisions for themselves. This can include decisions about medical treatment, surgery, medication, and other health-related matters. A health care power of attorney may also include instructions or preferences regarding end-of-life care, organ donation, and other important medical decisions. The principal can also include guidance on the types of treatment they wish to receive or avoid. A Durable Power of Attorney for Health Care is an essential aspect of advance planning as it allows individuals to appoint someone they trust to make critical medical decisions on their behalf if they are unable to make those decisions on their own. It is also an opportunity to provide a clear directive for their wishes prior to becoming incapacitated.

What is the difference between a Living Will, a Practitioner Order for Life-Sustaining Treatment (POLST) and a Power of Attorney for Health Care?

An Illinois Living Will is a written declaration that instructs your physician to withhold or withdraw death delaying procedures in the event you have or develop a terminal condition. No agent is involved and the document is limited in scope to this circumstance.

A Power of Attorney for Health Care (see above FAQs for more detail) is a written agreement where you (the "principal") grant powers to another person (the "agent") to make specified personal and health care decisions for you. A Power of Attorney for Health Care could permit an agent to request to withhold nutrition and/or hydration whereas a Living Will does not permit a physician to withhold nutrition and/or hydration.

A properly executed POLST permits a person to direct when and under what conditions resuscitation should be attempted and what type of medical intervention and/or care should be provided in cases in which the person is unable to communicate on their own. Proper execution of a POLST requires both a witness and the signature of a licensed medical practitioner.

Do I need a Living Will if I have a Power of Attorney for Health Care?

The Illinois Power of Attorney Act provides that if the principal has a Living Will created under the Illinois Living Will Act, the Living Will is not operative so long as an agent is available who is authorized by a Power of Attorney for Health Care to deal with the subject of life-sustaining or death delaying procedures on behalf of the principal. If the principal would like to have both a Power of Attorney for Health Care and a Living Will, the principal should consider contacting a legal advisor to discuss the interplay between these two documents.

What is an organ donation? How do I make an organ donation?

In Illinois, any individual who is of sound mind and who has attained the age of 18 may direct the donation of all or any part of his or her body ("donor") at death to an appropriate institution or individual for medical or dental research, education, therapy, or transplantation. A gift of all or part of a person's body may be made by a will or by another written, signed document other than a will. A written, signed document other than a will may be part of the donor's driver's license or it may be a separate card or form completed by the donor. The statutory Illinois Power of Attorney for Health Care form also allows a person to indicate whether he or she would like to be an organ donor. The donor may also make an effective gift of all or any part of his or her organs or tissues by consenting to have his or her name included in the First-Person Consent Organ/Tissue Donor Registry maintained by the Illinois Secretary of State. The web site for the Illinois Secretary of State's organ/tissue donor registry is www.LifeGoesOn.com.

What is Joint Tenancy?

When individuals own property together in joint tenancy with rights of survivorship, each co-owner has an equal share of the property and survivorship rights. Two-person joint tenancies are generally treated as a 50/50 ownership split for estate tax purposes, and similarly all three-person joint tenancies are treated as divided in thirds. Each joint tenant has the right to use the entire property or, in the case of a jointly owned account, to withdraw the entire value of the account. Rights of survivorship mean that a deceased co-owner's share is automatically divided and transferred in equal shares among the surviving joint tenants. For example, Mai, Jan, and Ted own a house as joint tenants. Upon Ted's death, Ted's one-third share would automatically be split evenly between Mai and Jan. Mai and Jan would then own the house 50/50, as joint tenants. Upon Mai's subsequent death, if Jan survived Mai, Jan would be the sole owner of the house. To own property as joint tenants with rights of survivorship, all owners share the asset in equal proportions.

What is Tenancy by the Entirety?

Tenancy by the Entirety (TBE) is similar to Joint Tenancy With Rights of Survivorship (JTWROS), but with some additional features. First, TBE, in Illinois and in many other states, is only available to married couples and only for ownership of the couple's primary home. As with JTWROS, upon the death of one spouse or party to a civil union, the surviving spouse or surviving party to a civil union would own the entire house. The extra benefit TBE provides is a limited amount of creditor protection: if the transfer into TBE was not done to defraud existing creditors, a creditor of just one spouse (or party to a civil union) cannot force the sale of the house to repay the debt owed to the creditor unless the other spouse or party to a civil union is also liable for the debt. After the death of one spouse or party to a civil union, TBE is terminated, and the property is owned individually by the surviving spouse or the surviving party.

What is Tenancy in Common?

Tenancy-in-common is "a shared tenancy in which each holder has a distinct, separately transferable interest." For example, if three individuals own a parcel of land as tenants-in-common, each person would have a distinct and separate, transferable interest in the property. Additionally, it is possible to have different percentage ownership interests, such as 50%, 30%, and 20%.

What are Payable on Death (POD) and Transfer on Death (TOD) accounts?

In Illinois, an owner of a bank or security account may transfer the account to one or more beneficiaries upon his or her death by using a "payable on death" ("POD') or "transfer on death" ("TOD") designation. POD accounts may be used to transfer assets held in a bank, savings and loan, or credit union to a beneficiary. TOD registration is used exclusively for securities and investment accounts. At the owner's death, the named beneficiary becomes the owner of the POD or TOD account without having to go through probate. POD and TOD accounts allow the owner to retain control over the entire account during the owner's lifetime; the owner can cancel or change the beneficiary without notifying the beneficiary. A person can open a new POD or TOD account or convert an existing account to a POD or TOD by contacting their banker, broker, or financial advisor for the proper forms.

What is a Transfer on Death Instrument for Residential Real Estate?

Commencing on January 1, 2012, Illinois allows for the transfer of residential real estate by beneficiary designation in a form of deed called a "Transfer on Death Instrument." Special rules apply to the form of the deed and the acceptance of the real estate by the beneficiary after the death of the owner. Like the POD and TOD, the owner retains control over the real estate and can cancel or change the beneficiary without notifying the beneficiary. The primary benefit to using this document is it is another way to avoid probate with the transfer of title / ownership of the residential real estate.

What is the federal gift tax?

The federal gift tax is a tax imposed on certain lifetime transfers of assets from an individual owner to another individual, to a trust, or to a charity, if the total lifetime transfers by an individual exceed a certain threshold. The federal gift tax is determined based on the fair market value of the transferred assets on the date(s) of the gift(s). Certain gifts are excluded from the federal gift tax based on the nature or relationship of the recipient of the gift. For example, gifts to spouses and qualified charities are typically not subject to federal gift tax. As mentioned previously, federal gift tax law provides that every person in the United States can give away a generous but limited amount of assets during their lifetime or upon their death before incurring any federal estate or gift tax on such transfers. This amount, known as the lifetime federal estate and gift tax exemption, is set by federal law, and is currently subject to annual adjustments. Individuals who are able to make large gifts during life or at death should consult with a qualified estate planning attorney to help structure those gifts.

What is the federal estate tax?

TThe federal estate tax is a tax imposed on the transfer of all the assets that a person owned or controlled on the date of their death. If the combined value of the assets owned or controlled by a deceased person at death exceeds the amount of their available lifetime federal estate and gift tax exemption, then the federal estate tax will be due and payable within nine months of the death. As noted above, the lifetime federal estate and gift tax exemption is set by federal law. Currently, the amount of the federal estate tax exemption available for use at death is the total exemption amount available in the year of death reduced by the value of any taxable gifts made by the deceased person during their lifetime.

Generally, the federal estate tax is assessed based on the value of all property that the decedent owned or controlled at death (sometimes referred to the "gross taxable estate"), including, but not limited to, probate assets, assets held in revocable living trusts, jointly held property, and assets that are payable or transferrable on death, such as retirement account assets, non-retirement account assets, life insurance proceeds and real estate. Note that in addition to the applicable lifetime federal estate and gift tax exemption, transfers on death to surviving spouses and qualified charities may also be exempt from federal estate tax. Federal estate tax liability may also be reduced based on debts owed as of the date of death as well as by the deduction of certain administrative expenses incurred as a direct result of the death.

Do individual states impose estate or inheritance taxes at death?

Currently, 12 states and the District of Columbia impose a state estate tax on the estates of individuals who reside in any of those states at death, or in some cases, own property that is physically located in those states. In Illinois, a state estate tax is assessed based on the value of all property owned or controlled by an Illinois resident at death with an aggregate fair market value that exceeds $4 million as of the date of death. Like the federal estate tax, Illinois estate tax law provides exemptions for gifts to spouses and qualified charities. Illinois estate tax liability can also be reduced by debts owed at death and deductions for certain post-death administration expenses. However, calculating the amount of Illinois estate tax owed at death is complicated because Illinois estate tax liability is based on a formula for determining the amount of a federal estate tax credit for state estate taxes that no longer applies under federal law.

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