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PROBATE VS. NONPROBATE PROPERTY

When creating an estate plan, it is important to understand the difference between probate and nonprobate property. When you die, the assets you own will be distributed depending on what type of assets they are and how you own those assets. A basic understanding of probate and nonprobate assets can help make sure your intentions are carried out upon your death.

Probate Property

Probate is the process by which a court monitors the administration and ultimate distribution of a decedent's probate estate. Distribution of a decedent's probate property is governed by the decedent's will or by Maine laws of intestacy if the decedent did not have a will. The probate court appoints a personal representative who has authority to transfer the probate assets to the intended recipients.

Probate assets might include:

- Tangible personal property, such as jewelry and furniture;
- Motor vehicles or other recreational vehicles titled in the sole name of the decedent;
- Real property owned solely by the decedent or as a tenant in common with others;
- Bank accounts owned solely in the name of the decedent (including accounts on which another may have had merely signature authority or involvement as an agent); and
- Any other property, asset, or interest owned by the decedent that requires involvement of a personal representative in order to transfer it to the intended recipients.

Nonprobate Property

Nonprobate property is also property the decedent owned or controlled at the time of his or her death, but nonprobate property transfers after death as a matter of law or pursuant to a contract. These assets are said to bypass the court process, and involvement of a personal representative appointed by a probate court is not necessary to pass the title. The decedent's will does not control the distribution of nonprobate property unless the decedent directed any death benefits to his or her estate.

In general, nonprobate assets are those that are jointly owned, controlled at death by beneficiary designation, or owned in trust. These might include:

- Tangible personal property or real property owned in joint tenancy with rights of survivorship;
- Bank accounts or other property jointly in two or more names;
- Accounts that are payable on death (POD) or transfer on death (TOD) or for the benefit of another;
- Motor vehicles or recreational vehicles titled jointly in two or more names; and
- Life insurance, annuities, retirement assets, and other accounts or assets with a named beneficiary (other than the decedent's estate).

In some states, the probate process is more onerous and expensive than in other states. In states where the probate process is generally complicated, time-consuming, and expensive, individuals often work with attorneys to avoid probate. Sometimes this is done through creation of a revocable living trust into which the individual transfers assets during life that would otherwise be part of his or her probate estate at death. Upon the settlor's death, the assets held in the revocable living trust pass by the terms of the trust, as nonprobate assets.

Conclusion

Should you plan to avoid probate at the time of your death? Discuss this with an estate planning attorney who will consider the nature of all of your assets and help you tailor your legal documents to meet your personal estate planning and distribution goals.

4/1/18

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