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“Tip of the Month”

The Living Trust Avoids Probate

In 1980, an estate planning consultant wrote How to Avoid Probate. Author Norman Dacey was not a lawyer and he did not like the way some lawyers got big legal fees for probate work.

Mr. Dacey popularized the revocable living trust as a method to avoid probate. The living trust had been around for a very long time, but it was being used only by the wealthy. Mr. Dacey showed that anyone could use the living trust as a will substitute. The trust is not just for the rich.

How does the living trust avoid probate? First, it helps to understand that probate is a mechanism for transferring title to the property of the deceased, such as real estate, bank accounts and investments. After all the bills of the deceased are paid, the probate court will distribute the rest of the estate to the beneficiaries of a will, or according to statutes if the deceased does not have a will. This takes a while.

The living trust avoids probate because the trust owns the property, not the deceased. The owner of the property (the grantor) is also the initial trustee of the trust. She transfers the house to herself as trustee with a new deed. Now the trust owns the house. The grantor also puts her bank accounts into the trust. When the grantor dies, the successor trustee takes over. The trust lives on when the grantor dies. There is no need to transfer title in probate.

Even though the trust owns the property, the trustee still has full control over the property. That is because the trust is revocable, which means changeable. The grantor as trustee could cancel the trust if she wanted. The grantor can do whatever she wants with the trust property. She could spend it all.

Avoiding probate means that the administration of this estate can be faster and more private. In New Hampshire, probate must remain open for at least six months. This is to allow creditors and claimants time to come forward. The probate court publishes in the newspaper a public notice that the estate is open. Anyone can look at the probate file. It is a public record.

In probate, the person who administers the estate is called the fiduciary. (A trustee is also a fiduciary.) In probate, the fiduciary has to apply to the court to be appointed. The court will require that the fiduciary post a bond to insure faithful performance. All this must be done before probate is even opened to start the six-month period. Until the case is closed, the fiduciary will have to get permission from the court to transfer or distribute any of the estate. Some people do not like the delay and expense.

The living trust is a private document, like a contract. When the grantor dies, trust administration does not involve a probate file that is a public record. The trustee needs not post a bond or get permission from the court to take action. As a fiduciary, the successor trustee is held to the highest standard of care in fulfilling the grantor's wishes as spelled out in the trust.

Probate has improved a lot since Norman Dacey wrote his book. Probate is easier than before, but the revocable living trust is still very popular, and not just because of probate.

If you have any questions about wills, trusts or the probate process, please feel free to give us a call at 668-1971 or contact us through the Internet at *Meslaw @ aol.com*.

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