HOW TO AVOID THE PITFALLS OF PROBATE

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A. You Don't Plan to Fail - You Fail to Plan

1. Do you have a will?

If you do not have a properly executed will which disposes of your assets upon death, then the state intestacy laws will determine the distribution of your estate and who administers your estate.

Wills do more than dispose of property and appoint a Personal Representative to handle your estate. Other considerations for the will would be to address the need for a testamentary trust for minors, guardians for minors, charitable bequests, allocation of estate taxes, marital trusts, bond requirements and limiting compensation of the Personal Representative (PR), and giving the PR the authority to sell assets especially real estate.

Once you have a will, you need to inform your attorney and the appointed Personal Representative and the alternates where your original will is located. The original will must be turned into the Probate Court after death. However, if all testate and intestate heirs agree that the original will was lost then a copy may be probated. If you place your will in a safe deposit box then keep a copy at home with the location of the safe deposit box. By law, the named Personal Representative may have access to the safe deposit box for the sole purpose of retrieving the will. You must have proof of death and you must be the named Personal Representative or alternate Personal Representative.

If you do have a will – have you had a Will Checkup lately? The tax laws have changed tremendously over the last 10 years and the plan that may have looked good back in the 1990s may not be the plan of 2004. Life changing events should prompt you to take a look at your documents and give an attorney a call.

2. Do you have a Durable Power of Attorney?

A Durable Power of Attorney (DPOA or POA) is a very powerful tool for appointing an agent to act on one's behalf. The document spells out the authority of the agent and can be broad or limited in powers. You must absolutely trust the person that you name as your agent because they are given unlimited powers to act on your behalf and the document usually takes effect immediately unless there is a "springing power" in the document. A Durable Power of Attorney must be filed or recorded in the Register of Deeds office of your county of residence. The document should not be acknowledged absent evidence of it being filed or recorded. Accounts created by the POA should be set up as an individual account not a joint account with right of survivorship. For example, the account should be titled "Mary Smith by Jane Smith as POA" and not "Mary Smith and Jane Smith."

What makes the POA durable? If the POA does not specifically address the future incapacity of the principal then the agent's powers stop at incapacity. Therefore, you must have the "magic" language that states that the authority to act on behalf of the principal lasts through incapacity.

Examples of powers include: handling banking transactions; buying and selling property or assets; settling claims; filing lawsuits; entering into contracts; filing tax returns; applying for government benefits. Note: Gifting powers must be specifically addressed in the document.

Inform your agent of the appointment and where you will keep this important document.

If you do not have a Durable Power of Attorney, when you become incapacitated there will be no one in place to manage your affairs. Your family will have to petition the Probate Court in your county of residence and begin a legal action to have a Conservator and Guardian appointed to manage the assets. This is costly because an attorney must represent the petitioning party and another attorney is appointed by the Court to represent the incapacitated adult. The Court will also appoint two (2) examiners and a visitor to evaluate the incapacitated adult and report to the Court.

3. **Do you have a Health Care Power of Attorney?**

A HCPOA is a document that allows you to designate an agent who will have the authority to make health care decisions on your behalf if you are unconscious, mentally incompetent, or otherwise unable to make such decisions.

If you do not have a Health Care Power of Attorney, when you become incapacitated there will be no one in place to make health care decisions for you and the Court will need to appoint a Guardian. The HCPOA is a state provided form and a sample can be found at www.richlandonline.com/departments/probate/forms/Healthcare.pdf.

Every time you go to the hospital, you should take a copy of your Health Care Power of Attorney. You should also give a copy of this document to your named agents and all medical providers.

3. Do you have a Living Will?

The Living Will (also known as a Declaration of a Desire for a Natural Death) addresses only two medical situations during the dying process. Two physicians must declare that you are either terminal and will die within a reasonably short period of time if life sustaining measures are not used or persistent vegetative state. If you have a strong desire not to receive life sustaining treatments when death is imminent then you are placing a huge burden on family members at a very difficult time without this document. In addition if you have strong desires to receive life sustaining treatments you should also execute this document. This is a state provided form, and a sample can be found at www.richlandonline.com/departments/probate/forms/Livingwill.pdf.

Every time you go to the hospital, you should take a copy of your Living Will. You should give a copy of this document to all medical providers as well.

B. Estate Taxes: Who Pays Them and How Much???

Have you addressed the possibility of estate taxes in your estate planning?

The current threshold for a taxable estate is $1,500,000 and will continue through December 31, 2005. Your taxable estate includes everything that you own or have a right to ownership in. This includes but is not limited to real estate, stocks and bonds, cash, receivables, life insurance that you own and designate the beneficiary on, 401(k), IRAs, pension and profit sharing plans, trust that you are the beneficiary of and have control over the disposition, automobiles, boats and personal and household effects.

If you know that your estate will be over $1,500,000.00, you can address reducing estate taxes during your lifetime by setting up gifting plans and at death by having an estate plan that utilizes funding of a unified credit shelter trust to dispose of $1,500,000.00 estate tax free to someone other than your spouse. Spouses can give each other an unlimited amount of assets estate tax free because there is an unlimited marital deduction, but you don't want to overload a spouse's estate and pay estate taxes at the second death if you can avoid estate taxes all together. Annual gifting exclusion is $11,000 per donee and $22,000 for married couples per donee.

C. The Best Laid Plans Down the Drain

You can have an absolute foolproof estate plan, but sound planning can be destroyed by improper titling of assets and the failure to understand the difference between Probate and Non-Probate Assets. Probate Assets are the assets in the Decedent's name at death and which are controlled by the Decedent's Will. Non-Probate Assets are those assets that by operation of law go directly to someone upon death and the will does not control the disposition. For example, real property owned by husband and wife as "Tenants in Common" would be a probate asset and one-half of the value would be includible in the husband's estate and controlled by the will. Real property that is owned by husband and wife as Joint Tenants with Right of Survivorship will automatically go to the survivor and the will cannot control the disposition. Other examples of non-probate assets include: life insurance with a beneficiary designation other than one's "estate"; 401(k), IRAs, pension plans, Payable on Death (POD) accounts; trusts; bank accounts that are JTROS.

Most common mistake is to create a revocable living trust, but failing to title the assets in the name of the trust. If you are successful in titling all of your assets in the name of the revocable trust, you can avoid probate because the trust assets will be non-probate assets. You may forget about a certain asset and not title it in the name of the revocable trust and therefore, not avoid probate at all. Setting up a revocable trust will not allow you to avoid creditors or estate taxes, but it does allow some privacy, as it is not filed with the probate court for public review, unlike a will.

D. BEWARE OF JUMPING ON THE BANDWAGON TO AVOID PROBATE

There is a steady stream of discussion about "Avoiding Probate." In SC, the probate fees are nominal compared to states such as NY and CA where the fees can be as high as the estate tax rates of 50%. A probate fee schedule can be found at www.richlandonline.com/departments/probate/fees.htm. There should be a proper motivation for "avoiding probate" such as privacy issues, continuity of a business, management of assets or ownership of real property in more than one state. Probate typically takes from one to two years, and the assets are not frozen by the probate process. There is a fiduciary in charge called a personal representative and that fiduciary has a duty to the heirs and the creditors to follow the wishes of the Decedent and the law of priorities of distributions among the creditors & heirs.

The most common tool to avoid probate is the use of a Living Trust. A Living Trust is typically revocable, meaning that you can change the terms of the trust, add assets to the trust and remove assets from the trust during your lifetime. If you are successful in titling all of your assets in the name of the revocable trust, you can avoid probate because the trust assets will be non-probate assets. There are inherent problems or misconceptions with a revocable trust. You may forget about a certain asset and not title it in the name of the revocable trust and therefore, not avoid probate. Setting up a revocable trust will not allow you to avoid creditors. A revocable trust will not allow you to avoid estate taxes. A revocable trust does allow some privacy, as it is not filed with the probate court for public review, unlike a will.

Use of "Joint with Right of Survivorship":

Titling real estate as "joint with right of survivorship" will allow the real estate to pass directly to the survivor without going through the Probate Process, but will it accomplish your estate plan. Titling brokerage accounts or stocks as "joint with right of survivorship" will accomplish this same goal. Ask the question: will it overload the spouse's estate at the second death. A potential problem can occur if your estate will be over $1,500,000.00 and you title property as "joint with right of survivorship" to avoid probate. You could be setting up a situation for the loss of a unified credit deduction that you may need. If the surviving spouse dies and the estate is still over $1,500,000.00, whoever would inherit at that point, typically children, would pay more estate taxes. Be aware of this before you title property as "joint with right of survivorship."

Most banks recognize joint accounts as having an automatic joint with right of survivorship without the particular language. For automobiles and boats, if the title reflects Mr. Smith "or" Mrs. Smith, "or" will be recognized as designating the survivor as receiving, where "and" will be recognized as designating tenants in common where each person owns 50% of the property.

Finally, beware of the use of titling Certificates of Deposit or other cash account Jointly with Children:

It is very common for the surviving spouse to use JTWROS accounts as a tool to allow children to assist with management of funds for an elderly parent or as an equalizing tool. If you have the financial ability to not need any of these assets, everything will be fine. However, inevitably you will need to cash an account out or withdraw some amount. Therefore, the accounts at death will be unequal and will cause great discord among the children. The better way to address the management of assets is to execute a Durable Power of Attorney. To equalize your estates, leave a will or a trust that makes equal distributions of all assets.

E. INSURANCE AND BEQUESTS TO MINORS AND THE PROBATE COURT'S INVOLVMENT

I discourage you from ever naming a minor as outright beneficiaries in a will, of life insurance, of retirement accounts or annuities.

In SC, if a minor child receives an amount over $10,000.00 outright, a conservatorship proceeding will be necessary. This is costly litigation that involves the Court monitoring the assets until the child is 18 years of age. The child will receive the assets outright at eighteen (18). A conservatorship hearing will be held and the Court will select an appropriate fiduciary to handle and invest the funds conservatively until final distribution of the assets at eighteen. This can absolutely be avoided by setting up a trust for minor.

F. DON'T TRY THIS AT HOME

The disclaimers that run across the screen when watching reality shows with crazy stunts should be flashing on the screen when an individual attempts to download estate planning documents from the internet. Yes, you can purchase all of these documents online or in a store, but you will be creating a costly problem for your family. Seeking the advice and help of an estate planning attorney is critical to help you protect your assets, avoid costly litigation and avoid the probate process altogether.

You would not perform a medical procedure on yourself so why would you attempt to prepare legal documents?

PROBATE 101
PROCEDURES FOR PROBATING ESTATES

Once a Personal Representative has been appointed, the following information concerning the statutory requirements of administering an estate could be helpful. The staff of the Probate Court will be happy to furnish assistance and information.

1. NOTICE TO CREDITORS

Immediately after appointment, the Personal Representative is required to publish the Notice to Creditors. Publication is to be once a week for three weeks. Here in Richland County, the Court handles this for you. Publication is in The Columbia Star or The State and the fee for advertising is included in the initial filing fee, which was paid when the estate was opened. The Personal Representative may also provide actual notification to creditors. The time period for filing claims is eight months from the date of first publication of the Notice to Creditors or sixty days from actual notification, whichever is later.

2. INFORMATION TO HEIRS AND DEVISEES

Within 30 days after the appointment, the Personal Representative must give information of their appointment and the probate of the will, if applicable, to all heirs and devisees. These are the persons named in the will and those who inherit if there was no will. FORM 305PC, Information to Heirs and Devisees, along with an original completed FORM 120PC, Proof of Delivery, must be filed with the Court. If you use a different manner of giving notice for different persons, please indicate such on the Proof of Delivery.

3. INVENTORY AND APPRAISEMENT

Within 90 days after the appointment, the Personal Representative must file with the Court FORM 350PC, the Inventory and Appraisement. The Personal Representative is to list and value all property owned by the decedent at death including property owned with another person. The Personal Representative may employ appraisers to assist in determining fair market value on date of death but they are not required. Take care to discover, list and value all property or delays may be encountered in closing the estate.

4. CLAIMS

Eight months after the first publication of the Notice to Creditors or one year after the decedent's death all claims against the decedent's estate are barred. Proceed to pay allowed claims. If the assets of the estate are insufficient to pay all claims in full, payment is to be made in the following order:

1) costs and expenses of administration, including attorney's fees, and reasonable funeral expenses;
2) reasonable and necessary medical and hospital expenses of the last illness of the decedent;
3) debts and taxes with preference under federal law;

4) debts and taxes with preference under other laws of this state, in the order of their priority; and
5) all other claims.

Also, while a Personal Representative may pay debts or claims at any time, you may incur personal liability if any preferred creditor is damaged or injured by such payment.

5. SELLING REAL ESTATE OWNED BY THE ESTATE

If the real estate is needed to satisfy creditors claims, the Personal Representative can only sell the real estate, if this power is given to them in the will. If there is no will, the Personal Representative must receive Probate Court approval before this can be done. This can be accomplished by the use of FORM 430PC, the Petition to Sell Real Estate.

6. DEED OF DISTRIBUTION

If there is real estate in the estate, FORM 400PC, the Deed of Distribution, must be completed. The property needs to be transferred out of the decedent's name to those who inherit it. It is suggested that this not be done until all claims are received and it is determined that the real estate does not need to be sold to pay the debts. You need to file the original of the completed form along with a check or money order for $10.00 with the Probate Court. You will also need to send a self-addressed postage paid envelope with your deed and recording fee. If the property is in another county, you will first need to file certified copies of the administration from Richland County in the Probate Court where the real estate is located. The Personal Representative would then forward the deed to the appropriate office for recording. Upon receipt of a recorded deed, you should first make a copy and send it to your assigned estate clerk in Richland County. You should then deliver the deed to the new owners of the property.

7. ACCOUNTING AND PROPOSAL FOR DISTRIBUTION

One year after the first publication of the Notice to Creditors (or, if this is a taxable estate, 90 days after receipt of the state or federal tax closing letter), you must file a complete accounting of the entire administration listing the beginning balance as shown on Schedules B, C, D-1, F and I (if no named beneficiary) of the Inventory and Appraisement, plus assets received during the course of administration and what amounts or assets were paid out or distributed. The Personal Representative will complete Accounting Form 361PC. You must also file your Proposal for Distribution (FORM 410PC) indicating what you intend to do with any remaining assets.

8. PETITION FOR SETTLEMENT

With the accounting and the proposal for distribution you must file FORM 412PC, Petition for Settlement. You should complete the form as applicable except Item 5E must be completed to ask for the estate to be closed.

9. NOTICE OF RIGHT TO DEMAND HEARING

Any interested person has the right to demand a hearing concerning any matter covered in the Accounting, Proposal for Distribution or the Petition for Settlement.

You must send a copy of your Accounting, the Proposal for Distribution (if applicable) and the Petition for Settlement to everyone who is a distributee, and to known creditors or claimants whose claim has not been paid nor barred along with a Notice of Right to Demand a Hearing. Proof that you have sent these documents must be furnished to the Court by filing FORM 120PC, Proof of Delivery.

10. CLOSING

If no hearing is demanded or all waivers received, the Court will set forth the matters, which must be completed prior to closing. You should proceed to complete these matters, including distributing the assets remaining, in accordance with the Court's instructions. After all items have been distributed, you should obtain a receipt from the distributees, FORM 401PC or FORM 403PC. These should be filed with the Court. Once this has been done, your appointment, as Personal Representative will be terminated.

11. GENERAL CONSIDERATIONS

In order to keep proper books for the estate, it is very important that you deposit all money belonging to the decedent which comes into your hands into an Estate Account at a bank and pay all claims by check. By doing this you will have no trouble in keeping the account in exact balance and producing proper receipts at final accounting.

If, at any time during the administration of the estate, you receive a Demand for Notice, you must comply with the demand and send a copy of whatever is demanded to the person indicated on the form. Any time you file documents with the Court, you will be required to provide the Court with FORM 120PC, Proof of Delivery, indicating what you served and on whom.