

Non-probate Asset Transfer

How to Distribute Assets Not Managed by a Will or Trust



Creating a Will or Living Trust is a significant part of a well thought out estate plan. Even the most exacting estate plan, however, will not necessarily avoid estate administration – that is, the probate process for a Will or the trust administration process for a Living Trust. While those processes are often lengthy, complicated and expensive, there are legally authorized tools to get a variety of assets to intended beneficiaries, without going through the probate or administration process.

This Guidebook will review the more common lifetime asset arrangements you can use to avoid probate or trust administration. Knowing which non-probate asset transfer arrangements are available offers more estate planning options to get property to intended beneficiaries quickly, cheaply and with less hassle.

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Glossary

Joint Tenancy with Right of Survivorship. A property ownership arrangement where the property transfers to the survivor at death.

Multi-party Account. An account with more than one owner. “‘Multiple-party account’ means an account payable on request to one or more of two or more parties, whether or not a right of survivorship is mentioned.”¹

Non-probate Asset Transfer. The distribution of a deceased’s property through any means other than probate. “A ‘non-probate asset transfer’ means a valid transfer effective at death, other than a transfer of a survivorship interest in a joint tenancy of real estate, by a transferor ... to the extent that the transferor immediately before death had power, acting alone, to prevent the transfer by revocation or withdrawal and instead to use the property for the benefit of the transferor or apply it to discharge claims against the transferor’s probate estate.”²

Pay on Death Account. An ownership arrangement where ownership is retained until death, but then transfers at death to the designated beneficiary.

Pay on Death Designation. “A ‘Pay-on-death’ (POD) means the designation of:

- a beneficiary in an account payable on request to one party during the party’s lifetime and on the party’s death to one or more beneficiaries, or to one or more parties during their lifetimes and on death of all of them to one or more beneficiaries, or
- a beneficiary in an account in the name of one or more parties as trustee for one or more beneficiaries if the relationship is established by the terms of the account and there is no subject of the trust other than the sums on deposit in the account, whether or not payment to the beneficiary is mentioned.”¹

Securities Account. A share, participation or other interest in property or in a business. “‘Security’ means a share, participation or other interest in property, in a business, or in an obligation of an enterprise or other issuer, and includes a certificated security, an uncertificated security, and a security account.” ‘Security account’ means:

- a reinvestment account associated with a security, a securities account with a broker, a cash balance in a brokerage account, cash, interest, earnings, or dividends earned or declared on a security in an account, a reinvestment account or a brokerage account, whether or not credited to the account before the owner’s death, or
- a cash balance or other property held for or due to the owner of a security as a replacement for or product of an account security, whether or not credited to the account before the owner’s death.”³

Tenancy by the Entirety. An ownership arrangement similar to joint tenancy but is only for married couples and, in a few states, same-sex couples who have registered with the state.

Totten Trust. A bank account that’s held in trust for a beneficiary, who inherits any money in the account when the account holder dies. “A ‘Totten trust account’ means an account in which the owner designates that it is held by the owner” in trust for” or “as trustee for” one of more beneficiaries, and is payable to those beneficiaries upon the death of the owner, and in which the beneficiaries have no rights unless and until the owner dies.”⁴

Transfer on Death Designated Account. An ownership arrangement that allows property to transfer to a beneficiary at the death of the owner. “A transfer-on-death account can be set up by using the words ‘transfer on death’ or the abbreviation ‘TOD,’ or by the words ‘pay on death’ or the abbreviation ‘POD’, after the name of the registered owner and before the name of a beneficiary on the beneficiary form.

‘On death of a sole owner or the last to die of all multiple owners, ownership of securities registered in beneficiary form passes to the beneficiary or beneficiaries who survive all owners. On proof of death of all owners and compliance with any applicable requirements of the registering entity, a security registered in beneficiary form may be reregistered in the name of the beneficiary or beneficiaries who survived the death of all owners. Until division of the security after the death of all owners, multiple beneficiaries surviving the death of all owners hold their interests as tenants in common. If no beneficiary survives the death of all owners, the security belongs to the estate of the deceased sole owner or the estate of the last to die of all multiple owners.”³

Non-Probate Asset Transfers

Nearly everyone will leave behind some type of estate, whether property, shared accounts or assets in retirement plans. The question for many is, "How can I own and control assets while still getting property to heirs or other beneficiaries when I am gone?" Fortunately, laws exist in all states that authorize the creation of *non-probate asset transfers*.

A *non-probate asset transfer* can be arranged in one of two ways:

- Provide for beneficiaries in documents that control the asset
- Title the asset or financial account properly

Aligning Your Will, Beneficiary Designations and Account Ownership

While your Will is important, it is not the only document that determines how assets will be distributed. It's important to review provisions for how certain types of accounts will be distributed. Make sure your beneficiary and ownership designations are stated correctly on accounts such as:

- ✓ 401(k)s
- ✓ Bank accounts
- ✓ Security accounts
- ✓ Certificates
- ✓ IRAs
- ✓ Pension plans
- ✓ Life insurance policies
- ✓ Annuity contracts

In cases where the beneficiary designation differs from other written instructions you have given, the beneficiary designation is generally honored.

Reminder: While non-probate asset transfers are attractive, it is often not wise, practical – or even possible – to avoid estate administration entirely. The purposes of estate administration are to:

- Pay the deceased's debts (money owed to others, death taxes and final expenses). In fact, the estate's representatives can make claims against property that passes outside of probate to help pay debts and claims.
- Deal with claims the deceased had against others (outstanding lawsuits or injury claims).
- Resolve disputes among heirs.
- Ensure that proper documentation of real estate title chains exist.
- Distribute assets transparently to beneficiaries and heirs.
- Properly fund asset handling arrangements (support trusts for minor beneficiaries).

In addition, the estate's representatives can still make claims against the property that passes outside of probate to help pay debts and claims. Regardless of the lifetime arrangements made, property may remain in a decedent's name at death. This property is part of the estate and will go through estate administration.

Securities Accounts

Securities generally include shares, participation or other interest in a property or business.

How can security accounts be transferred without probate?

The laws of all states (except Louisiana) permit the owner of a securities account to designate a beneficiary or beneficiaries who will receive the account proceeds upon proof of the owner's death. The owner retains complete ownership and control of the account while living.

State intentions on a beneficiary form. A form is available (generally called a *beneficiary form*) from the brokerage house or other entity that originates, transfers or maintains the securities' titles. Use this form to specify and register your intentions as to who will become the owner of the security or security account after your death.



Bank Accounts

Almost all of us have accounts with banks. An account is a contract of deposit between a depositor and a financial institution, and includes checking accounts, savings accounts, certificates of deposit and share accounts.

How can bank accounts be transferred without probate?

A number of arrangements are available for bank accounts that permit the owner to designate a beneficiary or beneficiaries who will receive the funds upon proof of the owner's death.

Use a pay-on-death account. A *pay-on-death* account is an account in which the owner designates one or more beneficiaries for the account upon the death of the owner, while maintaining complete ownership and control of the account while living. Commonly called POD accounts, they are permitted by the laws of all states.

Set up a Totten trust account. Another option is to arrange an "in trust for" account. This is commonly called a *Totten trust*, and is permitted in all states, either specifically as "*Totten trust accounts*" or as *Pay-on-Death accounts*.

Consider a multiple party account. Very often bank accounts are held by more than one person (e.g., accounts in the names of spouses or domestic partners or close relatives). The co-ownership can be arranged so that upon the death of one co-owner his or her interest passes directly to the other co-owner(s). There are a variety of such co-ownership arrangements, called "multiple party accounts," with differing post-death treatment.

If the multiple-party account agreement was written with survivorship rights to the co-owners, then that account arrangement would be a non-probate transfer of the account upon the death of one of the co-owners.

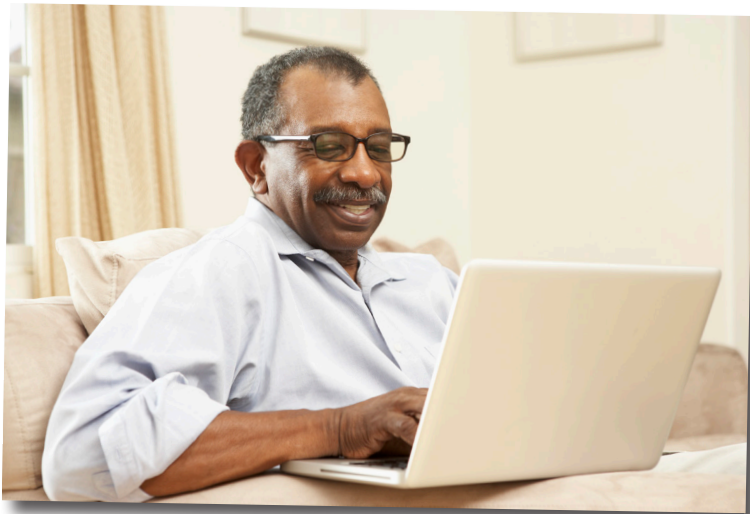
Joint Tenancy with Right of Survivorship. The most common form of multiple-party account that passes the account to surviving co-owner(s) is an account titled as a *Joint Tenancy with Right of Survivorship*. A joint tenancy form of ownership means that any co-owner has the ability to access and control the account during their lifetime; the right of survivorship feature means that

the interest of any joint tenant who dies passes to the remaining joint tenants equally.

Set up an account agreement. The critical document in a multiple-party account is the account agreement because it specifies how the funds in the account are to be handled upon the death of one of the account owners.

For example, a bank account owned by Josh and his wife Erin could be set up so they held funds in the account as tenants in common. If Josh passed away, his share of the funds would become part of his estate rather than passing to Erin. Another option is to set up the bank account as a convenience account where Erin is the owner but Josh is permitted access to the account as Erin's agent during her lifetime. If Erin passed away, the funds would not pass to Josh unless the account agreement specified.

Just like single owner accounts, multiple party accounts that don't have a survivorship provision can have "pay-on-death" provisions that pass a co-owner's share to persons other than one of the co-owners.



Life Insurance

Life insurance policies are contracts between the person who owns and controls the policy (the owner) and the insurance company which issues the policy (the insurer). The policy promises to pay the policy proceeds (the policy's death benefit) upon the death of the insured life (the insured) to certain persons (the beneficiaries).

How can life insurance be transferred without probate?

If the owner and insured are the same person, the owner can name specific beneficiaries. Proceeds will become part of the estate and be subject to estate administration only if no beneficiary is living at the owner/insured's death, or if the owner/insured designates the estate as beneficiary.

Designate a beneficiary. Beneficiary designations are flexible and can be made to one or more people, in equal or varying shares. Alternative beneficiaries can be named if a primary beneficiary does not survive the insured as an option to keep proceeds out of any estate administration.

If the owner and insured are not the same person, the owner can designate beneficiaries of the proceeds, or transfer ownership of the policy. The difference between a beneficiary designation and a transfer in ownership is that the beneficiary would receive the policy proceeds. The new owner would be able to surrender the policy for cash, use it as a policy loan, transfer it to another policy and be able to name a new beneficiary. The life insurance policy is an asset of the owner because the policy could be surrendered for cash, used for a policy loan or transferred to another policy. The owner also retains the option to change beneficiaries. These rights of the owner will pass to the owner's estate unless the owner has specified a successor owner.

Annuities

An annuity is a contract between the owner of the annuity contract and the insurance company that issues the annuity contract (the insurer). The contract pays annuity payments to the beneficiary (the annuitant).

How can annuities be transferred without probate?

The owner of an annuity contract has significant control over the contract (changing beneficiaries, making withdrawals, surrendering for cash value). The owner may also sell the annuity contract to a buyer who steps into the owner's rights over the annuity contract. The owner may or may not be the annuitant.

Name alternate annuitants. Annuity contracts will name someone as the annuitant to receive the cash flow of the annuity contract. The owner can also choose to name a successor annuitant if the first annuitant dies before the contract's payments are exhausted. An annuity contract with a successor annuitant is typically called a *survivorship annuity*.

Name beneficiaries. Annuity contracts, like life insurance contracts, have death beneficiary features so that the owner can designate one or more persons to receive the undistributed benefits of the annuity contract.

Retirement Plans

Retirement plans include pension plans, 401(k) plans (for most employers), 403(b) plans (for governmental, school, church, and tax-exempt employers) and IRAs and similar retirement arrangements. The non-probate transfer options in pensions depend on whether the payments stop with the death of the retiree. In other retirement plans the non-probate transfer options will involve designating the beneficiaries of the unexpended funds in the retirement accounts.

How can retirement plans be transferred without probate?

Benefit protections for surviving spouses exist under retirement plans such as defined benefit plans, money purchase plans, 401(k), 403(b) and other defined contribution plans. The employee/retiree's spouse cannot be deprived of a survivor's benefit or be replaced by another beneficiary unless the spouse gives written and informed consent.

Since retirement plan and retirement account contributions generally were not counted as taxable income when made, there will be income tax imposed on the distributions from them, and they will be subject to special rules that can accelerate or stretch out distributions and the resulting tax impact. Consult your tax advisor before deciding on your distribution options.

Real Estate

Real estate ownership is shown in the deed to the particular parcel of real estate. A deed shows:

- who is making the transfer of the real estate interest (i.e., the grantor)
- to whom the grantor is transferring the real estate interest (i.e., the grantee)
- how the grantee(s) are to hold the title to the real estate interest

How can real estate be transferred without probate?

A person owning or acquiring real estate can use certain language in the deed so that the real estate interest can pass directly to the persons designated in the deed.

Consider a Joint Tenancy with Right of Survivorship. (JTWROS) is a way to title jointly owned real estate in which the co-owner's interest in the property passes automatically to the other co-owner at death. If there are only two co-owners, then the death of one passes the entire interest to the surviving co-owner. If there are more than two co-owners, then the death of one passes that co-owner's share to the surviving co-owners equally.

To create a JTWROS, the language in the deed must clearly state that intent. Check the laws of the state where the real estate is located for the correcting wording.

A few states (Alaska, Louisiana, and Tennessee) do not recognize real estate ownership in JTWROS form.

While avoiding probate makes a JTWROS useful, keep in mind that in a JTWROS each of the co-owners have ownership interests and rights during their respective lifetimes. These interests and rights can lead to undesirable effects on the other co-owners (e.g., the ability of a co-owner to sell or gift his/her interest or of creditors to make claims on his/her interest).

Consider Tenancy by the Entireties. This is a way to title real estate ownership that is similar to joint tenancy with right of survivorship but is only available to owners who are married. A *tenancy by the entireties* deed typically shows the ownership as "A & B, husband and wife" or "A & B, husband and wife, as tenants by the entireties." If the owners are still married on the date that one of them dies, the ownership of the entire property automatically passes to the surviving spouse/co-owner.

A tenancy by the entireties can only be created between a married couple and only lasts as long as they are married. If they divorce, the tenancy by the entireties converts into a tenancy in common. This means that the former spouse's share of the real estate is subject to sale or gift by that former spouse, the creditors of the former spouse can make claims on the former spouse's share, and the share of the former spouse passes to the former spouse's heirs or beneficiaries.

States that do not legally recognize tenancy by the entireties

- 25 states do not legally recognize tenancy by the entireties: Alabama, Arizona, California, Colorado, Connecticut, Georgia, Idaho, Iowa, Kansas, Louisiana, Maine, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Ohio, South Carolina, South Dakota, Texas, Washington, West Virginia and Wisconsin.
- The community property states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin) do not legally recognize tenancy by the entireties.

Special considerations in community property states. In a community property state, where real estate is owned by husband and wife then upon the death of one spouse only half is treated as property in the estate of the deceased spouse. Most community property states (Arizona, California, Idaho, Nevada, New Mexico, Texas, Wisconsin and Washington) now recognize a form of real estate ownership between spouses called community property with

right of survivorship which, upon the death of one of the spouses, passes full interest to the surviving spouse.

Details on community property can vary among the community property states, so it is best to consult with local legal counsel on community property issues.

Special considerations for same sex married couples and domestic

partners. Tenancy by the entirety is available to same sex married couples and to domestic partners for real estate located within some of the states that legally recognize these arrangements (e.g., Delaware, District of Columbia, Hawaii, Illinois, Maryland, Massachusetts, New Jersey, New York, Oregon, Rhode Island and Vermont); however, at least for now it is not available for real estate located outside of those states. The law in relation to same sex couples and their legal rights to the same property rights accorded to conventional married couples is developing. Same sex couples should consult attorneys in any state where they own or intend to own real estate to determine if tenancy by the entirety is available to them.

Currently California, Nevada and Washington extend to domestic partners the same community property treatment that is extended to traditional marriages but this a rapidly changing area of law so the current state of law needs to be consulted.

While tenancy by the entirety is more commonly seen in titling real estate ownership, it can also be used in titling personal property ownership in the states that legally recognize this form of ownership unless the state statutes expressly limit it to real estate.

Even if a state does not recognize tenancy by the entirety, if it also recognizes a joint tenancy with right of survivorship, the same intended result (namely the passage of full ownership to the surviving spouse) could be accomplished by use of the joint tenancy with right of survivorship form.

Consider transfer-on-death or beneficiary deeds. These are a relatively new device for accomplishing the non-probate transfer of real estate.

“A small but growing number of jurisdictions have ... [been] enacting statutes providing an asset-specific mechanism for the non-probate transfer of land. This is done by permitting owners of interests in real property to execute and record a transfer on death (TOD) deed. By this deed, the owner identifies the beneficiary or beneficiaries who will succeed to the property at the owner’s death. During the owner’s lifetime, the beneficiaries have no interest in the property, and the owner retains full power to transfer or encumber the property or to revoke the TOD deed.”⁵

States that allow TOD deed

- 18 states allow TOD deeds or their equivalents: Arizona, Arkansas, Colorado, Hawaii, Illinois, Indiana, Kansas, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Wisconsin.

Conclusion

Non-probate asset transfer options are an important part of your overall estate planning. Your Will or Living Trust need to be coordinated with the non-probate asset transfer strategy, especially provisions for debt payment and gifting. Review and coordinate as a regular part of estate planning so if assets are distributed according to your intent.



Preparing to Meet Your Attorney

If you decide to consult an attorney about your legal matters, we suggest you complete the following worksheet prior to your meeting. By preparing this information ahead of time, you have the opportunity to clearly think through your needs and the attorney will have the necessary information to provide you with the highest level of legal service.

Start by thinking about your current situation, the communications you have received and any history you have about the legal matter. Summarize your legal needs in a few sentences. Use this as a starting point when you make your first phone call to an attorney.

List the names, dates and pertinent details about your legal matter so you will be ready to discuss it with your attorney either over the phone or during an in-office visit.

List and attach any documents or background information you think will be helpful in the first meeting with an attorney.

Resources for More Information

The following were used as resources in developing this guidebook and provide additional resources:

Department of Labor:

www.dol.gov/ebsa/publications/wyskapr.html

www.dol.gov/dol/topic/retirement/consumerinfension.htm

Internal Revenue Service:

www.irs.gov/retirement/index.html

¹Uniform Multiple Persons Account Act, © 1990, National Conference of Commissioners on Uniform State Law.

²Uniform Non-probate Transfers on Death Act, © 1990, National Conference of Commissioners on Uniform State Law.

³Uniform TOD Security Registration Act, © 1990, National Conference of Commissioners on Uniform State Law.

⁴Matter of Totten, 179 NY 112, Court of Appeals of New York, 1904, www.courts.state.ny.us/reporter/archives/totten.htm

⁵Uniform Real Property Transfer on Death Act, © 2009, National Conference of Commissioners on Uniform State Law.

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