



Dugger Law

UPDATE—APRIL 2017

Do you need to review your existing Estate Planning Documents?

If you have not reviewed your Estate Plan or your Estate Planning documents in the past 5 years, it may be prudent to do so. If your financial, medical or family circumstances have changed since the execution of your Estate Planning documents, please contact our office to set up a free consultation.

HOW TO AVOID PROBATE (TEXAS PROBATE CONSIDERATIONS DURING ESTATE PLANNING)

Every permanent Texas resident should consider executing at least the following estate planning documents: (1) Last Will and Testament; (2) Durable Power of Attorney; (3) Medical Power of Attorney; (4) HIPAA Authorization for the Release of Medical Information; and (5) Directive to Physicians and Family. These documents make up the core of any estate plan. Other documents such as trusts, guardianship declarations, appointment for disposition of remains, etc. can also be important for an individual's estate plan. However, in any estate planning discussion, it is important to analyze whether an individual wishes for their estate to attempt to avoid the probate process.

The probate process is essentially the official proving of a Last Will and Testament in court. The probate of a Last Will and Testament will take place in a County Court or a Probate Court dependent upon which Texas County the deceased permanently lived in at the time of death. Here the judge will either appoint an administrator or executor of the estate to gather the estate assets, pay estate liabilities and expenses, and divide the remainder amongst the estate beneficiaries. Although Texas has a streamlined probate process, probate is an additional expense of your estate that will require an attorney's legal guidance.

As such, it is extremely important to realize that certain assets will be controlled by a Last Will and Testament and governed by the probate process, while other assets may pass outside a Last Will and Testament thereby avoiding probate. Below, we will highlight some of the simpler means in which an individual can utilize his or her assets to pass to beneficiaries outside of a Last Will and Testament and the probate process. With proper planning probate can be avoided altogether.

Survivorship and Payable on Death (P.O.D.) Account Designations

Most people have either a bank account, retirement account, or some other form of financial account. However, do you know how you hold said account? Do you know if the account has a right of survivorship or payable on death designation? Do you know if it is a joint account or an account with other authorized users? Often times, people have held these accounts for so long that they cannot remember how the account is held and also no longer have the account opening paperwork. In order to properly implement any estate plan, the account holder must ascertain how these accounts are held. If you wish for these accounts to avoid the probate process, you may go to the bank or financial institution where the accounts are held and execute their approved right of survivorship form or payable on death form (sometimes called a transfer on death form) so

DUGGER & ASSOCIATES

1401 Enclave Parkway • Suite 125 • Houston, Texas 77077 • 281.497.1770(T) • 281.497.1459(F)

Dugger@Duggerlaw.com; www.duggerlaw.com

that these accounts may pass directly to your desired beneficiary. Assets with these types of designations will not be controlled by a Last Will and Testament and will pass outside the probate process.

Transfer on Death Deed

A relatively new method to pass assets outside of probate is the Transfer on Death Deed, which the Texas Legislature effectuated on September 1, 2015. As the name implies, upon the death of the owner of real property, the real property identified in the deed will automatically transfer to the named beneficiary subject to all mortgages, liens, encumbrances, and other creditor claims. To be effective, the owner of the real property must execute the Transfer on Death Deed in front of a notary, have the document notarized, and file the document in the real property records of the country where the real property is located prior to the owner's death. Upon the owner's death, the beneficiary must survive the transferor by 120 hours and subsequently file an Affidavit of Death in the real property records where the real property is located at the beneficiary's earliest convenience to fully effectuate the transfer. The Transfer on Death Deed must be executed by the owner of the real property, and any Transfer on Death Deed executed via a power of attorney will be considered invalid.

The filing of a Transfer on Death Deed has no effect on the rights of the real property's owner during the life of the owner. After executing a Transfer on Death Deed, the owner of the property may obtain a mortgage, refinance the real property, sell the real property, use the real property as collateral, etc. Further, the Transfer on Death Deed may be revoked, canceled or amended at any time. Sale of the real property during the owner's life will also effectuate the automatic revocation of the Transfer on Death Deed. Finally, the real property disposition contained in a Transfer on Death Deed will always be deemed superior to any Last Will and Testament that attempts to dispose of the same real property. A Last Will and Testament may not revoke or supersede a Transfer on Death Deed even if the Last Will and Testament is executed after the Transfer on Death Deed.

Of final note, if you or a family member is concerned about Medicaid recovery upon death, a Transfer on Death Deed may be a viable alternative to a Ladybird Deed in certain situations. A Ladybird Deed is a deed that creates a form of life estate in the real property where the grantor retains all ownership rights during life, and upon the grantor's death, the Ladybird Deed causes the real property to immediately vest in the name of that individual named as remainderman in the deed. This allows the real property to pass outside of probate in the same manner as a Transfer on Death Deed, thereby avoiding Medicaid recovery efforts.

Trusts

A final method to avoid probate is to place personal and/or real property into either a revocable or irrevocable trust. The creator of the trust (called a "grantor") can design the terms of the trust so that he or she is both the trustee of the trust (a "trustee" is someone who controls and manages the trust assets), as well as the primary beneficiary of the trust. Upon the grantor's death, a new trustee is automatically appointed pursuant to the trust's terms, and the trust's secondary or contingent beneficiaries will then immediately be permitted to benefit from the remaining assets of the trust. If you own real property in Texas or another state, it may be advisable to place this real property into trust in order to avoid probating the estate in Texas and/or the other state where the real property is located.

Please feel free to contact our law office if you have any questions with regard to the above. This newsletter does not substitute for specific legal advice, may not reflect the most current legal developments, and is not intended to create an attorney-client relationship.

DUGGER & ASSOCIATES

1401 Enclave Parkway • Suite 125 • Houston, Texas 77077 • 281.497.1770(T) • 281.497.1459(F)

Dugger@Duggerlaw.com; www.duggerlaw.com