Probate v. Non-Probate: What Is the Difference?

When planning your estate it is important to understand the difference between probate and non-probate assets. Probate is the process through which a court determines how to distribute your property after you die. Some assets are distributed to heirs by the court (probate assets) and some assets bypass the court process and go directly to your beneficiaries (non-probate assets).

The probate process includes filing a will and appointing an executor or administrator, collecting assets, paying bills, filing taxes, distributing property to heirs, and filing a final account. This can be a costly and time-consuming process, which is why some people try to avoid probate by having only non-probate assets.

Probate assets are any assets that are owned solely by the decedent. This can include the following:

- Real property that is titled solely in the decedent's name or held as a tenant in common
- Personal property, such as jewelry, furniture, and automobiles
- Bank accounts that are solely in the decedent's name
- An interest in a partnership, corporation, or limited liability company
- Any life insurance policy or brokerage account that lists either the decedent or the estate as the beneficiary

Non-probate assets can include the following:

- Property that is held in joint tenancy or as tenants by the entirety
- Bank or brokerage accounts held in joint tenancy or with

payable on death (POD) or transfer on death (TOD) beneficiaries
- Property held in a trust
- Life insurance or brokerage accounts that list someone other than the decedent as the beneficiary
- Retirement accounts

When planning your estate, you need to take into account whether property is probate property or non-probate property. **Your will does not control the distribution of non-probate property**. Check the ownership of your property and your accounts to make sure jointly owned property will be distributed the way you want it to. It is also important to review your beneficiary designations.

Contact us to determine whether your property is being distributed according to your wishes.

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Using an Annuity to Keep the Spouse of a Medicaid Applicant from Becoming Impoverished

When one spouse qualifies for Medicaid to pay for a nursing home stay, the spouse who is at home is often left without many resources. While Medicaid has rules to prevent community spouses from impoverishment, the protections aren’t always enough. There are steps that you can take to increase the community spouse’s income, and as a recent case illustrates, an annuity may be a good option.

In order to qualify for Medicaid coverage, the applicant can have no more than $2,000 in resources (in most states). In general, the community spouse may keep one-half of the couple's total "countable" assets up to a maximum of $115,920 (in 2013). Called the "community spouse resource allowance," this is the most that a state may allow a community spouse to retain without a hearing or a court order. The least that a state may allow a community spouse to retain is $23,184 (in 2013).

One way to ensure that the community spouse has enough money to live on is for the community spouse to purchase an annuity. By purchasing an annuity, the spouse turns a countable resource into an income stream, which should not be counted by Medicaid. The annuity must meet certain qualifications in order to not be considered an asset transfer, including be irrevocable and name the state as a remainder beneficiary. (For more information on annuities and Medicaid planning, click here.)

Some states have improperly denied Medicaid benefits to an applicant whose spouse has purchased an annuity, but a recent decision by a U.S. Court of Appeals makes clear that community spouses can purchase annuities under current federal law.

North Dakota resident John Geston entered a nursing home, and his wife purchased a single-premium annuity for $400,000, which would give her $2,735 a month in income over 13 years. The annuity provided that it could not be sold or transferred, and it named the state as a remainder beneficiary. Mr. Geston applied for Medicaid benefits, but the state denied him benefits on the grounds that the annuity was an available asset under state law. Mr. Geston sued in federal court, challenging the state law. In *Geston v. Anderson* (8th Cir., No. 12-2224, Sept. 10, 2013), the 8th Circuit Court of Appeals decided in favor of the Gestons, ruling that the annuity was not a resource and should not be counted in determining Mr.

Geston's eligibility for Medicaid. To read the full case, click here.

Before purchasing an annuity or applying for Medicaid, you should consult with your attorney who can tell you the best way to protect your spouse.

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Digital Assets Raise Estate Planning Questions

More and more, we are conducting our business on the Internet, whether that's online banking, shopping at Amazon and other sites, uploading documents and files to the "cloud," posting videos on YouTube, or communicating with high school classmates via Facebook.

So, what happens to all of our accounts and files when we become incapacitated or pass away? Will our spouses and children have access to them? Where will they find our usernames and passwords? Who can take down our Facebook and LinkedIn pages, or would we prefer that they continue for posterity? And if we've saved photos, videos and other files on the cloud, who should have access to them and how long should they stay out there?

These are questions almost everyone needs to think about today and they often raise difficult security and legal issues. For example, if you become incapacitated and your daughter starts handling your finances online, is she doing so legally?

Presumably you've given her your assent to do so, but the bank may not have a durable power of attorney on file with this authorization. As far as the bank knows, you're still the person logging in and paying your bills or shifting your investments. Is this fraud on the bank? Does anyone care as long as your daughter is acting in your best interest?

And what if you pass away and your child, rather than notifying the financial institutions, continues to pay bills online and make distributions to family members? This is clearly contrary to law, but it could be much more convenient than going through the probate process. Is it an instance of no harm, no foul?

States are beginning to grapple with these issues. A few states have enacted laws, giving executors access to online accounts. In addition, every Internet provider has its own rules about access to user accounts, and generally users have agreed to these rules when they first enrolled, whether they actually read the service agreement or not. In April 2013, Google introduced the concept of an Inactive Account Manager who Google users can name to receive notice when a Google user has not accessed her account for a long period of time. The Inactive Account Manager has access to Google accounts designated by the user and can take whatever action is necessary to access them or shut them down.

The legalities aside, here are some steps we can all take to better manage our digital assets:

- **Inventory your digital estate.** Make a list of all of your online accounts, including e-mail, financial accounts, Facebook, Mint, and anywhere else you conduct business online. Include your username and password for each account. Also, include access information for your digital devices, including smartphones and computers.
- **Store the list in a safe place.** There are a number of options for where you and your representatives can store

the list, each with its own problems. If you have the list on paper, someone who you don't trust might discover it and gain access. You can keep it in a safe deposit box or give it to your lawyer to hold in her files. In each case, your representative needs to know where it is and how to gain access. If you keep the list online, make sure you do so securely. You can upload the file to Dropbox, giving your representative access, or use one of a number of new services for this purpose. These include: Cirrus Legacy, and SecureSafe.

- **Give access to your personal representatives.** Once you have your inventory, you will need to provide it to the people who will step in if you become incapacitated or pass away, or let them know how to find it when and if they need to do so. Make sure that they save the information as securely as you have yourself. You might want to simply give them access to one of the services listed above with a username and password that they can remember.
- **Authorizing language.** Make sure the agent under your durable power of attorney and the personal representative named in your will have authority to deal with your online accounts. The Web site DigitalEstateResource.com provides sample language.
- **Update the inventory.** As you open new accounts and services, purchase new devices, and change usernames and passwords, you will have to update your list so that it remains current.

Unfortunately, as the Internet makes our lives easier and quicker, it also makes them more complicated. We all need to take steps to make sure that our loved ones have the necessary access when access becomes necessary.

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Dealing with a Deceased Loved One’s Debt Collectors

The last thing anyone wants after the death of a family member is calls from debt collectors dunning the loved one’s estate. While some family members can be contacted by debt collectors, the family is protected from abusive, unfair, or deceptive practices.

Usually the estate is responsible for paying any debts the deceased may have left. If the estate does not have enough money, the debts will go unpaid. A debt collector may not turn to relatives to try to collect payment (unless they were co-signers or guarantors of the debt). However, the spouse of the decedent may have responsibility for any debts that were jointly held.

Debt collectors are allowed to contact the personal representative (executor) of the estate, the decedent’s spouse, or the decedent’s parents (if the decedent was a minor) to discuss the debts. They may not discuss the debts with anyone else. The only reason debt collectors may contact other relatives or friends is to get the name of the personal representative or spouse. But they cannot say anything about the decedent’s debt to those individuals or even say that they are debt collectors. When speaking with family members, debt collectors may not mislead the family into believing that the family members are responsible for the deceased person’s debts. They also can’t use abusive or offensive language.

Even if you are the person who is responsible for paying the estate’s debts, you can request that a debt collector stop contacting you. To do this, you need to send a letter to the

debt collector asking the collector not to contact you again. You should keep a copy of the letter for your records and send the letter "certified" with a return receipt. Once the collector receives the letter, the collector can contact you only to tell you that there will be no further contact or to inform you of a lawsuit. Remember, the estate is still responsible for paying its debts to the extent that it can.

If you have a problem with a debt collector, contact your state attorney general's office or the Federal Trade Commission at ftccomplaintassistant.gov.

Should I Enroll in Medicare If I'm Still Working?

Many people keep working well beyond age 65—the age when most people become eligible for Medicare. If your employer offers health coverage, do you need to enroll in Medicare? What if the employer offers or does not offer prescription drug benefits?

Most workers probably should enroll in Medicare Part A, which is free for most people and covers institutional care in hospitals and skilled nursing facilities, as well as certain care given by home health agencies and care provided in hospices. But ask your employer (or your spouse's employer, if that's where you get your coverage) whether your current coverage will change in any way if you enroll in Medicare, even just Part A. For more information on Part A, click here.

Medicare Part B has a monthly premium, which changes each year (it is $104.90 a month in 2013). Medicare Part B covers outpatient and preventative care like office visits and tests.

Individuals who don't sign up for Part B when they first become eligible can pay a 10 percent premium penalty for each year that enrollment is delayed. However, there is an exception for employees who are currently employed and covered by their employer's group health plan. In most cases, as long as you have group health insurance through your employer, you can delay signing up for Part B without a penalty. When you retire, you will have a special enrollment period of eight months to sign up for Part B.

Whether you should enroll in Part B while you are still working depends on whether your employer has more than 20 employees. If your employer has more than 20 employees, you do not need to sign up for Part B right away because your employer's group health plan will be the primary insurer. If your employer has fewer than 20 employees, however, you should enroll in Medicare when you are first eligible. Medicare is the primary insurer, which means it pays before your employer's insurance pays. If you don't enroll, your employer's plan can refuse to cover you for services that Medicare would have covered. That means that you may have to pay for those services out of your own pocket. For more information on Medicare Part B, click here.

Medicare Part D covers prescription drugs. Even if you choose not to enroll in Medicare Part B, you can still enroll in Part D and doing so may be advisable to avoid a late-enrollment penalty similar to the one for Part B. If you already have prescription drug coverage through your company, your insurance plan should send you a letter that will state whether or not the company's coverage is "creditable" – meaning it is equal to or better than what Medicare is offering. If it is "creditable," then you won't have to pay a late-enrollment penalty if you decide to switch to Medicare Part D later.

Also, if you are already covered by your company's drug plan, a Medicare plan may not be right for you. Don't sign up until

you compare your current plan with the Medicare plans available to you. Finally, before you sign up for a drug plan, ask your employer if you can drop your drug coverage without losing your other supplemental insurance. Once that insurance is gone, you may not be able to get it back.

If you are currently receiving Social Security benefits, you don’t need to do anything to enroll in Medicare. You will be automatically enrolled in Medicare Parts A and B effective the month you turn 65. If you do not receive Social Security benefits, then you will need to sign up for Medicare by calling the Social Security Administration at 800-772-1213 or online at http://www.socialsecurity.gov/medicareonly/. If you decide not to enroll in Part B, fill in the box on the back of your Medicare card declining Part B coverage and mail it back to the address listed. You will be mailed a new card.

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