

Consumer's Guide to Trust Suitability and Probate Avoidance

information provided by

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What is Estate Planning?

Lots of things!!

One definition is as follows: Deciding, in advance, what you want to happen to you and your property when you die, or if you become incapacitated, and leaving clear instructions to the people who will act for you.

Following are some common goals of Estate Planning:

1. Minimize expenses
2. Minimize delays
3. Maintain control as long as possible
4. Maintain privacy
5. Provide for loved ones

Who needs to plan their estate? **It is difficult to find someone who does not need to plan their estate.** The following analysis may be useful: Assume you are in a car wreck on the way home from work. Then assume various scenarios of deaths and disabilities. What would happen to you, to your property, and to your family? Not pleasant thoughts, to be certain, but certainly the possibilities are always there, and we all know someone to whom this has happened. Although the statistical likelihood isn't strong on any given day, we all know that each time the sun rises we are one day closer.

Take a moment to think about your "stuff". Do you own a house, a car, a boat, a farm? Do you have life insurance, a 401(k) plan, bank accounts, or IRA's? Will you inherit something from someone else?

Something will happen to all of your stuff. **Planning is the process of assuring that the right things happen and that your wishes are carried out.**

What is Probate?

How Much Does it Cost?

Many myths circulate surrounding probate. Most of them are either exaggerations or extreme examples of highly irregular circumstances. However, there is no question that Probate is not a fun, cheap, or efficient process.

One short answer to the question is as follows: Probate is the process of getting property from someone who dies to where it is supposed to go when no other provisions have been made to get it there.

Where is your stuff supposed to go? If it goes through probate you either follow the rules that the state has set up (“intestate succession”), or you prepare and execute a Will.

One of the most common myths concerns the results of preparing a will. **Wills absolutely do not, by themselves, avoid probate.** Indeed, a common definition of a will is a “set of written instructions to the probate court”.

The common objections and complaints about the probate process are as follows:

1. It's too expensive
2. It's too slow
3. It's too public

These are all valid complaints.

The costs include attorney's fees, Personal Representative's (“executor's”) fees, Court costs, and surety Bonds. The largest of these is normally Attorney's fees. Included in this booklet is a list of the Missouri “minimum” Attorney's fees, as well as a range of total costs for a typical probate estate.

In Missouri, a probate estate must generally be open for at least 6 months and 10 days. Many stay open for 2, 3, or 4 times that long depending on the particular facts and circumstances.

Probate records, absent very unusual circumstances, are public records and can be viewed at any time, by any one, for any reason, or no reason.

Following is a listing of the “Minimum” Attorney Fee Schedule established by Missouri Statutes:

Estate Size	Fee
Less than \$5,000	5%
\$5,001 - \$25,000	\$250 + 4% of excess over \$5,000
\$25,000 - \$100,000	\$1,050 + 3% of excess over \$25,000
\$100,001 - \$400,000	\$3,300 + 2 3/4% of excess over \$100,000
\$400,001 - \$1,000,000	\$11,550 + 2 1/2% of excess over \$400,000
Over \$1,000,000	\$26,550 + 2% of excess over \$1,000,000

Unfortunately, the Attorney's fees are not the only costs involved in settling a Probate Estate. Following is an analysis of potential total estate costs in Missouri:

Estate Size	Costs
\$50,000	\$2,300 - \$4,100
\$150,000	\$5,300 - \$10,000
\$300,000	\$9,400 - \$18,200
\$500,000	\$14,800 - \$28,800
\$750,000	\$21,100 - \$41,400
\$1,000,000	\$28,600 - \$55,100
\$1,500,000	\$38,750 - \$75,300
\$2,500,000	\$59,500 - \$115,900

Assumptions: Lower amount includes "Minimum" Attorney's fees, estimated Court Costs, estimated Surety Bond Costs, and other miscellaneous costs; Higher Amount also includes fees of Personal Representative ("Executor"). **Costs listed above do NOT include estate taxes.**

Should I Avoid Probate? If so, How?

For most people, the answer is a resounding **yes**. For most people, a simple analysis of the costs involved answer the question. If probate can be avoided at a reasonable cost, and if the desired planning results can be achieved, then of course, probate should be avoided!!

After consideration of the simple dollars and cents costs, one can also consider the time delays and privacy issues which are present in the probate setting.

Assuming the decision is made to avoid probate, the tougher question is: How do I do it?

There are several tools available. ***All have advantages and disadvantages, and the final decision should be made taking into account all of the factors.***

On the next page is a listing of the tools available and the relative advantages and disadvantages. Remember, **WILLS DO NOT HELP YOU AVOID PROBATE!!**

Probate Avoidance Tool Analysis

Avoidance Tool	Advantages	Disadvantages
Joint Ownership	Very inexpensive (sometimes free), very efficient	Wrong person may die first, hidden capital gain taxes, liability exposure for Joint owner, may be difficult to control in disability situation, need conservatorship (“living probate”) for minors
Payable on Death (“POD”) or Transfer on Death (“TOD”)	Very inexpensive (sometimes free), very efficient, sometimes solves capital gain and liability issues	Wrong person may die first, may be difficult to control in disability, may need to establish conservatorship (“living probate”) for minors, cannot be used for some types of property
Beneficiary Designations	Very inexpensive (normally free) very efficient	Wrong person may die first, difficult to control in disability, may need to establish conservatorship (“living probate”) for minors, can only be used with certain types of property
Revocable Inter vivos (“Living”) Trust	Most flexible, powerful tool available, solves all problems raised by the other tools and provides many other benefits for families	Probably most expensive tool, at least initially, and takes the most initial effort to establish

What Exactly is a Trust?

The definition of a Trust can be difficult to put into words. Indeed, a leading law dictionary takes 6 pages to define a trust!! It is easier, perhaps to illustrate what they do. **Trusts are legal instruments that help people who care for their loved ones and who own some property or have life insurance.** Trusts are normally written documents that state how the person who makes it wants their property to be handled in a variety of circumstances.

Trusts can be created by a Will (a “testamentary” trust). Of course, since a will is involved this type of trust only comes into being after the Probate process has run and probate expenses paid.

For a large number of people , their goals, wishes, and desires are best accomplished using a Plan based on a Revocable “inter vivos”, or “Living” Trust. This is a contract entered into by the person who makes it (“Trustmaker” or “Grantor” or “Trustor”), and the person who executes or administers it (the “Trustee”). It is administered for the benefit of the people for whom the person making the trust wishes to provide (the “Beneficiaries”). These can be, and often are the same person/people.

The trust contract, oversimplified, is a statement made by the person creating it to the Trustee that goes something like this:

I'm giving you my property. You can only use it for my benefit while I'm alive, and have to do whatever I tell you. I can change the rules anytime I want, but you can't ever change them unless I say you can. Since you technically own the property, there won't be any probate when I die. This means you don't have to go to court or get anybody's permission, you just do what I've told you. If you die or can't be trustee any more, then I'm naming other people (or banks) to take your place. If I am disabled use my money and property to take care of me. When I die give it to my family at such times and in the proportions or amounts that I tell you.

In most Trust Based Plans, the Trustmaker, Trustee, and Beneficiary are all the same people, at least to start. This means that very little changes in reality. **There is no loss of control**, and in some circumstances there is **more** control.

There are many other types of trusts which are outside the scope of this pamphlet. The most common ones are those used for IRA's, Pension Plans, 401(k)'s, and similar employee benefit plans.

How do I Decide if I need a Trust Based Estate Plan?

Simply answered, you need to do trust based planning if the long term cost savings, privacy, and other benefits outweigh the initial cost to set it up. However, there really is no simple answer. The best way to make the decision is to have an in depth discussion with an experienced attorney. When making the decision factors such as these should be considered:

- 1. The desire to leave a lasting legacy for children or grandchildren**
- 2. The need to protect children or grandchildren from creditors, predators (such as divorcing spouses), and others.**
- 3. The need to deal with “spendthrift” children.**
- 4. “Special Needs” beneficiaries.**
- 5. The cost of probate administration.**
- 6. The desire for privacy.**
- 7. The desire for efficiency in the handling of your estate when you are gone.**
- 8. The desire to have your property efficiently managed if you are disabled.**

ANY ONE OF THESE CONCERNS MAY IN AND OF ITSELF DICTATE THAT TRUST BASED PLANNING IS YOUR BEST CHOICE.

What is the Process?

The first step is to select a competent attorney to work with. First, and foremost, you should be personally comfortable with the attorney. There are many lawyers out there, and there is no reason to work with one that you don't like!! If you have an attorney already, he or she should be on your list for consideration.

Whatever attorney you choose, be certain they are comfortable with this area of work. Generally speaking, ethical rules prohibit lawyers from claiming "specialties". However, like Physicians, many attorneys concentrate their work in one or more related areas. Some attorneys work primarily in the estate planning area, some do some estate planning, and others do none. Simply ask your attorney how much work in the Estate Planning area he or she does, and if they are comfortable working with you on the project.

After you have selected an attorney, you will need to compile financial and personal information. Most attorneys will have some sort of form for you to complete, and may ask you to bring in certain documents, such as insurance policies or deeds. After one or more interviews, working drafts or summaries will likely be prepared. After the drafts are approved and any needed modifications are made, you will need to execute the final documents.

After final document preparation, and assuming a Revocable Living Trust is involved, you and your attorney must then "fund" the Trust. This is an absolutely critical step, and involves re-titling real estate, bank accounts, mutual funds, and other property, and changing beneficiary designations on Life Insurance Policies and retirement plans.

What Documents do I need?

For a typical Trust Based Estate Plan, assuming a moderate sized estate, assuming a married couple, and further assuming no need for Estate Tax Planning, you will likely need the following documents:

1. **Joint Revocable Inter Vivos (“Living”) Trust.** This is the backbone of the plan, and, properly utilized and funded, contains all of the important provisions and instructions as to what you want to happen to your property literally from the point of execution forward until it is finally distributed to your loved ones after your death.
2. **“Pour Over” Wills for both spouses.** These are wills designed to “Pour” into the Trust any property or asset that is not properly re-titled into the trust. They act as a sort of “insurance policy” in the event assets are overlooked or otherwise not properly funded into the trust. The wills essentially say “Take my property that isn’t in my trust, run it through probate, put it in the trust, and then act like it was there to begin with”.
3. **Legal and Financial Durable Powers of Attorney for both spouses.** These documents enable an individual designed to handle financial and legal affairs in the event of disability, and in the event that some assets are not funded into the trust. It is similar to the “Pour Over” Will, but is only effective prior to death. It, too, is sort of an “insurance policy”.
4. **Health Care Powers of Attorney, Living Wills, and HIPPA Authorizations.** These documents are written statements made to a spouse, child, or other loved one, instructing them as to your wishes if you are incapacitated, and unable to make and/or communicate your health care decisions. They also authorize others to make health related decisions when you are unable to do so.
5. **“Funding” Documents and Instructions.** These are deeds and other documents designed to be certain that your property is owned by the Trust, thereby providing that the terms of the Trust will be effective. These actions are critical to assuring proper functioning of your trust.

Obviously, in more complex situations there may be other documents and instruments involved. Many of these are needed to do Estate Tax Planning.

One Page on Estate Taxes

First and foremost, Estate Taxes cannot be covered on one page. The subject is very complex.

As you may be aware, several years ago Congress started a slow phase out of the Estate Tax. The results of the act bring about these general rules:

1. There is currently no estate tax

2. The “Repeal” of the estate tax is “unrepealed” after 2010. In other words, the way the law is written, the tax reverts to January 1, 2001 status (we think) after 2010. Most estate planning professionals believe the repeal will likely be undone at some stage, and that the tax will be reinstated. Whether an attempt will be made to make it retroactive to January 1, 2010 is quite uncertain. The status must be monitored.

3. During this period of no estate tax there are other new issues concerning the tax basis for capital gains purposes on inherited assets. This can be a complex area, and must be taken into consideration.

4. State estate and inheritance taxes must always be considered..

Your attorney can assist you in determining if you need estate tax planning, and if so, how to best proceed. Due to the changes in tax law, fewer people need Estate Tax planning. Nevertheless, Legacy Planning, Probate Avoidance, Disability Management, and property distribution planning remain a strong need for many!

Summary

We hope this Consumer's Guide has been helpful. Please be very aware that the information in this Guide is very basic, and in no way should be used as a substitute for professional advice.

Final thoughts:

1. **Don't delay!! Take action today** to be certain that your loved ones are treated the way they deserve and receive what you desire to give them.
2. Use competent advisors with whom you are comfortable.
3. After your plan is established, monitor and maintain it. Schedule appointments with your advisors periodically for reviews.

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The Law Offices of Richard J. Herndon are located in Kearney, Missouri, twenty minutes north of Kansas City. Rick Herndon has been practicing in the areas of Estate Planning, Probate Avoidance, Living Trusts, and Estate Settlement since 1986. He received his Bachelor's Degree in Accounting from Northeast Missouri State University and his Law Degree from the University of Missouri at Kansas City. Clients include individuals with estates of all sizes as well as small business owners throughout the Midwest. He has taught classes on Estate Planning and Living Trusts for various organizations and has also presented his own seminars in those areas. Rick's practice philosophy centers on educating clients as to their options and implementing their wishes using team based approach which may involve other financial advisors and consultants.



Rick Herndon has been extremely active in civic affairs. He has previously served on the Kearney Board of Education, as a Director of the Kearney Fire and Rescue Protection District, and on the Pastoral Council of the Church of the Annunciation. He is an active member of the Knights of Columbus and has coached baseball and softball for over fifteen years. Rick and his wife, Cheryl, have been married for 32 years and have three children and four grandchildren.