

The importance of a property title.

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Most people realize that having a last will and testament is a necessary part of even the simplest estate plan; however, far fewer people realize that a will does not direct or control certain assets that do not flow into a person's probate estate at his or her death.

A last will and testament names a personal representative to administer the person's estate at death and directs the disposition of the decedent's property. Assets such as pay-on-death accounts at financial or investment institutions, life insurance policies, or retirement accounts with beneficiary designations pass according to the beneficiary designations placed on those accounts—not according to the person's will.

Therefore, a well-planned estate will have a last will and testament but also will include at least some discussion and analysis of the types of accounts and property, and the titling of them, to make sure those assets pass properly according to the person's plan.

Probate versus non-probate assets

Assets owned by the decedent at the time of his or her passing may be classified as either probate assets or non-probate assets. Probate assets pass according to the last will and testament, or the state's intestacy laws if no valid will exists, and are subject to the estate's debts and creditor claims during the probate. A last will and testament is not a self-executing document. Once a person



dies, a friend or loved one typically comes forward and presents the decedent's last will and testament for probate.

Once proven to be the decedent's will, the court will issue an order admitting the will to probate and appointing a personal representative to administer the estate by marshalling the decedent's probate assets, paying the decedent's debts, and distributing the remaining property to the beneficiaries named in the will. Title to these assets pass or transfer to the beneficiaries according the state's established probate process.

Non-probate assets pass title to the beneficiary at the owner's

death according to a contractual agreement, statutory provision, or by operation of law. As such, a personal representative of the decedent's estate does not have authority over non-probate assets. A financial institution that refuses to provide a personal representative any information about a decedent's account after presenting them with letters testamentary or letters of administration (documents showing court authority to act on behalf of the estate) are indicating, without improper disclosure, that the account was a non-probate asset. Non-probate assets are governed by documents or title that indicate the assets' successor owner upon the original owner's death.

Types of title

While owning property, the owner may change the character and type of title by which he or she owns and holds the property by using the appropriate legal process to do so. A discussion of the differing types, features, benefits, and limitations of each type of property ownership available in your state or the states where you own property should be done while creating your estate plan.

Married couples can agree to hold property as tenants by the entirety (if recognized in their state) or change community property into separate property (in community property states). Accounts can hold property titled as joint tenants with rights of survivorship (if recognized in the state), which automatically vests outright ownership to the property in the surviving account holder. Each different type of titled property varies as to it being a probate or non-probate asset.

Real and personal property

Real property is property affixed to the land, the land itself, and certain rights associated with the land, while personal property is property that is not real property. Statutes exist that dictate with specific clarity the requirements needed to transfer the title to real property in each state. These laws exist to prevent fraud and to make it clear to others who the rightful owners to the land are so past sales may be linked to future sales of the land to create a continuous, traceable chain of title. As a result, these laws must be carefully followed when conveying, transmuting, or transferring title to real estate.

Trust funding

Trusts are not entities; rather, trusts are the separation of legal and equitable title to property. The trustee is the legal title holder while the beneficiaries are the equitable title holders. Therefore, only property conveyed to the trust with its legal and equitable title split in such a manner is subject to the terms of the trust. The trust document does not govern or control property outside of the trust or property improperly transferred to the trust. Trust documents that make a statement indicating that all real property owned by the grantor is hereby transferred to the trust without a deed doing so fail to transfer any real property. As discussed above, such a statement would fail to be a proper conveyance of real property to the trust. To convey real property to a trust, a deed is required, which meets the state's statutory requirements to validly convey the property.

Estate plan ramifications

Property titling issues may inadvertently vitiate an estate plan. An estate plan seeking to fund

certain testamentary trusts in a will may have insufficient cash or assets to fund them because the account believed to be a probate asset subject to the will's provisions was instead a pay-on-death account paid to a sibling. Certain non-probate assets, such as life insurance and retirement benefits, may enjoy protection from creditor claims depending on state law; however, if the beneficiary designations fail or indicate to pay directly to the decedent's estate, these assets may now be subject to such claims.

On their face, most estate plan documents effectively implement the plans and goals of the client; however, without knowing the types and titling of the client's property and accounts, latent disasters may await the plan's execution.

Knowing how accounts and property are titled and discussing them with your estate planner helps alleviate any potential disasters that may cripple your estate planning objectives.



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