IMPLEMENTING THE ESTATE PLAN: ASSET OWNERSHIP STRUCTURE

I. Types of Ownership: Ownership of assets can be characterized as "probate" or "non-probate". Those assets characterized as probate assets will be transferred to the appropriate beneficiary upon an individual's death pursuant to such individual's Last Will and Testament, or by the laws of intestate succession. These probate assets will be administered through the probate court and will be distributed to the beneficiaries, after payment of all appropriate debts, claims and administration expenses. Non-probate assets, on the other hand, will be distributed to particular or named beneficiaries outside of the probate process. The types of ownership which will ultimately determine whether an asset is probate or non-probate is better described below.

A. Probate. Generally, an asset will be a probate asset if upon review of the "title" to the asset, it cannot be ascertained how the asset is disposed upon death.

1. Individual. An asset which identifies one individual owner, without any beneficiary designated in the title, is a probate asset. For example, an asset in the name of "John Doe", with no other designation or ownership structure is an individually owned asset, and therefore must be administered through the probate process.

2. Tenants in common. Assets held in "tenants in common" are also probate assets. These assets are held in common with other individuals and the title does not have "survivorship" language. Often, especially pre-1980's, real estate was held by two individuals, particularly husband and wife, as tenants in common. In such case, each individual was deemed to own an undivided one-half interest in the property. Thus, the undivided one-half interest requires probate administration to ultimately be distributed to the survivors of the decedent.

3. Miscellaneous. Even though an asset has a joint tenant or beneficiary designated with the title to asset, if that joint tenant or beneficiary is deceased, and no other tenant or beneficiary is included in the title, then the asset may require administration through the probate process. A typical example may include US savings bonds held by husband and wife, jointly with rights of survivorship. One of the spouses passed away, and the surviving spouse failed to change the title to the asset after the first spouse's death. Upon the surviving spouse's death, even though the asset was titled jointly with rights of survivorship, the bond will need to pass through the probate process since the joint tenant pre-deceased the decedent.

B. Non-Probate. Conversely with probate ownership, these types of assets include or identify another individual who will receive title to the asset upon the death of the primary or co-owner.

1. JTWROS (Joint tenants with Rights of Survivorship). Many assets titled jointly are owned with rights of survivorship. The limited exception is the asset owned jointly as tenants in common, described above. JTWROS is typically the most common form of ownership held by spouses. Survivorship ownership can include almost any type of asset, whether real estate, bank accounts, automobile title, etc. With this ownership, however, the title holders have "ownership" interest in the asset, and therefore often have the ability to change, withdraw, encumber, or otherwise dispose of this asset.

2 TOD/POD. ("Transfer on Death" or "Payable on Death"). TOD and POD ownership have become a very common method of ownership and probate avoidance technique. Essentially, title to the asset is maintained by an individual, with a beneficiary or beneficiaries identified in the title, to be transferred upon the individual owner's death. Unlike survivorship ownership, the beneficiary of a TOD or POD has no current ownership rights. A sometimes problematic aspect of this type of ownership occurs when a designated beneficiary predeceases the owner. In such a situation, the distribution lapses, unless an alternate beneficiary is identified. For example, if a widow has a POD bank account identifying her three children as beneficiaries, and if one of those three children predecease the widow, then the surviving two children will receive the asset equally, and the children of the deceased third child will not receive anything. Therefore, it is very important that if TOD or POD ownership is utilized, the individual owner changes the beneficiary designation in the event any other named beneficiary predeceases the owner. (No "per stirpes" designations permitted.)

3. Beneficiary Designation. Various assets by their nature, require the owner to identify a beneficiary to receive the asset upon the owner's death. Common examples of this ownership include life insurance, individual retirement accounts (IRA), annuities, 401(k) plans, etc. It is very critical that not only a primary beneficiary be named, but an alternate or secondary beneficiary be included on the beneficiary designation form of the asset. Keep in mind that if the primary beneficiary predeceases the owner, and no alternate beneficiary is listed, then the asset may require probate administration to ultimately pass to the beneficiaries.

4. Trust. Assets which are specifically transferred to a trust, by ownership in a "trustee" will also avoid the probate process. Title to the asset must specifically identify the trustee and often require additional information in the title, such as the name of the trust and/or the date of the trust. The mere existence of the trust will not cause the assets to avoid probate. Assets must be transferred to the trustee in order to pass outside of probate. Typically when a trust is created, the terms of an individual's Will provides for distributions to the trust ("Pourover" Will), but this contemplates the transfer of assets through the probate process to the trust. Trusts can be unfunded while living, and funded upon death with TOD or POD designations, or the

utilization of beneficiary designations with other assets. Sometimes titling assets in trust can prove to be clumsy, as financial institutions and governmental agencies (County Recorders and title bureaus) may be unfamiliar with the titling process.

II. Identifying Assets:

A. Inventory – A very important aspect of the estate planning process is the inventory of all assets of the individual or couple to the plan. A detailed list of assets should include the name of the financial institution, account number, current value, cost basis, ownership (see above) and beneficiary. Reviewing Schedule B of the Federal Income Tax Return (Form 1040) can be helpful with this process. Also, a review of the specific types of assets below can assist in identifying all assets of an individual or couple.

B. Specific types – It is very important when identifying assets to also identify ownership, so as to ascertain whether the same will be probate or non-probate assets.

1. Real Estate: Real estate can be owned by a variety of structures including –

   Individual/Tenants in common (ie, undivided one-half interest)
   JTWROS/Tenancy by the Entirety
   TOD – caveats (see above)
   Trust
   Limited Liability Company
   Out of state (i.e. Florida)

2. Bank accounts: With accounts held by financial institutions, please be certain that ownership is fully understood. For example, if you believe that you have provided one of your children with a Power of Attorney so that they can assist you with writing checks for convenience purposes, then the account should be owned solely by the individual, and not jointly with rights of survivorship. Obviously, such ownership may have unintended consequences.

3. Stocks: All stocks whether held in street name or by certificate, must be identified. Additionally, de-mutualized insurance companies are often assets held individually and subject to probate administration. Frequently, shares of stock of de-mutualized companies (for example, Metropolitan Life) are distributed to a policy holder, and held in an account by the insurance company. A review of Schedule B of Form 1040 can often times uncover this “dangling” asset and avoid the probating of an estate simply to transfer shares of a de-mutualized insurance company.

4. Bonds : Savings bonds (E, EE and H) - When ascertaining the value of this asset, also be sure to identify accrued interest, of which no income tax has been paid. Income tax planning may also prove beneficial during this process. Also, be aware of matured bonds which no longer pay interest.

5. Brokerage accounts [JTWROS with TOD] – Most brokerage firms, such as Wachovia, UBS, Butler Wick, Merrill Lynch, Smith Barney and others, allow for ownership to be held jointly with rights of survivorship, with a transfer on death beneficiary designation. So, a married couple can own a brokerage account jointly with rights of survivorship, with transfer on death beneficiary designations to their children. This ownership structure, of course, avoids the possibility of the probate estate upon the simultaneous death of the joint owners.

6. Life Insurance:
   Beneficiary designation – As indicated above, please be sure to identify both a primary and alternate beneficiary for all life insurance policies.

   Insured/Owner – Please also be aware of the appropriate owner and/or insured. Often times a parent may be an owner of a life insurance policy naming their children as the insured. This may be considered a probate asset of the parent upon his or her death, so that the policy may require probating through the deceased owner's estate.

7. IRA, Annuities, 401(k), etc. – A beneficiary designation is a very important consideration with this asset. An individual with a spouse should generally identify the spouse as the primary beneficiary, so that the spouse will be permitted to continue to defer federal income recognition through the use of a spousal rollover. A non-spouse beneficiary may be able to elect to take the proceeds from the account in installments based upon the beneficiary's life expectancy, and thereby spreading the income tax recognition over many years. If a non-spouse is intended to be identified as a beneficiary and the owner is currently married, the spouse generally must consent or sign the beneficiary designation form.

8. Automobiles, boats, etc. – Ownership to these assets are evidenced by a Certificate of Title. In Ohio, titles to these assets may be held jointly with rights of survivorship, and now with transfer on death beneficiary designations. Regardless of the value, if this asset is owned individually, it may require administration through the probate process. A spousal exception to probate of automobiles, boats and motorcycles are included in Ohio Revised Code Sections 2106.18-19. Essentially, even though an automobile is titled individually, a surviving spouse may elect to take up to two automobiles, so long as the aggregate value of the two automobiles does not exceed $40,000.00, and is not otherwise specifically disposed of by the Will or TOD.

9. Business Interests - closely held stock; LLCs; partnerships, etc. – Generally, agreements by shareholders or partners in a partnership or limited liability company will identify rights upon the death of the owner. Thus, Buy Sell Agreements may require the company or other shareholders to purchase the deceased owner's interest by paying a certain amount to the spouse of the decedent, or specific designated beneficiaries. A client's estate planning attorney should be aware of these interests and their transfer upon death, and whether they avoid probate.

10. Unclaimed funds – Funds held by the Ohio Department of Commerce which are “unclaimed” are also subject to the probate process and therefore the Secretary of State’s website should be reviewed when inventorying assets.

III. Distribution scheme: Title to and ownership of assets must comport with intended distribution scheme. Testator may provide for specific or charitable bequests, but if all assets are non-probate, then intended beneficiaries will not receive the bequest. Further, ownership with one child “for convenience”, when equal distribution is contemplated may create unintended consequences.

For example, John Doe’s Last Will and Testament provides for a $10,000.00 charitable bequest to Hospice, the residue then to son, Jim Doe. If all assets of decedent are titled in a JTWROS bank accounts with son, then Hospice will not receive its bequest. Likewise, if Testator’s Will provides for distribution to five children equally and all assets are in name of child and Testator as JTWROS, at the death of Testator, child gets all … period.

IV. Trust Planning for Tax Considerations: (A/B Trusts and their funding). Spouses should maintain separate and distinct estates, and at a minimum, to the extent of the exemption equivalent. Unfortunately (or fortunately), you do not know who is going to die first. The goal is for each spouse to fully utilize the federal exemption equivalent of $3,500,000 (for 2009) of property for estate tax purposes, especially if the couple has more than $7,000,000.00. Ideally, the plan should confirm that at the second spouse’s death, estate tax will be eliminated or at least minimized to the greatest extent after utilizing the exemption equivalents of both spouses. The AB trust arrangement allows the exemption equivalent amount to be segregated upon the first spouse’s death from inclusion in the surviving spouse’s taxable estate.

[**NOTE**: Keep in mind that the current federal estate tax exemption equivalent is $3,500,000.00 in 2009, then is unlimited in 2010 (ie, NO estate tax). But then in 2011, the federal estate tax law “sunsets” and the exemption equivalent reverts to its 2001 amount, or $1,000,000.00. There is an expectation of a change in this law prior to reaching 2010, which may include a variety of nuances, and perhaps an exemption equivalent amount between $3M to $5M. Of course, this is simply an educated guess, so clients are urged to consult with their estate planning counsel often – at least annually, until the changes, if any, are settled. The federal GIFT tax exemption is frozen at $1,000,000 under existing law.]

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