

WILLMS, S.C.

MEMORANDUM

TO: Clients and Friends of Willms, S.C.
FROM: Attorney Peter J. Smiley
DATE: April 11, 2016
RE: Avoiding Probate for your Personal Residence

For many people, a personal residence is one of the most valuable assets they own. As a result, ensuring that a personal residence is passed to loved ones in the manner the property owner intends is a vital part of the estate planning process.

There are two categories of methods available to transfer a residence after the owner's death: (1) "probate transfers," and (2) "non-probate transfers."¹ This article provides a brief summary of these categories as available to Wisconsin residents.

Probate Transfers

Probate transfers require a court to supervise the distribution of the residence as a part of the probate process. Probate transfers are necessary whenever property is owned by a deceased party at the time of his or her death, and there are no prior arrangements for a non-probate transfer. Provided proper planning is done beforehand, probate transfers can sometimes be effective in fulfilling the residence owner's intentions. However, many individuals desire to avoid probate because the process can be quite slow, is a public proceeding, and can generate significant expense when compared to other methods of transferring property.

It is a common mistake for people to believe that a Will can be used to avoid probate. The function of a Will is to direct a probate court on how assets are to be distributed via the probate process. Therefore, if you are relying on a Will alone to transfer your home to your heirs, please understand that your home will still have to go through the probate process.

Non-Probate Transfers

Non-probate transfers, as the name implies, allow a property owner to transfer ownership of a residence prior to or upon their death, without going through probate to do so. These transfers are often faster and more cost effective than probate. The remainder of this article

¹ Please let your attorney know about any mortgages or creditor claims secured by your residence, as they will need to be addressed when planning for the disposition of your residence.

is devoted to providing a brief overview of several common types of non-probate transfers available to Wisconsin residents.

1. Avoiding Probate with Joint Ownership

There are several ways to avoid probate by owning a property jointly with another party. These include owning the property jointly with a right of survivorship or as survivorship marital property.

a) Joint Tenancy with a Right of Survivorship

A simple way to avoid probate of a personal residence upon the death of one owner is to own the property “jointly with a right of survivorship” with another party. The joint tenants do not have to be married, or even related to own a residence in this manner. Once the first of the joint tenants die, a residence owned jointly with a right of survivorship can be transferred to the surviving owner with a relatively simple affidavit. The surviving owner will then own the property outright.

While this type of ownership is simple, and fairly common, there are some important points to consider.

- When a residence is owned jointly with a right of survivorship, each joint owner is considered to own an undivided interest in the entire property. This means that any debts (e.g. mortgages) or judgements (e.g. bankruptcy, divorces...) against one owner of the residence has the potential to result in a forced sale of the entire property.
- After the first owner’s death, the surviving owner will then own the property solely in their own name. When the surviving owner dies (or in the event of the simultaneous death of both owners), the residence will be subject to probate unless further planning is done.
- Property owned jointly with a right of survivorship receives a basis adjustment upon the death of an owner to the extent of the deceased owner’s interest in the property.²

b) Survivorship Marital Property

If a married Wisconsin couple owns their residence jointly and has not elected otherwise, the property will be classified as “survivorship marital property”. This method of ownership will avoid probate upon the death of the first spouse to die, but, absent additional planning, will not avoid probate upon the death of the second spouse or in the event of simultaneous death.

² Tax basis is generally the price an asset was purchased for, plus or minus certain adjustments. The asset’s basis is used to calculate the taxable gain or loss when the asset is sold. An in-depth discussion of basis step-up adjustments will be in the next Willms, S.C. Newsletter. Look for it this summer.

Upon the death of the first spouse, survivorship marital property receives a basis adjustment to fair market value for both spouses' interests in the property.

2. Avoiding Probate with Marital Property Agreements

A less common way to avoid probate for married couples is the implementation of a marital property agreement with a "Washington Will" provision. A Washington Will provision in a marital property agreement can designate a person or trust to receive a spouse's interest in property (including a residence) upon the death of either spouse. A Washington Will provision can be implemented without probate, but it does require filing certain documents with the Register of Deeds upon the owners' death.³

3. Avoiding Probate with Transfer on Death Deeds

Transfer on death deeds allow the owner of a residence to name a beneficiary to receive the property upon the owner's death. The residence will avoid probate, but this method also requires filing certain documents with the Register of Deeds upon the owner's death.

If a residence is transferred to an individual via a transfer on death deed, they will own the property outright, and it will become part of their probate estate.

4. Avoiding Probate with a Revocable Living Trust

The most flexible and thorough way for either single or married individuals to transfer a residence (and many other types of property) without probate is the "revocable living trust." In general, a trust is a legal relationship that is established by an agreement to hold property on behalf of one or more persons. If the party(s) who transfers property to the trust (the "grantor" or "grantors") can modify or revoke the agreement that governs a trust as he, she, or they see fit, the trust agreement is considered to be "revocable."

A revocable trust can be structured so that during the grantors' lives they will have virtually the same level of control over the residence as they had when it was owned directly in their names. The residence can be sold, improved, or given away by the grantors just as it could be before it was transferred to the trust. The grantors will oftentimes not notice a difference between trust and outright ownership of the residence, other than a change to the names on the property's deed and tax bill.

A residence owned by a properly constructed revocable living trust will avoid probate. However, because trusts can hold many different types of assets, a properly funded⁴ revocable living trust can also allow all of a grantor's other assets to avoid probate, in addition to the residence. Further, the terms of the trust agreement can remain confidential, as opposed to those of a Will, or the deeds listed above, which become public records when filed.

³ Wis. Stat. § 867.046(2).

⁴ Trust funding is the process of transferring property into a trust. A detailed discussion of trust funding will be in the next Willms, S.C. Newsletter.

A revocable living trust can provide grantors and beneficiaries with the best of all worlds when planning for the distribution of a residence. Besides avoiding probate, a revocable living trust provides many other benefits. A few of these benefits include:

- The grantors may choose to continue the trust after their deaths for the benefit of the beneficiaries. This continuing trust can be drafted so that the interests of the beneficiaries are protected from their creditors in the event of a bankruptcy or divorce.
- The trust can facilitate the distribution or sale of the property upon the death of the last grantor to die. It can also provide a framework to distribute the proceeds among the beneficiaries.
- A trust agreement can set forth dispute resolution procedures, thus minimizing any potential conflicts between beneficiaries.
- Property owned by a revocable living trust can generally qualify for all of the same tax credits, exclusions and basis adjustments available to personally owned property.

Conclusion

Planning for the distribution of your residence should be an important part of every home owner's estate plan. When selecting a method to transfer your residence, it should be coupled with a comprehensive estate plan to ensure all of your assets are administered and distributed as you desire. Please contact us if you would like more information on any of the topics discussed in this article.⁵

End of Memo

Information contained in this memorandum is not a substitute for professional estate planning advice nor should any information provided in this memorandum be construed as legal advice. Therefore, none of the information being provided should be relied on without seeking the advice of legal counsel or other professionals regarding the tax and non-tax consequences associated with the same.

⁵ This article summarized several of the most common probate avoidance methods for real estate. For a more specialized option outside of the scope of this article please see Attorney Andrew J. Willms' article in this Newsletter on planning for vacation homes for a discussion of the Qualified Personal Residence Trust ("QPRT"), which is another method to transfer a residence without probate.