Pasternak & Fidis Reporter

FALL 2021

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Avoiding Probate with the Right Plan

BY CHRISTINA K. SCOPIN

Often, when meeting with a client to discuss their estate planning, one of the first questions is, "How can I avoid probate?" Probate can be a source of anxiety for clients who want to avoid imposing on their loved ones what they envision as a long list of cumbersome tasks after their death.

Probate is the process by which a decedent's will is carried out and, depending on the nature of the assets involved, requires varying levels of court involvement. Typically, probate assets are those assets a decedent owned in his or her sole name that do not go to a designated beneficiary. The probate court appoints the personal representative of the decedent's estate, and monitors payment of the decedent's debts, compliance with mandatory notification procedures, and distribution of assets in accordance with the decedent's will.

Probate can be a relatively painless and straightforward process. Nevertheless, for the client whose priorities include avoiding probate, the tools discussed below, together with careful planning with estate planning counsel, can provide an effective means to that end.

Revocable Trust. A revocable trust is a highly effective method to avoid probate. The creator of the trust (the "grantor") titles his or her assets, such as real estate, cash and securities accounts, and business interests, in the name of the trust. The grantor decides who will serve as the trustee of the trust. The grantor typically will be the initial trustee during his or her life and will choose who will serve as successor trustee if the grantor is unable to serve due to incapacity, and after his or her death.

During the grantor's lifetime, the grantor can revoke the trust or otherwise make changes to its provisions. The appointed trustee manages and administers the trust for the benefit of the grantor (and, in many cases, the grantor's spouse) during the grantor's lifetime, and distributes the remaining assets in the trust after the grantor's death in accordance with the provisions of the trust.

Assets held by a revocable trust are not probate assets after the death of the grantor. For example, when a decedent dies owning real estate in a state other than that of his or her legal residence, a supplemental probate proceeding must be initiated in that state. However, real estate held by a revocable trust, wherever located, is not subject to probate. A revocable trust can be particularly useful for people who own real estate in multiple states, as it makes supplemental probate proceedings unnecessary.

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COVID-19 and the Rise of Electronic Signatures

BY PAOLA FLORES ROMAN

Since early 2020, fewer face-to-face transactions have been possible because of mandatory social distancing. These restrictions changed the way lawyers and clients handled contracts and other business and personal transactions. The remote work environment reduced ink-to-paper signatures and increased the use of electronic signatures for contracts. Parties to a contract use the click of a button, sign on an electronic notepad, add their signature to the end of an email, or upload a picture of their signature to software. This development has led to questions about authenticity, validity, and enforcement of contracts.

Although an oral contract can be valid, with some exceptions, most contracting parties prefer a written agreement with signatures. In the family law area, a premarital agreement must be in writing and signed by the parties. In Virginia, by statute, a marital settlement agreement incident to a separation or divorce must be in a signed writing (unless made in open court). In D.C. and Maryland, where case law allows for an oral divorce settlement, written and signed agreements remain the most common choice.

Forms of Electronic Signature. The most common method of executing a contract is by parties signing using ink on paper. Other methods of signifying a party's adoption of a contract are permissible. A signature can be stamped, engraved, recorded, or printed. A Virginia Circuit Court case, *Pierce v. Foreign Mission Bd. of the So. Baptist Convention*, recognizes "any mark, symbol, sign, or other thing" if the person intends the mark as their signature. Historically, when illiteracy was more common, the use of an X, a cross, or a thumbprint could substitute for a conventional signature. There are also a variety of ways to sign electronically. A party can use software that allows them to type in their signature, or signify adoption through an electronic recording, with an electronic pen, by clicking an "Accept" button, by adding a symbol, or by applying a scanned image of a handwritten signature to a document. Some more advanced systems allow a user to upload their thumbprint to their computer or access a document with a pin or password.

Validity of Electronically Signed Documents. Most states, including D.C., Maryland, and Virginia, have enacted the Uniform Electronic Transactions Act of 1999 ("UETA"). UETA eliminates obstacles to electronic trade by giving electronic records and signatures the equivalence of physical records and handwritten signatures. In addition, the federal Electronic Signatures in Global and National Commerce Act of 2000 ("ESIGN"), provides for electronic records and signatures. If the electronic record accurately reflects the parties' agreement and can be reproduced as needed, ESIGN gives the contract legal validity. Both acts require a court to enforce such a contract if otherwise valid. Electronic signing is not an option for some contracts and transactions. UETA and ESIGN contain several exceptions which limit their use. The ESIGN Act defers to state law for adoption, divorce, and family law. For example, Maryland's enactment of UETA does not apply to transactions to the extent they are controlled by laws "governing adoption, divorce, or other family law matters." Maryland's other laws determine whether documents regarding divorce, alimony, child support, and child custody can be signed electronically.

THANK YOU TO LAW CLERK PAOLA FLORES ROMAN for her help this summer. Paola came to us through the Montgomery County Bar Foundation's Pipeline Scholar Program, which is a collaborative project between the Foundation and several specialty bar associations to enrich our legal community by bringing diverse law students into county law firms as summer interns. Like the four Pipeline Scholars we have had before her, **Paola** was invaluable around the Firm, helping with research, drafting estate planning documents, attending client meetings, and even pitching in on a trial. **Paola** returns for her final year at the University of Baltimore School of Law and plans to graduate in the spring. We wish Paola the best with her legal career!

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The Uniform Cohabitants' Economic Remedies Act and Cohabitation Agreements

BY LINDA J. RAVDIN

In July 2021, at its annual meeting, the Uniform Law Commission adopted the Uniform Cohabitants' Economic Remedies Act (UCERA). Cohabitants already have the right to enter into a written or oral contract under general contract law principles. If enacted, UCERA would create statutory recognition of these rights and would expand the bases for cohabitant property claims.

UCERA has not been adopted, or even considered, by the legislatures of Maryland, Virginia, or the District of Columbia. It seems unlikely that it ever will. However, it addresses a problem that will continue to exist when two people live together, acquire property, make promises to each other about sharing assets upon death or dissolution, or when one party believes they have done so. Whether UCERA is ever adopted, it points up the need for cohabitants to have a written agreement that specifies their rights at the end of the relationship.

Rights of Cohabitants upon Death or Dissolution. Marital status alone creates property rights and obligations upon death or dissolution. In D.C., parties who enter into a registered domestic partnership (RDP) also acquire property rights by virtue of their status. By contrast, in the majority of states, including D.C., Maryland and Virginia, living together in a committed relationship does not.

Express and Implied Oral Contract and Other Legal Theories. Cohabitants may enter into a written contract governing their property rights at death or dissolution. When they have not done so, disappointed surviving or former partners have tried a variety of legal theories in pursuit of a remedy. These include express oral contract, implied contract, unjust enrichment, irrevocable gift, and implied partnership.

When cohabitating parties acquire real estate with joint title, principles of property law will be applicable. Property held by tenants in common is presumed equally owned. When one member of a couple acquires sole title to real estate, the other cohabitant who contributes money or labor to acquisition or improvement may be able to pursue a claim for reimbursement.

Cohabitants Need an Express Written Agreement. Cohabitants should have a written contract spelling out their rights. Without one, a party may be forced to defend in court a property or support claim he or she thought could be avoided by remaining unmarried. For an economically weaker party, anything less than a written contract will provide poor protection for that person's interest in property he or she may help to create but which is titled in the name of the other partner. Where the claimant must assert his or her claim after the death of the partner, the lack of an express, written contract creates a greater obstacle to enforcement.

Parties who plan to enter into an RDP in D.C. need a written agreement. If either party leaves the jurisdiction and moves to a state that does not recognize the parties' legal status, and the property and support rights that flow from it, in the absence of a written contract, their remedies will be inadequate.

In sum, cohabitants who wish to reduce the risk of litigation and to protect their financial and property interests from claims upon dissolution or death, or who wish to establish their monetary rights in the fruits of shared labor, need an express written contract defining their rights and obligations.

Criteria to Create an Enforceable Cohabitation Agreement. Cohabitation contracts are governed by the same validity criteria as any other contract. It must be executed voluntarily, not under duress or as a result of fraud, by parties with legal capacity to contract, and there must be consideration. There must be agreement as to all essential terms.

Consideration is something of value given by each party. Consideration can include: agreement to share and pool income and other economic resources; domestic services; services as an unpaid employee of a business; labor in the acquisition or improvement of real estate; agreement to quit work, retire, or move to a different geographic area; agreeing to care for a party during an illness.

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AVOIDING PROBATE WITH THE RIGHT PLAN

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Another benefit of the revocable trust is privacy. Probate court proceedings and documents, such as the decedent's will, are open to the public. However, a revocable trust, including the identity of beneficiaries, the terms of distribution, and the value of assets in the trust, do not become a part of the public record.

A revocable trust is also useful for incapacity planning. In the event of the grantor's incapacity, the assets in the trust will be managed by the designated successor trustee without the need for a court proceeding to appoint a guardian or conservator.

Despite the many benefits, a revocable trust is not for everyone. Some may not want to do the legwork or incur the additional expense of putting assets in trust. Many couples own their home in survivorship form so that it will automatically pass to the surviving spouse without the need for probate. In addition, many clients already hold major assets, such as life insurance and retirement accounts, with a beneficiary designation; these assets, too, pass outside of probate. A revocable trust may be unnecessary for these individuals.

Beneficiary Designation. The owner of an IRA, an annuity contract, or a life insurance policy can name a beneficiary to receive the asset upon the owner's death by filing a designation of beneficiary with the financial institution. The owner may designate one or more primary beneficiaries, determine the percentage to go to each beneficiary, and may designate a contingent beneficiary in the event the primary beneficiary predeceases the owner. The owner may opt to designate a revocable trust or a trust created under his or her will as the beneficiary. Such a beneficiary designation removes the asset from the owner's probate estate. The owner should plan for the possible death of one or more of the designated beneficiaries; if no beneficiary survives the owner, the asset will pass in accordance with the financial institution's own terms, which may not be what the owner wants. This highlights the importance of the owner routinely reviewing and updating beneficiary designations to ensure that they coordinate with the owner's estate plan.

Joint Title. Titling assets in the joint names of one or more owners in a survivorship form of title is another means to exclude an asset from probate. An asset, such as real estate or a cash account, held as joint tenants with rights of survivorship (JTWROS), for example, will automatically go to the surviving owner, outside of probate and not under the will of the predeceasing owner. There is no limit on the number of owners, and they need not be related to each other. In addition, Maryland, D.C., and Virginia have a form of ownership called tenancy by the entirety (T/E), available to married couples (and in DC registered domestic partners). Like JTWROS, T/E ownership creates a right of survivorship.

When considering retitling inherited assets in joint names with a spouse, the owner should think about the effect of adding his or her spouse as a joint owner of their nonmarital asset. Doing so will avoid probate but could cause the asset to become subject to division if the parties divorce. The owner may want to consider a postmarital agreement to address this contingency.

It is important to note the distinction between joint ownership and simply adding an authorized signer to an account. An older person may add an adult child to a bank account to help with bill-paying. Whether the bank considers the additional signer to be a joint account-owner, thereby removing the asset from the account-owner's probate estate, however, depends on the institution's contract terms.

Pay-on-Death or Transfer-on-Death Designation. A pay-on-death (POD) account, typically a cash account, provides for a beneficiary to receive the account upon the account-owner's death. A transfer-on-death (TOD) account does the same for a securities account. POD and TOD designations are a simple way to remove an asset from the account-owner's probate estate. A POD or TOD designation can also be useful in coordination with revocable trust planning, as the owner can designate the revocable trust as the beneficiary of the account at death, while avoiding the potential inconvenience associated with retitling an account in trust during lifetime.

As with all planning tools, a POD or TOD designation is not appropriate for all estate plans. A decedent's estate will need enough liquid assets to pay debts, taxes, and administration expenses. A TOD designation over a securities account that comprises the majority of the decedent's assets could result in insufficient liquid assets in the decedent's probate estate. Likewise, if the decedent's will provides for a cash gift, but there are insufficient assets in the probate estate to satisfy the gift, the gift will lapse while the TOD account goes to the named beneficiary, a result that may not be what the decedent intended. A POD or TOD designation will supersede any contrary

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Virginia Passes Uniform Collaborative Law Act

Virginia has joined Maryland and D.C. in passing the Uniform Collaborative Law Act (the UCLA). The Virginia UCLA will apply to all Virginia family law Collaborative cases as of July 1, 2021. Begun in 1990 as a newcomer to the array of Alternative Dispute Resolution options, Collaborative Law was introduced in the DMV area in 2005 and has become a popular choice for couples who prefer an out-of-court process to settle their divorce and family law issues. Collaboratively trained family law attorneys, including those in our firm, welcome the adoption of this Act. ■

COVID-19 AND THE RISE OF ELECTRONIC SIGNATURES

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Both D.C. and Virginia enacted UETA without the family law exception. Both D.C. and Virginia law require a premarital agreement to be in writing and signed by the parties. In both jurisdictions, UETA provides that when a law requires a writing or signature an electronic record or an electronic signature will suffice. Therefore, it appears that an electronically signed premarital agreement is permissible. Electronic signing under UETA is not an option where a statute requires handwritten signatures, a formal notarial process, a seal, or witnesses to be present, for example, for a will, codicil, or testamentary trusts, but a number of states rushed to authorize (either legislatively or via Executive Order) the electronic signing and/or remote witnessing of estate planning documents during the COVID epidemic—leading to a hodgepodge of different, confusing, and sometimes conflicting requirements. These problems have yet to be ironed out. At this time we recommend no change in the way clients execute estate planning documents.

Federal law governs certain transactions that affect parties to a marital agreement or a divorce. The federal Employee Retirement Income Security Act ("ERISA") governs employer-sponsored retirement plans. Spouses during a marriage or after a marital separation may agree to waive spousal survivor rights under ERISA. ERISA requires that the spouse's consent be in writing and witnessed by a plan representative or a notary. ESIGN permits the act of witnessing to be done remotely with the witness signing electronically. Similarly, ESIGN appears to permit a waiver of spousal rights in a federal civilian pension, such as the Federal Employees' Retirement System ("FERS") pension. The Office of Personnel Management ("OPM") prescribes the rules and protocols for such a transaction.

Where electronic signing is generally permissible, the contract must still comply with other requirements. The signing person must intend to sign in that manner. The electronic signature should be clearly attributable to the person who signed and be affiliated with the specific document or record signed. In Maryland and Virginia, if a standard contract provision allows transactions to be conducted electronically, then the parties must separately consent to that clause. In Maryland, D.C., and Virginia, if a law requires retention of records, an individual complies with the law by keeping an accurate and accessible electronic record. For an electronically signed contract to be effective, it must be a type that is permitted under ESIGN and the applicable state UETA, and comply with all requirements of intent, consent, and authenticity.

Authentication of Electronic Signatures. Just as a signature on physical document can be forged, or the document tampered with, so can an electronic signature or document. Software such as Adobe Pro, DocuSign, HelloSign, or Sign Easy can store the signed document with a timestamp and protect the record from tampering. Software with an embedded digital certificate of the document's history allows an expert to track the IP address, to see who sent the document, how it was sent, and the date it was accessed and signed. Certain sophisticated tools allow tampering, but those changes can be detected. Software with two-factor authentication requires a person seeking access to the document to prove their bona fides with a password, a pin, or by answering questions.

Conclusion

As the world reopens, many ways of doing business that changed as a result of the pandemic will persist; businesses and individuals will likely continue to conduct transactions virtually. ■

THE UNIFORM COHABITANTS' ECONOMIC REMEDIES ACT

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Financial Disclosure. Financial disclosure is not a general obligation of parties to a cohabitation agreement, as it is for a valid premarital agreement. However, for some couples, it may be a good idea to make some disclosure. Disclosure can help to establish the identity of a party's pre-cohabitation separate assets. The weaker party may need to get disclosure in order to have a basis to negotiate the terms.

Scope and Terms. An agreement may address property rights upon the death of a partner or the dissolution of the relationship. It could address only ownership of specific property, such as a home, investment property, or a business; or, it can be broader and apply to all property. It can provide for the parties to waive all rights and claims so that a parties' rights are determined exclusively by title. It can include an obligation for the wealthier party to transfer assets, make lump sum payments upon dissolution, or make provisions for the weaker party in the event of death. It could provide that parties will pool their resources and create a shared estate.

Provisions for Support After Dissolution. Parties can agree to a specific amount and duration of support if the relationship ends or can waive any such claim. They could agree to go to binding arbitration to determine a future post-dissolution support claim. It is doubtful that a court in D.C., Maryland, or Virginia would hear such a claim, but this is untested.

Terms Affecting Retirement Benefits. Retirement benefits are a special class of property. Parties can provide in an agreement for their value to be counted in the event of dissolution and for a payout of cash or a trade-off of other assets to compensate for such value. Courts have no authority to order a plan administrator to pay benefits to the nonparticipant. Parties can agree that a plan participant will name a cohabitant as a survivor of a death benefit so long as the terms of the plan permit the participant to do so. These contractual rights may not be enforceable directly against the plan.

Effect of Marriage or Other Formal Legal Status on Agreement. A cohabiting couple may decide to marry or enter into an RDP in D.C. The contract could provide either that it survives so that it functions as a premarital agreement or that it is terminated upon such an event.

Conclusion

An unmarried couple has the right to enter into a contract governing property upon death or dissolution and providing for support, or for a waiver of any claims. Cohabitating parties who have property interests they wish to protect from partner claims upon dissolution or death, or who need protection from being divested of property to which they have a valid claim, should enter into an express, written agreement defining their rights. ■

AVOIDING PROBATE WITH THE RIGHT PLAN

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provision in a will or trust regarding the same account. Therefore, it is important that the use of POD or TOD designations be coordinated with the account-owner's overall estate planning objectives.

Transfer-on-Death Vehicle Registration. In Maryland and Virginia, the owner of a motor vehicle may designate a beneficiary to receive title to the vehicle at the owner's death. In that event, the vehicle will not be a probate asset and will pass automatically to the beneficiary. Only one beneficiary may be added to a vehicle title. If an initial designated beneficiary predeceases the vehicle owner, the owner must update the designation to name a living beneficiary; otherwise, the vehicle will be a probate asset at the owner's later death. The owner may cancel or change the beneficiary designation at any time prior to the owner's death.

Conclusion

While the planning tools discussed above can provide an effective means of probate avoidance, ultimately, whether it is appropriate to make use of one or more of these tools should be based on consideration of your goals and objectives in consultation with your estate planning attorney. ■

P&F NEWS

Partner **Anne Coventry** was recently listed in the latest Chambers & Partners High Net Worth publication as a leading attorney in the field of Private Wealth in Washington, DC. This is the fifth year in a row Anne has received this distinction.

Best Lawyers, a peer-reviewed publication, and U.S. News have named several Pasternak & Fidis attorneys as the "best" in Bethesda, Maryland for 2021. In Family Law, **Jan White**, **Linda Ravdin**, and **Vicki Viramontes-LaFree** took top honors. **Linda** and **Vicki** were named as best in Family Law Mediation, while **Jan** was named among the best in Collaborative Law: Family Law. **Anne Coventry**, **Stephanie Perry**, and **Adam Swaim** were named among the best Trust & Estates attorneys in Bethesda. Congratulations to our Best Lawyer award winners!

Proposed Changes to Federal Estate and Income Tax Laws

A proposal from the Ways & Means Committee of Congress would significantly impact estate planning if enacted as proposed. One change would be a reduction of the exemption from the federal estate, gift, and generation-skipping transfer (GST) taxes, from its current $11.7 million figure, down to approximately $6 million, as of January 1, 2022. Another change would dramatically affect the treatment of irrevocable "grantor trusts" (including spousal lifetime access trusts (SLATs) and life insurance trusts, many of which are grantor trusts), which have been a key estate planning tool for many years: under the proposal, grantor trusts that are created OR funded after the date of the legislation's enactment would be subject to estate tax at the grantor's death, and distributions from grantor trusts created OR funded after the date of enactment would be treated as taxable gifts from the grantor at the time of distribution. Importantly, the proposal does not affect the treatment of existing grantor trusts, except to the extent that additional contributions are made to them after enactment of the legislation. This summary reflects the status of the proposal as of September 17, 2021. We are monitoring closely the progress of these proposed changes through the legislative process; this is, of course, only proposed legislation and its provisions may change before the bill is enacted into law. ■

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