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LEGAL MEMORANDUM

RE: TWO WAYS TO AVOID PROBATE

A Will is merely a piece of paper with your written wishes on it. It has no importance, force or effect unless it is brought to court and probate proceedings are used to appoint the personal representative (executor) and give the Will effect. Your heirs can receive nothing unless and until the Will is probated in court proceedings.

Probate means "prove." It must be proven to the court that: (1) the Will is valid and lawful; (2) you were not forced to make the Will; (3) you were not laboring under misunderstanding at the time you made the Will; (4) you were competent to make the Will; (5) the personal representative is proper; (6) all creditors have been notified, paid, and/or settled; (7) all accounting is done; and (8) all heirs are getting their proper due.

Probate proceedings are costly and time consuming. In the normal, **formal administration** probate proceeding, attorneys and the court charge fees based on how large your estate is. Attorneys commonly charge between 3% and 8% of the gross estate plus court costs. The most common fee is 4%-5% of assets. A full administration probate proceeding for an estate which owes no estate taxes can take 6-12 months before all is done and, quite often, proceedings take a much longer time. An estate subject to estate taxes may take several years. Moreover, your heirs and personal representative will be subjected to the aggravation of red tape, time delays and paper work.

Another reason to avoid probate concerns Medicaid law. If someone receives Medicaid benefits in a nursing home or at home due to infirmity, the state would have a lien against all probatable assets to reimburse the state for benefits paid.

You can avoid probate proceedings entirely if you plan ahead. You should try to avoid the costs, time delays and aggravation entailed with probate proceedings.

There are two (2) principal ways to avoid probate proceedings: **(1) the living trust**; and **(2) "common property" procedures**. By far, the best way in most cases is the **living trust** because it accomplishes much more than merely avoiding probate procedures.

I. THE LIVING TRUST

A. Nature—A living trust (inter vivos trust or revocable trust) is merely a contract you make with your trustees. You can be your own trustee and you should name one or more co-trustees to serve with you. Your co-trustees can be one or more of your children, friends, relatives, attorney or a trust company (bank).

There are two kinds of trustees. A **successor trustee** cannot act until it is proven that you are incompetent or dead. The problem is that you may be ill, not incompetent, and need help but the successor will not be able to act for you or you may be incompetent and the successor trustee may have difficulty proving same without passage of time, court proceedings and expense. I prefer my clients to have **co-trustees** who can act for you at any time, whether you are ill or healthy, without proof or delay. Of course, in picking any kind of trustee you need someone who is honest, prudent and trustworthy.

You need not pay a co-trustee to act as such, but, of course, a bank or an attorney would want a fee and require one. A trust agreement can be **"revocable,"** that is, you can change it or cancel it at any time. For a large estate where there may be income and/or estate tax problems, an **"irrevocable"** trust may be used, but that means you could not be a trustee or change or cancel it in most ways. Most people use the **"revocable"** trust. The trust agreement is legally enforceable in court, but rarely are there any court actions unless an heir thinks he or she is being cheated by a trustee.

B. "Funding" the Trust—After the trust agreement is signed by you and your co-trustees, you must put all of your assets in the name of the trust (i.e., Name your Trustee, Trustees Pursuant to, THE (your name) REVOCABLE TRUST, dated (date signed)). To do so, you merely: (1) go to your banks and have the banks put the new title on all your accounts and have new signature cards signed by all trustees; (2) go to a stockbroker or contact the company directly in order to get new certificates for all your stocks and bonds or create an account for the broker to hold all securities in the new name (some brokers do not charge for this service); and (3) have your attorneys prepare and record new deeds or assignments so that all your real estate interests are in the name of the trust.

C. Parts of the Contract—The trust agreement has three (3) parts to it.

1. In the first part, you name your trustees (yourself, if you wish, and one or more co-trustees) and give them their duties and authorities.

2. In the second part, you state what use of your assets is to be made during your lifetime. Most people state that during their lifetime, the trustees pay them or their spouses as much money as they need. Since you can be a trustee for yourself, you have complete control over your assets and their use as you do now. If you were a trustee, you could withdraw monies at your whim or invest, re-invest and do all you can do with your money as you could do without a trust. You need not report to anyone for what you do. However, other trustees must report to you for what they do. Most commonly, trusts provide that nothing can be done with your trust assets except for you or your spouse's benefit or as you may otherwise direct.

3. In the third part, you state what should happen to your trust assets (your estate) after your death. Thus, it operates like a Will, but since it is a contract with your trustees, it does not have to go through probate proceedings. Your remaining co-trustees can pay your bills and then distribute your estate to your heirs as you directed in the trust agreement very rapidly, efficiently and without great expense. Florida law requires creditors to be notified and bills paid out of trust assets. An attorney would be necessary to help your trustees follow that law but, for most other matters, the trustees need not use an attorney. There should be no other reason to go to court and the trustees can immediately follow your directives without any hassle. Your co-trustees must distribute your estate as you direct as there would be no discretion on their part.

Thus, the trust agreement avoids the costs, aggravation and time of probate proceedings. But it eliminates other headaches as well during your lifetime. **The main purpose of a trust is to protect you during your lifetime to see that your lifetime needs are met.**

D. Illness or Incompetency—Should you become ill or incompetent due to a stroke or other physical or mental illness or wish to take a long vacation and need someone to take care of your business your co-trustees can immediately step in and take care of your financial needs (and those of your family if you wish) out of your assets. If you do not have a trust, the only way your assets could be used for your benefit during your incompetency would be to have a court name a guardian for you. Guardianship proceedings are very costly, demeaning and, definitely involve more red tape than probate proceedings. True, a power of attorney may suffice, but if you are incompetent, you cannot make a power of attorney and even if one existed, many banks, stockbrokers and real estate title insurance companies often refuse to obey powers of attorney, though they are required to accept a Durable Power of Attorney according to Florida law. Moreover, in Florida, powers of attorney, except for one statutory form ("durable power of attorney"), are automatically canceled upon incompetency. All powers of attorney are automatically canceled upon death. **Thus, through the trust, your co-trustees could care for all your financial needs without court hassle, speedily and efficiently.**

E. Nursing Homes—A trust will hinder a nursing home from taking your assets. It is extremely rare when public or private nursing homes may demand that, in order for you to stay there. In some other states it is more common. The trust hinders the nursing home from that claim; if made. Instead, the nursing homes will settle for a contract with your co-trustees that the trust will pay the monthly bills. Also, the other trustees would possibly do transactions for you that would qualify you for Medicaid benefits so nursing home and health care costs are paid by the government.

F. Other Creditors—Florida law requires your trustees to determine if there are creditors and to pay them prior to your heirs receiving their due. It is best, for this purpose, that an attorney be used to advise Trustees on procedures.

G. Care of Spouse or Other Loved Ones—What would happen if a "healthy" person dies or becomes very ill leaving a spouse or other loved one who is sick or otherwise unable to handle his or her financial affairs? Under the trust, your co-trustees can immediately step in and care for all of you, if that is your wish, without hassle, or bother, efficiently and expeditiously.

H. Handicapped Children—The trust can be used to provide inheritance to your handicapped (mentally or physically handicapped) children or other heirs so they will not lose their government assistance. If you merely leave an outright inheritance to these heirs, they could lose all or most of their government benefits. Provisions can be made in the trust document that their inheritance is to be handled for them by the trustees so they do not lose any benefits but, rather, have a better life.

I. Doling Out Assets—If it is your wish that you do not want one or more of your heirs getting your assets after your death until they reach a certain age, or if you want your assets paid to your heirs over a period of time, the trust agreement can provide the mechanism to do so.

J. Will—A Will would not be necessary if all of your assets were in the trust name. However, we do make a Will as a "back-up" in case you forgot to put an asset in the name of the trust and to cover personal property such as cars, jewelry and collectibles. In these circumstances, to get that asset into the hands of your heirs through the trust, we will use a Will, called a "pour-over" Will. For personal property as noted above there may not be need of probate but for other assets there will be a probate proceeding if those assets were not in the name of the trust. That "pour-over" Will merely states that your personal representative (executor) distribute the forgotten asset to the trust to be held, managed and distributed as you dictate in the trust. Ordinarily, the Will would never have to be used if you remember to put all of your assets in the trust name.

K. Cost—Ordinarily, my charge to prepare the trust document and pour-over Will is $*[dollar amount of fee]* for one person, or $*[dollar amount of fee]* for a husband and wife joint trust agreement. The fee may be higher in special circumstances. For estates of husbands and wives over $*[dollar amount of large estate]*, due to special estate tax savings provisions that must be made, the cost is $*[dollar amount of fee]*. Of course, those charges may save all the costs, time and aggravation that probate and/or guardianship proceedings entail.

II. COMMON PROPERTY PROCEDURES

The second method of avoiding probate proceedings can be called, for convenience sake, "the common property procedure." It will only avoid probate procedures. It does not avoid problems you may encounter during your lifetime due to sickness, incompetency, nursing homes, creditors or caring for your loved ones who may need financial help should you become incapacitated.

A. Joint Ownership—If all of one's assets are owned jointly (with your spouse or another person), the survivor receives those assets immediately upon the death of the other. No probate proceedings are necessary, but **joint ownership** entails problems:

1. Creditors of one joint owner can possibly get those assets even if the other joint owner complains.

2. A joint owner could run away with your money.

3. Joint ownership of stock certificates requires the signature of all owners to do any sale or transfer.

4. Many brokers will not allow numerous names on a stock certificate.

5. You could lose all or part of your Florida real estate homestead exemption if you own title to your home with someone not a resident in that home. Higher real estate taxes each year will be the result.

6. If you wish to transfer a joint bank account to another name or to another person, all owners must first sign off and that may be impossible due to unwillingness of your joint owner or his or her incompetency or death.

7. Under Federal estate tax laws, joint ownership would possibly mean greater estate taxes to be paid. There could also be capital gains tax problems.

8. You could have difficulty treating your heirs the way you wish. If you wish to divide your estate into certain percentages for each of your heirs, you must make sure that your joint property with those heirs follow the same percentages. This is sometimes impossible as your assets, bank accounts, interest rates and dividends received, and values change from time to time. You also may need to use those assets for yourself during your lifetime, thus thwarting your wish to give that heir a certain asset or percentage.

9. A joint owner receives title on your death and with no legal responsibility to share that asset with other of your heirs, even if you wanted him or her to do so.

10. If a joint owner dies, unless you remember and are able to change the account name, there may still be a probate proceeding.

B. Totten Trusts—On bank accounts you could have title in your name in trust for one or more of your heirs. Upon your death, the beneficiary merely presents a copy of your death certificate and proves who he or she is to get the money. No probate proceedings would be necessary. This system, too, has some problems:

1. You may not be dividing your estate the way you wish. Accounts change in amounts, interest rates, renewals and new ones opened, so you may constantly have to shuffle and change other beneficiaries' names so the beneficiary you choose will get what you choose, no more or less.

2. Monies received by a beneficiary under that type of bank account (a totten trust) does not have to be shared with any of your other heirs even if you wish it to be shared. The beneficiary can keep all the money contrary to your wishes.

3. Beneficiaries may not know about such accounts when you die, unless you make sure they know about it during your lifetime, and there is a possibility that, through ignorance, no one gets the money.

4. If a beneficiary dies and you made no change in the account due to your forgetfulness or sickness, there will be a probate proceeding.

5. No one has access to your bank accounts to pay your bills and help you out if you are sick.

C. Real Estate—To pass real estate to an heir without going through probate proceedings or a living trust, you can do a few things: (i) make a **life estate deed**; (ii) give title to a **land trust** or your **revocable trust**; or (iii) put title into a corporation you own so the shares of stock of the corporation go to your heirs.

1. In a **life estate deed**, you continue to hold a life interest in the real estate and if you wish, can sell, mortgage, lease or otherwise transfer the property at any time. You can be in complete control. Upon your death title would vest in those heirs you name on the deed. Moreover, you keep your homestead real estate tax exemption.

2. In a land trust, title to your real estate is owned by a trustee or trustees to be disposed of according to written instructions. A problem with land trusts is that some buyers, condominium associations and mortgages do not want to deal with land trusts for fear that the trustee may not have the authority to do what he or she says he or she can do.

I charge $300.00 including recording costs for the preparation and recordation of the **life estate deed**. You won't have to pay anything to set up your bank accounts in joint names or as a totten trust. There should be no costs for you to name beneficiaries of your pension plans or life insurance. Some brokers, but not all, charge to get new replacement stock or bond certificates for you so you have those owned jointly or as noted below in a T.O.D. account.

D. Insurance, IRA's, Keough Plans—You should make sure you name beneficiaries on your life insurance, IRA accounts and other pension plans. If you do not, there will be probate proceedings.

E. Securities—If you have all of your stocks, bonds and mutual funds held by a stockbroker in your name (and under your social security number) T.O.D. (transfer on death) and then name your heirs, the heirs would gain title to the securities upon presentation of a death certificate to the broker. However, they will get title at the value existing at the time of your death, thus, avoiding capital gains taxes should they sell the securities immediately. If, however, their names are on your securities as joint owners, they get the title when you die at the value you paid for the stock and may have to pay capital gains taxes on the increase in value.

III. ADVANTAGES OF A LIVING TRUST OVER THE COMMON PROPERTY HOLDING

A. There are strict civil and criminal liabilities on a trustee for wrongdoing. There is no control over a joint account holder.

B. The trustee of a trust must account for all he or she does. A joint account owner need account to no one.

C. A trustee can only use the funds as set forth in the trust agreement or risks civil and criminal penalties. A joint account holder, on the other hand, can do pretty much anything he or she wants.

D. The creditors of a trustee cannot get at the funds in your trust agreement. However, the creditors of a joint account owner could take your money.

E. Someone can step-in and do for you if you cannot do for yourself with safety and assurance if you have the proper trust. No one can step-in and have access to your funds in a "totten" trust.

F. A trust is more efficient when dealing with multiple heirs and interests.

G. You can have more latitude to provide for heirs by doling out funds and protecting handicapped heirs through a trust.

H. You need not make changes in the trust provisions if an heir dies or becomes ill as, most often, the trust will provide for those contingencies.

I. You will protect children of your heirs through trust provisions that cannot be done through joint accounts or “totten” trusts.

A living trust is, most often, the best and safest procedure to use.