

MAXIMUM PROBATE FEES DOUBLED EFFECTIVE SEPTEMBER 1, 2005
TAKE STEPS NOW TO AVOID THIS TAX AND THE BURDENS OF PROBATE

By: R. Daniel Brady

Someone famous recently said "I can call a pig a dog all day long, but it doesn't make it a dog." North Carolina legislators are fearful of being labeled as those who would dare to increase a tax. As a result, tax increases slide into our life either in the dark of the night as with the extension of the North Carolina Inheritance tax hidden in the Continuing Budget Authority Bill or as a tax described as something other than a tax.

We have recently been surprised to learn of this year's increase in probate filing fees by one third and doubling of the maximum probate fees from three thousand dollars to six thousand dollars. I can call a pig a dog all day long, but at the end of the day, a pig is a pig.

Even though we will all leave this transitory life one day, the good news is that this probate tax is voluntary.

Probate is the court administered process for the supervision of the management and transfer of ownership of estate assets. Probate fees apply to all decedents' estates, to the estates of all minors, incompetent persons and a trust estate created under the will of a decedent. Fees charged for the administration of an estate are set by the Legislature as an initial filing or facilities fee, plus an additional fee calculated as a percentage of probate assets. Prior to September 1, 2005, the first component of the fee was thirty dollars due upon the filing of the estate with the second part calculated to be four dollars per one thousand dollars of property listed on the estate inventory. The maximum fee before September 1 was three thousand dollars. The fee is due upon filing of the inventory. In other words, four-tenths of one percent of the value of all bank accounts, brokerage accounts, stock, bonds, partnership interests, vehicles, jewelry, and other personal property in the estate was paid as a probate fee to support the Court and obtain access to the good, gentle and fair offices of our Clerk of Court who is charged with the responsibility of overseeing the administration of all estates in the county.

The new State Budget increases the initial filing fee from thirty to forty dollars and doubles the maximum the inventory fee from \$3,000 to \$6,000. The calculation of the fee remains the same; four dollars per one thousand dollars of property listed on the estate inventory. The doubling of the fee will only affect estates with a value in excess of seven hundred fifty thousand dollars.

This fee buys the guardian, trustee, executor or administrator (the personal representative) access to the office of the Clerk of Superior Court. Do not expect much help from the Clerk's office which is prohibited from giving legal advice and has been plagued with massive turnover since the last election. Even with the access to the Clerk's

office, the personal representative is not relieved of any of the fiduciary responsibilities of his or her job. In North Carolina, the courts, in describing those responsibilities state that a fiduciary “is held to something stricter than the morals of the market place. Not honestly alone but the punctilio of an honor the most sensitive, is the standard of behavior. Uncompromising rigidity has been the attitude of the courts when petitioned to undermine the rule of undivided loyalty. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.” Wachovia v. Johnston, volume 269 of the reports of the North Carolina Supreme Court, at page 711.

Unfortunately, the fees aren't the only drawback to the probate process. In addition to its costs, probate often takes up to two years to complete with more sophisticated or contested estates taking longer. During this time, estate assets are not available for distribution to the heirs and costs and expenses are scrutinized by the Court even when it is apparent that the expense was clearly authorized by the decedent and agreed to by the heirs. This power of the Clerk is apparently justified with the Clerk's vague but general authority to audit and approve an accounting, notwithstanding very clear and specific authority granted to the personal representative both by statute and under the governing document to pay expenses, to pay, settle and compromise claims, to litigate and to employ and compensate any agents deemed necessary to advise or assist the personal representative. This often creates a hardship for family members and an unanticipated challenge to the personal representative. Certainly if the personal representative violates the “punctilio of an honor the most sensitive”, the beneficiaries may seek remedy of that violation outside of the office of the Clerk.

Furthermore, probate is a very public process, and all documents in the probate file are public information. As a result, any interested party can examine the file and determine the extent of the estate assets and obligations. The names, addresses and often times the ages of beneficiaries are available in the probate file. Perhaps the biggest disadvantage to probate, however, is the overall lack of control you and your heirs have over the process. The Court and the applicable probate laws control the cost, length of time, and the amount of information made available to the public. Your personal representative is often faced with a court imposed financial disincentive for seeking professional help with the process even in cases where all heirs consent to the expenditure. While these pitfalls are essentially unavoidable after formal probate proceedings are initiated, it is quite simple to avoid the probate process altogether through the use of an effective estate plan.

In the old days, when probate fees were capped at three thousand dollars, the incentive to avoid probate was marginal. Why pay one thousand dollars now to save three thousand dollars later? However, with the new fee being six thousand dollars, the decision is much easier and often worth the time and energy to realize the financial savings, not to mention the other benefits of probate avoidance. There is another famous North Carolina saying: “Pigs get fat and hogs get ate”

Here is how to avoid probate and eliminate this voluntary tax.

First of all, assets that are transferred to a beneficiary under an account or title document providing for joint ownership with right of survivorship will pass directly to the surviving joint owner outside of the probate process. No fees are charged and the Court has no jurisdiction over the account or asset. Most any kind of asset, including real property can be owned with any other person with right of survivorship. There is however risk associated with this type of ownership. Generally joint accounts may be accessed by either joint owner resulting in the loss of control over the account. In addition; joint assets may be considered available to pay the debts of either joint owner, subjecting the asset to an unexpected loss. The sale or other disposition of the asset may require the consent of all joint owners. These risks can be summarized as the owner's loss of control over the asset or account.

Some states, but not North Carolina, provide for the disposition of a bank or brokerage account with the establishment of a Pay On Death (POD) or Transfer On Death (TOD) account. While North Carolina does not specifically authorize these types of accounts, brokerage firms often have a business situs outside of North Carolina in a state that has adopted this form of ownership. Unlike the joint survivorship accounts, there are no rights that accrue to the beneficiary of the pay on death accounts until death and the owner of the account remains in control.

Some types of assets allow the owner to designate a beneficiary. These are typically insurance policies, retirement accounts such as IRA's and 401(k)'s and annuities. The beneficiary designations will control the disposition of these assets outside of probate and without probate fees or court involvement.

Avoid living probate in the form of a formal guardianship for an incompetent person with the execution of a springing, general, durable power of attorney. The springing power becomes effective only when certain conditions, such as the consent of a physician are obtained. The durable power specifically states that the power will continue after you are determined to be incompetent. The power of attorney should specifically waive court accountings and provide for a successor attorney in fact. Avoid a minor guardianship by directing that any inheritance of a minor beneficiary is to be paid to a specified custodian under the Uniform Transfers to Minors Act.

Finally, by establishing and funding a revocable living trust during your life, you can eliminate probate fees and the court administration of your estate. A revocable living trust is, in simple terms, a contract created by a living person (the grantor) whereby a third party (the trustee) agrees to hold and manage property for the benefit of another (the beneficiary). For revocable living trusts created with the primary objective of avoiding probate, these three identities will usually be the same person leaving all of the control

and beneficial enjoyment of the property in the creator of the trust. You as the grantor transfer all of your assets to yourself as trustee to hold for the benefit of yourself for the balance of your life. You as the grantor retain the rights to amend and revoke the trust at any time, for any reason. You as the trustee control the sale, investment and re-investment of all of the trust assets at any time, for any reason. In order to be effective, all of your assets, including your residence, vehicles, bank and brokerage accounts, stocks, and other valuable personal property would be titled in the name of your revocable living trust.

The real benefit will come at your death, however, when your successor trustee takes control of the assets in your trust and manages or distributes them according to your instructions in the trust document, without the involvement of the court and without the costs of probate.

The benefits of a revocable living trust cannot be overstated. In the event you become incapacitated and are unable to serve as your own trustee, your successor trustee (appointed by you in your revocable living trust document) will step in and manage your assets for as long as necessary. No court appointed and supervised guardian will be needed. At your death the headaches of probate are completely avoided simply because you have very little (if anything) in your estate to be transferred since your assets are owned by the trust. Remember that probate is the court administered process for the supervision of the management and transfer of ownership of estate assets. At your death, there are new beneficiaries of the trust, but the title remains in the trust, to be transferred by the trustee at the time and on the conditions that you direct in the trust agreement, without mandatory court supervision. Your successor trustee carries out your wishes and manages your assets in private. The trustee's direction may be simply to distribute the assets to beneficiaries; or to hold and manage the assets until a beneficiary has reached an appropriate age; or, held, in the discretion of the trustee, until the beneficiary has developed an appropriate discretion commensurate with the proper use and management of the funds. These directions and conditions are your specific instructions to the trustee.

Remember that your assets must first be transferred into your trust for this technique to work. Failure to fully fund your revocable living trust means that there would be property owned by you at your death that will be transferred through probate.

Some assets have more formalities pertaining to transfer than others. Assets with titles, such as real property, vehicles, and boats, will need to be re-titled into the name of the trust. Real property will require the execution of a deed, while title to vehicles will need to be changed through the Division of Motor Vehicles. Bank accounts, stocks, and other investments generally need to have the record owner changed by contacting the appropriate institution. Most of this can be handled by mail, telephone, or in person. For other personal property of lesser value, an assignment listing all property to be transferred to the living trust will suffice. Insurance, annuities, IRA accounts and 401(k) accounts

should be transferred by beneficiary designation, but careful consideration should be given to these “qualified”, pre income tax assets to avoid unexpected income tax acceleration for yourself or your beneficiaries.

Neither probate fee increases, nor the administrative road blocks of court supervision, nor the loss of privacy can hijack your estate if you take preventive measures to protect you and your beneficiaries during your lifetime. There are a number of techniques to accomplish this depending upon the complexity of your particular situation.

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