

Elder Law: Before It's Too Late

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Probate avoidance is a driving force behind much estate planning. Probate fees in Pennsylvania are set by a progressive schedule based on the value of assets subject to administration. There are additional document filing fees, advertising costs and (of course) the legal expense of preparing all of the probate-related paperwork. To the extent such expenses can be avoided, there is generally no reason not to do so. Many people choose to place their assets in trusts that continue to function after their deaths, so as to avoid the necessity of having an executor appointed to move solely-owned assets "frozen" by death. Many people place assets in joint tenancy with right of survivorship, so that the assets will automatically pass to the survivor by operation of law upon death. Securities can be registered in "transfer on death" (TOD) form, and bank accounts can be registered as "in trust for" (ITF) or in "payable on death" (POD) form, so as to automatically pass at death to designated recipients without probate. Unfortunately, no matter what people do to try to avoid probate (either upon advice of legal counsel or on their own), it often turns out (after it's too late to do anything about it) that probate is necessary for some unexpected reason. Here are a few "unexpected" reasons for probate that I frequently encounter in my estates practice.

1. The Safe Deposit Box. The inheritance tax regulations and policies (which seem to be in a constant state of flux) make it next to impossible to gain access to a decedent's safe deposit box without appointment of an executor, unless the box is jointly owned with a surviving spouse *and nobody else*. **Solution: Get rid of the safe deposit box.**

2. The Not-Joint Joint Bank Account. Often, it becomes necessary to use a power of attorney to change ownership of a bank account from sole ownership to joint ownership, and often the bank is requested to add the person having power of attorney as the new joint owner. The bank will say that they have to have the power of attorney reviewed and approved by their legal department before doing so, and a week or so later the bank will call the requestor to advise that "everything has been taken care of." Indeed, the new bank statements start coming with both names on them, and there is no reason to believe that anything is amiss. However, upon the death of the original account owner, it is discovered that the bank never actually made the account joint; they simply authorized use of the account by the person having power of attorney (and never told anybody what was actually done). Since *power of attorney terminates at death*, probate is required to obtain the funds. **Solution: Go back to the bank and get confirmation of joint ownership.**

3. Demutualized Life Insurance Company Stock. Many people own this without knowing about it, because it essentially materialized in a form closely resembling junk mail. In fact, it predominates the state's unclaimed property website. Check your income tax records to see if you received dividend income from a life insurance company. If you did, it's because you own stock. Even if you know that you own such stock, the important thing to know is that *it does not pass along with the life insurance proceeds at death to the designated policy beneficiaries*, so probate will be required to deal with it. **Solution: Get rid of (i.e. sell) it.**

A joint checking account is always a good idea if you're trying to avoid probate, because a check payable to a decedent can still be deposited in the account, and even a solely-owned account can be recovered without probate if

the account balance is less than \$3,500.00. Also, it is a good idea to make sure that somebody who has already died is not the only designated beneficiary of a life insurance policy or retirement plan. While there may be truly unexpected developments which necessitate probate, you can at least avoid some common ones.