THE COST OF WEALTH TRANSFER AT DEATH

A STUDY OF PROBATE
IN
DOUGLAS COUNTY, NEBRASKA

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EXECUTIVE SUMMARY

This paper reports on an investigation by estate planning attorney, Rodney A. Halstead, into three important aspects of the Douglas County, Nebraska probate system. Probate is a legal process involving the county court for wealth to be transferred from the estate of a deceased person to living persons or entities. This report looks at: (1) the costs of probate, including fees for attorneys and personal representatives; (2) the length of time it takes to complete the probate process; and (3) it looks at the estates of those who avoided probate but still reported the settlement costs associated with the cost of an inheritance tax determination and trust administration as reported through the probate court system. The report concludes with observations about either (1) how a person needing to probate the estate of a loved one can save fees on probate or (2) how a person who is wanting to establish an estate plan can do so and save the money, time and publicity of probate by creating and maintaining an estate plan which avoids probate.

As part of this investigation, sixty-six (66) randomly selected probate court case files in Douglas County Court in Omaha, Nebraska were reviewed. From cases that were opened in 2002, information was gathered about the value of property passing through probate, both gross and net values, the cost of attorneys' and personal representatives' services, and the length of time taken to complete the probate process. Some data was also compiled on whether the deceased left a will or had a revocable living trust.

Thirty-seven (37) files which were created solely to report and pay inheritance tax were also reviewed. These people have avoided the probate process, but the State of Nebraska uses the county court probate filing system to report and pay Nebraska Inheritance Tax into the counties. Consequently, those records can be obtained, although such records usually do not get published in a newspaper for notice purposes like probate cases. With these inheritance tax determination files, the primary information being reviewed was attorney’s and trustee’s fees reported in those administration proceedings.

The fees from inheritance tax determination proceedings are then compared to the fees associated with probate proceedings. This comparison is important because more than likely the people for whom the inheritance tax determinations were performed were told that by avoiding probate they would avoid the high fees of probate. This comparison will show just how much was saved after death by avoiding the probate process.

Potential clients often report that they have been advised by other attorneys that they don’t need a revocable living trust to avoid probate because probate is not that bad in Nebraska. Well up until now no studies have specifically reviewed fees in Nebraska to refute those representations by other attorneys. Only studies from other states could be used to speculate that those attorney’s representations were incorrect. This report not only looks at the exact numbers in Douglas County, Nebraska, but also compares those numbers to a couple of those reports done in other states.

This study concludes that **probate in Nebraska is every bit as costly and time consuming as probate reported in any other state's reports**. Nationally, probate fees -- for attorney and personal representative services alone -- could cost $2 billion or more each year. In addition, probate generates hundreds of millions of dollars more for bonding companies, appraisers, and probate courts themselves. In Douglas County, probate fees -- for attorney and personal representative services alone -- could cost $40 million or more each year of the estimated $2 billion that are transferred each year.

In at least one case, attorneys' fees consumed as much as 25 percent of the estate's value. <u>Small estates fees ranged from 4% to 6% on average. The overall average combined fees for attorney's and personal representatives was over $15,200.</u>

Aside from the cost, probate is time consuming. There were nearly 40 percent of files reviewed that were still open from the first part of 2002, sometimes over two and a half years. **The average file took at least eighteen months to process.** And with such a large number of files still open, clearly that number is definitely under-reported.

The report finds that the attorney's and trustee's fees reported in the inheritance tax determination records were considerable less costly. Those average combined fees of $5,600.00 per file averaged $9,600 less than the combined probate fees.

The report concludes that the probate system can definitely be and should be avoided with proper planning and the easiest way of doing that is with a revocable living trust and the changing of title on all assets to properly reach the full potential that a living trust can accomplish for you. This changing of asset titles cannot be overlooked. There were many probate estate files where this exact situation occurred, the deceased had purchased a revocable living trust and then either did not change title on any assets or left significant amounts of assets out of the trust thus requiring the probate administration.

However, the report also suggests ways for those persons who are responsible for administering the estate of another can minimize fees. Whether you have to go through the more costly probate administration process or the inheritance tax and trust administration process, it may be possible to minimize fees. This report explains how.

I. INTRODUCTION

There have been several studies of probate done in other states over the past several years. The biggest one was probably done by the American Association of Retired Persons back in 1990 in which they studied Probates in California, Delaware and Wisconsin. The AARP copyrighted report was titled *A Report on Probate: Consumer Perspectives and Concerns.* The comprehensive report disclosed compelling evidence that the probate process is causing unnecessary strain and financial and emotional stress on the unknowing public. **The study found that probate takes too much time, costs too much, and is completely unnecessary—and that a Revocable Living Trust is a legitimate alternative to avoid the probate process.**

More recently, Henry Abts III, the author of *The Living Trust—Revised and Updated Edition*, commissioned probate studies in Maryland and New York. The December 2000 Maryland study was quite extensive and found that the average probate cost was between 4% to 7%, varying with the value of the estate. The study reviewed 1996 probate cases and still 16% of the files were still open four years later. Interestingly enough, the Maryland State Bar Association, stated, on its website, July 25, 2000, "In Maryland, for example, the probate fee for an estate of between $500,000 and $750,000 is $750.," that would only be one-tenth of one percent. The New York study was not as extensive because the state of New York had sealed the probate records to all but attorneys and stopped even these attorneys when it was discovered that a report was being created. There was enough evidence to conclude, however, that **New York probate is as expensive and time-intensive as the other studies, if not greater.**

Attorneys who promote wills often state and clients who have talked to probate friendly attorneys often state that they were advised that probate is not that bad in Nebraska, compared to other states. These same attorneys often advise potential clients that they do not need to have a living trust. Consequently, this project to research probate files in Douglas County, Nebraska, was instituted just to see if there was any measurable difference between Nebraska and other states.

Also, in Nebraska, all estates have to file an Inheritance Tax Return in the probate court, so the research could also determie how the fees for those people whose estates successfully avoided probate compared to probate cases as well. The report also found many unfortunate souls who prepared a revocable living trust but still ended up in probate because they did not transfer all of their assets to their trust during their lifetime. This discovery reenforces the fact that **no estate planning can be successful without changing title on assets to utilize that planning.** Before we look in detail at the results of the study, let's look at exactly what probate is and why changing title to assets is so important.

A Probate Primer

To an attorney, the term "probate" means a legal process involving the county court for wealth to be transferred from the estate of a deceased person to living persons or entities. To everyone else, probate often conjures up all kinds of different images relating to after death administration, from transfer of all assets to inheritances and estate taxes. To many, the following phrase summarizes their understanding: "*Probate, I do not know what it is, but I know that I want to*

avoid it." Unfortunately, on their death, most do not avoid probate. We will discuss several of those reasons in this report and the resulting consequences of failure to avoid probate.

If you agree with that statement then that probably means that you have heard something about the "evils of probate," but you still do not understand the distinctions of what probate is and what it is not. We will try to help you understand more about probate and we will also look specifically at two of the three "evils of probate" in Douglas County, Nebraska and let you decide if the cost of the probate process and the time probate takes, along with the public record nature of probate are all things you want to avoid. We will also help you understand how you can avoid probate. Finally, if you happen to have recently lost a loved one and you are wondering what to do next with the property he or she left behind, this report will help you figure out what to do and may help you save money doing it.

What is Probate?

As stated earlier, *probate is a legal process involving the county court for wealth to be transferred from the estate of a deceased person to living persons or entities*. The goals of the probate process are to ensure that the debts of the deceased are paid and that the deceased's remaining property gets transferred to the rightful owners. Probate is a system completely controlled by state law and can vary greatly from state to state. In Nebraska, that probate process generally must take at least five months. But, generally speaking, probate deals only with the deceased person's individually owned property, called probate property (we will discuss the difference between probate and non-probate property later). **So the key as to whether or not a deceased person must go through the probate process or not is comes down to the titles on assets or how the property was owned by the deceased at his or her death.**

Once it is determined that a deceased person has probate property and, (with one caveat) therefore, his or her estate must go through the probate process, then whether that person has a valid will or not determines who gets the probate property at the end of the probate process. If a person dies with a will, he or she is said to have died "*testate*," and the deceased person gets to control who gets the probate property at the end by having written the will. If, instead, a person dies without a valid will, he or she is said to have died "*intestate*," and state law determines to whom the deceased person's probate property goes to. A percentage of intestate property even ends up going to the State of Nebraska every year because there are living blood relatives.

The "*personal representative*" is the person who is authorized by the probate court to take the deceased person's property through the probate process and to get the remaining property to the right living people at the end of that process. Other names often used for the personal representative are: the executor, executrix, or administrator. If the deceased person had a valid will, it usually names the deceased person's choice for personal representative has first priority to be appointed by the court. If the deceased person died intestate, the law gives the list of who has priority to be appointed as personal representative by the court.

The Probate Process

Very briefly, here are the steps of the probate process:

1. An interested person petitions the court for the right to start a probate process for the deceased person. The court decides whether or not the deceased person had a valid will and then also decides who gets appointed as Personal Representative.

2. Once appointed, the Personal Representative must give notice to all known creditors of the deceased that a probate procedure has been opened for the deceased. The creditors then have two months to make a claim against the estate. Generally, if any creditor fails to make a claim against the estate during the two months, then that creditor legally loses the right to make a claim later.

3. During the first three months, the Personal Representative is required to determine what the value of the probate assets are and to file an inventory of those assets with the court.

4. Once any creditors have filed claims against the estate, then the Personal Representative has two months to decide whether or not each creditor has a legal claim against the estate and whether the estate can pay the claim or not. In most cases, all valid creditor claims are paid.

5. Once the Personal Representative has paid all of the creditors, and all of the administrative claims, then he or she determines who is entitled to receive the remaining property of the estate and how much each recipient should receive, then the Personal Representative makes those distributions.

6. Finally, once the Court determines that the Personal Representative has done the job properly, it dismisses the Personal Representative and closes the probate.

Probate and Non-Probate Property: What's the Difference

A deceased person's property does not have to be subject to a probate proceeding. *Probate property* is property which is controlled by the authority of the probate court, and *non-probate property* is all property which is not controlled by the probate court. Probate property usually includes assets owned solely by the deceased person, like bank accounts and certificates of deposit, stocks and bonds, automobiles, and the personal residence. Also, the proceeds from life insurance or IRAs for which a living beneficiary is not named or the estate is named as a beneficiary ends up as probate property as well.

Non-probate property generally includes jointly-owned property, any property that has a valid beneficiary designation with a living beneficiary, and any property held by trustees of a trust. Joint ownership is the most popular form of ownership for married couples. Thus, at the first death, jointly-owned real estate, bank accounts, and stocks are non-probate property. Life insurance policies and IRAs are usually non-probate property, as well because the surviving

spouse is usually the named beneficiary. Non-probate property normally passes to survivors regardless of the terms of a will.

Probate and Non-Probate Property: Why is it Important?

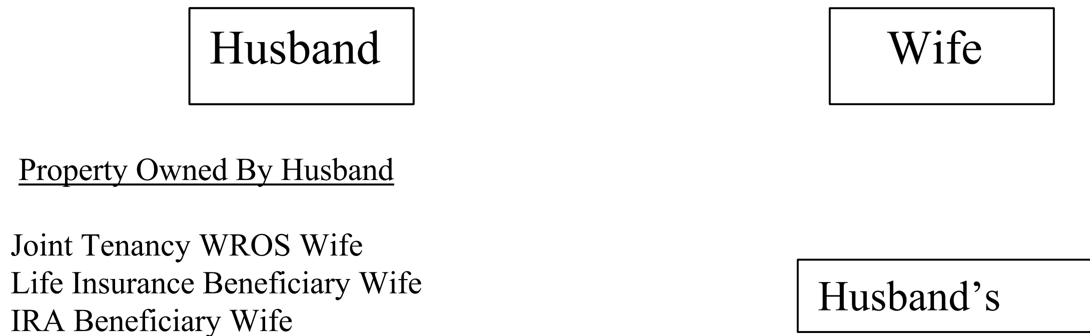
This distinction is important for several reasons.
First, it determines whether or not probate is necessary. If a deceased person owns no probate property, then the probate process described above can be avoided. Generally, in Nebraska, if the deceased person has probate property valued at less than $25,000, that is not real estate, then they can still avoid the full probate process and transfer ownership of those assets by a process called a small estate affidavit.

Second, the form of asset ownership determines the type of estate administration. After death, there is always some form estate administration and in Nebraska, every estate is subject to Inheritance Tax and may be subject to both State and Federal Estate Tax. Probate property is subject to probate and the tax issues are handled as part of the probate process. The administration process for non-probate property depends on the form of ownership used for each individual asset. For jointly held assets, there is a specific administrative process for each type of asset that needs to be followed by the surviving joint owner or owners to have the asset re-titled by the surviving joint owner. **However, the surviving owner will not avoid probate without doing more planning because at his or her death the property will be owned individually, thus probate property.** For life insurance and IRAs, each institution has its own administrative process which needs to be followed for beneficiaries to receive the death benefits. For all assets held in trust, the administrative process is determined by the terms of the trust, which were usually determined by the deceased person prior to death. <u>But regardless of the type of ownership, in Nebraska, two things must happen as part of the after-death administration, assets must be re-titled before they can be sold and inheritance taxes must be determined, even if the amount of tax is zero.</u>

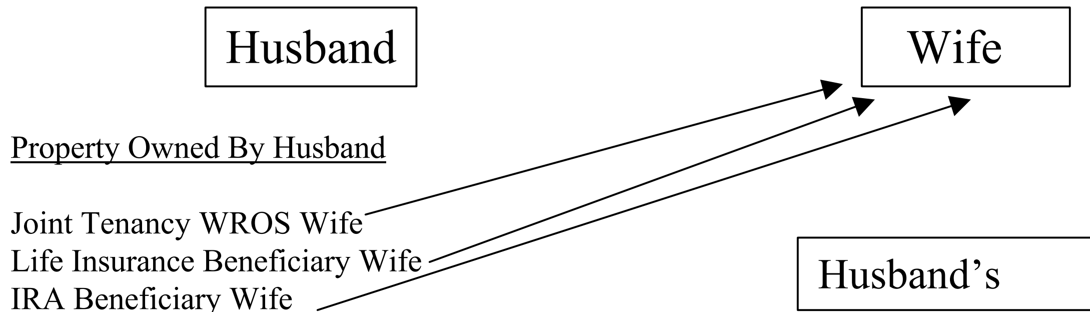
In Nebraska, life insurance proceeds that are left to a named beneficiary, other than the probate estate, are the only asset that is exempt from Inheritance Tax. All other property is subject to the inheritance tax determination process. For probate property, this inheritance tax determination is included as part of the probate process. *For non-probate property the inheritance tax determination is the only part of the administration that must be handled through the probate court.* The inheritance tax determination process should be far less complicated and time-consuming and consequently, less expensive than the probate process and the inheritance tax process combined.

Third, the success or failure of your planning depends on proper title. If you do any type of wealth transfer planning, the ultimate success or failure of that planning depends upon the form of ownership of the assets at your death. Whether you use a will or a revocable living trust to do your planning, **<u>it is necessary to properly change title on your assets to allow your estate plan to work</u>.**

As an example, a married couple can do estate tax planning through a will which has trusts created after death, or a revocable trust which creates sub-trusts after death, but if the title to assets are not changed, what happens? Let's look at the diagram below:



Does this planning look familiar? Isn't this the typical ownership for a married couple? Pretty much everything is owned jointly. What is not owned jointly, the beneficiary designation names the spouse, right? Now let's see what happens on the death of the husband.



Did you notice what happened in the typical married couple estate plan? I have good news and bad news. The good news is that there was no probate on the first death. The bad news is that the Husband's Estate Planning with all of the Tax Planning did not work and there will be a probate on the wife's death without further planning including changing title on the Wife's assets. That could be an over $600,000 mistake on a taxable estate.

II. THE DOUGLAS COUNTY, NEBRASKA PROBATE STUDY

How Are Legal Fees In Probate Determined in Nebraska?

Nebraska is under the Uniform Probate Code System which has been adopted at least in part by at least eighteen states. As part of this system, Nebraska attorneys and personal representatives are allowed to collect "reasonable fees" for services. Neb. Rev. Stat. 30-2482. The statute lays out a standard for determining what a reasonable fee is, but it is determined on a case by case basis and as the statute makes clear, the fees are assumed reasonable unless someone objects. The objecting person then has the burden to prove that the fees were unreasonable. So in other words, regardless of what amount an attorney charges or how he or she determines the fee, that fee will be "reasonable" unless someone objects and convinces the court that it was unreasonable.

How Fees were Studied in Probate?

Recognizing that the cost of probate has been found to be a major concern in studies done in other states, one of the purposes of this study was to determine how much attorneys in Douglas County, Nebraska charge for their legal services in probate court. In researching actual court records, it becomes quickly obvious attorneys do not often detail their hours worked in the probate court records. Dollar amounts for attorney's and personal representative's fees, however, are usually found in at least one and possibly two places in a probate file. Nebraska allows both attorney's fees and personal representative's fees to be deducted as an expense on the Inheritance Tax Worksheet which must be filed in every estate. So most of the time, if there was tax due, these fees were reported. The other place fees could be reported is on a final accounting form but this reporting requirement can be waived by the heirs. In those cases where fees were reported in both places often the fees on the final accounting were more than the fees on the inheritance tax return. Unfortunately, a lot of the cases that were studied either had not closed yet or waived the final accounting requirement. So the fees that are reported here could actually be even higher than reported.

Data was collected from 103 cases from the court records for cases opened in 2002. Those included 66 probate cases and 37 inheritance tax determination cases. It is difficult to determine the exact percentage of the total probate cases and the inheritance tax cases that were studied because the probate court computer system cannot distinguish between types of cases filed for statistical purposes. The court administrator indicated that the only way to determine how many probate and inheritance tax cases were filed in 2002 was to look at all of the nearly 1800 court files opened in 2002 to determine whether it was a probate, an inheritance, a guardian or conservator or a trust administration case. So all that can be reported is that the 103 cases represent approximately 6 percent of the nearly 1800 cases filed in Douglas County Probate Court in 2002.

This report intentionally reviewed court files opened in 2002 with the expectation that most of the files would have been closed after sometimes as long as over two and one-half years of being open. However, 26 of the 66 probate court files or almost 40 percent of the files were still open after between 22 and 31 months of probate. The files were selected randomly without regard to the dollar value of the estates, but because of the number files that were still open steadily increased the further in the year the case was opened, the cases that were reviewed are from January 2, 2002 to August 6, 2002.

An Overview of Probate Fees in Douglas County, Nebraska

Looking at all of the files in the study, in Douglas County, the average attorney fee was nearly $12,000. Although most estates did not report fees for personal representatives, for those that did report fees, the average fee was a little over $3,400. So the average combined fee was over $15,200.

The court files allow reporting of total asset inventories for estates, which are referred to as *gross estate* values and asset values after subtracting secured debt which are referred to as *net estate* values. Fees were measured as a percentage of both the gross estate and the net estate. Not surprisingly, most of estates did not have a great deal of secured debt associated with it so there was not a great discrepancy in the averages between gross estates and net estates. In some of our individual cases, though there was a huge differential in percentages in between the gross estate and the net estate. The average gross estate was just over $814,500. The average net estate was about $797,000.

Ranges of Fees in Ranges of Estates

Sometimes it is hard to understand numbers on the average so the numbers are reported below by asset ranges as well.

Average Combined Attorney's and Personal Representative's Fees In Probate

Asset Range	# of Files	Avg. Gross E.	Avg. Fees	% Fees	# of Files	Avg. Net E.	Avg. Fees	% Fees
0-100,000	14	54,844	2,343	4.28%	15	46,733	2,353	6.47%
100,001-250,000	14	170,983	4,472	2.62%	17	165,076	4,224	2.56%
250,001-500,000	16	349,564	7,959	2.28%	13	376,439	8,742	2.33%
500,001-1,000,000	15	739,598	18,034	2.44%	14	751,105	18,928	2.52%
1,000,001- up	7	4,844,239	72,752	1.51%	7	4,812,990	72,752	1.52%

This chart helps to put the fees into perspective and it helps for you to get a better idea of what you could expect to pay for an estate of your size. Notice that the fees are much higher from a percentage standpoint on small estates. Also notice the bigger difference between percentages of gross estates and net estates at the lower estate levels. There was one small estate where 25% of the estate went to attorney's fees.

Douglas County, Nebraska Comparison with Other States' Studies

It is a little hard to compare results between surveys because not much information is given in those studies. However, the AARP study did indicate that average attorney's fees for Wisconsin, another Uniform Probate Code state, "was nearly $3,000," compared to nearly $12,000 in Nebraska. Also, the AARP study shows average fees for estate values less than $100,000 in Wisconsin to be $1,666 compared with $2,096 in Douglas County. This survey number is higher than two of the three states in the AARP study in this estate value range. California was $2,182 and Delaware was $1,547. When looking at combined attorney's fees with the personal representative, the Douglas County survey number look much better with Wisconsin at $3,206, Delaware at $2,135 and California at $4,356 compared with $2,343 in Douglas County, Nebraska. However, in the $100,000 or lower estate values, only one file in our survey took personal representative's fees.

Percentages used in the AARP study are somewhat elusive. It mentions 3 percent for attorney's fees and five to six percent for combined personal representative's and attorney's fees for all of the states. Those percentages would be consistent with our findings on estates of $100,000 or less but the national percentages would be high if it includes estates of all sizes.

Time Delays of Probate

The probate process, as outlined above, generally must take five months. It was previously mentioned that almost 40 percent of the files were still open after between 22 and 31 months of starting the probate process. There were only three files that were closed in the statutory minimum of five months. Two of those files were estates under $100,000 and the other one was in the $875,000 range. A total of 22 files were closed in a year or less. The average file took eighteen (18) months to settle. Of course, with nearly 40% of the cases still open this average is clearly low.

Douglas County, Nebraska Time Comparison with Other States

The AARP survey calculated the time of probate proceedings in days instead of months as in this report, but in converting those days into months of 30 days, this survey results in Douglas County were much higher than Wisconsin and California and just slightly lower than Delaware. Wisconsin was 380 days or about 12.67 months, California was 448 days or about 15 months, and Delaware was 574 days or a little over 19 months. Our study average of 18 months may very well be much higher after all 26 open cases are actually closed.

Inheritance Tax Determinations and Fees

Nebraska is apparently unique from the other states that have had probate surveys done in them in that it also has an inheritance tax that is administered through the county probate courts. Generally, the estate of every person who dies in this state has to file an inheritance tax determination in the probate court system. Consequently, that allowed this study to check on fees that were charged to estates that managed to avoid probate. Thirty-seven (37) of these inheritance tax determination files were reviewed in this study in Douglas County and the average attorney fee was $4,467. Although most estates did not report fees for trustees, for those that did report fees, the average fee was a little over $1,258. So the average combined fee was over $5,725.

The Inheritance Tax Determination Fees have been broken down below into the same categories as the Probate Fees.

Average Combined Attorney's and Trustee's Fees For Inheritance Tax Determinations

Asset Range	# of Files	Avg. Gross E.	Avg. Fees	% Fees	# of Files	Avg. Net E.	Avg. Fees	% Fees
0-100,000	4	48,583	1,588	3.27%	4	42,933	1,588	3.70%
100,001-250,000	7	156,673	1,662	1.06%	7	156,673	1,662	1.06%
250,001-500,000	5	402,289	4,427	1.10%	7	403,314	4,205	1.05%
500,001-1,000,000	19	649,543	6,354	0.98%	19	649,543	6,354	0.98%
1,000,001- up	2	4,257,283	25,500	0.60%	2	4,257,283	25,500	0.60%

There is a significant difference in reported fees between probate and inheritance tax determinations and trust administrations. The average attorney's fee for probate was over $7,500 more than for inheritance tax and trust administration. The average personal representative's fee was over $2,100 more than the average reported trustee's fee. So the average combined difference between probate fees and inheritance tax and trust administration fees was over $9,600.

III. OKAY, NOW I KNOW WHY I WANT TO AVOID PROBATE, BUT WHAT IS THE BEST WAY TO AVOID PROBATE?

The numbers taken directly from the public probate records in Douglas County, Nebraska indicate that the probate process is much more expensive than the non-probate inheritance tax determination and trust administration process. The numbers also indicate that the probate process takes on average at least 18 months before the probate estate is closed. Certainly, because probate court requires published notice and the records are public records your affairs are fully public. So it should now be clear that the "three evils of probate" in Douglas County, Nebraska are that bad or at least very comparable to all other probate studies out there and certainly is a process that can and should be avoided. But it should also be clear that probate will most likely not be avoided without taking some specific steps to avoid it.

In the following paragraphs, the various methods of avoiding probate will be discussed with an emphasis given to the revocable living trust, as the most flexible method to avoid probate.

For those of you who may be reading this report, from the standpoint of a person who is responsible to administer the estate of someone who has recently died, and you cannot now avoid probate, I suggest skipping down to the discussion of how to save fees in probate and inheritance tax and trust administration proceedings. Then later, come back to this section to make sure you have planning in place so your successors can avoid the probate process on your estate after your death.

Estate Planning Tools and Title To Assets

There are really only three ways to own property, one guarantees probate, one delays probate and one avoids probate. Individual ownership at death guarantees probate will occur after your death, if you have taken no planning steps to avoid probate. Joint Tenancy with right of survivorship avoids probate on the first death, but results in individual ownership for the last owner and individual ownership at death guarantees probate. Ownership in trust is the only form of ownership which can truly avoid probate.

There are also three general estate planning tools, again one only helps with probate property, one can be used to avoid probate for some individually owned property, and the third tool can be used to avoid probate, but only if title to assets are changed to take advantage of the planning. The will, as discussed above, is only applicable after your death and only applies to probate property. Consequently, **if you choose a will as your primary estate planning tool, and it works the way it should, you have guaranteed your estate will be subject to the probate process after your death**.

Beneficiary Designation is the second form of estate planning. It can be used on most accounts that are held by financial companies to direct the proceeds someplace other than your probate estate. Beneficiary designation may have different names, such as payable on death, or transfer on death, but it is a tool that must be used. <u>The underlying account is usually owned individually and will become a probate asset on your death unless you have living persons or legal entities</u>

named on the beneficiary designation forms at your death. Beneficiary designation does not apply to real estate in Nebraska. Consequently, if you own real estate, this method cannot be used alone to avoid probate. The other disadvantage of beneficiary designation is that it results in outright ownership to the beneficiary at the instant of death and cannot be used to do any post-mortem planning without the consent of the named beneficiary.

THE REVOCABLE LIVING TRUST:
THE MOST FLEXIBLE ESTATE PLANNING TOOL
AND
THE BEST WAY TO AVOID PROBATE

That leaves the revocable living trust as the last method of estate planning which can be used to avoid the probate process, but it can only do so if titles to individually owned and joint assets are changed to trust ownership. But that sounds scary, so let's explore the revocable living trust as little more.

What is a Revocable Living Trust?

A trust is a legal contract or agreement between two people, one who gives property to the other to manage for the benefit of a third party. The *Trustor* or *Trustmaker* is the person who transfers the property and actually makes the trust and decides what the terms of the trust agreement are, including who the Trustees and the Trust Beneficiaries will be. The *Trustee* is the person who accepts title to the Trustmaker's property and manages that property. The *Trust Beneficiary* is the person who receives the benefit of the trust property.

The trust can take several different forms. It can be created and made *irrevocable* meaning that generally the Trustmaker cannot change the terms of the trust once that trust is signed. Or the trust can be *revocable* meaning that the Trustmaker can change the terms of the trust agreement, including revoking or canceling it completely, at anytime that the Trustmaker is alive and mentally able to make such decisions. A trust can also be *testamentary* which means it is only effective through a will and after death. This generally means that the property going into the trust will go through the probate process in order to get into the trust. Finally, a trust can also be *current or living*, which means it is effective immediately upon signing and can be used during the life of the Trustmaker.

So then putting these various terms together, a *revocable living trust* can be defined as a contract between the Trustmaker and the Trustee, who manages the Trustmaker's property for the benefit of the Trust Beneficiary, and the Trustmaker reserves the right to change the terms of the trust during his or her lifetime and the trust is effective immediately upon signing of the agreement. The one other thing that makes the revocable living trust so attractive is the fact that the Trustmaker can also be the original Trustee and Trust Beneficiary. **This means that if you establish a revocable living trust, you retain complete control and use of your assets during your lifetime, while you are mentally competent**.

The Trust as Part of A Complete Estate Plan and Your Mental Incapacity

Further, if you do become mentally incapacitated, you have chosen the people you want to succeed you as the Trustee, and the Successor Trustee is still managing those assets for your benefit, and according to your written instructions. By having these provisions as part of your trust, you avoid the living probate proceeding, also known as a conservatorship proceeding. As you can imagine from the results of this report, a probate proceeding that last for the length of your incapacity will more than likely be much more expensive than death probate, fully public and obviously could last for the rest of your life. You should also have several other documents as part of a complete estate plan to complement the trust.

Those other documents are a **Power of Attorney for Financial Matters, a Power of Attorney For Health Care, a Living Will, and a Nomination of Conservator**. The Power of Attorney For Health Care and the Living Will are important because these are the documents through which you legally communicate your desires regarding your healthcare decisions for you, if you become mentally incapacitated, including who you want to make all your decisions for you and expressing your directions for end of life decisions.

The Power of Attorney for Financial Matters and the Nomination of Conservator documents are utility instruments or tools. If you become incapacitated, you may never need them but you want to have them if you need them. Think of the Financial Power of Attorney as your water ball retriever in your estate planning bag of instruments. The successor trustee should have control of almost all of your assets because you have retitled them into the trust. If you did not have everything retitled into your trust or if you have qualified plan assets that must be handled while you are incapacitated then the financial Power of Attorney can be pulled out of your estate planning bag to retrieve those assets from the legal hazard known as a Living Probate proceeding, which could not be avoided otherwise. The Nomination of Conservator document is like your sandwedge. If you cannot avoid the legal hazard of Living Probate, for whatever reason, then you want to have the Nomination of Conservator Document so that you can nominate who you want to handle that process.

The Trust as Part of A Complete Estate Plan Upon Your Death

The Living Revocable Trust and the other documents discussed above can be really valuable if you become mentally incapacitated, but the living trust can really show its value after your death. You may or may not become mentally incapacitated, but whether you want to acknowledge it or not, you are going to die sometime. So the benefits of the trust after death are where the trust can really shine.

First, the trust is completely flexible. So you can customize it to cover your unique situation or any conceivable situation. So if you have minor children, you can set up the terms of the trust to provide for those children through the Successor Trustee and you get to decide when control is turned over to those beneficiaries, if ever. The special needs beneficiary can also be cared for very easily with the trust and the beneficiary can still be qualified for government benefits. Also, just like each of your beneficiaries has a unique personality, the trust share could be customized for them. If you have children from multiple marriages again the trust is quite flexible to cover all

of the possible scenarios you may have. You name the situation, the trust could probably be tailored to cover the circumstances the way you want to handle them.

Second, the trust, because it becomes irrevocable upon your death, can provide benefits for your beneficiaries that they could not get anywhere else. The basic concept underlying these benefits is creditor protection. While you are alive, your revocable trust offers no real creditor protection because you have complete control of the assets as Trustmaker, Trustee, and Beneficiary, by being able to revoke the trust. Your creditors are given the same rights that you have. However, upon your death, you are no longer able to change the terms of your trust, and your beneficiaries are not legally viewed as having complete control of the assets because a successor trustee is now managing those assets and deciding whether the beneficiary will receive benefits based upon an objective standard, based upon their complete discretion. Again, the creditor of the beneficiary is allowed to step into the shoes of the beneficiary, but because the Trustee has complete discretion to say no to the beneficiary, the creditor cannot force funds out of the trust.

That is the legal concept on which catastrophic creditor protection is based. But there are some additional concepts which make it even better. In most situations, the beneficiary can also be the successor trustee and still avoid having to pay the beneficiary's catastrophic creditor. In other words, the beneficiary wears two hats, the beneficiary hat and the successor trustee hat, but the creditor can only recognize the beneficiary hat. The other concept is that the beneficiary must be comfortable that he or she can get what they need out of the trust under the objective standard required in the trust. Literally, the beneficiary should think of the standard as having a conversation with themselves in a mirror. "Self, I have a need, is it for my health, education, maintenance or support?" If the answer is yes, then the beneficiary can pay for it out of the trust. If the answer is no, then maybe the Trustee incapacity provisions should be reviewed. So the beneficiary can get everything they need out of the trust but their catastrophic creditors cannot.

There are three general categories of creditors that can be protected against with a trust. There is the lawsuit creditor, who gets a judgment against the beneficiary because of some negligent act by the beneficiary. The second category is the failed marriage creditor where the soon to be divorced spouse is looking for every pot of money possible. The third category is the catastrophic illness or "Medicaid" creditor. All beneficiaries, except the surviving spouse can be protected from all three of these categories by receiving and keeping their assets in their irrevocable trust share. The surviving spouse may be able to be protected from these categories of creditors but it could require additional actions and planning.

Federal and State Estate Tax Planning For Married Couples

Finally, the revocable living trust can be used to fully optimize the planning that is available to avoid or minimize both Federal and State Estate Tax. This report does not go into any great detail on how this done, but a married couple with assets anywhere near $1,000,000 or more should be considering taking advantage of those estate tax planning provisions. As the value of your assets increases, these provisions become of much greater importance and should be explored more completely.

SUMMARY OF THE BENEFITS OF THE LIVING TRUST

The revocable living trust, into which you have transferred ownership or beneficiary of all of your assets, is the key piece of a complete estate plan which can meet all of your planning needs. It is flexible enough to cover your unique situations. It allows you to maintain control through your possible incapacity and well beyond death. It offers catastrophic creditor proctection to your beneficiaries. You can completely avoid or minimize federal and state estate taxes with provisions which can be added to a revocable living trust. **Finally, the fully-funded revocable living trust can avoid the costs, delays and publicity of probate at set out in this report.**

IV. YOUR ESTATE PLANNING AND AFTER-DEATH ADMINISTRATION HOW TO PAY FOR IT AND SAVE MONEY TOO!

It should be blatantly obvious by now that the biggest expense in the estate planning process and in the after-death administration process should be the attorney's fees. These fees can definitely be worth the expense in both tax and probate savings and in the piece of mind derived from the planning. However, there is no reason that you should not be able to minimise or control those fees. Basically, you can do this by interviewing and picking the attorney based upon these interviews. **Whether you are picking an attorney to help with your estate planning or to help with the administration of another's estate in probate or inheritance tax and trust administration, you can and should know before you hire an attorney how much that attorney will charge you for the work they are going to perform for you.**

Let's first look at how attorney's determine their fees and how you use that knowledge to control the fees that are being charged.

What Methods Do Attorneys Use To Set Fees?

Hourly-Billing. Attorneys are one of many professions who have traditionally calculated their fees based upon an hourly rate and actual time incurred in delivering those services. From the attorney's perspective, it is the ideal way to bill for their services. It leaves them in complete control of how much they will get paid. The client has agreed up front to pay the attorney for their services whatever they may cost. The attorney is expected to keep accurate records, but certainly can estimate time when that fails. Also, there is no incentive on the part of the attorney to perform work in an expediant manner. In fact, the incentive is quite the opposite. The more time it takes the attorney to perform the services, the more the attorney is going to get paid. Certainly there are some types of legal matters that still justify billing by the hour. Estate planning and after-death administration is probably not one of them.

Contengency Billing. Another popular method of billing for legal services is contengency billing. This method is usually a relatively high percentage of the proceeds collected as a result of the legal representation and if the attorney does not collect on the case the attorney gets paid nothing. This method is often used in types of cases where the outcome is questionable and the client cannot or will not pay the attorney on an hourly basis. The percentage the attorney agrees

to is roughly based upon the attorney's assessment of the amount of work required and the chances and amount of possible recovery. The percent tends to go up with the amount of risk that the attorney feels he is taking on the case. Clients tend to like this method because they only pay if they win. Contingency billing probably is not an appropropriate method of billing in estate planning and after-death administration because, in most circumstances, the outcome is pretty clear and the risk that the attorney would be taking is pretty low so a contingency fee of 1/3 or more would certainly be unreasonable to you as the client.

Flat Rate, Percentage or Value-Billing. This method of billing is used by an attorney when the legal services that he is asked to perform are fairly certain and quantifiable. The attorney generally knows what will be required of him or her for the fee, and they can either base the fee upon an estimate of time to be expended times an hourly rate, or the attorney knows that the services have added value to the client and consequently the client is willing to pay more than the actual time expended times the usual hourly rate to perform those services. The fee can also be based upon a percentage of the assets involved in the transaction as a basis of the value to the client for the services rendered and the benefit received. This method seems to make the most sense for estate planning services and after-death admininstration services because the work is often very finite and identifiable. However, the work has great value to the client so the client does not mind paying a little more for the service because hopefully they have peace of mind knowing that the job was done right. Also, clients like to know up front what the total cost is going to be. This is the only method where the client either know the exact amount or at least a fixed percentage of a dollar amount that the client can estimate with reasonable proximity. The attorney should like this method for the same reason.

HOW TO INTERVIEW ATTORNEYS FOR AFTER-DEATH ADMINISTRATION WORK.

The very first thing you need to know before you meet with an attorney is whether they are charging you for the initial meeting. **Ask on the telephone, "will there be any charge for the initial meeting?" If the answer is "yes there will be a charge," cancel the appointment.** Any attorney that is client sensitive will offer a free initial meeting to discuss your needs and help educate you on what you can expect in the after-death administration process. The experienced attorney will also recognize that you are experiencing grief after the loss of a loved one and that you may need to have extra-time to ask your questions and to be comforted and not feel like you are "on the clock."

Second, you are not legally-obligated to use the attorney who prepared the will or the trust for the now-deceased person. If the attorney has the original will or trust, schedule a time to pick up the original document from them. There should be no charge for that document, after all the deceased person previously paid for the work. If you are interested in hiring the attorney to assist you in the after-death administration work, schedule a free initial appointment with them, but make clear to the attorney on the telephone that you expect to leave the meeting with the original will or trust if you do not decide to hire them at the end of the meeting. Interview them just like any other attorney even though they may have an edge if they had a relationship with the deceased and they have an intimate knowledge of the deceased's affairs.

Remember that attorneys expect to get the after-death administration work on the majority of the documents that they prepared. Some suggest that probate attorneys even treat wills as a loss-leader with the expectation that they will get the lucrative probate administration some day. But the attorney should not refuse to give you the original document or in any way interfere with your decision to use someone else to do the after-death administration.

Third, always ask a lot of questions about the after-death administration process. Make sure you understand what you are expected to do and what you can expect the attorney to do and what you are expected to hire someone else to do. Also, ask such questions as "How long do you anticipate this administration process to take?" and "How long have have other similar cases that you handled taken?" Asking for the names of other clients who have used him or her for after-death administration services is also reccommended. If you the attorney is unwilling to give you the names of clients that they can contact, then ask for the names of some of the deceased's probate or inheritance tax estates that they have handled, then go to the probate court and review those files to see how long the took and how much the attorney charged. You also certainly can get the name and telephone number of the personal representative from the public probate file and then call them and ask them about their experiences with the attorney.

Fourth, make sure that you discuss the attorney's fees and how you will be charged for his or her services. If the attorney tells you that they are going to charge you by the hour, ask them how many hours it is going to take and what their hourly rate is. If they will not give you an estimate or an upper limit, politely end the interview. You do not want to hire them.

The attorney should be willing to discuss specifically how they are going to charge you and have a fairly specific estimate of the total fee you can expect to pay for their services. If you cannot get a flat fee then you should at least get them to give you a fixed percentage of the assets. **You should now know based upon this report what is reasonable and what is not**. Ultimately, you should be looking for an attorney who also has some knowledge of what the average fees for after-death administration for similarly sized estates are and be willing to perform the ordinary services for at or below that average. An experienced attorney should certainly be able to do the routine after-death administration for at or below the average cost. If there are specific concerns about your case that concerns the attorney, he or she should build contingencies or exclude those possibilities from the fee.

Finally, when you do decide to hire an attorney, get your agreement in writing, the more specific the better. This is for the mutual protection of both you and the attorney. Written agreements simply avoid a lot of misunderstandings later. Especially in after-death administration, you are going to forget a lot of what the attorney told you and you are going to have to be reminded a lot about what you need to do because you are also dealing with grief. You should not have to be guessing about what you are going to be charged or what the attorney should be doing and not doing. A written agreement helps keep everyone clear on expectations.

HOW TO INTERVIEW ATTORNEYS FOR ESTATE-PLANNING WORK

The interview process should not be a whole lot different for estate planning services then for after-death administration. Obviously the questions that you are going to ask are going to be different, but **you should expect a free initial consultation; you should expect to be educated on the attorney's philosophy of estate plannning during that meeting (ie, do they primarily recommend wills or trusts); you should expect a specific conversation on fees, including how they would charge for after-death administration; and, of course, you should expect the agreement for the attorney you hire to be in writing.**

Hopefully, you have gained enough basic information from this report to form an opinion as to how you want to proceed with your estate planning. Do you want to spend less money now and get a basic will, knowing that your estate will be charged a lot more after death for the probate process. Or do you want to spend a little bit more now getting your estate organized with a revocable living trust and retitling of your assets now, so that your successors can avoid probate and the much higher fees and delays later.

Once you have made that philosophical determination, then you should do a telephone prescreening telephone interview with the attorney to determine what his or her estate planning philosophy is. IF YOUR PHILOSOPHY MATCHES THE ATTORNEY'S PHILOSOPHY AND HE OR SHE OFFERS A FREE INITIAL CONSULTATION, GO AHEAD AND SCHEDULE THE MEETING. Once you have scheduled your interview, your estate-plannign preference will determine the direction of the questions that you ask the attorney at the interview.

Will-Based Estate Planning Interview Questions

If you are wanting the inexpensive will-based estate plan, then you will want to find out from the attorney what other types of documents the attorney recommends as part of the basic estate plan. **You should expect to have the attorney offer the same additional documents outlined above: the durable power of attorney for financial matters; the durable power of attorney for health care; the living will and the nomination of conservator**. In the will-based estate plan, the financial power of attorney and the nomination of conservator become much more critical in the case of a mental incapacity. If you become mentally incapacitated and you do not have a valid financial power of attorney, a conservatorship proceeding in probate court (Living Probate) will be necessary to take care of your financial affairs. If you do not have the nomination of conservator, the court could appoint whoever it deems in your best interest as your conservator.

You will also want to discuss with the attorney about your assets, how you own them and what the approximate value of your estate is. This should prompt a discussion about how assets owned as joint tenancy with right of survivorship and assets with beneficiary designation to living individuals or entities will need to be changed in order for your will to control those assets upon your death. Also, if you have a large enough estate, it should prompt a discussion of the use of testamentary trusts to do estate tax planning, fi you are married. <u>Again, change of title is critical to the success of the will-based estate plan</u>. If the attorney does not stress the importance of title to the success of your plan, go find another attorney to do your planning.

Finally, you should discuss the cost for the preparation of the will-based estate plan, which hopefully is flat-fee, but you should also ask how much the attorney will charge to probate your estate after your death. This question is actually pretty fun to ask a will-based estate planning attorney because they usually do not want to discuss probate with you and especially not how much they may charge you. First, the attorney may tell you that there is no possible way that they could tell you because they charge by the hour and they do not know enough about the circumstances of your death to estimate the fee. If you persist, you may get some information out of the attorney but this author is fairly certain that you will not get any agreement in writing regarding limitations on probate administation fees.

Trust-Based Estate Planning Interview Questions

If you are wanting the revocable living trust as the basis to your estate plan, then you should find out how long the attorney has been preparing trusts and whether or not estate-planning is his or her primary source of legal revenue. **Trust-based estate planning is a fairly specialized area of the law and you do not want your divorce or patent attorney to prepare your trust and other estate planning documents.**

Also, it is important to find out how the attorney will actually have the documents prepared, and how his trust and other documents are updated for changes in the law. If the attorney has actually drafted all of the documents himself, and tells you either that there is generally no need to make changes to your estate planning documents or that he will notify you if he believes an update is necessary, be very concerned. There are very few attorneys who are going to be able to practice law full-time, even if it is primarily in estate planning, and be able to keep track of all of the possible changes in both case law and statutory law. This is especially true, if the attorney believes that the trust should be updated for changes in federal law and all forty-nine other states. **This author believes that the only prudent option for any attorney who offers living trust-based estate plans is to use a company that only prepares estate planning documents to prepare your customized documents based upon the attorney's directions and that has a staff devoted to looking for changes in the law in all fifty states from the federal government and to recommended changes when warranted.**

You will also want to discuss with the attorney about your assets, how you own them and what the approximate value of your estate is. This should prompt a discussion about how assets owned as joint tenancy with right of survivorship and assets with beneficiary designation to living individuals or entities will need to be changed in order for your trust to control those assets upon your disability and death and in order to avoid probate. Also, if you have a large enough estate, it should prompt a discussion of the inclusion of specific sub-trust language to handle basic estate tax planning, if you are married. <u>Again, change of title is critical to the success of the trust-based estate plan</u>. If the attorney does not stress the importance of title to the success of your plan, go find another attorney to do your planning.

Finally, you should discuss the cost for the preparation of the trust-based estate plan, which hopefully is flat-fee, and whether those costs include specific assistance in retitling of assets, but you should also ask how much the attorney will charge to administer your trust,

including inheritance tax, after your death. This question should not be as uncomfortable to the trust-based estate planner. They should be able to give you an idea of how they currently charge for trust administration and they may or may not be willing to put something writing regarding those after-death administration proceedings.

V. CONCLUSION

After having reviewed this report you should have a clear understanding that the Probate Process in Douglas County is just as expensive and untimely as any other states that have been researched. You should also understand that probate can be avoided with proper planning and that Title of Assets is key to the success of any estate planning effort. Finally you should also have a good idea of what the revocable living trust can do for you and how to interview an attorney to assist with both after-death administration and estate planning.