

PLANNING FOR THE FUTURE OF YOUR FARM

Legal tools and strategies for farm transition and estate planning

LEGAL TOOLS FOR AVOIDING PROBATE

The probate process serves the important purpose of administering a deceased person's estate. During probate, assets are accounted for, outstanding debts are paid, and property is distributed to heirs and beneficiaries, all with the oversight of the probate court. However, the probate process can be time consuming, costly, and open to public records. If these disadvantages of probate are a concern to you, note that there are other ways to distribute most your property to beneficiaries without going through probate. The law in Ohio allows you to make advance plans for transferring certain types of property outside of the probate process. In this bulletin, we begin by examining the costs of probate and then explain legal tools that allow you to avoid probate while guaranteeing that your assets transfer as you intend.

THE COSTS OF PROBATE

There can be time, privacy, and financial costs to sending farm assets through probate. In Ohio, it can take six months to a year or more for an estate to complete the probate process. Trying to continue a farm while its assets are tied up in probate for an uncertain amount of time can hinder a farming operation. Additionally, because a probate court oversees an estate going through probate, estate records are public records. Many consider this lack of privacy an additional cost of probate.

Of perhaps the most concern, however, are the financial costs for sending a farm estate through probate. The attorney that handles an estate can charge legal fees that are usually a percentage of the value of estate assets that go through probate. To limit the fees, Ohio law allows a county to set maximum probate fees attorneys can charge in the county. Even so, because farms tend to be "land rich," these legal fees can add up and amount to a significant cost. **Consider the example on the following page.**

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A county in Ohio sets the maximum fees an attorney may charge an estate in probate as:

For personal property including proceeds of real estate sold:

- 6% on the first \$3,000
- 4% between \$3,001 and \$15,000
- 2% on the balance

For real property transferred but not sold:

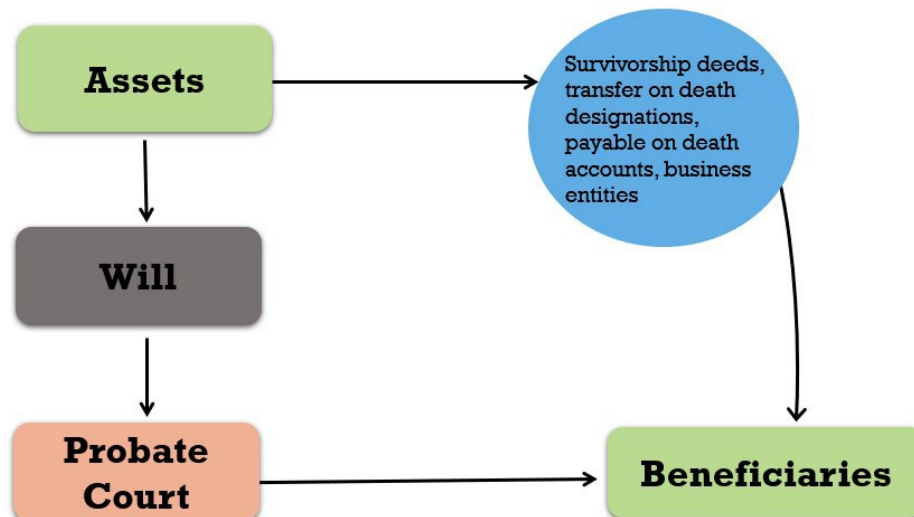
- 2% on the first \$10,000
- 1% on the balance

For all other property transferred: 2% of the property value

Joe dies owning farmland valued at \$500,000. The attorney could charge Joe's estate \$5,100 in fees to transfer the farmland to his beneficiary.

AVOIDING PROBATE

Fortunately, there are several legal tools that can keep a farm parcel like Joe's and many other farm assets out of probate, reducing not just the financial costs but also the time and privacy costs of transferring assets through the probate process. Survivorship deeds, transfer on death designations, payable on death accounts, trusts, and business entities are the most common of these tools. We discuss trusts in another bulletin in the Planning for the Future of Your Farm series. The other tools, explained below, send assets directly to the intended beneficiaries rather than transferring through the estate administration process in probate court. The illustration below shows how the tools can keep assets out of probate court.



SURVIVORSHIP DEEDS

Ohio law allows co-owners of real property to pass their share of the property to the surviving coowner(s) upon death through a survivorship deed, also referred to as a “joint tenancy with survivorship rights.” This type of deed is common in a marital situation, where the spouses own equal shares in the property and each becomes the sole owner if the other spouse passes away first. A survivorship deed is useful for other joint ownership situations in addition to marriage, whenever the owners want to ensure that their share goes only to the other co-owners upon death.

The process for establishing a survivorship deed is simple. The property deed must contain language expressing the intent of the joint owners to have survivorship rights. The language signals that the property is to transfer automatically upon death of a co-owner, making it unnecessary for the property to go through probate to accomplish a transfer of ownership. **Consider this example:**

John and Jane are married and own farmland. The deed to the farmland states “to John and Jane Doe for their joint lives, remainder to the survivor of them.” This language indicates an intent for the property to pass to the surviving spouse if the other spouse dies. Upon John’s death, the property automatically vests with Jane, who becomes the sole owner of the property. The property does not have to go through the probate process to transfer to Jane.

TRANSFER ON DEATH AFFIDAVIT

Another instrument for designating a transfer of real property upon an owner's death is the "transfer on death designation affidavit." This affidavit allows property to pass to one or more designated beneficiaries if the owner dies. The process is simple but requires a few forms and steps. First, the owner must complete the affidavit and file it with the recorder in the county where the land is located. Then, upon the owner's death, the designated beneficiary must complete an affidavit of confirmation and present it to the county auditor and county recorder along with a verified death certificate for the deceased owner. Once the county recorder files the affidavit of confirmation, the beneficiary holds title to the deceased owner's share of the designated property.

TRANSFER ON DEATH DESIGNATION AFFIDAVIT
[RC 5302.22]

STATE of OHIO
COUNTY of _____

_____, owner, with a marital status of _____, now owner of record of the following real property located at _____ as recorded at Instrument No. _____ of _____ County deed records, with the following legal description:

Title of record to the above property is held by owner(s) as follows:
 Sole owner
 Tenant(s) in common
 Tenant(s) in survivorship
 Tenant(s) by the entireties

Hereby designates the following as transfer on death beneficiary to receive the owner's title to that property upon the death of the owner:

VEHICLES

Ohio law also allows motor vehicles, boat, campers, and mobile homes to transfer outside of probate with a transfer on death designation made by completing and filing a Transfer on Death Beneficiary Designation (form BMV 3811) at the county clerk of courts title office. The beneficiary may be an individual, corporation, organization, trust, or other legal entity.

There is a special rule for automobiles owned by a deceased spouse that did not include a transfer on death designation. Upon the death of a married person who owned at least one automobile at the time of death, the surviving spouse may transfer an unlimited number of vehicles valued up to \$65,000 and one boat and one outboard motor by taking a death certificate to the title office and completing a Surviving Spouse Affidavit (form BMV 3773). It is important to note that the deceased spouse provision only applies to automobiles used "as a method of conveyance." Grain trucks, trailers and other commercial vehicles are typically not permitted to transfer using this method.

PAYABLE ON DEATH ACCOUNTS

Farmers may have several other types of accounts that can pass automatically to identified beneficiaries. Checking accounts, savings accounts, stocks and bonds, IRAs, life insurance policies, and similar types of accounts can pass outside of probate if designated by the owner as "payable on death." The institution that holds the account requires an owner to complete the institution's forms to make a payable on death designation. As with transfer on death affidavits, the institution will require the named beneficiary to provide a certified copy of the owner's death certificate before transferring the account to the named beneficiary, and the account need not go through the probate process. Institutions often ask for beneficiary designations when a person opens an account, but

owners may forget about these designations or fail to change them as circumstances change. For these reasons, it is good practice to review and update your payable on death designations regularly.

BUSINESS ENTITIES

The many advantages of using business entities are well known but avoiding probate is an often overlooked attribute of business entities. Ohio law allows business entity ownership to be transferred outside of probate by making a transfer on death designation. This is most commonly done with ownership certificates or within the operating agreement. Upon the death of the owner, the ownership is transferred to the designated beneficiary with a simple transfer business document.

Consider the following example:

Andy and Betty own XYZ Farms LLC. Andy wishes for his ownership to transfer to Betty upon his death. To avoid probate, Andy and Betty create ownership certificates for the LLC. Andy's certificate is titled "Andy, transfer on death, to Betty". This simple certificate with this simple phrase causes Andy's ownership to pass to Betty outside of probate.

Business entity ownership certificates can be relatively simple and are often drafted by the attorney setting up the entity. The certificates do not need to be recorded; they remain private business documents. Existing entities without certificates can create new certificates for a transfer on death designations. Upon establishing a new entity, certificates should be drafted to allow for a transfer on death designation.

NON-TITLED ASSETS

As the above discussion shows, Ohio law allows titled assets to avoid probate rather easily. However, farms have many untitled assets such as machinery, equipment, livestock, crops, and grain. These assets can be made non-probate, but it will require either a trust or a business entity.

The non-titled assets can be transferred to a trust then distributed to beneficiaries without the need of probate. In a similar manner, non-titled assets can be transferred into a business entity and the entity ownership certificates made to include a transfer on death designation. If neither a trust nor business entity is used, the non-titled assets will likely need to pass through probate upon the death of the owner.

REVIEWING YOUR NON-PROBATE TRANSFER OPTIONS

It's surprising to learn how much of an estate can transfer to beneficiaries without going through the probate process. Whether you need a simple or complex transition and estate plan, these tools will likely contribute to your plan. Review your assets and their transfer options with your attorney to see how these tools can help you plan for the future of your farm.

REFERENCES

Ohio Revised Code Section 5302.20, Survivorship tenancy
<https://codes.ohio.gov/ohio-revised-code/section-5302.20> Ohio

Revised Code Section 5302.22, Transfer on death deed form

<https://codes.ohio.gov/ohio-revised-code/section-5302.22>

Ohio Revised Code Section 2106.18, Transfer of vehicle by surviving spouse

<https://codes.ohio.gov/ohio-revised-code/section-2106.18>

Ohio Revised Code Section 2106.18, Transfer on death designation for business entities

<https://codes.ohio.gov/ohio-revised-code/section-1709.05>

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Find all our **Planning for the Future of Your Farm** resources at

<https://go.osu.edu/farmplanning>

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