

**ESTATE PLANNING PRACTICE**

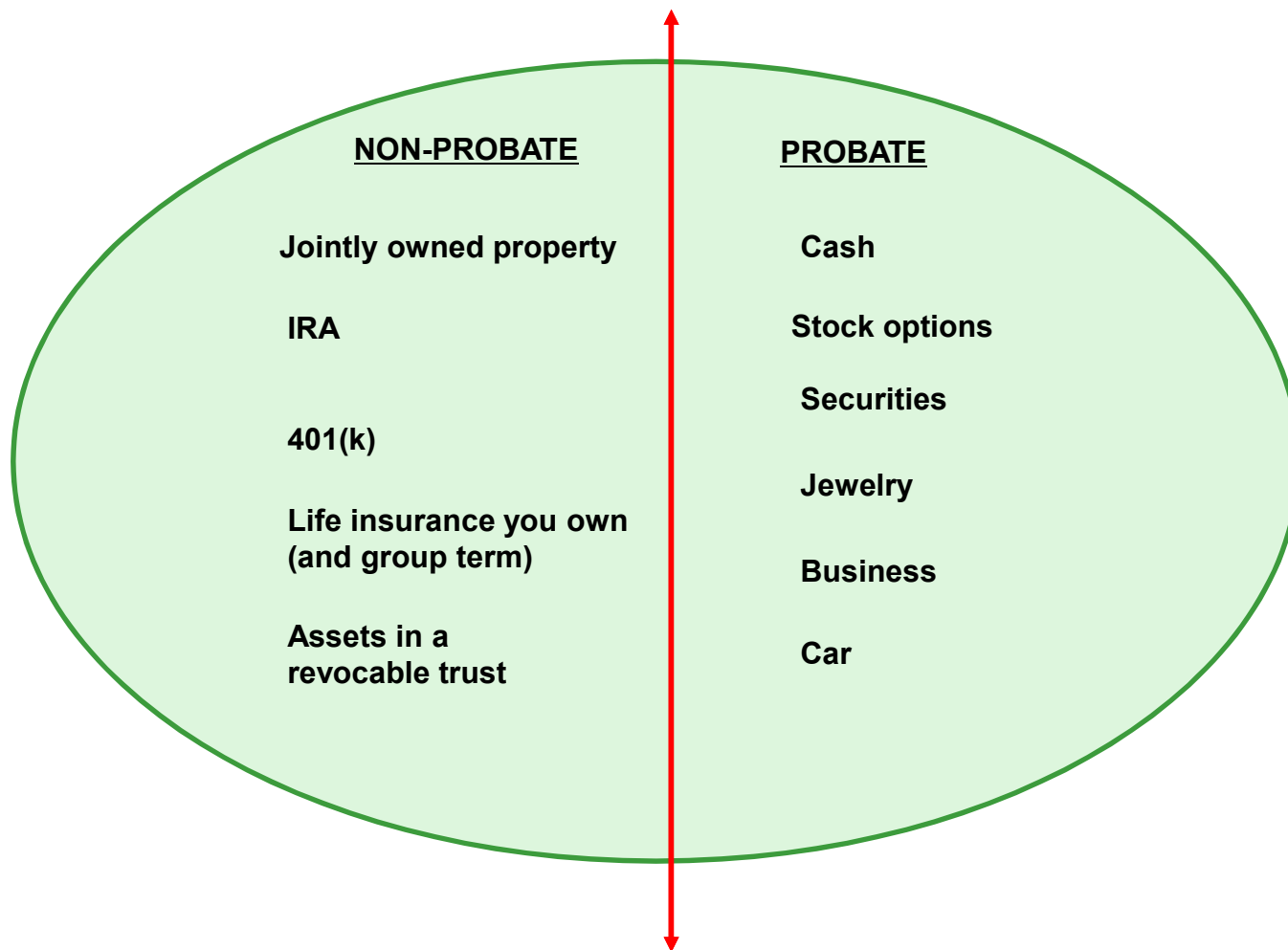
**FUNDAMENTALS:**

***NON-PROBATE TRANSFERS***



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# PROBATE VS. NON-PROBATE PROPERTY



# NON-PROBATE TRANSFERS

## Advantages

- Provides family immediate liquidity; no need to wait for will to be probated to access funds
- Ease of transfer
- Privacy; no need to include on probate inventory

## Additional Considerations

- Tax apportionment; is residue responsible for value of non-probate property?
- Impact on funding formulas
- Elective share
- Joint accounts: convenience vs. ownership
- Impact on beneficiary?



# OPTIONS FOR CREATING NON-PROBATE TRANSFERS

1. Add “transfer on death” or “payable on death” designation
  - Revocable
  - No need to add additional owner and expose accounts to additional owner’s creditors
  - Available for bank accounts and some brokerage accounts
2. Complete beneficiary designation form
  - Revocable
  - Easy to address contingencies
  - Minor beneficiary: “John Smith, as custodian for Susie Smith, under the Massachusetts Uniform Transfers to Minors Act”
  - Available for retirement accounts and life insurance



# OPTIONS FOR CREATING NON-PROBATE TRANSFERS

## 3. Create joint tenancy

- Tenancy by the entirety (added creditor protection in real estate context because property cannot be partitioned between spouses while one spouse is using house as principal residence)
- Joint tenancy with rights of survivorship
- Gift tax consequences?
- Joint owners have equal rights to withdraw property
- Available for real estate, bank accounts and brokerage accounts

## 4. Create life estate with remainder passing to individuals or trust

- Available for real estate



# DESIGNATING BENEFICIARIES OF LIFE INSURANCE POLICIES

- Default beneficiary?
- ILIT – make sure beneficiary designation changes when ownership changes
- Does life insurance support divorce obligations (e.g., child support payments)?
- Percentages v. specific sums
- Life insurance death benefits are not subject to claims of insured's creditors if payable to someone other than the insured or his estate (M.G.L. c. 175, § 125)



# DESIGNATING BENEFICIARIES OF RETIREMENT ACCOUNTS

- Retirement Equity Act of 1984 (IRC §§ 401(a)(11), 417)
  - Restricts form of distribution of certain qualified plans (e.g., defined benefit plan and money purchase pension)
  - Married participants required to receive retirement benefits in a qualified joint and survivor annuity
  - To name beneficiary other than spouse, spouse must sign waiver
- Impact of marriage on beneficiary designation?



# DESIGNATING BENEFICIARIES OF RETIREMENT ACCOUNTS

- IRA needs all “designated beneficiaries” for a beneficiary to stretch distributions after owner’s death
- Determination as to who counts as a designated beneficiary made September 30<sup>th</sup> of the year following the owner’s death

## Designated Beneficiaries

Individuals  
Trusts?

## Non-Designated Beneficiaries

Charities  
Estate  
Trusts?





# DESIGNATING BENEFICIARIES OF RETIREMENT ACCOUNTS

- Why a trust?
- “See-through trust” (Treas. Reg. § 1.401(a)(9)-4, A-5(b))
  - Valid under state law
  - Irrevocable (or becomes irrevocable upon owner’s death)
  - All beneficiaries “identifiable”
  - Plan administrator provided with copy of trust
- Result: treat trust beneficiaries as the participant’s “designated beneficiaries”



# DESIGNATING BENEFICIARIES OF RETIREMENT ACCOUNTS

QTIP as “designated beneficiary”

- Lose benefits of spousal rollover
- Revenue Ruling 2006-26
- Example: “the Trustees shall direct the custodian or trustee of the Retirement Account to make distributions at least annually to them of an amount not less than the greater of (a) all of the net income earned by the Retirement Account and (b) the amount required to be distributed from the Retirement Account under section 401(a)(9) of the Internal Revenue Code.”



# DESIGNATING BENEFICIARIES OF RETIREMENT ACCOUNTS

## Disclaimer to a Credit Shelter

- Contingent Beneficiary in Case of Disclaimer
- Contingent Beneficiary in Case of Death
- If relying on disclaimer, confirm plan recognizes disclaimers
- Don't ask custodian to make legal judgment regarding effective disclaimer



# DESIGNATING BENEFICIARIES OF RETIREMENT ACCOUNTS

- Retirement benefits are income in respect of a decedent (“IRD”)
- Consider income tax impact on beneficiaries
  - Charities receive retirement assets income tax free
  - Avoid funding credit-shelter with retirement assets
- Income tax deduction for federal estate tax paid
- Consider contingent beneficiaries carefully
- Be mindful of effective dates



## MISCELLANEOUS

- MUPC Article 6 – Non-probate transfers on death
- Revisit beneficiary designations after marriage and divorce (M.G.L. ch. 190B, § 2-804)
  - Impact of ERISA? (Egelhoff v. Egelhoff, 532 U.S. 141 (2011))
- Consider giving express authority in durable power of attorney to update beneficiary designations





# Thank you!



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