SESSION 308

Transferring Real Property to the Next Generation Without a Probate – TODDs, Life Estates, Living Trusts or Joint Ownership?

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TRANSFERRING REAL PROPERTY TO THE NEXT GENERATION WITHOUT A PROBATE-- TODDS, LIFE ESTATES, LIVING TRUSTS OR JOINT OWNERSHIP?

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**TRANSFERRING REAL PROPERTY
TO THE NEXT GENERATION
WITHOUT A PROBATE--
TODDS, LIFE ESTATES, LIVING
TRUSTS OR JOINT OWNERSHIP?**

I. INTRODUCTION

Avoiding probate is often the primary objective for estate planning clients. They have had bad experiences in probate or have heard stories of others having bad experiences. They also want to avoid the expense and delay of going through probate. They also want something quick and simple.

They often have no idea what probate is or how it works. Nevertheless, they want to avoid it, much like wanting to avoid death and taxes.

Another frequent objective for clients seeking estate planning is to shelter assets against the future possibility of nursing home expense. Most clients have little experience with nursing homes expenses or they have had a bad experience or heard stories of bad experiences suffered by others.

These objectives often co-exist, but sometimes they conflict. Avoiding probate may not shelter assets against nursing home expense, and sheltering assets may not avoid the expense of nursing home care because attempts to shelter might not prove successful when applying for medical assistance (MA) benefits to pay for long term care.

These materials will review the most common ways of avoiding probate for real estate, and will discuss the advantages and disadvantages of each technique from the point of view of achieving the objectives of avoiding probate and sheltering assets against nursing home expense.

These materials are not intended to deal with probate avoidance techniques available to shelter great wealth from probate or taxes, or to facilitate family business succession planning.

References in these materials to the "EPM" are references to the Minnesota Department of Human Services (DHS) Health Care Programs Eligibility Policy Manual (EPM) as of July 17, 2017, available at: http://legal-dictionary.thefreedictionary.com/joint+tenancy

II. JOINT TENANCY

Joint tenancy has its origins in the English common law.[1] The English common law was transported to the American colonies and became the basis of the common law of most of the American states (Louisiana being the exception). The common law of Wisconsin formed the basis of the common law of Minnesota when Minnesota became a state. Since statehood Minnesota has modified the common law of real property by statute in a number of situations.

Joint tenancy is a special form of ownership of the same property by two or more persons. The individuals, who are called joint tenants, share equal ownership of the property and have the equal, undivided right to possess, keep or dispose of the property.[2] Joint tenancy includes the right of survivorship.

The right of survivorship is often described as a transfer of ownership from a deceased owner to the surviving owners by operation of the survivorship feature of ownership but a more accurate description, considering that each owner already has an ownership interest in the whole of the property, is that a deceased owner's interest in joint tenancy real property disappears at death rather than transferring. The deceased joint tenant and the survivor or survivors no longer share ownership of the property, the survivors continuing their interests in the whole.

As a practical matter when two or more joint tenants sell real property during their joint lifetimes, the proceeds are split in equal shares among the sellers.

Under the common law, the Four Unities were required to create a joint tenancy: the unities of time, title, interest and possession. To create a joint tenancy, the grantor had to convey all four unities of ownership to the proposed joint owners in the same conveyance. Minnesota abolished the Four Unities in 1979.[3]

To create a joint tenancy by deed, it is now sufficient to convey to the grantees "as joint tenants." There is no need to add "with right of survivorship."

If the deed does not explicitly include the words "as joint tenants," the deed will create a tenancy in common among the grantees.[4] A tenancy in common does not include the right of survivorship and the death of an owner will require probate to determine who is entitled to the deceased owner's interest in the property.

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[1] 2 Blackstone Commentaries 180-187. See *Joint Tenancies in Wisconsin*, Kathleen Lundman, Marquette Law Review, Vol. 30, Dec. 3, 1946, footnote 7.

[2] The Free Dictionary by Farley, available at: http://legal-dictionary.thefreedictionary.com/joint+tenancy

[3] Minn. Stat. § 500.19, subd. 3.

[4] Minn. Stat. § 500.19, subd. 2.

Joint tenancy is the most common form of ownership between spouses.

Advantages of a Joint Tenancy

When there are only two joint tenants, a joint tenancy avoids probate on the death of the first joint tenant to die. When there are more than two joint tenants, probate is avoided until the last joint tenant dies.

It is quick, easy and inexpensive. If the joint tenancy is created by gift, the only expense is the cost of drafting and recording the deed..[5] If the joint tenancy is created by gift, only the minimum deed tax applies. The deed can be recorded after the grantor's death.[6]

When a joint tenant dies, only an affidavit of survivorship and a certified copy of the joint tenant's death certificate needs to be recorded in the office of County Recorder to remove the life tenant's name from the record of title. No probate is required.

When a joint tenant dies, the property receives a step-up in basis on the deceased joint tenants undivided interest in the property.[7]

When the joint tenants are not married to each other, joint tenancy makes the real property unavailable against asset limits for determining eligibility for medical assistance benefits.[8]

Disadvantages of Joint Tenancy

A joint tenancy by itself cannot be used for complicated estate planning involving many joint tenants. Probate is still required when the last joint tenant dies unless the last joint tenant has taken other steps to avoid probate.

When the joint tenants are not married, joint tenancy can create problems regarding sharing of expenses such as property taxes, insurance, maintenance and upkeep, utilities, other operating costs, and improvements. If a parent is paying more than the parent's pro

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[5] Throughout these materials, a deed will be required to avoid probate for the real property described in the deed. Many years ago a presenter at the MN CLE Real Estate Institute expressed a preference for a Warranty Deed over a Quitclaim Deed when conveying real estate to family members or a family trust. I have followed the recommendation for Warranty Deed. over QCD ever since. If I am transferring real estate from a parent to a child or to a living trust, I want the parent to be financially responsible for correcting any title defect rather than the child or the trust.

[6] Title Standard No. 17, Effective Delivery of Deed Assumed Prior to Grantor's Death

[7] 26 U.S. Code § 1014 - Basis of property acquired from a decedent

[8] Minn. Stat. § 256B.056, subd. 1a (SSI methodology used to evaluate income and assets for Minnesota medical assistance; .EPM 2.3.3.2.4.1.1 Shared Ownership

rata share of expenses, each payment within the MA look-back period[9] may be treated as an uncompensated transfer to the child, and penalized under the MA asset transfer penalty rules.

If the goal of the joint tenancy is to transfer title from a parent to a child, the child may die first, leaving the title in the parent's name, requiring probate to determine who then is entitled to take title.

If the joint tenancy was created on or after August 1, 2003, the joint tenancy will not disappear on the joint tenant's death if the joint tenant was receiving MA benefits at the time of death.[10] Instead, the joint tenancy will merge into the remainder interest and the value of the joint tenancy at the time of the joint tenant's death will continue to be subject to recovery of an MA.[11] MA can obtain a lien against the property to secure payment of the claim. The survival of the joint tenant's interest in the property after death does not apply to a joint tenancy between spouses in homestead real property.[12]

If the joint tenancy was created by gift, the entire value of the joint tenancy property after the MA recipient's death could be subject to recovery of the MA claim.[13]

<u>MA Treatment of Joint Tenancies</u>

Here are relevant provisions from the EPM regarding evaluation of joint tenancies by county financial workers:

> EPM 2.3.3.2.4.1.1 Shared Ownership
>
> Availability of Shared Ownership Assets
>
> > A jointly owned asset is unavailable when all of the following criteria are met:
> >
> > > the permission of a joint owner is required to sell or dispose of the asset;
> > >
> > > the joint owner is not a member of the household or a financially responsible relative whose assets are deemed to the person; and

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[9] Currently the look-back period starts 60 months prior to the month of application for MA benefits. Minn. Stat. § 256B.0595, subds. 1(a).

[10] Minn. Stat. § 256B.15, subd. 1.

[11] *Id.*

[12] Minn. Stat. § 256B.15, subd. 1(a)(6)

[13] See *Estate of Sylvester G. Grote*, available at: http://caselaw.findlaw.com/mn-court-of-appeals/1185529.html

the joint owner refuses to allow the sale or disposal of the asset.

* * *

Other Assets

For all other assets, each owner is considered to own an equal share unless the person documents a greater or lesser share of ownership.

EPM 2.3.3.2.7.4 Real Property

Sole Ownership in Real Property

Sole ownership of real property means that only one person may sell, transfer, or otherwise dispose of the property. Sole ownership may be limited by conditions imposed by other interests.

Shared Ownership in Real Property

Shared ownership of real property means that two or more people own the property at the same time. Shared ownership may be limited by conditions imposed by other interests. There are three types of shared ownership:

Tenancy-in-common

Tenancy-in-common is a form of property ownership in which:

Owners may not have the same interests in the property. This means that while two or more people each have an interest in the entire property, these interests are not necessarily equal; e.g., two joint tenants do not necessarily each own half of the property.

Owners may sell, transfer or otherwise dispose of their share of the property without the permission of the other owner(s).

Owners do not have survivorship rights. This means that when one tenant-in-common dies, the other tenant(s)-in-common does not automatically gain rights to the deceased owner's interest in the property.

Joint tenancy

Joint tenancy is a form of property ownership in which:

Owners have the same interest in the property. Each owner owns all of the property and may possess all of the property.

Owners generally may not sell, transfer or otherwise dispose of their share of the property without the permission of all other owners.[14]

Owners have survivorship rights. If one-joint owner dies, that owner's interest in the property passes to the other joint owner(s).

The value of a person's joint tenancy interest in real property is determined by dividing the equity value by the number of owners.

EPM 2.1.1.2.1.1 Estate Recovery (in part)

Recoverable Assets

County agencies may recover against the following assets:

the person's probate estate;

all of the person's interests or proceeds of those interests in real property the person owned as a life tenant, <u>or as a joint tenant with a right of survivorship, that were established on or after August 1, 2003, and were owned at the time of the person's death</u>; (emphasis added)

As noted above, recovery against joint tenancy real property could extend to the full value of the real property unless some other consideration in law or equity prevents recovery. *Estate of Sylvester G. Grote*, cited above.

III. LIFE ESTATES

Life estates also have an ancient lineage. They go back to early English common law.[15] Minnesota has recognized life estates under the common law since the earliest days of statehood. Life estates are recognized in statute at Minn. Stat. § 500.01.

A life estate may be created by deed, by inheritance or by court order.

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[14] The requirement that consent to sale is required from the other non-spouse owners is what makes joint tenancy real property an unavailable asset.. Creation of the joint tenancy might still be penalized if made for less than fair market value during the look-back period. Since consent to sale from the other owners is not required (in theory), non-homestead tenancy in common real property will be counted against asset limits unless the owner is making reasonable efforts to sell. See EPM 2.3.3.2.7.4.2 Non-Homestead Real Property. What is reasonable effort to sell?

[15] 2 Blackstone Comm. p 120

A life estate is created when title to real property is transferred to someone, but someone else retains or is given the right to possession and control of the property for the person's lifetime. The person with the right to possession for life is known as the "life tenant." The person who is given ownership of the property subject to the life estate is known as the "remainder person." Life tenants share the exclusive possession and control of the real property. Life tenants have the obligation to pay taxes and insurance for the property. Life tenants also have the exclusive right to rents and profits from the property even if the life tenants no longer reside on the property.

A person may convey a life estate to one or more persons and remainder interests to others. A person does not have to retain a remainder interest to create a life estate.

In the most common situation, a parent will convey title to the parent's real property to one or more children while reserving a life estate in the deed..

When a parent retains a life estate in a gift of real property to the children, the value of the remainder interest, reduced by the value of the retained life estate, is the gift to the children.

The IRS and DHS publish actuarial tables to determine the value of life estate and remainder interests at the time of critical events. The value of a life estate is based on the age of the life tenant at the time of the event. The appropriate IRS table[16] differs considerably from the MA table.[17]

<u>Advantages</u>

Creating a life estate by deed is quick, easy and inexpensive. The only expense is the cost of drafting and recording the deed.. If the life estate/remainder interest is created by gift, only the minimum deed tax applies. The deed can be recorded after the grantor's death.[18]

When a life tenant dies, only an affidavit of survivorship and a certified copy of the life tenant's death certificate needs to be recorded to remove the life tenant's name from the record of title. No probate is required.

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[16] According to the appropriate IRS table, for creation or sale of a life estate by a person aged 85 in the month of July 2017, the value of the life estate would be 12.249% of the amount to be divided between life tenant and remainder persons. The remainder value would be subject to potential gift tax.

[17] According to the MA Mortality Table found at EPM Appendix G, the value of a life estate created or sold by a person in the month of July 2017 would be 35.359% of the value to be divided between the life tenant and the remainder persons.

[18] Title Standard No. 17, Effective Delivery of Deed Assumed Prior to Grantor's Death

Retention of a life estate reduces the value of the gift to the remainder persons, thereby reducing the potential for gift tax, and reducing the potential for an uncompensated transfer for MA.

The life tenant retains full control of the property for the life tenant's lifetime. The life tenant retains the right to rents and profits from the property.

The property will not be considered available as an asset if the life tenant applies for MA.[19] But see treatment as an uncompensated transfer as a Disadvantage if the life estate was created within the look-back period.

The property qualifies for a step-up in basis when the life tenant dies.[20]

Disadvantages

The life tenant remains responsible for the property's expenses. Remainder persons might not be able to afford the property expenses if the income and assets of the life tenant can no longer be used for those expenses.[21] This sometimes forces sale of the property while the life tenant remains alive. This can have unfortunate tax and MA eligibility consequences.

Once a life estate is created by the life tenant, the life tenant no longer can sell or mortgage the property without joinder by the remainder persons and their spouses.

A life estate by itself cannot be used for complicated estate planning. The death of a remainder person will require probate unless the remainder person has made other arrangements to avoid probate for the remainder person's interest in the property.

When a life estate/remainder arrangement is created by gift, the value of the remainder will be subject to potential federal gift tax. Basis in the property will also have to be divided between the life tenant and remainder persons based on the allocation of value between the life tenant and remainder persons. As noted above, the IRS tables for allocating values between life tenant and remainder persons differ substantially from the MA table.

If the property is sold during the life tenant's lifetime, sale proceeds must be allocated between the life tenant and remainder persons. The remainder persons will have to pay capital gains tax on their pro rata share if the remainder person is in the 25% tax bracket

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[19] Minn. Stat. § 256B.056, subd. 4a, Asset Verifications

[20] U.S. Code § 1014 - Basis of property acquired from a decedent

[21] MA severely restricts use of a recipient's income for real property expenses. *See* EPM 2.3.3.4.1 Medical Spenddown Types.

or higher.[22] The life tenant will no longer be entitled to the full amount of the proceeds from sale unless the remainder persons give the proceeds to the life tenant.

If the life estate was created on or after August 1, 2003, the life estate will not disappear on the life tenant's death if the life tenant was receiving MA benefits at the time of death.[23] Instead, the life estate will merge into the remainder interest and the value of the life estate at the time of the life tenant's death will continue to be subject to recovery of an MA.[24] MA can obtain a lien against the remainder interest to secure payment of the claim.

<u>MA Treatment of Life Estates</u>

2.3.3.2.7.4.3 Life Estates and Remainder Interests (in part)

Life Estate Evaluation

Life estates are treated as real property.

If the life estate is the person's principal place of residence, it is considered homestead property and is excluded.

If the life estate is not the person's principal state of residence, it is treated as non homestead real property. However a person is not required to make a good faith effort to sell a life estate because life estates are assumed to not be saleable. Therefore, non-homestead life estates are considered not available and are not counted.

The proceeds from the sale of a life estate interest is counted as an asset in the month following the month of the sale, if retained:

When the property is sold

When the remainderman or someone else purchases the life estate interest

Determining the value of a life estate interest in real property

The value of a life estate interest in real property is the property's equity value, multiplied by the person's mortality figure based on the person's age, as determined by the Life Estate Mortality Table.

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[22] See taxation of capital gains at IRS Tax Topic 409, available at: https://www.irs.gov/taxtopics/tc409.html

[23] Minn. Stat. § 256B.15, subd. 1.

[24] *Id.*

If there are two or more life estate owners, each life estate owner has a different amount of life estate interest due to differences in the owners' ages.

Remainder Interest Evaluation

Remainder interests are treated as real property and counted as an asset.

Determining the value of a remainder interest

The value of a remainder interest when a person is a remainderman is the property's equity value, multiplied by the remainderman mortality figure that corresponds to the life estate owner's age, as determined by the Life Estates Mortality Table.

When the Remainder Interest is Available to the Life Estate Owner

If a person owns both the life estate interest and the remainder interest, the life estate and remainder interests merge into full ownership of the property. The property is evaluated as a non-life estate real property.

EPM 2.1.1.2.1.1 Estate Recovery (in part)

Recoverable Assets

County agencies may recover against the following assets:

the person's probate estate;

all of the person's interests or proceeds of those interests in real property the person owned as a life tenant, or as a joint tenant with a right of survivorship, that were established on or after August 1, 2003, and were owned at the time of the person's death;

Recovery on a life estate is limited to the value of the person's interest on the date of death as determined by the Life Estates Mortality Table.

IV. TODDS

The newest opportunity to transfer real estate without probate is the Transfer on Death Deed (TODD) under Minn. Stat. § 507.071.

A TODD is like a Quitclaim Deed but it has it own special characteristics, requirements, restrictions, effect, and problems. Nothing like a TODD existed under the Minnesota

common law. It is entirely a creation of statute, and the statute must be consulted to understand the opportunities and limitations available to a TODD.

A TODD transfers the interest described in the TODD from the Grantor Owner, whether one or more, to the Grantee Beneficiary, whether one or more, when the TODD becomes effective. The TODD becomes effective on the death of the Grantor Owner whose death is specified in the TODD.[25] If the Grantor Owners are joint tenants, the TODD becomes effective on the death of the last joint tenant to dies.[26] The TODD can be revoked before the last surviving join tenant Grantor Owner dies.[27]

Most important, the TODD has no effect until it becomes effective.

Unlike other forms of deed, a TODD must be recorded before the first Grantor Owner dies (whichever Grantor Owner's death is specified in the TODD).[28]

Both spouses must sign the TODD to avoid problems with Minn. Stat. § 507.02 (both spouses must sign a deed to a homestead). All general requirements for recording a deed must be followed (e.g., acknowledgment of signatures, drafting statement, name and address of grantees).

A TODD is similar to a Quitclaim Deed (QCD), but it can be used to transfer less than all of the Grantor Owner's interests in the property.[29] Although the statutory form[30] contains no warranties of title, nothing prevents including warranties of title to make the TODD more like a Warranty Deed.

Advantages

A TODD is a cheap, easy and quick way to avoid probate for the described real property. The only expense is the drafting and recording of the deed. There is no deed tax, conservation or environmental fee or need for e-crv. The only fee is the $46 recording fee for an instrument.

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[25] Minn. Stat. § 507.071, subd. 2

[26] Minn. Stat. § 507.071, subd. 6

[27] Minn. Stat. § 507.071, subd. 10. The statutory form is only a suggested form. The statutory form is sufficient to constitute a TODD. Suggested forms for various circumstances are also available from the Uniform Conveyancing Blanks (Forms) Commission at: http://mn.gov/commerce-stat/pdfs/uniform-conveyancing-blanks.pdf (Forms 10.8.1 to 10.8.9).

[28] Minn. Stat. § 507.071, subd. 8

[29] A QCD transfers all of the grantor's interests in the property. Minn. Stat. § 507.

[30] Minn. Stat. § 507.071, subd. 24

It works well for simple situations.

It does not interfere with the Grantor Owner's ownership or control of the property prior to death.

After the TODD becomes effective, probate is avoided by recording an affidavit of survivorship and certified copy of the Grantor Owner's death certificate, but a Clearance Certificate must also be recorded (see the Disadvantage below).

The property qualifies for a step-up in basis when the designated Grantor Owner dies.

A TODD works well to avoid probate when it works well.

Disadvantages

If the TODD is not recorded prior to the Grantor Owner's death, it is not effective. If the Grantor Owner is close to death, a deed creating a life estate is a better option because it can be recorded after death.

It does not work well for complicated situations, such as when there are a large number of potential Grantee Beneficiaries or the Grantor Owner wants to provide for secondary beneficiaries if the primary beneficiaries die before the TODD becomes effective.

If may not avoid probate if a Grantee Beneficiary dies before or after the TODD becomes effective.

All TODDs require a Clearance Certificate from the local MA agency in the county where the real property is located..[31] The County Agency may withhold a clean Clearance Certificate if any unpaid MA claim may be asserted against the real property identified in the TODD. Resolving any dispute over the issuance of a clean Clearance Certificate may require a probate proceeding.

A probate proceeding may be required to enforce the TODD or resolve any dispute over the validity or interpretation of the TODD, or resolve any dispute over the existence or amount of a medical assistance claim or lien.[32]

MA Treatment

Since a TODD has no effect during the lifetime of the Grantor Owner, a TODD will not shelter the property against asset limits. The property described in the TODD will count unless excluded or considered unavailable under other MA criteria.

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[31] Minn. Stat. § 507.071, subd. 23

[32] Minn. Stat. § 507.071, subd. 26

If TODD real property is still owned by the Grantor Owner at the time of his or her death, it could be subject to MA estate recovery.

> EPM 2.1.1.2.1.1 Estate Recovery (in part)
>
> > Transfer on Death Deed
> >
> > A transfer on death deed (TODD) allows title of real property to transfer to a named beneficiary at the death of the owner, or the last to die of multiple owners. At the time of the death of the grantor owner of a TODD, the grantee, or the grantee's attorney or agent, must apply to the county agency for an Application for Certificate of Clearance for Medical Assistance Claim-Transfer on Death Deed (DHS-5893) to request clearance of MA claims against the grantor owner or the grantor owner's deceased spouse.
> >
> > Any MA claim is payable, in whole or in part, from the property identified in the certificate of clearance. The claim can be allowed, denied, and appealed in the same way as a claim in a probate proceeding. The county, or any person claiming an interest in the real property, may petition the district court for an order determining the validity of the MA claim and allowing sale of the real property for the recovery of MA benefits received. The net sale proceeds from such a sale must be used to pay MA claims if the MA claim is determined valid.

V. LIVING TRUSTS

A living trust is a revocable trust. Unless the trust agreement expressly provides that a trust is revocable, the trust will be considered irrevocable under the new Minnesota Trust Code.[33] If the trust is revocable, the settlor may revoke or amend it. The right to revoke or amend is the right that prevents the trust from being taxed as a separate tax entity. The income and gains of the trust are taxed to the settlor's personal income tax returns.

Living trusts have a long history of being used to avoid probate while continuing the settlor's effective control over trust property.

Living trusts are will substitutes. They are included in the definition of "governing instruments" under the Minnesota Probate Code."[34] Living trusts are therefore governed by the provisions of the Probate Code to the extent not inconsistent with the more specific and recent provisions of the Minnesota Trust Code.

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[33] Minn. Stat. § 501C.0602(b).

[34] Minn. Stat. § 524.1-201(26). For example, the Probate Code defines "heirs" (Minn. Stat. § 524.1-201(28) and covers disclaimers. (Minn. Stat. § 524.2-1108). The Trust Code provides that the laws applicable to disposition of property by will apply to construction of trusts. Minn. Stat. § 501C.0112.

Advantages

A living trust is the best mechanism for dealing with complicated estate planning issues, whether complicated fact situations, family situations, tax problems, or other unusual situations. Living trusts are only limited by the creativity of the drafter.

A living trust can be the most comprehensive mechanism for dealing with appropriate estate planning.

A living trust may provide a mechanism for dealing with family situations unfolding over a number of generations.

A living trust may deal with the special needs of existing or future family members.

A living trust may provide for succession and continued management of family farms and other family businesses.

A properly drafted living trust may reduce or avoid estate taxes and other tax obligations levied as a result of the death of a property owner.

Disadvantages

Transferring real property through a living trust is the most expensive, time-consuming and complicated means of avoiding probate. The expense alone often deters parents from considering them.

It is more complicated than needed for simple situations.

Property must be transferred into the trust to avoid probate for the property.[35] Property not transferred into the trust might still have to go through probate. Nothing is worse than going through the trouble and expense of creating a living trust and then learning that probate will still be required for an omitted asset.

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[35] In Minnesota, title to real property in a trust is held in the name of the trustee rather than the trust. Minn. Stat. § 507.421 treats the conveyance of real or personal property to or from a trust as though the conveyance was made to or from the trustee of the trust. Best practice is to name the trustee as the grantee or grantor of a conveyance to or from the trust. If the conveyance purports to be directly to or from the trust rather than the trustee, the conveyance will still be effective under the statute.

MA Treatment

EPM 2.3.3.2.7.9 Trusts (in part)

A trust is any arrangement in which a grantor transfers property to a trustee or trustees with the intention that it be held, managed, or administered by the trustee(s) for the benefit of certain designated beneficiaries. A trustee holds a fiduciary responsibility to hold or manage the trust's corpus and income for the benefit of the beneficiaries.

The term "trust" also includes any legal instrument, device or arrangement which may not be called a trust or qualify as a trust under state law, but which is similar to a trust.

EPM 2.3.3.2.7.9.2 Client-Funded Trusts[36]

Client-funded trusts are trusts funded with the income and assets of the person and/or the person's spouse. A client-funded trust must be evaluated for people with an asset limit to determine whether the trust can contribute toward the person's health care needs.

Trust Characteristics

A client-funded trust must meet all of the following criteria:

Not established by will;

Funded with the assets or income of the person or the person's spouse;

Established by one or more of the following; and:

The person

The person's spouse

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[36] A living trust qualifies as a "client funded trust." All the assets in the trust will count against asset limits unless excluded or considered unavailable under some other MA criteria.

A person, including a court or administrative body, with legal authority to act in place of or on behalf of the person or the person's spouse

A person including any court or administrative body, acting at the direction or upon the request of the person or the person's spouse

Established on or after August 11, 1993.

Trust Funding

Who funds the trust determines how the assets held in the trust are analyzed for purposes of determining eligibility for Medical Assistance (MA).

Funded by the Person and/or Person's Spouse

The assets in the trust are analyzed using the availability concepts applicable to revocable and irrevocable client-funded trusts.

Funded by the Person and Any Other Person

The portion of the trust funded with assets of the person or the person's spouse are analyzed using the availability concepts applicable to revocable and irrevocable client-funded trusts.

The portion of the trust funded with assets of any other person is not analyzed using the availability concepts applicable to revocable and irrevocable client-funded trusts. The portion of the trust funded with assets of any other person is analyzed under the availability concepts applicable to third party established and funded trusts.

Trust Availability

The availability concepts applicable to client-funded trusts apply regardless of any of the following:

The purpose for which the trust was established

Whether the trustees have or exercise any discretion

A discretionary support analysis for a client-funded trust is unnecessary, as all client-funded trusts are available for purposes of determining eligibility, regardless of whether they are discretionary or support. (emphas added)

Any restrictions on when or if a distribution may be made from the trust

Any restrictions on the use of the distributions from the trust.

Any client-funded trust, which meets the basic definition of a trust, can be counted in determining eligibility for MA. How a specific trust is counted for eligibility purposes depends on the characteristics of the trust. (Emphasis added)

Revocable Client-Funded Trusts

A revocable trust is a trust that:

Can be revoked by the grantor

Provides that the trust can only be modified or terminated by a court

Is called irrevocable but contains language that allows it to terminate if some action is taken by the grantor

Trust Corpus

The entire trust corpus is counted as an available asset.

Distributions

Any payments from the trust to or for the benefit of the grantor is income to the grantor.

EPM 2.1.1.2.1.1 Estate Recovery (in part)

Recoverable Assets

> County agencies may recover against the following assets:
>
> * * *
>
> assets conveyed to a survivor, heir, or assign of the person through survivorship, living trust, or other arrangements. (emphasis added)

VI. COMPARISON OF PROBATE AVOIDANCE TECHNIQUES

Among the probate avoidance techniques discussed in these materials, a life estate or living trust seems to be the most advantageous.

The life estate is preferable to a joint tenancy because there is no danger that the property will remain owned by the parent if the child dies first.

A living trust is preferable above all other strategies because it can be the most comprehensive and reliable to achieve all of the client's goals and objectives no matter how complicated the fact situation and family dynamics.

The difference among preferable techniques is largely a question of cost and the willingness of clients to accept more complicated estate planning strategies.