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Coordinating Real Estate With Your Estate Plan

Real estate often accounts for a significant percentage of a person's net worth. When considering how to distribute your estate, it is important to coordinate your estate plan with how you hold title to real estate. If you have definite plans on who you wish to inherit the family home, vacation home, or investment properties, you should discuss your wishes with your estate planning attorney.

For homestead property, your options are limited. When a husband and wife own homestead property, they typically hold title as an estate by the entireties so that the surviving spouse will own the property upon the passing of the first spouse. This provides added creditor protection benefits. If a couple intends a different result, then they will need to have executed a valid prenuptial agreement, or they will need to execute a post nuptial agreement which includes the provisions of a Tescher release. However, if there are minor children, then even a marital agreement will not suffice. An invalid devise of homestead property will mean the property will be subject to probate, and the surviving spouse will either receive a life estate or a 50% tenant in common ownership interest in the property, neither of which are generally the intended result.

Married couples may transfer homestead property to a joint trust which provides that the surviving spouse has complete rights over the homestead after the death of the first spouse. This allows the property to pass to your beneficiaries without requiring probate. Any estate tax concerns should be discussed with your estate planning attorney. If creditor protection issues are a concern, you should consider Crews v. Bosonetto, 271 B.R. 403 (Bankr. M.D. Fla. 2001), where the court held that homestead property titled in a trust was not entitled to creditor protection in bankruptcy because the trust was not a natural person. Although Bosonetto has been criticized, it has not been overruled.

Couples in second marriages should discuss how they wish homestead property to be distributed after the death of the second spouse, especially if each spouse has children from prior marriages. As long as there are no minor children, they should be able to achieve their goals with marital agreements.

There are more options with non-homestead property. Investment property can be held in a business entity, such as a limited liability company, a corporation or a partnership, which provides creditor protection benefits. Then, to coordinate

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asset protection with estate planning, the ownership interest, such as shares of stock for a corporation or membership interest in a limited liability company, can be transferred to a trust.

Vacation properties create the most complications, especially in large families. While parents may wish for all of their children and grandchildren to enjoy a special property, their descendants may have different financial abilities, and vacation properties may not be accessible to all family members. If parents wish to maintain the property, then the property could be held in a trust or a limited liability company. In this situation, the trust or company should be funded with sufficient resources for the maintenance and upkeep of the property, or other arrangements should be considered to maintain the property.

A simple plan that works for some people is to title real estate jointly with others with rights of survivorship so that it will pass upon death to the survivors, or to title real estate as an estate in common so that each party will own his or her individual share which may be devised. Some parents elect to transfer real property to their children, reserving either a life estate or an enhanced life estate. You should meet with your estate planning attorney and financial advisor to discuss the income tax, gift tax and estate tax implications of this type of transfer, and how it will effect the rest of your estate plan.

As we have seen, real estate values fluctuate. If an estate plan leaves real property to certain beneficiaries as their share of an estate, then a comprehensive net worth statement should be reviewed periodically to ensure that the ultimate distribution, taking into account current values and encumbrances, is in accordance with your plans. Your periodic review should also take into account estate, income, and capital gains tax impacts of your estate plan.