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OWNING REAL ESTATE IN A REVOCABLE LIVING TRUST

By: Dorothy L. Korszen
September 2007



Real estate titled in a person's name must go through probate in the state in which the real estate is located. People who own property in several states may avoid numerous probate proceedings by creating Revocable Living Trusts which, among other benefits, allow their heirs to avoid probate to the extent that the trust has been "funded." Real estate is transferred to a trust by preparing and recording a deed transferring the property to the trustees of the trust. Then, after a grantor passes away, the successor trustee of the trust can transfer the property in hopes to avoid probate proceedings in any state where properties are located.

Although a trust may help avoid probate, there are several issues to consider before transferring real estate to your revocable living trust. For example, if you wish to transfer home-stead property to a trust, you should make sure you will continue to receive the \$25,000 exemption from ad-valorem property taxes, and preserve your Save Our Homes (SOH) cap which limits the assessed value of your property. For more information on the SOH cap, please refer to the Farr Newsletter: "Tax Winds Blow Hard-Don't Lose Your Cap!" by Guy S. Emerich, March 2004. With a revocable living trust where the grantor retains the present right to possess and live on the property, the property will retain both the \$25,000 exemption and the SOH cap. Your attorney can review your trust to determine if it is drafted to allow you this right. Either you or your attorney may need to provide the property appraiser with an affidavit stating that you have this right.

Another consideration before transferring property to your trust is whether the property has a mortgage. Virtually all mortgages now include a "due upon sale" clause that allows the lender to call for the outstanding balance of the mortgage to be due upon transfer of the property. However, the Garn-St. Germain Act, 12 U.S.C.A. § 1701j-3, provides that the transfer of residential property containing less than five (5) dwelling units from the owner to the owner's revocable living trust will not trigger the "due on sale" clause. Along the same line, some lenders will not provide financing for property purchased by the trustee of a trust. In those cases, owners may purchase the property in their individual names and then transfer the property to their trust. In Florida, as long as the beneficial ownership of the property remains the same, documentary stamps will not be due upon transfer of the property to your trust.

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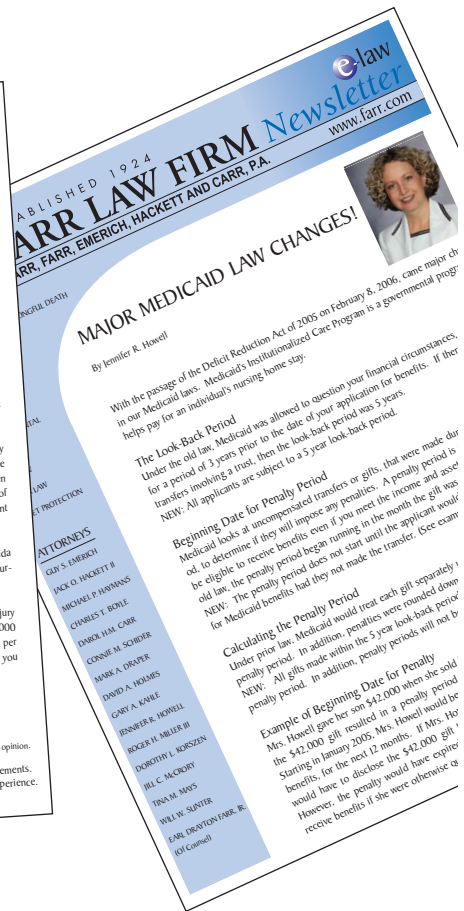
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PROPERTY OWNERSHIP

When you own real property, you must decide how to "hold title," or take ownership of the property. There are four main ways a "natural person" (as opposed to a partnership or other entity), can own property. These are:

- Joint Tenancy with Right of Survivorship** - which allows property to be held between two or more individuals, is often used with children, siblings, or sometimes business partners. Joint tenants equally share control of the property. Upon the death of the first joint tenant, the ownership of the property passes to the surviving joint tenants.
- Tenancy in Common** - each owner controls an individual interest in the property. The amount of each individual's interest can vary but is usually proportionate to the number of owners. Each owner may sell, give away or dispose of their share any way they want. This is limited because most buyers do not want to buy a portion of a property. Tenancy in common allows for control after death, because the owners can pass their share of the property to heirs.
- Tenancy by the Entirety** - the entirety shares many of the characteristics of joint tenancy; however, only a husband and wife can hold property as tenants by the entirety, and ownership of property can be transferred only with the consent of both spouses. For married persons, this is the preferable way to hold title as this offers some protection from creditors' claims.

There are many issues to consider when deciding how to hold title, such as, transfer at death, homestead issues and estate planning. Your attorney can advise you on the best way to hold title to real property, based on your situation.

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