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## ATTORNEY AT LAW

### WHAT IS THE BEST WAY TO OWN REAL ESTATE?

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### KEY TERMS

#### 1. Individual Name –

- While you are alive, no one has authority to act on your behalf without a Power of Attorney.
- When you die, your estate will own the property.
- When you die, no one has authority to act until a Personal Representative/Executor is appointed.

#### 2. Joint Tenancy –

- When one tenant dies, surviving tenant takes ownership automatically.
- Remember, joint tenant has no authority over other joint tenant. Please consider Durable Power of Attorney for finances.
- One tenant can force the sale of the property so if unmarried consider a co-ownership agreement– it does not have to be complicated or elaborate, but will prevent partition for forced sale.
- Can break the joint tenancy, turning into tenants in common (see below).
- If deed does not reference “joint tenancy” it is presumed to be a tenancy in common in Maine. Check your deeds!!!!
- **In Maine only**, non-spouse surviving joint tenant is not subject to estate recovery so there is some asset protection for surviving joint tenant if not spouse.
- Surviving Joint Tenant does not get full “step-up” in basis when you die. Would not be an issue if surviving Joint Tenant uses the property as their primary residence.
- Biggest downside of this deed is a joint tenant’s divorce, bankruptcies and tax issues can affect you.

#### 3. Tenants in Common –

- When one tenant dies, their ESTATE owns their share.
- No one has authority to act in regards to that share until a Personal Representative/Executor is appointed.
- One tenant can force the sale of the property, so if unmarried, consider a co-ownership agreement – it does not have to be complicated or elaborate.

#### 4. **Life Estate** –

- “Remainder men” (the people you designate on the deed as the people who will own your real estate when you die) do not take ownership until “Life Tenant” has passed.
- Big advantage is that it allows you to retain ownership of your property while you are alive and avoid probate when you pass.
- Another advantage is “Remainder men” will get a full “step-up in basis” when life tenant dies (unlike joint tenancy).
- However, sale of life estate during life tenancy will lead to capital gains tax on remainder men and an accountant should be consulted to calculate the ownership interest.
- In Maine, not used for Medicaid planning. Life estate is considered an asset, and valued actuarially.
- Cannot mortgage or sell without permission from remainder men.
- Only works well if you will never sell the property and want to retain all ownership rights to the property until you die.

#### 5. **Real Property Transfer on Death (R.P.T.O.D.)**

- Just like a Pay on Death (P.O.D.) account at bank or Transfer on Death for stock account (T.O.D.) the deed allows you to designate who will get your real estate when you die.
- Unlike Life Estate Deed or Joint Tenancy, you can change the designation you make any time as often as you want. (requires new deed)
- Can mortgage, sell at any time without anyone’s permission.
- Will likely replace Life Estate deeds now that it is available.
- In Florida referred to as “Ladybird” deed.
- Can even name a contingent beneficiary on the deed.
- Deed must be recorded before your death.
- Beneficiaries must be added as additional payee on property insurance in case of fire or damage after death.
- If your property is mortgaged, I would recommend speaking with your bank before you do the deed to make sure they will not consider it triggering their “due on sale” clause.
- Make sure you properly identify your intended beneficiary (i.e. “Jr.”, IV”) As a practitioner I look to Social Security Card as ultimate determination of legal identity.
- No assets protection or exemption from estate recovery.
- Beneficiaries get full “step-up” in basis.
- Designed to eliminate the need for trusts. Avoids probate simply.
- Inflexible so not a good option if beneficiaries don’t get along.
- Not a good option if beneficiaries are minors or have special needs. Better off with will or trust (see below) to provide succession planning.

#### 6. **Simple Revocable Trust** –

- Trustee, who is usually the Grantor, owns property. Revocable Trust can be altered or amended at any time. Property can be moved in and out of trust with no transfer tax or capital gain consequences.

- No asset protection (Medicaid planning).
- Probate avoidance is the main reason for holding property in a revocable trust.
- Provides succession planning. One person can oversee the distribution of property.
- You can borrow money and do all the same things you would otherwise do if you owned the property in your name alone.
- Absolutely essential if you own real estate (including time shares) in more than one state.

#### 7. **Nominee/Real estate Trust –**

- All tenants in common should consider this form of trust.
- Probate avoidance.
- Common way for families to own real estate.
- Remember: with these trusts, beneficiaries must direct the trustees, trustees have no rights or control unless they are a beneficiary.
- Perfect vehicle if you don't want anyone to know you own the property – a third party can be the trustee and your name is not publically associated with it.

#### 8. **LLC**

- Considered by many to be a **must** for rental property. Umbrella Insurance can help but can only go so far.
- Ideally, every rental property is in its own LLC, otherwise other real estate is vulnerable to claims.
- If attempt is made to follow formalities, Maine does not “pierce corporate veil” (Third party Registered Agent, Operating Agreement, separate books, etc. careful all you Legal Zoomers)
- Requires yearly annual reporting to Maine Secretary of State, but fees nominal in Maine.
- If renting, potential tax advantages.
- Not used for Medicaid/nursing home planning.
- Ideal for rental properties or other investment property.

#### 9. **Family Cottage LLC /Dynasty Trusts**

- Excellent vehicle for multiple family ownership throughout the generations.
- Provides bylaws and guidelines for family to live by as well as inheritance succession planning.
- Can limit membership to blood only, if desired.
- Can limit right to force sale or impose buy out that has favorable terms to those who want to continue to own.

## 10. Irrevocable Trust –

- Trustee, who is never the Grantor, controls the property. Irrevocable Trusts cannot be revoked and rarely can they be amended.
- Sale of property may possibly incur capital gain tax consequences.
- No homestead exemption.
- Provides succession planning.
- Used for asset protection.
- Assets are out of control of the Grantor.
- Cannot mortgage or borrow against.
- If properly drafted, cannot use funds for your care.
- No right to principal or interest.
- If you have a mortgage on your home then you are not ready for an Irrevocable Trust.
- If you have so few cash reserves that you would need access to a home equity line of credit to fix the roof or boiler, then you are not a candidate for an Irrevocable Trust.
- If you want to remain in your home as you age and may need to use a reverse mortgage to finance your care, you are not a candidate for an Irrevocable Trust.
- If your family does not get along or doesn't communicate well, you are not a good candidate for an Irrevocable Trust.

Thoughts from trenches:

DON'T do your own deeds

DO go to a seasoned Real Estate Attorney for any deed work

DON'T assume your kids love your property as much as you do

DON'T rule from the grave

DO remember that preserving good family relationships is more important than any home or camp.

Please call me with any questions regarding any of these topics.

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