

The Law and You Treat Your Deed with Care

In the past, I have discussed the dangers of adding the name of a child to your deed. Last year, I wrote about a possible new law that could help avoid those dangers. In this column, I will bring these two themes together.

A married couple most often takes title to their property as joint tenants with rights of survivorship. This means that the surviving spouse takes full title to the home automatically upon the death of the other spouse. No probate is required.

Since the transfer of title is so easy and automatic, and since the surviving spouse is used to having a second name on the deed, it is very tempting to add the name of a child. It feels safe and comfortable.

However, there are inherent risks and costs when you add a child to your deed. These dangers relate to (1) fairness among other of your children; (2) capital gain taxes, and (3) potential judgments.

First, adding a child to your deed is equivalent to gifting half of your home to your child. As a result, it may be difficult, if not impossible, to treat your other children equally, unless your entire estate is substantially greater than the value of your home.

Second, gifting half of your home to your child may result in unnecessary capital gain taxes. The half that you gift to your child has the same value, or “tax basis,” as you have.

If your home was purchased many years ago, it likely enjoys considerable appreciation. When your child eventually sells your home, the half received as a gift

will be subject to capital gain taxes. Transferring the home to your child or children upon your death avoids the capital gain taxes.

Third, by transferring half of your home to your child, you subject your home to potential judgments that may be entered against your child. This could result from collection actions against your child or from an uninsured accident caused by your child.

These dangers can be avoided by leaving your home to your children in your Will or your Trust.

There is potential new way to avoid the dangers of adding a child’s name to your deed. Unfortunately, it has not yet been passed by our Legislature, although it has been presented to them.

The new way is a “TOD Deed,” or a Transfer on Death Deed. At this time about 14 states have enacted legislation that permits a TOD Deed.

A TOD Deed grants no ownership interest to a child or children until the owner dies. The owner can sell or mortgage the property freely without any obligation to consult with or inform the child.

The TOD Deed merely names the ultimate beneficiary or beneficiaries for the property. But, the beneficiary has no vested interest in the property until the owner dies. That way, gifting is not complete until death, thereby protecting the stepped-up tax basis now available when property passes through a Will.

Since the beneficiary has no ownership interest in the property, no

creditor's claims against the child can attach or become a lien against your property. It is a safe way to name your beneficiary without the dangers inherent in adding such beneficiary to your deed.

These TOD Deeds operate much like a POD Bank Account, where "POD" means to Pay on Death. Such an account does not transfer ownership, but the person designated as the POD automatically receives the account without any probate or further legal process.

Likewise, a TOD Deed would operate upon your death to automatically convey your property to your beneficiaries. At the same time, your beneficiaries would not have any say in what you do with your property, such as taking out a mortgage or selling it. And, you can change your beneficiaries at any time without consulting them.

This new TOD Deed should be enacted by our Legislature and Governor. However, it may take your influence. Call your Representative and Senator and express your interest in a TOD Deed as a way of transferring your property without going through Probate and without the dangers of adding a child to your deed.

If you need legal help or advice about your property and your estate planning, you should consult a knowledgeable Elder Law Attorney. Check your local Yellow Pages or the National Academy of Elder Law Attorneys at (520) 881-4005, or on their web site at www.naela.com.