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## Options for transferring real estate properties at death

Own property is full of challenges, few greater than the transfer of property at death.

Absent proper planning, when a decedent dies with assets valued in excess of \$100,000, a probate estate must be opened.

Probate proceedings are costly, require assets to be frozen for at least six months during the creditor claims period in Illinois and everything becomes a matter of public record.

For decedents with assets valued at less than \$100,000, a small estate affidavit can be utilized; however, a small estate affidavit cannot be utilized for the disposition of real estate.

And, where a client holds real estate properties out of state, the estate may be required to open up several probate or ancillary probate estates in multiple jurisdictions, creating further complications and increased costs.

### Transfers to revocable living trust

Incorporating a revocable living trust as part of an estate plan and retitling assets into a trust is the most effective way to ensure assets avoid probate and are asset protected for beneficiaries. Many clients are initially reluctant to transfer real property to a revocable living trust out of fear that it may trigger a due-on-sale clause.

Due-on-sale clauses are loan provisions which stipulate that if a borrower transfers a portion or all of the property without the lender's consent, the lender may request immediate payment of the unpaid balance of the loan.

Disputes in the 1970s concerning the enforceability of due-on-sale clauses encouraged Congress to pass the Garn-St. Germain Depository Institutions Act of 1982. The act placed enforceability of due-on-sale provisions under a federal scope. While the act clarified that these clauses are enforceable, the act also created exceptions for "qualifying transfers" which include the transfer of residential property to a revocable living trust.

Some instances in which a lender may not invoke a due-on-sale clause are:

- Transfer of title by joint tenancy. The act prevents the

mortgage lender from invoking the due-on-sale clause after a joint tenant dies and the living joint tenant receives title.

- Transfer of title to a relation. If a relative is given title due to the death of the owner and then moves into the residence, a lender cannot invoke the due-on-sale clause.

- Transfer of title to a spouse or child due to divorce. When co-owners of a property divorce and title is passed on to either a spouse or child who will live in the residence, the act prevents the use of a due-on-sale clause.

- Transfer of title through an inter vivos living trust. If title to a home is transferred to a trust and the borrower is the beneficiary and the occupant, a lender is prevented from invoking a due-on-sale clause in the mortgage.

Although the act provides these exceptions, clients are encouraged to consult with an attorney regarding their particular situation.

Real property may be transferred to a revocable living trust through a quit claim deed that is recorded with the recorder of deeds for the local county. This ensures that real property will pass seamlessly to beneficiaries outside of probate. Such transfers are typically exempt from transfer taxes.

### Tenancy by the entirety

Where property is held as joint tenants with rights of survivorship or as tenants by the entirety (TBE), the property will pass automatically to the survivor by operation of law. However, the surviving owner will face the same predicament to avoid probate on the survivor's death and there is no guarantee that the parties will not die simultaneously.

In Illinois, a married couple or partners in a civil union can hold title to their primary residence as TBE. Under TBE, the property is considered to be owned together by the spouses as a single legal entity. Property owned as TBE is considered to be owned together by the spouses as a single legal entity. Property owned as TBE is considered to be owned together by the spouses as a single legal entity. Property owned as TBE is considered to be owned together by the spouses as a single legal entity.

Holding a residence as TBE is listed as another exception to a due-on-sale clause in the Garn-St. Germain act. If a spouse dies and title is transferred to the living spouse, a lender cannot invoke the

### THE BUZZ



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due-on-sale clause.

Previously, spouses had to choose between owning a primary residence through their trusts, or as TBE. Effective January 2011, House Bill 5282 (now PA 96-1145) went into effect and allows title to a homestead to be held through a spouse's revocable living trusts as TBE. This allows for clients to get maximum estate planning and asset protection benefits.

### Land trusts

Land trusts are another easy way to convey property. A land trust involves the recorded title to real estate to be held by a trustee, but the rights of ownership are held by the beneficiary. This allows the beneficiary to have total managerial control over the property, but doesn't require the beneficiary to deal with the legal burdens of real estate. Land trusts are private, as the trust agreement is not public record, so only the trustee is listed.

Upon death, succession occurs without needing probate. The trust document can list beneficiaries which easily transfer title.

### Bond in lieu of probate

If an estate contains less than \$100,000 in personal property and has real property, another option to transfer real property is a bond in lieu of probate. Illinois requires a two-year period to allow creditors

the opportunity to make a claim against a deceased person's probate assets. After this period, claims are cut off.

If it would not be possible to wait two years, a bond in lieu of probate can be used, which is posted by the seller. This bond protects potential creditors or claimants; if a claim is made on the property, the bond company pays the claim.

After payment, the company will require payment from the person who received the proceeds of the sale. The payment is 2 percent of the sale price within one year of the owner's death and 1 percent for the second year. After two years, there is no charge.

These costs are sometimes more than the fees associated with opening a probate estate, so cost and timing should be considered in every case to see what the best option is.

### Transfer on death instrument

As of January 2012, Illinois allows a transfer on death instrument (TODI) as another tool to transfer real estate and bypass probate. This new option was created by the Residential Real Property Transfer on Death Instrument Act, which only applies to residential real estate.

A TODI differs from many other forms of transferring property in the sense that a TODI only takes effect upon the death of the owner. The instrument is revocable prior to the death of the owner, even if the text of the instrument says otherwise. TODIs are not perfect and there are several problems that could arise from creating one. Some issues include:

- Probate cannot be avoided if the sole designated beneficiary does not survive the owner.
- If the notice of death affidavit and acceptance is not filed within two years of the owner's death, the TODI is void.

Clients are strongly encouraged to ensure their estate plans properly address real estate holdings.

While land trusts, bond in lieu of probate and TODIs provide options for real estate transfers, in many instances, the transfer of real property to a revocable living trust is the most effective tool.

*Thanks to Chuhak & Tecson law clerk Matt Ricco for his contribution to this month's column.*