

Social Security Disability and Medicaid Law Newsletter



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A FREE LEGAL UPDATE FOR ELDERS AND OTHERS WHO SEEK ASSET PROTECTION ♦ AUGUST 1, 2014 EDITION

WHY IT IS BETTER TO FILE FOR PROBATE EVEN THOUGH ALL ASSETS ARE IN A REVOCABLE LIVING TRUST

In Florida, a number of attorneys suggest the use of living trusts. Living trusts can be useful, particularly when it comes to having someone manage your affairs

If you are unable to handle your own affairs, your successor trust can do this. But, frequently, living trusts do not in fact avoid probate.

The theory behind a living trust is that you create this artificial entity, called a trust, which has an independent existence. You transfer all your property into the trust.

The trust now owns all of your property and you name yourself as trustee. You also provide that upon your death someone new, typically a child or a spouse, will become the new, or "successor" trustee.

The successor trustee is supposed to manage the property, and after your death, to distribute the property to your intended beneficiaries. It is supposed to escape probate because you, individually, do not own property.

Your property is owned by your trust. After your death, the trust continues and the successor trustee steps in and manages the property. Thus, there is no need to probate the estate

Problem is that Florida law provides that a revocable trust is liable for the estate debts of the decedent; and there is a 2 year statute of non-claim.

In other words, if someone dies with a revocable trust, the trust is on the hook for 2 years after the person dies. It owes for any debts or claims against the person who died.

What if the trustee distributes the money to the beneficiaries before the 2 years is up, and that results in the trust not having the

money to pay creditors? Then, the trustee is PERSONALLY liable to the creditors for two full years!

USING CONVENTIONAL LIFE ESTATE DEED IS OFTEN A BAD WAY TO AVOID PROBATE

Often, people execute deeds that include other family members in an effort to avoid probate. The most common type of deed that people use is a life-estate deed.

Normally, a life estate deed reserves the right for the owner to live in the home for the remainder of his or her life and upon death, the property belongs to the designated family members.

Although a life-estate deed avoids probate, it can cause many unforeseen problems. These problems include:

1. A gift for federal income tax purposes (which is often unreported); can accrue interest and penalties for years;
2. Loss of the stepped up basis the recipient would receive upon the death of the original owner;
3. The inability to sell or refinance the property without the consent of all owners and ALL REMAINDERMAN.
4. It creates a disqualifying transfer for Medicaid qualification purposes.

People often create a life estate on their home, with remainder to their children. When these people die, the property passes to children and no court is involved.

But what if they need a mortgage or sell the home to pay for debts? Without consent and joinder of children, this is not possible.

Giving owner right to sell or mortgage property converts life estate into an ENHANCED LIFE ESTATE.

If Donald Sterling would die owning the

L.A. Clippers, his estate would have avoided an almost 2 billion dollar capital gain. This means taxes of two-thirds of a billion dollars in federal and California estate taxes.

Had his tax advisors created an enhanced life estate, this would have protected the stepped up basis. Assuming his heirs would then sell the basketball team shortly after his death, there would be no capital gain tax.

Moreover, an Enhanced Life Estate Deed avoids probate, maintains the stepped up basis benefit upon the death of the life tenant, does not create a gift, and it's not a disqualifying transfer for Medicaid qualification purposes.

Indeed, one must use caution when executing an Enhanced Life Estate Deed, because it is possible to draft them incorrectly and create problems that will result in the necessity of probate.

News You Can Use

2014 FLORIDA MEDICAID LIMITS

Gross Monthly Income Limit for Medicaid Applicant:	\$2,163.00
Personal Needs Allowance:	\$105.00
Asset Limit (Individual):	\$2,000.00
Asset Limit (Couple):	\$3,000.00
Medicare Part B Premium:	\$104.90
Community Spouse Resource Allowance:	\$117,240.00
Minimum Monthly Maintenance Income Allowance:	\$1,938.75
Maximum Monthly Maintenance Income Allowance:	\$2,931.00
Monthly Personal Needs Allowance:	\$35.00
Home Equity Interest Max.:	\$543,000.00