

What will happen to your castle? Keeping it real and keeping your real estate out of probate – Part 2

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Hello, and welcome back to Part 2 of our “keeping real estate out of probate” series. Did everyone have a nice Valentine’s Day? We actually celebrated this Valentine’s Day as a big group with family, and I was utterly amazed at how excited the kids were about Valentine’s Day. I swear my niece and nephew were more excited about their candy and stuffed animals than they were about all the toys on Christmas. It must be the candy...kids L.O.V.E. candy! Anyway, I hope you all had a nice Valentine’s Day and maybe even indulged in something sweet yourselves to celebrate!

Earlier this month we launched Part 1 of this series, which discussed the use of a Beneficiary Deed (MO) or Transfer on Death Instrument (IL) for one mechanism to keep your real estate out of probate. In that post, we highlighted the pros of these tools – short, easy to record, inexpensive, avoid probate. Now we are back to shed some light on potential cons or situations when the Beneficiary Deed standing alone may not be the best option to meet your dispositive goals.

Remember Jack from Part 1? Jack had a \$200,000 house that he wanted to leave to his only daughter, and he wanted a simple, straightforward way to do so as all of Jack’s other assets were passing via beneficiary designations or TOD designations. For Jack, he was specifically searching for something akin to a transfer on death designation for his real estate, and he only wanted to leave his house to his daughter. If his daughter was not alive when he passed, he did not care what happened to his house. This was extremely important information when we met with Jack and recommended the Beneficiary Deed.

Why? Because if Jack wanted something else to happen to his house in the event his only daughter passed away before him, then that would have to be provided for within the Beneficiary Deed as well. These documents may be simple and straightforward, but if you try to prepare one without consulting an attorney, not only is it likely that legal mistakes may occur, but people often forget to provide for the possibility that their beneficiary could pass away before them. The statutes vary by state as to whether the beneficiary must survive the owner or not, and some are even silent on whether survival is required. The deed can contain a series of contingent successor beneficiaries, but you must be aware of this option, decide how many contingent successors you wish to name and make sure it jives with the rest of your estate plan.

Along similar lines, if Jack's only daughter had special needs and was receiving public benefit, this Beneficiary Deed would not address all of Jack's goals. Jack could still utilize the Beneficiary Deed, however, he would also need to create a Special Needs Trust for his daughter and direct the house to the trust for the benefit of his daughter. If Jack left the house directly to his daughter, instead of in a trust, he would risk disqualifying her from the public benefits she is receiving that are likely her primary source of support. The same is true if you want to leave your house to your children but they are currently all minors. A minor cannot receive an inheritance, so a trust would need to be set up either within your Will within your own Trust to hold the property for the benefit of your children while they are minors.

Another con to using the Beneficiary Deed is that you want to try to make sure it stays consistent with your estate plan as it evolves during your lifetime. Each time you change the dispositive provisions of your Will or Trust, you would need to think, does my Beneficiary Deed still work as well? For example, if your Will says that your house passes to your nephew upon your death, but your Beneficiary Deed still has your sister named, this creates an ambiguity that may cause delay and/or for your house to not end up where you wanted. Although the law is clear in this area, the Beneficiary Deed trumps as long as it is validly recorded and unrevoked, it is an ambiguity that may cause delay after death nonetheless. You also may be unaware of which document takes precedence and mistakenly only change your Will or Trust before death thinking that those documents control.

Overall, the Beneficiary Deed or Transfer on Death Instrument is still an excellent means to transfer real estate, but it is important to be aware of the potential pitfalls or situations where another option may be a better fit for your plan.