An Estate Planner’s Perspective on Transfers of Real Property in Montana.

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Estate Planning:
- Helping clients distribute their property to friends, family, and/or charities upon death in the most efficient manner
- Client’s primary concern – transferring real property
  - Who is the record owner of the property and how is it titled?
  - Distribute through non-probate, probate, or trust
- Client’s secondary concern:
  - Who has the authority to deal with my real property if I become incapacitated?
    - Financial power of attorney
    - Conservator
    - Trustee

Other Non-Probate Property
- Joint tenants with right of survivorship
  - Automatic transfer at death to surviving joint tenant(s)
  - Other owner records statement to document death Mont. Code Ann. 72-16-503 and 7-4-2613(1)(c)
- Common problem:
  - Husband and wife own property as joint tenants with right of survivorship
  - Husband dies but a Statement of Termination of Joint Tenancy is never filed with the Clerk and Recorder.
  - Wife now wishes to distribute property under the will
    - Wife files termination of joint tenancy
    - Wife dies before husband’s interest in the property terminates.
    - Generally, the personal representative of wife’s estate files statement of termination of joint tenancy.
Life estates
- During life: many variations - look to language to determine rights of life tenant v. remainderman
- At death: remainderman records statement to document death
  Mont. Code Ann. 72-16-503 and 7-4-2613(1)(c)
- Not as common.

Non-Probate Property: Beneficiary Deeds
- Popular with clients
- Effective for the right client but not advisable for everyone
- What it is?
  - deed that conveys an interest in real property to beneficiary and that expressly states that the transfer is effective on death of owner
- Key characteristics
  - Transfer subject to liens, encumbrances, etc.
  - Must be recorded prior to death of owner
  - Can be revoked at any time, but revocation must be recorded before death of owner
  - Beneficiary has no rights until death of owner
  - Although statute clearly provides that no notice to beneficiary is required for validity, Montana Department of Revenue require beneficiary’s social security number for Realty Transfer Certificate

Non-Probate Property: Beneficiary Deeds
- Beneficiaries
  - Can name one or more beneficiaries
  - If more than one beneficiary, can take title as joint tenants with right of survivorship or tenants in common
  - Beneficiary can be a revocable or irrevocable trust
  - Can designate successor beneficiary, must state condition on which successor takes title (ex. if A is deceased, then to B)
Non-Probate Property: Beneficiary Deeds
- If more than one beneficiary deed for the same property, the deed last recorded before death is effective.
- Joint owners with right of survivorship:
  - If signed by all joint tenants, title transfers upon death of last joint tenant.
  - If signed by less than all, title transfers to beneficiary only if the last surviving owner was the one who signed the beneficiary deed.
- If the property is owned by joint tenants, and if a revocation is not executed by all owners, the revocation is not effective unless executed by the last surviving owner.
- Sale of property inherited by beneficiary deed within creditor claim period.

Non-Probate Property: Beneficiary Deeds
- Death of owner must be proved by recorded acknowledged statement.
  Mont. Code Ann. 72-6-121(12) and 7-4-2613(1)(c).
- If owner received Medicaid prior to death, Montana Department of Public Health and Human Services may assert "claim…against the property.
- New statute added in 2013 – a beneficiary is liable for allowed creditors' claims in owner's probate and for statutory allowances for spouses and children (liability of beneficiary vs. claim against the property).

Non-Probate Property: Beneficiary Deeds
- What is the effect of a will on the beneficiary deed?
  - After a deed has been signed and recorded in the county where the real property is located, the deed cannot be revoked by a will.
- What is the effect of a trust on the beneficiary deed?
  - Beneficiary deed can name the trustee of the trust.
  - If the property is not retitled in the name of the trustee of the trust, then the beneficiary deed controls the distribution of the property.
Non-Probate Property: Trusts

- Montana Uniform Trust Code
  - Became effective October 1, 2013
  - Generally, applies to trusts created before or after effective date
  - Significant changes from prior trust code

- Types of trusts:
  - Irrevocable v. revocable
  - Testamentary v. inter vivos

- Why are trusts popular?
  - Avoid probate
  - Privacy
  - Professional management
  - Other estate planning goals

Non-Probate Property: Trusts

- Conveyances to a Trust
  - Best if deed clearly identifies trust and trustee to avoid later confusion
  - A conveyance of real property to a trustee vests the whole estate conveyed in the trustee, and the beneficiaries of the trust take no estate or interest in the real property
  - The designation of the name of a trust in a recorded conveyance vests the property in the trustee of the trust even if the trustee is not identified
  - The trustee (and any successor trustee) may record an affidavit specifying the trustee’s name and address and confirming that he/she is currently the trustee.
Non-Probate Property: Trusts
- Conveyances from a Trust
  - Even if original conveyance to trust rather than trustee, a subsequent conveyance may be made by the trustee
- Successors
  - May record affidavit setting forth date and circumstances of succession
  - Same applies to death, resignation, or incapacity of co-trustee
  - Sometimes see succession set forth in subsequent deed

Non-Probate Property: Trusts
- Protection of Third Parties Dealing with Trustees
  - A third person dealing with a trustee who acts for valuable consideration and is without knowledge that the trustee may be exceeding or improperly exercising his authority is protected from liability
  - A third person is not bound to inquire whether the trustee is properly exercising a trust power and may assume the existence of such power and its proper exercise

Non-Probate Property: Trusts
- Documentation of Trust
  - Copy of trust
  - Copy of first page, signature page, and pages showing trustee and powers of trustee; or
  - Certification of trust Mont. Code Ann. 72-38-1013
Non-Probate Property: Trusts
- Certification of trust
  - Persons acting in reliance upon a certification of trust, without knowledge that representations are incorrect, is not liable and may assume, without inquiry, the accuracy
  - Signed by trustee (may be acknowledged to record)
  - Recipient may require excerpts that designate trustee and power of trustee to act in transaction
    - But, if demand and court determines that not requested in good faith, liability for damages

Non-Probate Property: Trusts
- Certification of trust – contents:
  - Existence of trust and date of execution
  - Identity of settlor
  - Identity and address of current trustee
  - Relevant powers of trustee
  - Revocability or irrevocability and identity of person holding power to revoke
  - Authority of co-trustees and whether all or less than all required to act
  - That trust has not been revoked, modified or amended in manner that would make incorrect

Using Probate to Distribute the Real Property
- Probate – Property that must pass through probate “estate” proceeding
  - Property owned solely by the deceased
  - Undivided interests in property owned by the deceased as tenants in common
- Estate Planning and Probate
  - Not all assets can be distributed by beneficiary designation, so if client is already expecting to through probate, the house is sometimes probated as well.
  - Beneficiary deeds are not a good option based on the testator’s intent
  - Wish to transfer the property into a trust at death for the benefit of the beneficiaries
  - Dying intestate (without a will)
Will – Distributing Assets
- Options:
  - Specific devises (ex. parcel A to Judy)
  - Outright or in trust
  - Residual devises (ex. balance 50% to Judy and 50% to John)
- Intestacy – as directed by statute if no Will
  - Determine “heirs”
  - Shares of each depend on family relation and value of assets
  - Look at intestacy law at time of death
  - Private agreements among successors to alter distribution
  - Elective share of surviving spouse and statutory allowances

Probate: Real Property
- Probate/Estate laws are very state specific
- Montana has adopted Uniform Probate Code
- Probate proceedings are necessary to conclusively establish
development of real property owned by a decedent absent a non-probate
transfer
- To effect the disposition of property, a Will must be declared valid by
a court
- A Personal Representative appointed in another state has no authority
to transfer real property located within Montana in the absence of
ancillary probate proceedings in Montana

Probate – General
- “Estate”
  - Technically, assets subject to court proceeding
  - More generally used to describe all assets and entire process to
handle final financial affairs of decedent
- “Probate”
  - Technically, “probate” is court process where decedent left a Will
  - More generally, “probate” is used to describe the court process
regardless of whether the decedent left a will
- “Intestacy” or “intestate estate”
  - Estate where decedent did not leave a will
- “Personal Representative” or “PR”
  - Person(s) appointed by court to administer estate and with authority
over estate property
Probate – General
- Where?
  - If a Montana resident, county of residence
  - If a non-resident, county where the real property is located
- When?
  - At least 120 hours following death
  - If there is a will, must commence within 3 years following death
- Big exceptions to this rule, such as confirming title to assets in the successors to the estate
- Length?
  - At least six months (unless qualifies for small estate exception)
  - 2 year statute - show cause

Probate – Informal v. Formal
- Opening
  - Informal – Will admitted and/or Personal Representative appointed upon filing of application with the Clerk of Court
  - Most common in Montana
  - Formal – Will admitted and/or Personal Representative appointed following notice and hearing before a Judge
- Closing
  - Informal - Closed by sworn statement of Personal Representative – ongoing authority for 12 months after filing
  - Formal – Closed following notice and hearing before Judge

Probate - Personal Representative
- Authority and appointment documented by “Letters” issued by court
- One or more
- Co-Personal Representatives if more than one
- Co-Personal Representatives generally all must act together
- Priority for appointment
  - Will
  - Statutory priorities
  - Court discretion
- Broad powers
  - Can be restricted by terms of Will or court
  - Can be subject to supervised administration
- Bond - rare
Probate – Other – Less Common
- Supervised Administration
  - Probate proceeding more closely supervised by court
  - Can happen at any point during probate proceeding
  - Powers of Personal Representative subject to supervised administration
  - Restrictions on authority of Personal Representative
  - Restrictions are primarily related to ability to distribute estate property, but can include other restrictions including power to sell estate property
  - If court has placed restrictions on powers of Personal Representative (other than distributions), those restrictions must appear on Letters

Probate – Other – Less Common
- Special Administrator
  - Appointed when necessary to protect estate
  - Prior to appointment of Personal Representative
  - If Personal Representative dies, resigns, etc. and no successor has been appointed
  - Where Personal Representative cannot or should not act
  - Powers of special administrator
  - Depend on several factors
  - Can be limited to certain time and/or certain acts
  - Used most often by attorneys involved in foreclosure proceedings for purposes of serving notice upon the estate

Ancillary Probates – Non-Resident Decedents
- Generally
  - Personal Representative appointed in another state does not have authority over real property in Montana
  - Ancillary probate – Montana proceeding whereby court registers the authority of a foreign personal representative in Montana, which gives that Personal Representative the authority over Montana property
Ancillary Probates – Non-Resident Decedents

- Process
  - Abbreviated – If probate in decedent’s state of residence, then can use simplified procedure in Montana
  - Registration of “domiciliary foreign personal representative,” Letters are not issued
  - If no probate in state of residence, then follow regular probate procedure in Montana
  - Normally, procedure is simpler because it only deals with Montana real property, and much of the other administrative matters (creditors, taxes, etc.) are dealt with in decedent’s state of residence

- Timing –
  - Most probates of Montana residents occur shortly after death
  - Some ancillary probates occur many years after death
  - In general, an estate administration must be commenced within 3 years of death; however, there are big exceptions:
    - If Will probated in other state within 3 years, then informal in Montana
    - If Will not probated in other state within 3 years, then formal in Montana, but Personal Representative only has authority “necessary to confirm title to the property in the successors to the estate” (Does this include power to sell?)
    - If intestacy, then informal, but Personal Representative only has authority “necessary to confirm title to the property in the successors to the estate” (Does this include power to sell?)

Ancillary Probates – Non-Resident Decedents

- Powers of Personal Representative in ancillary probate
  - Once registered, Personal Representative has the same general powers granted to any other Personal Representative appointed in Montana
  - Power to convey property pursuant to Personal Representative's deed
  - Language differs from traditional Personal Representative's deed
  - Montana law v. law of another state
  - Procedure – Montana
  - Execution/validity of Will – Montana or state where executed or state of residence
  - Intestacy – which state’s intestacy laws apply
Real Property Transfers at Death in Montana: Probate and Non-Probate Issues

Incapacity – Real Property
- Financial Power of Attorney
  - Effective immediately or upon incapacitation
  - If effective upon incapacitation, has the principal been deemed incapacitated? By whom?
  - Authority set forth in MCA 72-31-339
  - Traditional quitclaim or warranty deed

- Court-Appointed Conservator
  - Temporary or Permanent
  - Temporary conservatorship only lasts 6 months
  - Letters
  - Authority to Sell Protected Person’s Real Property pursuant to MCA 72-5-427
  - Conservator’s Deed
  - Court Order approving sale and Letter? Recorded?
  - Statutory authority sufficient?
  - Out of state proceeding

Questions?
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