

Transferring Property and Assets: How to do it and avoid unintended consequences

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Types of Property Transfers

- Sale
- Gift – lifetime
- By will
- Laws of intestate succession
- Surviving spouse-
 - Tenancy by the entirety
- Joint tenancy with right of survivorship
- By operation of law
 - Spousal rights
 - Involuntary transfers – foreclosure & bankruptcy
- Under a Power of Appointment
- Through a trust



Questions to ask

- Was the transfer effective?
- What was transferred?
 - Partial or complete interest?
- Are there spousal rights in the transferred property?
- Is there a governmental interest in the transferred property?



Questions to ask

- Is there a creditor's interest in the transferred property?
- What is the impact upon any remaining co-owners?
- What are the restrictions on any retained interest?
- What are the tax consequences of the transfer?



Transfers of real property

- By deed
 - What did the deed guarantee?
 - Ownership by transferor
 - Free from encumbrances
 - Free from liens?
 - Was any interest retained?
 - Were any restrictions placed on the transferred property?



Transfers of real property

- By deed
 - Does the deed contain an adequate description of the property?
 - Was the deed recorded in the correct county prior to the recordation of any competing claims?
 - Were spousal claims waived?



Transfers of real property

- By deed
 - Was the deed a deed of gift?
 - Was it delivered to the donee within the donor's lifetime?
 - Was the donor competent at the date of delivery?
 - Did the donor act without duress?
 - Was the deed properly recorded within two years of making?



Transfers of real property

- By will
- Laws of intestate succession
- By operation of law
 - Survivorship property
 - Tenancy by the entireties
 - Joint tenancy with right of survivorship
 - Termination of a life estate
 - Spousal rights



Transfers of real property

- Tax consequences
 - Sale
 - Gift
 - Transfer at death
 - Character of the property
 - Business
 - Investment



Transfers of real property

- New Medicare Surtaxes starting in 2013
 - 3.8% Medicare tax on investment income
 - Interest, dividends and capital gains
 - Annuities, royalty
 - Rental income
 - This poses a potential trap



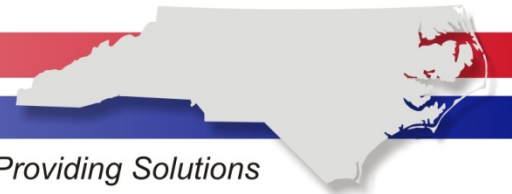
Transfers of real property

- New Medicare Surtaxes starting in 2013
 - Rental Potential Trap
 - Rental income now is subject to the additional Medicare surtax. The underlying asset, if sold, is now treated as an investment asset.
 - Therefore, if a farm is rented, and then sold, the capital gain on the farm is now subject to the 3.8% surtax.



Transfers of real property

- New Medicare Surtaxes starting in 2013
 - Any planning should take this surtax into consideration.
 - A farm is a business asset, not an investment asset. Renting it converts it to an investment asset.



Transfers of personal property

- Titled personal property
 - Must be transferred in the manner required by statute



Transfers of personal property

- Untitled personal property
 - Possession evidence of ownership
 - Need to keep receipts, bills of sale, etc. to prove ownership
 - Serial numbers and descriptions



Personal property

- Survivorship in personal property
 - Mobile homes are the only personal property that may be owned as tenants by the entireties
 - Other personal property, primarily bank and other financial accounts, may be owned as survivorship property if the document indicating ownership of the account explicitly provides for it



Personal property

- Are there liens or security interests attached to the property
 - Crops
- Spousal interests
- Business property?
 - Depreciation recapture upon disposition?



Resources

- National Agricultural Law Center
 - Commercial Transactions Reading Room
 - <http://www.nationalaglawcenter.org/readingrooms/commercial>

