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Concept

Even if wills and revocable living trusts are drafted to maximize estate savings, titling and beneficiary designations of property may prevent the documents from operating as intended. Additionally, assets may not pass to the intended beneficiaries if not titled properly.

Description and Operation

Joint Ownership

When two or more people own property, generally the title is held as joint with rights of survivorship (JWROS), joint tenants in common (JTIC), or tenants by the entirety (TBE)).

- **Joint with Rights of Survivorship.** When property is owned as JWROS, when one of the owners dies, the surviving joint owners automatically receive control and ownership of the entire property. The assets do not go through the probate process.
    - If Mark and Mary own stock as JWROS and Mary dies, Mark will own the stocks and bonds entirely. Mark will receive the stock even if Mary's will leaves the stock to her son, Manny.
- **Joint Tenants in Common.** When property is owned as JTIC, the deceased owner's fractional share passes by will or revocable living trust. While a JTIC owner has the right to control his share (such as lien, use, sale, partition), in practice, a JTIC may require the consent of the other owners. In the absence of the words "with rights of survivorship" many states infer that the property is owned JTIC.
    - If Mark and Mary own stock as JTIC and Mary's will leaves the stock to her son, Manny, Manny would receive Mary's share of stock. Manny would become a JTIC with Mark.
- **Tenancy by the Entirety.** TBE is a statutory form of ownership similar to JWROS, however only available to spouses. Each spouse owns the entire property so he/she cannot convey it independently, and it cannot be partitioned, providing some degree of asset protection. If a spouse dies, the survivor will be the sole property owner. Not all states have TBE.

- **Community Property*.*** Other common forms of ownership include: community property (with or without rights of survivorship) and separate property. Only a limited number of states operate under the community property system: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin.

Non-Probate Assets

- Another potential asset titling problem relates to assets that pass by contract or beneficiary designation. Common assets are retirement benefits, IRAs, employee benefits, annuities and life insurance contracts.
  - If Mary names Mark on her IRA beneficiary designation, Mark will receive the benefits, even if her will or her revocable living trust states that the IRA should pass to Manny. In some states, even if Mark is an ex-husband he will receive the IRA.
- It is common for bank accounts and investment accounts to be titled as Payable on Death (POD) or Transfer on Death (TOD).

Other Considerations

- Beneficiary designations and financial accounts should be checked frequently to make certain the beneficiary or the ownership is as the owner intends.
- Non-probate assets cannot fund trusts created in a will or a revocable living trust unless the beneficiary designation specifically states the name of the trust. Additionally, certain requirements must be included in the trust document when retirement plans are made payable to trusts.

Tax Implications

- Gift Tax: Changes of title may result in gift tax, due to change of ownership.
- Estate Tax: Both probate and non-probate assets owned by the decedent are included in the estate.
- When the first owner of community property dies, both the decedent's and the survivor's halves of the community property receive a step up in basis. Therefore, it is important to take care when re-titling community property.
- Change of ownership of a residence may affect the homestead exemption and liability insurance.
- FDIC considerations should be considered for bank account changes.

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