OWNERSHIP OF PROPERTY

OUTRIGHT OWNERSHIP

Outright ownership is often as simple as: John owns an automobile, or Mary owns a diamond necklace. John and Mary are generally free to do whatever they want with their property. Of course, if John borrowed money to purchase the automobile, the lender generally has the right to recovery of any outstanding loan upon a transfer of the automobile. In this situation, although John may generally be free to use the automobile as he pleases, John can really transfer only the value of the automobile in excess of the loan.

Life Estate / Remainder

Sometimes outright ownership can be split into a life estate and a remainder. A person with a life estate is generally free to use the property or income from the property for life. The person with the remainder interest receives the property when the person with the life estate dies. For example, Mike owns a house. When Mike dies, Mike leaves the house so that his sister, Sally, can live in the house for her life. Sally has a life estate. When Sally dies, the property will pass to Mike's nephew, Bob. Bob has a remainder interest.

TENANCY IN COMMON

A tenancy in common is a form of co-ownership of property. Tenants in common own an undivided right to possess the property. Each tenant is generally free to transfer his interest in the property as he wishes.

JOINT TENANCY WITH RIGHT OF SURVIVORSHIP

Another form of co-ownership of property is a joint tenancy with right of survivorship. Joint tenants also have an undivided right to the enjoyment of property. However, when a joint tenant dies, that person's interest in the property passes to the remaining joint tenant or joint tenants. While a joint tenant is alive, a joint tenant can generally sever the joint tenancy or transfer his interest to another.

For example, Dad leaves a vacation home to his three children, Tom, Ann, and Rita, as joint tenants with right of survivorship. Ann dies first. The vacation home is then owned by Tom and Rita as joint tenants. Tom dies next. Rita succeeds to outright ownership of the vacation home.

TENANCY BY THE ENTIRETY

In some states, a joint tenancy with right of survivorship between spouses is called a tenancy by the entirety. When one spouse dies, the jointly owned property passes to the surviving spouse. However, while both spouses are alive and married to each other, one spouse cannot terminate a tenancy by the entirety without the consent of the other spouse.

COMMUNITY PROPERTY

Nine states have a form of ownership between spouses called community property. Those states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. Alaska offers community property ownership if the parties elect it and establish a community property agreement or trust.

In a community property state, each spouse owns a one-half interest in property acquired while the spouses are married. Each spouse is generally free to transfer his one-half interest in the property at death as he wishes. However, while both spouses are alive and married to each other, one spouse cannot dispose of the community property without the consent of the other spouse.

Community property can be important even if a couple does not currently live in a community property state. Community property generally remains community property even when the spouses move to a common law (noncommunity property) state.

Certain property is noncommunity property even if a couple live in a community property state. Property that a spouse acquired prior to marriage remains the separate property of that spouse. Also, property acquired individually by one spouse by gift or inheritance during marriage is also the separate property of that spouse. Additionally, property acquired by a couple prior to moving to a community property state would generally remain noncommunity property.

Spouses are generally free to make agreements regarding community property. For example, the spouses can agree that what would otherwise be community property is not community property.

TRUSTS

A trust is a fiduciary relationship in which property is held by one or more person(s), for the benefit of one or more person(s). The person creating the trust is generally called a settlor, trustor, or grantor. The grantor typically executes a trust document and transfers property to the person who will be responsible for administering the terms of the trust, who is called a trustee. The person for whose benefit the trustee administers the trust is called a beneficiary. The property held in trust is often called the trust corpus or res.

State law controls the creation, operation, and termination of a trust. Common law is generally controlling except to the extent that a state has enacted a statute dealing with a particular aspect of trusts. The trust may generally have any terms except to the extent that a term is illegal or against public policy.

Theoretically, the law of any state with which the trust has contact could apply. Such states could include the state where the grantor resided upon creation of the trust, where the trustee is located or resides, where trust property is located, especially regarding real estate, or where the beneficiaries reside. The grantor may specify in the trust document the state whose laws are to be applied to the operation and termination of the trust.

Usually, the beneficiaries of the trust are the grantor and/or members of the grantor's family. Having a charity as a beneficiary is also very common.

A trust may provide for management of property, accumulation or distributions of income to beneficiaries, distributions of trust corpus to beneficiaries, withdrawal powers in beneficiaries, and other powers of appointment.

Trusts arising at death, or testamentary trusts, are subject to probate at the grantor's death. On the other hand, trusts created during lifetime, or inter vivos trusts, are generally not subject to probate.

Trusts created during lifetime are either revocable or irrevocable; a trust created at death is irrevocable. A revocable trust is a trust in which the grantor retains the right to revoke the trust; upon revocation, property in the trust would be returned to the grantor. A trust that is not revocable is irrevocable.

A revocable trust is taxable to the grantor for income tax purposes. The grantor is not treated as making a gift upon transfer of property to a revocable trust; however, a revocable trust is includable in the grantor's estate at death. The grantor of an irrevocable trust generally makes a gift upon transfer of property to an irrevocable trust. Whether the grantor is taxable upon trust income or whether the irrevocable trust is includable in the grantor's estate generally depends on what interests the grantor has in the irrevocable trust.

UGMA / UTMA

The Uniform Gifts to Minors Act (UGMA) provides that during lifetime, an adult may make a gift of certain types of property, such as securities, money, or a life insurance (or annuity) contract, to a minor by (depending upon the property) registering the property in the name of, or delivering it to, a custodian for the minor. The custodian may be the donor (except in the case of unregistered securities), another adult person, or a trust company. Many states also allow gifts of real property, personal property, and intangibles, and a few states permit transfers to custodians from other sources, such as trusts and estates, as well as lifetime gifts.

The Uniform Transfers to Minors Act (UTMA) allows any kind of property, real or personal, tangible or intangible, to be the subject of a custodial gift. The UTMA also permits transfers from trusts, estates, guardianships, and from other third parties indebted to a minor who does not have a conservator. Almost all the states have replaced their UGMA laws with the much more flexible UTMA.

Under both the UGMA and the UTMA, the minor immediately acquires both legal and equitable title to the subject matter of the gift held by the custodian.

Custodial gifts reduce or avoid many of the problems and expenses of outright gifts, trusts, or guardianship arrangements for minors.

A gift under UTMA or UGMA can avoid certain problems associated with outright gifts to children. A minor who owns property outright is free to do whatever the minor wants with the property, including possibly squandering the property. Also, other people are often hesitant to deal with a minor, because a minor can generally disaffirm contracts while still a minor. Custodianship avoids these problems.

A gift under UTMA or UGMA can also be used instead of a gift in trust for the minor. The custodianship avoids the expenses of a trust. A trust for a minor may be indicated where there is an intent to make a series of gifts to the minor or the amount to be transferred is substantial.