

TRANSFERRING REAL PROPERTY TO ADULT CHILDREN

The following should be considered before transferring real property, especially a personal residence, to a child or children or when adding the name of a child or children to title to real property:

1. **Ownership/Control:** Transferring property or adding a child's name to the title creates additional owners. As a result, the original owner no longer has control over future sales, transfers, or borrowing on the property. All new owners **MUST** sign any new deed to transfer the property. The original owner cannot transfer, sell, or borrow on the property without the agreement and cooperation of all the owners.
2. **Child Becoming Disabled:** If a child becomes mentally or physically disabled, and cannot sign documents pertaining to the real property, the original owner may not sell, transfer, or borrow on the property unless a conservator is appointed for the disabled child or the disabled child has given another person legal authority to act on his or her behalf (such as executing a power of attorney). This can create delays and additional expense, making it difficult to accomplish the desired result within the original owner's preferred timeframe.
3. **Divorce of Child:** If a child obtains a divorce or legal separation, the real property may be considered an asset in the divorce case and subject to a property settlement in a divorce proceeding that is unfavorable to the original owner. The original owner also may have to participate in the divorce case.
4. **Bankruptcy:** If a child on the title for real property files for bankruptcy, then the real property, or an interest in it, will become an asset subject to the jurisdiction of the bankruptcy court. The original owner may be forced to purchase the child's interest from the bankruptcy court to prevent the home from being sold.
5. **Judgments:** If a child has financial difficulties, and a judgment is entered against the child, the judgment will become a lien on the real property. If the property is sold, or if a loan is needed, the judgment may need to be paid out of the child's percentage share of the house. This circumstance may create a delay or prevent a future sale or loan. Unpaid child support or spousal support owed by the child also would become a lien against the real property.
6. **Tax Liens:** If a child has a state and/or federal tax lien, or other government agency lien, those liens may attach to the real property. As a result, those tax liens would need to be paid upon a sale or transfer of the real property or if a loan is sought. This can delay or prevent the sale or loan.
7. **Death of a Child:** If a child owns or has an interest in the home, besides the original owner, it may be impossible to predict who will own the deceased child's share. Did the deceased child leave a will or die intestate? Did he or she have significant debt? If the home was transferred to the child outright (as sole owner), the original owner has no interest in the home. If there was an informal agreement that the original owner would be able to live in the home, that right would disappear upon the death of the child.
8. **Estate and Gift Tax Consequences:** The estate and gift tax consequences vary, depending on whether the entire property is transferred to a child, or a child's name is merely added to the name of the parent. Placing the entire property in the child's name alone is a completed taxable gift for federal gift tax purposes. Oregon does not tax gifts. If the child's name is placed on the property along with the parent's name, the property will be included in the parent's gross estate based on the proportion of the consideration provided

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by the parent (often 100%). To the extent the property is included in the gross estate of the parent, the property will receive a new stepped-up basis for income tax purposes. If a completed gift was made during life, the basis will not be stepped-up at death. Thus, the best approach might be to not place the child's name on the property alone.

9. **Due-on-Sale Provisions:** Frequently a Deed of Trust (Mortgage) has a provision that if real property subject to a Deed of Trust (Mortgage) is sold without the written consent of the lender, the lender may declare the entire unpaid balance due and payable. This acceleration clause could create a financial hardship if the owner/borrower could not promptly pay the loan off in full.
10. **Senior Citizen Property Tax Deferral:** Some Oregonians over age 62 may elect to have their property taxes deferred until a sale or death. If a child is on title to the real property this may disqualify or render the property ineligible for the tax deferral program.
11. **Veteran's Surviving Spouse Property Tax Exemption:** Surviving spouses of some veterans may be entitled to a reduction in property taxes by way of a veteran's exemption. Adding others to title, besides the surviving spouse, may disqualify, or render the property ineligible, for the surviving spouse exemption.
12. **Medicaid Eligibility:** A transfer of the home to a child or children, or adding a child's name to title may affect, hinder, or render ineligible the original owner for Medicaid assistance. Medicaid assistance is often needed to pay monthly rent at either an assisted living facility or nursing home. The Medicaid rules are very strict regarding transfers of property for less than full value within a few years before applying for Medicaid benefits. Transferring ownership but retaining a life estate can create Medicaid eligibility issues due to how Medicaid determines the value of the life estate.
13. **Homeowners Insurance:** If you transfer all of your interest in your home, the new owner must obtain their own fire and casualty insurance policy. If you continue to live in the home, you may wish to obtain a renters policy of fire and casualty insurance to cover your personal property and furniture because the new owner's policy will typically not cover the contents of a non-owner.
14. **Vesting:** "Vesting" is how people hold title to property. Examples for two owners may be: Owner A - 75%, Owner B - 25%; Owner A - 50%, Owner B - 50%; or with the right of survivorship, meaning that the surviving owner will automatically own the property 100% upon the death of the other owner. A common and potentially expensive mistake is when people fail to add the "vesting" after the names on a deed. Another common mistake is forgetting to properly vest title in a Living Trust. Practitioners should counsel clients carefully about vesting of ownership before preparing and recording a deed.
15. **Minor Children:** A transfer of property to a minor child is easy but should be avoided. A minor child cannot sign a deed to transfer the property; nor sign loan documents (such as a refinancing). Unraveling this circumstance is often complicated and time consuming.
16. **Disagreements:** If the original owner wishes to sell the property, a child or children may disagree regarding the price, terms, or other arrangements pertaining to the sale. Such disagreements can delay, or prevent, an anticipated sale.

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17. **Capital Gains:** If you transfer your home to your child or add your child's name to the deed during your lifetime and the real property later is sold, your child will have to pay capital gains based on the increase in value from the date *you* purchased the property. If the child did not live in the home as their primary residence and/or did not own the home long enough before the sale, they may not be eligible for the capital gains exclusion. By contrast, if the house transfers to them as part of an inheritance and they later sold the house, they would pay capital gains just on the increase in value from the date of your death.

Summary

Unanticipated events and misfortunes may occur to the best of adult children regardless of age. Disability, injury, or death is just as unpredictable. Not everyone dies in order of age. Advise clients to carefully reflect on their own individual circumstances prior to transferring their personal residence to an adult child or adding the name of an adult child or children to the title to real property. This information is not designed to discourage transferring property or adding names to title, but to assist practitioners in helping their clients make sound and thoughtful estate planning decisions.

Note to Practitioners Regarding Transfers on Death

Oregon permits transfer on death deeds where the property transfers on the death of a parent to the child. This avoids some issues raised above but comes with some of its own issues. Among the risks created by a transfer on death deed is that some homeowners insurance will consider the policy canceled immediately upon the death of the owner who created the transfer on death deed. See Freeman Green, "Oregon's Uniform Real Property Transfer on Death Act: Part I," *OSB Estate Planning and Administration Newsletter* (April 2012) and Freeman Green, "Oregon's Uniform Real Property Transfer on Death Act: Part II," *OSB Estate Planning and Administration Newsletter* (July 2012) – available online at OSB Estate Planning and Administration website, <https://estateplanning.osbar.org/newsletters/>.

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