

PASSING TITLE TO LOVED ONES: WILLS, PROBATES AND ALTERNATIVE OPTIONS

**Affidavits of Heirship, Life Estates, Joint Tenants w/Right of Survivorship, Trusts
and Transfer on Death Deeds**

PRESENTED TO

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About the Speaker...

Since 1989, Jeffrey A. Rattikin has envisioned and brought to market a multitude of innovative solutions to the land title, tax-deferred exchange and legal services industries. Mr. Rattikin has practiced commercial and residential real estate transactional law for 36 years. An AV-rated and Board Certified attorney, Jeff has been honored with a number of local and state awards, including a 2025 Top Real Estate Attorney designation in his city for the 18th consecutive year, and has been selected as a Texas Super Lawyer by Texas Monthly Magazine, a designation afforded to the top 5% of lawyers in Texas. He is a graduate of the University of Texas at Austin with a B.B.A. in Finance and Southern Methodist University School of Law. Mr. Rattikin serves as co-owner, counsel and Manager/Escrow Officer of a 81 year old privately held title company, and founder, owner and President of two companies offering regional and national qualified intermediary services to clients engaged in §1031 tax deferred exchanges. Mr. Rattikin is active in numerous local, state and national industry associations, faith-based initiatives in Ethiopia and Brazil, and local civic boards. Mr. Rattikin is a frequent presenter and speaker at real estate, exchange and legal industry conferences, workshops and meetings. A father of four children, Jeff makes his home in Fort Worth, Texas.

PRESENTATION OUTLINE

PASSING TITLE TO LOVED ONES: WILLS, PROBATES AND ALTERNATIVE OPTIONS

Affidavits of Heirship, Life Estates, Joint Tenants w/Right of Survivorship, Trusts and Transfer on Death Deeds

WILLS

- Last Will and Testament: A written document signed by property owner and witnessed/notarized, directing who will inherit the decedent's assets upon death.
- MUST be filed for probate proceedings in a probate court to be effective. Unless and until probate, the terms of the will are meaningless to pass title.
- Present Enforceability: Not enforceable until death; may be changed or revoked at any time.
- Benefits:
 - Deals with all assets, not just real estate.
 - May be revoked/changed/amended at any time prior to death, so not a permanent pronouncement.
- Detriments: Perceived cost of Probate, and potentially subject to Medicare reimbursement claims.
- Is Probate required if a will has been prepared?
 - If the beneficiary of the will is the exact same person or persons as who would stand to inherit the property under Texas intestate law where there was no will, or none was probated in four years, then an Affidavit of Heirship can be used to set forth the facts of inheritance, and filed of record to reflect the new property owners.
 - If the will leaves assets to a person or entity different than who would inherit the property under Texas intestate law, then an Affidavit of Heirship cannot be used; a probate action in the probate court would be necessary to give effect to the directions set forth in the will. The will is not effective to transfer property until probated, but it cannot be ignored in favor of the application of Texas intestate law either. Beneficiaries have 4 years to file probate and claim title to the assets.

AFFIDAVITS OF HEIRSHIP

- If an owner of real property passes away without a will, or if the heirs do not probate an existing will within four years after death, the Texas intestacy laws determine the identity of the legal heirs of the decedent (the deceased person). In order for the real property records to reflect the new owners of the property resulting from the decedent's death, it is necessary to file an affidavit of

heirship of record. Such document will serve to put the public on notice of the decedent's death and the identity of those heirs who are now in title to any property owned by the decedent as a result of the death.

- The Affidavit must be signed in front of a notary public by three persons who are familiar with the facts surrounding the birth, life, family history and death of the decedent. One of those signers may be an heir; however, the other two signers need to be **disinterested parties** that will not inherit any assets of the decedent (such as friends, neighbors, clergy or distant relatives).
- Benefits:
 - Quicker and less expensive than preparation of Will and Probate
 - Easily resolves ownership issues when owner dies without a will
 - Can sometimes be used instead of probate, even if a will was prepared, where the results would be the same.
- Detriments:
 - Can't be used if a will is present, and heirs would differ from will.
 - Sometimes challenging to enlist help of disinterested parties that were familiar with Decedent's family history.

LIFE ESTATES

- Deed Reserving Life Estate: The grantor can presently convey the property to his/her intended beneficiaries, but reserve the right to continue living on the property until death. This option serves to avoid future probate upon death (at least as to the real estate), give the intended beneficiary some peace of mind that they have secured title to the property, but allows the grantor to retain possession, along with any tax exemptions they may qualify for in most counties. The drawback is that in conveying title now, the grantor cannot change their mind and "undo" the transaction later without the consent of the beneficiaries.
- Present Enforceability: Permanent, cannot be undone if grantor changes mind; possession of beneficiary delayed until death or moveout.
- Benefits:
 - Inexpensive to prepare.
 - Gets title out of estate presently;
 - Preserves homestead tax exemption.
- Detriments:
 - Can't revoke or modify; it's permanent.
 - doesn't deal with all assets, may still need will for other assets.

RIGHT OF SURVIVORSHIP

- Deed a Half Interest to Another with “Right of Survivorship”-This option adds another person to the title, and allows the survivor of either owner to take full title upon death of the other without the need for probate.
- Enforceability: Permanent, cannot be undone.
- Benefits:
 - Avoids probate.
 - Inexpensive to prepare.
 - Preserves homestead tax exemption for occupant. However, the amount of tax exemptions may be reduced due to the addition of another owner, who may not qualify for the same exemptions.
- Detriments:
 - Can’t change your mind; permanent
 - Doesn’t deal with all assets, may still need will for other assets.
 - Title Companies won’t insure right of survivorship.

LADY BIRD DEEDS

- AKA Enhanced Life Estate Deeds; present document conveying future interest; can’t do under common law. Estate planning attorneys loved it because govt said it avoids Medicare reimbursement claims. But real estate bar and title industry did not think they were enforceable; Texas common law provides that a deed must be a present conveyance to be enforceable, otherwise only a will can speak for a decedent’s wishes. As a result, title companies won’t typically give effect to a lady bird deed in chain of title; they will require other heirs to sign off on sales.

TRANSFER ON DEATH DEEDS

- Transfer on Death Deed (TODD): This new type of deed allows a present property owner to convey an interest now to an intended beneficiary and thereby avoid probate upon their death, but in the meantime, the grantor can continue to occupy the property, qualify for present tax exemptions, and even change their mind and rescind (cancel) the deed at any time. The grantor can even sell their property without the joinder of the grantee. A TODD also has the benefit of avoiding future Medicare/Medicaid reimbursement claims.
- Present Document, but not effective or enforceable until death. Upon death, title transfers to beneficiaries without probate.
- Enforceability: Present document, filed of record, but can be revoked, or grantor can sell, encumber, etc. without consent.

- Benefits:
 - Inexpensive to prepare.
 - Grantor can change mind and revoke.
 - Avoids probate.
 - Preserves homestead Tax exemption.
 - Survives Medicare reimbursement claim.
- Detriments:
 - Cannot be relied on by beneficiary, because grantor can change mind, revoke, mortgage, etc.
 - Doesn't deal with all assets, may still need a will for other assets

One major consideration between Deed Reserving Life Estate and Transfer on Death Deed: As a Deed reserving life estate is a present conveyance, the recipient of the title may not be able to enjoy the “step up in basis” when selling the property in the future, potentially exposing them to capital gains tax. Since a Transfer on Death Deed doesn't officially pass title until death, under today's tax laws the recipient at the time of death would probably qualify for a step up in basis and avoid future capital gains taxes on the rise in value during the grantor's ownership.

TRUSTS

- Trusts: Present written document to control ownership of assets after death. Requires an Appointment of Trustee and naming of beneficiaries.
- Effective to put limitations on future ownership, name guardians for minors or other children that may not be ready to exercise complete control.
- Benefits: Present conveyance, owner can control what happens after death, can be revoked (if trust is a grantor, living revocable trust).
- Drawbacks: Expensive, complicated, NO STEP UP IN BASIS!. Not needed except large taxable estates.