

Transferring Property Prior to Death: Pros, Cons, and Alternatives

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I frequently field questions where a landowner is trying to decide whether it would be better to transfer his or her property to the next generation (or their identified heir) while the landowner is still living or wait until the landowner has passed away. I always try to outline the pros, cons, and highlight two other options here in Texas that may allow a landowner to receive the pros and avoid the cons of a transfer prior to death.

Pros of Transferring Property Prior to Death

There are certainly advantages to deeding property prior to one's death, rather than waiting for that property to pass by will.

First, it is done and the landowner no longer has to worry about it! It can also allow the landowner the enjoyment of watching the next generation take over and begin operating the family farm or ranch that the next generation now owns.

Second, it allows the land to pass without going through the probate process. Even though the probate process here in Texas is not nearly as complex as some other states, it is a process that can take time, effort, and money to complete.

Third, this is a way to get land out of the landowner's name. This may be important for a number of reasons including qualifying for Medicaid and avoiding Medicaid Estate Recovery Program. It would ensure that the asset involved would not be part of the landowner's taxable estate when calculating potential federal estate tax liability. It would also decrease certain expenses for the landowner, such as property taxes since the land would no longer be in his or her name.

Cons of Transferring Property Prior to Death

There are also downsides to deeding property to another person while the landowner is still living.

First, once the property is deeded, the landowner has no more control and the deed is irrevocable. This means if the landowner gets angry at the heir, he or she cannot take back the transfer. Similarly, if the heir decides that he or she wants to do something with the property that the landowner disapproves of—like selling the land, for example—the landowner has no say over that decision because the land is owned by the heir.

Second, there are tax implications of making this type of lifetime transfer. If property is deeded during a person's lifetime, that may have gift tax consequences and may also affect the landowner's lifetime exemption with regard to estate taxes. It is critical that a landowner consult with a tax professional before making a decision to gift during his or her lifetime. To learn more about estate and gift taxes, [click here](#) for a podcast I did with Kitt Tovar on these topics.

Third, another potential negative tax consequence of this type of lifetime transfer occurs as it relates to capital gains taxes. Generally, if property is passed by will at a person's death, the heir receives a step up in basis for capital gains tax purposes, thus likely decreasing the capital gains taxes that would be owed if the property is sold. If property is transferred prior to death, the heir will not receive this step up in basis. To learn more about capital gains taxes, [click here](#) for an interview I did with Pat Dillon on this topic.

Fourth, this type of transfer could cause several issues related to Medicaid. It could trigger the Medicaid Transfer Penalty. When a person seeks to apply for Medicaid benefits, one question that they will have to answer is whether they have transferred property for less than fair market value within the last 5 years. If they have, then they may be ineligible to qualify for Medicaid for a certain period of time. Additionally, the value of the property transferred within that 5 year period would be counted towards the value of the person's assets for purposes of determining whether they qualify for Medicaid. For more information on elder law issues like these, [click here](#) for an interview I did with Texas-based attorney, Kristen Porter.

Fifth, since the land would be in the name of the heir, it could potentially be subject to any creditors or judgement against the heir.

Alternatives to Consider

In Texas, there are two alternative transfer methods that offer many of the benefits and avoid many of the disadvantages of lifetime transfers. As with anything in the law, there is no "one size fits all," so I recommend consulting an attorney to determine if one of these options might be right for you.

These are the Transfer on Death Deed and the Enhanced Life Estate Deed (also known as the Lady Bird Deed). Although they differ in details, these two deeds are very similar in operation. Both allow the landowner to designate who his or her property will be transferred to and deeds are completed and filed during the landowner's lifetime. For a Transfer on Death Deed, the transfer does not actually occur until the death of the grantor. For a Lady Bird Deed, the grantor would retain a life estate in the property and transfer the remainder interest to the identified heirs, but would retain a number of "enhanced rights," including the right to revoke

the Lady Bird Deed and the right to sell or encumber the property without consent from the heirs.

To learn more about these deeds and the minor differences between them, [click here](#) to listen to a podcast episode I did on this very topic with Garrett Coutts and be sure to read my prior blog posts discussing [Transfer on Death Deeds](#) and [Lady Bird Deeds](#).

Both of these types of deeds offer the benefits of a lifetime transfer in that the land will not be subject to the probate process and it is out of the landowner's name for purposes of Medicaid.

They also avoid many of the downsides of lifetime transfers.

These deeds are revocable—meaning that if the landowner decides that he or she wants to “take back” the transfer, he or she can do so up until death. For example, if a Transfer on Death or Lady Bird Deed is drafted and filed giving the farm to Child A, but later the parents decide they want to give one part of the farm to Child A and another to Child B, they can simply revoke the previously recorded deed or file a new, modified deed to make that change. Similarly, if the parents initially did a Transfer on Death Deed or Lady Bird Deed to a child, but then decided to sell the property rather than leave it to the child, they have the right to do so.

Second, these deeds do not trigger any gift tax liability. Likewise, these deeds will allow the recipient to obtain the stepped up basis for capital gains taxes.

Third, these deeds were designed to avoid issues related to Medicaid, so they have the benefit of getting the property out of the owner's name to allow qualification for Medicaid. These deeds are not considered a transfer to which the Medicaid Transfer Penalty applies. Additionally, since they are not technically part of the grantor's probate estate, the assets deeded by a Transfer on Death or Lady Bird Deed are not subject to the Medicaid Estate Recovery Program.

Lastly, these transfers will likely protect the property from the heirs' creditors. For a Transfer on Death Deed, since the transfer technically does not occur until after the death of the grantor, the asset is not subject to claims of the heir since the heir does not technically own the property until the death. For a Lady Bird Deed, were

there to be an issue with an heir's creditor seeking to claim the property, the deed could simply be revoked by the grantor during the grantor's lifetime.

Conclusion

With estate planning, there are pros and cons to almost every tool. It is important for people to think carefully about the tools that offer the most benefits and the least downsides when making and executing their estate plan. I highly recommend working with an attorney licensed in your jurisdiction to help make the best decision of you and your family.