

FUNDING TRUSTS WITH COLORADO REAL ESTATE

This INFORMATION SHEET is intended to explain the procedures and concerns when someone who owns Colorado real estate wishes to transfer ownership to their trust.

The topics are:

1. Documents needed to transfer ownership to Trust;
2. Casualty Insurance;
3. Transfer Tax;
4. Title Insurance;
5. Existing loans;
6. Beneficiary Deeds;
7. Fees.

1. DOCUMENTS NEEDED TO TRANSFER OWNERSHIP TO TRUST.

- a. The recorded **Deed** that placed ownership of the property in the current owners' names. This deed will provide the legal description of the property, and will identify the proper names to be used in the Deed transferring ownership to the Trust.
- b. The first and signature pages of the **Trust**, in order to identify the proper name of the Trust.
- c. The names and addresses of the **current beneficiaries** of the Trust;
- d. The names and addresses of the **trustee**, or trustees if there is more than one trustee. If there are co-trustees, we need to know if they can act alone or if they can only act together. The address is important since this is shown on the Deed, and is used by the County to send real estate tax bills.
- e. Although any type of deed recognized in Colorado is sufficient, it is preferable to use a **SPECIAL WARRANTY DEED**. The Grantee is the Trust itself, rather than the trustees of the Trust. We will prepare this Deed for signing by the current owners and the trustee(s). It will include statements about authority of the Trust to act as owner of the property, and that the interest of the beneficiaries is personal property (in order to avoid any probate of the property in Colorado if a beneficiary should die).
- f. Colorado law requires what is called a **STATEMENT OF AUTHORITY** to be recorded along with the Special Warranty Deed to the Trust. This form discloses the names and addresses of the trustees and other matters. We prepare this form for signing by the trustee(s). If the trustee is changed, through resignation or death, such that the successor trustee is to act, this Statement of Authority needs to be amended and recorded.
- g. Thus, the Special WarrantyDeed and Statement of Authority will be recorded in the County

where the property is located. This recording completes the transfer of the property into the Trust. The County Assessor will "see" the recorded deed, and changes the records so that the tax bills go to the Trust.

2. CASUALTY INSURANCE

- a. After the title is transferred into the Trust, you need to contact your insurance agent to have the insurance policy endorsed to reflect the Trust as owner of the property. However, it may be necessary to keep the individuals as "owner-insured", and name the Trust as an "additional insured". This is because the insurance company may treat the Trust ownership as "rental" property if the Trust is named as "owner-insured", and thus causing an increase in premiums, and additional exclusions.
- b. An inexpensive asset protection tool is to include "umbrella" coverage on your homeowners' insurance policy, say \$2,000,000. This coverage may help protect your assets from lawsuits against you that are not strictly related to your real estate. Check with your insurance agent on what can be covered.

3. TRANSFER TAX

- a. Some cities and towns in Colorado (such as Winter Park) impose a transfer tax on sales of real property. A transfer into a Trust is normally exempt from the transfer tax (as long as it is not a sale to the Trust). Usually the County Recorder will not record a deed for property in a jurisdiction where there is a transfer tax, unless the jurisdiction has placed a stamp on the deed showing either that the transfer tax has been paid, or that the conveyance is exempt from the transfer tax. If exempt, we will need to fill out an Application for Exemption, and send the original signed deed to the city/town. The municipality will then send the deed back to us, so that we can record it with the County.
- b. Thus, we will need to know if the property is in any city or town, or otherwise located in a resort area (some owners' associations impose a transfer tax even though the property may not be located in a city/town, ie Beaver Creek in Eagle County).

4. TITLE INSURANCE

- a. Because a conveyance to the Trust is a change in ownership, many title insurance policies will not cover the Trust unless an endorsement is issued specifically covering the Trust. Some owner's policies will cover the Trust (we have seen this in some recent policies). However, we will need to see the Owner's Policy in order to determine this.
- b. If the property has been owned for many years, there may be little risk that any claims may arise. However, if the property is a more recent purchase, then it is usually recommended that an endorsement be obtained from the title company. This endorsement will cover the Trust in case any title claims arise. The title company may charge a premium for this endorsement of \$75 to \$200 - depending on the company.

- c. If you do not want to do anything about the old title insurance, there is some belief in the legal community that with a Warranty Deed or Special Warranty Deed conveying the property into the Trust, that the warranties under the deed might provide a basis for a claim against the insured under the Owner's Policy. On the other hand, others believe that since the transfer to the Trust was not a sale for consideration, then there is no warranty coverage. Out of caution, we normally use a Special Warranty Deed.
- d. If you want us to look into the title insurance matters, we will need a copy of the Owner's Policy, and the name and address of the title agent who issued the policy (sometimes this information is disclosed on the policy itself).

5. EXISTING LOANS.

- a. Oftentimes the property will be encumbered by a mortgage or deed of trust (Colorado form most used to place a lien on real estate). If the property is the primary residence of the owners, and the Trust has been set up by those same owners, then federal law allows the conveyance into Trust.
- b. Because the Trust is normally revocable, there is no separate tax ID number for the Trust, and the Settlor treats it as his/her own for income tax purposes. Thus the interest paid on the loan is still reported as though no Trust existed.
- c. However, if the Trust is irrevocable, or the Settlor is someone other than the owner of the property, then approval from the lender should be obtained in order to avoid the normal "due on sale or transfer" clauses found in most loan papers.
- d. If the property is investment (including a "second home") or commercial property, then we recommend lender approval for the conveyance into Trust. There is no federal law similar to that for transfers of primary residence property.
- e. If the property is residential, and if the owner is planning on refinancing, many lenders will require that the property be in the name of the individual owner, rather than the Trust. Many title companies will prepare deeds conveying the property back to the owner, so that the loan can be closed. Then after the loan is closed, the owner will have to prepare another deed conveying the property back into the Trust. Some lenders will make a loan to the Trust, but may want an attorney to issue a letter that the Trust is validly formed and legal in the state where the property is located.
- f. The problems with lenders can often be avoided by using a Beneficiary Deed.

6. BENEFICIARY DEED

- a. In 2004, Colorado changed its laws to allow use of Beneficiary Deeds. This deed is signed and

recorded now, but is not effective until death of the owner – at which time the Trust will be the owner.

- b. The individual owner can deal with the property as though there is no transfer of ownership (new loans, dealing with current lenders, payment of real estate taxes, etc.). However, the Beneficiary Deed will become effective on the death of the owner, thus avoiding probate of the property;
- c. This kind of deed may be useful if the property is a second home, or investment property, on which there is a mortgage that has a due-on-sale clause. The Beneficiary Deed will not be considered a “sale”.
- d. Negative is that a Beneficiary Deed does not help if the owner becomes incapacitated. A Durable Power of Attorney may not be enough for title insurance companies to permit the “agent” to deal with the property. They may not recognize the authority of the agent to deal with the property during lifetime of the owner/principal. On the other hand, if the property was in the Trust immediately (not use the Beneficiary Deed), then it is much easier (meaning can avoid court appointed conservator) for the successor trustee to deal with the property even prior to the death of the owner. If you are using a Beneficiary Deed, it may be wise to also sign (but not immediately record) a Deed in Trust. If incapacity occurs, your agent or attorney can record the Deed in Trust so that the Trust then has ownership. This will enable the successor trustee to take over the property pursuant to the terms of your trust.

7. FEES

For the activities described in #1 above, for each parcel of property we charge a flat fee of \$250.00 for the first deed, \$100 for the second deed (as where a husband and wife have their separate trusts), plus \$50.00 for recording and other expenses. If there is more than one parcel of property, we can provide a multi-parcel discount. For time spent on transfer tax matters (#3 above), title insurance (#4 above) or lender approval (#5 above), our usual hourly rates would apply (\$275.00), plus costs. The fees are due when the documents are prepared.

MESSAGE: This Information Sheet is intended to provide general information only. It is not intended to cover all of the legal issues that arise in each situation. It is suggested that none of the documents described above should be signed without first talking to an attorney who is knowledgeable about such matters. This material is dated and the enclosed information may change because of new laws, regulations, or other impacts. Prepared on July 1, 2012.

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