

**WARNING REGARDING TRANSFERS OF REAL ESTATE  
BETWEEN SPOUSES OR BETWEEN PARENTS AND CHILDREN OR OTHER  
FAMILY MEMBERS**

As a real estate attorney I am often asked to prepare deeds transferring title to real estate between family members. In many of those instances I am merely asked to prepare the necessary documents, and I am *not* asked to give advice regarding the *wisdom* of the transfer. For the instances where I have been asked to prepare transfer documents but have not been consulted with regard to estate planning, I have prepared the following summary:

It is not uncommon for aging homeowners to transfer ownership title of their home or property to a younger family member - be it a son, daughter, or grandchild - before they pass on. They may have different reasons for doing so, some obvious (the obvious gesture of a gift) and some less obvious (to attempt to protect the property from lien claims for end-of-life medical expenses or nursing home costs).

However, parents must be cautioned that simply deeding a home to a child may cause more anguish than relief. First off, when the transfer is completed the parent will lose control over the property. A child may have a falling out with a parent, and the parent then realizes that they have no legal power regarding the property. There have even been instances where a child has evicted his or her aging parents from the home which was “gifted” to them, or has lost the home to a creditor after the “gift” because after the transfer the property becomes vulnerable to claims of that child’s current and future creditors.

Second, the child or grandchild may grow resentful of the potential costly nature of the “gift” if they are required to pay mortgage payments, property taxes or other burdens. They could wind up paying considerable capital gains taxes if they decide to sell the home.

In most instances, estate planning attorneys are of the opinion that putting a child’s name on the deed in any manner, either by transferring the home to the child outright or making the child a co-owner, is a bad idea. Such gifts often can create unintended long-term consequences, and may wind up endangering the parent’s financial security.

Transferring title between spouses may also have consequences. Spouses can enter into a valid and binding agreement regarding the community or separate property nature of their assets. Such an agreement could be important in many situations, including the following situations:

1. One spouse has separate property which he or she wishes to protect in the event of a divorce.
2. One spouse has separate property which he or she wishes to protect from the creditors of the other spouse.
3. The spouses wish to transmute the character of certain property, that is, change community property to separate, or vice versa, for tax or other reasons.
4. The couple has a blended family, i.e., one or both spouses has children of a prior marriage, or otherwise has different beneficiaries who they would like to have inherit on death.

The drafting of a property agreement between spouses is not a casual matter. While there may not be a current conflict of opinions between spouses, there may be real conflicts of interest between them in the legal sense. The rights and benefits of each spouse, during marriage, on divorce, or on death, can vary significantly depending on the property characterization. In addition, the spouses may have different beneficiaries (such as children), whose benefits at death will differ depending on the property characterization. The agreement will be binding on divorce, as well as death. Agreeing, for example that an asset is community property rather than separate property may be advantageous on death, but not so on divorce. Conveying title to real property from separate property to community property, or from community property to separate property, may affect property rights in the same way as a property agreement between spouses.

Because of these conflicts of interest, and in accordance with the current rules governing legal ethics, we strongly advise that in the preparation of a property agreement or a grant deed between spouses that each spouse be represented by separate counsel. This helps ensure that each spouse receives the advice needed to make a good decision, and also that the agreement is binding.

The above summary is not intended to be comprehensive; it is merely intended to explain to you some of the potential consequences of a transfer between spouses or a transfer between a parent and child or other relative.