

The Elder Law Update: Life Estates

By Remo A. Hammid, Esq.

As seniors and their advisors come to recognize the need for long-term care planning to protect their assets, they are also being bombarded with a great deal of misinformation.

Consider the subject of "life estates" – a popular technique to help seniors protect their home. A client recently showed me two articles, both from reputable publications, both giving seemingly different answers to the same question: Can we sell a house that has been transferred subject to a life estate?

First, let's first define the term "life estate." A "life estate" generally grants an individual or individuals the right to occupy, use and possess a particular property. In other words, it grants the right to live on a piece of property. Typically, we are dealing with real property (houses and condominiums) when we contemplate the use of a "life estate." (Although, in a few rare cases, there can be life estates with cooperative apartments.)

A "life estate" is created when the owner grants the right to live on a particular property to another person. The person that has the right to live on or use the property is called the "life tenant." When the life tenant dies the

property belongs fully to the "remainder person."

In the terms of elder law planning, usually parents will transfer a property to their children but retain a "life estate" for themselves. Legally, the property is split into two interests – the interest of the remainder persons (the children) and the interest of the life tenant (the parents).

Because the parents are entitled to live on or use the property as they see fit, they are still eligible to continue receiving any property tax reductions that they may have been receiving prior to the transfer. For instance, if the parents were eligible for an enhanced STAR exemption, a senior's or veteran's exemption, they will likely be eligible for those exemptions after the transfer.

Can you sell a house after it has been transferred subject to a "life estate"? The answer is yes. A piece of property that was transferred subject to a "life estate" may be sold in whole or in part. So, in the event that a parent, Mom, transferred her home to her two children and retained a "life estate," the home can be sold at a later date. To do so, however, all of the parties must consent to the sale. Therefore, Mom and her children must all agree

to sell the house.

Alternatively, the house may be sold subject to the parent's life estate. For example, one child may buy out the other child's interest without affecting Mom.

Is it advisable to sell a property transferred subject to a "life estate"? Generally, the answer is no. There are two reasons that selling the property will typically not make sense for a family.

The first is that seniors will usually transfer a property to protect it from liens by Medicaid in the event long-term care is needed in the future. But if the property is sold, the parent's "life estate" has a value and therefore a portion of the proceeds must be paid to the parent at the time of the sale. The percentage is based on the parent's life expectancy (as established by Medicaid). To illustrate, a parent age 76 will be entitled to fifty percent of the proceeds. Therefore, by selling you are un-protecting fifty percent of the property's value.

The second reason that selling with a life estate might not make sense is that there may be capital gain tax consequences to the children.

Can you sell a house with a life estate? The

answer is yes, but the need for Medicaid benefits and the tax consequences of a sale must be considered. Seniors would be well advised to consult with a qualified elder law attorney before creating a "life estate" in a property or selling a property with a "life estate."

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