

Elder Law Update: Protecting the Home

By Remo A. Hammid, Esq.

Question – My husband and I are both 76-years old. I'm in fairly good health, but my husband suffers from dementia. I want to keep him at home for as long as I can, but I know I won't always be able to take care of him. Eventually, I'll have to pay for an aide or, worse, put him in a nursing home. I'm concerned about paying for his care – all we have is a little bit of savings and our home. Is there a way to protect our home if he needs care?

Answer – As an elder law attorney, I spend much of my time helping clients create plans to protect their assets, including their homes. Protecting one's home is a priority for most, but the home takes on a greater significance for seniors as it is usually their most valuable asset and their safety net.

I must, however, preface this answer by stating that every situation is different and this column by necessity is general in nature and should not be relied upon without further consultation with a qualified elder law attorney.

Factors to consider include: For whom are you saving the home? Do you have children that you wish to inherit the house? If so, are those children trustworthy enough to transfer ownership in part or whole? Will you possibly need to access the equity in your home to pro-

vide for your retirement? Can you foresee a situation where you will sell the home? The answers to each of these questions have significant ramifications on the type of plan that will make sense to the senior.

The answer for most individuals is to consider an estate plan that includes transferring the home. There are a few ways to transfer (i.e., gift) the home and protect it from a future claim: (1) you can transfer the home outright, (2) you can transfer the home to your children and reserve a life estate for yourself, or (3) you can transfer it to an irrevocable trust. Choosing the right option depends on a variety of considerations, but most importantly on whether the home will be sold during your lifetime. It has been my experience that, except in specific situations, gifting outright makes little sense. We will therefore limit our analysis to life estates and irrevocable trusts.

Life Estates. When a home is transferred subject to a "retained life estate," the person transferring the home, known as the Grantor, actually signs a deed giving title of the property to someone else. The transfer is often made to the Grantor's children, but a property may be transferred to anyone subject to a "retained life estate."

The deed is drafted

so that the Grantor is guaranteed the right to possess and use the home for his/her entire lifetime.

There are significant benefits to using a life estate. First, the property is no longer in the Grantor's name and is protected from Medicaid after the applicable penalty has elapsed. Second, the Grantor continues to control the property as though the transfer was never made. Any tax reductions that benefited the Grantor prior to the transfer (such as an enhanced STAR Exemption or Veteran's Exemption) will remain.

The life estate option also provides the recipient of the home with an increase in tax basis to the fair market value of the property on the date of the Grantor's death. The significance of this becomes clear if you consider the following example.

Example: Dad bought a home in 1980 for \$100,000. Dad transferred the home to his Son last year (2006) while retaining a life estate. Son sells the home after Dad dies for \$500,000. Son has a taxable capital gain or profit of \$400,000. However, because Dad transferred the property to Son subject to a retained life estate, Son's tax basis in the home will be "stepped up" to the value of the home at the time of Dad's death. If the house is valued at \$500,000 when Dad dies, Son can sell the home for up to \$500,000

without having to pay a capital gains tax.

The life estate option works very well provided the home will not be sold during the Grantor's lifetime. On the other hand, if it is likely that the home will be sold during your lifetime, an irrevocable trust is usually the better option.

Irrevocable Trust.

Transferring the home into an irrevocable trust allows a senior to obtain benefits similar to the life estate option with one notable difference: an irrevocable trust, if drafted correctly, preserves the option of selling the home during the senior's lifetime.

Clearly, transferring the home is not a decision that should be made lightly.

Remo A. Hammid is a local attorney who practices in the areas of Elder Law, Medicaid, Wills, Trusts and Estates. He is an Adjunct Professor at Queens College and Nassau Community College. To schedule an appointment with Mr. Hammid, please call (516) 355-0400.

If you would like to see a particular issue discussed, please write to: rhammid@hammidlaw.com or 99 Tulip Ave, Suite 306, Floral Park, NY 11001.

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