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The Life Estate Deed – One Option for Protecting Your Home

By Gina M. Barry, Esq.

After spending many years raising a family in the family home, the home is commonly the family's largest and most cherished asset. As such, protecting the home from nursing home costs is often on the forefront of the family's concerns. Fortunately, it is possible to avoid the need for a sale of the family home upon a nursing home admission, especially when planning begins early.

When there is no nursing home admission in sight, a very common technique for protecting the home is a deed reserving a life estate. This is a deed in which you transfer your home (or other real estate) to the persons whom you want to have it after you pass away (remaindermen), but reserve unto yourself the right to live in, occupy and have the benefit of your home until you pass away. Typically, the remaindermen are your children. The life estate is held by you (life tenant) and carries with it the responsibility of paying the ongoing expenses of the home, such as taxes and maintenance costs. The life estate interest guarantees the life tenant the right to exclusive possession of the property, even to the extent of being able to exclude the remaindermen during the life tenant's lifetime. This exclusivity also allows the life tenant to retain any tax abatements that are available to the life tenant.

After signing a deed reserving a life estate, you will have given an actual interest in the property to the remaindermen. Thereafter, should you ever wish to sell or mortgage the property, you and all of the remaindermen would have to agree to do so, and all of you would need to sign the necessary paperwork. In addition, should any of the remaindermen experience financial or legal difficulties, such as bankruptcy or divorce, their interest in your property will be considered their asset. As such, you should assess the risk for said difficulties prior to transferring your property.

There are several benefits to a life estate, including that when you pass away, the property will pass to the remaindermen without the necessity of probate. The property will be in your estate for estate tax purposes, but no estate taxes will be due so long as you maintain assets lower than the federal and state limits. Since your home remains an asset in your estate for estate tax purposes, at the time of your death, the remaindermen will receive a "stepped-up" basis in the real estate equal to the fair market value of the real estate at the time of your death. This means that when the remaindermen sell the property, they should be able to avoid capital gains tax – unless, of course, the property appreciates to a value greater than the date of death value prior to the sale.

A deed reserving a life estate is a gift that triggers a five (5) year waiting period for Medicaid benefits. Medicaid pays for nursing home care for those who qualify by meeting both clinical and financial eligibility requirements. If you require nursing home care within five (5) years of signing a deed reserving a life estate, you would have to privately pay for your care until the remaining penalty period ended or the remaindermen would have to deed the property back to you in order to "cure" the gift. Five (5) years after the transfer, the penalty period expires and Medicaid benefits can be obtained without having to sell the home.

If you are in the nursing home and receiving benefits, the Medicaid office may place a lien on the life estate for the value of services rendered. This lien is released upon the death of the life tenant leaving 100% of the property to the remaindermen. If the home is sold prior to the death of the life tenant, it is not be possible to protect 100% of the property; therefore, this technique works best when there is no intent to sell the property. It should also be noted that the property would have to be maintained by the remaindermen, as opposed to the life tenant, during any period that you may be in a nursing home and qualified for Medicaid as Medicaid will not provide any allowance to maintain the property.

A deed reserving a life estate is not an option to be undertaken without serious consideration. In addition, a deed reserving life estate is not the only option when it comes to protecting assets from nursing home costs. There are other options available, some of which involve permissible transfers; therefore, a deed reserving life estate is not right for everyone. When determining your best course of action, it is highly

recommended that you consult an elder law attorney so that you may understand and choose from all of your options.

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