

TRANSFERRING YOUR HOME TO YOUR CHILD, A BEE'S NEST OF ISSUES

BY BEN KINIRY, ESQ.

It's no secret many families have the desire to provide an inheritance for the benefit of their children. Also, it's arguably human nature to have the desire to benefit loved ones at the time of death. The question is how to go about creating a plan that won't create significant legal headaches or what I will call *unintended consequences*?

Additionally, in order to leave an asset to their children, people are aware they must either avoid a long-term nursing home stay (I think we can agree this is out of your hands) or take some type of pro-active action to protect an asset prior to experiencing a decline in their health (this you can certainly do).

Following are some thoughts on why families should not go it alone. The topics discussed are a few of the issues that can arise in the realm of unintended consequences of asset protection planning regarding your home. Note: this writing doesn't even begin to tap into the horrors of making a Medicaid application for long-term-care benefits after the creation of the unintended consequences (an article for another day)!

Transferring the home: Many families who are trying to accomplish asset protection planning on their own may consider transferring the family home to their child or children.

What if you transferred your home to your son?

One of the major pitfalls for this type of planning is that your son becomes the *legal owner of your home*, which creates a whole host of issues.

What if he gets sued or needs to file for bankruptcy?

What about divorce? I had a client named Bill who came to me adamant that all he needed to do was to transfer his \$270,000 condominium to his married son. He swore his son's marriage was stable, so did his son. Luckily, I was able to talk Bill out of making the transfer. Bill and I are both veterans and we kind of hit it off. The following summer he invited me to a party at his home. At the party I found out that his son's wife had been having an affair, moved in with her boyfriend and filed for divorce. Bill was really happy that I had talked him out



of the transfer, so was I.

What if your child decides to evict you from what is now *his home*? You can laugh, but I had a client (after the fact) in Connecticut who didn't think her eviction was very funny. Apparently, the son decided to move into her home, with his wife. The son's wife and his mother did not get along. The son and his wife physically pushed my client out the front door of *what was her home*.

What if your married son were to die unexpectedly after the transfer? Who would own your home at the moment of his death? **Not you.**

Depending on your age and other criteria, you may be receiving some type of property tax discount, which you will lose. Residents in New Hampshire also have a homestead right, which is gone the moment you sign the deed.

In the alternative, what if your son is doing relatively well, financially speaking, and his children apply for student loans? Now your son has an additional asset and his children may not be approved.

At this point you might be thinking "but I don't have the funds to spend on an elder law attorney" or "I don't want to spend my money on an elder law attorney". I certainly understand, so let me see if I can make a financial argument that may have you seeing it differently.

Let's run some numbers and see how your son fares in the end financially, doing it your way (riddled with all the pitfalls) verses my way (planning around the pitfalls). After all the goal is to create a larger, not smaller, inheritance, right?

For example, assume you paid \$50,000 for your home back in 1975. Today you sell the property

for the sum of \$250,000. At the time of the sale the closing attorney will see that your basis (what you paid for the property) is \$50,000. Since you resided in the property for all those years, you would pay **zero** in capital gains tax because under Internal Revenue Code Section 121 you are allowed a \$250,000 capital gains tax exclusion.

In the alternative, what happens if you transfer the property to your favorite son and **he sells the property**? First off, your son receives your \$50,000 basis. He, however, won't receive the \$250,000 capital gains tax exclusion and will therefore have to pay a 15% capital gains tax on the difference between the amount you paid for the property and the amount he sells it for. Using my numbers: \$250,000- \$50,000 equals \$200,000 in capital gains. Take the \$200,000 and multiply it by 15%. The devastating result is a **\$30,000** capital gains tax that was completely avoidable with proper planning (run your own formula, how much would your child pay?).

As can be seen, the transfer of the property opens your life up to a bee's nest of possibilities, which may or may not ever come to fruition, but sometimes the unintended consequences do occur. On the financial side, it's possible to calculate how much the transfer will eventually cost in capital gains taxation, which can be compared with the cost of paying a professional for planning services.

Often, there are ways to protect some of your assets, including your home, not open yourself to the bee's nest of unintended consequences and avoid the capital gains tax. The appropriate avenues often involve the use of trusts and other techniques which are very complicated and well beyond the scope of this article. The point is, with good planning, the unintended consequences, as well as the capi-

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tal gains tax, can likely be avoided.

Beyond the pitfalls discussed above, there are numerous rationales for NOT doing asset protection planning (either with or without counsel) because it's so very complicated and can create legal and family issues, even in the best of circumstances. Please seek help: If you are thinking about moving forward with an asset protection strategy on your own, I want to encourage you to seek out professional help. You may be talked out of moving forward with such planning.

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