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## **Legal Landmines of Transferring Property to Children**

By James S. Rizzo, Esq.\*

Transferring property to children as people age, while retaining the right to live at the property for the rest of ones' life (in legal jargon, "retaining a life estate"), is a common practice but one fraught with problems. The logic is the property will go to the kids when you die anyway, so why not just do it now? Here are several reasons to consider:

**1. Nursing Homes will look to unwind the transfer if it was done within five (5) years of entering a Nursing Home** or impose a penalty amount against you for any property transfer under fair market value. Separate articles can be written on the complexities of Medicaid. However, it is vital to know that in order to have Medicaid cover any portion of nursing home costs, any asset transfers done within five years of entering a nursing home need to be reported and you could be made to private pay the full amount of nursing home costs equal to the fair market value of the transfer (i.e., the "penalty period"). You also run the risk of the nursing home bringing an action to undo the transfer and recoup the value of the property.

**2. What if your children predecease you while you are residing in the property?** If one or all of your children die, their respective estates will now be the owner of their share of the property. That child's share may now be clouded by probate or estate problems, or the property may pass into the hands of a son or daughter-in-law by inheritance contrary to your intentions.

**3. Divorce.** If one of your children is going through a divorce, the value of his/her ownership interest will generally have to be reported and may be the subject of the divorce proceeding. The financial upheaval of divorce may force that child to sell his/her interest in the property to a third party. While your ability to remain in the property under a properly worded life estate interest should not be disturbed, generally, the thought of someone other than your child owning the property during your lifetime can create a great deal of uncertainty and stress.

**4. What if your children have judgments against them or file bankruptcy?** If one of your children has financial problems and is a bad money manager, any liens or judgments against them can attach to property in their name. This can create discord among siblings without these problems and will generally delay and inhibit any future sale of the property until all such liens and judgments are satisfied. If a child declares bankruptcy, his/her ownership percentage needs to be reported and resolved in accordance with the bankruptcy action, much like a divorce.

**5. What if your child is or becomes disabled?** If your child is receiving governmental or disability benefits, or becomes disabled while owning the property, this can create a host of

unintended consequences. If a child is responsible for the upkeep of the property, it will need to be determined how the property will be maintained going forward. If the now disabled child had agreed to pay mortgage or other costs, those expenses will need to be resolved to avoid the judgment and lien problems mentioned above. Also, if property is transferred to a disabled child, an attorney concentrating in estate planning should review the situation to ensure any disability benefits are not disrupted or reduced as a result of the value of such a transfer.

**6. Physical Disease or Addiction.** The adverse consequences of physical disease are many, but what if your child has the “disease” of drug, alcohol or gambling addiction? The financial problems and emotional turmoil of those situations can have long lasting and devastating consequences which tie directly into most all the categories outlined in this article.

**7. Discord among family members.** Disagreement and dislike among family members does not discriminate based on race, wealth or how large or small a family is. Disagreements may and often do arise among children co-owning a property together and/or between the parent(s) living at the property. It is axiomatic that a legal dispute among family members is something to be avoided if at all possible.

**8. Tax and Capital Gains consequences.** While a tax professional should be consulted for any large transfer of assets, generally, a transfer of property to your children during your lifetime can have the unintended consequence of imposing a hefty capital gains tax on the children when they sell the property. If a trust or Will is properly designed, the capital gains tax can be avoided in most circumstances if property is inherited (transferred to children post-death).

What is the better alternative if your intention is to have your children own your property after you die? A well-crafted estate plan, especially one incorporating an irrevocable Medicaid trust, can address and avoid the above situations while allowing you to live in and retain control of the property. Such a plan also allows you to retain the all-important STAR tax exemption and any other exemptions for your primary residence. An attorney concentrating in estate planning should be able to provide guidance and options to best suit your needs.

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