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Transferring Assets: In Trust or to Children?

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Many clients have a general understanding that in order to qualify for Medical Assistance (MA), such as Medicaid, they may need to transfer assets out of their names. Timing is often critical: if an asset is transferred out of a client's name far enough in advance of applying for MA, then the transfer will not cause the transferor to be ineligible for MA for a period of time.

However, a question clients often want to know is: **What is the best way to structure the transfer?** Should a client transfer assets into the names of one or more of their children (or other family members)? While person-to-person transfers can work in certain situations, **it is more often preferable to transfer assets to a trust that will ultimately benefit the intended family members.**

Why?

Direct transfers to a child (or to most other types of persons) entail certain risks. If the property at issue is a home, one obvious risk is that the transferee (the child) might decide not to let the transferor (parent) live in the property anymore. Hopefully, for most families, this particular risk is not great. Still, if ownership of the family home is given to a child (or to some other person), and if the former owner (the parent) plans to continue living in the home, then they need to understand that their right to do so is subject to the goodwill of that new owner (the transferee/child). That concern can be addressed by reserving to the transferor a lifetime right to live in the property (often called a "life estate" interest).

However, even if a parent reserves a life estate interest in property, they need to understand that if another person (the transferee/child) becomes owner of the property, then that person's problems can in effect become problems for the transferor as well. **For that reason, before a parent transfers ownership of his or her home to a child, the parent should give due consideration to certain questions, such as:**

- What happens if my child gets legally divorced?
- What happens if my child is involved in an accident and becomes the subject of a lawsuit?

- What happens if my child encounters financial difficulties?
- What happens if my child dies before I do?

If a child to whom the property is transferred gets divorced or encounters financial or legal problems, then a person outside the family could conceivably end up with an interest in the property.

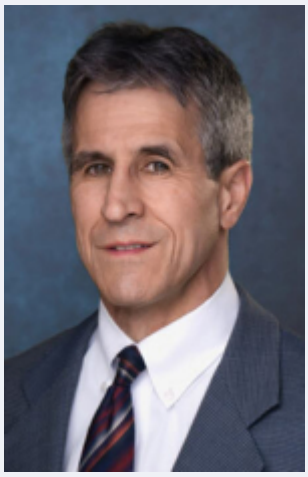
Similarly, if a child to whom the property is transferred unexpectedly predeceases the parent, any number of problems could arise. For example:

- The child might not have a Will, and therefore the property could pass to someone other than the parent under applicable statutory law.
- Even if the child does have a Will, the child might forget to include the parent as a beneficiary and therefore the property could pass to someone other than the parent.
- Even if the deceased child has a Will and even if that will gives all rights to the property back to the surviving parent, the parent could still end up having to pay inheritance tax on the reacquired property interest.

For all of the reasons listed above, it's often advisable to transfer interests in a family residence to a trust rather than to children or to other family members. The trust agreement will usually expressly provide that the person transferring property (typically a parent) to the trust will be allowed to live in the property throughout their lifetime. The "remainder" beneficiaries (i.e., the transferor's children) do not become owners until after the transferor (parent) has died. Because they do not own the property during the parent's lifetime, the parent's right to continue living in the property is not affected by any problems that might befall the children.

Another advantage of making the transfer "in trust" is that it can facilitate centralized decision making. For example, a parent might want to benefit each of their 4 children equally at death; but that does not mean that the parent is equally confident about all of the children's decision making. A trust enables a parent to designate a hierarchical pecking order for managing trust assets but still benefit each of the parent's children equally when the parent is no longer living.

If you have questions about transferring assets in trust or have other Elder Law or Estate Planning concerns, please contact one of our Elder Law Attorneys or call 814-459-2800.



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