Legal Matters®

Elder Law
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How to pass on your home tax-free

Giving your house to your child or children can have tax consequences, but there are ways to accomplish this tax-free. The best method to use will depend on your individual circumstances and needs.

Leave the house in your will

The simplest way to give your house to your children is to leave it to them in your will. In 2017, as long as the total amount of your estate is under $5.49 million it will not pay estate taxes. In addition, when your children inherit property it reduces the amount of capital gains taxes they will have to pay if they sell the property. Capital gains taxes are paid on the difference between the "basis" in property and its selling price. If children inherit property, the property's tax basis is "stepped up," which means the basis would be the value of the property at the time of death, not the original cost of the property.

There are some downsides to this approach. Some states have smaller estate tax exemptions than the federal exemption, meaning that leaving the property in your estate may cause it to owe state taxes. Also, if you were to need Medicaid at any time before you died, a lien might be put on the property and it might need to be sold after your death to repay Medicaid.

Gift the house

When you give anyone other than your spouse property valued at more than $14,000 ($28,000 per couple) in any one year, you must file a gift tax form. But as of 2017 you can gift a total of $5.49 million over your lifetime without incurring a gift tax. If your residence is worth less than $5.49 million and you give it to your children, you probably won't have to pay any gift taxes, although you will still have to file a gift tax form.

The downside of gifting property is that it can have capital gains tax consequences for your children, and this tax could be steep if your children plan to sell the home. When property is gifted it does not receive a step-up in basis as it does when it is inherited. When you give away your property, the tax basis (the original cost) of the property for the giver becomes the tax basis for the recipient.

In addition, gifting a house to your children can have consequences if you apply for Medicaid within five years of the gift. Under federal law, if you transfer assets within five years before applying for Medicaid, you

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Wendy A. Craig P.A.
207 East State Street
Black Mountain, NC 28711
828.669.0799
828.669.0055 (fax)
wacraig@wncelderlaw.com
WNCelderlaw.com

Medicaid's benefits for assisted living facility residents

Assisted living facilities are a housing option for people who can still live independently but who need some help. Costs for these facilities can range from $2,000 to more than $6,000 a month, depending on location. Medicare won't pay for this type of care, but Medicaid might. Almost all state Medicaid programs will cover at least some assisted living costs for eligible residents.

Unlike with nursing home stays, there is no requirement that Medicaid pay for assisted living, and no state Medicaid program can pay directly for a Medicaid recipient's room and board in an assisted living facility. But with assisted living costs roughly half those of a semi-private nursing home room, state officials understand that they can save money by offering financial assistance to elderly individuals who are trying to stay out of nursing homes.

As of May 2016, 46 states and the District of Columbia provided some level of financial assistance to individuals in assisted living, according to the website Paying for Senior Care (www.payingforseniorcare.com), which features a "State by State Guide to Medicaid Coverage for Assisted Living Benefits" that gives details on each state's programs. According to the website, the Medicaid programs of Alabama, Kentucky, Louisiana and Pennsylvania are the only ones that provide no coverage for assisted living, although non-Medicaid assistance may be available.

The level and type of support varies widely from state to state. Because they are prevented from paying directly for room and board, some states have devised other strategies to help Medicaid recipients defray the cost of assisted living, including capping the amount Medicaid-certified facilities can charge or offering Medicaid-eligible individuals supplemental assistance for room and board costs paid for out of general state funds. States also typically cover other services provided by assisted living facilities, which may include nursing care, personal care, case management, medication management, and medical assessments and exams.

In many states, this coverage is not part of the regular Medicaid program but is delivered under programs that allow the state to waive certain federal rules, such as permitting higher income eligibility thresholds than regular Medicaid does. To qualify for one of these waiver programs, applicants almost always must have care needs equivalent to those of nursing home residents. These waiver programs also often have a limited number of enrollment slots, meaning that waiting lists are common. In some states, the support programs may cover only certain regions of the state. One state's definition of "assisted living" may differ from another's, or other terms may be used, such as "residential care," "personal care homes," "adult foster care" and "supported living."

If your state does not cover room and board at an assisted living facility, help may be available through state-funded welfare programs or programs run by religious organizations. If the resident is a veteran or the surviving spouse of a veteran, the resident's long-term care may be covered through the VA's Aid and Attendance pension benefit.

Steer clear of non-lawyers offering Medicaid planning services

As the U.S. population ages, more non-lawyers are starting businesses that offer Medicaid planning services to seniors. While using one of these services may be cheaper than hiring a lawyer, the ultimate costs may be far greater.

If you use a non-lawyer to do Medicaid planning, they may not have any legal knowledge or training. Bad advice can lead seniors to purchase products or take actions that won't help them qualify for Medicaid and may actually make it more difficult. The consequences of taking bad advice can include the denial of benefits, a Medicaid penalty period or a tax liability.

As a result of problems that have arisen from non-lawyers offering Medicaid planning services, a few states (Florida, Ohio, New Jersey and Tennessee) have issued regulations or guidelines providing that Medicaid planning by non-lawyers will be considered the unauthorized practice of law.

Applying for Medicaid is a highly technical and complex process. A lawyer knowledgeable about Medicaid law in your state can help you navigate this process and may be able to help your family find significant financial savings or better care. This may involve the use of trusts, transfers of assets, purchases of annuities or increased income and resource allowances for the healthy spouse. Talk to your attorney about what might work for you.

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will be ineligible for Medicaid for a period of time (called a transfer penalty), depending on how much the assets were worth.

Sell the house

You can also sell your house to your children. If you sell the house for less than fair market value, the difference in price between the full market value and the sale price will be considered a gift. As discussed above, you can use the $14,000 annual gift tax exclusion as well as the $5.49 million lifetime gift tax exemption on this gift. The same issues with gifts discussed above will apply.

Another option is to sell the house at full market value, but hold a note on the property. The note should be in writing and include interest. You can then use the annual $14,000 gift tax exclusion to gift your child $14,000 each year to help make the payments on the note. This can be tricky and you should consult with your attorney to make sure this won't cause tax problems.

Put the house in a trust

Another method of transferring property is to put it into a trust. If you put it in an irrevocable trust that names your children as beneficiaries, it will no longer be a part of your estate when you die, so your estate will not pay any estate taxes on the transfer. The house will also not be subject to Medicaid estate recovery.

The downside is that once the house is in the irrevocable trust, it cannot be taken out again. Although it can be sold, the proceeds must remain in the trust. Similar to making a gift, if you apply for Medicaid within five years of transferring the house, you may be subject to a Medicaid penalty period.

Figuring out the best way to pass property to your children will depend on your individual circumstances. Talk to your attorney to decide what method will work best for your family.

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What is undue influence, and how can it be avoided?

Saying that there has been "undue influence" is often used as a reason to contest a will or estate plan, but what does the term mean?

Undue influence occurs when someone exerts pressure on an individual, causing that individual to act contrary to his or her wishes to the benefit of the influencer or the influencer's friends. The pressure can take the form of deception, harassment, threats or isolation. Often the influencer separates the individual from loved ones in order to coerce him or her. The elderly and infirm are usually more susceptible to undue influence.

To prove a loved one was subject to undue influence in drafting an estate plan, you have to show that the loved one disposed of his or her property in a way that was unexpected under the circumstances, that he or she is susceptible to undue influence (because of illness, age, frailty or a special relationship with the influencer), and that the person who exerted the influence had the opportunity to do so. Generally, the burden of proving undue influence is on the person asserting that it took place. However, if the alleged influencer had a "fiduciary relationship" with the loved one (meaning that the loved one placed a high degree of trust in the influencer to handle his or her affairs), the burden may be on the influencer to prove that there was no undue influence. People who have a fiduciary relationship can include a child, a spouse or an agent under a power of attorney.

When drawing up a will or estate plan, it is important to avoid even the appearance of undue influence. For example, if you are planning on leaving everything to your daughter who is also your primary caregiver, your other children may argue that your daughter took advantage of her position to influence you. To avoid the appearance of undue influence, do not involve any family members who are inheriting under your will in drafting the will. Family members should not be present when you discuss the will with your attorney or when you sign it. To be totally safe, family members shouldn't even drive or accompany you to the attorney's office. You can also get a formal assessment of your mental capabilities done by a medical professional before you draft estate planning documents.

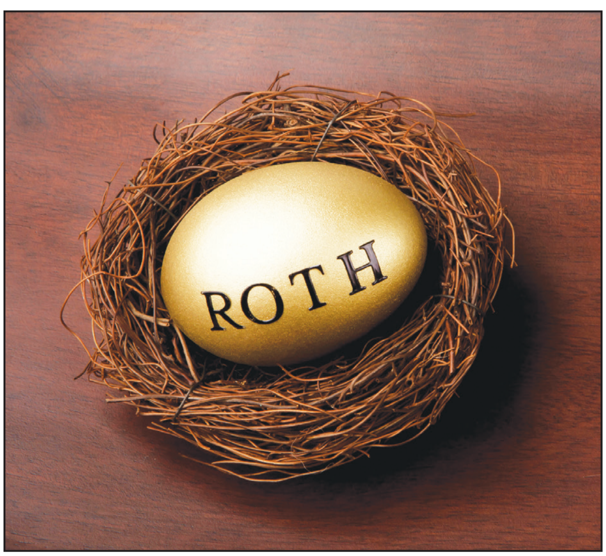
Wendy A. Craig P.A.

207 East State Street
Black Mountain, NC 28711

828.669.0799
828.669.0055 (fax)

wacraig@wncelderlaw.com
WNCelderlaw.com

Understanding the tax consequences of inheriting a Roth IRA



Passing down a Roth IRA can seem like a good idea, but it doesn't always make the most sense. Before converting a traditional IRA into a Roth IRA to benefit your heirs, you should consider the tax consequences.

Earnings in a traditional IRA generally are not taxed until they are distributed to you. At age 70 1/2 you have to start taking distributions from a traditional IRA. By contrast, contributions to a Roth IRA are taxed, but the distributions are tax-free. You also do not have to take distributions from a Roth IRA.

Leaving your heirs a tax-free Roth IRA can be used as part of an estate plan. However, in figuring out the best type of IRA to leave to your beneficiaries, you need to consider whether your beneficiary's tax rate will be higher or lower than your tax rate when you fund the IRA. In general, if your beneficiary's tax rate is higher than your tax rate, then you should leave your beneficiary a Roth IRA. Because the funds in a Roth IRA are taxed before they are put into the IRA, it makes sense to fund it when your tax rate is lower. On the other hand, if your beneficiary's tax rate is lower than your tax rate, a traditional IRA might make more sense. That way, you won't pay the taxes at your higher rate. Instead, your beneficiary will pay at the lower tax rate.

Regardless of which IRA you pass on to your heirs, remember that your IRA is part of your taxable estate, so it can be subject to estate taxes if your estate is over the estate tax exemption, which is $5.49 million in 2017.

Also bear in mind that all this is based on the tax rules as they are now. Future tax rules regarding inherited IRAs may change, making certain strategies more or less advantageous.