

Considerations Regarding Transfer of Real Property

A person may inherit a piece of real estate by Will or by intestacy or a house may be deeded shortly prior to the death of family members. Most clients that we deal with inherit a property by Will wherein a parent leaves a property to a child or to children.

Often said child or children of the parent want to keep the property in the family. In order to do so, there are a number of issues that need to be addressed, as follows:

1. **Tax Basis for Capital Gains Tax** - If you inherited the property, the good news is that you receive a “step-up” in basis, which means that when you sell the property your basis in the property is the value as of the date of death of your parent. Accordingly, it makes some sense to get an appraisal as of the date of death so that you can confirm the value when you eventually sell the property. If you own and reside in the home for your lifetime you will have an exemption regardless of when you sell it. The basis issue may not be of any concern, but to protect yourself you might want to consider getting an appraisal. An appraisal costs somewhere in the range of \$150.00-\$250.00.

If the property is gifted to you, your “basis” is what the prior owner (presumably your parent) paid for it plus all capital improvements since the purchase. If your mother and father paid \$10,000 for the property in 1951 and you sell it for \$110,000, your capital gain is \$100,000 and that gain will be taxed at 20% or you will owe \$15,000 dollars to the Federal Government. With regard to the State of New Jersey, you will pay tax on the \$100,000 at your ordinary income tax rate for New Jersey which could be anywhere between 0%-8.97% (8.97% being the maximum). Your percentage of tax is based on a graduated scale depending on your income level.

2. **Real Estate Taxes** - The real estate taxes are currently in the decedent’s name and therefore it makes sense to transfer the property to the new owner so that the new bills come in the name of the person who is paying. That way you can ensure the deduction on your 1040 income tax return.

3. **Due Diligence** - In order to do a new Deed there are certain prudent practices, which should be followed. Sometimes when the house has been in the family, my clients take the option to not spend any additional money to do the “Due Diligence” often associated with the purchase of a real property. However, there are items, which are optional, such as a survey, title report, termite, radon, or any other type of inspection you might want to pursue.

4. **Title Report** – A title report is important because many, many times parents do not discharge old mortgages from the record because their bank was negligent and never took care of it. There also can be old bail bonds, judgments outstanding, or other issues. For that reason, it is important to order a title search. Your options are the following:

a. You can order a full title report from a Title Company and it is commonly known as a “last owner search”. This has a cost of about \$250.00-\$350.00.

b. There is also another option, which is ordering a “quickie” title report, and this option costs approximately \$75.00. It is almost as good as the above title report, and it is certainly a lot cheaper. Of course, there are no guarantees given by the title company for the “quickie” title report. Most of the time this cheaper search suffices.

c. You can also decide to not get a title report at all, but attorneys should not recommend that. In this case you will be left with whatever title is existent at the Registrar of Deeds in the county where the house is located. Without a search you will not know what problems lurk on your real estate title.

d. It is also important to get a judgment search on your parents, yourself and possibly any siblings who inherited the property to make sure that there are no outstanding judgments against you, your parents or your siblings. If there are judgments against you or your siblings, you should discuss the possibility of a disclaimer with an attorney. A judgment is a money damage award that is of record and serves as a lien against the property. For instance, your parents could have been in a car accident and there could be an outstanding \$50,000 judgment that would have to be paid in the event you sell the property. For that reason, a judgment search must be done on both of your parents or grandparents, yourself and your siblings. It is approximately \$10-\$20 for each individual.

5. **Survey** – Often when property is descended by inheritance, the property has been in the family for 10-50 years and no survey has been done during that period. This can present a problem because there could be an encroachment by a garage in your backyard or fence or any other type of encroachment such as a driveway or sidewalk. The old legal description also does not meet modern standards of legal surveying and may well be an errant or improper legal description. If it is wrong, you simply extend the existence of the error. A survey clarifies all of these issues and also gives us a modern written legal description to use in the new Deed. The survey costs approximately \$250.00 to \$350.00. We recommend this, but if you do not want to spend the money or do not have the money, you can simply use the old legal description or the current Block and Lot from the tax map.

6. **You Assume the Risk of lack of “Due Diligence”** - In the event you do not get the title search, survey, judgment search, termite report, lead paint report, radon report or home inspection report you must understand that you are assuming the risk.

7. **Homeowners Insurance** – It is important and you must check to make sure that the homeowners insurance policy is still in effect. If the property burns down and you do not have insurance, the only value left would be the value of the land. You can suffer a serious financial setback, so make sure the insurance is still in effect. To that end, you must make sure there is a current policy in place and make sure that the homeowner’s policy is put in the new owner’s name as soon as the Deed is transferred. I recommend that clients call the insurance agent the week before and the day before to make sure the transfer of the insurance takes place. You should also get something in writing from the insurance agent, which is often called an endorsement or an actual policy. If you will be the new owner, then you would be the new insured on the homeowner’s policy. There may also be a change in the type of policy insofar as the new owner may not be in residence at the home.

8. Existing Mortgage:

a. If there is an existing mortgage, you could simply let the existing mortgage stay in place and continue to pay the monthly payment. All mortgages have a “due on transfer” clause and the mortgage company could call the loan at any time. This clause, which generally states that transfers of the property to another party without the lender's prior written consent may subject you (the mortgagor) to an immediate call of all sums due and owing under the Note. In laymen's terms this means, "if you deed the property to someone else, the bank can call the loan and ask you to pay off the entire balance." For example, if you owe \$100,000 on your mortgage, the bank can ask you to repay this total amount of \$100,000.

Clients often choose to transfer property to their spouse or another person, contrary to the “due on transfer” language. When you do so, you run the risk that the lender may call the loan. The risk of the call and acceleration of the loan is minimal, but the risk nonetheless exists. In my experience as a lawyer, I have seen this done from one spouse to another or from two spouses to one spouse without any problem on numerous occasions. Also in my experience, I have seen this done from parent to child without the loan being called.

Lenders are primarily concerned with receiving their payments on a monthly basis. If you make your monthly payment on each and every due date, it is unlikely that the lender will ever call the loan. The lender may not even be aware that the transfer has taken place, as there is arguably no duty on the mortgagor (that would be your parents) to notify the lender of the transfer unless it is specifically set forth in the mortgage document.

You may also choose to directly notify your lender that you are transferring an interest in your property. You can seek the approval and transfer from your lender. Some banks will permit it and some will not. Because there is little change in the underlying obligation to the bank (i.e. if both parties signed the note and mortgage, they will continue to be equally liable to the bank for any indebtedness after the transfer), some banks will approve the transfer without charge. Most banks will charge for the transfer. (FHA and VA loans are different animals altogether however.)

In conclusion, the mortgage payoff or transfer issue is a business risk that each client must make for him/herself. It is our job to advise you of the consequences and the reasonable likelihood of any problems.

If you choose to keep the property and not notify the mortgage company that you are simply going to make the future payments, you run the risk that they may call the loan all at once and you would have to go out and refinance. In light of the fact that it cost \$3,000-\$8,000 to refinance, I often suggest to people that they just simply keep making the mortgage payments in lieu of refinancing. Most banks are happy to receive their monthly payment on time and do not check to see if the deed has been transferred to a new owner. As long as the interest rate is reasonable, it makes sense to try and simply continue to pay the old mortgage.

b. If there are old mortgages, judgments or other liens on the real estate title, and there often are, you should contact an attorney to remove these old liens as the problem exacerbates with time.

9. **Rebates** - Once the Deed is transferred into your name you then become eligible for any real estate rebates that might be payable to you, the current owner. Rebates are not paid to estates; so if there are any rebates coming and the property is still in your deceased parent's name neither the estate nor you will qualify for the rebate. If you, as the new owner, are a veteran, senior citizen or New Jersey taxpayer you will need to apply for your rebate. See your Township tax collector.

10. **You are being sued as Grantee** – If the child, sibling, or the person to whom the property is being transferred is currently in a lawsuit or has prior outstanding judgments, you should speak with an attorney to discuss whether it makes sense to put the real estate in that person's name. You need to communicate with your child to make sure they are not currently being sued and if they are you need to consider your options. An attorney can delay putting the property into your children's name or file a Disclaimer if the transfer is being done through an estate proceeding. Your attorney should order a judgment search (at a minimum) on any Grantee, the person in whose name the property is being transferred. (See #4 above)

11. **College Planning** – If your children or grandchildren are planning to go to college and the ownership of this asset might eliminate the likelihood of your child obtaining a scholarship, you may want to delay or choose not to transfer the interest in the real estate. This risk has to be balanced against any Medicaid planning advantage that you might obtain and all the other issues described in this memo. In our era of tight money, the real property in your child's portfolio may disqualify your financial aid.

12. **Gift Taxes** – When you give property away that is in excess of \$14,000 to any individual in a year there is a possible gift tax consequence. Currently, the gift tax limit is currently \$5 million for Federal tax purposes. In the State of New Jersey, gifts are not taxed, but any gift within three years of death comes back into the estate for inheritance tax purposes. If the property you are transferring is located in a state other than New Jersey, the gift tax in that particular state has to be researched. You do not want to make the gift and then end up paying a 15% tax in a state because that issue was not explored. You should consider hiring an attorney in any state where the real estate is located to determine that answer.

13. **Medicaid Planning** – If you gift away assets and you apply for Medicaid within five (5) years of that gift, there is a five-year "look back" period wherein that transfer could disqualify you (generally the parent or the grandparent) from Medicaid eligibility. This is a complicated issue. In the event you are concerned about Medicaid, please pursue this issue more closely with your attorney or a Medicaid specialist.

If you gift/deed the property out during the parents' lifetime, at least five years prior to application for Medicaid benefits, then the home can be saved from the grasp of reimbursement regulations. There are tax and other consequences, however, if you take this step.

14. **Disability of your children or the Grantees** – If your children or their minor children or the Grantee on the Deed are collecting disability benefits, SSD or SSI from any government entity, he or she may lose their governmental benefits as a result of this transfer. Government benefits often depend upon a person having no ownership of any assets or minimal asset ownership. If your child and/or grandchild is currently collecting disability benefits, it probably makes no sense to Deed to them any interest in real estate. As a consequence of deeding the property to a disabled child, you may disqualify them from many government benefits and those benefits are generally more valuable than a minor interest they might receive as a result of a transfer of real estate from their parents or grandparents.

15. **In Whose Name should the Property be Transferred To** – If your child, or the person to whom the transfer is going to, is single, we generally simply transfer the Deed to their name. If the Grantee is married and your estate approaches \$675,000, you might want to Deed the property to only one spouse's name for estate and liability purposes. If you are renting the property you should form a Limited Liability Company to protect against liability of a million dollar verdict that you could suffer as a landlord. You can transfer the property into the name of the LLC to protect your individual assets from liability for this or any other reason you might have. This issue is of a primary concern and overlaps into many of the considerations noted herein.

16. **Possession** – If you transfer the property to your children outright without a life estate, the child owns the home and hypothetically they could evict you (toss you out on your rear-end with possibly no place to live) from the home if they choose to do so. This actually has happened to two elderly women in my career. Although I have heard of this happening only two times in my legal career, you nonetheless have to understand that your son or daughter could evict you if you do not retain a "life estate" in your home. An outright transfer with no reservations of an interest for the Grantor is a risky proposition for this reason.

17. **Joint Ownership Among Siblings or Others Who are not Husband and Wife** – If the Deed is transferred to a brother and sister you will need an Agreement to outline each sibling's responsibilities with respect to future ownership of the home. Such issues as real estate taxes, homeowners insurance, upkeep, repairs and capital improvements all must be addressed or you will more than likely have a major problem with your siblings at some point. You should contact an attorney to have such documents prepared. If one of the children is going to live in the house, adjustments need to be made to take into account the fact that said sibling is living in the property. Ordinarily in that scenario, the sibling living at the premises is solely responsible for utilities and for example other ordinary costs of running the home.

18. **Who is your roommate?** - If you Deed the property over to a child or someone else, you never know who may end up as your roommate. If your child has a spouse, you could run into issues regarding a domestic violence complaint against your son or daughter, which could eject them from the house until a domestic violence hearing took place. You could end up living with your son or daughter-in-law and experience a difficult situation. Your son or daughter may have children and you could end up with one of the children, or that child could get married and you could end up living with that child's new spouse. Whoever you deed the property to (notwithstanding your life estate), that person will have legal rights to come into the

house; and they may expand the parties with whom they may want to reside, which may affect your quality of life.

19. **To Obtain a Mortgage/Home Equity Loan** – Your ability to obtain a mortgage or home equity loan will be compromised. All others on the Deed would have to sign the Mortgage and the Note, and the bank may not allow you to take out a loan because you are no longer the 100% owner of the property. Generally, with older clients there is not much need of a mortgage or a home equity loan; but in the event there is a need, it will be difficult to obtain.

20. **Freeze Act on Real Estate of Seniors** - In the event you are entitled to benefit from the Property Tax Reimbursement (“Senior Freeze” Act) of your real estate taxes because of your age, the transfer of the property to your children may alter your reimbursement. If your real estate property is owned by multiple owners, you must stipulate the percentage share owned by each person. The senior citizen is able to receive reimbursement on their individual share’s property tax increase in proportion to the percentage they own in the property. On the other hand, if the property is owned by a person with a life estate, depending on the wording of the deed, the senior citizen may be able to receive full reimbursement. For example, if the deed says “Mr. John Adams Life Estate”, then he is entitled to an entire reimbursement even if there are two additional owners on the property.

It is important to apply for the “Senior Freeze” Act as soon as possible due to the structure of the reimbursement program. The program works to benefit senior citizens over the long term. Once a senior citizen files for their first Property Tax Reimbursement (PTR), they set a foundation for future reimbursements each subsequent year. The program traces back to the first year filed. Your eligible tax reimbursement package would be based on the difference in property tax increases from the first year filed and subsequent years thereafter. Accordingly, each individual year may not have a large tax increase; however, over the course of a decade or more, the amounts become significant.

21. **Your Decision** - Once you have considered all of this information you need to contact an attorney. When you meet with an attorney, you should bring the following documents and/or copies: old Deed, Short Certificate, surveys, probate letters, most recent property tax bill, and homeowners insurance policy.

In conclusion, keeping the house in the family is an admirable goal and is a very cheap and quick way to pass on the opportunity of home ownership to your descendants. It is important, however, to understand all of the above and make sure you do it correctly.