Should I Transfer my Home to my Kids to Protect it from the Nursing Home Care?

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I often get asked whether transferring someone's home to their children would protect it from nursing home costs. The short answer – probably not. The correct answer depends on your family's unique situation, including health and financial situation. There are several things to consider when transferring property.

Are there tax consequences to transferring my home to my kids?

Tax consequences must be considered when transferring your home to your children. If, for example, none of your children live with you when you transfer the property to them, then later when the property is sold, your children will need to pay capital gains on the sale of the home. The long-term capital gains rate in 2022 is 20%. So, if, for example, when you purchased your home in 1970 it was valued at $50,000 but when your children sell it is worth $200,000, then your children will have to pay as much as 20% on the $150,000 growth. Wow, that's a lot of tax.

What about the consequences of Medicaid eligibility in the future?

In the event you need long-term care, there is a five-year look-back period that applies to gifts (transfers of assets for less than fair market value) you make to anyone other than your spouse (and a few limited exceptions). Thus, if you are faced with a chronic disease or catastrophic illness within five years after you transferred the home to your children, then such a transfer may impact your ability to obtain Medicaid benefits. You cannot control what may happen in the future. What if your children cannot transfer the property back so you can apply for Medicaid? What if there is a creditor or divorce that prevents the child from giving it back? How will you get the care you need?

What are some other consequences of gifting the property outright to the children?

When you gift the property outright to your children, you no longer own the property. Therefore, there is a risk that your children could potentially kick you out of your home. Now, most clients tell us that their children would never do such a thing, but it is possible. For example, a creditor of a child could force the sale of the property out from under you to satisfy your child’s debts. Also, if your child files for bankruptcy, gets sued, or goes through a divorce, then suddenly what the child would want to do, and what he or she must do, could be quite different. So, the property you worked so hard for may be lost.

If an outright gift of the house is not a good idea, then what other option is there?

In most situations, the best way to transfer your home to your children is a properly drafted Irrevocable Trust. An irrevocable trust is created for the purpose of protecting any property placed into the trust from (1) having to be spent on nursing home care for the person who created the trust (that’s you, the Grantor), (2) having the property in the trust count as an asset when you apply for Medicaid, and (3) having the property placed in the trust be subject to “estate recovery.” Estate recovery is the process whereby Medicaid (MassHealth in

Massachusetts) looks to be paid back for the care paid by Medicaid from the deceased person's estate.

An Irrevocable Trust works particularly well for protecting the home or any other real estate. Other assets such as cash and stocks can also be placed in an Irrevocable Trust as well, but it is often not as advantageous as putting real estate into the trust

The advantages of an irrevocable Medicaid protection trust are:

- You retain control over your home.
- The property cannot be sold, mortgaged, or conveyed by the Trustee without the written permission of a Trust Protector.
- You have the right to live in the home for the rest of your life.
- You retain the right to change who receives the property at your death.
- While the property is in trust during your lifetime, your property is not at risk if your Trustee divorces, gets sued or declares bankruptcy
- You may remove or change the Trustee and/or beneficiaries.
- You maintain all current income tax, capital gains tax and estate tax status.
- You maintain the I.R.C. Section 121 capital gains tax exclusion.
- Your children should get a step-up in basis on your death.
- If the trust invests in rental property, the income could flow through the trust and be paid to you. The income would be taxable on your tax return.
- You can continue to deduct real estate taxes on your personal income tax return.

The disadvantages of an irrevocable Medicaid protection trust are:

- Although the income from the trust could be available to pay for your care, you cannot take any principal out of the trust.
- The transferring of property into the trust is a disqualifying transfer, with an associated five-year look-back period. You will not be approved for Medicaid to pay for your nursing home care if you apply within five years of putting your property into the trust.

Interested in learning more about Medicaid and how to plan for long-term care? Call a qualified elder law attorney. Don’t let long-term care costs drain in months what you saved a lifetime to achieve. As you can see, the transfer of your home is something that requires careful consideration and sound legal counsel.

The information contained in this article is not intended to make you an expert on estate planning nor is this article intended to replace the need for the advice of a professional. Rather, this article is simply intended to provide a basic understanding of why estate planning is important for everybody and a basic understanding of some of the more common estate planning tools. This article does not constitute legal advice.