

Deeds Retaining Life Estates

by Attorney Michael Hooker

Newspaper legal notices often reflect elders deeding their real estate to their children for a dollar. What you don't see in the notice is that the elder generally retains a life estate. I never recommend that a client transfer 100% ownership. Why not? Because if something happens to the child such as bankruptcy, lawsuit, or divorce, you are vulnerable. What if you become estranged from one or more of the recipients and they evict you? What if your son dies, and the daughter in-law you never got along with becomes owner? It happens.

What is a life estate? It is the retention of an interest. What you retain is the right to live in your house for the balance of your life. No one can evict you or sell the property from under you. It completely insulates you from your children's problems. If you deed the property away, and retain a life estate, then what you are transferring to your child is a future ownership interest. Your child will own full title once you have died, not now. Upon your death, a death certificate will be filed at the registry of deeds and the property becomes your child's, thus avoiding probate court, a goal of many of my clients.

Even though your child doesn't have a "current" interest but rather a future interest, you will still need his or her cooperation if you later want to do something with the property. For instance, if you want to sell or obtain a reverse mortgage (to help pay for care in the home), you will need that child to sign a deed or mortgage. There can be huge problems if that child has become estranged or has divorced or died. The child with a future interest cannot oust you because you retained a life estate, but they can block your later attempts to sell, mortgage or give the property to someone else.

I have had several clients come to me stating "I want to get my (estranged) child off the deed because he has not been visiting or helping me in my time of need." Unfortunately, there is little that I can do for that client. You can write them out of your will but that doesn't matter, because the real estate won't go through probate. Threatening to cut them out will not work when you have already deeded the property. At that point you have no bargaining power.

The granting of a future interest and the retention of a life estate can help avoid capital gains for your children if they subsequently sell the property. It will also aid in asset protection should you later need nursing home placement. You may know that our legislature recently extended the 3 year look back to five years. You now need to stay healthy and not be placed long term in a nursing home for up to five years following the transfer. If you can't guarantee that, you may have problems, particularly if your child won't undo the real estate transfer at that time.