

# Issues With Family Real Estate

## Planning for Your Residence and Your Vacation Home

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# Prepare to Plan

- Experience Required – Planning for your residence or cottage is not rocket-science – it's not that straight forward.
- Your attorney must be experienced in real estate law, estate planning, income taxes, gift taxes, estate taxes, Medicaid planning and creditor protection. A degree in psychology and a license in family mediation won't hurt either.
- Your attorney will need information about your home and cottage – copies of deeds, estimated values, costs and tax bases, and any existing estate planning documents.
- Brainstorm goals, concerns and questions: avoid probate, reduce taxes, qualify for Medicaid, protect from creditors, easy transfers, etc.
- Brainstorm expectations, fairness and clashes: will the children be surprised, angry, slighted, burdened, cooperative, apathetic, etc.

# Watch Your Step

- There are traps everywhere with your home and cottage.
- Think of Isaac Newton's law of motion – “to every action there is always an equal and opposite reaction”.
- Example: Husband and Wife want to avoid probate, so they transfer their home into trust. In doing so they forego creditor protection afforded to spouses in MA and complicate Medicaid planning.
- Example: Mom wants to do Medicaid planning, so she gives her home to her children. In doing so, she becomes vulnerable to her children's creditors, divorcing spouses, disabilities and mistakes.
- Don't be discouraged from planning; be encouraged to seek the necessary expertise to identify and consider the “reactions”.

# First and Foremost – You

- Most planning benefits your children or other heirs, not you.
- Saving on nursing home costs, avoiding probate hassles, reducing estate taxes, and easing the burden of inheriting are all important goals, but none of them actually benefit you.
- Focusing on the goals of planning can sometimes cloud the most important part of planning – your comfort and security.
- Don't let your future goals become more important than your present – especially when the “future” refers to when you are already dead.

# Traps in the Tricks

- For various planning reasons, Mom and Dad give their home to their son. Son knows that he is only taking title as part of a plan that will benefit him after Mom and Dad are gone.
- Some reasons might include probate avoidance, protection from their creditors, Medicaid planning, estate tax planning, etc.
- What could go wrong?
  - Greedy daughter-in-law.
  - Greedy ex-daughter-in-law.
  - Son has greedy creditors.
  - Son becomes disabled and can't qualify for assistance.
  - Son takes out mortgage to play just a few more hands of black jack.

# How can you own your home?

## Let's count the ways...

- Wendy owns her home individually. On death, it passes to her estate.
- Wendy and her sister, Sally, own a cottage together, but the deed says nothing more. They are “tenants in common”, and on death, Wendy’s share passes to her estate. Wendy’s Will leaves it in part to her boyfriend and the rest to the MSPCA. Hopefully Sally is as fond of strays as Wendy was.
- Wendy and Sally own a cottage together, and the deed says they are “joint tenants”. These two magic words ensure that the survivor of the sisters inherits the whole cottage, regardless of what a Will says. The phrase “joint tenants with rights of survivorship” in a deed accomplishes the same result.
- Wendy and her husband, Henry, own their home together as:
  - “husband and wife” – tenants in common, no rights of survivorship.
  - “joint tenants” or “husband and wife as joint tenants” – rights of survivorship.
  - “tenants by the entirety” – rights of survivorship and virtually unlimited protection from the other’s debts under MA law.

# The Trump

- Regardless of what you say in your Will, if there are rights of survivorship in your deed, the deed wins.
- This is the case even if you didn't know what your deed said, and it was unquestionable what you intended.
- Example: Wendy and Sally own their home as joint tenants with rights of survivorship. Wendy's Will leaves her share to her daughter Daisy. Sally inherits Wendy's share of the home and ousts Daisy who has no rights to the home despite being Wendy's intended beneficiary.

# Tenancy by the Entirety

- Only available for a residence owned by spouses under a deed (or statutory filing) that specifically states that they are “tenants by the entirety”.
- No set limit in the amount of protection.
- Protects the non-debtor spouse from the debts of the other.
- Dissolves with the marriage.
- Henry and Wendy own their residence as tenants by the entirety. Henry has a business debt against him for \$1 million. Henry’s creditor cannot interfere with Wendy’s right to the home. Presume no Homestead protection.
  - Henry dies, but Wendy is still protected from his debt.
  - Wendy dies, and Henry is without protection for his debt.
  - Wendy divorces Henry and moves out of the home, and Henry is without protection for his debt.



# Homestead Protection Massachusetts' Style

- Only available for your residence.
- Do nothing - \$125,000 of equity is automatically protected.
- File a form and pay \$35 - \$500,000 of equity is protected.
- Specific rules and requirements for co-owners, age 62+ owners, disabled owners, minor children of owners, trustees/beneficiaries of trusts, etc.
- Just a taste of the traps for the unwary in the new and improved MA Homestead law.

# Your Home or a Nursing Home

It is somewhat of an urban legend that if you go into a nursing home “they” will take your home. Some reality checks:

- ✓ If you pay for your care (without assistance) there is no issue.
- ✓ If you need assistance, Medicaid eligibility rules are favorable to homeowners.
- ✓ Your home is exempt when determining your eligibility for assistance – in fact, selling your home can be a big mistake by turning an exempt home into non-exempt cash.
- ✓ Although your home can remain exempt during your lifetime, a lien may attach to repay your benefits after your death.
- ✓ Still a financial benefit for your heirs with the lien and payback.
- ✓ There are ways to avoid the lien with planning, as well as Medicaid rules that allow you to avoid the lien in certain circumstances, such as if you have adequate long-term care insurance, you give your home to a disabled child or a caretaker child, etc.

# Realty Trust

- A trust is a separate entity that takes ownership of property for title purposes. Probate is avoided because, unlike a person, a trust does not die. A trustee might die, but a successor is named and the trust continues.
- The term “realty trust” is commonly used to describe a simple trust designed to hold title to real estate.
- Typically, a realty trust does not offer any tax savings or creditor protection.
- Remember “the trump” – a new deed must be recorded transferring the title to the trustee, and if this step is overlooked, the trust will not serve its purpose.
- It is a common misconception that when it comes to realty trusts “one trust fits all” because they are so common and simple as far as trusts go. However, this lack of respect for the realty trust leads to costly flaws. A well-drafted trust will include:
  - Provisions for successor trustees.
  - Trustee authority to do all things necessary for the property in an efficient manner.
  - Sufficient instructions for the trustees.
  - Built-in mechanisms for making changes when circumstances or goals change.
  - Carefully considered termination date.
- Although a common and relatively simple planning tool, realty trusts deserve the time, attention and expertise just like any other trust or planning vehicle.

# The Cottage

- Often the family vacation home holds the most sentimental and monetary value.
- In a perfect family, it may even become a family heirloom.
- In a rare case of an “imperfect” family, failure to be realistic and to communicate with the children can lead to disastrous results for the family and the finances.
- Be honest with yourself.
  - Do all of your children love the cottage equally? Will they all prefer a share of the cottage instead of cash?
  - Are all of your children ready, willing and able to contribute to the cost and maintenance? Will they cooperate in allocating the costs, chores and use?
  - Will all of your children able to enjoy the cottage enough to justify the cost and the lack of other inheritance (do some live close while others live far away)?
  - Can they all just get along?
- If you are lucky enough to answer “yes” to these questions (and not be delusional), what if a child gets divorced, sued, disabled, dead? In each case, who are the other children dealing with? An angry ex-spouse, a vindictive plaintiff, a court-appointed guardian, nieces and nephews (and their ex-spouses).

# Cottage Communication

- The best approach is to communicate with your children. It is better to know your dreams for the cottage as a family heirloom will not come true than to roll over and over in your grave as the children give all your hard-earned money to the lawyers.
- Planning ideas to consider:
  - Leave other assets to a child who does not want or can't afford to own a share of the cottage.
  - Set up a fund to pay for cottage expenses to avoid disputes about monetary contributions and to protect cottage funds from the children's personal problems.
  - Design a succession plan that outlines the rules of ownership and facilitates the resolution of common problems.
  - Consider the unthinkable – require that the cottage be sold and the proceeds divided (preferably with a right of first refusal for a child who wants and can afford to be a cottage owner).

# Our Cottage, Inc.

A great planning technique for managing and transferring your cottage is to create an entity (such as a corporation, partnership, or limited liability company) to own the cottage.

- Ownership is denoted by shares (like stock) so that succession is more efficient and manageable over the generations.
- Written governance for managing the cottage, voting on decisions, resolving disputes, etc.
- “Puts” and “calls” of shares in defined circumstances so that nobody is stuck with unwanted shares and nobody unwanted can hold onto shares. These provisions apply when there is a divorce, bankruptcy, death, or other significant event that has the potential to impact the other owners.