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Legal advice in estate planning is key

When it comes to estate planning, that is, a Will, Power of Attorney, or Healthcare Directives, many people think that the “planning” part of the equation does not apply to them. Many others think that they can handle their not complicated (so they think) estate planning themselves, either with a purchased program, internet documents, or using a Will prepared many years before. One of the prime areas that trip up many folks is disposition of real estate.

There are a few ways that this can become an issue. One is when someone transfers a house to a child or children thinking it will “save it from the nursing home.” Among other pitfalls in this scenario is the result of the gift when someone now needs that nursing home and is ineligible due to the transfer. Or worse, a parent needs another level of care and cannot afford that care because they gave away their largest asset. Another is to transfer a home into a Revocable or Living Trust (in Pennsylvania), and one spouse enters a nursing home leaving another spouse in the community. There is often an issue with Medicaid since the Trust owns the real estate and it is now an available asset. Yet another is to transfer real estate to a spouse's sole name to protect it from potential business liability. Jeff Marshall from Marshall Parker and Weber (www.paelderlaw.com) recently reported on a PA Superior Court case that dealt with unintended consequences of trying to protect real estate from business liability.

In Irish v. Warnshuis (PA Superior Court, October 10, 2013, William Irish transferred his interest in the couple's jointly owned real estate to his wife, Janet, in 1990. His intent was to protect their home from any liabilities arising from his airplane maintenance business. Janet predeceased William in 2009, leaving a Will from 2003 that gives her residuary estate (including the real estate) to her children from a prior marriage. William attempted to have the home transferred back to him but the Court rejects his arguments. The law in Pennsylvania establishes a presumption that transfer of property between a husband and wife is a gift. This type of gift includes transferring property held as tenants by the entirety (joint tenants with right of survivorship for husband and wife) when it is transferred to one spouse alone. It can be rebutted only with clear, explicit and unequivocal evidence that the transfer was not intended as a gift. So what William thought was a way to protect the property became a means for his step children to inherit the property when he was still living. No “give backs” says the Court. Too bad that William did not consult an attorney to see what his best options would be in this situation, none of which would likely have been what he thought that he was accomplishing by giving the property to his wife.

Planning for life as well as for death is vitally important. Do not leave important decisions, such as how to protect your assets, to non-attorneys, well-meaning friends and acquaintances, or to guess work. Taking the time to meet with an attorney can save a lot of headaches and heartaches later.