Legal Matters®

Estate Planning
winter 2018

How to leave your home to the kids

Deciding when and how to relinquish the family home can be one of the most challenging issues seniors face. For many, a home is their most valuable asset and a cornerstone of the wealth they'd like to transfer to their family.

If you're one of AARP's estimated 87 percentage of older adults who wants to stay at home and "age in place," you may be planning to stay put as long as possible with the goal of transferring your house to your heirs after you die.

Here is a review of the ways you can go about leaving your home to your children:

Wills

Perhaps the simplest way to do it is to leave the house to designated heirs in your will. After you die, the house will pass on to your named beneficiaries in probate. Your heirs will incur normal probate costs to administer the transfer, typically anywhere from 5 to 15 percent of the value. If more than one person inherits your home, they must decide jointly what to do with it. If one child wishes to keep the home while another wants his/her share of the proceeds, for example, the conflict could create an ongoing rift among siblings.

Trusts

Other legal options, such as trusts, can reduce the costs and delays of probate. Establishing a trust can simplify the process, lower the cost of transferring assets to your heirs, and allow you to cover certain expenses upfront. A trust can also help reduce family conflict as the trustee can make decisions as to who gets the house versus equal assets or when the house must be sold.

What's more, establishing an irrevocable trust can provide significant protection from creditors as well as claims made by otherwise interested parties, such as a child's ex-spouse.

But talk with an estate-planning attorney before you set up a trust.

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Communicate with your kids before leaving unequal assets

When it comes to leaving money to the kids, some parents struggle to reconcile "equal" with "fair." An equal inheritance treats each child the same, regardless of life situation or special circumstances. On the other hand, sometimes an unequal distribution can seem like the fairest thing to do, given a child's age, financial wherewithal, or previous track record.

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To avoid unpleasant surprises and contentious family squabbles, be transparent about your plans and talk with your children ahead of time. That helps children understand your point of view and gives them an opportunity to share concerns or life issues you may not be aware of.

Imagine, for example, that you intend to leave more to your daughter, the social worker, and less to your son, the small business owner. Disclosing this plan could encourage your proud son to reveal that business is declining and the operation has far less value than you thought.

Having these difficult conversations ahead of time allows you to adjust for such misunderstandings, before it's too late. You may find that that your children are sympathetic and accepting of unequal distributions. Alternately, you may change your mind if one child's sense of hurt and injustice threatens to divide family relationships.

Here's a partial list of reasons you may choose to allocate an inheritance unequally:

- A child has special needs and requires long-term financial help.
- A child struggles with addiction, legal issues, or chronic financial mismanagement (an option here would be to put this child's gift into a trust to control how he or she accesses it).
- A child earns more or has a significantly higher standard of living than his or her siblings.
- A child received sizable financial gifts while you were still alive.
- A child is younger and will need support for college and other coming-of-age expenses which you already provided to the elder children.
- A child has died and you do not wish to distribute your assets to his or her heirs.
- A child provided caregiving support to you in your old age while others did not.

Documenting your rationale

In addition to telling your children why you plan to leave an unequal gift, consider providing a written explanation of your decision that can be attached to your trust or will. Such a letter communicates facts and feelings that are not otherwise included in estate planning documents and may deter an unhappy heir from contesting your will. Consult your attorney about any estate planning letters you intend to leave to ensure you don't create any confusion in your plans.

Beneficiary designations

Talk to your estate planner and be sure you understand the implications of naming certain children as a beneficiary on a retirement account or life insurance policy. In such cases, those assets would pass to the named child directly and would be excluded from your estate, meaning those assets won't get divvied up among your heirs.

Even if your child recognizes this was a mistake and wants to redistribute the funds, it can be a costly and difficult issue to fix. Regifting assets to their siblings could trigger gift taxes. Alternately, the child could disclaim part of the inheritance, but that is best done with legal counsel and a full understanding of potential implications.

Alternative gifts

If you're convinced that an unequal distribution will create a serious sense of unhappiness, consider alternative ways to support a child or otherwise "even things out." You might consider making annual gifts to a child while you are still alive. In 2017, you can give $14,000 to any number of individuals without having to pay a gift tax. In fact, you and your spouse may give $14,000 each to the same person without triggering gift taxes.

Another option is to compensate a child for assistance he or she provides you, or seek out other ways to support the family, such as contributions to a grandchild's college fund.

Another way to assuage a child's hurt feelings could be to give one child more money while gifting the other one with meaningful family heirlooms or other assets, such as a vacation property or a collector car.

Fewer surprises, less discord

Money issues have significant potential to create conflict, even among the most harmonious families. Clear communication is critical to helping maintain relationships and goodwill among those you leave behind. An explanation of why you made the decision you did can alleviate uncomfortable questions and reduce (or hopefully eliminate) any lingering bad feelings.

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There are significant differences in the cost, upkeep, and potential impact of creating an irrevocable trust versus a revocable trust. Once an irrevocable trust is signed, it cannot be amended or revoked. However, it can be drafted in a way that creates flexibility for unexpected changes in circumstances. Meanwhile, revocable trusts, which can be withdrawn, come with significant administrative burdens and do not provide protection from creditors.

Deeds

A third option is to deed your home to a beneficiary using designations such as "Transfer on Death" (which is not recognized in all states) or "Joint Tenant with Right of Survivorship." Be aware that the latter creates joint ownership conditions before your death, which means you lose full control over selling or refinancing the house. It can also subject your home to debts incurred by your co-owner.

Before you plan to leave your heirs your house or vacation home, talk to them and find out if they even want it. If they don't have any intention of living in the property and don't want the hassles of real estate management, it might make sense to sell it while you're still alive. But if you want to continue living there, a will, a trust, or (sometimes) a carefully worded deed can be used to transfer the property to your heirs, who can then sell it and divide the proceeds after you die.

Have a conversation with your kids, evaluate your own needs, and then consult with an attorney who will help you determine which option best fits your goals and intent.

Pre-litigation claims can be effective in estate tax disputes

Pre-litigation is activity that occurs before a legal suit is filed. If you are involved in an estate transfer and your rights are unclear, pre-litigation may be an effective way to establish your position and head off a more costly legal conflict.

Pre-litigation claims are typically made in an effort to get the other party to back down or engage in negotiations. This process may be the first step in claiming a will or trust is invalid, challenging a premarital agreement, or charging that an executor is engaged in misconduct.

In a much-publicized conflict over the estate of former "Growing Pains" star Alan Thicke, for example, his sons filed a pre-litigation complaint to enforce their father's trust, claiming that Thicke's widow intended to challenge her prenuptial agreement. (Thicke's widow denied such intent and a judge subsequently dismissed the sons' claim.)

Because most parties prefer to avoid escalation when possible, pre-litigation can be a useful tool to reach resolution before the time and expense of actual litigation is incurred. Its success, of course, depends on the strength of the claim and the disposition of all parties involved.

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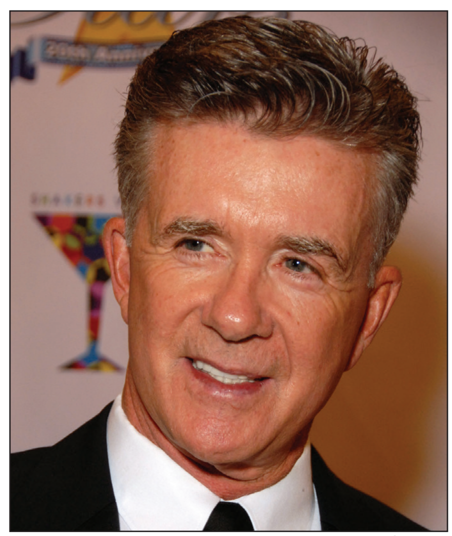

By Toglenn via Wikimedia Commons

If you stand to benefit from a will or trust and sense that a conflict may be brewing, consult a lawyer. Do not wait until the problem has reached a crisis point and litigation is unavoidable. A pre-litigation claim may be a cost-efficient way to establish your rights, find a solution, and avoid the inconvenience and disruption of a courtroom conflict.

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Proposed regulations curtailing valuation discounts withdrawn

The Treasury Department and the IRS have announced that proposed regulations that would have drastically limited valuation discounts for transfers of family businesses are being withdrawn.

The regulations would have curbed valuation discounts commonly used when family business owners transfer minority shares to other family members.

The withdrawal means that family business owners will still be able to transfer a portion of their business to their children while applying valuation discounts. Primarily, those discounts include adjustments for lack of control and lack of marketability.

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Proponents argued that such valuation discounts are fair and legitimate because a minority transfer does not provide children with a controlling interest in the business and those shares cannot be readily sold like publicly traded stocks.

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The U.S. Treasury initiated the withdrawal in response to President Donald Trump's executive order directing a reduction in regulatory tax burdens.