

**HOW TO MAINTAIN CONTROL OVER YOUR RESIDENCE WHILE
SIMULTANEOUSLY PROTECTING IT AGAINST NURSING HOME COSTS**

By Neil R. Lubarsky, Esq.

Senior citizens who do not own adequate long term care insurance need to consider taking steps to protect their residence against nursing home costs. One of the best ways for a senior citizen to protect his or her residence against nursing home costs is by placing a house or condominium in an irrevocable trust while reserving a limited power of appointment over the ultimate disposition of the trust assets. Such a trust can be structured to allow a senior citizen to continue to occupy his or her home for as long as desired, while simultaneously providing the senior citizen with effective control over the house's possible future sale and the reinvestment of the sale proceeds. This type of trust can also be used to minimize potential income taxes on the sale of the house regardless of whether the house is sold prior to or after the senior citizen's passing. Transferring a house or condominium to such a properly structured irrevocable trust will protect it from the risk of ever *having* to sell it to pay for nursing home costs, as long as a period of five (5) years has passed between the date of the transfer and the date on which the transferor or the transferor's spouse applies for Medicaid.

In allowing a person to qualify for Medicaid to pay for nursing home costs, the Department of Social Services will not "look back" at transfers made more than five years prior to the date of application for Medicaid. This policy effectively allows assets of any value transferred to an irrevocable trust more than five years prior to the making of a Medicaid application to be protected.

The retention of what is known as a limited power of appointment enables a senior citizen to maintain effective control over the assets placed into an irrevocable trust. A retained limited power of appointment can be used to permit a senior citizen who transferred his or her assets to the trust to have *ongoing* control over which children or grandchildren ultimately will inherit the assets contained in the trust. Even after the irrevocable trust is established, the senior citizen who transferred the assets to the trust may change which family members will receive the remaining assets in the trust upon the senior citizen's death. This can be accomplished through a provision that can be made in the trust creator's Will at any time during his or her life.

A senior citizen who creates such an irrevocable trust cannot be his or her own trustee, nor does such a senior citizen have the unilateral right to take back the assets placed in the trust. However, the trust creator can effectively control how a trustee handles the assets through the retention of this limited power of appointment. For example, let's say Mary sets up a trust. Mary has three children: Joe, John and Linda. Let's assume Mary places her home in an irrevocable trust, and names Joe as trustee. If three years later, Mary wishes to have her house sold, and to invest the proceeds of sale in bonds that will produce an income sufficient for her to move into and pay rent at an assisted living facility, she can instruct Joe to do so. Joe, her son, will as a practical matter, do what Mary asks. This is because Mary has retained the right to at any time change her instructions as to which of her children or grandchildren will receive the trust assets upon her death. If Joe says no to Mary's wish, Mary can, and probably will, use her limited power of appointment to ensure that Joe never receives any of the assets held by the trust. Even if Joe (for his own personal reasons) unexpectedly turns out to be more

interested in holding on to Mary's appreciating home rather than complying with her wish to sell the house, he will nevertheless do what his Mom asks. Joe would not likely take the chance of angering his Mom to the point where he might lose his potential inheritance to his siblings.

Additionally, a senior citizen's use of a properly structured irrevocable trust has the distinct advantage of being the only technique which can protect a home from nursing home costs while simultaneously preserving virtually all of the tax advantages which would have (otherwise) been available had the house continued to have been held directly by the senior citizen. For example, if a house which is occupied by a senior citizen and held by a properly structured irrevocable trust is sold while the senior citizen is still alive, \$250,000 of gain from the sale of the house (or up to \$500,000 of gain if the senior citizen is married) will most likely be exempted from any income taxation. Furthermore, the senior citizen will continue to be able to deduct the property taxes on the house even after the home is placed in the trust. After the senior citizen dies, the trust beneficiaries will likely be able to sell any house then held in the trust, regardless of its true value, without having to pay any income taxes upon its sale.

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