Smith Law Partnership
Solicitors

MAKING A GIFT OF THE FAMILY HOME

Gifts and Long Term Care
Part Two

Smith Law Partnership, Gordon House, 22 Rayne Road, Braintree, Essex, CM7 2QW
www.slpsolicitors.co.uk
Tel: 01376 321311 Fax: 01376 559239

STANDARD GUIDANCE FOR CLIENTS ON COST OF LONG TERM CARE

The Law Society has published guidance which notes that Solicitors should provide certain advice when clients are considering making substantial gifts, especially where the family home is involved. Gifts include both outright gifts and transfers into trusts. The Law Society has issued guidance in this area because it recognises that people who may consider such a gift will be vulnerable and may have been influenced to make the decision. This is an important note and we would ask you to consider the content carefully.

Avoid “Schemes”

The Law Society is aware of a number of non solicitor legal advice services which sells schemes with the aim of making a gift of property with the intention of reducing the older person’s liability to pay care home fees and other local authority means test. It notes “some make unjustified claims” or “fail to take into account the individual circumstances of clients” advice from solicitors such as Smith Law Partnership is independent and should be quite different from that of an off the shelf product sold by an unqualified person. If you have any doubts at all you should discuss these with us before going ahead. We can tailor a trust to your requirements. You should not go ahead if you are at all concerned that the transaction is not exactly what you want to do. **<u>It is your decision</u>.** If you are seeking to transfer your family home only because somebody else wants you to do it and it is not simply your decision then you should not go ahead.

THE LAW SOCIETY STANCE ON PLANNING TO REDUCE THE COST OF LONG TERM CARE FEES

The Law Society guidance notes that one of “the possible benefits” of transferring the family home may be “avoiding the need to sell the home to pay for charges such as residential care or nursing fees, thus securing the family’s inheritance”. The same might also apply to other means tested benefits. It is important to note that no one and no organisation can guarantee a way of avoiding the value of your home being taken into account in means testing, since the anti avoidance measures in the law enables some gifts to be ignored by the authorities and even set aside by the court. Not only are these measure subject to change from time to time, but it is also unclear how far the authorities will go to pursue contributions that they believe to be owing to them in individual cases. This advice is sound and please take care of over promises by non independent providers in this area.

It is important to also be aware of certain facts and figures. It is quite right that you should be advised that a local authority can take into account your capital assets including your family home. However it is important to put this in context because it is perhaps only 6% of people aged 75 to 85 that need long term care. This is quite a small percentage and there is evidence likewise that average time spent in such care can be of a limited duration. Also sometimes the NHS has a responsibility to pay all or part of a persons care fees. Even if this is not the case, if you enter nursing accommodation the NHS will be liable to pay a contribution to cover the nursing costs. Local Authority means test assessments of a long term care fees can also be incorrectly done and may be challenged through their complaints procedure, the Local Government Ombudsman and the Court.

What sort of action can a Local Authority take if a transaction is made which reduces liability to pay for the cost of long term care?

Local Authorities can sometimes place a charge on property (like a mortgage) if care fees remain unpaid but that does not apply to gifted property. That might be said to be an advantage of making a gift but gifts should probably not be entered into if that is the only concern. The Local Authority can in certain circumstances send the bill for care fees to the recipient of the gift or the trustees but that is only if the gift has taken place within 6 months of you entering permanent residential care. They can also treat you sometimes as owing the value of something which has already been given away and this effects your entitlement to local authority financial assistance. If the recipient of your gift is not in a position to assist or will not assist in payment of fees this creates an untenable position for you. It is also very important to note that there is not theoretical time limit in which a local authority can treat you as owing that which you have given away. The gift may have occurred 20 years ago and there may still be a reasonable link between the transaction and your subsequent claim for care. If you are in reasonable health now then over the course of time the risk will fade. Each case must be assessed on its own merits.

A local authority can also potentially sue for debts but there may be a good defence if they have misapplied the means tested rules. Again it does depend on circumstances. Sometimes the bankruptcy and insolvency rules can be invoked to set aside transactions. Few local authorities are willing to attempt making you insolvent because of the political, social implications and pure bad feeling. You do however need to be aware of these possibilities. As the Law Society rightly says there can be “no guarantees that there is a fool proof way of avoiding the value of the home being taken into account in means tested".

In short the Law Society's guidance and advice is that you should take care before deciding whether or not to make a gift of any type. Gifts can limit your choices and once made cannot generally be revoked. There can also sometimes be problems with local authority assessment for help with long term care fees.

For further information in respect of the above please contact a member of the team on 01376 321311.