Can I Sell My House If My Father Owns a Life Estate?
Real Estate In-Depth June, 2007
By Edward I. Sumber, Board Counsel

Life estates during the past twenty years, have become a significant estate planning and elder law planning device. The complexities of a life estate however, can create significant problems for the person who is to receive the fee interest after the death of the life tenant. Without the consent of the life tenant and the execution of a deed releasing the life estate, the property cannot be sold.

What is a “Life Estate”?

A “life estate” is an interest in real property the duration of which is limited to the life of an individual. That individual can be the person holding the life estate or it can be based upon the life of another person. The latter is referred to as a life estate pur autre vie (for another life). It lasts for as long as the life of the designated person continues. For example, a parent states in his will, “I leave my house to my son, John as long as my mother, Josephine is alive.” In this circumstance, John would not become the fee owner until the death of Josephine, his grandmother.

The life tenant in a “life estate” retains the right to use the property during his or her lifetime, including the rents and profits. The life tenant must bear the costs of maintaining the property. A life tenant cannot sell or waste the property without the consent of the “remainderman”. The “remainderman” is the person who will receive full ownership upon the death of the life tenant.

Why is a Life Estate an Effective Estate Planning Tool?

Before changes in the Medicaid rules became effective in 2006, many senior citizens did elder law planning which included granting a life estate to themselves while transferring the remainder interest in the property to their children. In this way, the senior citizen could be assured that although the equity in the property effectively had been transferred to his children, the elderly person would be permitted to remain in his home for his lifetime.

The use of a life estate also avoids probate. The life estate is automatically extinguished at the time of the life tenant’s death and the remainderman inherits the property without the necessity of any probate proceedings. In New York, a person can theoretically receive Medicaid benefits after transferring ownership of a property to his child or children subject to a life estate. This results because New York’s Department of Social Services recognizes that a life estate is not a probate asset and therefore, New York will not place a lien upon the property to recover Medicaid payments after the death of the life tenant.
Taxation of a Life Estate

A person who retains a life estate continues to qualify for Star Exemptions, Veteran’s benefits, and other property tax reductions available to an owner of property. Moreover, for estate planning purposes, with persons having less than One Million ($1,000,000) Dollars to transfer, there is no applicable gift tax or estate tax resulting from transferring real estate subject to a life estate.

New York State does not have a gift tax. The Federal Government allows any person to make gifts of Twelve Thousand ($12,000) Dollars each year, to as many people as one wishes to and also grants a One Million ($1,000,000) Dollar lifetime gift tax exemption which can be accumulated over a period of time. Therefore, if a person wants to make a gift of a Six Hundred Fifty Thousand ($650,000) Dollar residence in Westchester County to his two children subject to a life estate, the Internal Revenue Code (§2702) requires that the full value of the gift be applied to the transaction. The parent making a gift would normally be eligible for an annual exclusion amount of Twelve Thousand ($12,000) Dollars for each child (an aggregate of Twenty-Four Thousand ($24,000) Dollars). However, a life estate is considered to be a gift of a future interest and does not qualify for the Twelve Thousand ($12,000) Dollar annual exclusion. Therefore, the full Six Hundred Fifty Thousand ($650,000) Dollar gift would still be non-taxable because it is under One Million ($1,000,000) Dollars. The parent would continue to have the remainder of the One Million ($1,000,000) Dollars (One Million ($1,000,000) Dollars minus Six Hundred Fifty Thousand ($650,000) Dollars) available for future gifts of cash or other assets.

Why Doesn’t Everyone Do This?

Life estates can create extreme complications. A life tenant has the absolute right to occupy the property during the life tenancy. That is true even if the person becomes ill and enters a nursing home or is unable to enjoy physical use of the premises. The property can be rented and the rent income belongs to the life tenant. The remainderman has no right to come onto the land to monitor its condition or to use it. With life expectancies now reaching into the eighties, (life insurance has become less expensive because our life expectancies are increasing rapidly) it may be many years before a remainderman has actual fee ownership of the property.

If a remainderman wants to sell the property, the only way of doing so is to obtain a release of the life estate from the life tenant. This is often impossible. Accordingly, in the circumstance in which a son wants to sell a property which is subject to the life estate of the parent, he will not be able to do so unless the parent is willing to release his life estate. Even if the life tenant is not in a position to enjoy ownership because he now resides in another state, or is happily re-married and living elsewhere, or has become ill, nothing can be done by the remainderman until the life tenant either consents or dies.

“New Spouses” and “Significant Others”
It is now not uncommon to see a person in their seventies begin a new life with a new mate following a long marriage. The new mate may actually be a spouse or a significant other. These relationships can be emotionally and financially significant for either or both of the parties and it is not uncommon to use a life estate to ensure that the new spouse or significant other is able to remain in a residence following the death of the owner.

Example:

After forty-four years of marriage, John Smith’s wife Mary dies. Several years later, John meets Jenny Jones. John and Jenny decide to reside together in John’s Scarsdale home having a value of $1.7 Million Dollars. After several years, Jenny indicates that in the event of John’s death, she does not want to be asked to leave the home or the community she has become accustomed to. She does not want John to leave the house to her but wants him to give her the right to live there in the event of his death.

John then creates a last will and testament with a provision that states “If I am the owner of 26 Blackacre Drive in Scarsdale, New York at the time of my death, I leave same to my son James and my daughter Samantha, subject to a life estate for my beloved friend and significant other, Jenny Jones. Jenny Jones shall be required to pay all real estate taxes, upkeep, insurance and ordinary costs of maintaining such residence. Upon her death, the remainder interest will pass in fee simple, as tenants-in-common, to my children James and Samantha.”

Under such circumstances, John’s children James and Samantha, will be required to wait until Jenny Jones dies in order to be able to sell the property. The property may be a significant portion of John’s estate. Moreover, even if Jenny finds a new relationship and moves out of state, she will be able to retain her life tenancy interest in the property until her death. She need not use it. She can also rent it and receive the income derived from the rental of the property. The only effective way of removing Jenny Jones from the property is to have Jenny relinquish it voluntarily (with or without the payment of consideration for her to do so) or to await her death.

As a result of circumstances such as the one described above, life estates can create significant emotional issues for the remainderman who must wait for the death of the life tenant in order to enjoy the benefits of ownership.