Evicting Mom

By James F. McDonough, Jr. on February 29th, 2012 Posted in Asset Planning, Asset Protection, Estate Tax, Property Tax, Qualified Personal Residence Trust

I was listening to the radio Friday evening when the announcer described a news report to be aired after a commercial. Normally, I would change the station but was intrigued by the story — a son evicting his mother from the home she had lived in for forty years. The news story reported that the son served the eviction complaint on his mother's ninety-first birthday, just twelve days before Christmas. The reporter recited that the son had somehow gained control of the title and was seeking to sell it. Some one more clever than I must be rewriting *The Twelve Days of Christmas* with this story in mind.

While we do not know the back-story to this attempt to throw a ninety-one year old into the snow, one suspects that it arose from the desire to cut down on the estate taxes due on the mother's death. There are, however, methods to safeguard a parent's home while still trying to decrease the size of a taxable estate, and these do not necessarily require a parent to lose control and suffer the same fate as this ninety-one year old.

The classic method is a life estate, where the parent retains the right to reside in the property for life and transfers the remainder to his or her heirs, or to a trust. This technique is as old as English common law. There are also two other techniques, aside from a trust as commonly understood, that are covered by Treasury regulations and are accepted as mainstream by IRS and by the estate planning community. These are the Qualified Personal Residence Trust ("QPRT") and the Personal Residence Trust ("PRT"). The QPRT and PRT are both designed to hold title to residences although each has its own advantages. Moreover, in both cases, the donor-parent remains in the home for a defined period (referred to as the *initial term)*.

The disadvantage of a QPRT is that the donor's death before the end of the *initial term* pulls the asset back into the taxable estate. QPRTs are however more popular for several reasons. A QPRT prohibits commutation during the donor's *initial term*, thus protecting the parent's occupancy. A QPRT also provides certainty for planning purposes, because the planners know from the beginning how long the donor *must* survive in order for the asset not to be pulled back into his or her estate. If the donor dies during the *initial term,* any credit used to offset the gift is restored. There is thus a benefit to a taxpayer in calculating the value of the gift that makes this technique attractive.

In contrast, the *initial term* of a PRT may be commuted, and a PRT is not prohibited from distributing to anyone other than the donor-parent, during its *initial term*. This offers some flexibility if the donor's health declines. Some proponents used PRTs in anticipation of the repeal of the estate tax when transfer to the next generation would be triggered. Some PRTs are created without the possibility of commutation for reasons of asset protection.

A parent (donor) may be the trustee of his or her QPRT or PRT. This is especially important where the parent wants to remain in the home and maintain control but still engage in estate planning. Thus, as you see, there are ways to engage in pre-mortem asset planning without running the risk of facing life on the street at ninety-one.