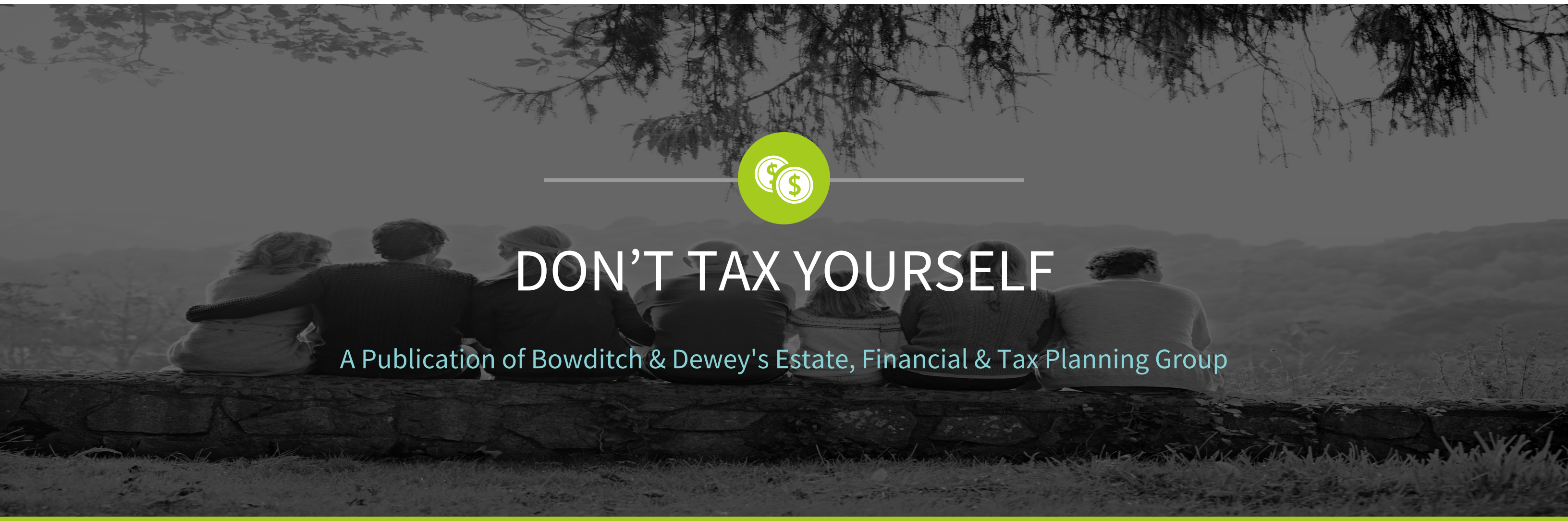

Legal Considerations of Living Together in a Multi-Generational Home

BY REBECCA MACGREGOR • OCTOBER 13, 2020

During COVID, many of us are balancing working remotely while caring for our children. This autumn, most of our children are returning to part-time or all remote school. We are using our residences as a home, office, and school. We are racing from virtual meetings and work calls to guiding our children with remote learning and homework. We are doing all of this while shopping, cooking, and cleaning up after preparing 3 meals a day. These extra uses on our homes create more housework, maintenance, and general wear and tear.

Exhaustion is setting in and it is not surprising that many of our clients are considering moving in with their parents or children and want to talk through the legal issues of living with multiple generations in one home. They wish to share the burdens and the benefits of raising and teaching the children together, dividing the chores, maintaining the home, and pooling their finances together during this time of uncertainty.

There are many ways to structure the ownership of a home between the parties. If you are considering living in a multigenerational home, there are some initial questions that you need to discuss with you family. Who is contributing to the purchase price? Is it a gift, advance on inheritance, loan, or will they hold an ownership interest equal to their capital contribution? How do you equalize your estate to the remainder of your family? What happens if a couple gets divorced? Who has the right to reside in the home and how will the ownership be divided? What happens if a parent must later reside in a nursing home for care? Do they have sufficient assets in their name to pay for nursing care or will Medicaid look to his or her ownership interest in the home for payment? If one of the owners dies, who receives his or her interest in the home? The answers to these questions will determine how best to legally structure the ownership of their family home together.

One of the often-overlooked issues is the payment of the estate taxes at the death of an owner. As an example, a client has a home worth $2 million and an investment account worth $2 million. Her daughter, son-in-law, and granddaughter had moved in with her. The client had a Will that stated the home would be distributed to the daughter, the remainder of her estate would be distributed to her son, and the taxes paid from the residue. The client thought that she had equalized her estate between her children. Since her Will was a standard Will that stated the taxes were paid by the residue, the estate tax of $280,400 on a $4,000,000 estate must be paid by the remainder of the estate.

This means that the specific bequest of the home would pass estate tax free to the daughter and the remaining funds in the investment account would be required to pay the estate taxes due to the Massachusetts Department of Revenue. To add insult to injury, if the investment assets are retirement accounts, then the assets would not receive a step-up in basis at death, and as the funds are withdrawn from the account to pay the estate taxes, the son would be required to pay ordinary income taxes too! Whereas, the daughter would receive a step-up in basis equal to the fair market value of the home on the date of the client's death, and would incur no taxable gain if she sold it for the same value.

This particular client wished to maintain control and ownership over her home, so we set up a realty trust to own the home with her as the sole trustee, and her revocable trust as the underlying owner. In the revocable trust, upon her death, we first divided the estate into equal shares, then allocated the home to the daughter's share. If the value of home exceeded the one-half value of the total estate, then she had the right to purchase the excess from the trust for the fair market value. If the value was less than the one-half value of the total estate, the trustee would transfer a portion of the investment assets to her to make up the shortfall. This ensured that the daughter and son were able to equally enjoy inheriting the appreciation of the home over time. In addition, we included an allocation tax clause so that the taxes would be borne equally by the daughter and son.

Other clients have shared ownership with their children utilizing a family limited partnership to track their capital contributions towards the purchase of the property and to provide an agreement for the use and maintenance of the property. If the property needs renovations or improvements, a family member may provide a loan to the partnership secured by a mortgage on the property for the outlaid costs. The AFR long term rate for a family loan is currently 1.12%.

The partnership agreement states that if a family member leaves (by death, divorce, or just plain choice), an appraisal is obtained to determine the fair market value of the partner's interest. The remaining partners may buy out the leaving partner, or they may elect to sell the home to a third-party purchaser. Upon the sale, any secured loans are paid in full, expenses and closing costs paid, capital contributions are returned to all partners, then the net sale proceeds are divided in accordance with their partnership interests.

Each family situation is unique as are the properties that they choose to live in together. Please contact us if you wish to live in a multigenerational home so that we can discuss the legal issues involved.