

# IRA M. LEFF

AND ASSOCIATES

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ATTORNEYS AT LAW

1800 CENTURY PLACE, N.E.  
SUITE 100  
ATLANTA, GEORGIA 30345

IRA M. LEFF

FACSIMILE: (404) 634-4300

DIRECT DIAL: (404) 633-1801

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## ELDER LAW MINUTE

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Last week I suggested a method to avoid Estate Recovery which involved a death-bed transfer to the heirs. How do you get a terminally ill person within days of his death to sign a deed? What I recommend is that early on in the Elder Law planning process a comprehensive durable power of attorney be executed which includes a specific gifting provision. This clause should not be limited to \$12,000 per year and should allow the agent to make gifts to himself if he is an heir of the principal. I typically give the principal the option of making this extraordinary power effective immediately or only upon disability of the principal.

As the principal's life draws to an end, I prepare a Quit Claim Deed for the agent to sign when the appropriate time arrives. If the client is in a nursing home, often the facility will recommend calling in hospice within a few days prior to death. This is usually a good indication that it is time to execute the deed. What if the principal does not die within 10 days of the deed's execution? The grantees of the deed could either refuse to accept the gift or could deed the property back to the grantor. If, instead, they keep the gift, the A/R has a duty to report the transfer to DFCS. Doing so will result in the imposition of a transfer penalty and will increase the likelihood of Estate Recovery.

So what's the downside to this approach? Lifetime gifts result in a *carryover basis* for income tax purposes. That means that the grantee retains the same basis in the property that the grantor had prior to the gift. Conversely, if the property had passed as a result of the A/R's death, the heir would receive a *stepped-up [to the fair market value as of date of death] basis*.

For example, assume that A/R owns a home worth \$150,000 which he bought for \$35,000. There is \$115,000 of unrecognized capital gain. With a death bed transfer, the tax on that gain will be paid by the grantee unless the grantee makes the property his homeplace for at least two years. Assuming a 20 percent federal and state combined rate, the grantee would pay \$23,000 in taxes because of the use of the lifetime gift. However, the Estate might save considerably more by avoiding Estate Recovery where the claims are often \$75,000 or more.

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This week I launched [IraLeff.com](http://IraLeff.com). I invite each of you to visit the site where, among other things, you can find a complete library of *Elder Law Minutes*. As always, I welcome your comments or questions, and I appreciate your interest and referrals.

*Member of the National Academy of Elder Law Attorneys*