REPRESENTING THE ELDERLY CLIENT

AND THE TRANSFER OF PROPERTY

Prepared by:

ERIN O'BRIEN EDMONDS
BURCHELL MACDOUGALL
Suite 210, 255 Lacewood Drive
Halifax, Nova Scotia
B3M 4G2
902-445-5511 (phone)
902-443-2600 (fax)
law@navnet.net (E-mail)

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REPRESENTING THE ELDERLY CLIENT AND THE TRANSFER OF PROPERTY

prepared by Erin O'Brien Edmonds

We have all been asked to represent an elderly client with respect to the transfer of property. Sometimes, we are simply selling the elderly person's property and must ensure that he or she is competent to execute the deed and closing documentation. Often there is much hand holding required and worries to listen to. The elderly person often finds the sale of their home stressful. It is important, as solicitors, that we document our conversations with our clients whether or not they are elderly. The paper trail is critical to protect us when a claim is made. When we are busy, conversations with our clients are often jotted on a phone message or not at all. The lack of a useable trail of letters and/or file notes to mark even the most basic event is a matter that can easily compromise the quality of advice or service given.

The way in which the principal residence of the elderly has been treated has changed over the years with respect to the issue of social assistance. The advice we give our elderly clients must keep up with these changes. On April 1, 1998, the Province of Nova Scotia took over management of social assistance applications for persons in or entering into nursing homes. A new set of policies were implemented under the regulations made under the *Social Assistance Act,* R.S.N.S. 1989, c. 432. Previous to this time, each Municipality had their own set of policy guidelines which varied from Municipality to Municipality.

These policies are not law but are adhered to by the Province as if they were law. The interpretation of these policies is not a matter that we as lawyers can give solid advice on. There is little case law to date to give us much guidance. However, the Department of Community Services has published guidelines and some common questions and answers to give the public some assistance. Situations can arise where the policies and the law conflict. These situations must be negotiated with the Department of Community Services. If a resolution is not found, recourse can be made to the courts.

We must ask ourselves, who is our client? Often the first contact with a lawyer is made by a child of the elderly person needing advice. We should be careful not to find ourselves in a conflict of interest and, when necessary, ensure the elderly client and the children have independent legal advice.

I will focus my comments on the transfer of real estate by a person who needs or may need social assistance at some time in the future and review what the policies allow with respect to transfer, improvement, sale and rental of real estate. I will also focus on some other ramifications of transfer of real estate such as income tax consequences and the "soft side" of the family dynamics.

DESIGNATION OF HOME

The Legislation

Under Section 8 of the *Social Assistance Act*, R.S.N.S. 1989, c. 432. , a person may "designate" his or her residence:

> 8.(1) In this Section, "residence" of a person means a housing unit in the Province that was ordinarily inhabited by that person for at least two years, and includes land on which the housing unit is situate that may reasonably be regarded as contributing to the use and enjoyment of the housing unit as a residence or such land that the person establishes in accordance with the regulations is necessary for such use and enjoyment.

The effect of a designation is to confirm that the home is protected from being considered an "asset" at the time an application for social assistance is made.

The Two Year Period

In order for the home to qualify, the person or persons must have "ordinarily inhabited" the home for a period of at least two years. The two year period need not be immediately before making an application for social assistance or entering a home for special care.

When To Designate

If a person has sold a home and purchased another, the new home will qualify if the person occupied two homes for a total of two years. (s. 8(2))

A person may, before or after any assistance is given, designate that person's residence as a residence for the purpose of the Act (s. 8(3)). The form of designation is attached to this paper. It need only be witnessed, not sworn.

The legislation indicates that the residence may be designated before or after assistance is given. However, if the designation is not made before death of the person, his or her personal representative cannot make the designation after the fact. The case of Lawson Estate v. Annapolis County, (1994), 134 N.S.R.(2d) 176 (S.C.), Aff'd (1995), 139 N.S.R. (2d) 318 (C.A.) is on point. In that case the designation had not been made prior to Mrs. Lawson's death and she had been receiving social assistance prior to her death. This case pre-dates the current policies but was decided pursuant to the Social Assistance Act. Justice Carver concluded at page 179 :

> "The recipient need not take the steps outlined in the guidelines set out by Social Services but the recipient must take some action that could be considered a designation"

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In that case, Mrs. Lawson's estate was required to pay the care costs of Mrs. Lawson during her life and the value from the home was included in Mrs. Lawson's assets and therefore her estate.

Apart from the case law, the Department takes the position in its policy guidelines that if a designation is not made before death, the value of home is exposed to pay care costs. It is now current practice of the care co-ordinators to have the owner sign the form at the time of the application for social assistance. It may be advisable for property practitioners to advise our clients to designate the home at the time of purchase if it qualifies as a "residence" within the meaning of the Act. Solicitors who practice in the area of Estate Planning are giving this advice regularly when wills and made and powers of attorney are drafted.

Who Can Designate

The following persons may designate the home:

1. A person who is an owner of the home and is competent;
2. A guardian of a person appointed under the *Incompetent Persons Act*,;
3. An attorney under a power of attorney;
4. A spouse of a person who owns the home.

The Designation Form

The designation is made on a form called "Designation of Primary Residence Form" and is included at the end of the paper. There is no requirement to have the document sworn. The legal description should be attached. This allows the care-coordinator to determine the size of the property. The designation covers lands on which the home is located if it can be reasonably regarded as contributing to the use and enjoyment of the home as a residence. The size of land allowed will depend on the individual characteristics of the property.

After Designation...

If the home is designated, title may remain in the designator's name or it may be transferred to anyone, not just family members, provided no value is received for it. If there is an actual sale while the designator still holds title, the value of the net proceeds of sale are included in the pool of assets that are used to pay care costs. There is no requirement to sell the home. The home does not have to be sold to pay for care costs.

If the home is designated and title remains in the designator's name, the home does not have to be rented either. The designator may allow a person to stay in the home for little or no rent.

Therefore, a transfer of the home for no value will not affect the application for social assistance. The Grantee may then sell or rent the home . The proceeds of sale or rental income are protected from care costs because they are not owned by the designator.

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However, it is important to remember that it is critical to designate the home prior to the transfer of title or rental. If this does not happen, the value of the home or the rental income is exposed to care costs. We should be recommending to our clients to designate the home before title is transferred or before we draft a lease for the rental of it .

If a transfer to a family member takes place prior to designation, this can be rectified by a transfer back, completion of the designation form and a transfer back to the family member. It may be more awkward to rectify a transfer to a non-family member due to the possibility of deed transfer tax being charged or if that person is not agreeable. It could also be difficult to transfer if the title has been encumbered in the meantime.

If a person who has designated their home goes into a care facility, and is likely to require social assistance, the designator may not use any of his or her income or capital to pay for maintenance, insurance, taxes etc. on the home during the 36 months preceding the application for social assistance. The amount of money spent on the home in the previous 36 months prior to an application for social services will be scrutinized by the Care Coordinator taking the application. If, for example, such a person requires a new furnace, this will be considered a necessary expense. However, additions and unnecessary renovations will be considered to have been a transfer of assets within the 36 month period and the application could be denied. Therefore, it makes sense to transfer the home to a family member or other person for no value at the time of entry into the care facility after designation. At that point, the transferee can pick up the costs.

A person who has authority under a power of attorney may find himself or herself in a conflict of interest if the home is transferred out of the name of the person requiring assistance into his or her own name unless the document authorizes such transfer. It has become part of my practice to add the following clause to Powers of Attorney drafted for clients:

> "In the event I am required to enter into a nursing care facility, I authorize my Attorney(s) to transfer title of my designated residence to my children who are then alive, including my Attorney(s) without being accountable to my estate for such transfer."

<u>One Designation Only</u>

A couple may only designate one home. (s. 8(4)). A second home such as a cottage may not be designated. The result is that any other real estate of the couple or person is exposed to be used for care costs.

Often the family cottage is a sensitive subject. The value of that property is the <u>assessed value</u> of the property. If a couple lived in their cottage for two years and did not have another home to designate, the cottage could be designated.

If a person requires social assistance, he or she must disclose, at the time of the application all of the assets owned by him or her. The designated home is not included (s.9(2)) in the total value of assets. If a second property is owned by two spouses, each spouse is required to apply fifty percent of the assessed value of the property to his or her care costs.

If only one spouse is going into a care facility, it may be advisable to disclose at the time of the entry into a care facility, the total value of both spouse's assets. In this way the care costs of one spouse will not eat into the other spouse's fifty percent. This will allow the spouse who is not entering into the care facility to have more assets available to him or her while he or she remains in the community.

The policy states that any transfer of property to another person will not be reviewed if the transfer took place longer than 36 months preceding the date of application for social services. Any transfer within the 36 months may result in denial of funding. The Care Co-ordinator in charge of the file will try to work out a solution with the family.

If, for example the family wished to keep the second property such as a cottage, the family could buy the cottage from the parent to make available funds for care costs. In this way the second property can remain in the family's hands. In some cases, the family may decide to sell the designated residence and use those funds to replace the value of the family cottage which has been transferred out of the parent's names. This is an alternate way of keeping the family cottage.

However, if the second property is owned jointly with someone other than a spouse, the policy states that the property is considered to be owned wholly by the person requiring assistance. This is the case even if the transfer was more than 36 months prior to the application for social services. Therefore, the 36 month rule does not apply when the asset is owned jointly with another person.

If the jointly owned property was purchased by the joint owner with his or her own funds then only the value in the asset of the person requiring assistance will be considered an asset of that person for the purposes of care costs. In that case, it is a matter of proving that the value in the property was contributed by the joint owner and not solely by the person making application for social services. It is important to keep record to prove the value of others in such jointly owned property.

We must be careful then when we give advice to clients. If we advise our client to transfer the second property to themselves and their children for reasons such as avoiding probate fees, such transfer may not protect the value of the cottage property if one or more parents requires social assistance. A transfer of the whole title of the cottage property more than 36 months preceding the application will work. Also, if the parent retains a life interest in the property, this is not considered to have any value that can be claimed for care costs.

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The policy states that where there is a transfer of property to a trust where the person requiring assistance is a beneficiary (sole beneficiary or one of many), then that person will be considered to be the sole beneficiary of the trust. This is true even if the transfer to the trust took place more than 36 months prior to the application. An interesting question is whether the Department will or will not recognize a transfer to trust outside the 36 month period where the settlor of the trust is a discretionary beneficiary of the trust. If the Department claims, as the policy states, that the person requiring assistance is deemed to be the sole beneficiary of the trust, will these policies be accepted by a court as overriding the trust document? There is no case law on this point at this time. I have been told by the Department that this situation has not presented itself yet. Also, what if there is a marriage contract where a spouse has released all claim to a second property? Will the Department deny social assistance if the spouse requiring it has no claim to this property? As you can see this is a tricky area and it is advisable to tread with caution when giving advice in this area.

To summarize, where there has been a complete transfer of title to children with a life interest retained in favour of parents or a transfer of the property to a trust within the specified time, and where the person requiring assistance is not a beneficiary of the trust then the transfers are protected. These are two methods of preserving the use of the property for the client but protecting the asset from being included in the person's list assets at the time an application for social assistance is made.

Income Tax Considerations

When giving advice to clients about the transfer of their property, we must be mindful of the income tax consequences. If we are advising clients about their principal residence, there will not be capital gains tax on the transfer due to the principal residence exemption. However, if the title of the principal residence is transferred to the parent and child jointly and that child is not living with that parent, then the principal residence exemption is lost with respect to the child's interest in the property for the years after the transfer. When the joint tenant dies, the capital gain on the portion owned by the joint tenant who is the occupant of the property (the parent) is exempt from tax. There is no tax at the time of death to the child. However, when the child sells the property or dies, the child is taxed on the gain from the date of transfer to him or her of the one-half interest and the gain on the other half from the date of acquiring the second half interest. The latter portion of the tax would happen in any event but the tax on the first half could have been avoided had the title remained in the parent's name only. If the property is not a principal residence, the capital gains tax on the parent's portion is payable by the estate. This tax will reduce the residue of the estate available to beneficiaries.

It is important to note that transfer of property to a trust may also precipitate a capital gain and should be considered before any transfer takes place. Also, if an individual transfers a property (which is not a principal residence and which has accrued capital gains) to another and the Grantor retains a life interest in the property, then the Grantor is deemed to have disposed of

and subsequently reacquired, the life estate at its fair market value at the time of the transfer. As a result, the entire accrued gain in the land will be taxable at the time of the transfer. Any future gains are deferred until death. The individual is deemed to have disposed of the life estate upon death at its adjusted cost base (the fair market value at the time of transfer) and that amount is added to the adjusted cost base of the land where the surviving holder of the remainder interest (now full owner of the land) and the deceased did not deal at arm's length. Therefore we must balance the possible gains that may be taxed with the benefits of the transfer to joint tenancy.

Transfers to save Probate Fees

One benefit of a transfer to joint tenancy is to remove the property from the assets of the deceased on death and therefore from his or her estate. This can also be seen as a detriment in certain cases which will be referred to later. Saving probate fees can be beneficial in some cases but an overzealous use of joint ownership can often create devastating consequences to others.

For example, if the principal residence of the parent also contains an apartment, then only a portion of the capital gain on transfer to the child is protected by the principal residence exemption. A capital gain or loss may be precipitated for that portion of the property that is income property. The transfer then could cause tax to be paid. The client will need to be advised to balance the paying of taxes now vs. saving Probate fees.

Exposure to Creditors of Joint Tenant

Often parents do not know about the debts of their children. Any judgment registered against a child will attach to the property of the parent on transfer. This is an obvious pitfall and most property practitioners are well aware of such a problem and will advise their client of same. However, one cannot predict the future problems that can arise. Claims of the spouses of the child may also present a problem and the client must be advised of the potential for problem by the spouse of his or her child as a result of division of matrimonial property under the *Matrimonial Property Act*. I do not intend to discuss when a spouse would have a claim against the transferred property at this time. Just remember this as an issue to be discussed.
If the child is present at the time of taking instructions from the parent, this can provide for an awkward discussion. This is the time when we should be mindful of who our client is.

Loss of Control

It is important to consider the "soft side" or the human consideration when transferring property. I have paraphrased an excerpt from the CCH Estate Planning Guide:

> Loss of control is one possible disadvantage of joint tenancy. Not only is any post-mortem control precluded, but control during life can be lost. In some cases, transferring to a joint tenancy can frustrate the intention of the transferor's Will. For instance, spouses with children from a previous marriage may wish to make a bequest of a certain value to one another while leaving the residue of their estate to their respective children. The problem is that, if the entire estate has been put into joint tenancy, it pass in its

entirely to the surviving spouse and the deceased's children will receive nothing.

There is also the possibility of a conflict between parent and child which could serve to deny the parent access to "his" or "her" assets. The fact is that once a person is made a joint owner of a property, his or her cooperation will be required if the original owner wishes to sell the property or otherwise dispose of it. Therefore, before a bank account or other asset in put into joint tenancy, the possibility of an eventual conflict between the Grantor and the party joined as a joint tenant should be carefully considered. In this regard, it may be noted that there is a presumption of advancement between spouses and a presumption of a resulting trust when property is transferred from a parent into joint ownership with his or her children.

Conclusion

To summarize, it is important that lawyers give advice to elderly clients with respect to the transfer of their property after consideration of all the issues. Some of these issues include nursing care costs, income tax, creditor protection, matrimonial claims, loss of control and conflict of interest. A clear understanding of how these issues interact is important. It appears that each case must be explored based on its own circumstances. The Provincial and Federal Laws do not lead us to the same conclusion in each case.

NOVA SCOTIA

Department of Health
Department of Community Services

Community Supports for Adults Programs

Designation of Residence Questions & Answers

This brochure applies to the following programs:

Homes for Special Care

- Nursing Homes/Homes for the Aged
- Residential Care Facilities
- Group Homes and Developmental Residences
- Adult Residential Centres
- Regional Rehabilitation Centres

Community Base Options Programs

- Community Residences/Associate Family Programs
- Small Options Programs
- Supervised Programs

SEPTEMBER 1999

Designation of Residence

If you are seeking admission to a Community Supports for Adults program but you cannot pay the full costs of your care, you may apply for financial assistance from the Department of Health or the Department of Community Services.

In order to determine whether you are eligible for assistance, your Care Co-ordinator will require information on all your income and assets (including property, bank accounts, RRSPs, etc).

All assets and income are considered for the costs of your care *except* the primary residence if it has been designated.

Enclosed are the answers to the most common questions people have about their primary residence. If you have a specific question about your primary residence, and you are in the process of applying for placement, your Department of Community Services Care Co-ordinator will be able to give you more information

This information is for general use only

Each individual case is determined on its facts by your Care Co-ordinator based on the *Social Assistance Act* and the provincial policies.

Q: If I need financial assistance with my costs of care in a nursing home, will I be forced to sell my home?

A: No. The Social Assistance Act states that your home is protected from being considered as an "asset" if it has been designated.

Q: What does "designating" my home mean?

A: Your home is protected if it is "designated". This simply means that you must complete and sign a form that states that you have lived in your home for at least two years. You must also include a description of the property from your deed, and the civic address.

You do not need a lawyer to designate your home. The form does not have to be sworn by a Commissioner of Oaths, and it does not have to be filed at the Registry of Deeds.

Q: Where do I get a designation of residence form?

A: There is a form attached to this brochure. You can also get one from your Department of Community Services Care Co-ordinator when you apply for placement to a Community Supports for Adults program.

Q: To whom can I designate my home?

A: A home is not designated <u>to</u> someone. Designation just identifies a property as your home, and indicates that you have lived in it for at least two years. After you "designate" it, the home still belongs to you.

Q: Can I designate my cottage?

A: No. You must have "ordinarily inhabited" the home in order for it to be designated. If you lived in your cottage full time as your sole residence for at least two years, it would be considered to be your primary residence, and you could designate it.

Q: My home sits on 25 acres of land. Is the land protected too?

A: Designation covers lands on which the home is located if it can be reasonably regarded as contributing to the use and enjoyment of the home as a residence.

When you apply for placement and assistance the individual facts of your case will be reviewed and a decision will be made as to how much land is covered by the designation.

Q: When can I designate my home?

A: You can designate your home anytime before or after receiving assistance. Even if you have been in a Community Supports for Adults program and receiving assistance with your costs of care you can still designate your home.

However in most cases your Care Co-ordinator will ask you if you wish to designate your home at the time your financial assessment is done.

If you designate your home prior to applying for assistance keep the designation form in a safe place, and provide a copy to your Care Co-ordinator when you make an application for nursing home.

It is important to remember that you must designate your home <u>before</u> you transfer it or leave it in your will to a beneficiary.

Q: If my home is designated, can I sell or rent it?

A: You can sell or rent your designated home, but all net proceeds must be applied to your care if the title to your home is still in your name.

Designation only means that the home doesn't have to be sold to contribute to your care; once you sell or rent the home, the profits from the sale or rental are not protected.

Q: Can I transfer my designated home to my children?

A: Yes. As long as your home was designated before the transfer took place, you can transfer the home to any other person(s) as long as you receive no value for it.

Q: If I transfer my designated home to my daughter, and she sells it, does the money from the sale go to the costs of my care?

A: No. Since the home was designated it is protected. And since the title was in someone else's names when it was sold, the money belongs to that person, and not to you.

The same is true for rental income from a designated home that is transferred.

Q: I want to keep the designated home in my name, but I want my daughter to live in it. Do I have to charge her rent?

A: No. There is no requirement that any rent be charged to a tenant in your home. However, if rent is charged the net proceeds must be applied to your care costs.

Q: If my daughter is living in my designated home, can I continue to pay the taxes and maintenance?

A: No. If it is anticipated that you will require financial assistance with your care costs then someone else must pay the costs of maintaining the home. Your income and assets can not be used for taxes, utilities, insurance, maintenance and any other costs related to the house (e.g. legal fees related to a sale or transfer).

Q: I am applying for assistance for my nursing home costs, and I have designated my home and will transfer it to my son. Three months ago I renovated my home and spent $15,000 on the renovations. Is this a problem?

A: When you apply for assistance, your Care Co-ordinator will look back 36 months to see if your income and assets have been depleted in a way which is not in compliance with the financial assistance policies.

A decision will be made as to whether the expense was a reasonable one. To do this, the Care Co-ordinator might look at whether the renovations were necessary for your use and enjoyment of the home, and whether they were done at a time when it appeared clear that you would soon be entering a nursing home.

If it is determined that the expense wasn't reasonable, your son (who now owns the home) would have to reimburse you for the costs.

Q: I want to transfer my cottage to my children. Is this allowed?

A: If you seek assistance with your costs of care, your Care Co-ordinator will look back 36 months to see if you depleted or transferred your assets or income in an unreasonable manner. If you transferred a cottage to someone else in the 36 months prior to applying for assistance the assessed value of that property will have to be applied to your costs of care before you receive assistance.

NOVA SCOTIA

DESIGNATION OF PRIMARY RESIDENCE FORM
Community Supports for Adults Programs

I/We _____ of _____ in the County of _____ Province of Nova Scotia, hereby designate

_____

[*print full civic address*]

as my/our primary residence within the meaning of Section 8 of the *Social Assistance Act*,. R.S.N.S. 1989, c. 432.

The Property designated is described in the description of land attached as Appendix A to this designation.

I confirm that I have inhabited the dwelling situate on the Property as my/our primary residence on a full-time basis and continuously for over two years.

Signature of Resident(s): _____

_____

Date: _____

WITNESS:
Name (please print) _____

Signature: _____

Date: _____

FOR OFFICE USE ONLY

DESCRIPTION OF PROPERTY ATTACHED [ ]
COPY OF POLICY GIVEN TO APPLICANT [ ]

SIGNATURE OF CASEWORKER: _____

DATE: _____

07/98

Department of Community Services Offices

Location	Phone	Fax
Amherst	667-3336	667-1594
Annapolis	532-3400	532-3401
Antigonish	863-3213	863-7053
Barrington	637-2335	637-2137
Dartmouth	424-1600	424-1629
Digby	245-5811	245-4121
Guysborough	533-4358	533-3822
Halifax	424-6111	424-8240
Hants	798-8319	698-6605
Kings	679-6256	678-3072
Lunenburg	543-5527	543-6186
New Glasgow	755-5950	755-3631
Queens	354-2771	354-7460
Sydney	563-5659	563-3707
Truro	893-6326	893-5609
Yarmouth	742-0720	742-0747

NOVA SCOTIA

Community Supports For Adults Policy Manual

Chapter: 3 Determination of Financial Eligibility	Subject: Designation of Primary Residence
Issued: April 1, 1998	Policy Number: 3.5

1. Pursuant to the *Social Assistance Act*, s. 22A a person in need of assistance from the Province for a Community Supports for Adults program may designate their primary residence if:

   (a) it is situated in the Province of Nova Scotia; and

   (b) they have ordinarily inhabited the residence as their primary residence for at least two years.

2. To satisfy the requirement of ordinarily inhabiting a residence the person in need of assistance may have lived in the home for two years at any point in the past. It is not necessary that they live in the residence for two years immediately prior to designating the home or for two years immediately prior to seeking assistance.

3. Where a residence has been inhabited for less than two years it may be designated if the client provides evidence that the residence was purchased with the proceeds of sale of another housing unit, and the two housing units were inhabited for a combine total of two years.

4. The residence is considered to be the primary home plus the land on which it is situated where the land can be reasonably regarded as contributing to the use and enjoyment of the residence.

5. If a couple is entering a Community Supports for Adults program they may not each designate different residences.

6. The person in need or someone legally entitled to act on their behalf must formally designate the person's residence in the prescribed form.

Chapter: 3 Determination of Financial Eligibility	Subject: Designation of Primary Residence
Issued: April 1, 1998	Policy Number: 3.5

7. If a publicly-assisted resident is deceased and has not formally designated their primary residence, the residence may be sold to assist with the costs of care.

8. Renovations or upgrades made to the designated residence which are paid for by assets and/or income of the publicly-assisted resident within 36 months of applying for assistance may be examined by the Province to determine if the renovations or upgrades were necessary for the publicly-assisted resident's reasonable comfort or enjoyment of the residence.

9. If a publicly-assisted resident has designated their home the costs of maintaining the home cannot be paid from the publicly-assisted person's income or assets once they are admitted to a program. This includes the costs of utilities, mortgage and property taxes.

10. (a) If a designated residence produces any income while the residence is in the publicly-assisted resident's name, the profit is considered to be that of the resident and must be applied in full to the costs of care.

    (b) This includes income from both sale and rental of the residence.