

Elder Law Report



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The Truth About Gifts and Taxes.

If you make a gift of money or property to an individual, without expecting to receive anything of value in return, then you have made a gift which may be subject to the gift tax. For the vast majority of people, there will be no tax due. There are a variety of factors to consider when determining if your gift is taxable. The gift recipient does not have to pay gift tax or income tax upon receipt of the gift. This is a very common misconception. For the person making the gift, there may be a gift tax return required to be filed and gift tax may be due if the it does not fall under one of the many exceptions from the gift tax. Due to the lifetime exemption of \$1,000,000.00 taxes are usually not due.

Under the federal government's gift tax system (Pennsylvania has no gift tax), the general rule is that any gift is a taxable gift. However, due to many exceptions, most gifts are not taxable. The exceptions from the gift tax include:

1. Gifts in the form of direct payments of tuition or medical expenses;
2. Gifts to a spouse;
3. Gifts to a political organization for its use;
4. Gifts to charities;
5. Gifts that fall into the annual or lifetime exclusion.

As mentioned above, the most important exception is the *lifetime exclusion* from the gift tax. Currently, the federal government excludes the first \$1,000,000 that you give during your lifetime from the gift tax. That means that you have the right to give away \$1,000,000 during your lifetime and not pay any gift tax. You may have heard of a law that allows you to give \$10,000 per year to any number of people without payment of gift tax. This is referred to as the *annual exclusion*. Today, this \$10,000 exclusion has been raised to \$11,000. Under the tax laws, you can give up to \$11,000 each to any number of people in a given year and none of those gifts

will be taxable or reportable to the IRS. Annual gifts of \$11,000 or less are excluded from being counted towards your lifetime exclusion of \$1,000,000. Married couples can elect to have a joint gift increasing the amount per recipient to \$22,000 per year.

Any gift larger than the \$11,000 exclusion is supposed to be reported to the IRS via a gift tax return filing. However, as explained above, you will not have to pay any gift tax if you do not give more than \$1,000,000 during your lifetime.

For example, if you gave \$16,000 to your daughter, \$11,000 of your gift would not be subject to gift tax because of the annual exclusion. Since your gift is \$5,000 over the \$11,000 exclusion, it should be reported to the IRS. The reporting of gifts in excess of \$11,000 is required by the IRS because it wants to keep track of gifts that affect your \$1,000,000 lifetime exemption. However, if you have't made gifts in the past, this \$5,000 would only reduce your lifetime exclusion of \$1,000,000 to \$995,000. No tax would be due until you make reportable lifetime gifts in excess of \$1,000,000.

As with any estate planning, gifting should only be done after all financial and family considerations are taken into account. Always **be aware of capital gains implications** on any gift made. Issues such as capital gains taxes may weigh heavily on the decision to gift your property, especially when dealing with real estate and stocks. Gifts can affect your eligibility for Medicaid. Family issues also impact the decision. Once money or property is gifted, it becomes subject to the financial risks in the recipient's life, such as divorce or bankruptcy. Therefore, it is strongly recommended that you consult with your Elder Law Attorney before making any significant gifts.

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Mr. Zacharia is a native of western Pennsylvania and is admitted to practice before all Pennsylvania and Florida Courts, the United States District Court for the Western District of Pennsylvania, the Third Circuit Court of Appeals, the United States Court of Federal Claims, and the Supreme Court of the United States of America.

Mr. Zacharia's practice focuses on Elder Law and Estate Planning. He received his undergraduate degree from Washington & Jefferson College and his law degree from Duquesne University where he was a published member of the *Duquesne Law Review*.

In addition, Mr. Zacharia is also a graduate of the Esperti Peterson Institute's Advanced Studies for Estate and Wealth Strategies Planning and a member of the American Bar Association, Allegheny County Bar Association, the Florida Bar, National Academy of Elder Law Attorneys as well as the Elder Law Committee of the Allegheny County Bar Association.

Misconception # 1

If I give anything away, I have to wait 3 years before I can qualify for Medicaid.

The Truth: It is true that giving something away can disqualify you for Medicaid for a period of time. But this is a very misunderstood rule and there are many exceptions to this rule. Some gifts, like gifts to your spouse or to a disabled child, can be exempt from any penalties. And, even if the gift is not exempt, you would have to give away more than \$190,000 for the penalty period to be as long as 3 years (in Pennsylvania). If you give away less, the penalty period will be shorter. It is true that there is a 3-year "look back" period for some asset transfers. This means that the County Assistance Office will want to know about gifts you made, including sales for less than full value, within 3 years of your application for Medicaid. For some transfers, the look back period is 5 years.

How much is gifted, when it is gifted, and how it is gifted are critical. An experienced elder law attorney can help you maximize gifting while minimizing taxes and nursing home exposure.

Misconception # 2

If I am in a nursing home I must sell my home in order to qualify for Medicaid.

The Truth: You do not have to turn your home over to the Nursing Home or the State in order to qualify for Medicaid. The County Assistance Office only requires that you spend "available" assets on the cost of your care. As long as you intend to return home if you get out of the nursing home, your residence is "unavailable." It doesn't matter if it is unlikely that you will ever return home. Your home is protected so long as you are alive.

There are often practical problems associated with keeping the home. A home has to be insured, be maintained, and pay taxes and utilities. These issues have to be addressed.

In addition, in Pennsylvania, without proper planning, Medicaid could have a claim against your home if it is part of your estate when you die. With careful planning, you can prevent this. The family home is one of the most cherished of all family assets. It is also one of the most difficult assets to properly plan for. It can be protected if done right.

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