



# McCormick, Murtagh & Marcus

ATTORNEYS AND COUNSELORS AT LAW

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LEGAL UPDATE

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**EDWARD G. McCORMICK**

#### **PRACTICE AREAS**

*Residential Real Estate*

*Commercial Real Estate*

*Business & Corporate Law*

*Elder Law*

*Estate Planning*

*Estate Administration  
& Probate Law*

*Municipal Law*

*Land Use, Zoning &  
Permitting*

*Labor Relations*

*Employment Law*

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## **PROTECTING THE FAMILY BUSINESS**

**By: Edward G. McCormick, Esq.**

One of the most challenging aspects of estate planning is the preservation and protection of the family business. Although in many cases the family business is one's most significant asset, nearly two-thirds of family owned businesses fail in transition to the next generation. Two of the major reasons for this failure are high estate taxes, and the inability of family members or employees to manage and operate the business following the death of the original owner. With proper estate and business planning, this treasured asset does not have to fail or become a burden upon the next generation.

In many businesses there is an unavoidable tension between family harmony and the demands of the marketplace. Therefore, the business owner needs to decide whether to pass the business to his or her children or arrange for its sale. Problems usually arise when some children are active in the business and some are not, or the talents and abilities of the children are unequal. It is possible to satisfy the objectives of the business and still treat the children equally by allocating non-business assets to the children that are not involved, or do not have the ability to be involved, in the family business.

Whether the business owner intends to keep the business within the family or to have the asset sold upon his or her death, certain business decisions and planning should occur to avoid business, legal and tax problems in the future. Agreements can be made to restrict transferability, to provide liquidity and to fix the value of a family business for estate tax purposes. The need to restrict the free transfer of closely held business interests is especially important when the family business is an S-corporation, a general partnership, or when stock is owned by a married child (whose marriage could end by divorce).

Since the family business may be the most significant asset, it is important to minimize the valuation of the business for estate tax purposes. The fair market value of a business interest for estate tax purposes is what a willing buyer would pay and a willing seller would accept. The IRS and the Court take into account certain reductions while valuating the family business. Valuation discounts can enable a business owner to gift and bequeath business interests to family members at a significantly reduced gift or estate tax cost.

Without proper planning for business succession and estate planning, the business owner's greatest asset at the time of death may become the biggest burden to his or her family. A farsighted owner will not only educate and communicate expectations to the next generation, but will also complete the appropriate business estate plan to preserve the family business for generations to come.

McCormick, Murtagh, Marcus & Almgren can assist you with all of your business and estate planning needs.



**PAULA K. ALMGREN**

**PRACTICE AREAS**

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*Estate Administration  
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**Care at Home:**

Did you know that there are many home based programs and benefits that can help one avoid nursing home care?

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## WHY SHOULD YOU CONSULT WITH AN ELDER LAW ATTORNEY ON MEDICAID ISSUES?

**By: Paula K. Almgren, Esq.**

Many people are hesitant to speak with an elder law attorney because they are afraid of incurring legal fees. This is especially true with respect to Medicaid coverage for nursing home care for some the following reasons:

- The perceived cost of consulting with an attorney;
- Medicaid eligibility is often seen as a non-legal matter that should be straightforward and not require legal assistance;
- Many nursing homes offer to prepare the Medicaid application for residents at no charge; and
- Many people are uncomfortable with using public benefit programs.

### Cost

There is no getting around it that lawyer's do cost money. But the bottom line is that lawyers are a lot less expensive than nursing homes. In Berkshire County, nursing homes charge about \$6,500 or more per month. If the lawyer's work saves one month or more of nursing home costs the legal fees are more than justified. Protecting a lifetime of savings for the spouse in the home and the family is the goal.

### Medicaid Law

Ideally, one should be able to apply for public benefits without requiring the help of an elder law attorney. Unfortunately, this is not the case. The Medicaid eligibility requirements are defined in a conflicting set of state and federal laws, regulations, tables and bulletins that make it impossible even for attorneys to understand unless they specialize in the field of elder law. Again, there is a lot at stake and given the monthly costs of nursing homes; the elder law attorney will save the client much more than the attorney's fee.

### "Free" Application Services

Usually the nursing home offers to provide assistance with the application, (with the exception of one facility in Berkshire County) at no charge. It is very risky to use a nursing home application service without first consulting with an elder law attorney. I have seen countless examples of incomplete or incorrect advice leading to a significant loss of planning opportunities to my clients. It often times costs more to clear up the incorrect advice than it would have cost to implement a proper plan. In any event, the nursing home and resident's family have conflicting interests as every month a facility receives a private payment they earn an additional \$2,000 a month or so more than they receive from Medicaid reimbursement.

### Medicaid as Welfare

Medicare provides very limited benefits for assisted living and nursing home costs. The program that provides benefits to pay for community-based benefits and long-term nursing home costs in Massachusetts is "MassHealth", which is the Massachusetts Medicaid program. Medicaid is a joint federal/state program that is governed by both federal and Massachusetts regulations. In the absence of any other programs to pay for long term care for older Americans, Medicaid has become the nation's long term care financing system by default. Consulting with an elder law attorney permits seniors and their families to understand the present rules and the options available to them. This information is vital to preserving the financial security of a healthy spouse continuing to live at home and the family.

McCormick, Murtagh, Marcus and Almgren can help you through the Medicaid qualification process.



**DANA E. MARCUS**

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*Probate Law*

*Litigation*

*Landlord/Tenant Law*

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The annual **Gift Tax** exclusion will be raised to **\$12,000.00** per donee in January, 2006

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## **DO YOU HAVE AN ESTATE OF HOMESTEAD?**

**By: Dana E. Marcus, Esq.**

### **(1) What is an Estate of Homestead?**

An Estate of Homestead is an estate in land created by statute for the protection of a homeowner and his/her family from claims of certain of his/her creditors. A "homeowner" includes an owner of real estate as sole owner, a joint tenant, a tenant by the entirety, or a tenant in common. An Estate of Homestead pertains only to the property that the homeowner occupies as his/her primary residence. In the event of the death of the homeowner, an existing Estate of Homestead continues for the benefit of a surviving spouse and any minor children until the re-marriage or death of the surviving spouse and the youngest unmarried child attains the age of 18, as long as they continue to occupy the property.

### **(2) Are There Different Estates of Homestead?**

Only one owner can acquire a "regular" Estate of Homestead for his/her family. In addition to the "regular" Estate of Homestead, there is another Estate of Homestead which may be claimed by persons 62 years of age or older (single or married), or by a disabled person. In the case of a disabled person, the Declaration of Homestead must be filed along with a physician's letter certifying that the person meets the disability requirements of the Social Security Act, or a disability award letter from the Social Security Administration. If spouses have each reached the minimum age of 62 years, they may both acquire an "elderly" Estate of Homestead. It may also be that even if only one of the spouses has attained the age of 62, they may both acquire an Estate of Homestead, one "regular" and one "elderly".

### **(3) How is an Estate of Homestead Acquired?**

An Estate of Homestead may be acquired by a declaration in the deed at the time that the property is purchased, or in a separate signed, notarized statement if the property is already owned. In either case, the deed or separate statement must be recorded in the Registry of Deeds for the County or regional district within which the property is located.

### **(4) What is Protected by an Estate of Homestead?**

Once acquired, the Estate of Homestead is free from attachment by creditors up to the amount allowed by law (currently \$500,000.00 for a "regular" Estate of Homestead and \$1,000,000.00 for an "elderly" Estate of Homestead for a qualifying married couple). Certain debts are not barred by the Estate of Homestead, including:

- (a) Federal, State and local taxes;
- (b) Mortgages or other debts contracted for the purchase of the home;
- (c) Mortgages, debts and liens that existed prior to the acquisition of the Estate of Homestead; and
- (d) Child and spousal support.

### **(5) How is an Estate of Homestead Terminated?**

There are two methods for terminating an Estate of Homestead during the lifetime of the owner: (1) a deed conveying the property in which the Estate of Homestead exists, signed by the owner and the owner's spouse, if any, which does not specifically reserve said Estate of Homestead; and (2) a release of the Estate of Homestead duly signed, sealed and acknowledged by the owner and the owner's spouse, if any, and recorded in the Registry of Deeds for the County or district in which the property is located. **Be careful when refinancing the mortgage on your property if you've created an Estate of Homestead. The new mortgage may contain language that releases your Homestead.**

### **(6) Should You Have an Estate of Homestead?**

**ABSOLUTELY!**

McCormick, Murtagh, Marcus & Almgren can assist you with an Estate of Homestead, as well as your other real estate needs.

## **LANDLORD TENANT LAW: SECURITY DEPOSITS AND LAST MONTH'S RENT**

**By: Kathleen M. McCormick, Esq.**



**KATHLEEN M. MCCORMICK**

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The most common problem in landlord tenant law is the collection of Last Month's Rent and Security Deposits. The law is very complex and often misunderstood, causing an innocent misstep by the landlord to become an expensive problem.

Under Massachusetts law, at the beginning of the tenancy, the landlord may charge only: 1) First Month's Rent, 2) Last Months Rent 3) a Security Deposit equal to the first month's rent and 4) the purchase and installation cost for a key and lock.

Last Month's Rent is a prepayment made at the beginning of the tenancy to be applied to the last month of the tenancy. Interest earned from last month's rent must be paid to the tenant yearly at the rate of 5 % (or actual interest earned if landlord decides to hold the money in escrow).

A Security Deposit is money paid by the tenant and held in a separate interest-bearing escrow account to indemnify the landlord against losses incurred because of the tenant's actions. Because the Security Deposit belongs to the tenant until applied by the landlord, the landlord must follow specific steps to properly handle these funds.

If the landlord holds a Security Deposit a Statement of Conditions must be completed at the beginning of the tenancy. A Statement of Conditions is a comprehensive list of all then-existing damage to the unit. The completion of the Statement of Conditions is required for the landlord to be able to deduct for damages caused by the tenant upon the termination of the tenancy.

If the landlord does not take these specific steps for holding the Last Month's Rent or Security Deposit, the landlord may be exposed to liability, resulting in the payment of three times the interest due or the amount of the Deposit plus court costs and attorney's fees. The mishandling of tenant monies is the easiest way for a landlord to create unnecessary legal problems. If Last Month's Rent and/or a Security Deposit is being held, it is imperative that the landlord take the appropriate steps prior to the commencement of the tenancy to ensure minimal exposure to liability.

McCormick, Murtagh, Marcus & Almgren can assist you with all of your landlord/tenant needs, from drafting leases and occupancy agreements (including a landlord instruction packet) to evictions and collection matters.

For more information on the services provided by  
McCormick Murtagh & Marcus,  
or to view past newsletters,

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