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For philanthropists wishing to maximize the impact and life of their charitable gifts, the Foundation provides *resources for thoughtful giving*. Using its expertise and personalized services, **Toledo Community Foundation** helps donors transform their philanthropic impulse to measurable community impact. Beyond the gifting of assets, the Foundation helps donors identify issues of importance to them and *inspires engagement* with community organizations addressing these issues, thereby maximizing the impact of charitable gifts and creating a greater sense of fulfillment.

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Life Estates and Real Estate

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## **The Washington Post**

**Q:** My wife and I have owned our house for many years. I am several years older, so she is likely to outlive me. I want to make sure she will be able to stay in the house for the rest of her life and have heard that a "life estate" could take care of that. Can you explain how it works?

**A:** This is a complex area of the law, but here's a general outline.

First, if you and your wife hold title as tenants by the entirety, on your death, your wife would automatically own the entire property. No probate would be required.

But if the property is held as tenants in common, then on your death, your interest would have to go to probate, and assuming that you have left behind a will, your interest would be distributed pursuant to your instructions. If you do not have a will -- although you should -- your half would go to your heirs in accordance with the laws of intestacy in the state where your property is located.

Let's assume that you hold the property as tenants in common. You can, of course, change the way title is held and convey it to you and your wife as tenants by the entirety. You may have reasons not to do this, however, such as for tax purposes. Accordingly, on your death, your wife would continue to own her share of the property. (Usually this is allocated on a 50-50 basis.)

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To give your wife a life estate in your half of the property, your will would provide simply that on your death, your interest will go to your wife for the rest of her life, and on her death, to whomever you select. That person is called the "remainderman."

But don't just write "my wife gets a life estate." You have to consider many issues, all of which should be clearly spelled out in your will.

Here are some guidelines:

**Real estate taxes:** It is the general rule that the life tenant is responsible for paying all property taxes during his or her lifetime.

**Ordinary repairs, upkeep and maintenance:** These are the responsibility of the life tenant; that person lives in the house and is obligated to preserve the property.

**Improvements:** This question comes up often. Ordinarily, a life tenant has no right to make permanent improvements to the home. If they are made without the consent of the remainderman, it is at the expense of the life tenant. However, it is the obligation of the life tenant to make all of the necessary repairs.

**Homeowners' insurance:** Unless specifically spelled out in the will, the life tenant is responsible only for insuring his or her interest, while the remainderman has the obligation to insure the rest. Insurance carriers can assist in resolving this.

**Can a life tenant move out and rent the property?** The law says a life tenant is entitled to both possession and use of the property. Included in this "use" is the right to rent the property to another and to keep the rent money, which would be taxable income.

**Can the life tenant sell the interest?** Yes, but the potential buyer would only get what the seller has -- an interest that ends when the seller dies.

**What are the remainderman's rights?** The general principles give the life tenant the right to peaceful possession without interference from the remainderman. However, if it appears that the life tenant is not properly maintaining the property, the remainderman would have the right to inspect the home and make any necessary repairs. This may require court action.

**Can a life estate be held as tenants by the entirety?** Last year, the D.C. Court of Appeals said yes. A husband and wife owned property and, in 1982, conveyed it to themselves "as tenants by the entirety for the terms of their natural lives, and upon the death of the survivor of them" to person X. When the husband died, the wife in 1992

recorded a deed conveying eight-ninths of the property to herself and one-ninth to her daughter. After the wife died, her personal representative and the daughter sold the property to third parties.

Person X filed suit to evict the third parties. The lower court ruled in favor of the current property owners, holding that since one cannot hold a life estate as tenants by the entirety, the 1982 deed was void. According to that court, when husband died the wife automatically owned the entire house, and the 1992 deed was valid.

The Court of Appeals reversed the decision, making it clear that life estates can be held as tenants by the entirety. So when both husband and wife died, person X became the rightful owner of the property by virtue of the 1982 deed. The court sent the case back to the lower court to resolve other legal issues. (Allen v. Schultheiss, decided Oct. 1, 2009).

A life estate is an important tool for homeowners who are getting on in age. But it can have tax consequences, and it needs careful planning and crafting. Do you want to do this by deed while you are alive, or is it better to create the life estate through your will? Talk with your attorney and tax advisors about all these issues.

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Benny L. Kass is a Washington lawyer. This column is not legal advice and should not be acted upon without obtaining your own legal counsel. For a free copy of the booklet "A Guide to Settlement on Your New Home," send a self-addressed stamped envelope to Benny L. Kass, 1050 17th St. NW, Suite 1100, Washington, D.C. 20036.

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