

Elder Law Report



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*The Elder Law Report is
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Protecting the Family Home From the Costs of Nursing Home Care

For most people, their most important asset — both in value and personal attachment — is their home. For both reasons, they want to protect their home for themselves, their spouses and their children. The Pennsylvania Department of Public Welfare (DPW) rules recognize the special significance of the home since they permit an individual to own a home of any value and still get benefits. (You just have to check off the box on the application for benefits saying that you intend to return home.) However, after the Medicaid recipient dies, the state must attempt to recoup from his or her estate whatever benefits it paid for the recipient's care. This is called "estate recovery." Since the home is the only substantial asset a Medicaid beneficiary is likely to have, it generally is the only property subject to estate recovery. The claim also may only be made against the probate estate of the Medicaid beneficiary. Only property in his or her name alone passes through probate. Property under joint ownership or in trust, for instance, does not pass through probate. Instead, it passes to the surviving joint owner or the trust beneficiary, as the case may be. There are a number of methods of protecting the home from purchasing long-term care insurance to giving the house away. I will outline each option below.

For a Couple In addition, in the case of a married couple, if one receives Medicaid benefits, no claim can be made against the spouse's estate. So, the best plan is generally to put the house in the name of the healthy spouse. This step can be taken even in the case of "crisis" planning. The healthy spouse, however, must also change her estate plan. If she predeceases the nursing home spouse, the house will pass right back to him unless her will says to bypass him or to create a trust for his benefit. But this plan only works if we know which spouse is likely to need nursing home care.

Generally, if we're doing advance planning, we don't know if one or both spouses may require nursing home care. And often we're planning for individuals instead of for couples. So, for advance planning we need to look at other strategies.

Life Estate

For many people, setting up a "life estate" is the most simple and appropriate alternative for protecting the home from estate recovery. A life estate is a form of joint ownership of property between two or

more people. They each have an ownership interest in the property, but for different periods of time. The person holding the life estate possesses the property currently and for the rest of his or her life. The other owner has a future or "remainder" interest in the property. He or she has a current ownership interest but cannot take possession until the end of the life estate, which occurs at the death of the life estate holder. As with a transfer to a trust, the deed into a life estate can trigger a Medicaid ineligibility period.

Example: Jane gives a remainder interest in her house to her children, George and Mary, while retaining a life interest for herself. She carries this out through a simple deed. Thereafter, Jane, the life estate holder, has the right to live in the property or rent it out, collecting the rents for herself. On the other hand, she is responsible for the costs of maintenance and taxes on the property. In addition, the property cannot be sold to a third party without the cooperation of George and Mary, the remainder interest holders. When Jane dies, the house will not go through probate, since at her death the ownership will pass automatically to the holders of the remainder interest, George and Mary. Although the property will not be included in Jane's probate estate, it will be included in her taxable estate. The downside of this is that depending on the size of the estate, the property may be subject to estate taxation. The upside is that this can mean a significant reduction in the tax on capital gains when George and Mary sell the property because they will receive a "step up" in the property's basis. Life estates are created simply by executing a deed conveying the remainder interest to another while retaining a life interest, as Jane did in this example. Once the house passes to George and Mary, the state cannot recover against it for any Medicaid expenses Jane may have incurred.

Irrevocable Trust

Another method of protecting the home from estate recovery is to transfer it to an irrevocable trust. Trusts provide more flexibility than life estates but are somewhat more complicated. Once the house is in the irrevocable trust, it cannot be taken out again. Al-

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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.

though it can be sold, the proceeds must remain in the trust. This can protect more of the value of the house if it is sold. On the other hand, since the entire house is transferred to the trust, rather than a partial ownership, the resulting period of ineligibility for Medicaid is longer — up to five years. For tax reasons, trusts are preferable if the house is sold during the owner's life. With a life estate, on sale a portion of the proceeds passes to the children and they have to pay taxes on any capital gain attributable to their share. If properly drafted, a trust can avoid such taxes since the parent can use his or her right to exclude up to \$250,000 of gain with respect to the entire proceeds of the sale. A problem with the trust is that it's irreversible. If a client puts a house in trust and has a stroke a year later, she may have to pay for nursing home care out-of-pocket for the following four years. In the case of a life estate, there is at most three years of Medicaid ineligibility and the transfer penalty can be reversed if need be by the children returning the entire house to the parent. More and more, we are doing a hybrid of a life estate with the remainder held by an irrevocable trust. While this is still irreversible, the period of ineligibility is shorter because only a portion of the house is being transferred (the other portion being attributable to the parent's retained life estate). And if the house is sold during the parent's life, she can use her entire \$250,000 exclusion. But since it is irreversible, the parent must keep enough money to pay for her care during any resulting ineligibility period.

Outright Transfer

Some attorneys argue that the best plan is simply to give the house to the children outright. They

argue that this is simple and it avoids the possibility to Pennsylvania extending estate recovery beyond the probate estate. In most cases, the children will have to pay more in capital gains once the house is sold, but that is a small price to pay for guaranteed protection of the property. We generally advise against such an approach. The question is guaranteed protection for whom? Sure, an outright transfer might be best for the kids, but it puts the house completely at risk for the parents. That's too great a risk to take.

Do Nothing

It is a legitimate choice to take no steps to protect the house. Any of the steps described above (except purchasing long-term care insurance) involve giving up control and an ownership interest in your home. Any claim against the house will come only after you have died, so we're only talking about protecting an inheritance for your children. Given the possibility of selling your house if you do need nursing home care and transferring half of the proceeds to your children (see accompanying article) only half of the value of the house is at risk in any case. There's nothing wrong with deciding that you'd rather maintain control over your home than give it up, even if that means taking a small risk.

Conclusion

As you can see, there is a wide range of steps you can take with respect to your home, from leaving it in your name to giving it away to your children. Most of our clients choose a life estate or irrevocable trust, or a combination of the two. In any case, we recommend consulting with a qualified elder law attorney to review the pros and cons of each option in greater detail and to determine the best course for you in your situation.

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