

My Home Sweet Home

How to protect your personal residence from Medicaid Recovery

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My home sweet home is my most valuable asset. My home is where my heart is. I do not want to lose my home, home on the range. The question you ask is how do we, the estate planning professionals, prepare a proper plan to protect and transfer what is for most people, the single most valuable asset they possess, their home.

Do you desire to protect your home from the expenses of long term care, to insure to the extent possible that Medicaid will not seek to recover against your home for the costs of long term medical care? Is it your goal to ensure that your family inherits the home upon your death and reduce the tax consequences of transferring the ownership of your home to the greatest extent? If so, you may find it interesting to learn that the traditional conveyance of the home outright during lifetime to family or others poses many problems and may not be the best method of accomplishing your goals of protecting and transferring your home.

The outright transfer of real estate or joint ownership of property creates many issues which are solved with the use of a life estate.

For many people, setting up a "life estate" is the most simple and most appropriate method of protecting their home from recovery for long term care expenses, transferring the property to their heirs and minimizing the tax consequences of making a transfer. A life estate is a special form of ownership of property between two or more people but it is not joint ownership. In most instances, usually the parent retains the right to use, occupy, enjoy and live in the home for their lifetime i.e. the life estate by

transferring what is commonly known as a future interest in the property to another person or persons, usually the children. The children will own an interest in the property when they receive the gift but do not have the right to use, occupy, enjoy and live in the home until a future point in time which is the end of the life of the life estate holder.

As with an outright transfer of the home, as life estate holder you are not able to transfer, sell, mortgage or encumber the property without the consent of the children, and the children may not transfer, sell, mortgage or encumber the property without the consent of the parents. However with a life estate, unlike in an outright conveyance, the right of the parents to stay in the home for their lifetime is protected. You as the parent can not be forced out of the home, evicted or displaced by the children or their actions. The marriage of your children does not affect your ownership interest and right to stay in the home nor do you risk the loss of your ownership interest upon the divorce, liability or bankruptcy of a child. In these instances, your life estate is protected.

Upon your death your home will pass outside probate to your children if you own a life estate or if you have created joint ownership through an outright transfer. By operation of law, upon the death of the parent, the life estate and the remainder interest of the child(ren) merge together and the ownership interest in the home vests in the child(ren) without probate. Similarly, a joint owner takes by operation of law as the survivor. The difference lies in the ability of the children as remainder interest holders in a life

estate to receive a step-up in basis in the home upon the death of the parents (life estate holders). The children could then sell the property tax free. The step up in basis is lost in a joint owner scenario and a capital gains tax would likely be due upon a subsequent sale by the children.

But what does Medicaid say about life estates? In 2004, proposed rules for expanded recovery by Medicaid were repealed and the result was that the Commonwealth through Division of Medical Assistance (which administers the Medicaid program in Massachusetts), may only recover long term care expenses against the probate estate of a recipient of Medicaid. Therefore, a life estate is a favorable method of transferring property that protects the home from long term care expenses because Medicaid can only recover against probatable assets, and as discussed above the life estate is not probatable.

The Medicaid rules do consider a life estate to be a gift and because you may not give away all of your assets and immediately qualify for Medicaid, a disqualification period is assessed for making the gift. However, without going

through all the rules and regulations of Medicaid, the value of the gift will be accounted for in your personal asset protection plan making the life estate still one of the most favored methods of protecting your lifetime use of your property, insulating the property from recovery for long term care expenses, while passing the home to your children and reducing the tax consequences of ownership.

As this article does not address all the issues pertinent to your estate planning, it is strongly recommended that you consult an estate planning professional before making any transfer of property or otherwise attempting to protect your assets.

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