A Legal Update

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Planning to Protect the Family Home

Many elderly people are concerned that they will lose their homes if they ever need nursing home care. Their home often represents their most valuable financial asset obtained through years of savings and hard work. They simply wish to protect the home for themselves and their children. Unfortunately, the high cost of nursing home care has resulted in homes being sold to pay those costs, or being sold after a person passes away to reimburse Medicaid.

There are ways of insuring that the home is protected for the current owners and also for their heirs while obtaining Medicaid benefits to pay the nursing home. Those methods include obtaining insurance to pay for nursing home care, making allowable transfers to family members, and making transfers that result in a temporary disqualification from Medicaid benefits.

Long Term Care Insurance

Long Term Care Insurance (LTC) is the popular name for insurance that will provide nursing home care coverage. LTC policies will also typically provide benefits for home healthcare as well as care in an assisted living facility. In Massachusetts qualified long term care policies will exempt the home from a lien when a Medicaid application is filed, and from estate recovery by the Medicaid program. If the coverage is sufficient it will pay for the cost of nursing home care without the need to sell off assets. LTC Insurance is only carried by a small minority of Americans at this time. The insurance, however, is generally available and is written by many of the wellknown insurers. The premiums vary substantially based upon the age when the insurance is first obtained, and the amount of coverage that is provided.

Transfers that are allowed

The current Medicaid regulations allow certain transfers of the home without any penalty or disqualification. These allowable transfers can be made to a spouse, a blind or disabled child, a child under age 21, a caregiver child or a sibling who has an equity interest in the home. All of these possibilities should be reviewed before considering transfers that will result in some loss of Medicaid eligibility.

Transfers to a spouse are helpful when one spouse is in a nursing home, and transfers their interest to the spouse at home. The spouse remaining at home can then do a further transfer without any loss of Medicaid eligibility for the nursing home spouse.

The caregiver child transfer is helpful in circumstances where an adult child lives in the family home and provides care. In order to be a caregiver child, the child must reside in the home for at least two years prior to the parent's need for nursing home care, and have provided care which kept their parent out of the nursing home.

The other allowable transfers mentioned above are not available as often, but are valid planning options in the right circumstances.

Transfers that result in temporary disqualification

Transfers are available which will protect the home, but will result in temporary disqualification from Medicaid eligibility. Such transfers will allow the home to pass to heirs without probate, but do result in some loss of the owner's control and may have adverse tax consequences.

- Direct Transfers to Children
  Transferring the home to children would provide some protection, but causes adverse capital gains tax consequences and a complete loss of ownership in the home. Such a transfer would also subject the home to claims by the children's creditors or one of their spouses in a marital dispute. It is generally a bad idea to transfer the home to children.

- Deed Reserving a Life Estate
  This transfer allows owners to deed a remainder interest to their heirs. This most often occurs between parents and children but does not require such a relationship. This transfer results in probate avoidance, preservation of the capital gains tax step-up in basis, and lifetime control of the home. The owner's interest continues to be clearly stated in the deed to the property. If the home is sold before death, then there will be a negative capital gains tax consequence. In many circumstances, this is the most advantageous method of protecting the home.

- Trusts
  In order for a trust to effectively protect the home it must be irrevocable. Once the home is conveyed to the trust the owner relinquishes control, although the trust will allow lifetime occupancy. A trust can be drafted to preserve the owner's capital gains tax exemption if the property is sold by the trust during the owner's lifetime.

Revocable trusts do not protect the home when nursing home care is required. The main benefit of a revocable trust is to keep assets conveyed to the trust out of probate.

Conclusion

Protecting your home for yourself and your heirs is possible under the current Medicaid eligibility regulations. It is advisable to consider the alternatives as early as possible, because of the temporary disqualifications that can result from certain transfers. All of the transfer possibilities raise questions of control, tax consequences and creditors issues. No transfer should be made without a careful review of all the alternatives with a competent legal advisor.

As always, the attorneys at Russell, McTernan & McTernan will be happy to answer any questions you may have regarding issues raised in this newsletter or any other legal matter.