

Medi-Cal Estate Recovery: How To Protect Your Home

In our last edition of this newsletter, we introduced you to the concept of Medi-Cal “estate recovery,” that is, an unsecured claim made by Medi-Cal upon the death of a Medi-Cal recipient (and his or her spouse, if any) against the recipient’s estate for recovery of lifetime medical benefits paid to the recipient. Some people call it the “Medi-Cal lien.”

In this edition and upcoming editions, we focus our attention on ways to avoid the “Medi-Cal lien.”

There are several ways in which to protect the home from an estate recovery claim. If the Medi-Cal recipient is married, the solution is simple: give the home away to the well spouse. Remember the amount of an estate claim is the lesser of the following: the amount of Medi-Cal benefits provided or the value of the ill spouse’s estate at the time of death. If the ill spouse transfers all of his or her interest in the home to the well spouse, the ill spouse will have an estate worth zero. If the amount of Medi-Cal benefits provided was \$100,000 and the estate is only worth zero dollars at time of death, the claim will be the lesser of the two figures, or zero.

If the Medi-Cal recipient is not married, the solution is also simple: give the home away to a loved one. The analysis set forth in the preceding paragraph is the same, with one additional procedural twist: the transferee (i.e., the one who receives the property) must sign an affidavit stating that the Medi-Cal recipient can return home whenever he or she wishes and it is medically feasible for him or her to do so. The practical implication of this additional requirement is that the home may not be sold or further encumbered by the new owner(s) so as to defeat the Medi-Cal recipient’s right to return home. If the new owner(s) want to rent the home to total strangers, they are best advised to sign a month-to-month lease agreement rather than an annual lease agreement, just in case the recipient wants to return home and has the medical ability to do so.

So, what can go wrong? It sounds too simple. Well, you’re probably right.

The first problem is mental capacity to sign a deed. That is, the Medi-Cal recipient has to understand and appreciate the legal consequences of his or her act. If a person has advanced stage Alzheimer’s Disease or dementia (i.e., short-term memory loss), it’s too late for that person to sign a deed. They are already deemed by law to be incompetent and without the power to deed their home to anyone.

So, what are the alternatives for an incompetent person?

First, a living trust may provide authority for a successor trustee to make the gift of property. Unfortunately, most don’t unless drafted by a knowledgeable estate planning attorney.

Second, a durable power of attorney may provide authority to an attorney-in-fact (i.e., agent) to make a gift of the property. The power to make a gift of the home must be explicitly stated in the power of attorney and generally should not be limited by the amount of the annual gift tax exclusion (translation: \$11,000 per year per donee) and must authorize gifts to the agent in particular if the principal (i.e., the Medi-Cal recipient) wants the agent to benefit from the gift. Unfortunately, most powers of attorney are simply pre-printed statutory form powers of attorney which do not provide for such gifting and are therefore worthless when it comes to asset protection in a Medi-Cal setting.

Third, a court can authorize a gift from an ill spouse to a well spouse or an unmarried Medi-Cal recipient to a loved one. The process is usually time-consuming and expensive, but, in many cases, the benefits far outweigh the costs. For example, if Medi-Cal pays \$2,500 a month to the nursing home and it costs \$5,000 to hire a qualified attorney to obtain a court order to avoid the Medi-Cal lien, there is immediate payback to the client after just two months of nursing home care. If the lifetime cost of nursing home care is \$90,000 over three years, it makes economic

sense to pay \$5,000 to save \$90,000 in later estate claims. Of course, this type of planning only makes sense if you want to save your loved ones some money.

There are other problems with gifting which also must be considered, including gift and estate tax problems, income tax problems, property tax problems, asset protection problems, and estate planning problems. These, and more, will be considered in upcoming editions of this newsletter.

If you, or someone you know, are receiving Medi-Cal benefits and would like to discuss ways to protect your home from future estate recovery claims, please give us a call. We can help!

Editor's Note: This article is one in a series of articles dedicated to the need for long-term care planning in a comprehensive estate plan and how to pay for nursing home care without going broke. This information is for general informational purposes only and does not constitute legal advice. Please do not rely on the limited information given here. Medicaid is a highly complex area of the law; it varies from state to state and even within a particular state. *Unfortunate and costly mistakes can be made if you do not know what you are doing.* Before taking any steps to protect assets, you are strongly urged to consult with an elder law attorney who is competent in this area of the law so that you will understand all of the ramifications of your actions, including but not limited to property, estate, gift, and income tax; financial and estate planning considerations; and even possible *criminal sanctions*.

If you need help in planning for long-term care as part of a comprehensive estate plan or finding the right nursing home or paying for it without going broke, please give us a call. We can help!

JAMES E. BERGE, JD, CPA, LLM
Certified Specialist – Estate Planning, Trust and Probate Law
California State Bar Board of Legal Specialization
1101 S. Winchester Blvd., Suite I-208
San Jose, CA 95128-3904