

Medi-Cal Estate Recovery: How To Protect Your Home (“Life Estates”)

In the last several editions 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.”

Last week, we told you that an outright gift of your home during your lifetime to your spouse and/or loved ones would avoid the Medi-Cal lien provided your transferee signs an affidavit stating that you can return home whenever you wish and it is medically feasible for you to do so.

But what if you want more of an iron-clad guarantee of your right to return home or remain at home?

Several other possibilities are available: the life estate and the irrevocable house trust.

A “life estate” is a particular way of holding title to property, much like joint tenancy, community property, or tenants in common. A person who has a life estate (the “life tenant”) has the right to use and enjoy the property for his or her lifetime, including the right to occupy the property and to enjoy any rents and profits from the property during his or her lifetime. Upon the death of the life tenant, the property automatically passes to the “remainder” beneficiaries, i.e., those who take absolute ownership of the property. A life estate is usually created on the face of a grant deed to property as follows: “Grantor to Grantee, *for life*, remainder to [someone else]” or “Grantor to Grantee, reserving to Grantor a life estate in the property.” While it is customary and usual for the grantor and the grantee to be total strangers, in a Medi-Cal asset protection context, the grantor and the grantee will be one and the same person, i.e., the Medi-Cal recipient. The someone else will usually be the Medi-Cal recipient’s loved ones.

In the Medi-Cal context, there are two varieties of life estate: revocable life estates and irrevocable life estates. In the former, the grantor reserves the right to name new remainder beneficiaries. In the latter, the grantor gives up forever the right to name new remainder beneficiaries. In both cases, estate recovery is usually avoided, because the value of a life interest in property at the death of the life tenant is presumably zero (after all, who would pay good money for the use and enjoyment of property that could only be had during the life of an individual who had already died?), and estate recovery claims are limited to the lesser of Medi-Cal benefits paid or the value of the Medi-Cal recipient’s interest in property at death (zero).

The only problem with life estates as a method of avoiding estate recovery claims is the language of the Medi-Cal statute which gives the government a right to recover against life estates. There is a theoretical argument that a life estate has value at time of the life tenant’s death based on his or her *actuarial* life expectancy, rather than his or her *actual* life expectancy (i.e., zero). Thus, a person who dies at age 72 may normally be expected to live until age 85, and if value is based on the normal life-span of that person, there may be some residual value in the property which the state can claim against the remainder beneficiaries. Right now, Medi-Cal is not asserting claims against life estates, but that can change at any time based on the explicit language of statute.

Next week, we’ll see how irrevocable living trusts can avoid “estate recovery” claims.

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