

THE BEGLEY LAWYER ALERT

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EXEMPT MEDICAID TRANSFERS

By Thomas D. Begley, Jr., Esquire

As a general rule, when assets are transferred to third parties, the transfer results in a period of Medicaid ineligibility. Some transfers, however, are exempt and do not result in the imposition of a period of ineligibility for Medicaid. It is important to make transfers that are consistent with the estate planning goals of the client. If inconsistent transfers are made, they may result in litigation from beneficiaries of the estate who consider themselves to be treated unfairly.

1. The Family Home

There are four exceptions from the general transfer rules relating to a principal residence. These transfers are exempt.

Community Spouse

The residence can be transferred to the community spouse without penalty. A married couple can simply deed the house to the community spouse. There is no transfer penalty because the transfer is between spouses. In a typical situation, husband and wife own the home as tenants by the entirety. If one spouse enters a nursing home, and the community spouse predeceases that spouse, then by operation of law, title to the home will vest in the institutionalized spouse. The institutionalized spouse would then be required to sell the home and use the proceeds for nursing home care. In states that have a broad definition of

estate for purposes of Medicaid estate recovery, the home should always be transferred to the community spouse to avoid Medicaid estate recovery.

If the property is deeded to the community spouse, and that spouse dies first, the property can be left by the will of the community spouse to a special needs trust for the benefit of the institutionalized spouse or to the children. The elder law attorney must also be aware of the state elective share statute, which prohibits a person from disinheritting a spouse. Medicaid could, conceivably, take the position that failure of the surviving spouse to exercise his rights under the elective share statute constitutes a transfer, subject to the transfer penalty provisions.

Child Under 21, Blind, or Disabled

The home can be transferred to a child of the institutionalized individual who is under the age of 21, or a child of any age who is blind or disabled. For example, a person about to enter a nursing home has a daughter who is blind. The potential Medicaid applicant can transfer the home to the blind daughter as an exempt transfer, and there will be no transfer penalty. In a second marriage situation, the question remains whether the institutionalized individual could transfer ownership of the home to a stepchild who met the criteria of caregiver.

Sibling

The home can be transferred to a brother or sister of the institutionalized individual who already had an equity interest in the home prior to the transfer and who was residing in the home for a period of at least one year immediately before the individual becomes an institutionalized individual. It may not be necessary for the sibling to be named on the deed to the property for a year prior to the transfer. The sibling may have an equity interest if he or she has paid taxes or other expenses and has actually lived in the home for a period of time. For example, a potential Medicaid applicant is not married and lives in his home with his brother. Each owns a portion of the house as tenants in common and they have been living together for more than one year. The potential Medicaid applicant would simply deed the property to the healthy sibling, and there would be no transfer penalty.

Caregiver Child

The home can be transferred to a caregiver child. A caregiver is defined as a son or daughter of the institutionalized individual who is residing in the individual's home for a period of at least two years immediately before the date the individual becomes an institutionalized individual, and who has provided care to such individual that permitted the individual to reside at home rather than in an institution or facility. The care provided by the son or daughter must have been essential to the safety of the individual and consisted of activities such as, but not limited to, supervision of medication, monitoring of nutritional status, and ensuring the safety of the individual.

There may be an issue as to when the transfer of the home to the caregiver child must take place. In a New Jersey case, the Burlington County Board of Social Services contended that a deed transferred 90 days after institutionalization did not qualify, and that such transfers need be made within 30 days of institutionalization. The Administrative Law Judge held and the Director affirmed that there is no time set forth in the regulation as to when the deed must be given. The only reference to time is that the home must be the home in which the individual resided immediately prior to entering the nursing home. Based on this case, it would appear that a deed could be given at any time prior to, or subsequent to, entering a nursing home. For example, a potential Medicaid recipient is about to enter a nursing home. His daughter has lived with him for two years and provided a level of care sufficient to keep him out of a nursing home. The deed to the house can simply be deeded to the daughter. There would be no transfer penalty, because this is an exempt transfer.

Special California Ruling

The California Department of Health Services has ruled that transfer of a home may be an exempt transfer. The letter states that the home is an exempt resource so long as the individual files a written notice of intent to return home. Exempt property can be retained without affecting Medicaid eligibility. Since the transfer is not made for purposes of establishing Medicaid eligibility it is an exempt transfer.

2. Non-Home Assets

The Community Spouse

The transfer penalties do not apply to a transfer of assets to the community spouse. This is also an exempt transfer. The assets forming a part of the Community Spouse Resource Allowance (CSRA) must be transferred to the community spouse within 90 days of Medicaid eligibility; otherwise, they are no longer exempt as part of the CSRA.

For example, a husband is ready to enter a nursing home. The husband transfers all of his assets to his wife. All assets in the names of the husband and wife are also transferred to the wife. This protects the assets as a part of the wife's CSRA. If the wife dies prematurely, her will leaves the assets to a special needs trust for the benefit of the husband, and on the death of the husband to their children.

Exempt Children

Transfers from the institutionalized individual or the community spouse to the institutionalized individual's child, who is blind or permanently and totally disabled, are exempt. Therefore, there is no transfer penalty. For example, a potential Medicaid applicant is single and has \$100,000 of assets. He could transfer the \$100,000 to his blind daughter immediately prior to entering a nursing home. There would be no period of ineligibility due to the transfer.

Taxation

In transferring a home to an exempt child, consideration must be given to the gift tax rules, carry over basis, and the capital gains tax exclusion from the sale of a principal residence.

Announcements

“Begley, Begley & Bookbinder, P.C.” has expanded its representation of our senior citizen client base to advocate them in claims for veterans benefits, particularly those for Aid and Attendance. Over the past month, Thomas D. Begley, Jr., Thomas D. Begley, III, Dana E. Bookbinder and Austin DuBois have been designated as accredited attorneys authorized to undertake this work.

Speakers

If you are interested in having an Elder & Disabilities Law Attorney from Begley, Begley, & Bookbinder speak at an event, please contact Colleen Caruso at (856) 787-4237.

Begley, Begley & Bookbinder

Begley, Begley & Bookbinder, P.C. is an Elder & Disability Law Firm with offices in Moorestown, Stone Harbor and Lawrenceville, New Jersey and Huntingdon Valley, Pennsylvania and can be contacted at 800-533-7227. The firm services southern and central New Jersey and eastern Pennsylvania.

The Firm provides services in connection with protecting assets from nursing home costs, Medicaid applications, Estate Planning and Estate Administration, Special Needs Planning and Guardianships. If you have a legal problem in one of these areas of law, contact Begley, Begley & Bookbinder at 800-533-7227.

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