Saving the Family Home

The purpose of this article is to outline the various methods that elderly clients use to protect the value of their principal residence from the costs associated with long-term health care.

Many clients are under the misimpression that upon entering a nursing facility, the facility will "take their home." It is more accurate to state that if a single client's primary residence is not protected in compliance with a State Medicaid regulation, then the value of the residence is an available asset for determining if that person is "resource" eligible for Medicaid nursing home benefits. If the client is not "resource" eligible for Medicaid benefits, then their own funds, or other insurance benefits must be used to pay the nursing facility. As a practical matter, if the residence represents the client's only asset, it may have to be liquidated. After the sale of the residence all, or a portion (if appropriate planning is in place), of the sale proceeds are then available to pay the nursing facility on a monthly basis, and not in a lump sum as many clients believe.

The threshold question that should be asked before proceeding is why protect the home? Oftentimes, a home is a greater liability to an elderly client than an asset. A residence requires substantial maintenance. Real estate taxes may adversely impact the lifestyle of an elderly person living on a fixed income. The home as a liquid asset has substantial benefits. As a liquid resource, the home, and its income, can be used to offset a person's cost of long-term care or its value can be preserved through advance planning. In the real world however, many, if not most clients will not consider selling their residence and moving to an alternative living arrangement.

The remainder of this article outlines the alternatives available to elderly or infirmed clients who are single or widowed and wish to preserve the use of their residence for their heirs.

Implications of An Outright Gift

The issue of preserving the family residence often starts with the client calling a real estate attorney and asking, "Can I sell my house to my child for a $1.00?" The great body of law indicates that such a sale of the house for a dollar is a gift of the value of the house. Therefore, it is vitally important to meet with the client and discuss the potential implications of the proposed transaction, and the available alternatives, as discussed below.

Many older people have heard of a friend giving real property to a relative in return for a promise of lifelong care, and once the property is transferred the donor is evicted. Even though a lease could offer some limited protection against eviction, the client must be advised as to the voluntary and irrevocable nature of the proposed gift and its legal importance.

If your client has a low tax basis in the residence, which is often the case, then she will be giving her tax basis to the donee. If the donee is not advised about the current

capital gains exclusion applicable to a principal residence, the client's donee may incur substantial capital gains taxes upon the subsequent sale of the property. See, 26 USCA § 121. Finally, the proposed transfer could also result in the imposition of gift taxes. See generally, 26 USCA § 2502 and 26 USCA § 2010.

One potential implication of an outright gift of the residence is the resulting penalty period, which may render your client ineligible for Medicaid benefits (the program that insures financially eligible beneficiaries for nursing home and home care benefits) for a period of time in which the client has inadequate additional resources to pay for her care. Effective February 8, 2006, a person is ineligible for one day of Medicaid benefits for each $218 the value transferred without consideration. The penalty applies when the client applies for Medicaid benefits, is in a nursing facility and has assets less then $2,000.

Planning Alternatives

State Medicaid Only regulations provide specific guidance concerning planning alternatives available to most clients. The planning alternatives addressed below can be lumped into two basics categories: exempt transfers and life estate/remainder deeds. Exempt transfers are explained in detail below.

Exempt Transfers

Many clients' situations already contain the fact pattern needed to fall within an exempt transfer of the principal residence. Moreover, advanced planning could place many clients in the position to make use of the exempt transfers.

Effective June 18, 2001, N.J.A.C.10: 71-4.10 governs transfers for less than adequate consideration. Subsection (d) outlines four transfers of the "principal place of residence" for less than adequate consideration that are potentially exempt from any penalty in determining Medicaid eligibility.

The first exempt transfer, which by definition is inapplicable to a single client, is an intra-spousal transfer. N.J.A.C.10: 71-4.10 (d)(1). Since a residence is an exempt resource in the case of a married couple with one spouse residing in the community, this exemption allows married persons to transfer the residence among them without penalty.

Subsection (d)(2) exempts a transfer to the child of an institutionalized individual who is under the age of 21, or a child of any age, who is blind or totally and permanently disabled.

The brother or sister of a potential Medicaid recipient, who maintained an equity interest in the home prior to transfer and who resided in the home for a period of at least one year before the individual becomes an institutionalized individual, also enjoys potentially exempt status. N.J.A.C.10: 71-4.10 (d)(3).

N.J.A.C.10: 71-4.10 (d)(4) contains one of the most commonly used exempt transfers. This is the "care giver" child exception, which requires several conditions to be met in order to claim exempt status. First, the donee must be the son or daughter of an institutionalized individual. Second, the son or daughter must have resided in the parent's home for period of at least two years immediately before the date of

institutionalization. Finally, the son or daughter must show that he or she provided support that "exceeded normal personal support activities." N.J.A.C.10: 71-4.10 (d)(4).

Generally, a son or daughter's tax returns and official identification provide the objective evidence to prove the residence element of the N.J.A.C.10: 71-4.10 (d) (4). The determination of the level of support provided by the son or daughter is more subjective and is established using medical records, and the affidavits of the caregiver child and a treating physician.

N.J.A.C.10: 71-4.10 (d)(4) outlines facts to consider in determining if the son or daughter has provided the appropriate level of support. The institutionalized parent's "physical or mental condition shall have been such as to require special attention in care." Id. Moreover, N.J.A.C.10: 71-4.10 (d) (4) (i) requires that "the care provided by the son or daughter shall have been essential to the health and safety of the individual and shall have consisted of activities such as, but not limited to, supervision of medication, monitoring of nutritional status, and ensuring the safety of the individual."

Finally, N.J.A.C.10: 71-4.10 (e) permits the transfer of any property, including a principal residence, to a Trust which is "established for the sole benefit of the individual under a 65 years old who was disabled as defined by the Social Security Administration."

Even though an exempt transfer may preserve the residence without a resulting penalty for Medicaid eligibility, other adverse implications still apply. The transfer is not exempt for gift tax purposes. Nor do the capital gains issues change. Sometimes, the client no longer holds an interest in the property.

There are other potentially adverse implications to consider. An intra-sibling transfer could upset the testamentary scheme established by the institutionalized sibling. Since the "caregiver child" exception strictly demands that the principal residence only be transferred to the child providing the care, other children may be denied their share of an inheritance. All these implications need to be discussed with the client prior to engaging in an exempt transfer of the residence.

Conclusion

There are many ways by which elderly and infirmed clients can preserve their primary residence from the devastating costs of long-term care. The Grodberg Law Firm, LLC can utilize the exemptions in the Medicaid regulations, and other tools, to accomplish this goal. However, there are numerous implications to a proposed transfer of a principal residence that must be carefully examined and weighed, so the client can make an informed decision as to the proper action.