The Law Offices of
DOUGLAS E. KOENIG
PLLC

ELDER LAW, ESTATES, VETERAN BENEFITS

6208 FAYETTEVILLE RD, SUITE 104, DURHAM, NORTH CAROLINA 27713
T: (919) 883-2800 F: (919) 590-1590
DOUG@DOUGKOENIGLAW.COM / DOUGKOENIGLAW.COM

DOUGLAS E. KOENIG[1,2]

[1] ADMITTED TO NORTH CAROLINA STATE BAR
[2] ADMITTED TO FEDERAL DISTRICT COURT, MIDDLE DISTRICT OF NORTH CAROLINA

# Protecting a home in Medicaid Planning

Medicaid Planning is an enormously complex opportunity. Many competing interests and limitations affect each decision, and not all options are available for all clients. For those who own a home, the fear ow "estate recovery" drives important decisions. This document suggests some alternatives for those clients owning a home. Be sure to contact your elder law attorney for help!

To protect a house, we usually have to consider the situation in deep detail, and consider the many competing issues. The general issues are 1) qualification for Medicaid and 2) Medicaid estate recovery. If the person needing to consider Medicaid is married, then we also have to consider how the person staying home (the "community spouse" or CS), can afford to do that.

## Qualification

The overriding objective in qualifying for Medicaid is establishing impoverishment. Normally, our target is the spouse needing institutional care (the IS). Impoverishment is necessary because Medicaid is not an option until a) medically necessary and b) financially qualified (below $3,000 in funds, generally, for a couple and $2,000 for a single person). So, sad though it might be, before one spouse can qualify for Medicaid, that spouse has to be very poor and, in some cases, also with limited income. This does not prevent the CS from holding assets or keeping their own income, however.

There are several considerations when it comes to owning a house. First, a house is exempt from counting toward eligibility. Therefore, in many cases, we simply let the house continue to exist in the name of the owner. It is exempt and cannot be recovered against by Medicaid until both spouses pass away. If a community spouse (the CS, the one not in the skilled nursing home) stays at the house (the normal case) and eventually needs to qualify for Medicaid too, then it is still exempt. If the CS needs to sell the home to raise funds to pay for care, then that is an easy option ... that spouse simply sells the home. But, it is important to note that if the home is sold, that sale converts the otherwise exempt asset to cash, which is not exempt. Excess cash can affect the CS once s/he eventually needs care and if the funds were not yet fully spent.

On the other hand, if you decide to protect the house as an entity (to give to the kids, perhaps), and are not planning to sell it, we might consider some other options. An essential concept here is that you can't give the home away without some negative effect on your eligibility. This is because movement of assets to another person (or a trust) is always evaluated for improper transfer prior to approval by Medicaid. As part of the Medicaid evaluation, if the transaction is less than fair market value (FMV) it may be sanctioned. "Sanction" can be thought of as a penalty for trying to hide assets from Medicaid. But, it isn't a forever view … Medicaid can only see a short distance back in time. Medicaid cannot "see" a transaction if it occurred more than five years ago. This is called the "lookback." However, they will find it if it is within the five-year lookback window.

So, for example, if you give away a home worth $250,000, the entire amount will be subject to sanction by Medicaid if that "gift" occurred less than five years before you apply for Medicaid. That will be a very significant sanction! To avoid this, sometimes a fractional deed is used to give away just a smaller part and reduce the negative result. So, for another example, if the applicant gives away 1% using the "1% deed", the amount gifted is now just $2,500. This is a much smaller sanction and easily affordable when the time comes to apply for Medicaid. Alternatively, if the applicant <u>sells</u> the 1% to a son, and he pays a fair price (for a $250,000 home, that price is just $2,500) then it is <u>not</u> a sanctionable transaction because it is for FMV. Therefore, there is no impact for Medicaid eligibility!

If you do not want to give away the home, or even a fractional share, we can put the home into an irrevocable asset protection trust. This is the same as the gift as to Medicaid sanctions if less than five years before application to Medicaid, but offers better control over the assets you put in it. The home is one significant asset, of course, but there are other assets that can be placed into a protection trust.

What if the transaction was more than five years ago? Well, then whether it was a full gift or a 1% deed or any other variation, Medicaid won't see it, and it won't matter. So, if the applicant gives the whole house to the son, it won't be an issue for Medicaid UNLESS you apply before five years.

The general rule is this: Moving assets (by gift, deed, or simply into an irrevocable planning trust) is always evaluated, but, it is also subject to the five year look back. If you move any funds more than five years before needing it, you will have complete protection from Medicaid recovery and could be able to qualify after 5 years.

Now, why do we stress about putting the home or other assets in to a trust?

## Estate Recovery

Estate recovery is the idea that Medicaid can place a legal claim on the funds and estate holdings of the deceased person who was responsible for paying the Medicaid bills (also called Medicaid payback). That means that in North Carolina, a Medicaid lien can be used to force payback using almost any of the deceased person's assets. Note, it is never the responsibility of the CS to payback to Medicaid for the IS while the CS is still living. That means you can't be forced to give up your assets or your home when your husband on Medicaid dies and there is a big bill. In fact, if there is a house, you could sell it or remortgage it following death of your husband … the proceeds stay with you, the CS. Once the CS dies, then the assets are subject to recovery.

So, in this phase of the planning process, our goal is to reduce the countable estate at the last spouse's death. Essentially, we are trying to get assets out of your hands five years prior to your needing Medicaid, and getting those assets into someone else's hands. We like Medicaid, but we don't think our clients should have to pay more than is required by law. This is why we often suggest a **1% deed** for the home in planning ... it converts the home into an asset that is not technically part of your estate because it transfers to the 1% owner immediately on the death of the other owner. There are pitfalls, however, because under some conditions with several 1% owners a joint tenancy with right of survivorship (JTWROS) can convert to a tenancy in common, and that might expose the other owner of the home to estate recovery. A single 1% owner does not present that risk. One caveat, under new proposed rules, North Carolina might adopt expanded recovery, which would probably mean that all "joint" assets of all types would be accessible to Medicaid. So, while this 1% deed works today, it might not in the future.

What if your home has a mortgage? Will the 1% deed or transfer to a trust work? Mortgages are an issue with some 1% transactions because the mortgage converts to a lien at the note holder's death. When you die, in the example above after giving your son a 1% deed, your son would get the home entirely, due to the 1% as JTWROS. So, who would owe the remainder of the mortgage? The estate of the deceased owes the mortgage … and if the home vanishes from the estate by operation of the 1% deed, then the bank can't get their money or their asset. That is the issue for banks, and it is why you get an immediate "no" when you ask a bank to allow you to use a 1% deed.

In some cases, a solution proposed by Suntrust and others recently is to let the son be on the *warranty deed* (meaning that he gets the 1% and eventually the 99% too) but not on the *deed of trust* (DOT) (meaning that the bank cannot go after him for repayment, but they WILL file a lien for the remainder balance and your estate will have to pay it). Usually, a bank won't let him be on the DOT because they have not underwritten his creditworthiness and they want to keep access to your estate, not his. Your 99% share won't go to him until the lien is satisfied. As for Medicaid, however, they can't file a lien until the last person has died, and at that point, the house is not actually in the estate to be filed against.

Another approach to protecting the home is to use a **life estate**. In this case, you give the home to your son and reserve a "life estate" in the home (which means that you live there until you die, then he takes ownership). This is a gift larger than 1% and is based on your age and the home's value. So, it will create a sanction larger than the 1% deed, but less that the full value of the home. In addition, there is no risk to his losing the home to his creditors. But, you have to file a gift tax return in the year you make the life estate gift.

A similar approach is use of a **Ladybird deed**. In this version, the life estate can be recalled and sold along with the home … so you can decide to change your mind and not grant the life estate after all. Some elder law attorneys in North Carolina say that this is not an option in our state, and so, as a general practice, we do not suggest these in normal cases.

The **irrevocable asset protection trust** provides complete protection, after five years, and is an important planning tool because it covers more than just the home ... also any other assets you put in there. The downside to the trust is that the assets have to age for the five years to be fully protected and you lose control over the assets permanently once you move them into the trust.

## Long Term Care Insurance (LTCi)

One option we very much recommend is long term care insurance. Medicaid is a form of LTCi, but what we suggest is a private purchase. There are many forms available and you need to see an agent to find the best choice for you. But, faced with assets that need to be placed, LTCi is a great planning tool. If you decide to purchase a long term care insurance option (LTCi) that reduces the amount of money you will need once you get sick enough to trigger it.

> For example, if you have $500,000 in assets, you might decide to live on $200,000 and put $300,000 into the trust. So, you will have $200,000 for general living expenses, travel, and so on. If you spend $40,000 a year more than social security, your $200,000 will last 5 years. If you are sick before then, you will tap into the LTCi and have funds remaining (because your spending and travel will likely be reduce). If you need skilled nursing, you will be able to access it with the LTCi. When you run out of money you will simply transition to Medicaid.

## Summary

In general, we are talking about "planning". In this situation we have to decide how much you can stand to "give away" to a trust. If you have enough to live for five years, and if you WANT to qualify for Medicaid earlier rather than later, a trust can be a great tool. But, the key is whether and when you want to qualify ... most of our clients will protect some of their wealth, and live on the rest.

Some people want to have care givers and never want Medicaid. In that case, planning to protect funds is pointless because you will spend them, and be happy doing it. We can always protect about half of what is left just before you need Medicaid ... and I mean as late as the day or week before ... once you are in a rehab facility after a serious event.

The bigger fear is that you will not need LTCi or Medicaid for 10 years. Then what? You have put your money into a trust that you cannot touch and your spending runs you short on cash after just five years. We have ways to help with that in the design of the trust, but this is the deciding issue for most people ... do you want to pick an amount to leave to the kids, or do you want to spend it on yourself as you age, or need care?

## So, what to do with the house?

As we have discussed, there are many options.

- Leave it as it is, subject to estate recovery (if you ever need Medicaid)
- Sell 1% to your child (which complicates the deed a little and also means he has to be involved in a future sale because he is a co-owner) or give it to him and just accept the sanction if you need Medicaid before five years. It also means that it is an asset that his creditors might try to execute on, especially in the case of his bankruptcy.
- Transfer the home to a revocable trust along with other assets (still an asset for Medicaid and still subject to recovery, but not an issue for the banks)
- Transfer the home to an irrevocable trust (protects it fully after the five years but it makes access to the value very difficult)
- Transfer a life estate to your child
- Execute a ladybird deed, which retains the right to sell the entirety of the home, even though you gave the life estate to your child. It is not clear if NC allows this ... we have a split opinion in the attorney group that discusses such things, so our Practice never suggests this option

This paper tries to shed light on some of the options for planning with a home (and some ancillary issues too). Your next step is a big decision. Come talk it over with us!

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Enclosure