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Estate lawyer Gwynne Waitrowski Guzzeau brings some legal ease to the ever-changing laws that are now going into effect.

Look Before You Leap: Long-Term Care Planning Strategies for Your Home

by Gwynne Wiatrowski Guzzeau

I often sit at the round conference table in my office with a client and their adult children who want to know what they can do to protect the client's assets – especially the home on the Cape – in the event the client needs 24/7 nursing home care.

The answer is not as clear-cut as most people anticipate.

There are a lot of moving parts to long-term care planning that often require you to contort your finances in ways you otherwise wouldn't. Therefore, it's imperative to have a clear understanding of the options and what best fits your needs.

First, you need to know some basics about what Medicaid requires in order to become eligible for benefits that cover nursing home care. Second, you need to know what planning options are available. Third, you need to decide what personal values will guide your decision-making process. Finally, you need to consider the pros and cons of available options and make a decision about what planning strategy, if any, you'll pursue.

This column provides general information about what to consider when trying to preserve your residence in the face of long-term care costs. In particular, I'll focus on the use of a life estate as a planning strategy. In next month's column, I'll review basic points of how an irrevocable trust can be used to preserve your home.

Probate Assets

Before selecting a long-term care planning strategy, it's important to understand what is considered a probate asset in Massachusetts.

Any asset a person owns in their own name at the time of death is considered part of the probate estate. A Last Will directs the distribution of probate assets and the Probate Court is either formally or informally involved (see my last column, Scared of Probate No More, for more on the new probate laws.)

Assets that name a beneficiary who will receive the asset (or a share of the asset) upon your death (e.g., an IRA, 401K, or life insurance policy) are not probate assets. Any asset that is owned jointly by you and another person is not part of your probate estate. Instead, these assets pass directly to the joint owner upon your death.

In addition, any assets owned by a trust you create and fund during your life are not part of your probate estate but are distributed in accordance with the terms of the trust document.

MassHealth

Medicaid is a federal and state funded welfare program that is administered at the state level in accordance with each particular state's Medicaid regulations. MassHealth is the Massachusetts Medicaid program that covers long-term care costs in a nursing home. As you probably know, the cost of nursing home care can run as high as $10,000 per month.

> In order to qualify to receive Medicaid payment of long-term nursing home costs, an individual must have no more than $2,000 in countable assets. Your home is not considered a countable asset, as long as equity in the house doesn't exceed $750,000.
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> Assuming all other requirements are met, an individual can own up to $2,000 and a house worth no more than $750K and that person can most likely qualify for Medicaid to cover nursing home costs.
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> Once you qualify for MassHealth, the state places a lien on your house. This means that the state is seeking reimbursement only for the monies it pays to the nursing home for your care.
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> If your house is sold during your lifetime, then the lien is paid off at the closing for the amount of funds contributed by MassHealth up until the date of sale. Typically, once an unmarried individual becomes eligible for long-term care coverage

under MassHealth, the home must be listed for sale.

For married couples, where the spouse is living in the home, a lien is placed on the home only if the nursing home resident still owns legal title to the property.

If the house was not sold during your lifetime, then upon your death, the state can get reimbursed only from your probate estate for the cost of the services paid for your care. Any remaining probate assets go to your heirs or named beneficiaries.

Transfer of Assets

Transfers, such as gifts to children (regardless of the amount), incur a penalty period of Medicaid ineligibility depending on the size of the transfer. For example, for every $8,200 transferred in the past 5 years (to someone other than a spouse), a one-month penalty period is incurred.

Life Estate

By executing a new deed you can create a "life estate" in your real property that gives you control of the property during your lifetime, but upon your death it passes to the "remainder" beneficiaries who are named in the deed.

Pros: The main benefit of a life estate is that you retain control of the property during your lifetime. Upon your death, the property is not included in your probate estate because it passes directly to the remainder beneficiaries, such as your children. Therefore, under current regulations, even though MassHealth would have a lien on your house, MassHealth cannot collect against the lien on the house because the house is not in your probate estate.

Cons: Please note that the creation of a life estate is considered a partial transfer of your real estate; therefore, you will incur one month of ineligibility for every $8,200 in value that you transfer to the remainder beneficiaries. The formula used to determine the value transferred is based on your life expectancy and the assessed value of the home.

A note of caution: If the MassHealth regulations were expanded to allow recovery of liens from assets outside of the probate estate, then there is a possibility that the lien would need to be satisfied based on the equity in your home during your lifetime. While Massachusetts did try expanded estate recovery approximately ten years ago, it was successfully challenged and is no longer permitted. However, be aware that Massachusetts has taken this action in the past, as you consider the pros and cons of a life estate deed strategy to protect your house.

The cost of this planning strategy includes the time for consultations, the charge for drafting a deed, and recording costs.

Summary

The life estate is a simple planning tool to protect both your interest in keeping control for your lifetime, as well as protecting the house in the event that a lien is placed on the property. This strategy is effective, as long as MassHealth can only recover its liens from a person's probate estate.

Finally, while this strategy triggers an ineligibility, the life estate approach would incur a shorter ineligibility period because you are deemed to have retained some value in your life estate, thereby making only a partial transfer of your home's value to the remainder parties.

By using a life estate deed to protect your home, the intention is to protect the house from the collection on the MassHealth lien. In contrast, an irrevocable trust protects the house from the lien ever being placed on the property. In the next issue, my column will review some the pros and cons to using an irrevocable trust as a Medicaid Planning strategy.

The information in this column is offered as general information and it is not intended as legal advice. For complex planning matters related to long-term care and nursing home costs an experienced elder law attorney should be consulted. You can find elder law attorneys in your area at www.naela.org (National Academy of Elder.

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If you have questions for Gwynne please email the Editor at CapeWomenOnline.

You can also visit Gwynne's website at www.gwglaw.com