FINANCING LONG TERM CARE: PROTECTING THE HOME

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FINANCING LONG TERM CARE: PROTECTING THE HOME

The reason people generally talk about giving away their homes (or adding names to the deed) is to try to protect the home in the event that nursing home care is needed. If a person were to make that gift, it is important to determine whether there is any source of payment for that care beyond the equity in the home. Nursing home care generally costs between $90,000 and $110,000 per year in Massachusetts. There are three major sources of payment for long term care, including nursing homes: (1) private funds; (2) long term care insurance; and (3) MassHealth (also known as Medicaid). In rare cases the Veteran's Administration also pays for the cost of long term care. The Medicare program pays for very little long term care.

MassHealth provides public financing for long term nursing home care in Massachusetts. MassHealth currently provides no financing for assisted living for the vast majority of people and limited benefits for persons seeking services in the home. If a person qualifies for MassHealth for nursing home care, it pays for the full cost of care over and above the patient's monthly contribution (at least $60.00 less than the patient's monthly gross income) and, for that reason, it is a very desirable benefit.

The following rules are important to know if MassHealth eligibility for nursing home care in Massachusetts is a possible goal. They are the rules on which the advice in this letter will be based. However, please understand that the MASSHEALTH RULES CHANGE FREQUENTLY so you should not assume that the advice given in this letter will be appropriate indefinitely.

MassHealth Rule 1. A person can own a car, clothing, jewelry, household furnishings, term life insurance of any amount, whole life insurance with a face value of $1,500 or less, and $2,000 in other assets, including bank accounts, and still be eligible for MassHealth.

A person can also own a Massachusetts home used as a principal place of residence (provided the value is less than $750,000) as long as (1) the individual intends to return home, (2) the individual has long term care insurance that meets state requirements, or (3) one of the following individuals resides in the home:

(1) a spouse[1];

[1] There is no ceiling on equity if this condition is met.

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(2) a child who is under age 21 or blind or disabled[2];

(3) a sibling who has an equity interest in the home and who resided in the home for a period of at least one year prior to the sibling's institutional placement;

(4) a child who resided in the home for a period of at least two years prior to the parent's institutionalization and who provided care to the parent which permitted the parent to reside at home rather than in an institution;

(5) a dependent relative; or

(6) a joint owner who will lose housing if the home is sold.

These rules exempting the home do not apply, however, to real estate held in a revocable trust. In order for the home to be excluded, it must be removed from the trust.

A home owned by a MassHealth recipient is also potentially subject to a lien and estate recovery. See the final MassHealth rule below.

The assets that MassHealth disregards are called **non-countable** assets. All of the rest are called **countable** assets.

MassHealth Rule 2. A MassHealth applicant may set aside funds for burial which will not interfere with MassHealth eligibility. This can be done by depositing $1,500 into a bank account marked "for burial purposes" and also by (1) entering into a prepaid irrevocable funeral contract for any amount or (2) setting up an irrevocable burial trust for any amount.

MassHealth Rule 3. The Office of Medicaid which administers MassHealth presumes that a jointly held bank account is totally available to the MassHealth applicant. This presumption can be rebutted by proving the original source of the deposits to the account.

MassHealth Rule 4. The Office of Medicaid presumes the MassHealth applicant owns an equal share of non-bank investments such as jointly owned securities (including money market accounts owned in shares). Thus, the MassHealth applicant is presumed to own half of jointly owned stock if there are two names on the certificate, one-third of jointly owned stock which is held in three names, etc.

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[2] There is no ceiling on equity if this condition is met.

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MassHealth Rule 5. If a person gives away assets in order to qualify for MassHealth within 60 months of the date of application (the *look back* period), that transfer will automatically disqualify the person from receipt of MassHealth for five years or until the asset has been returned and spent down in accordance with the MassHealth rules except that **no disqualification** is caused by transfers to:

(1) a spouse or another for the sole benefit of the spouse;

(2) a disabled child or a trust established solely for the benefit of a disabled child which meets certain requirements; or

(3) a trust established solely for the benefit of a disabled individual under 65 years of age that meets certain requirements.

MassHealth Rule 6. A person will similarly be disqualified from receipt of MassHealth if he has given away his principal place of residence unless it is transferred to:

(1) a spouse;

(2) a child who is under age 21 or blind or disabled;

(3) a sibling who has an equity interest in the home and who resided in the home for a period of at least one year prior to the sibling's institutional placement; or

(4) a child who resided in the home for a period of at least two years prior to the parent's institutionalization and who provided care to the parent which permitted the parent to reside at home rather than in an institution.

If a house which has been the individual’s principal place of residence has been returned, the penalty period will be eliminated. If the person is otherwise eligible for MassHealth, there should be no barrier to eligibility.

MassHealth Rule 7. The Office of Medicaid may be able to place a pre-death lien on any real estate in which an institutionalized MassHealth recipient has an ownership interest, depending on who continues to reside in the property and on whether the MassHealth recipient is expected to return home. The Commonwealth can insist on pre-death MassHealth reimbursement if property on which a lien has been placed is sold prior to the recipient's death. It is important to note that the debt to MassHealth accrues at the rate at which MassHealth pays

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for care, which is closer to $6,000 per month than the private pay rate of $8,500. In addition, if any person who has received MassHealth for institutional care, or any person over age 55 who received medical assistance for any reason, dies leaving a probate estate, the Office of Medicaid can make a claim against the probate estate for reimbursement for all medical expenses paid.

TAXATION OF CAPITAL GAIN UPON THE SALE OF A HOME

A gift of a home may result in the eventual payment of a capital gain tax when the house is sold that would have been avoided if the homeowner had sold the home or if it had been sold by the family after death. To understand this starts with an explanation of the tax basis in a home. The basis of a home starts with the home's purchase price - the price that an individual paid for the home. It can be increased by the value of capital improvements and is adjusted at the death of a homeowner. When a home is sold the difference between the selling price and the basis is the capital gain The lower the basis, the greater the capital gain.

Tax Rule 1. Every homeowner who sells a principal place of residence can exempt up to $250,000 of capital gain from tax as long as he has lived in the house for at least two of the five years prior to the sale. The exemption may be up to $500,000 for a married couple where at least one member of the couple meets the ownership and residency requirements. There are some exceptions to the rule for special cases such as moving to a nursing home.

Tax Rule 2. If a person (the **donee**) receives property as a gift from another (the **donor**), the donee's tax basis in the property is the same as the donor's tax basis. Because the basis "carries over" from the donor to the donee, this is called the **carry-over** basis.

Tax Rule 3. If a person receives property as an **heir** of a decedent, the heir's tax basis in the property is the value on the date of death. Because the value on the date of death is usually higher than the decedent's tax basis (e.g., his original purchase price plus capital improvements), this is often referred to as a **stepped-up basis**.

IMPLICATIONS OF CHANGING OWNERSHIP OF THE PRINCIPAL RESIDENCE

Capital Gain Tax Implications

It is important in designing a plan to consider how to retain the tax benefits outlined above in the section entitled **TAXATION OF CAPITAL GAIN UPON THE SALE OF A HOME,** i.e.,

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- how to give away the property in a way that if it is sold during the donor's lifetime, the capital gain is reported on the donor's tax return and the homeowner capital gain tax exemption applied thereto, and

- how to insure that at the death of the homeowner, if the property has not been previously sold, the property will get a stepped up basis.

MassHealth Implications

From the perspective of MassHealth, a transfer of any interest in real estate can be considered a disqualifying transfer of an asset and can cause the imposition of a five year disqualification penalty. Thus, if a person transfers title to the home it is essential to have a plan to address the possibility that nursing home care will be needed but the individual will not be able to qualify for MassHealth to pay therefor for five years from the date of the deed.

Homeowner's Security

A homeowner generally wants to be sure that, as long as he is alive, he cannot lose the property. Obviously, if the homeowner has full ownership, the homeowner can lose the property only in extraordinary circumstances having to do with the homeowner's credit or financial status. Anything less than full ownership will decrease the homeowner's security.

Estate Planning Goals

If a homeowner changes title to the home, the homeowner must consider how that change effects the homeowner's overall estate plan.

GIFT TO AN IRREVOCABLE TRUST

If a property owner (the grantor) conveys property to a correctly drafted trust, the trust can assure that the property will receive a "stepped-up basis" at the date of the grantor's death, assuming it is still owned by the trust at that time. If the property is sold during the lifetime of the grantor of the trust, generally the first $250,000 of gain ($500,000 for a couple) will be exempt from tax. Thus, from a tax perspective, a trust can preserve the homeowner tax benefits outlined above. This addresses the *capital gain tax issue*.

In order for a trust to protect a person's assets from having to be used to pay for the cost of nursing home care, the trust must meet the following requirements:

(1) It must be **irrevocable**, meaning that once assets are transferred to the trust, the transferor can never take them back; and

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(2) The trustee cannot have authority to transfer any of the original trust investments back to the grantor of the trust.

If a person transfers assets into a trust within sixty (60) months of applying for MassHealth financing of nursing home care, that transfer will automatically disqualify the person from receiving any help paying for the transferor's nursing home care (unless the trust is for the benefit of a disabled or blind child or a disabled person under 65 years of age). Thereafter, so long as the law does not change, the trust should not interfere with the MassHealth eligibility of the grantor.

The trust can give the trustee the authority to make a distribution of the home from the trust to the beneficiaries of the trust (presumably the children) who could then give the property back to the grantor to eliminate the penalty. However, there is no way to compel the trustee to do that nor any way to compel the beneficiaries to do so either. Further, if the property is given back, even though it would solve the MassHealth problem, the property would then be potentially exposed to estate recovery at the death of the MassHealth recipient. There are, thus, some obvious risks relative to MassHealth but also some obvious benefits if the grantor does not need MassHealth for five years after the gift.

The grantor can be given, in the trust, the right to use and occupy the premises. In the alternative the grantor can retain the life estate and convey the remainder interest to the trust. In either case, the Commonwealth cannot force reimbursement from the trust fund at the Grantor's death although there is always a possibility the law could change. This is the best one can do relative to *homeowner security*.

As far as preserving the grantor's *estate planning goals*, a trust is a good vehicle to accomplish that.

THE MASSHEALTH APPLICATION

Should the transferor ever require long term care and apply for MassHealth, the Office of Medicaid will review the application and the title to all of the applicant's assets. If the applicant has conveyed property to a trust, the applicant has the right to examine the deed and the trust documents and to apply the law that is in existence at that time, not at the time the documents were signed. For that reason, because we do not have a crystal ball, no estate planner can guarantee that the plans that they develop will be effective in the future.

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