<u>WILLMS, S.C.</u>

MEMORANDUM

TO: Clients and friends of Willms, S.C.

FROM: Jessica A. Liebau

DATE: April 11, 2016

RE: Protecting a Personal Residence from Medicaid

<u>Introduction</u>
As an elder law attorney, perhaps the most frequently asked questions I am asked is, "If I need nursing home care, will they take my house?" The second most frequently asked is, "How do I protect my house?" This article discusses these questions.

<u>Who Are "They?"</u>
Who are we worried about when we talk about someone "taking the house"? It is essential to understand that being disabled or needing long-term care does not automatically mean your house is in jeopardy. The following conditions must first be satisfied:

1. You must have a disability that requires long-term care or support services; AND

2. You must seek assistance from the government in paying for that care, AND

3. The program that you seek assistance from must be "means tested.

Many people receive bad advice by not considering these questions. Receiving benefits for a disability does <u>not</u> automatically mean your home is at risk. Assets like a house have no bearing on your ability to receive disability-related benefits such as Social Security Disability Insurance because eligibility is not based on asset and income levels. Eligibility for this program is instead based on earnings record, similar to Social Security Retirement benefits. For these program recipients, generally no special planning is required in relation to the home.

Conversely, Supplemental Security Income (which provides an income stream for disabled individuals who cannot work) and Medicaid (which pays for long-term care for elderly and/or disabled individuals), <u>do</u> require that the recipient meet certain asset and income requirements. In other words, these are "means-tested" programs. It is only for the programs that fit into this latter category that assets are measured, and accordingly, special planning may be required to protect the house.

Overview of Medicaid Eligibility and Home Ownership

Medicaid is one common type of means-tested program.[1] That means that if an individual needs long-term care services and cannot afford those services himself or herself, Medicaid is the government program that can help pay for those long-term care services in a nursing home, assisted living, facility, or a private residence, if the individual meets certain financial requirements. This is the program people apply for in old age when they cannot afford their nursing home bills.

The financial requirements for qualifying for Medicaid are complicated, and vary depending on an individual's particular circumstances, but the basics are as follows. Medicaid requires that an unmarried individual own no more than $2,000.00 in countable assets. A married individual has the same limit, but his or her spouse will be permitted to keep somewhere between $50,000 and $119,200 in countable assets.[2] "Countable assets" include cash, bank accounts, investment accounts, retirement funds, most life insurance policies, and virtually any other asset that can be liquidated to pay for long-term care.

Certain assets are not counted toward the $2,000 limit, and these are "exempt" assets. The most valuable exempt asset owned by a Medicaid applicant is generally their house. A personal residence is not counted as long as the individual either lives in the house or expresses a subjective intent to return home. The house is also exempt if the individual's spouse, minor child, or disabled child resides there. In any of these circumstances, Medicaid will not make the applicant sell their house in order to qualify for benefits. Therefore, any special planning to protect a house from Medicaid is generally not done for purposes of initial Medicaid eligiblity. However, as the next section explains, this is not the only consideration where Medicaid is involved.

Overview of Estate Recovery and Home Ownership

Initial Medicaid eligibility is only one part of the equation. Medicaid allows individuals to keep their house when they apply for benefits, and even while they receive Medicaid benefits over time. However, that exception does not protect the house forever.

When an individual who receives Medicaid dies, the State of Wisconsin seeks to recover the funds it spent on the individual by looking for any assets the individual might still own at

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[1] Medicaid goes by many names, including but not limited to: Medicaid, Medical Assistance, Title 19, Family Care, IRIS, and waiver programs, which leads to much confusion.

[2] As of the date of this article. This maximum amount of assets a "community spouse" is allowed to retain is based on a calculation of assets at the time of the first date of institutionalization, and is adjusted periodically by the government. A community spouse is a spouse who is not residing in an institution. If both spouses reside in institutions, the asset limit for both of them is a combined $3,000.00.

death. This includes real estate, even though it was exempt during lifetime. If there is not a surviving spouse or child who is disabled or under the age of 18 living in the house, Medicaid can take that house as payment. This happens in two main ways. First, Medicaid may impose a lien on the house during the Medicaid recipient's lifetime if the house was not occupied by the individual, their spouse, or a disabled child. Second, even if a lien was not imposed during lifetime, Medicaid can file a claim against any interest owned by the individual at their death (or at the death of their spouse, if their spouse survives them.)

This is the situation where Medicaid may "take the house." Under the current rules, executing a Transfer on Death designation or "life estate deed", or funding a revocable trust, will not prevent estate recovery from seeking reimbursement from a Medicaid recipient's home after his or her death.[3] The house that was paid for in cash 50 years ago, or the farm that passed down through three generations, may essentially become the ownership of the State of Wisconsin because long-term care costs were too much to handle without assistance from Medicaid. This is the situation for which planning is necessary.

Planning Options

For clients who are concerned about their ability to pay for long-term care, and protecting their personal residence from Medicaid is the goal, several options may be considered.

- **Sell the Residence**. For some clients, it is important that the particular property pass to their children. In this option, the children of the potential long-term care recipient are able to afford to purchase the residence for fair market value. Because the individual no longer owns the property after the sale, it is protected from Medicaid. If this option is pursued, it is important that the purchasers pay for the property outright or secure outside financing, because there are very stringent rules and penalties related to a Medicaid applicant making a loan to a family member.

- **Gift the Residence Outright**. If an individual no longer owns a house, it is not counted as an asset and is not subject to estate recovery, so a house could also be gifted to the individual's children. However, Medicaid does impose severe penalties on applicants who make gifts within 60 months (5 years) of applying for benefits. Additionally, gifting a residence outright to children has its own risks, even if done more than 5 years before a Medicaid application is filed. Not only does the recipient lose the step up in income tax basis that would occur at the death of the current owner if held until their death, but the real estate could be vulnerable to the creditors of the recipient child, or subject to division in divorce.

[3] There are exceptions in some circumstances for certain types of real estate-related planning completed prior to August 1, 2014. These largely relate to the treatment of life estates and the treatment of non-probate transfers. The assistance of an attorney is recommended before relying on (or reversing) pre-2014 Medicaid planning.

Additionally, if the individual or their spouse wished to continue living in the house during their lifetimes, nothing prevents the children from selling the residence out from under them. The children are also responsible for all expenses related to the property. For these reasons, gifting the property outright to children is not one of the more popular strategies.

- **Gift a Remainder Interest in the Residence**. This used to be a very popular strategy. An owner of real estate retains the right to life in the residence and use the residence during their lifetime, but gifts the "remainder interest" in the real estate to their children. This prevents the children from selling the residence without the consent of their parents, and preserves the step-up in basis for income tax purposes at death. Because the owner only owns the life estate after the gift and not the entire property, he or she cannot sell the property without the consent of the individuals owning the remainder interest. This makes the entire property unavailable, and according to pre August-2014 rules, not subject to estate recovery.

  However, by laws effective August 1, 2014, gifting a remainder interest now only protects a portion of the value of real estate at a Medicaid recipient's death. The value of the life estate (as valued by Medicaid's own life estate tables), is still subject to estate recovery.[4] Therefore, gifting a remainder interest in real estate can protect perhaps a majority of the value of a home, but the remainder interest owner will be required to pay back an amount to estate recovery at the Medicaid recipient's death that is equal to the value of the life estate on the day before the Medicaid recipient's death. This often means the house itself will be sold to satisfy that estate recovery claim, but only a portion of the proceeds are payable back to Medicaid.

- **Gift the Residence to an Irrevocable Trust**. With this option, the owners of real estate gift their real estate to an irrevocable trust in which they have no right to receive income or principal. For Medicaid purposes, the gift is completed. For IRS purposes, the grantors of the trust may retain certain powers to preserve a step-up in basis upon death. The grantor's children are then the beneficiaries of the trust. Because the real estate is gifted to a trust versus gifted outright, the creditors or ex-spouse of the children are not able to attach the property. The grantors of the trust can then enter into a lease with the trust in order to continue living in the residence and paying for expenses.

  This option has drawbacks as well. The grantor of the trust must ensure that the gift is made at least 5 years before applying for Medicaid, just the same as any other strategy involving gifting. This means either not needing long-term care for at least 5

[4] Life estates created prior to August 1, 2014 are grandfathered under the prior laws.

years, or retaining enough assets other than the real estate to pay for care for 5 years. However, completed properly, this can be an effective strategy to protect a home from Medicaid claims.

Conclusion

Medicaid planning is a complicated endeavor, and the rules change frequently. Sometimes, it simply is not feasible or practical to protect the value of a home when Medicaid is imminent. However, in many circumstances it is possible to effectively protect the home from Medicaid claims and pass this valuable asset on to the next generation. If this is a topic in which you are interested, we would be happy to discuss your options with you based on your particular situation.

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