

## Medicaid Nursing Home Planning and Your Family Home

9-26-13 by James M. Kane, Attorney

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The purpose of this email alert is to suggest a way of helping save the family home from the possible ravages of expensive nursing home care by excluding the residence when obtaining Medicaid nursing home financial assistance.

Realistically, this planning is for clients with combined assets in the under-\$5 million range who hope at least to salvage their family home if nursing home care is later required for either or both spouses.

By contrast, higher net-worth clients may in many instances be able to self-insure and pay for their nursing home care without seeking Medicaid financial assistance for such care.

In any event, whether to move forward with Medicaid planning (or any other planning) is a personal decision and depends on what factors ring true and motivate one to action.

My personal litmus test for determining whether I will put into place any preventive planning is how it will affect my kids. Or, maybe better expressed, how will my failure to plan affect my kids. I certainly consider my wife in this equation, but the real test focuses on my kids – especially

when both my wife and I will no longer be around to care for them or assist with these matters.

On the other hand, I am not interested in jumping at every planning opportunity merely out of fear. As a relevant aside, I always have liked a quote attributed to the poet W.B. Yeats, who reflected: “When I think of all the books I have read, wise words heard, anxieties given to parents. . . of hopes I have had, all life weighed in balance of my own life seems to me a preparation for something that never happens.”

Planning also, in my view, should be primarily a financial consideration. Namely, will the planning be worthwhile in terms of saving me and my family from what otherwise in the future can be a waste of valuable time and money?

As to this family home Medicaid planning, here is a short summary. A universal old-age expense many of us fear is nursing home care. The average cost in Georgia is presently \$5,000 per month. For many families this ongoing expense will ultimately erode the family’s entire net worth.

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More specifically, as an example, if I were to enter a nursing home (due to a head injury, old-age dementia, etc.), my wife will have to use our family assets to pay for my nursing home care.

When my assets drop virtually to zero and my wife's own assets drop to around \$115,920 (her Medicaid community spouse maximum for 2013), my wife can apply for payment of my nursing home care using need-based Medicaid assistance.

Our family home -- regardless of its value -- is not taken into account as long as my wife continues to live in the house.

But, assume in this example I die and thereafter my wife later has to enter a nursing home. My wife will not qualify for Medicaid assistance until she spends down the above \$115,920 and our house is sold with its proceeds used also to pay for my wife's nursing home care.

Only after the spend-down of both the \$115,920 and the house sale proceeds can my wife qualify for Medicaid assistance for her nursing home care.

The key point in this example is that we lose our house due to its sale and use of the house-sale proceeds to pay my wife's nursing home care until she is virtually destitute and thereafter can apply for need-based Medicaid nursing home assistance.

Here is a Medicaid planning idea that can help save a family home.

- Each spouse's Will needs to include a testamentary special needs trust (SNT) for holding the first-to-die spouse's interest in the personal residence.

- This trust will be designed as a third-party funded SNT with all the bells and whistles that satisfy the Medicaid rules, Social Security Administration POMS rules (the "Program Operations Manual System"), etc.
- As defined in the Will, the above SNT can kick in only, for example, if the surviving spouse is age 75 or older when the first spouse dies [or whatever target age for the particular situation] or if at that time the surviving spouse is already residing in an assisted care facility or a nursing home.
- Depending on the ages and net worth of the married couple, this Will provision can also include a requirement that at the first spouse's death the existing mortgage be paid off for the residence to the extent the first-to-die spouse has any other assets passing under the Will at her death.
- This pay-off will help increase the Medicaid protected equity value of the residence in the SNT.
- The surviving spouse will have an expressly stated right to live in the house rent-free for her lifetime, etc.
- One trade-off with this family home planning is the surviving spouse cannot be trustee of this SNT.
- If the surviving spouse ends up having to move out of the house for nursing home care, the house can be sold with the proceeds continuing to be held in this SNT and not countable for determining Medicaid eligibility.
- Also as part of the above planning, if one of the married spouses becomes ill and appears most likely to be the first-to-die, the well spouse can transfer his or her interest in the residence to the ill spouse so that when the ill spouse dies first, the entire interest in the house goes into the

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SNT for the benefit of the surviving spouse, etc.

This planning deals only with the family home and is not a cure for all possible nursing home outcomes for a married couple (with or without children). In short it is effective to help save the family home if the surviving spouse ends up in nursing home care, subject to the conditions specified in the Will (such as the above age 75 triggering threshold).

### The Punitive 5-Year Medicaid Rule

The punitive Medicaid 5-year look back rule requires more complex planning if additional assets (other than the family home) are to be excluded for Medicaid purposes.

Essentially, the 5-year rule mandates that any transfers or gifts of property during the 5-years prior to applying for Medicaid nursing home assistance (except generally transfers to a SNT) will result in a failure to qualify for this assistance.

The alternative gold standard for Medicaid planning in view of this 5-year rule is for a married couple to transfer ownership of the residence and other available assets to a trust (e.g., an inter-vivos QTIP trust is an excellent option) or other entity, possibly an LLC, 5-years before possible Medicaid nursing home care is needed.

The target goal here for this more complex 5-year Medicaid planning is that transfers of property that occur prior to the 5-year look-back period are not considered countable assets in determining need-based Medicaid.

The above 5-year option (especially the inter-vivos QTIP) is ideal for Medicaid planning in certain situations.

By contrast, the family home planning discussed in this email alert is more easily and potentially attractive to a broader range of families. It operates essentially analogous to an additional rider to an insurance policy. A safety net.

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