

Protecting the Family Home

Kemp Scales, CELA*

“Mom’s going into a nursing home and she wants to transfer her house to me. For a dollar. Can you help?” So began my elder law practice.

Protecting the home is one of the greatest concerns my clients have when facing long-term care. Not only is the home often the asset with the greatest financial value, but it carries with it great personal significance as well. Many of my clients have lived in the same home for decades, and it’s where they raised their children. For some, the home is where they have lived their entire lives. It represents comfort, security, and independence, and it can be traumatic to have it put at risk if they or their spouse needs long-term nursing care.

When illness or disability makes it impossible to live independently, the thought of having to leave home to move into an assisted living or skilled nursing facility is naturally disturbing. Many people are also worried that if they need long-term care they will have to sell their home to pay for it, until they become financially eligible for Medicaid (the government program which pays for healthcare for the poor). Well-meaning friends and relatives may suggest taking steps to “protect” the home, such as putting it into a child’s name, with the belief that without such steps the home would be lost.

Many years ago, when my office did a lot of real estate work, it was not unusual for aging parents to come in with the request to transfer their home to a child (often for one dollar) “so the nursing home won’t get it.” Researching the laws regarding such transfers of assets and Medicaid eligibility is what began my career as an elder law attorney. (And, by the way, it’s not the “nursing home” that takes the house. Rather, houses are lost in such cases as the result of an “estate recovery” claim by the Pennsylvania Department of Public Welfare after a Medicaid recipient has died.)

I learned that the home is considered an “exempt resource” and does not have to be sold in order for a person to become eligible for Medicaid to pay for long-term care. However, after the person’s death, the State will have a claim against the estate for any Medicaid payments made for long-term care. This is called “Medicaid estate recovery.” If the home is part of the estate, it will likely have to be sold to pay off this claim. There are ways to prevent this, however, and we often work with people to protect their homes from Medicaid estate recovery.

In helping clients stay at home as long as possible and protect their home, we typically consider the following issues:

Is it possible to receive care at home? Over the past several years, opportunities to receive long-term care in the home have increased. For seniors who are financially eligible (countable assets less than \$8,000 and monthly income less than

\$2,022 per month), the “PDA Waiver” program provides care in the home paid for by Medicaid. In many ways this is a “win-win” situation: virtually everyone would prefer to live in their own homes for as long as they can, and it costs the state less to provide care at home than in a nursing facility. While the Medicaid PDA Waiver program does not provide 24-hour care, it can be of great assistance for seniors who can be partially independent or who have family or friends who can help as caregivers

I work with my clients to help get them eligible for Medicaid while protecting a significant part of their life savings which would otherwise have to be spent paying for their care. It is important to identify ways to make the home better suited for those facing disability or age-related frailty. From something as simple as installing grab-bars in the bathroom to an extensive renovation, these steps can be a good investment for people who wish to remain at home for as long as possible. Many of my past articles have discussed these various techniques (gifting, annuities, no-penalty spend-down, etc.).

What is the family situation? This is always a key question. For married couples, when one spouse enters a nursing home and the other spouse continues to live at home, the house can usually be protected from Medicaid estate recovery altogether. We have our clients take some additional protective measures, such as putting the house into the sole name of the “community spouse.” In this way, if the spouse at home passed away first, the house would not end up belonging solely to the spouse in the nursing home (and then subject to Medicaid estate recovery). And for the same reason, we have the “community spouse” change his or her Will so as not to leave everything to the institutionalized spouse.

How best to transfer the house? In some cases, especially when the elderly client is single, in order to protect the home from Medicaid estate recovery it does need to be transferred to a child or other loved one. However, even in these situations I do not have my clients transfer the entire house outright. Once the home is owned entirely by a child, it is subject to attachment by the child’s creditors, the claims of a divorcing spouse, bankruptcy, drug and alcohol problems, the child’s death. Protecting the security of my clients is very important, and that is why I do not have an elderly parent transfer the home entirely to a child or children.

Also, transfers of assets result in a period of ineligibility for Medicaid. Under the current Medicaid law, a transfer of a house worth \$100,000 would result in a period of ineligibility of about thirteen months, but this period does not even start to run until the senior is in the nursing home and “otherwise eligible” for Medicaid, meaning that he or she has no more than a few thousand dollars left to pay for any care! Because any transfers of assets within five years of applying for Medicaid have to be disclosed on the Medicaid application, it is quite risky to make large transfers of assets if nursing home care could be needed within the next five years.

One way to help reduce this risk is for the parent to transfer the home to a child or children but retain a “life estate.” This arrangement has a number of advantages.

- First of all, the parent remains the owner of the home with the security of always having a place to live, without the risk of losing the home because of anything that might happen to the children (death, divorce, creditor problems, bankruptcy). So the parent's quality of life has not been affected.
- Second, because the parent owns only a "life estate" in the home, at the parent's death it passes directly to the child or children (those owning the "remainder interest") rather than going into the parent's estate. As a result – at least under current Pennsylvania law – this protects it from a Medicaid estate recovery claim.
- Third, while the transfer of a remainder interest will still result in an ineligibility period for Medicaid, it will be a much shorter period than if the entire home were transferred outright, making it easier to find ways to bridge the gap in Medicaid coverage.

Legal strategies for protecting the home vary greatly depending on a client's situation and wishes. A qualified elder law attorney can identify the options that make the most sense for a particular client's situation.

The content herein is for general informational purposes only and does not constitute legal advice. For specific questions you should consult a qualified elder law attorney.

Note: *With the restrictions in the Deficit Reduction Act that came into effect in 2006, it is more true than ever that "time works against you" when planning for long-term care. It is important that families who have a spouse, parent or other loved one needing long-term nursing care contact a knowledgeable and experienced elder law attorney for advice as soon as possible. While ideally this should be done when there is at least five years before such care will be needed, families need to realize that even with the new restrictions in the DRA, there remain opportunities for seniors to protect a significant portion of their life savings when facing an immediate crisis, with no advance planning. But every day of delay represents a potential \$220 of irretrievable loss, so seek advice sooner rather than later.*

Kemp Scales, CELA,* is an Elder Law Attorney who serves clients throughout western Pennsylvania from offices in Erie and Titusville. He can be reached toll-free at (888) 827-2788 or by e-mail at Info@ScalesLawOffices.com. Scales Law Offices, LLC has an Internet presence at www.ScalesLawOffices.com.

* Certified as an Elder Law Attorney by the National Elder Law Foundation as authorized by the Pennsylvania Supreme Court.