

FREQUENTLY ASKED QUESTIONS ABOUT MEDICAID

Question: Is it *legal* to transfer or retitle assets in an attempt to qualify for Medicaid?

Answer: Yes, it is absolutely legal. There are no laws prohibiting the transfer or re-titling of assets. However, transfers must be made very carefully, because a Medicaid applicant who has made uncompensated transfers within 5 years (or 3 years if the transfer was made prior to Feb. 8, 2006) of applying for Medicaid will face a “period of ineligibility” for Medicaid based on the amount of the transfer divided by the average cost of a month of nursing home care in the applicant’s geographic area. For example, in Northern Virginia (the counties of Arlington, Fairfax, Loudoun and Prince William, and the cities of Alexandria, Fairfax, Falls Church, Manassas and Manassas Park), every \$5,403 given away during the 5 years prior to a Medicaid application creates a one month “period of ineligibility” (in the rest of Virginia, every \$4,060 gift creates the same waiting period), which period of ineligibility may be longer than 5 years. For example, if an applicant in Fairfax County gives her house, worth \$500,000, to her children two years prior to her nursing home admission, the applicant would be ineligible for Medicaid for at least 92 months ($\$500,000 \div \$5,403 = 92.5$).

Question: Is it *ethical* to transfer and retitle assets in an attempt to qualify for Medicaid?

Answer: Yes, it is absolutely ethical and moral; in fact, it is the “right” thing to do if a family is concerned about the long-term care

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of a loved one. From a moral and ethical standpoint, Medicaid planning is no different from income tax planning and estate planning.

Income tax planning involves trying to find all of the proper and legal deductions, credits, and other tax savings that you are entitled to — taking maximum advantage of existing laws. Income tax planning also involves investing in tax-free bonds, retirement plans, or other tax-favored investment vehicles, all in an effort to minimize what you pay in income taxes and maximize the amount of money that remains in your control to be used to benefit you and your family.

Estate planning involves trying to plan your estate to minimize the amount of estate taxes and probate taxes that your estate will have to pay to the government, again taking maximum advantage of the existing laws. Similar to income-tax planning, estate planning is a way to minimize what your estate pays in taxes and maximize the amount of money that remains in your estate to be used to benefit your family.

Similarly, Medicaid planning involves trying to find the best methods to transfer, shelter, and protect your assets in ways that take maximum advantage of existing laws, all in an effort to minimize what you pay and maximize the amount of money that remains in your control to be used to benefit you and your family.

Like income-tax planning and estate planning, Medicaid planning requires a great deal of extremely complex knowledge due in part to constantly-changing laws, so you need to work with an experienced elder law attorney who knows the rules and can advise you properly.

Question: If someone transfers assets, when does the Medicaid “period of ineligibility” start — when the transfer is made or when the applicant applies for Medicaid?

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Answer: The answer to this question depends on when the transfer was made. For a transfer made prior to February 8, 2006, the old law will apply and the period of ineligibility will begin when the transfer was made. For a transfer made after February 8, 2006, the new law will presumably apply and the period of ineligibility will begin when the applicant applied for Medicaid, assuming the applicant is otherwise eligible for Medicaid *but for* the application of the period of ineligibility.

Question: How much of my assets can be protected?

Answer: This varies from client to client and depends on the situation and the specific goals and desires of the client and the client's family. In general, an experienced elder law attorney should be able to protect anywhere from forty percent (40%) to one-hundred percent (100%) of a person's assets, depending on the situation. As a general rule, the earlier someone begins the planning process, the more assets that person will be able to protect.

Question: I've heard you can't do Medicaid planning within three years of entering a nursing home — is this true? And does the new law mean you have to do this type of planning five years prior to entering a nursing home?

Answer: No and No. This was a myth under the old law and remains a myth under the new law. As we have already stated, the law imposes a calculated period of ineligibility for certain types of transfers made prior to applying for Medicaid; however, an experienced elder law attorney will be mindful of these laws and will be careful to comply fully with and work within the law, sometime even making transfers intentionally to create a period of ineligibility. Plus, there are several different planning strategies that can be implemented at any time — even after someone has already entered a nursing home — and will not trigger any period of ineligibility. Because of the complexities of this type of planning, many of the strategies used and transfers made as part of

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a Medicaid plan are often very time sensitive, and you must always be sure to follow your attorney's instructions carefully.

Question: If I added a child's name to my bank account (or the title to my home) more than 5 years ago, is it now protected from having to be spent for the nursing home?

Answer: No. The entire amount in a joint bank account is still counted as belonging to you unless you can prove some or all of the money was actually contributed by the child whose name is on the account. This rule applies to all assets, including real estate. Moreover, joint ownership with children can be disastrous for a number of reasons unrelated to Medicaid transfer rules. For example, your accounts, once in joint ownership with a child, will be vulnerable to the debts and liabilities of that child. Thus, if your child is in an automobile accident, your property could be at risk; or if your child has a business setback, runs up large debts, or goes through a bankruptcy or divorce, your home will be at risk. Also, because jointly-owned assets will pass directly to the co-owner when you die, and not through your Will or Trust, titling assets in joint ownership may unintentionally disinherit your other children.

Question: Can't I just give all of my assets away?

Answer: The answer is "maybe" — but only if you do it the right way and at the right time. If assets are given away at the wrong time and/or in the wrong amount, the law provides for a penalty — a period of ineligibility for Medicaid — based on the amount of the transfer.

Question: Doesn't federal law allow me to give away \$10,000 per year to my children?

Answer: Yes. In fact, the limit has gone up to \$12,000 — the Federal Gift Tax laws allow you to give away up to \$12,000 per year to anyone you want. You and your spouse may each give an unlimited number of these \$12,000 gifts per year. So, for example,

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if you have 4 children and 8 grandchildren, you could give away up to \$144,000 each year ($\$12,000 \times 12$) if you each gave \$12,000 to each child and grandchild. However, even though the Federal Gift Tax laws allow you to give away up to \$12,000 per year to as many people as you wish *without gift tax consequences*, Medicaid laws still apply to these gifts, meaning that these gifts will result in a penalty — a period of ineligibility for Medicaid in Northern Virginia of more than two months per \$12,000 gift ($\$12,000 \div \$5,403 = 2.22$). So, your \$144,000 annual gift would actually result in more than two years of ineligibility for Medicaid.

Question: Does giving money to my church or other charities create a penalty?

Answer: Yes. Giving away money to charity is treated the same as giving away money to your children or grandchildren. There is no exception for gifts made to charity. Many people who apply for Medicaid are horrified to discover that they are penalized for having been good citizens and having given money to charities.

Question: If I gave assets away and created a period of ineligibility for Medicaid, can the person to whom I gave the assets return the assets to me and eliminate the period of ineligibility?

Answer: Yes — the general rule is that a transfer can be cured by the return of the transferred asset. In fact, there is a potential planning strategy under the new law that is based on the partial return of transferred assets. However, because the regulations giving effect to the new law have yet to be written, it is not clear whether this new strategy will work.

Question: Are there any assets that can be transferred without resulting in a period of ineligibility?

Answer: Yes. There are transfers to certain recipients that will not trigger a period of Medicaid ineligibility. These exempt recipients include:

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- (1) A spouse (or anyone else for the spouse's benefit);
- (2) A blind or disabled child;
- (3) A trust for the benefit of a blind or disabled child; or
- (4) A trust for the benefit of a disabled individual under age 65 (even for the benefit of the applicant under certain circumstances).

Question: Are there any special rules that apply to the transfer of a family home?

Answer: Yes. There are special exceptions that apply with regard to the transfer of a family home. In addition to being able to make the transfers without penalty to one's spouse or blind or disabled child, or into trust for other disabled beneficiaries, the applicant may freely transfer his or her home to:

- (1) A child under age 21 (though transferring to a child under 18 can be very dangerous);
- (2) A sibling who has lived in the home during the year preceding the applicant's institutionalization and who already holds an equity interest in the home; or
- (3) A “caretaker child,” defined as a child of the applicant who lived in the house for at least two years prior to the applicant's entry into a nursing home and who during that period provided such care that the applicant did not need to move to a nursing home. Very strict proof requirements are needed to obtain this exception.

Question: Can I really be forced to sell my home in order to qualify for Medicaid?

Answer: Yes — without proper advance planning, many Medicaid applicants find themselves forced to sell their homes in order to qualify for Medicaid.

Under Virginia Medicaid, as previously explained, the home is an exempt asset only if there is an at-home spouse living in the home.

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Otherwise, the home must be sold six months after qualifying for Medicaid, and the sales proceeds must then be used to pay for the nursing home.

Fortunately, there are many ways in Virginia to protect the equity in a home, but since the Medicaid rules are complex and constantly changing, you will need to seek help from an experienced elder law attorney to help you in your planning.

Question: You mentioned earlier that a life estate in real estate is an exempt asset — what is a life estate and how can it be used in Medicaid Planning?

Answer: Life estate deeds are used in Virginia for many different purposes, including Medicaid planning and avoiding probate. A life estate in real estate is a type of “split interest” ownership based on time, similar in concept to a timeshare. If you own a timeshare, you have the exclusive right to use your timeshare property during your period of ownership, typically a certain week each year. When you own a life estate, you have the right to live in the property for the rest of your life, and your ownership interest terminates upon your death. For example, a mother can transfer a home to her daughter by deeding to the daughter what is called a “remainder interest” in the property, with the mother keeping a “retained life estate,” which will allow the mother the right to live in the home for her remaining lifetime and to be considered the owner of the home for most purposes. In this situation, the deed would normally be written so that the mother will still be responsible for the payment of all taxes, insurance and maintenance on the home.

One common Medicaid planning strategy under the old Medicaid law was the purchase of a life estate in the home of a child, even if the parent never lived in the home. Although the new Medicaid law considers purchase of a life estate to be a penalized transfer if the applicant does not reside in the home for at least a year, the new law appears to allow a parent to purchase a child’s home and then

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sell the child a remainder interest in the home, thereby accomplishing the same goal. However, because the regulations giving effect to the new law have not yet been written, it is not clear whether this new strategy will work.

Another common Medicaid planning strategy involves the gift of a remainder interest. A gift of a remainder interest in real estate has many advantages over an outright gift of real estate by a regular deed: 1) the parent, as the owner of the life estate, will continue to qualify for any property tax exemptions such as veterans and senior citizens exemptions that were available prior to the transfer; 2) the parent will not lose the legal right to live in the property, sell the property, or rent the property; 3) the children can't make the parent move out; 4) the children's creditors or bankruptcy trustee can't take possession of the property; 5) capital gains when the children sell the home will be calculated on a stepped-up basis, which is the value at the date of the parent's death rather than the parent's original cost basis; and 6) since the value of the remainder interest is lower than the full value of the house, a gift of a remainder interest will result in a shorter Medicaid penalty period than a transfer of the entire house.

To determine exactly how a gift of a remainder interest will affect eligibility for Medicaid, the look-back period and the value of the transfer must be considered. The transfer is not considered to be for the full value of the house but only the "remainder interest" in the house. The remainder interest is the right that the children have to receive the home automatically upon the death of the parent. The value of the remainder interest is calculated using special actuarial tables that determine the parent's life expectancy. The number of months of ineligibility is calculated by dividing the value of the transfer by the average monthly cost of nursing home care — \$5,403 per month in Northern Virginia, \$4,060 throughout the rest of the Commonwealth.

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The Department cannot require an applicant to liquidate the life estate or to rent the life estate interest property. However, if the property is rented, the net rental income must go to the nursing home resident and will be counted in determining eligibility for Medicaid.

If the property is sold during the lifetime of the parent, how the sales proceeds are treated depends on how the deed is worded. The deed can be worded so that the parent will continue to have a life estate in any replacement real estate and/or in the proceeds of sale. If the parent receives income from the invested proceeds, that income will be counted in determining eligibility for Medicaid. Or, the deed can be worded so that the life estate is terminated upon sale of the property, in which case the parent's portion of the proceeds will be a countable resource for determining Medicaid eligibility.