

PROTECTING THE FAMILY FARM FROM THE NURSING HOME AND FORCED PARTITION SALES

GORDON & ASSOCIATES
PROFESSIONAL CORPORATION

Dan Gordon
July 30, 2019

Protecting the Farm from Nursing Home Costs

- Three ways to pay for long-term care:
 - *Self-Insure*
 - Very few can afford this
 - *Long-term Care Insurance*
 - Option for some
 - *Government Benefits*
 - Many rely on Medicaid
 - Some receive VA benefits

Shielding Farm Assets

- Four techniques used to shield farm-related assets from the costs of long-term care
 - *Outright gifts*
 - *Gifts of land with a retained life estate*
 - *Transfers to irrevocable trusts*
 - *Transfers to a limited liability company (LLC) and then gifts of the interest in the LLC*
- However, none of these can be easily reversed or changed*

Outright Gifts

- Good:
 - *Completed with only a deed*
 - *Less likely to be affected by law changes*
- Bad
 - *Takes the income with it*
 - *After an outright gift there is no right to live in the principal residence*
 - *Removes control of the asset from the donor (who can rent and on what terms)*
 - *Carries with it the donor's basis and there is no basis step up at the donor's death*

Gifts of Land with a Retained Life Estate

- Good
 - *Completed with a deed*
 - *After the gift, the donor:*
 - *Retains the income from the land*
 - *Retains the right to live in the home*
 - *Retains control of the decisions about the land*
 - *Those who receive the gift get a basis step-up at the donor's death*
 - *There is no Medicaid estate recovery on the remainder interests*
- Bad
 - *If the land is sold, those who received the gift are entitled to a portion of the sale proceeds (and must sign the deed)*
 - *If the land is used as collateral, those who received the gift must sign the mortgage (but not the promissory note)*
 - *Restricting subsequent transfers by those who received is not easy (their divorce can cause major problem)*
 - *The exemption from resource recovery is not recognized in all states*

Transfers to Irrevocable Trusts

- Good
 - *The income from the land and the right to live in the home can be retained (unless there are VA benefits)*
 - *If the income is retained, there can be a basis step-up*
 - *The trust can be used to control the succession of the farm after the donor's death*
 - *If the land is sold, the sale proceeds stay in the trust*
 - *While the land is in/owned by the trust, those who will eventually receive it cannot transfer/lose/mortgage it*
- Bad
 - *The settlor no longer controls the asset*
 - *Costs more than simple gifting options*

Transfers to a Limited Liability Company (LLC)

- Good
 - *Insulates farm assets against outside liabilities, such as accident liability or nursing home cost.*
 - *Also can be used as part of the overall farm succession plan or for death tax reduction planning*
 - *May preserve control and income for the one setting up the LLC*
- Bad
 - *LLC's can be more complicated and expensive than irrevocable trust*
 - *LLC interest of owners attachable by creditors/ex-spouse/Medicaid estate recovery, but outsiders do not get right to vote*
 - *Future gifts of an LLC as part of a succession plan can create new gifts that count against Medicaid eligibility.*

Revocable Planning Techniques

- The typical revocable living trust that is used for probate avoidance is not an effective planning technique for the protection of farm assets against the cost of long-term care (unless it was signed and farm land was transferred to it prior to May 1, 2002)
- Transfer on Death arrangements also are not effective

Long-Term Leases or Contracts

- Reduce impact of nursing home cost
- Long-term lease can preserve opportunity to farm at a reasonable rental amount
 - *But lease payments will go to nursing home*
 - *Land itself is not protected from Medicaid recovery*
- Long-term sale contract can preserve land at a reasonable purchase price
 - *But purchase price payments will go to the nursing home*
 - *Payments remaining at death are subject to estate recovery by Medicaid - IHCPM 4650.00.00, et seq.*
 - *The duration of the land contract must not exceed the life expectancy of the seller, or the principal will be a countable resource.*

Self-Insuring

- What is the likely need for long-term care
 - *Have ancestors required long-term care in the past*
 - *Can family members provide long-term care*
- How much does long-term care really cost
 - *Daily costs for nursing care at many facilities now exceed \$300 per day.*
- What income and assets are truly available
- What will be the impact on the estate plan of spending that income or using those assets for long-term care

Long-Term Care Insurance

- Determine the availability of long-term care insurance
 - *Many people do not qualify*
 - *For others, it is too expensive*
- Long-term care insurance benefits are likely to be there in the future even though today's Medicaid eligibility planning techniques may not be
- Long-term care insurance insulates assets in second marriage situations where prenuptial agreements may not
- May offer Asset Protection from Medicaid resource limits and estate recovery
- Hybrid policies that also have a death benefit are now available

Government Benefits

- Three types of government benefits may be involved in the payment of nursing home costs
 - *Medicare*
 - *VA*
 - *Medicaid*

Medicare Payments

- Requires a qualifying hospital stay for Medicare rehabilitation benefits to start
- Typically are available only during the first 100 days of care and only if patient is improving or continuing care is recommended to obtain improvement or maintain condition
- Not all care qualifies for Medicare reimbursement

VA Benefits

- Only veterans with service during wartime periods and their dependents qualify
- There are income and asset tests for eligibility
- Qualifying to receive Medicaid benefits may reduce VA benefits
- There is a three-year look-back period for disqualifying gifts
- An irrevocable trust may be used to hold assets that would otherwise cause ineligibility but should be established by another person.
- That trust should not pay its income to the person who is applying for VA benefits
- Go to va.gov and click on Benefits tab for more information

Medicaid

- Principal source of assistance for paying for nursing home costs
 - Available for home care and assisted living in limited situations
 - Eligibility requires satisfaction of both an income and an asset test
 - More information can be found at Indiana's website: <http://in.gov/fssa/index.htm>
 - The Indiana Health Coverage Program Policy Manual can be found here: http://in.gov/fssa/files/Medicaid_Combined_PM.pdf

Medicaid Situation #1

- One spouse is in nursing home and one is at home
 - Step 1 – spend down countable resources as of snapshot date (1st day of at least a 30-day stay in a health care facility) to the lesser of \$126,420 or ½ of total countable resources (but not less than \$25,284) - 405 IND. ADMIN. CODE 2-3-14(c)(3) (2016).
 - Non-countable Resources:
 - Income-producing real estate, Home, Furnishings, Vehicle, Funeral, IRA of non applicant spouse
 - Spend Down Options:
 - Funeral Home (Ind. Family & Soc. Servs. Admin. v. Culley, 769 N.E.2d 680 (Ind. Ct. App. 2002))
 - Home Repairs
 - Immediate Annuities
 - Nursing Home Costs
 - Farm Land/Equipment/Debt Reduction
 - Newer Home/Vehicle
 - Gifts made in the last 5 years before applying create a period of ineligibility
 - Step 2 – transfer assets to spouse at home
 - Step 3 – revise estate plan of spouse at home

Medicaid Situation #2

- Surviving spouse is in the nursing home or both spouses are in the nursing home
 - *Must spend down resources to \$2,000 or less for surviving spouse or \$3,000 or less for a couple*
 - *5-yr Look-back Period*
 - Gifts made in the last 5 years before applying create a period of ineligibility
 - Length of the period relates to the amount of the gift and the cost of nursing home care (currently \$6,682/month - 405 IND. ADMIN. CODE 2-3-1.1(g) (2016).
 - Ineligibility period begins at the time of the Medicaid application, when the applicant is in the nursing home and otherwise eligible for Medicaid - 405 IND. ADMIN. CODE 2-3-1.1(c) (2016)

Protecting the Farm from Partition

- A joint tenant or tenant-in-common of farm land may force it to be partitioned (I.C. 32-17-4-1)
- Today partitioning land does not mean dividing the land
- Prior to July 1, 2012, the partition statute contained a procedure for actually dividing land
- As of July 1, 2012, the partition statute was changed and the procedure for actually dividing the land was deleted (I.C. 32-17-4-2.5)
- Today a lawsuit demanding partition first will result in the judge ordering mediation, but if that is not successful, the judge will order the land sold

Protecting the Farm from Partition, continued

- The land will be sold at auction unless the parties agree on another method of sale
- The auction will be conducted by the sheriff unless the parties agree on an auctioneer

Practical Effects of Partition

- The partition statute favors those who want to sell the land and get money
- Those who want to keep all or part of the land must somehow reach an agreement with those who want to sell or the land will be sold
- Once a lawsuit demanding partition has been filed, those who want to keep the land must be prepared to finance its purchase and outbid all others at the auction.

Solutions to the Partition Problem

- Work to get the law changed to favor those who want to keep the land rather than those who want to sell
- Revise will or trust to give specific land to specific family members rather than all land to all family members as equal tenants-in-common who can demand partition
- Revise will or trust to give those who want to keep the land an option to buy the land on terms that will make it possible
- Revise trust so that land will continue to be held in trust after death with those who want to sell not actually owning land but still getting income from their share of the land

Solutions to the Partition Problem, continued

- Revise trust to include a provision giving those who want to continue to farm the land the right to rent the land held in the trust
- Enter into a long-term lease with those who want to continue to farm the land before it is distributed to those who want to sell
- Establish an LLC to hold the land with those who want to keep the land having control of the LLC and those who want to farm having a lease with the LLC

GORDON & ASSOCIATES
P R O F E S S I O N A L C O R P O R A T I O N

- Phone: (260)824-9377
- Fax: (260)824-9675
- Website: www.gordonlegal.net
- Locations:
 - *Bluffton*
 - *Fort Wayne*
 - *Huntington*
 - *Rochester*