

Transfer Traps and the Medicaid Estate Recovery Program

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We've all received the call- parents wanting to transfer their homes to their children. But beware, what might seem like a simple real property question can turn into a Medicaid nightmare. Gifts, including any transfer for less than fair market value, can trigger transfer penalties. These penalties can include the loss of all benefits, requests for recoupment of overpayments, and nursing home discharge. In order to ensure that parents or other loved ones are safe from loss of benefits or discharge from health care facilities, more and more real estate attorneys are asking clients questions about medical, health, and long term care before drafting a real property deed.

Here's the problem: Mom or Dad might need nursing care and can't afford the \$5,000 or more a month it can cost, so Medicaid pays the difference. The client, usually for fear of losing their home, makes a transfer of assets for less than fair market value, which can result in immediate loss of all benefits. Medicaid assesses a transfer penalty for most transfers made in the previous five years without full fair market value compensation. Medicaid Eligibility Handbook (MEH) Sec. I-1200 <https://www.dads.state.tx.us/handbooks/mepd/I/I-1000.htm#secI-1200> . The penalty period, for most transfers, doesn't begin to run until the first day of the month when the client is otherwise eligible. MEH Sec. I-5200 <https://www.dads.state.tx.us/handbooks/mepd/I/I-5000.htm#secI-5200>

Why not just leave the home in Mom's or Dad's name? You may do so at the risk of losing it. The threat comes from the Medicaid Estate Recovery Program "MERP"- a program that causes many people who need care to refuse to apply for benefits. It's a misunderstood Medicaid program and Health and Human Services has no stated intention of correcting the pervasive culture of misinformation regarding the program. The program creates fear in the hearts of the elderly and disabled because it allows Texas to reimburse themselves from the probate estates of people who have received Long Term Care benefits- at home or in a facility. The fact is that most people won't lose their homes if they receive competent legal advice.

Many people believe MERP can take a person's home during that person's life to pay for care or that MERP can put a lien on the family home. That is simply **not true**. The truth is that the statute controlling MERP is a creditor claim statute, making MERP a class seven creditor under Sec. 355.102 (h) of the Texas Estates Code. <http://www.statutes.legis.state.tx.us/Docs/ES/htm/ES.355.htm> Not only can't MERP take the client's home during her life, but in terms of getting paid from the estate, they rate just above unsecured credit card debt. Texas Estates Code Section 355(i).*id.* Just as importantly, MERP can *never* put a lien on a non-probate home as Texas is not a lien statute state. That's why any time a

client receives long-term care Medicaid, the goal is to remove her estate from the formal probate process.

The solution is often a Lady Bird Deed or Enhanced Life Estate Deed. A Lady Bird Deed is a Life Estate Deed with extras. It allows the Grantor to retain, above and beyond a traditional life estate, the right to sell, transfer, encumber, or take most other actions a fee simple owner could take, without the joinder of the remainder beneficiary, as the Grantor also retains the power of appointment. Lady Bird Deeds are revocable instruments. A Lady Bird Deed conveys only a contingent remainder interest, and thus incurs no transfer penalty under Medicaid rules. Title then passes automatically upon the Grantor's death. Thus, the home is a non-probate asset, and not subject to a claim by MERP. A Lady Bird Deed is an easy way to protect the home from MERP, without triggering a transfer penalty that could disqualify the client from receipt of benefits for months or years.

Where there is capacity or a well-drafted and properly recorded Power of Attorney, Lady Bird Deeds are the easiest way to avoid MERP. Sometimes though, a Lady Bird Deed isn't an option and another solution to the MERP threat must be explored. This can happen under a guardianship or where the Power of Attorney does not grant the necessary authority. Even under these circumstances, MERP can often be avoided because MERP does not apply for certain exempt estates, most importantly the surviving spouse or under the unmarried child exemption. It can even be possible to use MERP's failure to comply with proper notice requirements to end the claim.

If a Statutory Durable Power of Attorney agent is signing on behalf of the principle, make sure that no agents transfer the home to themselves. Title companies may not insure a subsequent sale because of questions over self-dealing and possible breaches of fiduciary duty.

In fact, the legislative focus in recent decades has been to scrutinize self-dealing and accounting by agents. While strict prohibition bills have been proposed, they have failed. What did pass was 751.101 of the Texas Estates Code which clarified that as fiduciary agents, they have a duty to inform and account for any actions taken as agents. http://tx.elaws.us/law/es_title2_chapter751_sec.751.101. If you want to use the POA to make a real property transfer, the POA must be recorded in the county clerk's office of the county where the property is located.

The courts have held that the agent owes the principle the "high duty of good faith, fair dealing, honest performance, and strict accountability." *Sassen v. TANGLEGROVE TOWNHOUSE CONDO. ASSOC.*, 877 S.W.2d 489 (Tex. App. 1994). <https://www.courtlistener.com/texapp/de14/sassen-v-tanglegrove-townhouse-condo-assoc/cited-by/>. That duty is increasingly including the duty to investigate the direct, life-threatening repercussions of losing Medicaid benefits.

So what should you do when an elderly mother asks you to transfer her home to her daughter? Be cautious and ask a lot of questions about their health and their plans for paying for their health care in the coming years. Remember that transfers can deny people vital nursing care

services by pricing them out of range during a transfer penalty period. Talk about a Lady Bird Deed and the purposes for the transfer. Fix transfers that might cause a penalty, since Medicaid allows the return of the asset to wipe out the transfer. Call an expert if you are unsure. Remember that no one should have to refuse nursing care for fear of losing her home, and thank goodness, give-backs are always allowed!