

ESTATE PLANNING UPDATE-SPRING 2010

Most individuals over 65 have Medicare and a Medicare Supplement policy. Together, they do an excellent job of covering the acute phase of an illness. However, upon discharge from a hospital into a rehabilitation facility, coverage is limited to the first 100 days provided that one requires “skilled nursing”.

For individuals who require care beyond 100 days, the payment options are few: One may privately pay (avg \$400/day); Access benefits under a Long Term Care Insurance policy; or seek coverage under the Medical Assistance (Medicaid) program.

Medicaid

Most people pay privately for long-term care until they become eligible for Medicaid. Medicaid is a joint federal-state program. Each state operates its own Medicaid system, but this system must conform to federal guidelines in order for the states to receive federal money.

Those who are not in immediate need of long-term care sometimes seek to protect their assets in advance. There are no general rules for so-called “asset protection planning” because every client’s case is different. Some have more savings or income than others. Some are married, others are single. Some have family support, others do not. Some own their apartments, some rent. Still, a number of basic strategies and tools are typically used in Medicaid planning. These are described below.

Transfers

Congress has established a period of ineligibility for Medicaid for those who transfer assets. This period of ineligibility is determined by dividing the amount transferred by the relevant regional transfer rate. For 2009, NYC is \$9838, Long Island is \$10352, and Westchester is \$9439. The only transfers that are looked at are those made to third parties within 42 months prior to the Medicaid application (the 60 month look-back will be fully phased in as of 2011).

Example:

If Mrs. Jones transfers \$100,000 within 42 months of applying for Medicaid, the penalty will be 11.27 months ($\$100,000 \div 9838 = 10.16$). The penalty period begins to run on the first of the month following the transfer. So it is possible for a penalty to be over long before the expiration of 36 months. Conversely because there is no limit on the length of a penalty period, it is possible for a penalty to last far beyond 42 months.

Any transfer strategy must be very carefully undertaken. If one gives money to children, it belongs to them and one can't guarantee that the money will be available for one's benefit. However well-intentioned they may be, children may lose the funds due to bankruptcy, divorce or lawsuit. Any of these occurrences could jeopardize the savings one spent a lifetime accumulating.

In addition, when children are holding funds in their names they may jeopardize their children's eligibility for financial aid in college. Transfers can also have negative tax consequences for children. This is especially true of assets that have appreciated in value, such as real estate and stocks. If one gives these to children, they will not get the tax advantages they would get if they were to receive them through an estate. The result is that upon the sale of the property, they will have to pay a much higher tax on capital gains than they would if they had inherited it.

In any event, one should never transfer assets for Medicaid planning without providing for care needed during the resulting period of ineligibility for Medicaid.

Permitted Transfers

While most transfers are penalized with a period of Medicaid ineligibility, certain transfers are exempt from this penalty. Even after entering a nursing home, one may transfer any asset to the following individuals without having to wait out a period of Medicaid ineligibility:

- A spouse.
- A child who is blind or permanently disabled.
- Into trust for the sole benefit of anyone under the age of 65 and permanently disabled.

In addition, one may transfer a home to the following individuals (as well as to those listed above):

- Your child who is under 21.
- Your child who has lived in your home for at least two years prior to your moving to a nursing home and who provided you with care that allowed you to stay at home during that time.

Trusts

The problem with transferring assets is that you have given them away. You no longer control them, and even a trusted child or other relative may lose them. A safer approach is to put them in a living (or "inter vivos") trust. A trust is a legal entity under which one person—the "trustee"—holds legal title to property for the benefit of others—the "beneficiaries". The trustee must follow the rules provided in the trust instrument. Whether trust assets are counted against Medicaid's resource limits depends on the terms of the trust and who created it.

Revocable trusts are also known as "Living Trusts". They are often touted by promoters as being the answer to all of one's estate planning goals. In truth, a Revocable Trust confers no protection whatsoever with respect to long term care planning or estate taxes. This is because the assets owned by a Revocable Trust are completely available to the individual who

establishes the Trust.

If, for example, I establish a Revocable Trust and name myself as the trustee, I can have unfettered access to the trust assets. How then are they protected in the event I require long term care? The answer is they are not.

Though outside the scope of this discussion, the same reasoning applies to the estate tax arena. The Internal Revenue Code provides that all assets over which I have retained control, will be taxed as part of my estate.

Some may ask if there is any merit whatsoever to doing a Revocable Trust. The answer is yes; depending on one's individual situation.

A Revocable Trust will enable an individual to avoid probate. Probate is the process by which one's Will is authenticated by the Surrogate's Court at death.

Everyone has, no doubt, heard of probate horror stories. As a Trusts and Estates attorney, I have witnessed some. However, the overwhelming majority of probate proceedings are concluded within a matter of weeks.

Probate tends to be problematic (and thus one may consider a Revocable Trust) in the following situations: A second marriage; a disinherited child; children who do not get along with each other; or when a child has special needs and may be receiving government benefits.

The only type of trust that can help protect assets against the costs of long term care or reduce estate tax exposure is an Irrevocable Trust.

For further information on any of the topics addressed, Ann-Margaret Carrozza, Esq, is an estate planning and elder law attorney. She can be reached at (718) 224-4746.