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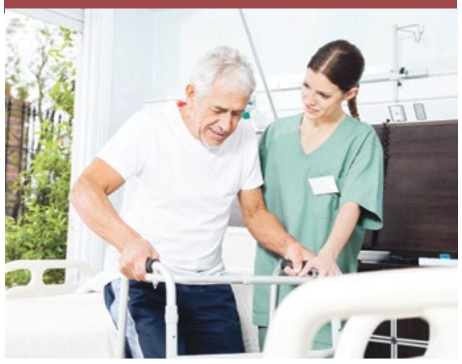
Long-Term Care Planning with Trusts



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As people continue to enjoy longer life expectancies, there have been increases to what the average American can expect to spend on his or her long-term care. In light of the potentially staggering cost of this type of care, irrevocable trusts have become an increasingly popular vehicle to protect assets. While the word "irrevocable" often makes clients leery, for many clients, the benefits of this estate planning tool far exceed the downsides.

A client's most valuable asset is commonly his or her primary residence. Clients are often, and understandably, anxious about what happens to his or her home in the event long-term care, such as nursing home care, is needed in the future. Depending on the age and health of the client, an irrevocable trust may be a great vehicle for protecting the value of the property in the event the client requires care and wants to obtain Medicaid benefits to finance such care.

Medicaid Program

The Deficit Reduction Act of 2005 ("DRA"),[1] enacted in 2006, a federal law implanted in the states, made considerable changes to New York State's Medicaid program, specifically to the transfer penalty rules for nursing home coverage. The law increased the "look-back" period for nursing home Medicaid eligibility from three years to five years.[2] The DRA also changed how the penalty period itself is imposed.

Prior to the law's enactment in 2006, the penalty period was calculated based on when the transfer was made, meaning the day a non-exempt transfer was made, the clock would begin to run. The DRA imposed a new requirement that, for transfers made after 2006, the penalty period would not begin to run until the applicant is in the nursing home, is otherwise eligible for Medicaid (below the asset limit) and has submitted an application for Medicaid.

Following the enactment of the DRA, there was little significant change in the New York State Medicaid program for several years. That changed, however, in 2020 when the State's annual budget made major cuts to the Medicaid program.[3] The most notable change in the Medicaid program will be the imposition of a lookback period in the home care or community-based coverage.

Traditionally, the home care Medicaid program did not impose any look-back period for individuals seeking community-based services. The changes to the home care Medicaid program were initially scheduled to go into effect on October 1, 2020 but have been delayed several times. It appears likely that the changes will go into effect on July 1, 2021. Now more than ever, it is important to speak with clients about the need to protect assets and to plan for the future.

Under the DRA and the upcoming new home care lookback period, unless the transfer of assets meets one of the Medicaid exemptions, the value of the uncompensated transfer or gift will be used to calculate a penalty period. A penalty period is a number of months where the applicant will be ineligible for Medicaid coverage and is responsible for privately paying for services. The penalty period is calculated by combining all of the non-exempt transfers that occurred within the applicable look-back period and dividing the resulting total by the "regional rate" where services are sought. For example, a nursing home resident in Nassau County seeking services in 2021 would use $13,834 as the divisor when calculating a penalty period.[4] It remains unclear, however, how the calculation of a penalty period will work in the context of a home care Medicaid application.

Even with the passage of the DRA, transfers remain that are disregarded or considered exempt when determining an applicant's eligibility. These exemptions, when applicable to an applicant, allow for greater flexibility in shielding assets. The most commonly used exemption allows for unlimited transfers to the applicant's spouse, or to another for the sole benefit of the individual's spouse. Although used less frequently, another exemption is when a transfer was made exclusively for a purpose other than to qualify for Medicaid coverage. This exemption is useful when an applicant is in need of care suddenly and had previously made non-exempt transfers.[5]

When utilizing the spousal transfer exemption, another important tool to consider is the spousal refusal. A spousal refusal is a legally valid Medicaid planning tool in New York. It is designed to insure that the non-applying or community spouse is not impoverished as the result of his or her spouse's need for long-term care. A spousal refusal is completed by the community spouse and states that he or she is refusing to make his or her income and assets available for the applicant spouse's care. At the time of application, as long as the applicant spouse's countable resources are below the individual Medicaid asset level ($15,900 in 2021), he or she will be financially eligible for Medicaid. Any excess resources must be transferred to the community spouse during the month prior to the application.

Once the Medicaid recipient is approved and receiving care, some practitioners may believe the job is done. However, the final component to consider for a Medicaid recipient and his or her family is estate recovery. The federal government, the purse strings behind every state's Medicaid program, has a policy that requires the states to attempt to recover the costs paid on behalf of the Medicaid recipient. While estate recovery is deferred during the lifetime of the applicant's surviving spouse and minor or disabled children, it is important to plan to ensure assets remain protected.

As the New York State Department of Health explains, the state can attempt to recover from the estate of a Medicaid recipient, up to the amount spent on care. Estate, for purposes of Medicaid estate recovery, includes real property and personal property. It includes assets passed via a will, assets passed under intestacy law, and all "other assets in which the decedent had any legal title or interest at the time of death."[6]

Medicaid Asset Protection Trusts

When meeting with a client who owns real property and has concerns about the cost of long-term care, an experienced elder law attorney will generally advise the client about the benefits of an irrevocable trust, also known as a Medicaid Asset Protection Trust ("MAPT"). These trusts are particularly useful to protect a client's primary residence and other real property but can be used to protect other assets as well. This makes them an attractive option for clients whose home is their largest or most valuable asset.

A trust is a legal document that involves three main parties. The Grantor is the person who establishes and funds the trust. The Trustee is the person who is tasked with following the directives contained in the trust, managing property, and administering the trust at its conclusion. The beneficiaries inherit the trust property at the death of the Grantor or at some other pre-determined event outlined in the trust. In order for a MAPT to be effective in having the trust assets disregarded

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by Medicaid, some person other than the Grantor must serve as Trustee. This requirement, partly, ensures that Medicaid cannot argue the Grantor has control over or access to the trust assets.

It is important to note that transfers to an irrevocable trust will result in a penalty period if made within five years of either spouse needing nursing home Medicaid or the applicable lookback for home care Medicaid once the new lookback period goes into effect. This is why irrevocable trusts are a planning tool most appropriate for clients who are healthy enough to have a reasonable belief that they will not require skilled nursing care within five years or home care within two and a half years of creating and funding the trust.

For Medicaid purposes, the Department of Social Services is entitled to count any income or principal as available to the applicant-Grantor that the trustee has the discretion to distribute to the Grantor or use for his or her benefit.[7] Therefore, in order to ensure the principal of the trust is unavailable for Medicaid purposes, a properly drafted MAPT must include clear language that the principal of the trust shall not be distributed directly to the Grantor or used for his or her benefit. If the trust requires the distribution of income to be payable to the Grantor, which has additional tax benefits discussed below, the income can be treated as an available asset if not actually distributed to the Grantor for eligibility purposes.

Once the MAPT has been properly drafted and executed, it must be funded by re-titling assets. If this crucial step is ignored or performed incompletely, the trust will not achieve its intended goal of protecting assets from Medicaid. In order to re-title real property in the name of the trust, a new deed and recording documents must be signed by the Grantor and the Trustees.

Advantages of Irrevocable Trust Over Other Changes in Title

It is important to note that there are other changes to the title of a piece of real property that can be made in order to achieve some of the benefits discussed above.

If a client's goal is avoiding probate and/or removing the asset out of his or her name for the purposes of shielding it from creditors, one option is an outright transfer of the property to another person or adding the other individual as a joint owner. An estate planning attorney frequently hears that a client wants to "give my house to my children," and while this seems like a desirable option, it has several drawbacks.

First, unlike property held in trust, an outright gift to an individual renders the property available to the new owner's own creditors, divorce proceedings, foreclosure, bankruptcy, and any other life circumstance.

Second, unlike property held in trust, if a primary residence is gifted outright, when the new owner or "donee" later sells the property, the appreciated value in the property from when it was originally purchased through the sale would be subject to capital gains tax.

Third, the new owner can also attempt to sell the property over the objection of the Grantor, despite not having to make any financial contribution to the property. These issues can be avoided by instead transferring the property into a MAPT, which offers the Grantor more control and protection.

Another way to avoid probate is to transfer the property to another individual while reserving a life estate for the Grantor. The creation of a life estate involves the Grantor transferring his or her ownership interest to another person by deed, with language indicating he or she reserves lifetime ownership in the property. At the death of the Grantor, his or her life estate extinguishes and the "remainder-man" owns the property outright, avoiding probate and capital gains tax issues.

While this may be more attractive than an outright transfer, it can still present issues for the Medicaid applicant. First, as discussed above, the life circumstances of the remainder-man still render the property vulnerable in the event of creditor, divorce, or lawsuit issues. Second, the remainder-man can still sell the property or mortgage it, over the objection of the Grantor.

While not an option for all families due to timing, cost, or other factors, irrevocable trusts remain an important tool for Medicaid qualification and asset protection. They allow clients to have the government pay for medical care, home health aides, and nursing home while sheltering assets. A Medicaid trust is a valuable tool that helps protect assets, allowing clients to instead leave them for the next generation.

1. Pub. L. 109–171, S. 1932, 120 Stat. 4, enacted February 8, 2006.
2. 06 OMM/ADM-5; Deficit Reduction Act of 2005–Long-Term Care Medicaid Eligibility Changes.
3. See https://bit.ly/3agxh5r, page 259.
4. GIS 19 MA/01, GIS 20 MA/13, GIS 20 MA/12.
5. 1996-ADM-08; OBRA '93 Provisions on Transfers and Trusts.
6. 02 OMM/ADM-3; Medicaid Liens and Recoveries.
7. 18 NYCRR § 360-4.5 (b)(1)(ii).