A Brief Introduction to Sheltering Assets from a Long-Term Nursing Home Stay
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1. Introduction

A nursing homes stay can cost anywhere from $75,000 to $90,000 per year. It goes without saying, therefore, that a long-term nursing home stay can easily impoverish all but the wealthiest of families. With proper planning, however, no one has to be wiped out by a nursing home stay. This article will summarize the Medicaid laws, including recent important changes, and will present some powerful ways to shelter assets. Naturally, there is no "one size fits all" solution, and this article is no substitute for a careful analysis of your situation by a competent legal advisor.

2. Medicaid Rules In General

There are different rules for single and married people. A single person in a nursing home has virtually no protection, being required to spend just about all of his or her assets. In addition to $2,500 worth of cash assets, a single person may keep a prepaid funeral, personal possessions and jewelry, one automobile, term life insurance and whole life insurance if the State is the beneficiary. In the case of a married couple, the healthy spouse can keep the house, the exempt items just listed, and the *lesser* of half of the remaining assets or $101,640.

[1] This handout expresses the opinions of the authors, and is designed to present general information regarding the subject matter covered. It is not intended to be used as a substitute for obtaining personal advice of a specific nature from a qualified attorney.

3. Changes Made by the State

A law known as Granite Care law (House Bill 691) made some important changes in New Hampshire. For our purposes here, the most important change is in "Expanded Estate Recovery." The state is said to engage in "Estate Recovery" when it tries to recoup Medicaid benefits from the estate of a deceased Medicaid recipient. Before Granite Care, estate recovery was limited to assets passing through probate at a Medicaid recipient's death. Since you can only qualify for Medicaid if you have less than $2,500, estate recovery wasn't a problem under the old law. A Medicaid recipient simply had virtually no estate to recover against.

The law, however, now allows the state to recover assets that pass to your heirs outside of probate. The new law has changed estate recovery from merely a trifle into a tremendous problem. The law expands the definition of "estate" broadly, stating:

> For purposes of recovering the costs of medical assistance, the estate of a recipient shall include all property, real or personal, which at the time of a recipient's death was held by the recipient in joint tenancy with rights of survivorship, tenancy in common, life estate, or living trust, without regard to the date that such title or interest was established.

The law goes on to state that within 45 days of a Medicaid recipient's death, the state is to send a bill to the person inheriting the property.

Many people have transferred the home, or other property, to their children, subject to a "life estate." A life estate is simply the right to reside in the property during life. Under Granite Care, if you go into the nursing home and receive Medicaid, the state will make a claim against the value of your life estate. [2] The value of a life estate is not fixed, but varies with age. For a 75-year-old, the life estate is valued at 52% of the value of the property. In other words, the 75-year-old owns a 52% share of the property, and the children own a 48% share. For a 90-year-old, the life estate is valued at 28% of the value of the property, so he or she owns 28% and the children own 72%. The life estate value decreases about two percent per year. Thus, a percentage of your property, depending on your age, will be subject to a state claim at your death.

[2] A life estate has an economic value that is a percentage of the total value of the property.

Unlike almost all other law changes, existing legal documents are *not* grandfathered. In other words, if you deeded your property to the children years ago, but kept a life estate, and you later receive Medicaid benefits, the state will make a claim against the property after your death. The survivors will have a bill to pay to the State of New Hampshire.

The same is true of joint tenancies. Say you and your sister inherited a house from your parents. You go into the nursing home and receive Medicaid. After your death, the state will make a claim against your half of the property, and your sister will have to settle up with the state.

4. <u>Changes Made by the Federal Government</u>

With The Deficit Reduction act of 2005 (DRA), Congress made some very harsh changes to the Medicaid eligibility rules. Here is a summary of the law's major provisions:

A. Lookback & Disqualification Period

People applying for Medicaid need to disclose transfers of liquid assets or real estate made within a set period of time before the date of application. This period is referred to as the "look back period." Under the old rules, there was a 60 month lookback period for transfers to irrevocable trusts and a 36 month lookback period for transfers to individuals. Under the DRA, the Medicaid lookback period for *all* asset transfers is now five years.

If assets are given away during the lookback period, then Medicaid will assess a penalty: For every $6,814 given away, there will be a period of Medicaid ineligibility of one month. Under the old law, the Medicaid disqualification period for assets transferred during the lookback period started from the date of transfer. For example, if your mother gives you $68,140 today, she will be disqualified for Medicaid for the next ten months. As long as the disqualification period is over, then, assuming she otherwise qualified, Medicaid would be approved. The new law changes this rule significantly. Now, the disqualification period runs from the date when the individual enters a nursing home and would otherwise be eligible for Medicaid coverage. In other words, the penalty period does not even begin until the nursing home resident is out of funds and has applied for Medicaid.

Two simple examples will show how these rules work. Let's assume that Uncle Harry gives away $68,140 on January 1, 2007. Under the old rules, he will be eligible for Medicaid ten months later, or November 1, 2007. The new rules, however, work very differently. Let's say Uncle Harry is perfectly healthy when he makes his $68,140 gift on January 1, 2007. He suffers a stroke four and one-half years later, and enters the nursing home on June 1, 2011. Let's assume that he has under $2,500 in assets at that time, so he is otherwise eligible for Medicaid. The disqualification as a result of the $68,140 gift that he made four and one-half years ago *first starts to run* when he applies for Medicaid on June 1, 2011. The disqualification period will run for 10 months from that time, and will end on March 31, 2012. Who will pay for the nursing home during the next ten months? Uncle Harry can't pay, because he is out of money. Unfortunately, no one knows who will pay. Congress did not think that issue through very well.

Under the new rules, people such as Uncle Harry will be penalized for any gifts they have made during the past five years, *regardless of the purpose of the gift*. It does not matter that a moderate gift was made exclusively for a purpose other than to qualify for Medicaid. Therefore, the new law, for all practical purposes, prohibits any gifting by people who have even a remote chance of needing nursing home care within the next five years, i.e., all Senior Citizens.

B. Annuities

The law also changes the rules concerning annuities. One way to make someone eligible for Medicaid is for the person to buy an immediate annuity. Under the new rules, if a Medicaid applicant purchases an annuity, the annuity must name the state as the remainder beneficiary for at least the amount of medical assistance paid. If the applicant is married, then the annuity must name the state as the remainder beneficiary in the second position after the community spouse or minor or disabled child.

In the proper case, an annuity can still be used to make someone eligible for Medicaid; it's just that the state is the beneficiary if that person dies within the term of the annuity. If the person outlives the annuity, then the state will not receive anything from the annuity proceeds. Therefore, there is nothing to lose in doing the annuity. That is, if the annuity is not purchased, then all of the countable assets are subject to the nursing home. With the annuity, the person can immediately qualify for Medicaid, and there is a chance that some assets will be protected. It is important to note that the subject of annuities is enormously complicated, and this article only provides a very brief introduction to the subject.

C. Home Equity

For a married couple, the home has always been a non-countable asset, and it remains so under the new law. With an unmarried person, the home has always been countable, with one exception. If an unmarried person owns a house, but has under

$2,500 in other assets, he or she could still qualify for Medicaid on a temporary basis if the house were put on the market and sold within six months. If the house failed to sell within six months, extensions were routinely granted as long as the person was making active efforts to sell the house. The new law, however, contains an absolute bar on Medicaid eligibility for any unmarried person who has over $500,000 worth of equity in his or her home. Even if this person has no other assets at all, but has a house with over $500,000 in equity, he or she cannot obtain Medicaid, regardless of whether the house is on the market or not.

5. <u>The Solutions</u>

Although the state and federal governments have made Medicaid planning more difficult, it is still possible to shelter assets from the nursing home. Here are a sampling of the techniques that are still available.

A. The Medicaid Trust

An irrevocable trust known as a "Medicaid Trust" is a powerful technique of protecting assets. Whatever assets you wish to shelter are placed into the trust. You are entitled to receive all income or dividends generated by those assets. You cannot receive principal, however, because, if you could, it would be subject to the nursing home.

Some people use the irrevocable trust to shelter their real estate only, while others use it to shelter their real estate and some, or all, of their investments. As explained above, there is a five-year lookback period on all irrevocable trusts. Therefore, people who are relatively healthy, and who are not expected to go into a nursing home within five years, would do well to consider such a trust in their estate planning portfolio.

B. The Pourover Trust

The Pourover Trust is revolutionary in that it allows a married couple to shelter assets from the nursing home using a trust that is completely revocable, that can be amended at any time, that allows unfettered access to the money, and that does not have a lookback period.

The pourover trust makes clever use of what is known as a “testamentary trust” coupled with a will and revocable trust. Federal law states that if a testamentary trust is written in the correct way, the assets therein will not be available to the nursing home; *i.e.*, it will be sheltered.

In the case of a married couple, in all but the most unusual case, one spouse will die before the other. Since we do not know who will be the first to die, we create a joint husband and wife revocable trust. The assets to be protected from the nursing home are placed into that trust. While both spouses are alive, they can use the trust assets as they wish, without any restrictions or involvement of the children. The trust states that on the first death, some or all of the assets are to "pour over" to the estate of the spouse who has died. At this point, the will of that spouse takes over. The will creates a testamentary trust for the benefit of the surviving spouse. That testamentary trust says that the funds are to be used for the care, comfort and maintenance of the surviving spouse, to maintain the spouse in his or her accustomed standard of living. Usually, one or more of the children act as trustees. Since testamentary trusts are exempt from the nursing home, the assets in the trust are protected! The nursing home does not have access to those assets.

The beauty of the Pourover Trust lies in the fact that during the lifetime of both spouses, the trust is revocable, and the spouses are free to do whatever they want with the assets, without the children being involved at all. Additionally, the Pourover Trust, being revocable, has no lookback period and is effective immediately. The trust can also be tailored to fit the needs of the client. That is, there is no requirement that all of the assets be placed into the trust. Whatever the couple wants to protect from the nursing home is put in the Pourover Trust, and the rest of the assets can be left out.

C. Planning for Those Already in a Nursing Home

While the government has cut back on the ability to shelter assets for people already in a nursing home, it is still usually possible to do so. One technique, concerning annuities, has already been mentioned. An annuity is a financial device that converts assets into income. In the case of a married couple, the income can be directed to the healthy spouse, and can thus be protected from being spent down. In the case of a single person, the annuity can get the person eligible for Medicaid right away, and can stretch out how long the person's money lasts. The law surrounding annuities is enormously complex, and is far too intricate to summarize here. Anyone with a loved one in a nursing home who is interested in sheltering assets owes it to themselves to get more information on annuities.

A second technique is known as the "Reverse Half a Loaf." The Reverse Half a Loaf is a technique of extraordinary complexity and sophistication by which it is possible to shelter about half of the assets of a nursing home resident. The law surrounding the Reverse Half a Loaf is even more complex than the law surrounding annuities, and is also too complex to summarize here. In the right case, however, it can be used to protect a good deal of the assets for someone who is already in the nursing home.

6. Conclusion

The financial well being of our seniors is more vulnerable than ever. Prescription drug costs and property taxes are out of control, and gasoline and heating costs are at the whim of foreign leaders of distant lands. Nursing home costs are astronomical, and Granite Care and the Deficit Reduction Act have made matters even worse. Seniors who are uninformed or who do not get good advice are at greater risk than ever of losing their nest egg. Fortunately, the door has not closed on many Medicaid Planning techniques such as the irrevocable Medicaid Trust. Therefore, in this sense, seniors that are well-informed can still protect themselves and their families, which is why the importance of asset protection is more crucial now than ever.