The Intersection of Elder Care and Estate Planning

ELIZABETH FORSPAN, ESQ.

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FORSPAN KLEAR
LLP

www.ForspanKlear.com

(516) 765-7772

eforspan@ForspanKlear.com

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Elder Care Planning

Long-Term Care Options to Consider

- Home Care
- Assisted Living/Memory Care
- Nursing Home Care

Financial Considerations: Are there sufficient resources to pay for the senior's care?

Consider and evaluate options, such as:

- Long Term Care Insurance
- Reverse Mortgages
- Support from Family Members
- Medicare?
- Medicaid

Medicaid Overview

2025 Medicaid Asset and Income Requirements

Asset Limitations

- The Medicaid applicant may keep up to the state applicable Medicaid asset threshold ($31,175 per person and $42,312 for a couple in New York) plus exempt assets
- $2,000 Asset Threshold in most states, including Texas!
- Community Spouse Resource Allowance

Income Limitations

- Varies by state (NY: $50 in Nursing Home - $75 in TX; NY: $1,732 at Home or $2,351 for a Couple at Home; TX: $2,901/mo. and $5,802 for a Couple)
- "MMMNA" – Minimum Monthly Maintenance Needs Allowance - $3,498/mo. in TX and NY (and 12 other states)
- Pooled Income Trusts (Available for Home Care)/Qualified Income Trusts

Spousal Refusal - A spouse can sign a Spousal Refusal – but again, beware of spousal suits!

Lookback: 5 years for Nursing Home care

What about Home Care?

- Not in NY – Currently
- TX has a 5-year lookback for some home care services

Medicaid Transfer Penalties: Nursing Home Applications

- When an individual applies for Medicaid nursing home care, Medicaid will look back 5 years to see what assets the applicant and spouse (if any) had, and what assets were gifted away.

- If money was gifted during the look-back, Medicaid calculates a so-called *"penalty period"* that will cause the applicant to become ineligible for Medicaid coverage for a period of time.

- Period starts when applicant is institutionalized, applies for Medicaid benefits and is "otherwise eligible" except for gifts.

- For example, a transfer of $134,150 within the 5-year lookback period will create a 10-month period of ineligibility (for NYC applicants using the NYC regional rate).

Some Tax Issues in Medicaid Planning

Tax Implications of Outright Transfers vs. Transfer to Trusts

- Transfers of Real Property Including Principal Residence
- Transfer of Liquid Assets
- Basis Issues

Outright Transfers (Gifts)

- Carryover Basis
- No Sec. 121(a) for Donor
- Creditor Issues
- Pre-deceased child/Donee
- Divorce

Transfers to Trust

- Basis Step-Up
- Sec. 121(a) is available for Grantor(s)
- Asset Protection

Irrevocable Medicaid Asset Preservation Trust

- Trust Requirements:
  - Must be Irrevocable
  - Settlor should not serve as Trustee (best practice)
  - Any principal or income that can be distributed to the Settlor or Settlor's spouse will be considered available for Medicaid purposes
  - Discretionary payments to Settlor / Settlor's spouse will be available even if subject to an ascertainable standard
    - "HEMS" will not be acceptable for Medicaid purposes

Irrevocable Medicaid Asset Preservation Trust cont.

- Advantages:
  - Considered a completed transfer for Medicaid purposes
  - Decision-making can be easier and more efficient
  - Can provide protection against children's creditors
  - Income tax benefits
    - Real Estate tax exemptions
    - IRC Section 121 Exemption can be maintained
  - Can preserve step-up in basis upon Settlor's death
  - Can reserve limited power of appointment to make limited changes to beneficiaries

Irrevocable Medicaid Asset Preservation Trust cont.

- Disadvantages:
  - Loss of control/independence
  - More costly / complicated
  - Difficult to mortgage real estate
  - Excess income considerations – i.e. Does the trust provide income to the Settlor? Will that result in high spend-down if Medicaid is needed at a later date
    - If so, consider giving income to another beneficiary
    - Beware high trust income tax rates

Transfers of Real Property Including Principal Residence to a Trust

- Ability to live in home
- Ability to receive rental income (if desired)
- May direct Trustees to sell property and exchange for new property
- Section 121 Exclusion
- Maintain basis step-up
- Asset included in estate of Settlor
- Limited Power of Appointment
- Maintain degree of control/independence

IRC Section 121(a)

- Up to $250,000.00 of gain excluded from gross income
- On sale/exchange of property
- Property **owned** and used as principal residence for periods aggregating 2 years or more

Section 121- Ownership Requirement

- Single owner entity disregarded for federal tax purposes (i.e. single member LLC) satisfies requirement
- Grantor trusts – satisfies requirement
- Limited partnership – does not satisfy requirement
- Regs 1.121-1(c)(3)

Transfers of Liquid Assets

- **Transferring Brokerage Accounts to a Trust**
- Low basis versus high basis assets will inform decision in many cases
  - Maintain step-up for low basis assets
  - Consider income tax consequences for beneficiaries
- Consider Grantor Trust so Grantor will pay income taxes regardless of who receives income
- Consider income being generated for Medicaid purposes

Transfers of Liquid Assets

- **Transferring a Non-qualified Annuity to a Trust**
- Cash value is considered an asset for Medicaid purposes: non-exempt asset
- Certain pre-DRA 2005 annuity rules apply: Medicaid may treat as income stream and not asset, but must meet DRA requirements
- Goal is to maintain tax-deferred status
- May only be transferred to a grantor trust
- IRC Section 72(u)

Tax Consequences of <u>Medicaid Trusts</u>

- Income Taxes
  - Who is paying the income taxes? Almost always structured as Grantor Trusts
- Estates Taxes
  - Do people who engage in Medicaid planning *generally* need to worry about estate taxes???
- Real Estate Tax Exemptions
  - Can be a significant help with expenses for seniors

Real Estate Tax Exemptions

- Veteran’s Exemption
- Senior Citizen’s Exemption
- Enhanced STAR Exemption

Where Good Estate Planning Equals Bad Medicaid Planning

- Annual Gift Tax Exclusion – Be careful!
- Revocable Trusts
- Irrevocable Trusts
- Life Estates
- CSTs
- Certain Powers
  - Trustee Discretion
  - 5X5 Power
  - HEMS

Annual Gift Tax Exclusion

- Annual Gift Exclusion:$19,000 ($38,000 for a married couple)
- However, this amount is considered a “gift” for Medicaid purposes and will cause a period of ineligibility
- Medicaid will, most likely, review all transfers of $2,000 or more (and may review ANY transfer) – very State and County-specific

Estate Tax Exclusions

- Federal: $13,990,000 per person (2025)
  - 12/31/2025 Sunset?
  - Portability
  - Unified Credit
- 17 states plus D.C. have an Estate or Inheritance Tax
- Example:
  - New York: $7,160,000 (2025)
    - Cliff
    - No Portability
    - Three-year clawback on gifts

Revocable Trusts

- General Purposes: Avoiding Probate and Privacy
- Assets held in a revocable trust are considered "available" assets for Medicaid purposes as if the Grantor owned the property outright
  - Grantor/Settlor has too much control
  - Alter ego for Grantor
- Will it be the new norm for protection against Medicaid Estate Recovery?
  - In the case of the Homestead for Community Medicaid

Irrevocable Trusts

- For “Medicaid Trusts”
  - Ensure that no principal goes to the Grantor
  - Income that Grantor has right to will be counted, even if it is not actually given!
- HEMS (health, education, maintenance and support) is **not good**
- 5 x 5 power is **not good**
- **Trustee Discretion**
  - **Not good if applicant is Grantor**
  - **If another is Grantor (third-party), ensure Trustee discretion!**
- Be careful with the ability to swap assets and changing Trustees – see what your County has previously done

Credit Shelter Trusts

- DSS will count the ENTIRE principal as available to spouse
  - Is this correct?
  - Principal for HEMS
  - 5x5 Power
  - Trustee discretion to go above
- What are some ways these can be used for client's advantage?
  - Kill the CST?
    - Basis step-up that would have otherwise been lost
    - Protect in a Medicaid Trust
    - BUT, CST must allow for the principal to be given to spouse in it's entirety!

Life Estates

- Good: Basis Step-up
- Bad: Section 121(a) is limited
- Bad: If home is sold during life, it can create a Medicaid ineligibility period
- Consider when: “Caretaker Child” exemption applies
  - And prior planning not done
- Transfer between spouses
  - Sometimes, this is necessary, but you must consider a Life Estate for the Step-up (especially if spouse will sell home)

Questions?

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