ESTATE and DISABILITY PLANNING

& ELDER LAW BASICS

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Estate planning involves financial and long-term care issues for families and seniors and overlaps with issues relating to people with disabilities. With lifespans increasing and tax laws and governmental entitlements (including Medicaid) becoming more complex, parents and children are more concerned and confused than ever about these interrelated matters. Planning for the "expected unexpected" can save money and grief for you and your family.

The goal of this article is to explain some basic facts, legal concepts, tax rules and techniques to provide for alternate decision-makers and preserve family assets for New York residents. It is critical to get competent professional advice because there are many exceptions to general rules, laws are changing (as well as their interpretation and implementation), and everyone's situation is different.

Topics beyond the scope of this article include Medicare (and Managed Care programs), Social Security, SSI and SSD, abuse of seniors by relatives or strangers, and how to select a nursing home or other care environment.

What Everyone Needs to Know about Advanced Directives, Guardianship and Wills

WHY YOU SHOULD SIGN A HEALTH CARE PROXY/ LIVING WILL

By signing a Health Care Proxy, you appoint someone (and an alternate) to make medical decisions and access medical information if you can't do that yourself. It requires two witnesses, and copies are valid. For adults in a hospital or nursing home who can't act, the Family Health Care Decisions Act of 2010 allows a surrogate to be named including a court appointed guardian or a family member.

A Living Will is not a will at all but rather an expression of your wishes about medical treatment. It usually states that you do not wish your body to be kept alive if there is no reasonable hope of recovery from some terminal condition. Rather, you wish to be allowed to die with dignity and as little pain as possible. Many lawyers add Living Will language directly into the Health Care Proxy.

WHY YOU NEED A DURABLE POWER-OF-ATTORNEY ("POA")... to appoint a trusted decisionmaker as your agent.. If you suffer a severe accident or stroke or lose your memory due to Alzheimer's disease, it may be too late. Then an expensive and time-consuming Guardianship proceeding in court may be required. By signing

a POA, you give one or more people the authority to act on your behalf for most financial and legal matters, effective even after you become incapacitated because of a "durability clause". However, your named agent(s) cannot make or take gifts unless you sign a separate rider authorizing this power (important for Medicaid eligibility planning, see below). You can revoke the POA at any time, assuming you are competent, and it becomes ineffective at your death.

Many hesitant people never sign a POA, worried that this important document might be misused. One solution is for your attorney to retain the originals in a safe (and give the agents a copy for information only) to be released upon your future instruction or if your subsequent disability is independently confirmed. The law says NY banks must recognize a properly notarized standard POA and give your agent access to your accounts and safe deposit box while you are alive, but branch staff often insist on getting approval from the bank's legal team. Your loved ones should know how to locate your original POA and professional advisors in the event of accident or disability.

WHEN IS A GUARDIANSHIP REQUIRED?

When an individual is or becomes unable to make his or her own decisions, a petition for Guardianship can be submitted to the court by a family member, social service agency or other interested party.

In the case of an Alleged Incapacitated Person (an "AIP"), a state Supreme Court judge will appoint an independent Court Evaluator to help determine if a Guardian should be appointed to manage the personal needs and property of the AIP pursuant to Article 81 of the Mental Hygiene Law. All interested parties and possible heirs must be notified of the hearing date, usually set within one month after a petition is submitted. The AIP may hire her or his own attorney or have one appointed by the court. The judge may determine the AIP to be an IP or person in need of a guardian (PING) and appoint as Guardian one or more trusted family members or, in the event of a dispute or when appropriate, an independent person or agency. Appointees must complete a training session to qualify (online or in person) and obey the judge's order to take the IP's desires into account as much as possible. The need for a Guardianship can often be avoided with a previously signed durable POA and Health Care Proxy.

In the case of a minor child or an individual with an intellectual or developmental disability, a petition to the Surrogate's Court requires a great deal of family and medical information but a hearing is not necessarily required before an appointment is made. A Guardianship for a competent minor ends when the child turns 18.

All Guardians are subject to the rules of the court and must file periodic reports and accountings.

WHY YOU NEED A WILL

A Last Will & Testament can greatly simplify the process for your family of dealing with your death and distributing your assets. You can:

- Choose your beneficiaries, including grandchildren, friends or charities;
- Recommend a guardian for minor children;
- Create trusts to maximize benefits and/or minimize taxes and other pitfalls for loved ones and disabled individuals and minors;
- Name an executor to be in charge and avoid the possibility of the court appointing strangers who are paid substantial fees to distribute your estate;

TESTAMENTARY SUBSTITUTES; A WILL DOES NOT COVER EVERYTHING

A will directs how your solely-owned assets are distributed after you die and your debts are paid. Other assets (collectively called "Testamentary Substitutes") pass directly upon your death to a named survivor if they are owned:

- Jointly (which usually means the same as "joint tenancy with right of survivorship" = "JTWROS");
- In-Trust-For (ITF); payable on death (POD); or with a transfer on death (TOD) designation; or
- Naming a beneficiary (such as IRAs, annuities and life insurance policies).

If you want someone to have access to your bank account only as a convenience but want the balance to pass upon death via your will, then do not create joint accounts; rather, use a POA to name an agent instead.

"Now that we're dead, its just taxes."

WHAT A WILL INCLUDES

A will includes residuary and sometimes specific bequests to named people or organizations called Legatees.

Examples of specific bequests are: "I give and bequeath my diamond wedding ring to my niece and $10,000 to Sunnyside Community Services, Inc."

Residuary bequests refer to the "rest and residue" of your property: everything solely in your name (whether or not you specify it) including bank accounts, stocks, bonds, real estate, jewelry, household effects and perhaps even your social media accounts and the proceeds of a lawsuit settled after your death in which you were the plaintiff. The residuary can go all to one party or in percentages to several legatees.

Your will names an Executor (or Co-Executors), usually a family member or close friend, to carry out the will's instructions. An attorney need not be named Executor unless there truly is no one else appropriate; a banking institution is usually named only for very large estates. The Executor is a fiduciary who has legal responsibility to do the job properly and is entitled to a commission fixed by law, although family members will often waive it.

A will can provide for a trust, recommend a Guardian for minor children, or recite burial or cremation instructions. It should be clearly understandable (after all, you can't go back and ask a dead person what was intended), and it must be signed under strict requirements to be valid. When a will is signed under attorney supervision, all legal requirements are presumed to have been met. Anyone using a printed form or internet will is taking the chance of a lifetime.

HOW IS A WILL PROCESSED?

The processing of a will is called Probate (from a Latin word meaning "to prove"). A sworn Petition by the Executor is submitted to the Surrogate's Court in the county of legal residence of the person who died (the decedent) together with the original will, a death certificate, other documents and a filing fee. Notices are delivered to all Distributees (family members who by law would inherit if there were no valid will), all Legatees receiving legacies named in the will, and other parties having an interest. Parties

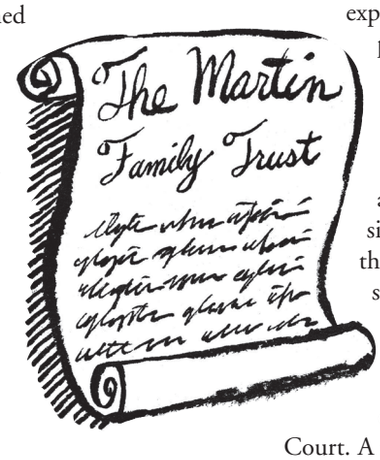
who may want to challenge the will by claiming fraud, undue influence, or lack of mental capacity of the decedent (and who bear the burden of proof) waive their chance if they do not appear on or before a date set by the court. After all requirements are met, the Surrogate issues Letters Testamentary (a plural name for a singular document) granting the Executor legal authority over the decedent's solely-owned assets.

Many people think that Probate is to be avoided because of high costs and lengthy delays. This is simply untrue in most circumstances (see "Why Create a Revocable Trust" below). Wills that are properly written and duly signed are rarely challenged, even more rarely overturned, and often processed in as little as 6 to 10 weeks. But special problems can delay the process. For example, the existence of a potential heir who is a minor, mentally incompetent, or whose identity or whereabouts is unknown often results in the court appointing a Guardian Ad Litem (GAL).

For the few estates subject to estate tax, now that exemption amounts are so high (see below), avoiding Probate does not result in avoiding estate taxes.

WHAT HAPPENS IF YOU DIE WITHOUT A WILL?

If you die without a valid Last Will & Testament, called dying intestate, NY law provides that your net solely-owned assets are divided among your next of kin, the Distributees. Your spouse receives everything if you have no children. If you have surviving children or grandchildren (collectively called your issue, whether you were married or not), your spouse receives the first $50,000 plus half the balance. Your children and issue of any pre-deceased child divide the other half. If you have neither spouse nor issue, your assets are divided among parents or, if none, among brothers and sisters or more distant relatives. Only if no relatives can be found do your assets pass to the state.



Someone must submit a sworn petition to become Administrator of your estate, similar to being an Executor. Normally this is your spouse, child or close relative. If no one steps forward, or if the closest relatives are cousins, then the job is performed by the Public Administrator, a county official named by the Surrogate. Like an Executor, an Administrator is entitled to a commission paid from your assets. When the judge is satisfied as to your family tree, that all parties have been properly notified, and as to the qualifications of the petitioner, then Letters of Administration are issued appointing an Administrator.

WHAT AN EXECUTOR/ ADMINISTRATOR DOES

An Executor/Administrator may retain the lawyer of her or his choice to do most of the work. Often this is the lawyer who drafted your will because she or he would have obtained appropriate family-tree and other important information and can best defend the will if it is challenged. Once appointed, the estate fiduciary has the authority and responsibility to collect all assets solely in your name (as opposed to Testamentary Substitutes), and to file your final income tax return. These assets are used to pay funeral expenses, legal and court costs, all valid claims by the decedent's creditors, and estate taxes if any (which must be paid within nine months of the date of death to avoid interest and penalties).

Partial preliminary distributions can be made to the Legatees (or to Distributees if there is no valid will), who should eventually review and approve an informal accounting of all the assets received, expenses paid, and proposed final distributions. Only after they all sign a Release should final distributions and the commission be paid out. If there is an objection, sometimes a time-consuming adversarial accounting must be carried out in Surrogate's Court. A fiduciary's responsibility for decedent's liabilities ends seven months following appointment by the court if she or he was unaware of a creditor's claim, has performed properly, and has distributed the net assets.

WHY CREATE A REVOCABLE LIVING TRUST?

For most New Yorkers, a Revocable Trust is more trouble than it's worth, although the benefit of avoiding probate may be greater to residents of other states. In NY, it is typically not difficult for the Surrogate Court to issue Letters Testamentary to an executor, and the process of administering the estate is generally smooth. Avoiding probate does not mean avoiding estate taxes (which only applies to NY estates over $5,850,000 in 2020).

TRUSTS are Not For The Wealthy Only

A Trust is a separate legal entity that can own assets such as stock, bank accounts or real estate (but not IRAs). It is created by a written agreement between a Grantor (who establishes and usually funds the Trust) and one or more named Trustees. The Trustee, as a fiduciary, has the duty to properly manage the assets for the benefit of ("f/b/o") lifetime or residuary beneficiaries according to the instructions or discretion set forth in the Trust. A Trust usually has its own tax ID# and pays its own income taxes.

A *Revocable Trust* can be changed at any time because the Grantor generally maintains complete control as initial Trustee, and Grantor's SS# can often be used (see below), and a successor Trustee eventually takes over.

An *Irrevocable Trust* cannot be changed for the most part, at least in the sense that a Grantor can't take back what is put into the trust's name. Although a Grantor is usually not a Trustee, she or he can retain certain powers such as the right to change the ultimate beneficiaries via a "Special Power of Appointment" (SPA) or to change Trustees. Irrevocable trusts are an important part of Medicaid eligibility and tax planning (see later).

A *Living Trust* (also known as "inter vivos"), created during Grantor's lifetime, can be either Revocable or Irrevocable. A Testamentary Trust created via a Last Will & Testament is merely a plan that can be changed during lifetime, and it only comes into existence upon death and is then irrevocable by definition.

Trust provisions can vary widely, and a Living Trust includes directions following the death of the Grantor as to a successor Trustee and distribution. In that sense, it can accomplish many of the same goals as a will (and avoid the probate process in court). Trustees can be given broad discretion as to use of Trust funds f/b/o beneficiaries, or the role can be more limited. The possibilities are limitless.

A Revocable Trust is very helpful in avoiding problems such as a potential will challenge or when missing distributees must be diligently searched for as a probate requirement, resulting in expense and delay. You can often avoid the probate process and still control your assets by naming yourself as initial Trustee and retling or deeding them into the Trust name. Typically, the Trust uses your own Social Security #. If you become disabled, or when you pass away, your named Successor Trustee can carry out your instructions quickly and without public exposure. This may be especially important when providing for a handicapped child or relative.

A Revocable Trust is certainly more expensive than a will, and it will not avoid the probate process if any assets remain solely in your name.

HOW A SUPPLEMENTAL NEEDS TRUST ("SNT") CAN AVOID INELIGIBILITY FOR GOVERNMENTAL BENEFITS

A Supplemental Needs Trust (SNT, sometimes called a "Special Needs Trust") provides funds for the benefit of ("f/b/o") a chronically disabled individual. It is controlled by a separate Trustee who is instructed to supplement, and not to replace, expenses that would otherwise be paid for via governmental entitlements such as Medicaid. Under NY law, a properly drafted SNT avoids ineligibility because the Trust fund technically is not owned by the disabled beneficiary, and the beneficiary can also receive SSI benefits but not excess income.

When created f/b/o someone under 65 from their own (or their spouse's) money or inheritance or a personal injury verdict a "Self-Settled" SNT must provide for notice to the social service agency and, upon death of the beneficiary, payback costs advanced by Medicaid from any trust balance. A person of any age may fund a "COMMUNITY POOLED" SNT that is managed by a not-for-profit organization f/b/o that person during lifetime and thereafter f/b/o other disabled people.

When created from funds provided by a parent or other person f/b/o a chronically handicapped person, a "3rd Party" SNT does not have to include payback provisions, and can specify ultimate distribution of any remainder to another party.

TRUSTS CAN BE USED TO PROTECT MINOR OR ADULT CHILDREN

Without appropriate trust provisions in a will, a minor child's inheritance is managed by the legal Guardian (usually the surviving parent) until the age of majority is reached at 18. To avoid having your child skip college and perhaps buy a sportscar instead, you can establish a Testamentary Trust naming suitable relatives or friends as Trustees to use their discretion f/b/o your child until a more mature age is reached, say 25. Spendthrift Trust provisions can also be helpful for children with substance abuse or gambling problems, shaky marriages, or the tendency to squander money.

Estate Tax Summary: Only Those With $5+ Million Need be Concerned

Here is the estate tax story in a nutshell:

Your gross estate for estate tax purposes generally includes all bank accounts, stocks, real estate and other assets owned solely, jointly, ITF, TOD, POD, or otherwise. It also includes proceeds of annuity and insurance policies on your life (unless owned by an ILITrust, see below), trust assets over which you have control, and the value of real estate subject to a life estate.

1. **Inheritances received from a spouse by a widow or widower who is a US citizen are not subject to NYS or Federal Estate Tax.**
2. **The NYS Estate Tax exemption is $5,850,000 in 2020, and rates range from about 4% to 16%. Gifts made before 3 years of death are exempt.**
3. **Federal Estate Tax exemption is $11.58 Million in 2020 (set to revert to $5.5 Million in 2025). Non-exempt assets are generally taxed at a 40% rate. Lifetime gifts by each person are exempt from Gift Tax up to this amount, but they reduce the estate tax exemption (unless under the Federal exclusion amount of $15,000/person/year in 2020).**
4. **Decedent's debts, funeral costs and probate/administration expenses are deductible from the gross estate. Bequests to charities and religious organizations are also exempt.**

Note:

Inheritances are not income, so recipients need not report them on tax returns (except for deferred income and consequent tax for inherited IRAs, annuities, Keoghs and US Bonds which is known as "IRD: Income in Respect of a Decedent").

Heirs receive a Stepped-Up tax basis on appreciated assets (such as stock & real estate) to the date-of-death (DOD) value. This can greatly reduce or eliminate Capital Gains Tax.

Fiduciary Income Tax, typically modest, may be due on net income earned by the estate between the DOD and distribution of the inheritance.

Estate Planning and Maximizing Inheritance

Everyone wants to have enough assets to live comfortably and be able to pay for health and care costs throughout old age, but investment strategies to accomplish this are beyond the scope of this article. Multi-millionaires want to minimize estate taxes, but some jump through unnecessary hoops attempting to protect assets from the government's clutches.

FOR THOSE WITH $5+ MILLION: GIFTING STRATEGIES TO REDUCE ESTATE TAX

Gifts up to $15,000/calendar year may be made to an unlimited number of people without reducing the Federal

estate tax exemption or having to file a gift tax return. Gifts made before 3 years of death are exempt from NYS estate tax. Sophisticated and complex strategies exist whereby $5+ million net worth individuals can transfer business interests or real estate during their lifetimes at a discounted value for estate tax purposes and sometimes still maintain considerable control. They may involve a Family Limited Liability Company (LLC), Qualified Personal Residence Trust (QPRT- different from conveying a house to a trust with a retained life estate, described later), or Grantor Retained Annuity Trust (GRAT).

A Charitable Remainder Trust can generate lifetime income and/or current tax savings and reduce estate tax, while resulting in ultimate charitable gifts.

An Irrevocable Life Insurance Trust (ILIT) can be used to own policies (often bought on a lump sum premium basis) the proceeds of which do not increase your taxable estate. The person whose life is insured must not own or control the policy and must survive the transfer of any existing policy by three years. Proceeds can provide liquidity and/or be used to pay estate tax and avoid the need to sell assets.

Guidance regarding these strategies and generation-skipping taxes is beyond the scope of this article, and you are urged to seek professional advice.

FOR WEALTHY MARRIED COUPLES: CREDIT SHELTER TRUSTS

Most spouses prepare wills whereby each leaves all solely owned property to each other or, if the spouse does not survive them, alternatively to children. These are often called "I Love You" or "A-B" wills (See cartoon). This is fine, but if your combined estate exceeds $5.85 million in NY in 2020 it can result in unnecessary estate taxes upon the death of the second spouse.

If a surviving U.S. citizen spouse inherits more than the NYS Estate Tax exemption, there is no immediate NY significance since the entire amount is completely exempt. However, that spouse's entire estate may become taxable at from 4% to 16% (and 40% for amounts over the Federal exemption amount of $11.58 million).

A Credit Shelter Trust can be used to obtain the full exemption for both spouses, thereby eliminating or greatly reducing tax on large estates. Also called a Bypass Trust, its terms are set forth in a will or Revocable Trust and can be changed during lifetime. Instead of leaving all to a spouse, a portion of solely-owned assets can be distributed to (or remain in) a Trust, often with children and the surviving spouse as Co-Trustees.

Typically, the goal is to reduce the estate of a surviving spouse by excluding Trust principal (eligible for exemption under the estate of the first to die), while still providing the survivor with the benefit of lifetime income and limited rights to invade the Trust principal, and upon his or her demise the remainder is generally distributed among children.

Credit Shelter trusts funded on a "disclaimer" basis can provide for significant flexibility to reduce estate tax. A will or a trust may provide that the surviving spouse inherits everything <u>except</u> what is renounced within 9 months after the first spouse dies, and those assets fund the trust.

Since a will only covers assets solely in the decedent's name, it is important that sufficient assets be solely-owned by each spouse. Otherwise, if a substantially less wealthy spouse dies first, a testamentary trust may not be fundable so as to use the full exemption amount.

Although Federal "portability" law provisions allow a surviving spouse to elect to use the exemption, trust provisions can accomplish goals better.

A SPOUSE CAN WAIVE PART OF HER OR HIS INHERITANCE TO SAVE TAXES

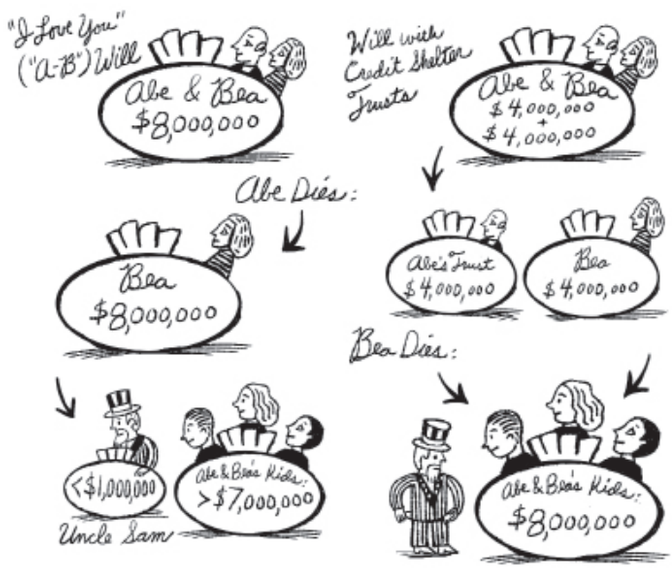
A wealthy surviving spouse can reduce estate taxes by renouncing part or all of what he or she would otherwise inherit. A waiver may even include half of the marital residence. A written renunciation must be submitted to the court within 9 months of the spouse's death. The waived sum passes instead according to alternate provisions in the will (or, if none, to successor distributees). Obviously, unless the disclaimer results in funding a Credit Shelter Trust, the surviving spouse loses all control or benefit from disclaimed assets.

A PRE-NUPTIAL AGREEMENT CAN BE IMPORTANT, ESPECIALLY FOR SECOND & SAME-SEX MARRIAGES

A Pre-Nuptial (or post-nuptial) agreement can avoid problems, especially in the event of divorce and/or if one or both parties have pre-marriage children or if gay or unmarried couples have a child. The agreement must be signed with special language so as to be in recordable form, and the parties must have fully understood it, usually by being represented by separate attorneys. The related discussion can clarify issues about income tax filing options, pension/retirement benefits and whether to comingle bank accounts and/or jointly own real estate and other assets.

For same sex marriages, most legal issues are the same as for heterosexual marriages since the U.S. Supreme Court struck down the Defense of Marriage Act in 2013 and in the 2015 Obergefell case determined that the right of same sex couples to marry is fundamental. But a pre-nuptial

Doubling The Estate Tax Exemption



NOTE: Uncle Sam represents NYS & the Fed'l Gov't, although the 2020 Fed'l exemption is $11.58 million.

agreement can also address child custody and support issues in the event of possible separation or divorce.

People contemplating 2nd marriages should review the impact of Social Security rules. In wealthier second marriage situations, a properly drawn Qualified Terminable Interest Property Trust ("QTIP") can maintain the marital exemption from estate taxes while providing income for a spouse during his or her lifetime and still pass on all or part of the principal to your own children.

YOU CANNOT BE DISINHERITED BY YOUR SPOUSE

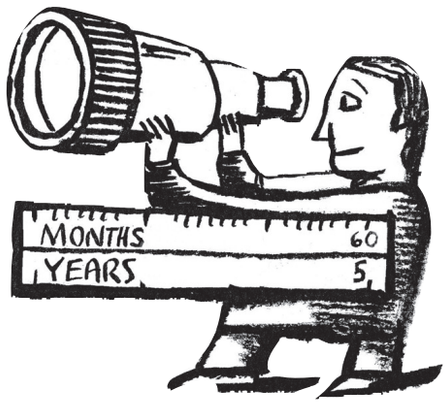
The Marital Right of Election in NY State law provides that, notwithstanding what a will may say, a surviving spouse can "elect to take against the will" and collect certain personal property and 1/3 of her or his spouse's entire estate. This even includes testamentary substitutes and assets transferred within one year of death, although certain life insurance policies may be excluded. A pre-nuptial or post-nuptial agreement before or during the marriage can alter or waive the right of election (and inheritance rights if there is no will), but it must be signed in recordable form. There are many special benefits and rules, including ineligibility for someone who has abandoned his or her spouse or has filed too late, so professional guidance is critical for this complex topic.

Medicaid Eligibility Issues

Medicaid eligibility planning to preserve family assets is very complicated both because everyone's situation is different and because Federal and State laws and regulations, and their implementation and interpretation, are in a constant state of flux. Generally, eligibility can be facilitated by early transfer of liquid or real estate assets to non-spouses directly or via a trust, and transfers to a spouse are exempt but may be subject to recoupment. You are strongly urged to consult with competent professionals.

MEDICARE and MEDICAID ARE DIFFERENT

Medicare is the government insurance program that covers certain medical costs for people over 65 and eligible disabled people. Social Security recipients automatically get Part A, which primarily covers hospital, hospice and limited skilled nursing care. People can get Part B covering doctors and other health services by paying a monthly premium, and part D applies to prescriptions. Medicare issues, including new Managed Long Term Care programs that join with Medicaid, are beyond the scope of this article. However, it must be noted that admittance to a nursing home can be easier when the patient is coming from a 3-day hospital stay since Medicare will then often pay up to the first 100 days: 20 days in full and 80 days with a deductible of $167.50/day in 2020.



Look Back Period

Medicaid, a joint federal/state program, can pay for medical, institutional and home care when you can't pay yourself. To be eligible, the applicant must spend down assets until he or she has under $15,750 in 2020 (except for non-Medicare recipients eligible under the Affordable Care Act). You may also keep a $1,500 burial fund or pre-paid irrevocable funeral trust of any amount for you, your spouse, your children and certain others.

NURSING HOMES and MEDICAID

Nursing home and skilled rehab facilities cost from $12,000 to $16,000/month or more in New York City. When applying for Medicaid, typically via the nursing home staff, you must provide a 5-year history of your assets noting all gifts and transfers. If you are eligible for Medicaid to pay, your monthly social security and other income (except for health insurance premiums including Medicare and a $50/month personal needs allowance) is applied on account of your care. If you are ineligible, you must pay privately until you become eligible.

If you are married, your "well" spouse (also called the Community Spouse) may retain a maximum Community Spouse Monthly Income Allowance (CSMIA) of up to $128,640 and Minimum Monthly Maintenance Needs Allowance (MMMNA) of $3,216 in 2020, or more by proving "undue hardship" at a Fair Hearing or by court order (also see "Spousal Refusal" below). Her or his retirement accounts in pay-out status can be exempt.

Transfers of the Medicaid applicant's assets are exempt and do not result in ineligibility if they are:

- to a spouse,
- placed in trust exclusively f/b/o a minor, blind or disabled child,
- for fair market value,
- of a home to a caretaker child or certain others (see below),
- proven to be for a purpose other than to qualify for medical assistance.

But other gifts or transfers (including the value of a house or co-op) during the 60 month Look Back Period prior to a Medicaid application for institutional care generally make you ineligible. Gifts or transfers before that time are not part of the application process. Withdrawals from joint bank accounts are deemed to be gifts. Previously transferred assets may generally be returned to the applicant to be spent down.

STRATEGIES FOR PRESERVING FAMILY ASSETS

The best strategies for preserving family assets depend on many factors including your health and wealth. All are based on you becoming eligible for Medicaid sooner rather than later.

Crisis planning applies when facing an imminent need for skilled rehab care on a long-term basis, if you have not accomplished asset transfers or other planning steps over five years earlier. It involves creating Promissory Notes or Annuities with a friendly third party (often a family member) specifically calculated to comply with the terms of the Deficit Reduction Act so as to pay for care privately during the period of ineligibility triggered by a current gift. Two separate applications for Medicaid are required, with eligibility anticipated based on the second one many months or a few years later.

Other less urgent strategies include asset transfers to a Community Spouse, creating and funding an Income-Only Irrevocable Trust, transfer of a family home (see below), or purchasing a life estate in a

child's home and residing there for at least one year.

To have greatest flexibility, your POA should include a rider providing for an unlimited Gifting Authority so your agent (or perhaps two agents acting jointly for this purpose) can act if you become unable to do so. In a Guardianship situation, the judge may authorize Medicaid eligibility planning steps.

ASSISTED LIVING, ADULT DAY CARE and MEDICAID

Assisted Living environments and Adult Homes vary widely as to the services provided, and terms describing them are inconsistent. Generally, they are private facilities for communal living and dining where trained staff provide 24-hour supervision, often including assistance with personal hygiene and medication management. They are generally suitable for people who need less care than a nursing home and can walk. Costs range from $4,000 to $8,000/month or more depending on accommodation size and service features.

Medicaid will not pay for most assisted living, but it will pay for care in facilities licensed through the NYS Assisted Living Program (ALP). Also, sometimes a "home care" attendant can be covered by Community Medicaid (see below).

You may be eligible for Supplemental Security Income (SSI) or Social Security Disability (SSD) benefits by applying to the Social Security Administration (www.SSA.gov 800-772-1213). NY SSI recipients are automatically eligible for Medicaid coverage of medical costs.

Adult Day Care includes social and recreational programs for physically or mentally frail seniors in facilities to which transportation is often provided. Services provided by trained staff often include therapy and supervision of medication. Medicaid will cover the cost of certain Adult Day Care programs.

HOME CARE (COMMUNITY) MEDICAID

If you are single and need help paying for home care services, Medicaid eligibility can be based only on your income because there is no penalty for transferring all your assets one month or more before applying. You are responsible for paying "surplus" monthly income in excess of $875 in 2020. Eligibility for home care if you are married is complicated by many factors including current budget pressures, often requiring a spousal refusal (see below). Retirement account payments based on Required Minimum Distributions (RMD) are usually exempt as are Holocaust reparations and similar payments.

Becoming financially eligible for Community Medicaid is the first step, followed by at least two home evaluations by different Registered Nurses. It is very helpful to hire a social worker/ aging life care manager to coach throughout the process and be present at evaluations to get the most successful result (visit www.NYALCA.org for aging life care/ geriatric care managers).

Details about Managed Long Term Care (MLTC) programs are beyond the scope of this brochure, but note that appeals of limits or reductions in care are often necessary and may have deadlines. Or you can always pay privately for home care.

SPOUSAL REFUSAL OF SUPPORT

NY couples under current law can freely transfer all assets to the well spouse (assuming competence or via a POA with a gifting authority) who can then sign a spousal refusal of support as part of the institutional Medicaid application. However, the Medicaid agency may subsequently sue the well spouse to require support and recoup funds actually spent on behalf of the institutionalized Medicaid spouse to the extent that the funds retained exceed the CSMIA or MMMNA at the time of application ($128,640 and $3,216 in 2020, respectively). Negotiations before or during litigation can reduce the amount recouped, as can a Fair Hearing based on "undue hardship". In NYC, the Medicaid agency may require only 25% of surplus income to be contributed toward a spouse's care.

But the possibility must be considered that the well spouse, in whose name all assets become titled, may die first. So it may be advisable for the community spouse to prepare a new will providing for an SNT f/b/o the Medicaid spouse and also consider transfers of assets to others more than 30 days after the spouse has been approved for Medicaid. However, this will affect subsequent eligibility for the community spouse

AN INCOME-ONLY IRREVOCABLE TRUST CAN PRESERVE FAMILY ASSETS and STILL ALLOW MEDICAID ELIGIBILITY

The goal of preserving assets within the family can be partially achieved via an Income-Only Irrevocable Trust, whereby income is distributed to you (and/or your spouse) during lifetime(s) while the principal balance is distributed to your children or others, usually at your death. Since a trust is a separate legal entity, the trust property technically does not belong to the Medicaid applicant, so only the income must be used on account of care costs. However, transfers into and out of a trust will generally result in a 60 month period of ineligibility. Various court decisions apply, but currently a grantor may retain a limited power of appointment allowing a change in the ultimate beneficiary among certain family members.

WHEN THE FAMILY HOME SHOULD BE TRANSFERRED

Sometimes. Although a house (or co-op) is an exempt asset up to an equity value of $893,000 in 2020 as long as the Medicaid applicant or his/her spouse resides there, a lien can be placed on the residence of a Medicaid recipient who is or becomes single. To avoid this, you might deed your home to your children with a retained life estate, which means you as grantor have the legal right to live there indefinitely. Another option is transferring the home to an Irrevocable Trust. In either case, a transfer results in a 60 month period of ineligibility. There is no penalty for exempt transfers to a spouse or to:

- a blind or disabled child;
- a child who has lived with and cared for their ailing parent for over 2 years as a primary resident;
- a brother or sister with a previous equity interest in the homestead; or
- certain trusts for a disabled individual under 65.

Complicating the decision as to the best strategy are capital gains tax implications if the residence might be sold during the grantor's lifetime, because

non-residents are ineligible for the primary residence exemption ($250,000 for singles; $500,000 for married couples). A sale after grantor's death can avoid a taxable gain because of the step-up in basis to the date-of-death value.

Note that recoupment by the Medicaid agency can only be against assets passing by will or intestacy.

A REVERSE MORTGAGE CAN HELP FAMILIES THAT ARE "HOUSE-RICH" and "CASH-POOR"

A bank mortgage can be federally insured if the borrower is over 62 and has attended a counseling session to explain this creative financing tool. No payments on a Reverse Mortgage are due until after the death of the senior, unless the house is sold during lifetime (but you still must pay property taxes and insurance). Loan funds can be advanced in three ways: a) at the closing, b) on a monthly basis thereafter, and c) on a credit-line basis. The maximum sum of these amounts is based on the house value and the borrower's age, generally in the $350,000 area. As time passes, interest (at a competitive adjustable rate) accumulates on funds the borrower has actually received so the mortgage balance increases, hence the term "Reverse Mortgage". The loan generally does not affect Medicaid eligibility and can usually be made even after transfer of a house subject to a life estate, assuming cooperation of the new owners. The legal fees and substantial closing costs can be financed as part of the loan. A reverse mortgage is ultimately paid off upon sale of the house and can never exceed the house value.

LONG TERM CARE INSURANCE (LTCi) POLICIES

Statistics show that an increasing number of people will eventually require Long-Term Care. Generally, LTCi policies are portable throughout the US and can be a cost-effective way of financing much of LTC costs for individuals with a net worth exceeding about $300,000 who have a sufficient income to easily pay the premiums.

Policies vary as to coverage, features and term. Proceeds can pay half or more of the cost of custodial care at home, in an assisted living facility, or in a nursing home (from $100 to $300/day). Many policies will not reimburse for home care unless provided by a licensed agency or certified home-health aide, but some policies include a cash benefit. Benefits commence when your physician certifies you are either:

- cognitively impaired from dementia, Alzheimer's disease or a stroke, or
- incapacitated or unable to perform 2 Activities of Daily Living (ADLs) such as bathing, dressing, eating, transferring from a bed or chair, toileting and/or maintaining continence.

Monthly premiums range from about $200 at age 60 to about $700 at age 75, depending on factors such as your health at application, whether benefits start after a 20 or 90 day deductible period, and the duration of benefits. It is important to have an inflation rider and to purchase from a strong insurance company. LTCi coverage and prices are not always guaranteed, and the NYS Insurance Department can grant or deny rate increases. NY State provides an annual 20% credit of premiums paid against your income tax (not a deduction), and IRS rules allow limited deductibility of premiums.

In New York, if you buy a government-approved LTCi policy under the "Partnership Plan" you are allowed to keep all of your assets and still be eligible for Medicaid after a claim period of 3 years in a nursing home (or 6 years of home care, or a combination). For shorter term policies, Medicaid coverage applies and resources are exempt up to the value of LTCi benefits received. Recovery of Medicaid costs against your estate will not be pursued, but you must pay any uncovered costs during the claim period and thereafter contribute your income toward your care.

Hybrid or Linked life insurance policies with guaranteed annual premiums have an LTC rider allowing limited lifetime use of benefits to pay for home care via a licensed agency.

HOW TO FIND AN ELDER LAW ATTORNEY

National Academy of Elder Law Attorneys 793-942-5711. www.NAELA.org

New York State Bar Association, Elder Law Section 518-463-3200. www.NYSBA.org

NYC Bar Association Referrals: 212-626-7373 www.NYCBar.org

Queens County Bar Association Referrals: 718-739-4100. www.QCBA.org

Marc Crawford Leavitt and Tali B. Sehati are partners of Leavitt, Kerson & Sehati. They are members of the NYS Bar Association Elder Law Section and NAELA. Marc lectures for Caring Kind, the Heart of Alzheimer's Caregiving and the Queens Library Foundation. Our late senior partner, Benjamin Shaw, was the founding lawyer for Sunnyside Community Services, Inc. in 1974. Our firm continues to provide counsel pro bono.

Paul E. Kerson met Marc at Columbia Law School in 1974 and co-founded the firm in 1982. Paul is an esteemed and award-winning litigator who served as 2015-16 President of the Queens County Bar Association.

Tali is a 1998 graduate of Cardozo Law School, has been providing insightful and diligent legal services to our clients since 2010, and before worked in an administrative capacity starting in 1994.

Our general practice offers legal representation regarding Civil and Criminal Litigation, Real Estate transactions, Employment Discrimination, Matrimonial and Family Law in addition to Elder Law & Estate planning issues.

Assistance with this brochure was provided by David I. Kronenberg, Esq. of Goldberg Abrandt & Salzman LLP; Abe Gruenwald of 65+, The Health Care Safety Net; Ron Barcellino, American Portfolios Financial Services, Inc.; and Steven Schwartzman of EldercareNY.com

This brochure is available on our website: LKSLawfirm.com. For a free reprint call 718-729-0986 or send a self-addressed envelope to: 68-61 Yellowstone Boulevard – Suite #116, Forest Hills, NY 11375.

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