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VASILIADIS PAPPAS

ASSOCIATES LLC

# How To Protect Your Home and Savings and Pay For Quality Long-Term Care as You Age

*Consumer Guide to Long-Term Care Planning*

As we age, we dream of retiring, with greater opportunity to do things we couldn't while working – perhaps traveling, playing more golf, pursuing a new hobby, or simply spending more time with family. Unfortunately, many of us don't properly plan for the realities of aging. Have you considered what would happen if you or a loved one needed long-term care? Would you go to a nursing home? If so, how would you pay for it without losing your life savings? If you wanted to stay in your home how would you pay for the cost of caregivers, since they are not covered by Medicare or health insurance?

Thinking about these things can be frightening, perhaps even overwhelming. At times like these, it's important that you pause, take a deep breath and understand that there are things you can do. Good information is available to help you make the right choices for you and your loved ones. With correct information and proper legal help, you and your family can create a plan that provides you with protection as well as peace of mind.

The attorneys at Vasiliadis Pappas Associates have written this guide to assist you in the planning process. It provides answers to many of the questions you will encounter. These are questions that we, as Elder law attorneys, deal with on a daily basis.

We hope you find this guide useful. If you need additional information please feel free to reach out to the attorneys at Vasiliadis Pappas Associates at 610-694-9455 or visit us at our website, www.lawvp.com.

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## *The Saga of Clarence and Elsie*

Clarence and Elsie were the envy of all who knew them. Friendly, kind, and content, this happily married couple were sometimes asked for the secret to their long and happy life together. "We never argued about money," replied Clarence. "We worked hard, spent prudently, saved, and invested wisely with professional help." Observed Elsie, "we put our kids through school, paid for their weddings, and managed to set aside a nice little nest egg. Now, in retirement, we live comfortably without struggling to pay our bills. We travel and we spend quality time with our grandchildren. What's to argue about?"

Suddenly one day Clarence suffered a stroke that left him paralyzed all along his left side. After a short hospitalization he transferred to a nursing home for rehabilitation. A month later, with Clarence still not back on his feet, the therapy ended. But Clarence remained in the facility, a virtual prisoner, unable to meet the physical demands necessary to return home. To make matters worse, his Medicare benefits would not pay for the cost of his continued care once therapy was cut off. Three years later, their nest egg exhausted, Clarence qualified for Medicaid. Now, with Clarence's income payable every month to the nursing facility, Elsie could no longer make ends meet and was forced to sell their home. "I guess we didn't do everything right after all," mused Elsie.

Fortunately, today's seniors are living longer than ever before. But for many, such as Clarence and Elsie, failing health makes the final years for them and their families less than pleasant. Clarence and Elsie failed to realize that prudent retirement and estate planning takes into account the possibility of long-term incapacity.

Medicare and health insurance don't pay for services and supports for persons who can no longer live independently. One year of nursing home care runs over $125,000. Care at home consumes thousands of dollars a month. Fortunately, Medicaid *does* pay for long-term care. But impoverishment is the price for admission to the Medicaid program.

It's important to know that proper legal measures enable a person to qualify for Medicaid and pay for needed care without losing everything acquired over a lifetime of hard work. This booklet describes these legal measures and shows how to protect your home and savings and pay for quality long-term care as you age.



## *What is Long-Term Care and Who Needs It?*

According to the U.S. Department of Health and Human Services, 70% of people who reach age 65 will need some form of long-term care during their lives. "Long-term care" refers to those services and supports that might become necessary to perform *everyday tasks* and *personal care needs*.

Everyday tasks, sometimes called "instrumental activities of daily living," are things such as cooking, cleaning, driving, managing money, taking medication, using appliances and responding to emergencies, such as fire alarms. Persons who need help with these tasks can no longer live at home independently. Where family supports are inadequate, caregivers must be hired. Unfortunately, Medicare and health insurance do not pay for help with everyday tasks. And the cost for this can be substantial. Many such persons choose to enter assisted living facilities, most of which in Pennsylvania are technically referred to as "personal care homes." The cost to live in these facilities typically exceeds a resident's income by thousands of dollars per month.

For many, successfully meeting the challenges of getting help with and paying for everyday tasks is not the end of the story. The inevitable aging process combined with the onset of chronic medical conditions give rise to new or enhanced physical and or cognitive impairment. These persons require help with their *personal care needs,* sometimes called "activities of daily living." Personal care needs refer to bathing, dressing, toileting, eating, transferring (for example moving from bed to chair), and ambulating (moving about). So, what happens to persons who, when they awaken, need help to get out of bed, to get from bed to bathroom, to perform toileting functions, or who are incontinent, who need to be bathed, dressed, or fed? What happens to those who have cognitive impairment, perhaps from Alzheimer's Disease, such that they must be watched round-the-clock so that they don't wander outside in winter and freeze to death, turn on the stove and burn down the house, or who when thirsty do not know to pick up a glass of water placed in front of them and drink? These are the people who populate our nursing homes. The consequences for those requiring long-term nursing home care and for their families can be, without proper legal planning, financially devastating.

# What Does Long-Term Care Cost and How Is it Paid for?

The official average cost of one day of nursing home care in Pennsylvania (2019) is $342.58. This amounts to over $10,400 each month or over $125,000 a year! And, to the surprise of many, Medicare and health insurance don't pay for this. There are helpful financial products persons can buy when healthy and before the need for care arises to help offset this cost. But for most seniors, these financial products are not enough, both in terms of how much they pay out and how long they last. Ask yourself what $125,000 a year in unreimbursed long-term care costs would do to your retirement plan.

So, what happens if someone's money runs out and he or she can no longer pay for needed long-term care? Medicaid, also called Medical Assistance, a federal program administered by each state, steps in. Medicaid will pay for long-term care for as long as needed and without any maximum payout limit. But impoverishment is the price for admission to the Medicaid program. For all but the very wealthy, prudent retirement and estate planning must include legal measures to protect against the catastrophic cost of long-term care by enabling one to qualify for Medicaid while preserving home and savings for loved ones.

But what about Medi*care?* Don't confuse this with Medi*caid.* Medicare is health insurance for the elderly (age 65 or older) and for younger persons who are disabled workers or their dependents. It pays for medically-necessary "acute," that is, short-term, care such as that provided by doctors and hospitals. It is operated and funded in full by the federal government, primarily through tax dollars and, to a lesser extent from premiums paid by recipients.

Medicare does pay for physician-prescribed rehabilitation services in a nursing home to a very limited extent, IF the following conditions are met:

- An immediately-prior 3-day hospitalization ("observation status" stays don't count)
- For a maximum of 100 days (usually terminated on or before 30 days)
- With a co-pay after day 20 of $170.50 (2019) per day

Private health insurance helps only to the extent of picking up Medicare deductibles and co-pays. The $170.50 co-pay referenced above only applies for Plan C or better coverage. When Medicare ends private health insurance also ends.

Now let's take a look at some helpful financial products. We will next examine two need-based public benefits programs, Veterans' benefits and Medicaid, including their eligibility criteria. Thereafter, we will answer some commonly-asked questions regarding Medicaid eligibility, followed by an illustration of some Medicaid planning legal strategies. Finally, we will suggest some important questions you need to ask before selecting an elder law attorney.



# Financial Products That Pay for Long-Term Care

## Long-Term Care Insurance

Long-term care insurance (LTCI), as the name implies, is a form of casualty insurance that pays for long-term assistance with the everyday tasks and personal care needs described earlier. Medicare and health insurance DO NOT pay for these services. So, what is it, who gets it, how does it pay out, and what are its advantages and disadvantages?

***Pool of money.*** Someone with LTCI has a pool of money that's available to pay for care at home or in a facility, including an assisted living facility as well as for nursing home care. The Declarations page at the front of the policy that summarizes its features will indicate a maximum daily benefit that pays out for a maximum number of days. It will also typically indicate the "elimination period," usually, a 30, 90, or 180 days waiting period after eligibility not covered by the policy before benefits commence. Sometimes the maximum payout is less for care in assisted living and less still for care at home. So, for example, someone, let's call him John, might buy a policy that pays out a maximum of $200 a day for up to three years. John has a $219,000 pool of money. He might use it all up in three years or it might last much longer if the cost of his care at home or in assisted living is less than $200 per day. LTCI policies will have riders attached that specify additional extra benefits. These include a "waiver of premium" rider that excuses payment of further premiums while someone is receiving an LTCI benefit; an inflation rider that provides for built-in increases in the maximum daily pay-out; and others.

***Chronically-ill individual.*** Medical criteria to qualify for LTCI are set forth in Section 7702B of the United States Internal Revenue Code. This specifies the benefit trigger. One must qualify as a "chronically-ill individual" to begin receiving benefits to pay for long-term care. Specifically, the person, as certified by a licensed medical professional, must have one of the two following impairments:

(a) inability to perform two or more activities of daily living without substantial assistance; for example, bathing, dressing, toileting, eating, transferring (for example, moving from bed to chair), and ambulating (moving about); OR

(b) severe cognitive impairment requiring round-the-clock supervision.

***Reimbursement or Indemnity.*** Most LTCI policies pay out on a reimbursement basis, where the insured pays out-of-pocket for the care, submits proof of payment to the insurance company, and then gets reimbursed. Alternatively, some policies pay out the maximum monthly benefit automatically to the insured regardless of whether the full benefit is needed.

## ADVANTAGES

*Greater Bang for your Buck.* LTCI is priced strictly on the cost of protecting against a risk. Unlike life insurance products that provide a long-term care benefit as an alternative to a death benefit, it is pure insurance, with no investment feature. The same amount of premium for LTCI will purchase greater protection than available from life insurance.

*Partnership LTCI.* Pennsylvania, in "partnership" with insurance companies, allows a Medicaid applicant to increase his or her resource limit ($8,000 or $2,400, depending on income level) dollar for dollar for the amount of benefits paid out by LTCI policies that carry specified provisions. To illustrate how this works:

**EXAMPLE:** *John has $200,000 of excess resources that prevent him from qualifying for Medicaid to pay for his nursing home care. His nursing home costs $400 per day. His LTCI pays a maximum of $200 per day. After 500 days of care John has $100,000 left. His LTCI has paid out $100,000 and he has paid out another $100,000 of his $200,000 excess resources. John qualifies for Medicaid benefits to pay for his care and may keep his remaining $100,000 of excess resources.*

**NOTE:** If the LTCI benefit that pays out is less than the actual cost of care, then John's savings will be less than the total amount of the available LTCI benefit. In the example above, since the maximum daily benefit payable by the LTCI ($200 per day) is only one-half of the actual daily cost of care ($400 per day) the extra assets John saves amount to only one-half of the total $200,000 pool of money available from the LTCI.

## DISADVANTAGES

*EXPENSIVE.* LTCI premiums, unlike other forms of casualty insurance, such as home owners' insurance, carries a fixed premium for the duration of coverage. But there is a big exception: Policies issued by a company can be raised on all insured's, across the board, if permission is granted by the State insurance department. That has become a common occurrence. The increases have been staggering. Insurance makes sense when a manageable risk is spread out over a large pool, such as is the case with home owners' insurance. But the pool for LTCI is relatively small, the number of insureds who actually put in claims is relatively large, and the amount paid out on most claims is usually very high. Moreover, a prolonged period of depressed interest rates has reduced the amount of income that insurance companies generate from premiums, thus adding to the pressure for them to increase premiums. Many seniors who purchased LTCI and are retired, living on a fixed income and savings, have had to terminate their insurance or, in some cases, reduce the amount of their coverage.



*LIMITED AVAILABILITY.* As the saying goes "you can't buy fire insurance when your house is on fire." Likewise, someone who's at heightened risk for requiring long-term care at some time in the future even if not presently needed, will not be able to buy LTCI. Persons diagnosed with Alzheimer's Disease or other forms of cognitive impairment, or who have Parkinson's Disease, severe osteoporosis, stroke history, or other similar conditions will not satisfy the medical underwriting criteria needed to buy LTCI.

*LIMITED DURATION.* When the "pool of money" runs out, the insurance coverage ends. There was a time when one could purchase LTCI to run for the life of the insured. Such policies are no longer being issued.

*USE IT OR LOSE IT.* This is the flip-side to the advantage of getting more bang for your buck. Someone fortunate enough to live for many years and not ever need long-term care will not have a residual benefit such as with life insurance, which will pay out a death benefit. Some consumers want a residual benefit if they don't ever need long-term care.

*LIKELY NOT COVER FULL COST OF CARE.* As noted earlier, when the pool of money provided by LTCI is used up, then coverage ends. The risk of outliving the benefit payable applies to all financial products. That's why reliance upon financial products is not enough. Prudent planning will include legal measures to qualify for Medicaid in the event financial products don't pay out enough or terminate.

## "Hybrids" – Life Insurance

Many alternative forms of life insurance are evolving that permit an owner to convert the death benefit into a long-term care benefit the owner can tap while alive to pay for care in the event of incapacity. These types of life insurance policies are referred to as "hybrids," since the death benefit can be converted into a lifetime benefit. This is usually a much better option than borrowing against the cash value of a life insurance policy or cashing it out. In 2017, in the United States, four times as many consumers purchased hybrids rather than traditional long-term care insurance. Only a brief mention of these products is contained here, since our main focus is on legal measures designed to qualify someone for public benefits such as Medicaid and Veterans' benefits. It bears mentioning again, that these and other financial products usually fail to pay out enough to cover the full cost of care and usually exhaust. They are no substitute for legal measures designed to qualify for Medicaid without first going broke.

***WHOLE LIFE.*** Many if not all traditional "whole life" life insurance policies offer an "accelerated death benefit" rider that allows the owner to convert the death benefit into a lifetime benefit in the event of chronic incapacity or terminal illness. With some, the monthly premium is higher. With others, there is no increase in the monthly premium but the lifetime benefit is discounted, yielding less than what would have paid out at death.

***UNIVERSAL LIFE.*** These life insurance policies, sometimes referred to as "asset-based" life insurance, are sold primarily for the purpose of paying for long-term care but also offer a death benefit if the owner does not become incapacitated. There are many variations on these policies and they have replaced long-term care insurance (LTCI) as the primary financial product for funding long-term care. They are not a "use it or lose" product. But because they carry an investment feature, guaranteeing a return on investment beyond strictly insuring against a risk, they do not provide as much "bang for buck" for the same amount of money as available from LTCI.

***VIATICAL SETTLEMENTS.*** A viatical settlement is a contract between a person (the viator) who owns a life insurance policy and a third party that buys the policy. It's often an attractive alternative to surrendering the policy for a far smaller cash surrender value. These settlements are relatively new, having first appeared following the AIDs epidemic, when people needed to obtain funds for medical care and to maintain their standard of living. They are typically used by owners who are either terminally ill or chronically incapacitated. The payout will rarely if ever match the long-term care benefit available from a hybrid. If the insured person on a life insurance policy is not expected to live very much longer due to terminal illness or chronic incapacity, the insured has a low "longevity" risk and therefore will more readily find a buyer and at a better price that a healthy person, who poses a greater risk of living longer. The longer the insured lives, the longer the buyer of the policy will need to pay premiums before collecting proceeds at death.



# *Veterans' Benefits That Pay for Long-Term Care*

The Veterans' (VA) Pension program, one of a broad array of veterans' benefits, offers important financial assistance to those veterans and their surviving spouses who need care at home or in a facility and who incur substantial out-of-pocket costs for assistance with everyday tasks and personal care needs. The medical criteria for eligibility closely resemble those applicable to financial products. Nursing home residents and many persons in assisted living facilities will satisfy those requirements. While these benefits will not prevent someone who requires long-term care in a nursing home from avoiding impoverishment, they can go a long way toward minimizing or at least closing the gap between one's income and the cost of care at home or in an assisted living facility.

## Financial Assistance

- Married veteran: $ 2,230 (2019) per month (maximum)
- Unmarried veteran: $1,881 (2019) per month (maximum)
- Widows of eligible veterans: $1,209 (2019) per month (maximum)

## Service Requirements

- 90 days active duty
- One day during wartime
- Discharge other than Dishonorable

***FINANCIAL CRITERIA – INCOME.*** Unreimbursed medical expenses, after a 5% co-pay, are deducted from income. An applicant whose out-of-pocket care costs equal or exceed his income qualifies for the maximum monthly benefit listed above.

***FINANCIAL CRITERIA – NET WORTH.*** Significant changes went into effect on October 18, 2018. Eligibility requirements were tightened. However, much of the ambiguity that previously hindered VA planning was eliminated. The net worth threshold above which eligibility will be denied includes all income as well as assets owned or otherwise accessible by a veteran (and spouse if married) available for the applicant's support. Transfer penalties were introduced as noted below. The net worth limit is annually adjusted for inflation. The limit established in 2019 is **$126,420**.

***TRANSFER PENALTY.*** Gifts made by an applicant or spouse in the 36-month period immediately preceding the date of application for benefits will incur a penalty in the form of a period of ineligibility for benefits. One month of ineligibility will be imposed for every $2,230 gifted, up to a maximum of 60 months. In other words, gifts made more than 36 months prior to application will not be penalized, no matter how large. Gifts made less than 36 months prior to the date of application will be penalized, but not for a period of more than 60 months. So, anyone gifting $133,800 or more and who thereafter applies for VA benefits less than 36 months later, will incur a 60-month period of ineligibility.

***PLANNING MEASURES.*** Creative estate planning, including properly-timed gifts, outright or to a properly-structured trust, will enable a savvy veteran to qualify for VA benefits while preserving assets for loved ones in amounts far in excess of the net worth limit. But beware: many persons who qualify for this VA benefit will eventually require nursing home care. These benefits will not be enough to prevent impoverishment. Consequently, *prudent VA benefits eligibility planning will incorporate measures to ensure that Medicaid eligibility is not later denied because of steps taken to obtain VA benefits.* Such planning will integrate VA and Medicaid eligibility strategies with traditional retirement, estate, and tax planning measures.



## *What Is Medicaid And Why Is It So Important?*

Medicaid, also referred to as "Medical Assistance" is a state-operated program, in compliance with federal guidelines, that is co-funded by state and federal government. It was implemented in 1965 under federal law at the same time as Medicare. In Pennsylvania, the Medicaid program is operated by the Pennsylvania Department of Human Services (DHS) through a series of field offices called County Assistance Offices (CAO). Medicaid and Medicare are two separate programs. They were added as the health care component of the Social Security Act, which was originally passed in 1934 to provide for a program of Old Age (that is "retirement") Survivors and Disability Insurance benefits (OASDI).

***COVERED SERVICES.*** Medicaid provides medical services to the needy; specifically, to persons who are aged, blind, disabled or dependent children who cannot afford necessary medical care. Medical services under the Medicaid program are more broadly defined than in Medicare. Covered items include nursing facility services and, in some states, such as Pennsylvania, home health care. The cost of prescription drugs is also significantly less for persons who qualify for both Medicare and Medicaid. In other words, *Medicaid is the only government benefit that pays for long-term nursing home care.*

***MEDICAL QUALIFICATION.*** Medicaid pays nursing home costs for someone who is "nursing facility clinically eligible" and who also satisfies financial criteria explained below. Specifically, the applicant must require substantial assistance with multiple personal care needs, such as bathing, dressing, continence, transferring, ambulating and feeding. This need must be on a long-term basis, not just for temporary rehabilitation. The local County Area Agency on Aging serving the region where the applicant is located makes that determination, based, in part upon a physician's assessment. *In Pennsylvania and other States that obtained an approved "Waiver" from the federal government, Medicaid is permitted to pay for home health care services in addition to nursing home care.*

***FINANCIAL ELIGIBILITY – UNMARRIED APPLICANT.*** An unmarried applicant must have "countable assets', referred to as "resources," of not more than $8,000 ($2,400 for a person whose gross monthly income exceeds $2,313). A countable asset is any asset not designated as exempt that an applicant can access for use in paying for care. This applies to assets held in a revocable living trust, which are legally titled in a trustee and not the applicant. It applies to the cash surrender value of a life insurance policy. It encompasses the entire value of an irrevocable trust to the extent it's available for an applicant's support UNLESS special provisions are included. There is no limit to the amount of an applicant's income except for

someone whose income is so high as to cover the full cost of care. There is also a penalty in the form of a period of ineligibility for benefits for uncompensated transfers, that is, gifts, made within the 60-month period immediately preceding the date an application is filed. More on that below.

***FINANCIAL ELIGIBILITY – MARRIED APPLICANT.*** For married couples, assets of both spouses are counted, regardless of which spouse is owner. Transferring property from the "institutionalized spouse" to the healthy, "community spouse" does not reduce the amount of countable assets. Before a married applicant financially qualifies for Medicaid, the combined non-exempt countable assets of the couple must fall below a specified protected amount. That amount consists of the institutionalized spouse's $8,000 (or $2,400) "resource limit" and the community spouse's "community spouse resource allowance" (CSRA). The CSRA is one-half of the value of countable assets as existed on the first day of institutionalization that resulted in a continuous stay in a facility (or multiple facilities) of 30 days or more. There is a floor and ceiling to the CSRA.

**EXAMPLE 1.** *John enters Happy Valley Nursing Home on April 9 and remains there permanently. The combined countable non-exempt assets of John and his wife, Mary, on April 9, totaled $200,000. Half of that amount, $100,000, is protected for Mary. John's resource limit is $8,000. John will qualify for Medicaid when the $200,000 shrinks down to $108,000.*

**EXAMPLE 2.** *Same as Example 1 except that the combined countable non-exempt assets amount to $300,000. Mary cannot keep one-half, $150,000, because that exceeds the legal maximum of $126,420. John qualifies when the $300,000 shrinks down to $134,420 ($126,420 + $8,000 = $134,420).*

**EXAMPLE 3.** *Same as Example 1 except that the combined countable non-exempt assets amount to $40,000. Mary keeps $25, 284, the minimum amount protected for her, even though it is more than one-half. John qualifies when the $40,000 shrinks down to $33,284 ($25,284 + $8,000 = $33,284).*

***FINANCIAL ELIGIBILITY - EXEMPT ASSETS.*** The following assets accessible to an applicant or spouse do not count in determining how much an applicant or a married couple can keep and still qualify for Medicaid.

- *Home – if spouse occupies**
- *One motor vehicle – unlimited value*
- *Furnishings & household goods – unlimited value*
- *Prepaid funeral & burial – reasonable amount limitation*



- *Spouse's IRA, 401(k), etc.- unlimited value*
- *Clothing, jewelry and personal effects – unlimited value*

**if the equity value of a Medicaid applicant's principal residence does not exceed $585,000 (2019) it may be designated as exempt. **But**, if owned by the benefits recipient at death it is subject to a Medicaid estate recovery claim.*

***FINANCIAL ELIGIBILITY - GIFTING PENALTY.*** A penalty is imposed in the form of a **period of ineligibility for benefits** if non-exempt assets are gifted during the 60-month period (look-back period) immediately preceding the application for benefits. The penalty is calculated by determining the total amount of gifts made by the applicant or *spouse* during the look-back period, and dividing that amount by the official average daily cost of a nursing home.

**EXAMPLE:** $10,500 (Gift)

divided by

$342.58 (Average daily cost of NH care in PA (2019)
= 30.65 = 30 days of ineligibility

PA "rounds down" the fraction: 30.65 = 30 days

The transfer penalty does not begin to run unless the applicant is in a nursing home and is otherwise medically and financially eligible to receive benefits. In other words, the penalty for gifting does not begin to run until the applicant is in a nursing home and is broke.

***FINANCIAL ELIGIBILITY – EXCEPTIONS TO GIFT PENALTY.*** There exist exceptions to the gift penalty the most notable of which are:

- Gifts to or for the benefit of a spouse
- Gifts to a disabled son or daughter
- Gift of home to a caregiver son or daughter*
- Gift of home to a sibling who co-owns

* a "caregiver" child is a son or daughter of a Medicaid applicant who resided in the applicant's home and provided care to the applicant for a period of at least two years immediately preceding the applicant's nursing home entry which enabled the applicant to remain at home instead of entering a nursing home.

***WHAT HAPPENS AFTER ELIGIBILITY?*** Once someone is approved for Medicaid benefits, that person's financial obligation to pay for nursing home care is limited to his or her gross monthly income, less a $45 per month personal needs allowance and less any medical expenses not covered by either Medicare or Medicaid. The Pennsylvania Department of Human Services (DHS) makes up the difference. If a recipient has no income then there is no payment obligation. *Medicaid benefits continue for as long as needed.* Very few medical expenses are not covered by either Medicare or Medicaid. Premiums for Medicare Supplemental health insurance are a notable example. These and other non-covered items, referred to as "Other Medical Expenses," reduce the Medicaid recipient's monthly "patient pay" obligation to the nursing home. The nursing home makes up this shortage by receiving an additional payment from DHS. If the spouse of a married recipient has monthly income that falls below a specified threshold, then part or, if necessary, all of the recipient's income can be diverted from the nursing home to the spouse. This "Community Spouse Monthly Maintenance Needs Allowance" is adjusted annually. Commencing the month after Medicaid eligibility, assets of a community spouse no longer affect the recipient's financial eligibility. That is, only the assets of the recipient are counted in determining continued eligibility rather than the combined assets of both spouses, as occurs before eligibility. So, if, after benefits eligibility, the community spouse receives an inheritance or otherwise exceeds his or her protected amount of assets, the institutionalized spouse's Medicaid eligibility is not adversely affected. A recipient has 90 days from the date of notice of eligibility to segregate his assets from those of the community spouse.

***WHAT HAPPENS AFTER A MEDICAID RECIPIENT DIES?*** DHS has an unsecured claim against the decedent estate of someone who received Medicaid benefits at age 55 or older. Assets jointly owned by a surviving spouse, or with others in the form of "joint tenants with right of survivorship," pass directly to the survivor, not in accordance with the decedent's will, and are therefore NOT subject to the DHS reimbursement claim. Assets that pass via beneficiary designation, such as IRA, 401(k) or other qualified retirement plans, life insurance and deferred annuities, are also NOT subject to the DHS reimbursement claim. Moreover, the DHS reimbursement claim does NOT apply to the estate of a surviving spouse. One may rightly ask, if someone must be impoverished in order to qualify and remain eligible for Medicaid, why would there exist a "probate" estate after death from which to obtain a reimbursement? Because of the home, which up to this point may have been exempt. Absent proper planning, *a Medicaid recipient's home will be lost, either to pay for nursing home care or to pay a DHS reimbursement claim.*



## *Some Common Questions*

***"I've added my kids' names to my bank account. Is it a countable asset?"***
Yes. The entire amount is counted unless you can prove some or all of the money was contributed by the other person who is on the account. It's counted because you can withdraw the entire amount even though someone else's name is on it. However, if a jointly owned asset, such as a certificate of deposit, U.S. Savings Bond, or brokerage account, cannot be accessed unless the other co-owners give their consent, and they refuse to consent, then the asset is unavailable and therefore, doesn't count. But, beware, if the asset is unavailable, adding the kids as co-owners may result in a transfer penalty.

***"My wife is entering a nursing home. Must I disclose all of our assets?"***
Yes. But don't worry. Federal law guarantees the right of a nursing home resident to legally protect assets via Medicaid planning. Proper planning enables one to obtain needed care while protecting assets for loved ones. But such a plan must ensure that benefits eligibility commences when other sources of payment are exhausted.

***"Will my kids be liable for the cost of my nursing home care if I go broke?"***
No, provided you qualify for Medicaid benefits immediately after your funds exhaust. That won't happen if you engage in an improper pattern of gifting or fail to timely and properly document and file your Medicaid application (the most common reason for denial). However, in Pennsylvania, children who knowingly or even unintentionally violate Medicaid requirements can and have been held liable for the cost of their parents' nursing home care through Pennsylvania's "filial" responsibility law.

***"How can I ensure that my mother gets good nursing home care?"***
Many important factors affect the quality of care in a nursing facility. These include staffing levels, specifically, the ratio of staff to residents, and frequency of visits from family and friends. Many problems can be avoided or minimized with frequent and regular visits by friends and loved ones. Seek the assistance of a qualified geriatric care manager (GCM) in selecting the right nursing home and monitoring care on a regular basis.

***"Can't I Just Give My Assets Away?"***
Many people wonder, can't I give my assets away? The answer is, maybe, but only if it's done just right. The law has severe penalties for people who simply give away their assets to create Medicaid eligibility. In Pennsylvania, for example, every $342.58 given away during the 60-month period immediately preceding the filing of a Medicaid application creates a one-day period of ineligibility. Stated in other words, every $10,420.14 gifted creates a one-month penalty. So even though

the federal Gift Tax law allows you to give away up to $15,000 per year per person *without gift tax consequences,* those gifts could result in a period of ineligibility for Pennsylvania Medicaid.

Though some families do spend virtually all of their savings on nursing home care, Medicaid often does not require it. There are a number of strategies which can be used to protect family financial security.

***"Will I Lose My Home?"***

Many people who apply for Medicaid benefits to pay for nursing home care ask this question. For many, the home constitutes much or most of their life savings. Often, it's the only asset that a person has to pass on to his or her children.

Under Medicaid regulations, the home is an excluded resource unless holding an equity value in excess of $585,000. This means that it is not taken into account when calculating eligibility for Medicaid. But this exclusion is illusory. After a Medicaid recipient dies, federal law requires states to attempt to recover previously paid benefits from the recipient's *probate estate.* This is referred to as "Estate Recovery." Generally, the probate estate consists of assets that the deceased owned in his or her name alone without beneficiary designation.

About two-thirds of the nation's nursing home residents have their costs paid in part by Medicaid. Obviously, the Estate Recovery law affects many families. The asset most frequently caught in the Estate Recovery web is the home of the Medicaid recipient. A nursing home resident can own a home and receive Medicaid benefits without having to sell the home. But upon death if the home is part of the probate estate, the state may seek to force the sale of the home in order to reimburse the state for the payments that were made.

Fortunately, various legal strategies exist to protect one's home. These include transfers to Medicaid trusts, full or partial interest sales to family members in exchange for Promissory Notes, and gift transfers to protected persons, such as community spouses, caregiver children, and disabled children.



## *Using Trusts In Estate & Long-Term Care Planning*

***WHAT IS A TRUST AND HOW DOES IT WORK?*** A "trust" is an arrangement in which someone (a "**settlor,**" also called a "grantor") transfers money or other assets to another (a "**trustee**") who manages the assets and spends the money under written terms and conditions for the benefit of a specified person or persons (a "**beneficiary**"). There are all kinds of trusts that exist for a variety of purposes. Not all trusts are the same. Some are "revocable;" others are "irrevocable;" some become active immediately when created (*inter vivos,* that is, "living trusts"); others are included as part of one's Will and do not come into existence until after death ("testamentary trusts"); some are created to protect against the risk of mismanagement; or improvident spending; or against various kinds of taxes; many are designed to provide a combination of different benefits and protections. But all trusts contain the roles noted here – *settlor, trustee* and *beneficiary.*

Interestingly, the same person or persons can fill more than one of these roles. For example, the commonly recognized "Living Trust" that we've all heard about is a revocable trust in which the settlor, trustee, and beneficiary are all one and the same person. More often, the settlor, either one person or a group, such as a married couple, create and fund a trust administered by a corporate trustee for the benefit of family members.

Trusts generally fulfill one or more of the following purposes:

- Management Assistance
- Tax Avoidance
- Creditor Protection
- Probate Avoidance
- Public Benefits Eligibility

**EXAMPLE – SUPPORT TRUST:** *John and Mary transfer cash and securities to XYZ Bank under a signed agreement whereby the bank manages the money and spends it for the health, education, maintenance and support of John and Mary's children.*

Support trusts are often used in traditional estate planning by parents who want to ensure that the inheritance they pass on to their children is not squandered by divorce, improvident spending, consumed by the re-married spouse of a deceased child, or seized by creditors.

**EXAMPLE – REVOCABLE LIVING TRUST.** James, a bachelor with no children or other close relatives, nominally funds a revocable trust with $10, naming himself as both trustee and beneficiary. He retains full authority to amend and cancel

the trust and to spend income and principal in any way he wishes. If and when he chooses to actually fund this trust, because he retains full control over and full access to the entire trust fund, he derives no tax benefit from the trust nor protection against his creditors. Moreover, even though he technically no longer owns the assets in the trust in his individual name, because of the fact that he has the ability to access the trust fund, it is a countable asset for purposes of Medicaid, Veterans' and other public benefits eligibility programs, and is therefore not protected.

So, why bother with having such a Revocable Living Trust? The frequently-touted benefit of avoiding probate is illusory, in that the law now requires these "Will Substitutes" to comply with virtually all of the same requirements imposed upon the executor of an estate. Just like the executor, the successor trustee who takes over must identify and safeguard assets; value them; pay obligations of the deceased settlor out of the trust if the decedent's probate estate is insolvent; provide statutory notice to the remainder beneficiaries who inherit the trust upon the settlor's death; pay income and inheritance taxes; provide an accounting of his administration of the trust to these beneficiaries, and obtain their release prior to distribution. Any trustee who fails to follow these requirements, out of ignorance or otherwise, ignores them at his own peril. The other oft-touted benefit of such a trust, that of "privacy," is overblown. Who will really care what is in your estate when you die other than the beneficiaries who will receive notice? Moreover, unless special steps are taken with the Department of Revenue to ensure privacy, the settlor's finances will be a public record accessible by any interested person who goes to the court house to check.

Yet, in the example above, implementing such a trust is the prudent thing to do. That's because James named XYZ Bank & Trust Co as the successor trustee, waiting in the wings, to step in, fund the trust, and manage his affairs in the event James becomes incapacitated and therefore no longer able to manage affairs for himself. Most persons would simply name a trusted individual to serve as agent under power of attorney in the event of incapacity and not implement a living trust. But serving as power of attorney for an incapacitated person will likely be a difficult time-consuming job that can last for many years. Even a good friend might not be up to such a task. Those without a spouse, dependable children or other close family members willing and able to properly serve as agent under power of attorney should utilize this kind of trust rather than take the risk of appointing someone under power of attorney who will either steal or mismanage the assets. Another situation for appropriate use of this kind of trust is for "blended"



families, that is, situations in which one or both of the spouses were previously married and have children from a prior marriage. When spouses have different beneficiaries, implementing and funding separate revocable trusts can ensure protection against disruption of one's estate plan by the surviving spouse or by children of the surviving spouse.

**EXAMPLE - MEDICAID ASSET PROTECTION TRUST.** *John and Mary transfer their home and some of their investments to their son, Sam, who holds the assets for the benefit of his parents. John and Mary continue to live in their home, rent-free, and continue to pay for all the costs of maintaining the home. They continue to receive all of the income from the investments. The principal may not be distributed to them or used to pay any of their financial obligations. But they retain indirect access to and control over the trust assets.*

A properly-structured Medicaid Asset Protection Trust can fulfill all of the previously listed purposes. It can be created by one person or set up as a joint trust, typically by a married couple. Here are examples of the various benefits available from such a trust:

**EXAMPLE – MEDICAID ELIGIBILITY.** John's countable non-exempt assets must shrink down to $8,000 to qualify for Medicaid to pay for his nursing home care. Assets in his Medicaid Asset Protection Trust don't count as part of his $8,000 resource limit. There is no maximum limit to the amount of assets that can be protected in this trust.

**EXAMPLE – GIFTING WITHOUT MEDICAID PENALTY.** John and Mary periodically direct Son, Sam, the trustee, to gift assets from their trust fund. Assets gifted by the trust, even though directed to be gifted by John and Mary, the settlors, are not considered gifts by John and Mary and will not incur a Medicaid transfer penalty if either of them later apply for Medicaid benefits.

**EXAMPLE – AVOIDANCE OF MEDICAID REIMBURSEMENT CLAIM.** After John and Mary pass away the trust ends and the trust fund is distributed to their named beneficiaries without an obligation to reimburse any Medicaid benefits paid out on behalf of John or Mary.

**EXAMPLE – CREDITOR PROTECTION.** John and Mary are sued. A large judgment is entered against them. The assets in their Medicaid Asset Protection Trust can't be seized to pay the judgment.

**EXAMPLE – TAX AVOIDANCE – HOME SALE EXCLUSION.** John and Mary decide to move after placing their home in a Medicaid Asset Protection Trust. The

Trust sells the home and they don't pay capital gains tax. The Trust buys them a new home. It has the same protections as the first one did. When they die the Trust ends and their home is distributed to their children.

**EXAMPLE – TAX AVOIDANCE – FEDERAL INCOME TAX.** All income, deductions and credits from a Medicaid Asset Protection Trust pass through to John and Mary on their personal income tax return, resulting in less tax paid than if paid directly by the Trust.

**EXAMPLE – TAX AVOIDANCE – CAPITAL GAINS - HOME.** John and Mary buy their home for $50,000. They subsequently put it into a Medicaid Asset Protection Trust naming themselves as beneficiaries. After John and Mary have both died the Trust ends and the home, now worth $250,000, passes to their children who sell it. The children pay NO federal income tax on the $200,000 capital gain. They acquire the home at a tax basis "stepped-up" to its value as of the date of death of the surviving spouse.

**EXAMPLE - TAX AVOIDANCE – CAPITAL GAINS – SECURITIES.** John and Mary invest $100,000 in a Vanguard Fund. They subsequently transfer this investment into a Medicaid Asset Protection Trust naming themselves as beneficiaries. After John and Mary have both died the Trust ends and the Vanguard Fund, now worth $350,000, passes to their children. The children's tax basis on the Vanguard Fund is "stepped-up" to the $350,000 date of death value. They pay NO income tax on the $250,000 capital gain.

**EXAMPLE – ACCESS TO TRUST INCOME.** John and Mary receive all the income from their Medicaid Asset Protection Trust. After Mary enters a nursing home and qualifies for Medicaid, all of the income shifts to John instead of Mary's one-half being paid over to the nursing home as part of Mary's "patient pay" obligation.

**EXAMPLE – INDIRECT ACCESS TO TRUST PRINCIPAL.** John wants to buy a car with money from his Medicaid Trust. He directs Sam, his son, the Trustee, to gift $30,000 to John's daughter, Diane. Diane voluntarily uses her $30,000 gift from the Trust to buy the car for John.

**EXAMPLE – CONTROL OVER TRUST FUND.** Mary's Medicaid Asset Protection Trust allows her to direct the Trustee to distribute all or part of the trust fund to anyone other than herself or her husband. This authority extends to how the Trust assets are distributed after John and Mary die. Mary or her husband, John, may, at any time, change the beneficiaries who will inherit the trust assets after they die, or the amount each beneficiary will receive.



**EXAMPLE – ESCAPE HATCH – TRUSTEE TERMINATION.** John and Mary decide they no longer want their Medicaid Asset Protection Trust. The Trust is irrevocable, meaning neither John nor Mary may revoke it. But the Trust instrument authorizes the Trustee to terminate the Trust and pass the trust assets to the remainder beneficiaries if the Trustee determines the Trust is no longer in the best interests of the settlors. Son, Sam, the Trustee, terminates the Trust and distributes the assets to himself and his sister, Diane, the remainder beneficiaries. They voluntarily give the assets back to John and Mary. Sam and Diane do not pay income tax on the distribution to them of trust principal.

**EXAMPLE – ESCAPE HATCH-SETTLOR DIRECTS DISTRIBUTION.** John and Mary decide they no longer want their Medicaid Asset Protection Trust. The Trust is irrevocable, meaning neither John nor Mary may revoke it. But the trust instrument authorizes John and Mary to direct the trustee to distribute all or part of the trust fund to others of their choosing. They tell the Trustee, son, Sam, to distribute the entire trust fund to Sam and Sam's sister, Diane. The children then voluntarily give the assets back to John and Mary. Sam and Diane do not pay income tax on the distribution to them of trust principal.

Prudent retirement and estate planning takes into account the possibility of chronic incapacity as we age – long-term care planning. An essential component of long-term care planning for all but the very wealthy includes measures to qualify for Medicaid. A properly-structured asset protection trust is an important tool. It enables one to retain beneficial use of assets in a tax- friendly manner, with protection from creditors, and ultimately to qualify for Medicaid benefits, if necessary, while preserving the financial security of loved ones.

***MARITAL ASSET PROTECTION TRUST – PROTECTING ASSETS WITHOUT GIFTING.*** The Marital Asset Protection Trust, or "MAPT," is a planning measure that can protect half of the estate of a widowed person who requires long-term nursing home care. The plan must be implemented while both spouses are alive and not in apparent need for long-term care. No gift penalty is associated with this planning measure. This planning enables a married couple to accomplish one or more of the following goals --

- Protect assets of a surviving spouse against nursing home costs
- Eliminate federal death taxes
- Reduce Pennsylvania inheritance taxes
- Avoid claims of creditors

*HERE'S HOW IT WORKS --*

- Each spouse signs a will that transfers assets to the surviving spouse "In Trust" at the time the first spouse passes away
- This "Trust" is the MAPT. The surviving spouse retains full access to the trust fund, with power to use as much of the assets as he or she needs
- The MAPT may not be seized to pay for nursing home costs
- The MAPT does not pay federal death taxes
- Creditors of the surviving spouse or of the children can't grab assets out of the MAPT
- The MAPT is distributed to the couple's children or other beneficiaries named in the will if the surviving spouse enters a nursing home and qualifies for Medicaid or when the surviving spouse passes away
- In some cases the couple's beneficiaries in the will pay no Pennsylvania inheritance tax on the assets they inherit from the MAPT



# *Power of Attorney – The Most Important Legal Tool in Long-Term Care Planning*

***WHY HAVE A POWER OF ATTORNEY?*** Contrary to what many believe, neither a spouse, adult child, nor other close family member or friend has legal authority to handle one's financial affairs unless authorized to do so by a statutorily-compliant written and signed power of attorney. It might be too late for an incapacitated person to sign a power of attorney that will be recognized as legally valid, depending upon the extent of physical and cognitive impairment. Obviously, this can pose major problems for an incapacitated person who enters a nursing home and needs to implement legal measures to avoid impoverishment, or who needs to fund a trust, change a Will or take other steps to create or modify an estate and long-term care plan. Until recently, the same problem existed as regards health care decision-making and still exists to a lesser extent based upon changes to the law that grant some limited health care decision-making authority to immediate family members.

***NOT ALL POWERS OF ATORNEY ARE ALIKE.*** To compound the problem discussed above, *the overwhelming majority of powers of attorney in existence today are not adequate for use in protecting one's home and savings in the event long-term nursing home care is needed.* Just as with trusts, not all powers of attorney are the same. Authority to make gifts, change beneficiary designations, create and fund trusts, add or remove owners from bank accounts and investments, and perform other extreme measures must be expressly and carefully stated in the power of attorney document. Otherwise, urgent legal measures cannot be implemented.

***WHY ARE MOST POWERS OF ATTORNEY INADEQUATE?*** There are various reasons for bad powers of attorney. Many lawyers apparently do not know about a change in the law that invalidated a particular provision commonly found in many older power of attorney documents. That provision purported to empower the "agent" (the person who is appointed to act on behalf of the "principal" (the person signing the document) to do whatever his principal can legally do. That provision is no longer legal. Another often fatal flaw in many powers of attorney is the absence of language authorizing an agent to make "gifts" of the principal's assets. Most of those that do, fail to specify in sufficient detail the extent of authorized gifting or, worse still, limit gifting to the federal gift tax annual exclusion of $15,000 per year per person (in 2019). Such a limitation is unnecessary for all but the very wealthy. Gifting beyond these limits, outright or in trust, occurs frequently in Medicaid planning. Still other lawyers seek to limit an agent's authority in order to protect against an agent's possible financial abuse. These lawyers do not engage in Medicaid planning and fail to see the importance of inserting provisions necessary to make it possible. A dishonest agent will steal regardless of any restrictions in the power of attorney.

Effective long-term care planning requires a power of attorney document, referred to as a "durable general power of attorney," that authorizes an agent to take whatever action his principal legally could do if able to, consistent with what the agent knows or should reasonably know are the principal's estate planning desires. Accordingly, DO NOT appoint anyone as your agent if you are not fully confident that person will be honest, capable of doing a good job, and if honest and capable, will diligently perform his duties rather than neglecting to do so. If no such person can be found, then consider using a revocable living trust, discussed earlier, as an alternative. An agent bears great responsibility, is required to keep an accurate record of receipts and disbursements, and might need to provide assistance for many years.

***WHAT ABOUT HEALTH CARE?*** Proper long-term care planning will include a comprehensive health care power of attorney, preferably a separate document from the durable general power of attorney, and separate from a Living Will (discussed below). A health care agent should perform three broad functions:

(1) make health care arrangements;

(2) authorize or refuse medical treatment in the event the principal is unable to make or communicate those decisions; and

(3) enforce a Living Will.

Health care arrangements typically include accessing medical records, discussing treatment options with medical personnel, getting second opinions, hiring and firing physicians or other medical personnel, and arranging for entry into hospitals, and long-term care facilities. Empowering a selected person or persons to authorize or refuse medical treatment ensures that such decisions will remain under the control of family or other trusted individuals and not be dictated by a facility or other health care provider.

***LIVNG WILL.*** A "Living Will" is a statement of desired treatment options in the event of terminal illness of a patient who cannot make or communicate health care decisions. A properly drafted Living Will makes clear the desire to receive whatever treatment is necessary to get well but further indicates that in the event of end-stage terminal illness, medical treatment be limited to comfort measures. Stated otherwise, the Living Will should communicate that medical treatment that merely prolongs the dying process is not desired.

***A FEW MORE THINGS TO KNOW ABOUT POWERS OF ATTORNEY.*** You can revoke your power of attorney at any time. Make sure to notify any financial institutions involved with your affairs regarding the cancellation as well as your agent. Also, you can still continue to handle your affairs. The person you appoint as agent will step in only if and when needed. You can appoint multiple agents, each of whom can act alone if the others are unavailable. You can name a successor agent in your power of attorney to step in if the primary agent resigns.

## *Married Couple Planning in Pre-Crisis*

"Pre-Crisis" refers to a situation where an individual is more likely than not at some time in the future to require long-term care in a nursing home. Becoming very old does not in itself mean someone is in "pre-crisis." But for those who are diagnosed with early-stage Alzheimer's Disease or other form of dementia, or Parkinson's, or have a stroke history, or suffer from severe osteoporosis, or from other similar threatening conditions, special planning measures beyond implementing comprehensive financial and health care powers of attorney and a Living Will are appropriate. In many such cases a Medicaid Asset Protection Trust can and should be implemented. But for others, because of the nature and amount of their assets, or the close proximity to the time nursing home care will likely be needed, or perhaps for other reasons, a trust is not appropriate. Regardless of whether or not a Medicaid Asset Protection Trust is used in these situations, married couples require special planning measures, including:

- Community Spouse (CS) changes Will to disinherit institutionalized spouse (IS)
- All of couple's assets, including the home, are transferred to CS name only
- CS removes IS from beneficiary designations for CS's life insurance, IRA, etc.

Passing an inheritance to a surviving spouse who will thereafter need long-term care in a nursing home is the same as naming the nursing home as beneficiary in place of the children or other desired beneficiaries. The above steps, however, must ensure that a surviving spouse at risk for nursing home care in the future, but not immediately, will benefit from the estate of the predeceased CS. Consequently, the CS's will must provide that after mandatory distribution to the IS of his one-third statutory "spousal elective share," the balance is held in trust for the benefit of the IS unless and until such time as the IS requires long-term nursing home care. Until that happens the trust fund is used to pay for home care or assisted living facility care and other living needs of the IS. If and when the trustee determines that the IS has reached the point of needing long-term nursing home care, the trustee, in accordance with the terms of the trust, declares it terminated and distributes the estate to the children or other desired beneficiaries *free of a Medicaid gift penalty*.

The trust described above is included as part of the CS's Will (a "testamentary trust") and does not come into effect unless the CS dies before the IS. If the IS already entered nursing home care prior to the passing away of the CS or prior to the time for distributing the CS's estate, then the trust will not go into effect and the CS's estate, except for the one-third mandatory distribution to the IS, will pass directly to the children or other desired beneficiaries.



***HOME PROTECTION.*** Suppose the IS eventually enters a nursing home, qualifies for Medicaid and the CS does NOT predecease the IS? Because the home was transferred to the CS's name only, if and when the CS decides to sell the home, he or she keeps all of the net proceeds. But if the deed to the home was NOT changed before the IS qualified for Medicaid, then half of the net proceeds from the sale of the home will pass to the IS, who will be dropped from Medicaid because of excess (at-risk) resources in the form of cash from the home sale. For married couples of modest means where the home is their principal asset, an IS can qualify for Medicaid with the CS keeping the home and losing only perhaps one-half or less of the countable non-exempt assets. They likely did not consult with an attorney, relying on the nursing home to assist them with the application. In many cases, that would be like the proverbial "fox guarding the hen house." In such situations, not only does the CS needlessly lose cash, investments and other assets, but potentially the home as well. This constitutes a major hardship to couples of modest means and happens all too often.

Married couple pre-crisis planning sets the stage for later aggressive "crisis" planning measures that become available for use AFTER the IS enters a nursing home. We next look at how this can be done, first for single persons and finally also, in the case of a married couple.

## *Crisis Planning – What to Do When A Loved One Enters A Nursing Home*

The greatest myth regarding long-term care planning – and by far the costliest in human as well as financial terms – believed by almost everyone -- is the mistaken assumption that it's too late to protect someone's assets after entering a nursing home. Memorize the following:

***IT'S NOT TOO LATE TO PROTECT ASSETS AFTER ENTERING A NURSING HOME***

ANYONE, no matter how small the amount of his or her excess resources, can legally protect them IF assistance is sought by a qualified elder law attorney. Of course, speed is crucial, in that every day that goes by costs a nursing home resident on average around $350. That comes to over $10,400 every month. Granted, greater savings will be achieved by those prudent enough to implement long-term care planning measures we discussed earlier. But for those who have and also for those who haven't, the planning strategies discussed below can and will achieve additional substantial savings.

CASE STUDY. CRISIS PLANNING FOR AN UNMARRIED PERSON: *GIFT & ANNUITY.*

About a month after Frank, a widower, entered a nursing home, his son, Sam, realized his father would soon be broke. "Dad's Medicare was just cut off and now the nursing home wants $10,000 a month," said Sam. "He can't afford that!"

Fortunately for Frank, Sam consulted with an elder law attorney and discovered that by implementing a planning strategy called "Gift & Annuity," Frank could pass along a substantial amount of his assets to his children and still qualify for Medicaid. Under the gift & annuity process, a nursing home resident gifts a substantial portion of his assets–typically about half–directly to family members or into a trust. At the same time the gift is made, the remaining assets are converted into an income stream via purchase of a Medicaid-compliant Single Premium Immediate Annuity, or "SPIA."

A SPIA is the opposite of life insurance. Life insurance protects against financial consequences of death. A SPIA, in its simplest form, protects against living too long in the sense of outliving your money. A person who buys life insurance makes monthly payments to the insurance company. When the owner-insured passes away, a beneficiary gets a lump sum of money. With a SPIA, the individual pays an up-front lump sum to the insurance company. Beginning the following month, the insurance company makes monthly payments to the owner for life or for a fixed term. This guarantees the owner a fixed income.



With gift & annuity, the SPIA meets specified legal requirements under the Medicaid law. It pays out equal monthly installments for a fixed period. That fixed payout period corresponds to the period of ineligibility for Medicaid imposed because of the gift.

It's not illegal to make gifts and then seek to qualify for Medicaid. But a penalty for gifting is imposed in the form of a period of ineligibility for benefits. The penalty period is calculated based upon the size of the gift. A larger gift incurs a longer period of ineligibility. Many mistakenly believe Medicaid eligibility can't be achieved if gifting occurs within 60-months, that is, five years prior to the date of application for benefits. Not so with gift & annuity.

After the penalty period expires and the SPIA payments end, the applicant qualifies for Medicaid. Meanwhile, during the penalty period the income from the SPIA enables the individual to pay for the care received. Frank was able to pass along over $100,000 of his $200,000 of excess at-risk assets to his children, pay the nursing home in full during the 10-month penalty period, and then qualify for Medicaid. He gifted assets and didn't have to wait 60-months.

This is all completely legal, but not very well-known. In fact, even most attorneys are unaware of this procedure–including those who claim expertise in elder law. So, it's important to carefully evaluate which attorney to select for help in this complex and specialized area of the law. The next section provides some helpful suggestions for how to go about making that choice. But first, let's take a look at what Clarence and Elsie–the unfortunate couple discussed at the very beginning, should have done.

CASE STUDY. CRISIS PLANNING FOR MARRIED COUPLE: *SPOUSAL ANNUITY*

This planning strategy is similar to, simpler, and yet more effective than the *gift & annuity* measure just discussed. That's because of the unique advantages available in cases where the Medicaid applicant has a community spouse (CS). First, assets transferred to or for the benefit of a CS are not subject to a Medicaid gift penalty. Of course, as previously pointed out, this alone provides no protection, since the assets of *both* spouses are counted, regardless of how titled as between the two of them. Second, although the assets of both spouses are counted for purposes of an applicant's financial qualification, the *income* of a CS is NOT counted. Third, "income" as determined for purposes of Medicaid is not the same as "income" for purposes of determining income tax. In Medicaid, any periodic payment, such as Social Security, pension, or an immediate annuity, is counted as all income, even though only some or none of those payments are taxable income. In the case of

short-term immediate annuities, which is what Medicaid-compliant immediate annuities almost always are, almost all of each monthly payment will be a non-taxable return of principal. But for Medicaid purposes, it is all income.

So, what does this all mean in terms of protecting assets? Simply this: *an unlimited amount of a couple's excess non-exempt at-risk assets can be protected for the CS by converting them into an exempt income stream payable to the CS.* The IS qualifies for Medicaid on the day after the annuity is paid for. Since there is no penalized gift (a transfer to or for the benefit of a spouse is not subject to a gift penalty) there is no period of ineligibility.

This planning strategy is not appropriate for all couples. Other planning measures may likely be better in situations where the CS is in poor health; or if most of the assets are IRA or other qualified retirement plan money, or are held in the form of real estate. In those cases, gifting into a Medicaid Asset Protection Trust might be preferable, even though the savings may likely not be as great. But for many couples this will work very well. It would have worked for Clarence and Elsie, if only they had known!



## Legal Assistance

As you likely realized by now, Medicaid planning is a complex process, requiring knowledge and expertise in multiple areas of the law, among which public benefits eligibility is just one aspect. Where should one look to find the right kind of assistance and what criteria are relevant to your selection? Asking the questions below can help you make the right choice.

***Are you a Certified Elder Law Attorney?***

All attorneys in Pennsylvania are licensed to practice law by the Pennsylvania Supreme Court. But only Certified Elder Law Attorneys, with the "CELA"—Certified Elder Law Attorney -- designation are recognized by the Court as elder law specialists. Strict and comprehensive criteria must be met in order to become a CELA. These include a full-day certification examination; rigorous continuing education requirements; substantial experience in a wide range of elder law issues; a favorable evaluation by five elder law attorney specialists; and a similar re-certification process every five years.

***How many cases like mine have you handled before?***

Any lawyer with little or no actual experience can claim to be an elder law attorney. Others may have elder law experience but not with the particular matter involved. For example, there are many lawyers who prepare wills, powers of attorney and living wills who don't know how to help someone protect their assets against financially ruinous nursing home costs. Ask for specifics, including the types of elder law cases they have handled in the past.

***Have you written any articles published in legal journals on elder law topics? Can I see some of them?***

As with medicine and many other licensed professions, publication in recognized legal journals or other peer-review periodicals is one indicator that the lawyer you interview has good credentials.

***Have you earned any awards or other recognitions in the field of elder law? What are they and who awarded them?***

Recognition by colleagues is more than just a plaque on the office wall. Attorneys, as other professionals, know their industry and are more likely to present professional honors on those who stand above their colleagues and the competition. This is another indicator that the lawyer you hire is qualified. Beware, however, of bogus titles. Check them out. For example, one organization that awards the title "Lawyer of Distinction" will hand out the title to anyone who submits an application and sends in a big fee.

*Have you presented any programs on behalf of the Pennsylvania Bar Institute on topics of elder law?*

An invitation from the Pennsylvania Bar Institute, the educational arm of the Pennsylvania Bar Association, to teach elder law to attorneys throughout the State demonstrates that this person is someone recognized by his or her peers as an expert in the field.

*Do you litigate adverse decisions in elder law cases? How many elder law cases have you litigated regarding the issues involved in my case? What is your track record of success in litigating adverse elder law decisions?*

Some lawyers who take on elder law cases have no litigation experience. Other lawyers may be experienced litigators but do not know or understand the law applicable in elder law matters. In either case, this can put the client at a great disadvantage. The Pennsylvania Department of Human Services, the agency that administers Pennsylvania's Medicaid program, occasionally takes positions contrary to federal mandates, often with the expectation that it will get away with it due to the scarcity of knowledgeable attorneys who are willing and able to litigate. But when faced with a credible challenge it will usually back down.

## *Conclusion*

For all but the very wealthy, arranging one's affairs to qualify for Medicaid is an essential part of retirement and estate planning. The consequences of failing to do so are devastating to families caught unprepared. Nevertheless, it's not too late to protect assets even after entering a nursing home, although greater savings will be achieved and less anxiety experienced by those prudent enough to act before a crisis occurs. Finally, know that good help is available to those who select wisely.

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