

CHAPTER 11

PLANNING FOR DISABILITY AND LONG-TERM CARE

Introduction

Planning for disability and long-term care is an important part of most, if not all, estate plans. The days are gone in which we can expect to live a full and healthy life up until the moment of our death. More likely, planning for a period of disability during lifetime is not only prudent, but essential.

Proper planning for disability and long-term care can be as simple as executing a basic estate plan including durable powers of attorney for the management of property and health care matters, and a health care directive to prepare for end-of-life decisions. An in-depth review of powers of attorney and health care decision making is in Chapter 3.

In addition, available long-term care insurance options should be reviewed. With convalescent care costs exceeding \$5,000 per month in many places, the likelihood of long-term care and planning for this expense should be considered as part of any thorough estate plan. The advice of an experienced long-term care insurance professional is invaluable in this process.



Planning for Medicaid eligibility

INTRODUCTION

In some circumstances proper planning in anticipation of long-term care may include sheltering assets to promote Medicaid eligibility (often called Medicaid planning). It should be noted that such planning is not intended to protect assets so that children may receive an inheritance. Rather Medicaid planning is designed to ensure that the expenses associated with long-term care that are not covered by the Medicaid program can be met.

WHAT IS MEDICAID

Medicaid is a government program that is designed to provide assistance to many individuals in need of medical care and are unable to pay for such care out of their own resources and income. The Medicaid program is a state and federally funded program. Individuals qualifying for Medicaid

apply to the state agency designated for the purpose of administering the Medicaid program in the state where long-term care is sought.

There are certain federal laws that all states must follow in administering their individual Medicaid programs. However, many options are available to the states; therefore, the Medicaid program in one state may be administered in a very different manner than in another state. You should seek the advice of an attorney experienced in navigating the myriad of rules applicable to Medicaid in the state where eligibility is being sought.

Medicaid should be distinguished from Medicare. As most people are aware, Medicare is a medical insurance program which is administered by the federal government (and not by the states) for the elderly and disabled. Medicare provides very little in long-term care benefits; therefore, proper estate planning and planning for disability should not be predicated on the assumption that Medicare will pay the costs of long-term care.

MEDICAID FINANCIAL ELIGIBILITY CRITERIA

Unlike Medicare, Medicaid has very rigid financial criteria. A person applying for benefits under the Medicaid program must meet the eligibility criteria or Medicaid benefits will not be available. This is one of the areas where there can be significant differences between states. Thus, a person may be eligible in one state but not in another.

Financial eligibility will be determined based on an individual's income and assets. Certain assets (such as a primary residence, an automobile and personal property) may be exempt from consideration in the process of determining Medicaid eligibility. For example, it is generally not required that a person's home be sold before Medicaid will pay long-term expenses. However, after the person's death, the state has the right to recover the costs of the person's long-term care expenses from the assets that were previously exempted from consideration, including the residence. Proper Medicaid planning must take into consideration the state's right of reimbursement.

Other resources such as cash, investments, bank accounts, the cash value of an insurance policy, and other assets are deemed to be available to pay for long-term care expenses under the Medicaid program and must be spent before Medicaid will pay any long-term expenses. These are referred to as non-exempt assets.

In a circumstance where a spouse requires long-term care, it is also important to understand that the state will consider the assets and income of both spouses in determining eligibility for Medicaid. Owning assets as separate property does not protect the assets nor will the presence of a premarital property agreement protect assets.

For a single person, a maximum of \$2,000 of non-exempt assets may be retained. For a married couple, the spouse not requiring long-term care may retain additional non-exempt assets.

Income is also taken into consideration. Substantially all of a single person's income must be spent on his or her long-term care. For a married couple, the spouse residing at home is generally entitled to all of the income he or she is entitled to receive (such as pension and social security payments). If this amount is less than a certain amount established under federal law, the spouse living at home may receive a portion of the institutionalized spouse's income.

TRANSFERRING RESOURCES

Great caution must be exercised in transferring or gifting assets in anticipation of long-term care. As part of the Medicaid application process, the applicant must disclose all transfers made within the prior five years because Medicaid will assess a penalty against the applicant who has made gifts within this time frame. This penalty, in the form of a period of ineligibility for Medicaid benefits, is calculated based on the value of the assets transferred.

Recent changes in the law have made planning for Medicaid eligibility through transfer of assets more complicated. Since the period of Medicaid ineligibility for asset transfer can be as long as five years, guidance from an experienced attorney is highly desirable before any transfers are made.

There are certain exceptions that apply to the asset transfer rules but they are rarely of much benefit. For example, a gift to a spouse does not affect Medicaid eligibility. However, as described above, the assets of both spouses are considered in determining eligibility. Therefore, transfers between spouses will not accelerate eligibility for Medicaid benefits, although there may be other advantages to transferring assets to the healthy spouse as described below.

MEDICAID AND TRUSTS

Transferring assets into a trust will rarely provide any benefit from a Medicaid planning perspective. Revocable living trusts (described in greater detail in Chapter 4) are deemed to be available to the applicant to pay his or her long-term care expenses since the applicant is generally the beneficiary of the trust during life and may revoke the trust. Depending on its terms, an irrevocable trust may exempt assets from consideration as part of the Medicaid application process; however, the transfer of assets to such a trust will be deemed to be a transfer of assets subject to the rules described above.

However, some forms of trusts are beneficial. For example, you may establish a trust under the terms of your will that will shelter assets after your death in the event that your spouse requires long-term care. Known as a “special needs trust,” this form of planning is important if your estate is modest in value and you have little or no long-term care insurance available to you.

Conclusion

Planning for disability and long-term care is part of any complete estate plan. Even in circumstances where a person has long-term care insurance or sufficient assets to pay long-term care costs, the use of powers of attorney and trusts should be considered in order to provide for the proper management of the disabled person’s financial and personal affairs. In many cases, proper advanced planning for Medicaid eligibility is also important.