## ASSET PROTECTION

**Medicaid: Eligibility Overview**

Given the skyrocketing costs of health care, all seniors, regardless of financial status, need to be fully informed about Medicaid: a joint Federal and State program administered by local governments. Medicaid is a valuable service to seniors because it can cover the cost of Home Care services or Nursing Home services, depending on the needs and eligibility of the applicant.

Generally, to qualify for Medicaid, an applicant must demonstrate financial need and retain only those resources that are determined to be exempt by Medicaid or within its financial limits. New York's financial requirements for an unmarried Medicaid applicant limit the applicant to a resource account of no more than $14,850.00 and a burial account of approximately $1,500.00.

Married applicant's face a different set of rules. The applicant's spouse (called the "Community Spouse") is entitled to retain a maximum resource allowance without affecting the applicant's Medicaid eligibility This Community Spouse Resource Allowance (the "CSRA") is adjusted annually for inflation. Currently, the maximum CSRA stands at $120,900.00. This resource allowance does not include certain exempt resources such as the spouse's homestead.

In addition to the resource allowance, the Community Spouse is entitled to retain a specific amount of the couple's combined income. This income allowance, referred to as the Minimum Monthly Maintenance Needs Allowance (MMMNA), is currently $3,022.50. The distinction between the criteria for individuals and the criteria for married applicant's is crucial because the rules enacted as a result of the Deficit Reduction Act of 2005, (DRA) have created harsh results for applicant's who have transferred assets during a Medicaid look back period.

An unmarried individual who has transferred assets at any time within the 5 year Medicaid look-back period, will be denied eligibility for a period of time based on the amount transferred. This means that any transfer made by an individual for less than fair market value during the 5 year period prior to their application for Medicaid will render that individual Medicaid ineligible.

Thus, an unmarried individual who has assets in excess of the Medicaid allowance may not apply until they have divested themselves of their assets for a long enough period of time as to be beyond the look back or until they have spent their assets down on the cost of their care.

This is different for married applicants. To obtain eligibility, an institutionalized spouse may transfer all of his or her assets to the Community Spouse without penalty. In addition, Federal law entitles a spouse to exercise the right of "spousal refusal" which, in effect, allows the community spouse to retain CSRA without jeopardizing the institutionalized spouse's Medicaid. The law provides this eligibility option because of a strong public policy concern that the cost of long term care should not result in the impoverishment of the Community spouse. However, in cases where the agency does provide benefits, and the spouses assets are above the "CSRA" the Medicaid agency retains the right to bring a proceeding against the community spouse for support to recover benefits paid on behalf of the Medicaid recipient. It should be noted that in the past such suits were rarely brought. However, they are on the rise as a result of the current economic downturn.

Home care eligibility rules different significantly from the rules for nursing home eligibility.
Of most importance is the fact that there is no ineligibility period for transfers made by applicant's for Medicaid Home care services. As a result, home care is becoming an increasingly important alternative to consider when evaluating an individual's long term care needs.

The Medicaid rules allow an individual in need of home care services to transfer their assets one month and qualify for Medicaid home care the following month, without penalty. However, it is crucial to understand that should that person's status change and nursing home care be required, the look-back rules will be applied to all transfers within the look back period, despite the fact that the individual is qualified for Medicaid home care services.

## Medicaid Planning and the DRA

As a result of the Deficit Reduction Act of 2005 (DRA), the requirements for Medicaid eligibility have become much more difficult for senior citizens in need of long term care. The most serious consequence of this act is that it mandated that transfers made within a Medicaid look-back period would render a person ineligible for institutional Medicaid services.

With the five year look-back period finally in place, and given the complexity of the application process, many people have been reluctant to engage in Medicaid planning. However, Medicaid planning can, and should, be employed to counter these adverse requirements and protect one's assets.

For those people who may be vulnerable to exhausting their savings due to the high cost of long term care, a transfer of assets adhering to a carefully designed plan, is highly recommended.

Transfers of assets, if done properly, can be beneficial in almost any circumstance. For example:

* They can qualify a senior citizen in need of care for Medicaid home care benefits immediately, without an ineligibility period, thus allowing the senior to remain at home, with the care they need, while preserving their assets.

* For those not requiring immediate assistance, a transfer can trigger the start of the Medicaid ineligibility period and provide an opportunity to preserve some or all of the persons assets if and when the care need does arrive.

* Those already in a nursing facility can still benefit from transfers as long as those transfers are carefully structured as part of a Medicaid plan referred to in the field as "a reverse half loaf" eligibility plan. Even in cases where such a plan may prove unfeasible, a transfer if properly constructed can provide significant income tax savings for the recipient if they use the transferred funds to private pay for the nursing home during the ineligibility period.

To maximize the assets protected, such transfers should occur proactively, i.e ., long before a Medicaid situation arises.

## Asset Transfer Plans

Asset Transfer plans can be broken down into two categories:

1. Advanced planning; and
2. Immediate Care Plans.

<u>Advanced Planning:</u>

Advanced planning is generally for people who are not yet experiencing significant care costs but are mindful of the effect of such costs in their future.

Such a proactive Medicaid approach begins with a Gifting Plan, wherein the senior citizen makes a gift of assets to a third party of their choice (relative, friend) who can be trusted with these funds.

The recipient then funds a **Third Party Grantor Trust** with these assets. This trust is established for the benefit of the senior who made the gift and dictates that the funds contained therein will, during the life of the senior, only be used to provide for the supplemental needs of the senior in a manner which does not interfere with their Medicaid eligibility.

**Some Benefits of a Third Party Grantor Trust:**

* As a revocable trust, it maintains the flexibility to use funds on behalf of the senior should nursing home services be required during the ineligibility period.

* It specifically outlines the manner in which the trust assets are to be used and spells out that the primary purpose of this trust is for the benefit of the senior citizen, not other members of the family or friends; and

* It ensures that the senior's testamentary wishes are carried out after their demise.

Although we have termed this course of action “advanced planning”, the benefits derived from such a plan are not necessarily in the distant future. In New York, for example, there is no transfer penalty for transfers made for the purpose of obtaining Medicaid home care eligibility. As a result, a person wishing to reduce their home care costs could benefit from a transfer of assets and establishment of a third party trust because such a transfer would financially qualify them for Medicaid home care services.

<u>Immediate Care Plans:</u>

Although the DRA was designed to prevent traditional asset transfer strategies, there are still some options available to those who have not established any advanced planning with respect to:

1. Home care cases

As mentioned above, a person in need of long term care at home can become financially qualified for Medicaid home care with no periods of ineligibility despite having made transfers of assets within the Medicaid ineligibility period.

As a result, though not advisable, a lack of planning should not be an impediment to qualifying for Medicaid home care services.

2. Nursing Home Cases

Obviously, the best hedge against the cost of long term care in

a nursing home is the proactive approach of transferring assets well in advance (at least 5 years) of requiring nursing home care. However, for those who have not made transfers, Medicaid planning is still an option.
One such form of planning, called the "reverse half loaf" theory, has emerged as a viable mechanism for qualifying for Medicaid in the post DRA world. The reverse half loaf is essentially a gifting plan in which the gift is supplemented with a promissory note designed to pay off the ineligibility period caused by the gift. It is a plan designed for the last minute and can be implemented at a point which most people would feel was too late.

Generally using the reverse half loaf, one half (1/2) to one third (1/3) of the senior's assets can be preserved despite the fact that no previous planning had been done.

As a caveat, the reverse half loaf plan is extremely complex to implement, it should not be undertaken without the guidance of an experienced Elder Law practitioner. It is, nonetheless, a real alternative for those who have not taken the opportunity to plan in advance. It has cracked open a door thought to have been closed by the DRA.

## Asset Protection Strategies

**Federally Exempted Funds**:

Victims of Nazi Persecution Restitution Trusts®

Reparation payments received as a result of Nazi persecution are exempt from attachment by Medicaid, and there is no better way of protecting these assets from the cost of long term care than the creation and funding of Victims of Nazi Persecution Restitution Trusts®.

We have had an unprecedented track record of success with these instruments over the past twenty years. In that time, every application for Medicaid filed by our office involving funds exempted under a Victims of Nazi Persecution Restitution Trusts® has been approved. Because it is Federal law which created the exemption of these funds, this form of planning can be implemented by any recipient of Nazi Persecution Compensation regardless of the State in which they reside.

### Care-giver Agreements

Care-giver Agreements constitute another form of asset protection by providing terms under which a person, usually a family member, is paid to provide services to the party wishing to preserve assets. The type of services can be broadly or narrowly defined and generous compensation is generally permissible as long as the claim for hours provided and services rendered are within reason. These agreements have generally been upheld except in cases where a retroactive lump-sum has been paid or when a person has already entered the nursing facility.

### Pooled Income Trust

One of the most viable forms of Medicaid planning today involves the Medicaid home care system. In New York, there is no ineligibility period for transfers to qualify for Medicaid home care services. This rule provides a great opportunity for individuals to obtain the care they need and still shelter their assets a way that can be used to supplement their care.

However, there can be a down side to this form of care for individuals who have a high monthly income. New York Medicaid allows a home care recipient to keep the first $825.00 of their

monthly income. All income in excess of that amount must be contributed, to the cost of their care. This excess income is called NAMI (net available monthly income).
While this rule may seem illogical in light of the high cost of living in New York, it is more reasonable when cast alongside the transfer eligibility rules for home care.

An alternative to the restriction of the home care income rule can be found through the use of a pooled trust agreement which provides an exception to the NAMI requirement for individuals whose monthly income exceeds the Medicaid requirements.

Medicaid allows Trust participants to divert their excess income to a pooled income trust and thus reduce their NAMI to zero. Once these funds are received by a pooled income trust, the individual may submit bills for expenses they have incurred to a pooled income trust administrator, who will in turn, pay those expenses.

By using a pooled income trust, an individual will be able to get more use of their income. This provides them with a better chance of staying home rather than being forced to enter a nursing home for financial reason.

## Tax Implications

### Asset Protection Through Transfers of Wealth

Although any gift or transfer of wealth is considered a taxable "event," not every transfer results in a tax actually being paid, and by understanding certain basic premises it is possible to eliminate or significantly reduce the tax liability your heirs may face.

Transfers of wealth, whether made during life or upon death, are taxed only when the transfer of wealth exceeds the applicable exclusion amount.

While a gift <u>may</u> be taxable, in certain instances such taxes may not actually have to be paid.

> The requirement to pay either estate or gift taxes ("transfer" taxes) is based on the value of the property transferred and whether such property was passed as a gift during life, or as a bequest as part of an estate.

**The Applicable Exclusion Amount**

Your taxable estate consists of the value of your estate at death, less allowable deductions, <u>combined with</u> the total amount of taxable gifts which you have given during your life.

In 2017, the combined federal estate and gift tax exclusion, i.e., the total amount of assets that can pass through your estate without being taxed, is $5,490,000.

It is important to note the way the estate exclusion and the gift exclusion interact.

> *Example: A person who dies leaving $3 Million, and who made $2 Million in taxable gifts during his lifetime, will not have a taxable estate, because the combined*

*exclusion amount is $5,490,000.*

*Example: A person who dies leaving $4 Million, and who made $3 Million in taxable gifts during her lifetime, **will** have a taxable estate. The reason is that, although the $4 million in the estate does not, <u>in and of itself</u>, exceed the exclusion amount for estates; and the $3 Million in gifts does not, <u>in and of itself</u>, exceed the exclusion amount, taken together, the estate and gift amounts exceed the exclusion amounts.*

Because the exclusion amounts are ultimately combined, all taxable gifts (see next Section), whether or not they result in a tax being paid, must be recorded by the filing of a Gift Return so they can be applied to the combined exclusion amount of the estate.

**Benefitting Your Estate Through Non-taxable Gifting**

Estates in excess of $5,490,000 are required to pay taxes of 40%. However, there are steps you can take to avoid this daunting prospect and minimize the liability of your estate, one of which is through non-taxable gifting.

Although the general rule to bear in mind is that any substantial transfer of wealth is taxable, many gifts are exceptions to this rule and are <u>not</u> taxable. The most well-known of these are:

* gifts to your spouse, which are unlimited;
* gifts to a political organization for its use; and
* gifts to charities.

There are, however, several other, lesser-known types of gift-giving which are also non-taxable, and we are going to focus below on the following examples:

* gifts which do not exceed the annual exclusion for the calendar year;
* tuition expenses you pay directly to an educational institution on behalf of an attending student (e.g., a grandchild)); and
* medical expenses you pay directly to a medical institution on behalf of a patient.

**Allowable Gifts under the Annual Exclusion**

If the value of your estate exceeds the federal exemption amount ($5,490,000 in 2017), you can reduce its size tax-free by making annual exclusion gifts. The annual exclusion for "present interest" gifts provides a means for making transfers that generate neither gift nor estate taxes. A ‘present interest” means the donee has immediate access to the gift as opposed to a gift in trust where the donee may have to wait several years before she can draw down the principal. However, there is an exception to trusts for minors. The annual exclusion provides that the first $14,000 worth of any gifts made by you to an unlimited number of donees during each calendar year is excluded from the computation of gift taxes, provided the gift is not a gift of a future interest. A married couple can give up to $28,000 of present interest gifts to an unlimited number of donees each year without incurring gift tax, if both spouses consent to the gifts.

*Example: A married couple with two children, each of whom also has two children, can remove $168,000 (6 donees x $28,000) from their estate on an annual basis with no gift transfer tax. (Note: This amount could be increased to $224,000.00 if gifts to each child’s* *spouse were included in the calculation.)*

Thus, when faced with the prospect of a taxable estate, annual exclusion gifting provides a means for the transfer of assets which reduce or even eliminate estate taxes.

**Gifts of Tuition Expenses**

Gifts of tuition expenses on behalf of an individual are excluded from the computation of gift taxes, provided the payment is made directly to a "qualifying educational institution." Gifts of tuition are <u>not</u> included in the $14,000 present interest gifts discussed above; they can be made in addition to such annual exclusion gifts.

For purposes of this exclusion, a "qualifying educational institution" is one that:

* maintains a regular faculty and curriculum; and
* has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on.

Be aware that the definition of tuition is very limited, and specifically excludes books, supplies, dormitory fees and other similar expenses that are not actual tuition.

*Example: An individual donor makes a "present interest gift of $14,000 to a donee and - **in addition** - pays that donee's tuition costs of $50,000. Both gifts will be excluded from a computation of the donor's taxable gifts for the year.*

## Gifts to Provide Medical Care

Gifts of medical expense payments for an individual are excluded from the computation of gift taxes, provided the payments are made directly to the medical provider, rather than to the donee personally. There is no ceiling to payments of medical expenses and, as with gifts of tuition, gifts of medical expenses do not count against the $14,000 per donee annual exclusion for gifts of present interests; they can be made in addition to such annual exclusion gifts.

For purposes of this exclusion, a "qualifying medical expense" generally includes any expense for the "diagnosis, cure, mitigation, treatment or prevention" of any disease or affecting any structure or function of the body, provided that the expense is not reimbursed by medical insurance. In addition, reasonable transportation expenses to obtain the medical treatments can be included.

> *Example: An individual donor makes a "present interest gift of $14,000 to a donee and -* ***in addition*** *- pays that donee's medical expenses of $50,000. Both gifts will be excluded from a computation of the donor's taxable gifts for the year.*