THE ElderCare LAW FIRM

THE SENIOR EDITOR

The Maze of Medicaid

Hi all, Eric here.

I hope you like the content of this newsletter. We see so much misinformation out there and hopefully this clears up some of that and protects at least someone from making painful and costly mistakes. Everyone should have a plan about how they will deal with a long-term care crisis. However, there are so many ways to approach the issue and it can be confusing and overwhelming.

That is why we love what we do at The ElderCare Law Firm, Inc. We bring order to the chaos. We help you cut through the confusion and come up with a sound plan of action -- whether that is pre-planning for a possible future crisis, or dealing with a current situation. If we can help you or someone you care about, please do not hesitate to call.

Sincerely,

Eric B. Barnes, Managing Attorney

5 Questions to Ask Before Making Gifts for Medicaid or Tax Planning

Many seniors consider transferring assets for estate and long-term care planning purposes, or just to help out children and grandchildren. Gifts and transfers to a trust often make a lot of sense. They can save money in taxes and long-term care expenditures, help out family members in need, and serve as expressions of love and caring.

But some gifts can cause problems for both the generous donor and the recipient. Following are a few questions to ask yourself before writing the check:

1. **Why are you making the gift?** Is it simply an expression of love on a birthday or big event, such as a graduation or wedding? Or is it for tax planning or long-term care planning purposes? If the latter, make sure that there's really a benefit to the transfer. If the value of your assets totals less than the estate tax threshold in your state, your estate will pay no tax in any case. For federal purposes the threshold is $5.49 million (in 2017). Gifts can also cause ineligibility for Medicaid if you apply within five years after the gift is made.
2. **Are you keeping enough money?** If you're making small gifts, you might not need to worry about this question. But before making any large gifts, it makes sense to do some budgeting to make sure that you will not run short of funds for your basic needs, activities you enjoy -- whether that's traveling, taking courses or going out to eat -- and emergencies such as the need for care for yourself or to assist someone in financial trouble.
3. **Is it really a gift (part one)?** Are you expecting the money to be paid back or for the recipient to perform some task for you? In either case, make sure that the beneficiary of your generosity is on the same page as you. The best way to do this is in writing, with a promissory note in the case of a loan or an agreement if you have an expectation that certain tasks will be performed.
4. **Is it really a gift (part two)?** Another way a gift may not really be a gift is if you expect the recipient to hold the funds for you (or for someone else, such as a disabled child) or to let you live in or use a house that you have transferred. These are gifts with strings attached, at least in theory. But if you don't use a trust or, in the case of real estate, a life estate, legally there are no strings attached. Your expectations may not pan out if the recipient doesn't do what you want or runs into trouble themselves -- bankruptcy, a lawsuit, divorce, illness -- that no one anticipated. If the idea is to make the gift with strings attached, it's best to attach those strings legally through a trust or life estate.
5. **Is the gift good for the recipient?** If the recipient has special needs, the funds could make him or her ineligible for various public benefits, such as Medicaid, Supplemental Security Income or subsidized housing. If you make many gifts to the same person, you may help create a dependency that interferes with the recipient learning to stand on their own two feet. If the recipient has issues with drugs or alcohol, they may use the gifted funds to further the habit.
6. **Am I being manipulated or coerced in any way?** Financial exploitation of seniors is an epidemic. Many times it is being done by those closest to them such as their children or grandchildren. If you suspect that is happening, get support. Talk to another child, your financial advisor, your accountant, or your attorney. They can empower you.

If after you've answered all of these questions and you still want to make a

Beware of Non-Lawyers Offering Medicaid Planning Advice

In recent years a number of non-lawyers have started businesses offering Medicaid planning services to seniors. While using one of these services may be cheaper than hiring a lawyer, the overall costs may be far greater.

Medicaid is very complex. At the time you are doing such planning, you will usually also have many other legal needs connected to that planning such as the use of trusts, guardianships, powers of attorney, etc. If you use a non-lawyer to do Medicaid planning, the person offering services may not have any legal knowledge or training. Bad advice can lead seniors to purchase products or taking actions that don't actually help them qualify for Medicaid and may actually make it more difficult. The consequences of taking bad advice can include the denial of benefits, a Medicaid penalty period, or tax liability.

As a result of problems that have arisen from non-lawyers offering Medicaid planning services, a few states (Florida, Ohio, New Jersey, and Tennessee) have issued regulations or guidelines providing that Medicaid planning by non-lawyers will be considered the unauthorized practice of law. For example, in Florida, a non-lawyer may not render legal advice regarding qualifying for Medicaid benefits, draft a personal service contract, determine the need for or execute an income trust, or sell income trust kits. In Florida, the unlicensed practice of law is a felony that is punishable by up to five years in prison, while in Ohio practicing law without a license is subject to civil injunction, civil contempt, and civil fine.

Applying for Medicaid is a highly technical and complex process. A lawyer knowledgeable about Medicaid law in the applicant's state can help applicants navigate this process. An attorney may be able to help your family find significant financial savings or better care for you or your loved one. This may involve the use of trusts, transfers of assets, purchase of annuities or increased income and resource allowances for the healthy spouse.

Protecting Your House from Medicaid Estate Recovery

After a Medicaid recipient dies, the state must attempt to recoup from his or her estate whatever benefits it paid for the recipient's care. This is called "estate recovery." For most Medicaid recipients, their house is the only asset available.

Life estates

For many people, setting up a "life estate" is a simple and appropriate option for protecting the home from estate recovery. A life estate is a form of joint ownership of property between two or more people. They each have an ownership interest in the property, but for different periods of time. The person holding the life estate possesses the property currently and for the rest of his or her life. The other owner has a current ownership interest but cannot take possession until the end of the life estate, which occurs at the death of the life estate holder.

Example: Jane gives a remainder interest in her house to her children, Robert and Mary, while retaining a life interest for herself. She carries this out through a simple deed. Thereafter, Jane, the life estate holder, has the right to live in the property or rent it out, collecting the rents for herself. On the other hand, she is responsible for the costs of maintenance and taxes on the property. In addition, the property cannot be sold to a third party without the cooperation of Robert and Mary, the remainder interest holders.

When Jane dies, the house will not go through probate, since at the time of her death the ownership will pass automatically to

[illegible]

These trusts, however, are very sophisticated and must be drafted by a knowledgeable elder law attorney or you may find yourself years later with a trust that simply does not work when you need it to.

Third Party Supplemental Needs Trusts

The asset protection trust detailed above is one you are creating for yourself. However, if you are creating a trust for someone else, you have a lot more flexibility. This is because it is your money and you can give it to someone else (like a child) with protections built in. A Third Party Supplemental Needs Trust, if properly structured, will not be considered to belong to the beneficiary in determining his or her own Medicaid eligibility. After a disabled person's death, these trust do not require any payback to the State and are not subject to estate recovery. Instead it can pay to your other children or grandchildren as you direct.

First Party Special Needs Trusts

The Medicaid rules also have certain exceptions for transfers for the sole benefit of disabled people under age 65. Even after moving to a nursing home, if you or your spouse are under age 65 and disabled, you can transfer assets into a trust for your or your spouse's benefit without incurring any period of ineligibility. The only drawback to special needs trusts is that, after the disabled individual dies, the state must be reimbursed for any Medicaid funds spent on behalf of the disabled person. This is called a payback provision.

If you or anyone you know needs help and advise with regard to any of these types of trusts or Medicaid issues generally, please give us a call.

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