Top 5 Strategies for Protecting Your Money from Medicaid

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Too few older adults know and understand their rights and options regarding long-term care (LTC), which, to quote the New York State Court of Appeals, is “ruinously expensive.”

Many people simply do not want to face this issue or somehow have faith that they will avoid needing such care when they get older. According to the U.S. Department of Health and Human Services, “Someone turning age 65 today has almost a 70 percent chance of needing some type of long-term care services and supports in their remaining years.”

Paying for Long-Term Care

It’s important to understand that the sources of payment for long-term care are limited to one’s own money, long-term care insurance (if one purchased a policy and kept up with the premium payments) and Medicaid. Both saving for LTC and purchasing a specialized policy to cover these services require forethought and involve either setting aside or paying a significant amount of money in advance. Because so many people do not plan accordingly for this expense, many find themselves looking to Medicaid for assistance. The catch here is that most people do not want to spend the savings they do have on their care. Unfortunately, even if they did, those funds would not last long.

How Medicaid Works

Unlike Medicare (which does not cover long-term care), Medicaid is a means-tested program. In other words, you can only own a small amount of money or property, have a low income, or both to qualify.

For example, in New York, which is more generous than most states, if you are 65 years of age or older, you can currently have no more than $15,150 in assets. In other states, eligibility is limited to those who have $2,000 or less in assets. Depending on where you live, income might be a factor as well, and permitted amounts are low. In New York, the annual income limit for a senior to be eligible for Medicaid is $10,100.

Seniors often wish to preserve their money out of habit or with the intention of passing it on to their families, but Medicaid eligibility requirements largely prohibit both these things. Medicaid wants Americans to spend their own money on LTC first before they will step in and lend a hand. If a senior attempts to give away money and other assets in order to qualify for Medicaid and provide family members with an inheritance, Medicaid will find this transfer during the “look-back” process and the applicant will be hit with a penalty period during which they will be disqualified from the program. This is where legal and financial strategies come in handy to help families meet as many of these needs as possible.

Strategy #1: Asset Protection Trusts

As its name suggests, an asset protection trust is designed to protect one’s wealth. But, if designed correctly, this legal tool can serve other purposes as well. Typically, we think of creating an asset protection trust when someone is planning to apply for Medicaid. As noted above, an applicant is only allowed to have a certain amount of money or property in their name.

While assets can be transferred to family members or friends, there are often risks and disadvantages to doing so. In addition to the obvious issue of the trustworthiness of the individuals involved, there are risks that cannot be calculated. For example, will any of the recipients incur a debt or liability that exposes the transferred assets to collection by a creditor? Will any of the individuals get divorced or pass away before you? Also, low-basis assets (e.g. a house that was purchased years ago for a much lower price than its current fair market value) have the same low basis in the hands of the persons to whom they were transferred.

With a trust, the same assets can be distributed to the same individuals upon your death, but with a “step up” in basis to fair market value. This means that your beneficiaries avoid capital gains tax on the increase in value that the trust assets accrued during your lifetime.

When a trust is properly designed to provide asset protection, the assets transferred to it no longer belong to you. As a result, they are beyond the reach of Medicaid or any other future creditors. For this reason, the trust is often called a “Medicaid Trust.” Be aware, however, that transfers to a trust—just like transfers to individuals—are subject to **Medicaid’s “look back” period**.

If your home is transferred to the trust, you can reserve the right to live in it for the rest of your life. If income-producing assets are transferred to the trust, you can still receive the income. Note, however, that you will have no right to withdraw or demand access to the principal once it is place in the trust.

Strategy #2: Income Trusts

When an individual applies for Medicaid, a strict income limit is enforced. If an applicant’s income exceeds this amount, it is considered excess and must be handled appropriately to obtain and maintain Medicaid eligibility. Two financial tools used for remedying this situation are Qualified Income Trusts (QITs) and Pooled Income Trusts (PITs).

QITs are irrevocable accounts that are designed to hold an applicant's excess income. They are sometimes referred to as Miller trusts. Some states allow applicants to spend down their excess income on their own care in order to meet Medicaid limits, but others, called "income cap" states do not allow spend down for eligibility. It is in these states where QITs are useful. A trustee is appointed to manage the disbursement of funds for acceptable expenses.

Pooled Income Trusts are also irrevocable accounts used to hold excess income, but specifically for disabled individuals. Their surplus income is pooled together and managed by a non-profit organization, which acts as a trustee and disburses the funds on behalf of the people for whom the trust was created. Note that Pooled Income Trusts are not an investment or estate planning vehicle. Unused funds will remain with the trust for charitable purposes.

Strategy #3: Private Annuities and Promissory Notes

All too often, seniors find themselves in a problematic situation of needing long-term care either within a recent transfer of assets or when they are still holding substantial assets. Getting rid of these assets within the look-back period will trigger a penalty. The penalty period is calculated by dividing the value or amount transferred by Medicaid's regional monthly rate for nursing home care, yielding a period of time in months that the person is ineligible for coverage.

The challenge is trying to preserve as much of an applicant's assets as possible while still helping them qualify for Medicaid. Fortunately, a federal law enacted in 2006 provides the answer: a properly worded and structured **private annuity** or promissory note. The idea is to create a cash flow from the applicant's assets that can be used to pay the nursing home during a shortened penalty period.

Here is an example that will explain the strategy:

Assume that Mom has $300,000 in the bank, and she needs nursing home care. She would like to apply for Medicaid and protect at least some of her assets at the same time, but she does not think it is possible. She is resigned to "spending down" her assets to the Medicaid limit.

The problem is that, if she transfers the $300,000 to a family member, then she will be subject to a Medicaid penalty. If the average local monthly cost of a nursing home room is $5,000, this means that she will be ineligible for Medicaid for the full five-year lookback period. However, if she transfers $150,000 to her son or daughter, she will be subject to a Medicaid penalty of only 30 months. Then, with the other $150,000, she can purchase a private annuity or promissory note that provides her with a monthly income of $5,000 for a period of 30 months. She can then use this monthly income, together with her Social Security benefits and pension, to pay the nursing home during the penalty period. After 30 months, she goes on Medicaid and her son or daughter gets to keep the original $150,000 that triggered the penalty.

Of course, the result is not as good as what could have been achieved if Mom had planned ahead, but, as a last-minute strategy, it works very well to pass on a good portion of her assets to her family.

Strategy #4: A Caregiver Agreement

A personal care agreement is an excellent strategy in many cases where seniors want or require extra services that would not be covered by Medicaid and are outside the scope of what a nursing facility or home care company would provide.

A family member or friend (who may have given up a job or taken time off from work) can render these services and receive an income. Another benefit of this strategy is that many seniors prefer to be cared for by those whom they know. The services can be paid for in advance, and the payments will legally reduce a Medicaid applicant's countable resources.

If the caregiver is to be paid in advance, an agreement must have certain characteristics to ensure it will be accepted by Medicaid. These include:

- The contract must specifically define the services provided and hours to be worked by the caregiver.
- The lump sum payment must be calculated using a reasonable life expectancy and legitimate market rates for the services.
- A daily log of actual services rendered and hours worked must be maintained, along with written invoices.
- Upon the death of the patient, any unearned amounts must be paid to Medicaid, up to the amount that Medicaid paid on behalf of the patient's care.

Strategy #5: Spousal Transfers and Spousal Refusal

An important feature of the Medicaid laws is that transfers between spouses are permitted, are not subject to the look-back period, and thus do not result in any penalty. In the case of a married couple, one of the basic strategies is to transfer any assets that are in the name of the spouse who needs care to the name of the well spouse. (In cases where the ill spouse is in an institutionalized setting such as a nursing home and the well spouse remains in their home in the community, the well spouse may be referred to as the “community spouse”).

New York and some other states permit something called “spousal refusal.” In these scenarios, the well (or community) spouse will refuse to provide support for the spouse who needs care. As a result, the spouse who needs care will be immediately eligible for Medicaid and receive services.

Once Medicaid provides services, it has the right to seek contributions from the well spouse. In some cases, however, Medicaid does not pursue its rights, and in other cases it is willing to settle at a discount. At a minimum, the well spouse will receive a significant benefit because any reimbursement to Medicaid will be at Medicaid’s discounted rates, rather than at the private pay rates that the providers would have charged. Unfortunately, most of the states are “spousal share” states that do not permit spousal refusal. In these states, the resources of both spouses are counted towards the Medicaid eligibility amounts, and the above strategy is therefore ineffective.

Some specialized elder law attorneys are very familiar with their state’s Medicaid programs and are able to work within the laws to produce favorable outcomes for their clients. Bear in mind that every case has its unique facts, and the strategies discussed here may or may not be a good fit for your family. It is best to find an attorney who specializes in Medicaid planning in your state and seek a consultation.

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