

PROTECTING LIFE SAVINGS FROM NURSING HOME COSTS

by
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IMPORTANT NOTE: The purpose of this outline is to familiarize the reader with the Medicaid rules. However, since this is only a summary, since the rules are constantly changing and since each person's situation is different, planning should not be undertaken without the advice of counsel. The discussion in this pamphlet is applicable only to Connecticut. . In compliance with regulations issued by the Internal Revenue Service, we inform you that any Federal tax advice contained in this communication, was not written to be used and may not be used by any person to avoid any penalties under the Internal Revenue Code.

1. THE NEED

- 1.1. **High cost.** The average convalescent care cost as determined by the Department of Social Services (DSS) is \$9,959 per month (as of July 1, 2008). Many facilities charge more than that amount.
- 1.2. **Medicare is of little help.** Medicare also has little coverage for convalescent care. It pays 20 days only if you are hospitalized for at least 3 days prior to going into the convalescent home and only if you require skilled level care (as opposed to custodial care). It will pay the excess over a \$133.50/day deductible (as of January 2009) for the next 80 days if those conditions are met. It never pays more than 100 days.
- 1.3. **Lack of insurance.** Medigap insurance (private health care insurance) simply picks up the deductible portion of the 80 days of Medicare coverage—again, only if the recipient is eligible for the Medicare payments. Convalescent care insurance is available, but few people own it.
- 1.4. **Assistance is available only for the poor.** Medicaid (Title XIX) is available only for those with limited income and almost no assets.

2. MEDICAID INCOME REQUIREMENTS

If a person is receiving long term care in a nursing home the only income eligibility requirement is that his income is less than the amount necessary to pay for the cost of care.

- 2.1. **Community Spouse's Income Is Exempt.** The income of spouse living at home (the community spouse) is not considered in determining eligibility of an institutionalized spouse. If the community spouse's income is very high, the state may look for a contribution of income to the support of the institutionalized spouse, but this is very rare.
- 2.2. **Minimum Monthly Needs Allowance.** The community spouse will be entitled to a portion of the sick spouse's income if needed to bring the community spouse's income

to at least the “minimum monthly maintenance needs allowance”. The minimum allowance is equal to 150% over poverty level.

The minimum is \$1,821.25 as of July 1, 2009.

- 2.3. **Housing Allowance.** The minimum allowance may be supplemented by a shelter allowance if housing costs exceed \$546.37 per month (as of July 2009), up to a total of \$2,739 (as of January 2009).
- 2.4. **Hardship Shown at Fair Hearing Overrides Limits.** It is theoretically possible to be allowed a larger monthly needs allowance if hardship can be demonstrated at a DSS “fair hearing”. However, DSS has a very limited definition of “hardship” and this approach rarely works.

3. ASSET REQUIREMENTS FOR APPLICANT

- 3.1. **Exemption for Home.** The home (regardless of whose name it is in) is an exempt asset as long as:
 - a. The person applying for Medicaid is reasonably expected to return to the home and the equity in the home does not exceed \$750,000, or
 - b. It is occupied by a spouse, or
 - c. It is occupied by a dependent minor or disabled adult child, or
 - d. It is occupied for at least a year by a brother or sister who is a joint owner of the home.
- 3.2. **Other Exemptions.** Other assets which are not considered when determining eligibility are:
 - a. Household items
 - b. Personal effects (including jewelry if the items are used and not held for investment)
 - c. Burial plot and casket
 - d. Irrevocable (up to \$5,400 for each spouse) or revocable (up to \$1,200) funeral contract
 - e. Term life insurance
 - f. Whole life insurance with total face values up to \$1,500
 - g. Automobile with value up to \$4,500 (An automobile that is necessary for the community spouse to get to work or medical appointments is entirely exempt, even if the equity is in excess of \$4,500.)
 - h. \$1,600.00
- 3.3. **Protected Assets for Community Spouse.** In addition, if one spouse is institutionalized, the other spouse (the “community spouse”) can keep one-half (1/2) of other assets owned by both spouses combined as of the time of institutionalization, except:

- a. The community spouse can retain all of assets up to \$21,912 (as of January 2009).
 - b. No more than \$109,560 (as of January 2009) may be retained by the community spouse. The balance of the assets must be spent before the institutionalized spouse may qualify for Medicaid.
 - c. The asset levels indexed and will increase as the Consumer Price Index goes up.
- 3.4. **Additional Protected Assets.** It may be possible to preserve more assets by petitioning a court. This approach has worked in other states, but is still untested in Connecticut.
- 3.5. **“Institutionalized” Status while at Home.** It is possible to have a person designated as needing an institutional level care while still at home. The date of that designation is the date that the amount of assets the community spouse can keep is set. Consequently, if a couple is spending down assets to care for a person at home, it is essential to have that person designated as “institutionalized” as soon as possible. An early designation will allow the well spouse to keep more assets and may enable you to receive home health care once eligibility requirements have been met.

4. SOME POSSIBLE SOLUTIONS:

4.1. **Exempt Transfers.**

- a. **Transfer to Spouse.** Transfers to spouses are exempt from disqualification rules. Usually this is not very helpful since the assets of both spouses are considered as a unit in determining eligibility. However, once a person is institutionalized, transfers to his spouse can be useful.
 - i) Gives the community spouse control over the spousal protected amount.
 - ii) Allows the community spouse to revise his/her estate plan to limit the assets that pass to the institutionalized spouse.
 - iii) Once the institutionalized spouse is determined to be eligible, the community spouse can make transfers of any property other than the house or the proceeds of a home equity loan.
- b. **Transfer to Disabled or Dependent Child.**
 - i) Transfers of the home to children under age 21 are permitted (residence in the house is not required).
 - ii) Transfers of assets to disabled children are permitted.
- c. **Transfer to Child Caretaker.**
 - i) Transfer of the home to a child is permitted if the child can prove that:
 - (1) The child lived in the home for at least two years prior to institutionalization,
 - (2) The child has cared for the parent for during that two year period, and

- (3) The parent would have needed to be institutionalized but for the care provided by the child.
- ii) Transfer to someone other than a child may also be permitted if the other requirements in the previous paragraph are met, if the person applying for Medicaid promised to transfer the house in exchange for such care, and if the value of services rendered is equal to or greater than the value of the house.
- d. Transfer to Sibling.
 Transfer of the home to a sibling is permitted if:
 - i) The sibling has resided in the home for at least one year prior to institutionalization, and
 - ii) The sibling is a joint owner of the home. There is no minimum interest specified. Consequently, a small ownership interest (e.g., 5%) should suffice.

4.2. **Spend Down Techniques.**

- a. Steps to Take Prior to Institutionalization.
 - i) Payment for Care.
 - (1) Care given by children can legitimately be compensated. As long as the compensation is reasonable, the DSS should approve the payments.
 - (2) It is better if payment is rendered on an ongoing basis rather than right before entry into a nursing home. Another way to proceed is to contract for services in advance, even if payment is not made until later. (This is a reasonable way to transfer the home to someone other than a child who provides long term care.)
 - (3) Any payment made will be subject to income tax on the recipient's return.
 - (4) A formal written agreement should be signed.
 - ii) Payment for Rent.
 Since parents often live in their children's homes, payment for room and board should be considered. It is preferable, but not required, to have a written agreement.
 - iii) Purchase a Life Estate in a Child's Home. Sometimes it makes sense for a parent to move into a child's home. The parent can purchase a life interest in the child's house, but the parent must actually live in the child's home for one year in order for that purchase to be exempt from the rules prohibiting gifts.

- iv) Improve the Child's Home. Often the parent's move into a child's home requires improvements to the child's home. The parent can pay for those improvements if the purpose of the improvements is to accommodate the parent's needs.

b. Steps to Take After Institutionalization or Determination of Institutionalized Status While Still at Home.

- i) Pay off mortgage. (This works only if the house is an exempt asset. See 3.1 above).

Example: Couple owns home with \$50,000 mortgage. Non-exempt assets total \$220,000. If one spouse enters a nursing home, the community spouse is entitled to keep \$109,560 and the institutionalized spouse can keep an additional \$1,600, for a total of \$111,160, which means \$108,840 will have to be spent before the institutionalized spouse is eligible for Medicaid. If the mortgage is paid off, the non-exempt assets will be reduced to 200,000. The couple can retain \$111,160 and only \$58,840 will have to be spent down.

- ii) Make needed repairs. (This works only if the house is an exempt asset.)

Example: Couple owns non-exempt assets of \$250,000. Their house could benefit from improvements, including a new roof, siding and windows. The estimated cost is \$35,000. If the husband needs convalescent care, the couple would have to spend \$108,840 before he would be eligible for Medicaid. The house improvements are a part of this spending and there is no effect on the \$108,840 the couple is allowed to keep.

Note: If the home has been transferred to the couple's children without reserving a life estate, improving the home probably will be treated as an additional transfer.

- iii) Upgrade to more expensive home. (This works only if the house is an exempt asset.)

It can make sense to upgrade to a more expensive home if the couple's home is old and in need of extensive repairs, or if their home is very small, or if they do not own their own home. This can be especially helpful if the new home is better designed for elderly needs (e.g., ramps, wider doors, more energy efficient, fewer stairs).

- iv) Purchase Furniture and Furnishings. (This works only if the applicant or the applicant's spouse or disabled child is living in the house.)

Department of Income Maintenance (DSS) regulations do not inquire into the value of household furnishings. Therefore clients should determine if they could benefit from new appliances, furniture, etc. If their existing belongings are old, now is the time to replace them.

- v) Purchase Other Exempt Assets.

- (1) If the couple's car is old, a more dependable one, less likely to need repairs should be purchased. (This works only if the applicant's spouse lives at home.)
 - (2) Purchase funeral contracts, burial plots and caskets for both spouses.
 - (3) Pay up or purchase small insurance policies (all policies combined cannot exceed \$1,500).
 - (4) Pay off all debts.
 - (5) Be sure appropriate estate planning documents (e.g., Will, Power of Attorney) are in place
- i) Purchase an Immediate Annuity in a Qualified Retirement Account. An immediate annuity is a contract where the owner/annuitant purchases a right to monthly income. This is different from a tax-deferred annuity, where the owner can access any portion of the funds (although sometimes with a withdrawal penalty). If an annuity is purchased from an IRA, it converts a countable asset into an income stream. The State must be named as a beneficiary, but the spouse, a disabled child or a child under age 21 can be named as the primary beneficiary. The annuity must be irrevocable and non-assignable.
- Example: A couple owns \$220,000 of countable assets, including an IRA worth \$100,000. If an annuity is purchased within the IRA, the \$100,000 will no longer count as an asset and will be treated only as a stream of income. That will reduce the couple's assets to \$120,000, leaving only \$8,840 to spend down
- vi) Purchase Immediate Annuity from Assets other than an IRA. If an annuity is purchased outside of a qualified retirement account it must meet the qualifications discussed above. In addition, the annuity must be payable in equal installments either for a term certain that is actuarially sound, or over the life of the annuitant. Even if all of these requirements are met, the State will force you to try to sell the annuity.
- Example: A couple owns \$220,000 of countable assets. A qualified annuity is purchased for \$100,000.
- (1) If no buyer can be found, the \$100,000 will no longer count as an asset and will be treated only as a stream of income. That will reduce the couple's assets to \$120,000, leaving only \$8,840 to spend down.
 - (2) If a purchaser can be found the purchaser is likely to offer about \$40,000. Rather than selling the annuity, the annuity can then be valued at \$40,000 rather than \$100,000 annuity, reducing countable assets to \$160,000 and reducing the amount that must be spent down from \$108,840 to \$48,840.
 - (3) If a commercial purchaser makes an offer to pay \$40,000, it is possible to sell the annuity to a child for \$40,000, giving your child a \$60,000 profit.

- vii) Spend & Enjoy. There are rules against transfers without consideration, but no rules against using the assets. Although frivolous spending is not encouraged, there is no reason clients should not improve their life style while they can. Go out to dinner; take a trip; call your grandchildren in California.

4.3. **Gifts.**

a. Prior Law:

- i) The federal laws regarding transfers of assets were changed on February 8, 2006. Transfers prior to the effective date of the law are subject to the former law, which provided for a look-back period of 36 months for most transfers and 60 months for transfers in trust.
- ii) If assets were transferred prior to the effective date of the new law, it is possible that the applicant may be eligible before the expiration of 36 months from the date of the transfer, depending on the value of the asset that was transferred and the average cost of nursing home care at the time of application for benefits.
- iii) In June of 2005 the State of Connecticut passed a transferee liability statute that would allow the State to recover from the beneficiary of a gift the lesser of the value of the transfer or the amount aid of aid given to the transferor. This law probably is applicable only to transfers after June of 2005, but that is not totally clear. The validity of the law also is in issue.

b. New Law. The federal law which went into effect on February 8, 2006 includes the following provisions:

- i) The look-back period is increased to 5 years for all types of transfers.
- ii) The period of ineligibility resulting from transfers does not begin to run until the transferor (or his/her spouse) is in a nursing home (or at home with a determination of institutionalized status) and is otherwise eligible for benefits, and an application for benefits has been made.
- iii) The law presumes that all transfers are for purpose of qualifying for Medicaid. However, it sometimes is possible to rebut this presumption. Factors that DSS will consider include the purpose for the transfer (e.g., a grandchild's tuition), your health at the time of the transfer, whether you retain adequate resources to meet your foreseeable needs and how long before needing assistance the transfer was made.

Therefore it is best if gifts are made while you are still healthy and as early as possible.

For example: In February 2008 Mr. Smith makes a \$50,000 gift to his son. A year later, Mrs. Smith goes into a nursing home. At the time of her admission into the nursing home the Smiths own a house, a car and \$220,000 of investments. They spend \$109,000 on nursing home care and make application for benefits. Unless they can prove that the gift was for purposes

other than Medicaid eligibility, the application will be denied due to the \$50,000 transfer and Mrs. Smith will not be eligible for benefits for about 5 months (the actual length of the penalty depends upon what the average cost of care is at the time of application). Note that it is necessary to make the application to start the running of the penalty period.

Note: Although under this example Mrs. Smith would be eligible for aid approximately five months after application for benefits is made, under legislation which took effect in July of 2005, DSS can recover from their son an amount equal to the lesser of the value of the transferred assets or the amount of aid received if application for benefits is made within the look-back period.

Note: The DSS does not look at transfers which occur before the look-back period.

Note: **You should consult an elder law attorney before making gifts.**

Note: **If any gifts have been made, you should consult an elder law attorney prior to making application for benefits** since in some cases it will be important not to apply for benefits before 60 months has expired, while in other cases application should be made as soon as possible.

Note: Assets held as joint tenants with rights of survivorship between parent and child generally will be treated as being owned solely by the parent. Withdrawals from joint accounts in favor of the child are treated as gifts to the child.

c. Types of Transfers.

i) Transfer Home to Children, But Retain Life Use.

- (1) Creditors of the children generally will not be able to enforce a lien until after the death of the life tenant.
- (2) Can still obtain a reverse annuity mortgage.
- (3) The transferred asset is taxed to estate of parent and therefore the asset will get a stepped up basis (if the life interest has not been terminated prior to death).
- (4) Eligibility for real estate tax freeze or tax reduction benefits is retained.
- (5) If the parent needs Title XIX assistance, he still must wait for the expiration of five years after the transfer. In some cases, it may make sense to transfer the house back to the parent(s) if nursing home care is needed earlier than expected. In other cases, it will make sense for the children to pay for the care until the 5 year period has expired. Sometimes this can be accomplished by taking a mortgage against the house.
- (6) The retention of a life interest may create hassles with DSS since the State is entitled to the life interest portion. DSS

currently is not attempting to obtain ownership of the life estate, but it does expect to receive any net rent received.

- (7) If the property is sold during the parent's life the parent will be entitled only to the value of the life estate, not to the entire proceeds.
 - (8) If a sale is necessary prior to the death of the parent, the capital gains exemption will apply only to the value of the life interest portion.
 - (9) Under federal law, the DSS can collect against non-probate assets. So far Connecticut has not enacted legislation which would allow the State to enforce a lien against a life interest owned by a decedent recipient, but this policy could change.
- ii) Transfer Home To Children, Subject To Lease To Terminate When No Longer Occupy.
- (1) Should avoid potential hassles with DSS over sale of the life interest and attempts to collect value of life estate after death of recipient.
 - (2) A written lease should be executed and a notice of lease should be recorded.
 - (a) Some protection against children will be obtained.
 - (b) Some protection against creditors of children will be provided.
 - (3) May be able to get step-up in basis if the parent actually resides in the home at death. Will not get step-up if the parent goes into a nursing home or if the lease has terminated.
 - (4) Will lose the capital gains exclusion for sales of residences.
 - (5) Will lose the possibility of using a reverse annuity mortgage.
- iii) Outright Transfer. In spite of the loss of many advantages of retaining interests in the home, it sometimes makes sense to gift the home with no strings attached. If gifts of cash are being made for a specific purpose, it is a good idea to either pay the bill directly (e.g. tuition), or document the purpose of the gift (e.g., cover letter).

4.4. Trusts.

- a. Self Funded Irrevocable Trusts. Changes in federal law enacted in 1993 combined with Connecticut's "Trust Busting" law make it difficult to utilize trusts for the purpose of preserving assets for the next generation. To have a chance at working, the trust must allow pay-outs of income only (no invasion of principal) and must be in effect for 5 years prior to application for assistance. Even then, it is not certain that they will work.
- b. Self-Funded Special Needs Trusts. Trusts funded with the assets and/or income of the recipient can be useful if a disabled person is able to stay in the community with medical assistance from the state.

- i) A special needs trust can be established to preserve assets to make staying at home financially feasible for a person with disabilities who is under the age of 65. The trust must provide that the state will be reimbursed upon the beneficiary's death, so this type of trust usually is not effective to pass assets to the next generation, but can be effective to allow the recipient of benefits to live more comfortably.
 - ii) Although there is not an income cap to qualify for nursing home benefits, there is an income cap for home care benefits for the elderly (\$2,022/month in 2009). If a person has income in excess of the income cap, a special needs trust can be established to receive income in excess of the allowable maximum. This technique has been approved by DSS.
 - iii) Self-Funded Special Needs Trusts cannot be used to protect assets or income from State funded programs such as State Supplemental income and state funded group homes.
- c. Third Party Trusts. Special needs trusts established for an elderly or disabled person by a third party can be a way of helping the beneficiary have a more comfortable life while still receiving Medicaid benefits. Unlike trusts established with one's own assets, these trusts do not need to provide for state reimbursement unless the grantor is transferring funds to the trust to make himself eligible for Medicaid. This type of trust may be used for your spouse only if the trust is established in your Will.

4.5. **Disadvantages To Gifting.**

- a. Psychological.
 - i) Loss of control over assets can lead to a feeling of dependency. Instead of deciding how to spend one's own money, the parent must ask for money. The child takes the role of parent and the parent takes the role of child.
 - ii) Loss of control over assets can lead to feelings of insecurity since the parent does not know how his children will respond to his needs and desires.
- b. Upset Estate Plan.
 - i) A Will can only affect assets owned by the testator at his/her death, so if gifts are not made in the same proportions as in the Will, the estate plan will be thwarted.
 - ii) Even if gifts are made in accordance with the Will, a spend-down of assets can upset the plan. Often the assets held by or jointly with the child who does the most for the parent are spent first simply because they are the most accessible assets to that child. If the parent then dies, that child is the one who gets nothing.
- c. The Parent Will Be at Children's Mercy.
 - i) Control over assets is lost.

- ii) Money and self-interest can change a person's outlook.
 - iii) Even if the child remains trustworthy, if the child dies before the parent, the child's heirs may have different attitudes, so it is important for the child to make provisions for the parent in his will.
- d. The Property Is Subject to the Children's Creditors and Estranged Spouse.
- i) Business creditors of the children can place a lien on the parent's house.
 - ii) The parent's property could be taken to satisfy personal debts of their children such as taxes, debts to the State for benefit programs received by the child and unexpected medical expenses of the child.
 - iii) Personal Injury claims against the child could put the parent's house at risk. If a grandchild is involved in an automobile accident while driving the child's car, the claims could be huge.
 - iv) Even if the child's marriage appears stable, it could crumble later. The parent's house would be an asset of the marriage, subject to Court jurisdiction.
 - v) If the child predeceases the parent, his assets will pass to his heirs so the gifted assets could end up in the control of the parent's daughter-in-law or son-in-law.
- e. Transfers Can Result in Tax Problems.
- i) Gift Tax. Both Connecticut and federal gift tax forms are required to be filed, but no tax will be payable unless total accumulated gifts exceed \$1,000,000 for federal purposes and \$2,000,000 for Connecticut purposes.
 - ii) Capital Gains. Loss of step-up in basis can result in large capital gains when children sell the asset.

 On sale of property a capital gains tax is paid on the difference between the sales price and the basis of the property (usually the purchase price plus improvements). If property is transferred by gift, the recipient of the gift takes the same basis as the donor, so when the asset is sold, a capital gains tax will be payable. On the other hand, if an asset is retained until death, the person who inherits the property gets a new basis equal to the value of the property as of the date of death (known as a "stepped-up basis"). Therefore, if the property is sold after death at the reported date-of-death value, no capital gains tax will be due. Consequently, for low basis property, if the donor of property is not likely to be subject to estate tax there is a substantial tax savings if property is included in the estate rather than passed by gift during life. The current amount that passes free of estate tax is \$2,000,000 for Connecticut and \$3,500,000 for federal purposes.
 - iii) Loss of capital gains exclusion. If the house is sold during the parent's life, the capital gains exclusion for sale of the primary residence is lost.

Example: Home worth \$260,000, with basis of \$20,000.

If gifted then sold:

Capital Gains tax (federal and CT)	\$48,000
Total Tax	\$48,000

If retained until death then sold:

Estate Tax	\$ 0*
Capital Gains Tax	0
Total Tax	\$ 0

**Assuming the total estate, including the total value of gifts made during life, is less than \$2,000,000.*

- iv) Loss of Real Estate Tax Freeze. A transfer (without retention of a life estate) results in the loss of eligibility for real estate tax freezes and tax reduction benefits otherwise available to senior citizens with limited incomes.
- v) Reverse Annuity Mortgages. If a transfer is made (without retention of a life estate), the possibility of using a reverse annuity mortgage to increase income is lost. A reverse annuity mortgage is a program sponsored by HUD which allows an elderly person to borrow against the equity of his home and receive the borrowed funds over a period of years or for life, thereby increasing the money available for living expenses. No payments are due on the mortgage until the owner's death.

4.6. Other Planning Techniques.

a. Purchase Long Term Care Insurance.

Ideally, insurance should be purchased in an amount sufficient to cover expenses for the length of time necessary to provide care during the period of ineligibility if transfers are made.

Example: A widow owns a house worth \$300,000 and other assets of \$270,000. If she transfers all of her assets she will be ineligible for 60 months. If she owns convalescent care insurance sufficient to cover her expenses for 60 months, she can transfer assets after institutionalization. By the time the coverage expires, the look-back period should also have expired.

- i) Consider having children pay for insurance. The main purpose of transferring assets is to protect the children, therefore it is appropriate to suggest that they help pay.
- ii) Keep the cost down by considering available income but include a rider to allow an increase in insurance to cover rising costs.
- iii) Good policies provide for home health care, which may avoid the need to go into a nursing home.

b. Partnership Program.

- i) Connecticut has a program known as the Connecticut Partnership for Long Term Care. Under this program, assets will be protected up to the amount of long-term care insurance purchased.

Example: A couple has a house worth \$200,000 plus investments of \$200,000. Insurance is purchased under the Partnership program in the amount of \$100,000. The husband then enters a convalescent home. All of the coverage is expended and the need for care continues. The husband will be immediately eligible for Medicaid benefits even though none of the couple's assets have been expended since the home is exempt, investment assets equal to the insurance benefits are exempt, the applicant is allowed to keep \$1,600, and the spousal protected amount is \$109,560.

Note: It works best to buy a large daily benefit and extend the term only for so long as necessary to achieve the total benefit required to protect assets.

Note: If you move out of Connecticut, the insurance benefit will be retained, but the asset protection will be lost.

Eleven insurance companies (Allianz, Bankers Life and Casualty, CUNA Mutual, Genworth Life, Great American Life, John Hancock, MassMutual, MedAmerica, MetLife, Prudential and State Farm) have been approved to participate in the program. To sell this insurance, agents must take an online course and pass an exam, then take an additional classroom course conducted by the Connecticut Partnership staff. Agents who have not been certified to sell the Partnership insurance are not likely to recommend it.

- ii) More information can be obtained by accessing www.ctpartnership.org or contacting the Department of Social Services (860) 418-6318.

c. Power of Attorney including power to gift. If appropriate, your power-of-attorney should specifically allow gifting, the transfer of real estate to the holder of the power and the power to transfer to trust. This is an important tool if transfers are to be postponed since the Medicaid recipient may be incompetent when the need to make transfers arises.

Note: It is possible to use a "springing power of attorney", which does not take effect until a designated person has signed an affidavit that the person signing the power is incapable of handling his/her own affairs.

d. Execute New Will.

- i) If your institutionalized spouse is omitted from your Will, DSS will have a conservator appointed for the purpose of claiming your spouse's statutory share of your estate. However, that share currently is only a life interest in 1/3 of the probate estate. Therefore if your spouse is in an institution or is expected to need nursing home care if you are not there to provide care you should redo your Will either to leave only the

minimum statutory share to your spouse or to leave assets to your spouse in a special needs trust.

- ii) If your spouse is already receiving Medicaid, you may also consider titling assets in such a way that they will pass automatically to a beneficiary other than your institutionalized spouse in order to avoid the State insisting that a minimum statutory share and spousal support allowance be claimed on behalf of your spouse. The support allowance (commonly called a "widow's allowance") can deplete the entire estate in some cases.

Note: This technique should not be used for the house due to a case in which the court treated the trust as a disqualifying transfer upon the death of the person who established the trust. Since the spouse is not allowed to gift the house, the house should not be put in trust.

- iii) If neither spouse has been institutionalized, it may be appropriate to leave assets for the survivor in a testamentary trust. This is especially effective if the spouse will be able to live comfortably from the income of the trust, thereby protecting the principal. Due to the case referred to in the foregoing paragraph, a living trust cannot be used.

- e. Sell Interest in Home to Children: Since the use of a trust to pass the house to the children may not be effective, the children may want to consider purchasing an interest in the house from their parent. Title could be held as joint tenants with rights of survivorship or the parent could hold a life interest with the children holding a remainder interest. In either case, the property would pass to the children without probate on the parent's death. If this device is used it is important that the fair market value of the interest purchased be paid to the parent.

5. CONCLUSION

The transfer of assets to qualify for Medicaid is an extremely complex area due to conflicting considerations. Therefore no one solution fits all. Early individual planning is essential.

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