INTEGRATING LONG-TERM CARE INTO ESTATE PLANNING (2024)

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IMPORTANCE OF LONG-TERM CARE PLANNING

WHY INTEGRATE ESTATE PLANNING AND LONG-TERM CARE PLANNING?

Estate Planning is the means by which we document how we want our assets to be handled when we become disabled or die and ultimately pass property to the persons of our choice. Anticipating disability we may create a power of attorney to designate agents who can handle our business for us if we cannot do that ourselves. Anticipating death we select the person/s to handle our estate and pass our property to those persons we select by will or trust. We may also set up accounts with specific beneficiary designations to pass funds directly to those persons.

A significant part of assuring we have an estate left to pass involves **Long-Term Care Planning**. This requires taking an informed look at the high cost of long-term care services and making decisions about how to fund those expenses. Many good estate plans are destroyed by failure to plan for the cost of long-term care, so it is beneficial to consider these disability expenses while looking at estate planning.

START PLANNING EARLY

Planning for long-term care is best accomplished by the individual himself or herself who may need to finance long-term care in the future. Planning for long-term care expenses is best accomplished early – when the individual has full capacity and at least five years prior to the need for long-term care.

Often there is no planning, and, as a result, family members - perhaps spouses and children – find themselves having to make hard decisions. For one person to engage in planning for another there must be documented authority to act, even in many situations for a spouse to plan for another. Since a person’s power of attorney will lay the authority for any opportunity to plan to preserve the estate, and because an agent can act only within the scope of the powers granted in an advance directive, a person should keep that in mind when preparing a power of attorney.

While there are strategies that can be employed closer to the time long-term care is needed, when a placement is imminent, there are fewer opportunities to save assets. So while each person’s situation is different, and a comprehensive examination of his or her individual financial and health circumstances needs to be done, more time usually translates into more effective planning and savings.

FINANCIAL IMPACT OF LTC SERVICES

SO WILL YOU NEED LTC SERVICES?

About 60% of those turning 65 can expect to use some form of long-term care in their lives, according to the U.S. Health and Human Services Department.

Although many may never require substantial care in a skilled nursing facility, CMS projects that 20% of seniors will need 2 to 5 years of substantial care and another 10% may need more than 5 years of care.

In 2023 The Society of Actuaries estimates that the average length of skilled nursing home care is 25 months for those who need extended care. For 2023, a 25-month stay in a semi-private room in a skilled nursing facility in Alabama would cost approximately $165,000.

According to a recent survey, average retirement savings for the Baby Boomer generation is $202,000. Statistics such as these suggest that paying out-of-pocket for skilled nursing care is unlikely for most current seniors.

COST OF CARE

Genworth 2023 Cost of Care Report states that “the world’s population is aging at a faster rate than ever before and people are living longer. Every day until 2030, 10,000 Baby Boomers will turn 65 and 7 out of 10 people will require long term care in their lifetime.”

Based on the Genworth 2023 Cost of Care Report the following are median costs of care in Alabama:

Homemaker Services $4195 per month/$50,340 per year
Homemaker Health Aids $4385 per month/$52,620 per year
Adult Day Health Care $ 975 per month/$11,700 per year
Assisted Living (one bedroom) $4143 per month/$49,716 per year
Nursing Home (semi-private room) $7604 per month/$91,248 per year
Nursing Home (private room) $8060 per month/$96,720 per year

SOURCES OF PAYMENT

Sources of payment in different settings include (percentages from 2023):

Private Pay – all settings (13.5%)
Insurance – all settings insured (7.8%)
VA – limited financial assistance for in-home care, assisted living and nursing home care
Medicare – limited home healthcare, limited nursing home (18.2%)
Medicaid – limited home healthcare, primary payor for nursing homes (42.1% nationally but 75% in AL)

THE IMPORTANCE OF MEDICAID

MEDICARE LIMITATIONS

Medicare provides very limited long-term care assistance. It does not provide 24 - hour care at home, meals delivered to the home, homemaker services or personal care. It does provide limited home health care, hospice and durable medical equipment, and a very small amount of coverage for institutional long-term care in very limited circumstances. So it is important not to hang your long-term care expectations on Medicare.

Medicare will pay for the first 20 days of care in a nursing home if the patient has a three day prior hospitalization and is admitted to a nursing home within 30 days and requires skilled care. While the Medicare literature will indicate that Medicare pays for up to 100 days of nursing home care, the truth is that if the patient continues to have skilled care ordered by the doctor, on day 21 a co-payment of $204 per day begins.

That means that in a month, even with Medicare paying, the patient will pay over $6000 per month in co-payments. Under the best of circumstances Medicare will pay for only 20 full days of care and another 80 days if, and only if, skilled care continues to be ordered, and will pay for only a fraction of the cost of care while the patient pays the lion’s share through the $204 per day co-payment. After 100 days Medicare pays nothing.

Medicaid is the primary payor for nursing home long-term care in Alabama.

MEDICAID FOR INSTITUTIONAL CARE

As you can see, qualifying for Medicaid to pay for nursing home care quickly becomes an important concern for those who will need nursing home care on a long-term basis. In order to qualify for Medicaid to pay for long-term care a person must be medically sick enough and have income and resources low enough. The income limit in 2024 is $2829. If income exceeds $2829 a Medicaid Qualifying Income Trust (MQIT) can resolve the problem of excess income. The resource limit is $2000 but do recognize that there are some types of property that can be excluded.

For a married couple Medicaid allows the spouse staying at home (Community Spouse) to keep part of the assets and income to meet his or her needs at home. These provisions are known as Spousal Impoverishment Protections.

After Medicaid is awarded, a budget is prepared to determine the personal liability the resident is required to pay from his or her income. The resident can keep $30 for his or her personal needs allowance, enough money to pay for unreimbursed health insurance, and he or she is allowed to send home to the spouse at home enough of his or her income to bring the income of the spouse at home up to $2555. The rest of the resident's income is paid to the nursing home as his or her personal liability, and Medicaid pays the difference in that amount and the nursing home charges.

If assets are given away Medicaid will deny coverage at the rate of one month for every $7300 transferred within five years of application. This is why early financial planning for long-term care is so critical. There are multiple strategies to reduce countable assets, but some of those strategies, such as irrevocable trusts and life estate deeds, require a five year leeway before long-term care will be needed without Medicaid penalties being assessed.

SINGLE PERSONS

The income for a single person must be at or below $2829 or a Medicaid Income Qualifying Trust (MQIT) will need to be established.

Countable resources must be at or below $2000

MARRIED PERSONS

Income: The applicant's income must be no greater than $2829 (or MQIT). For a married person, Medicaid considers only his or her income, and the spouse's income does not count.

A single person can clearly establish eligibility when resources reach $2000. It is, however, a little harder to establish financial eligibility in the case of a married person. In order to determine how much a spouse at home can preserve for himself or herself (pursuant to the Spousal Impoverishment Rules), a married person applying for Medicaid must provide an inventory of property/assets the couple jointly and individually owned on the "snapshot" date (defined as when the person entered long-term care, which might be when he or she entered a hospital from which a placement was made to a nursing home without a 30 day break in institutional care). From those resources that existed on the snapshot date, the home is protected for the spouse who will continues to live there.

Besides the home and vehicle, the community spouse is allowed to keep the first $30,828. If joint assets exceed double that ($61,656), the community spouse can keep one-half up to a limit of $154,140. This is called the Spousal Impoverishment Protected Resource Amount. After reserving what can be set aside for the spouse, all remaining funds over $2000 plus the income of the applicant/institutionalized spouse must be spent down by the applicant/institutionalized spouse.

It is important to understand that even if a person is separated from a spouse, they are still treated as a married person, and prenuptial agreements will not shield assets from being countable by Medicaid.

Example One: A couple have $20,000 in countable assets. The community spouse keeps $18,000 (because all assets are below $ 30,828), $2000 is assigned to the institutional spouse for his or her resource allowance, and the institutional spouse qualifies for Medicaid without a spend down.

Example Two: A couple have $40,000 in countable assets. One-half is $20,000, but the spouse keeps the first $30,828. The applicant must spend down the rest except for $2000 ($40,000 - $ 30,828 = $9172 - $2000 = $7172) before qualifying for Medicaid. The institutional spouse spends down $7172 and his or her income before qualifying for Medicaid.

Example Three: A couple have $80,000 in countable assets. The community spouse keeps one-half, $40,000. The applicant must spend down the rest except for $2000 ($80,000 - $40,000 = $40,000 - $2000 = $38,000). The institutional spouse spends down $38,000 and his or her income before qualifying for Medicaid.

Example Four: A couple have $400,000 in countable assets. One-half is $200,000, so the cap of $154,140 applies, and that amount is retained by the community spouse. The applicant spouse must now spend down the rest except for $2000 ($400,000 – 154,140 = 245,860 – 2000 = 243,860). The institutional spouse spends down $243,860 and his or her income before qualifying for Medicaid.

MEDICAID TRANSFER PENALTIES

Medicaid looks back at all financial transactions for 5 years prior to application, and all gifts or sales of property for less than the value assigned by Medicaid is added and divided by $7300 to determine the months of ineligibility for Medicaid that will be assessed.

The penalty begins to run when the person is institutionalized and would otherwise be eligible if it were not for the transfer.

Example:
A second home valued at $175,000 is transferred to a child in January 2021. The parent applies for Medicaid in January 2024 (within five years). A penalty of 23.97 months (175,000 ÷ 7300) would be imposed. That penalty would not begin to run until the parent is in the nursing home and has used all of his resources and, but for the transfer, would be eligible for Medicaid. That means someone will have to privately paying for care for over two years during the time the penalty runs.

Gifting is not just giving away property. It is any transfer of an asset for less that the value assigned by Medicaid. An example might be selling a home for less than the tax assessor's appraised value. Often people trying to sell property will reduce the price to unload the property, and this is fine unless the owner is, or may become, a Medicaid applicant within five years. A better plan is to have the property reassessed or to obtain a commercial appraisal if the appraised value is over one year old. A house sold for $35,000 when the tax assessors appraised value is $52,000 will be a $17,000 uncompensated transfer and result in a 2.32 month penalty.

Be careful of WHEN to apply:
A person gives away $350,000 in March 2019. He has a stroke in January 2024 and is placed in a nursing home. If he applies for Medicaid in January 2024, a 47.94 month penalty will be assessed, and he won't be eligible for Medicaid until approximately 02/01/28. If he had waited until April 2024 to apply he would have qualified with no penalty because he was past five years from when he gave away the money. By privately paying for about 4 months and waiting to apply he could have avoided having to privately pay for nearly 4 years.

Remember this rule to get outside the transfer penalty: 5 years + the first of the next month.

TRANSACTIONS TO AVOID

- Selling property for less than the tax assessor's appraised value
- Enriching someone else's property
- Paying back someone without a promissory note
- Family members being paid to provide care without a caregiver agreement
- Thinking that a living trust will protect property from counting for Medicaid purposes
- Confusing Medicaid Penalties (1 month for every $7300 five years prior to application) with gift tax exclusion of $18,000 per year
- Thinking a prenuptial agreement will shield assets from having to be spent down when applying for Medicaid

CAN I SAVE ANY ASSETS?

EXCLUDED PROPERTY

When applying for Medicaid, all property counts unless it is specifically excluded. Some excluded resources include the following:

- Household goods and personal effects
- One automobile
- The home for the community spouse as long as he or she lives there (no lien can be taken)
- The home if a dependent relative other than a child under 21, blind or disabled lives there (a lien may be taken)
- **The home if a dependent child who is under 21, blind or disabled lives there (no lien may be taken and the property may be transferred without penalty)**
- **The home if a sibling with an equity interest lives there and was lawfully residing in the home for at least one year immediately prior to the applicant being admitted to the medical institution (no lien may be taken and property may be transferred without penalty)**
- The home if the applicant has a reasonable intent to return home (a lien may be taken but dissolves if the patient actually does return home)
- Real property where a joint owner lives for whom sale of the property would cause a loss of housing (a lien may be taken)
- Up to $6000 equity value in income producing property (remaining equity is a countable resource)
- **Life estates (value does not count and no transfer penalty if the deed dates back over five years)**
- **Assets held in a special needs trust**

- Real property the applicant is making a bona fide effort to sell (a lien will be taken)
- Term life insurance with no cash surrender value
- $5000 titled for burial or designated in a Statement of Claimant form
- Prepaid burial funds worth $5000 (in calculating the amount invested, do not count the space items such as plot, marker, casket, vault, opening and closing the grave which are completely excluded as a resource)
- **Face value** of life and burial Insurance policies that have a **combined face value of $5000 or less** (the face value is a countable resource but may be excluded when designated for burial)
- **Cash surrender value** of life and burial insurance policies that have a **combined face value exceeding $5000** where up to $5000 is designated for burial (the amount not designated for burial is treated as a countable resource)
- Proceeds paid by a long-term care Partnership Policy (for each dollar of benefits paid one dollar of assets is not counted toward the eligibility limit). For more about what qualifies as a Partnership Policy see

https://www.aldoi.gov/Consumers/LongTermPartnership.aspx

PERMISSIBLE TRANSFERS

Permissible transfers are those allowed by law resulting in no penalty being imposed. While some property is totally excluded, some property can be excluded and a lien taken, and some property can actually be transferred without creating a penalty. This would include:

- Home when a child under 21, blind or disabled lives there
- Home when a sibling with an equity interest was residing there for at least one year prior to the institutionalization
- Home when a son or daughter of the claimant who was residing in the applicant’s home for a period of at least two years immediately before the date of applicant’s admission to the medical institution or nursing facility, and who provided care to such claimant which permitted the applicant to reside at home rather than in an institution or facility
- Transfers of money into a Special Needs Trust.

CONVERTING COUNTABLE RESOURCES INTO EXCLUDED RESOURCES

If a person needs to spend down a certain amount of money to qualify for Medicaid, it makes perfect sense to use that money instead to convert it into non-countable resources or put it to use toward reducing the community spouse's monthly income needs. Examples might be:

- Paying off debt on a vehicle
- Paying off credit card debt
- Making needed home repairs
- Paying off a mortgage
- Purchasing pre-paid burial arrangements
- Using money to fund a Special Needs Trust

LIFE ESTATE DEEDS

A life estate is a form of joint ownership that allows one person to remain on property until his or her death, at which time it passes to the other owner, referred to as the person with the remainder interest. Life estates can be used to avoid probate while giving a house to children without losing the ability to live in the home, remaining responsible for property tax (with the benefit of homestead and age related tax exemptions), remaining responsible for homeowner insurance, yet creating ownership in the children at the death of the parent.

This type of deed can play an important role in Medicaid planning since Medicaid does not assign any value to a life estate when the parent applies for Medicaid to pay for nursing home care. If the transfer occurred prior to five years before application, there will be no penalty for the transfer.

Further, purchasing a life estate should not result in a transfer penalty if you buy a life estate in someone else's home, pay an appropriate amount for the property (determined by Life Estate and Remainder Tables at 26 C.F.R. §20.2031.7) and live in the house for more than a year. For example, an elderly man who can no longer live in his home might sell the home and use the proceeds to purchase a life estate interest in his child's existing home. Assuming the father lives in the home for more than a year and he paid a fair amount for the life estate, the purchase of the life estate should not be a disqualifying transfer for Medicaid.

MEDICAID ASSET PROTECTION TRUST
(INCOME ONLY IRREVOCABLE TRUSTS)

It is possible to remove assets from consideration through a Medicaid Asset Protection Trust. This is an irrevocable trust, meaning it cannot be revoked or changed once created. The trust must prohibit the grantor from accessing any of the principal under any circumstances (with only income being paid to the grantor). If the trust is not structured correctly all of the property it holds will be considered as countable resources by Medicaid.

Five years from when the trust is funded is needed before applying for Medicaid. Otherwise the transfer of assets into the trust will create a transfer penalty.

Do not confuse this type of trust with a revocable living trust or traditional family trust which does not work to shield assets from being considered as countable assets for Medicaid purposes.

MEDICAID SPEND DOWN SPECIAL NEEDS TRUST (SNT)

Special Needs Trusts in a long-term care setting are particularly useful in accomplishing spend down while acquiring additional resources for the long-term care resident.

There are many types of Special Needs Trusts (SNTs), including trusts for disabled younger persons, disabled children whose parents and grandparents want to provide for their future needs, persons on public benefits who recover money from personal injury lawsuits or who inherit money when a relative dies. Each type of SNT has highly specific requirements and responsibilities. But what they all have in common is the goal of protecting funds for a disabled person without those funds resulting in the loss of public benefits.

With the Medicaid Spend Down SNT, instead of spending down the money required to be spent by Medicaid on nursing home care before eligibility can be established, the money is paid into a SNT and can then be used to pay for special needs not otherwise paid for by Medicaid for the disabled person once he or she becomes eligible. Medicaid eligibility can be immediately established while these funds remain available to pay for special needs for the nursing home resident such as a private room in a nursing home (since Medicaid will only cover a semi-private room), sitters, and items and services that can improve the quality of life for the nursing home resident. This could be hair salon charges, manicures, telephone, newspaper subscriptions, audiobooks, movies, recreation, medical and dental expenses not otherwise covered, special equipment like wheelchairs or specially-equipped vans, therapy or rehabilitation services, training and education, travel, electronic equipment including computers and mobile devices.

Another incredibly useful expenditure from a SNT is payment for nursing home charges during a penalty period. For instance, if money was transferred earlier creating a penalty period, money from the SNT can be used to pay for care to get the resident through the penalty period.

The drawback to this type of SNT is the requirement that, on the death of the person for whom the trust was established, Medicaid must be reimbursed from funds remaining in the trust up to the amount Medicaid has paid for the nursing home resident’s care.

Still, creating a pool of money to meet the special needs of the nursing home resident after being awarded Medicaid is far better than simply spending down those funds before qualifying for Medicaid and leaving the resident with no resources to pay for special needs. Since Medicaid allows a nursing home resident to keep only $30 of his or her income each month to pay for personal needs, you can see how that is not enough to have needs met without families pitching in to help pay for necessary items.

RUSSIAN ROULETTE: GIFTING AND WAITING

Medicaid's five year look back permits people to give away assets they want to persons they want to have them so long as they do not apply for Medicaid within five years.

While this is a clear way to reduce assets that will have to be spent down, it also requires the relinquishment of control over those assets, and that makes many people uncomfortable. If this strategy is used, it is imperative that the money transferred be safeguarded in case the person transferring the money should need nursing home care during the five years and a penalty is assessed requiring private pay during that period.

Example: John sold some property and gave his son $75,000 in May 2020. All was well until April 2024 when he had a stroke following a COVID infection and needed a nursing home placement. His income is $2300, and the cost of care will be $6800, for a $4500 shortfall each month. After using his savings of $36,000, he will be out of money in 8 months. In November when he runs out of money he would have been eligible for Medicaid but for the fact he gave away $75,000 to his son. Because the gift was within five years, the penalty associated with it will be 10.27 months, and that penalty will start to run then. Since he won't qualify for Medicaid for 10.7 months, about $46,215 will be needed to pay for his care. If the son still has the money he received as a gift and is willing to do so, he can pay the shortfall during the penalty period. The estate would still clear $28,785. If the money is gone or John's son is not concerned about him, there are no funds to pay for his care.

Example: Mary gave her niece $300,000 in July 2018. In August 2024 she needs nursing home care. There is no penalty assessed because the transfer is outside five years.

PARTIAL LOAF GIFTING

Sometimes individuals will give away some amount of money and calculate how much money they will need to live through the penalty period that Medicaid will assess. Depending on the assets a person has, his income and cost of care, sometimes modest amounts can be preserved. Again, if this is done, great care must be used to assure that the gift recipient does not take the money and leave the care recipient with no way to pay for care.

Example: John needs nursing home care. He has $100,000 which he gives to his daughter, leaving him with no other resources. His income is $3200, and the nursing home cost will be $7200 per month. He will have a $4000 monthly shortfall. The gift to his daughter creates a 13.6 month penalty. Over the course of the penalty the daughter will pay the shortfall for a total of $54,400. The estate will come out saving $45,600.

CREATING A SPECIAL NEEDS TRUST

Sometimes when transfers have already happened, but resources are left, the remaining resources can be placed in a special needs trust and used to pay for care during the penalty period.

Without the transfer to a SNT the money would be used to pay for care and the penalty would only begin when those resources were used up.

DRASTIC SOLUTIONS

Spousal Refusal happens when the spouse refuses to participate in the eligibility process and will not provide information about their assets.

Divorce is considered by some, but is questionable from a practical as well as legally ethical standpoint.

MEDICAID ESTATE RECOVERY

Federal law requires states to recoup money spent for some Medicaid services, and the rules implementing this required federal recoupment vary from state to state. In Alabama only assets left in the probate estate can be collected.

In Alabama Medicaid Estate Recovery is required for the following expenditures:

- Benefits that were not paid correctly to a person of any age (resulting in what is known as an overpayment)
- Benefits paid after age 55 for nursing home Medicaid
- Benefits paid after age 55 for home and community based waiver services
- Benefits paid for hospital and drugs for persons who received those benefits in connection with nursing home or waiver services after the age of 55
- Expenditures for services received after age 55 for SSI eligible persons who qualify for Medicaid in the community

The provider, attorney, personal representative, sponsor or case manager is asked by Medicaid to contact Alabama Medicaid Agency's Estate Recovery section to provide notification of a recipient's death within 30 days of the death. Upon notification of death, Medicaid will send a questionnaire to the next of kin to ask about property the decedent owned at the time of death. Those handling the estate of the decedent who formerly drew benefits have always been under a duty to treat Medicaid as they would any creditor and notify the agency of intent to distribute the estate, but that requirement is now more stringent, and all estates are subject to notice.

A 2019 law requires that as of 09/01/19 all estates filed in Alabama notify Medicaid to give the agency an opportunity to review its records to determine if the estate may be subject to estate recovery. This is true for probating wills, administering estates and filing for Small Estate (Summary) Distribution, and the notice is required whether the decedent ever received Medicaid or not. The agency will have 30 days to file any claim it may have against the estate.

PROCEED WITH CAUTION

No one strategy works for everyone because everyone’s income, resources and objectives differ. Usually people will employ a mixture of methods to protect their assets, and many people decide to do nothing until the last minute in hopes that long-term care will not be needed.

A worst case scenario is one where the aging parent gave away property to grandchildren two years prior and now needs care, but the grandchildren will not return the property and cannot or will not contribute to the private pay expenses of long-term care. The senior faces the need for Medicaid to pay for care but is penalized for years with no way to pay $7000 per month when his income is only $1800. Where will the $5200 per month needed to pay for care come from?

I cannot stress enough the need for caution in planning and obtaining good legal advice since removing assets from an estate can have dire consequences for the long-term care recipient and his or her family.