MEDICAID PLANNING WITH SMALL BUSINESS INTERESTS

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Disclaimer

- This is an overview – not a complete statement of the law and is not to be considered legal advice

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Paying for Long Term Care

- Long Term Care Insurance
- Medicare/Medigap
- Medicaid

Long Term Care Insurance

- Private LTC policies can provide assistance with home care or nursing home care

- Newer hybrid policies combine LTC benefit with death benefit if LTC benefit not fully redeemed

- NYS Partnership Policies are a way to combine private LTC insurance with later Medicaid coverage

Issues with LTC Insurance

- Insurability
- Premium Affordability
- Limits on coverage

Medicare

- Medicare:
  - Eligibility: Most Seniors over **65**

- Coverage Divided into Parts:
  - A: Hospital Care
  - B: Medical Insurance
  - C: Medicare Advantage Plan
  - D: Prescriptions

Part A Nursing Home Benefits: 100 days?

- Days 1-20 fully paid, as long as doctor determines you need rehabilitation, and the stay is not deemed purely “custodial”
- Potential for 80 more partially paid days at a nursing home, but co-pay of $194.50/day
  - Early termination if rehabilitation services not leading to any “improvement.” Recent federal settlement to prevent this but not yet implemented.
  - Coverage also terminated if patient deemed “recovered”
- **CAUTION:**
  - **Need qualifying hospital stay to trigger any coverage of NH**

Observation Status: The New Grey Area of Medicare Part A Coverage

- Hospitals being surcharged by the Center for Medicare Services for admitting patients, rather than “observing them”
- New Observation Status Departments, where patients not admitted
- Leads to coverage denials of nursing home stays and higher costs to patients for hospital expenses not covered by Medicare Part A since not “inpatient”

Medicare Part B Coverage

- Medical services necessary to treat a disease or condition
- Clinical research
- Ambulance services
- Durable medical equipment
- Mental health
- Second opinions
- Limited outpatient prescriptions
- Preventive screenings and wellness visits

Very limited home care benefit (roughly 8 hours <u>per week</u>, post surgery, for wound or other skill needs, lasting 3-6 weeks in duration)

Medigap Supplemental Policies

- Help defray co-pays and deductibles relating to Medicare coverage
- Do not provide any additional coverage for LTC services not covered by Medicare

Medicaid

- Broader Range of Services Covered, including:
  - Up to 24 hours per day of Home Care
  - Unlimited amount of Nursing Home Care coverage

Medicaid

- Applications and rules vary depending on what coverage a person needs:
  - Community Care (covers home care)
  - Institutionalized Care (covers Nursing Home care)

- “[N]o government agency has the right to complain that **middle class people choose to voluntarily inflict poverty on themselves**, when it is the government itself which has established the rule that poverty is a prerequisite to the receipt of government assistance in defraying the costs of **ruinously expensive** but **absolutely essential medical care**.”

- *In re Shah*, 257 A.D.2d 275 (2d Dep’t 1999), order aff’d, 95 N.Y. 2d 148 (2000) (emphasis added).

NY Medicaid Transfer Rules

- Community Medicaid/ Home Care Services
  - No look-back period for transfers*
  - No penalties for uncompensated transfers*

*NYS has been attempting to implement a 30-month (2 ½ Year) look-back period for long term home care applications, however, this has been repeatedly delayed due to the COVID-19 public health emergency.

**NYS has also been attempting, very recently, to eliminate the resource test for Medicaid applicants. However, even without a resource test, Medicaid recipients will still be subject to the income limits as well as Medicaid's Estate Recovery.

NY Medicaid Transfer Rules

- Institutional Care
  - **5** year look-back period for uncompensated transfers
  - Non-exempt transfers create penalty period that does not start to run until the person is receiving institutional care

Medicaid Community Care

Assets

- One person household:
  - **$16,800** plus exempt assets
- Two person household:
  - **$24,600** plus exempt assets

Income

- One person household:
  - **$934 + $20**
- Two person household:
  - **$1,367 +$20**

Medicaid Institutional Care

Assets

- Applicant Resources:
  - $16,800
- Community Spouse Resource Allowance:
  - $74,820 up to $137,400 May be higher if request hearing and receive judicial approval

Income

- Applicant Income:
  - $50
- Community Spouse Income:
  - $3,435.00

NY Medicaid (Temporarily) Exempt Assets

- House (maximum of $955,000 value)
- Car (unlimited value) 
- Contents of Household (unlimited value)
- Certain Business Interests

Caveat: Although these are exempt assets for determining eligibility, most of these assets could be vulnerable to an <u>estate</u> claim by NY State

NY Medicaid Exempt Assets

- Life Insurance ($1,500 in cash value exempt if no burial account funded)
- Funeral/Burial Exemptions
  - Prepaid funeral trust (no limit, but should not be overfunded as unused portion must be returned to Medicaid)
  - Burial plot/vault exempt
  - Burial account funded with no more than $1,500. Account must be separate and specifically designated as a burial allowance
- IRAs as long as in pay-out status (i.e., MRD taken yearly)

Exempt Business Interests

- Business Property and all cash reserves necessary to operate the business are exempt.
  - However, there must be a ***<u>reasonable expectation</u>*** that the business property will be used within 12 months to produce income.
  - Examples:
    - A local pizzeria is owned by a Medicaid applicant. The pizzeria owns an operating account to receive income and pay for expenses, an inventory of pizza ingredients and pizza boxes. These would be exempt. However, what if the pizzeria owner has an account with a cash reserve?
    - What if a Medicaid applicant owns an interest in a local dealership that has such a large inventory of vehicles that it would be unreasonable to expect for all of them to be sold within 12 months? This presents an issue for eligibility that could be planned for in advance.

Caveat: Even if these are exempt assets for determining eligibility, most of these assets could be vulnerable to an <u>estate</u> claim by NY State

How to Preserve Assets

1. Outright Gifts
2. Asset Protection Trust
3. Pooled Trust to Shelter Income
4. Spousal Refusal
5. Exempt Transfers
6. Business Succession/Buyout Agreements

Outright Gifts

Pros

- Simple

Cons

- Negative Tax Consequences (especially for a house)
- No Asset Protection:
  - Divorce
  - Litigation
  - Death
- No Guarantee to get it back
- For businesses, a complete loss of control from the original owner

Irrevocable Income-Only Trust

- Pros:
  - Principal would be protected from creditors
  - Immediately upon transfer, assets would not count as a resource, **including business assets**!
    - Many business membership interests, such as LLCs, can be assigned to an Irrevocable Trust
    - Interests that cannot be transferred to an Irrevocable Trust can be sold to partners/other interested parties and the proceeds can go into an Irrevocable Trust
  - Trust Income still available to support H & W
  - Trust assets remaining at death can pass automatically to named beneficiaries AND receive step up in basis to date of death value

Irrevocable Income-Only Trust

- Cons:
  - Initial burden of transferring assets into trust
  - If either spouse needs Institutional Medicaid within the next <u>five</u> years, the trust would need to be unraveled and then an emergency Medicaid plan would need to be developed.

What Is A Trust?

- A separate legal entity
  - Can be assigned a tax ID number, but not always
  - Obligated to file a tax return if all income not distributed
- Corpus: trust assets, ***which can sometimes include certain business interests.***
- Trustee: the fiduciary and manager of all trust assets
- Creator: trustor, grantor or donor
- Beneficiaries/Remaindermen: designated recipients of income and principal

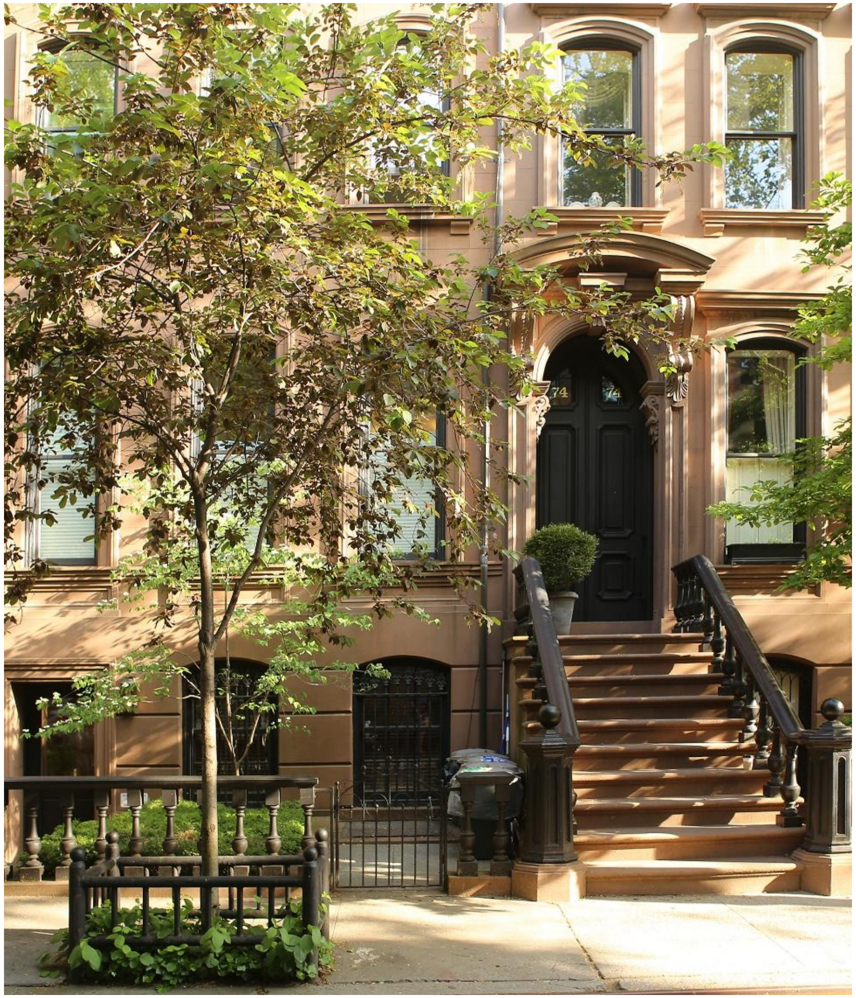
Why Use a Grantor Trust

- Medicaid Planning
- Protect a spendthrift beneficiary
- Beneficial tax treatment
  - Preserve Enhanced Star and VA real estate tax rates
  - Step up in basis upon death reduces capital gains tax on sale
- Allocate income and principal to different classes of beneficiaries
- Avoid Probate
- Protect minor or disabled beneficiaries

Rental Property Example

- Transfer Outright to Children
    - Vulnerable to children's creditors
    - No longer entitled to the income from the property
    - Income is taxable to the new owners (children)
    - Children inherit cost basis of parents: price of initial purchase plus cost of any improvements

- Transfer to LLC
    - If the members of the LLC are the parents, the LLC could still be an available asset for Medicaid planning purposes.



Rental Property Example: Outright Gift

- Parent's Initial Purchase Price: $50,000
- Current FMV: $650,000
- Cost Basis for Children: $50,000
- Capital Gains: $600,000
- 15% Tax: $90,000

Rental Property Example: Transfer to Trust-Owned LLC

- Parent's Initial Purchase Price: $50,000

- Current FMV: $650,000

- Cost Basis for Trust Beneficiaries
  Upon Grantor's Death: $650,000

- Capital Gains: $0

- 15% Tax: $0

Rental Property Example: Transfer to Trust

- Children receive date of death valuation on property as cost basis, so only capital gains owed is on increase post date of death
- Grantor given right to collect income in trust, if so desired
  - Legally obligated to pay real estate taxes
  - Continues to qualify for any real estate tax reductions
  - No value to Grantor if right released, because property fully owned by Trust

Revocation under New York Law

- EPTL allows for revocation of an irrevocable trust with the consent of all persons with a beneficial interest: EPTL 7-1.9

- Requires trusting family relationships

Practice Tip: Explore family dynamics and make sure that you create a trust that has the ability to limited interested parties to those with legal capacity

Business Succession Planning and Buyout Agreements

- Sometimes, transferring a business interest is not an option.
- Business formation agreements, such as partnership agreements or operating agreements may restrict what a partner/member is able to do with their share of the business. The agreements may only provide for a sale of the partner's/member's interest to the other stakeholders. The proceeds of such sale may be stretched out for several years at times. This can prevent Medicaid eligibility for years.
- These agreements need to be reviewed and sometimes, amended.
- By planning in advance, these agreements can have certain provisions that are triggered when a partner/member develops a long-term care need.

What About Income?

- 2022 Income limits: $934 (single) / $1,367 (married)
- Unearned Income Disregard: $20
- **Earned Income Disregard**: $65 + ½ of the remainder.
- Example: Susan and Ted are married. Susan is working, but Ted is disabled and receiving Medicaid home care services. Susan earns $5,000 per month from her job and Ted receives $2,100 per month from Social Security. $2,467.50 of Susan's income is **disregarded** for Medicaid purposes while only $20 is disregarded of Ted's unearned income.
- If Susan needs more than the earned income disregard, she can also sign a spousal refusal, but that comes with some risk.
- Currently, if a Medicaid home care recipient has "too much" income, they can funnel the excess income through a **Pooled Income Trust. This allows the Medicaid recipient to pay for expenses that Medicaid does not cover (i.e. rent, property taxes, utilities, food, etc.).**

Pooled Supplemental Needs Trusts

- Pros:
  - Transfer income overage into a Pooled SNT (i.e.,LIFE, Inc., CDR, and NYSARC)
  - Help make eligible for Medicaid without having to contribute income overage toward medical costs
  - Income can be used to help with items not covered by Medicaid, including expenses of the business if the Trust agreement makes the Medicaid recipient responsible for business expenses.

Pooled Supplemental Needs Trusts

- Cons:
  - Administrative Burden
  - Costs to administer
  - Money left in trust at death goes to pooled trust administration rather than to heirs

EMERGENCY MEDICAID PLANNING

- It's never too late to protect assets from the cost of a nursing home

Increase Value of Exempt Assets

- Purchase pre-need funeral contract
- Purchase a new car for a well spouse
- Make home improvements if equity under $955,000
- Place all Qualified Retirement Assets in pay-out status

Spousal Refusal

- Pros:
  - Applicant can transfer all assets to spouse and qualify for Medicaid
  - Spouse will not have to relinquish rights to any assets
  - Even if has to repay, the amount to be repaid is the lower rate paid by Medicaid, instead of the higher private paid rate for nursing home care

Spousal Refusal

- Cons:
  - Spouse may be sued in Family Court by NY State
    - With budget constraints, this is happening more frequently
  - Could jeopardize spouse's eligibility for future Medicaid benefits

Alternative to Spousal Refusal

- Applicant spouse transfers all assets to well spouse
- Well spouse <u>loans all</u> assets to trusted person, and applicant spouse qualifies for Medicaid
- When the loan is repaid, well spouse makes transfers
- On recertification, Medicaid only asks for resources of the applicant spouse, not the well spouse

Additional Emergency Medicaid Planning Strategies

- Gift/Loan Strategy for a single applicant:
  - Gift 50% of assets
  - Loan 50% to responsible person
  - Person then qualifies financially for Medicaid because loan is an <u>income</u> stream not an asset
  - Penalty period begins to run on 50% gifted when receiving institutional care and Medicaid application submitted
  - Loan income covers cost of care during penalty period

Gift/Loan Example

$500,000

- $250,000 Gift
  - 25 month penalty period

- $250,000 Loan
  - Pays for care during penalty period
    - Note: actual cost of care can exceed the loan amount
    - Precise calculations of income, assets and prior gifts to minimize penalty period and overage performed

Gift/Loan

- Cons:
  - Lose 50% of assets to health care costs
  - Risk loan not being repaid

Additional Emergency Medicaid Planning Strategies Continued

- Personal Care Contracts:
    - Transfer assets to caregiver in exchange for performance of services
    - Contemporaneous log of service required

- Cons:
    - Potential Income Tax owed by caregiver

NY Medicaid Home Care Planning Summary

- Take Advantage of Some Exempt Asset and Transfer Rules
- Create Irrevocable Income-Only Trust
- Use Pooled Supplemental Needs Trusts for Excess Income

NY Medicaid Institutional Planning Summary

- Emergency Medicaid Planning
  - Increase Value of Exempt Assets
  - Review Spousal Refusal Option
  - Personal Care Contract
  - Gift/Loan Strategy

Thank you

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