

ELDER LAW 101

SENIOR LAW DAY 2025

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What is Elder Law ?

Elder Law is mostly about planning:

1. Your Estate Plan – your Will, your Trust, and other strategies
2. Evaluating your financial risks, and creating a plan to protect your money and property
3. Planning for long-term care (your biggest financial risk)
4. Medicaid planning and applying for benefits
5. Planning for family members who are disabled
6. Advance Directives - Power of Attorney and Health Care Proxy

The Goal of Estate Planning

- To transfer your money and property upon your death to your beneficiaries in the most efficient and tax-effective manner.
- Wills and Trusts don't guarantee that you will have an estate. You also need a plan to protect your assets during your lifetime.





The Goals of Long-Term Care Planning

- To assure that you have access to the care that you need, if and when you need it.
- To protect your assets and income against the ruinous costs of long-term care.
- To assure that you will have an estate.

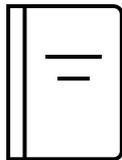
Trusts & Wills: The Differences

Last Will and Testament

Only the assets that are in your individual name when you die are subject to your Will

Your Will cannot be enforced without a probate proceeding in Court

A Will cannot help facilitate Medicaid eligibility, or protect assets

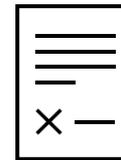


Trust

A Trust controls the assets/income that it owns during lifetime and after death

Trusts are private, managed by a Trustee without Court intervention

An Irrevocable Trust can help facilitate Medicaid eligibility and protect your assets.





Probate

The Will itself does not empower anyone to act

Probate is required – it can take months or even years!

Distributees (next of kin) receive notice, and opportunity to object / contest

Is the Will the “Last” one?

Did the decedent have testamentary capacity, and was the Will properly executed?

Was the Will subject to undue influence or fraud?

Trust Basics

A trust is a legally-created entity or person, like a corporation or LLC, except that trusts do not have owners. No court proceeding is needed to distribute assets from a trust.



A trust is created by an agreement between the person who is funding it (the “Grantor” or “Settlor”), and the person who will manage it (the “Trustee”).



A trust can own any kind of asset: real estate, co-op shares, cash or securities, tangible personal property. The trust governs the assets that it owns.



Different kinds of trusts are used, depending on the goals of the Grantor.

Kinds of Trusts

Revocable Trusts (a/k/a “Living” Trusts)

Irrevocable Trusts

Supplemental Needs Trusts

Revocable (“Living”) Trust

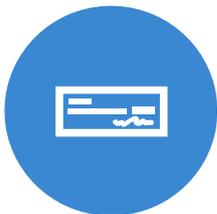
Avoids Probate, but does not protect assets or facilitate eligibility for government benefits



Creating a revocable trust, also called a “living trust,” is a strategy that is frequently used for estate planning.



It is often appealing because during the Grantor’s lifetime, he or she can be the Trustee, and retain full control over the assets in the trust.



Once the Grantor passes away, any assets that remain in the revocable trust are distributed under the terms of the trust and are not subject to probate or administration in court.



A revocable trust can be revoked or amended at the option of the Grantor – in other words, the Grantor still has control over the assets and income and has the ability to withdraw any or all of the assets or income at any time.

IRREVOCABLE TRUST,

a/k/a “Asset Protection Trust” or
“Medicaid Asset Protection Trust” (MAPT)



Unlike the Revocable Trust, you cannot control the Irrevocable Trust, and you must appoint an independent Trustee (who can be a family member or friend).

An Irrevocable Trust is legally a separate “person.” The assets in the trust don’t belong to you, and therefore cannot be counted by Medicaid or reached by creditors.

Why would you want an Irrevocable Asset Protection Trust ?

Your assets are protected during your lifetime

You can access Medicaid benefits

No probate proceeding, no court involvement

Your assets are distributed according to your wishes, privately and without delay or expense

Your beneficiaries avoid capital gains tax on unrealized gains that accrued during your lifetime



Irrevocable Trust – Grantor's Rights

Many people who consider an Irrevocable Trust are concerned about giving up control, as they must name an independent Trustee, and they cannot withdraw or control the assets in the Trust.

However, The Grantor can retain a number of important rights without compromising asset protection or access to government benefits such as Medicaid:

- The right to receive all of the net income of the Trust
- The right to use and occupancy of a residence owned by the Trust
- The right to change the beneficiaries of the Trust by a subsequent Will
- The right to exchange property of equal value for assets owned by the Trust
- Discretion can be given to the Trustee to distribute principal (to persons other than the Grantor) that can be used by the recipient to benefit the Grantor

Why should I have a plan for long-term care, and why should it be integrated with my estate plan?

Because:

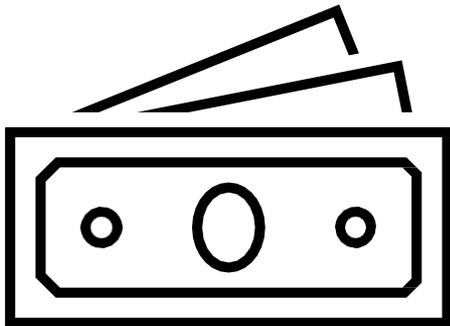
The risk of needing long-term is very high for everyone:

- 7 of 10 people will need long-term care of some kind at some point in their lives.
- 4 of 10 people will need nursing home care.

The cost of long-term care is ruinous. It could easily deplete your entire life savings.



Who pays for long-term care?



Private Pay (you / your children)

Long-Term Care Insurance

Medicaid

NOT Medicare

New York's Medicaid Program

- Medicaid is a federal / state partnership, administered by the states under state law.
- New York's program is the best in the U.S., by far.
- Medicaid covers home care, adult day care, assisted living care, nursing home care, medical care, plus many special programs.
- There is no such thing as a "Medicaid facility" – virtually all providers are privately owned, and they are required to provide the same care to all.

New York has two big categories of Medicaid Benefits

COMMUNITY MEDICAID

- Home Care (including CDPAP)
- Adult Day Care
- Assisted Living (ALP)
- Programs for special needs, e.g., Traumatic Brain Injury
- Nursing Home Transition Diversion Program (NHTD)
- PT and OT, Hospital and Medical Care, Prescription Drugs

INSTITUTIONAL MEDICAID (NURSING HOME)

- Care in a Nursing home
- PT and OT
- Hospital and Medical Care
- Prescription Drugs

Community Medicaid Eligibility (Home Care and Other Programs)



Medicaid Eligibility is based on **resources**. (\$32,396)



Income is NOT a factor of eligibility but is limited once receiving Medicaid to \$1,800 per month. If greater:

- (a) contribute balance to cost of care, or
- (b) deposit balance in a **Pooled Income Trust**



There is no “look back” for Community Medicaid Services. A 2 ½ year look back was passed into law in 2020, but it has not yet been implemented. Implementation is possible “some time in 2025.”

Is my home exempt?



If you are applying for Community Medicaid benefits, and your home is your primary residence, and your home equity is no more than \$1,097,000, the home would be temporarily exempt. However, the exemption is lost when the home is no longer your primary residence.

If you are applying for Nursing Home Medicaid, the home is no longer your primary residence and it is not exempt. It is a Medicaid resource and will be a significant obstacle to your eligibility.

Nursing Home Medicaid Eligibility



Medicaid Eligibility is based on **resources**. (\$32,396)



Income is NOT a factor of eligibility, but all income except \$50 is must be paid to the nursing home (this is called the “NAMI,” or Net Available Monthly Income).

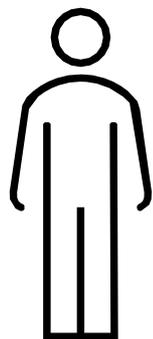
However, the “Community Spouse” is entitled to a share of the institutionalized spouse’s income if the Community Spouse’s monthly income is less than \$3,948 (the “MMMNA”).



If you are in the nursing home, and “otherwise eligible” for Medicaid, but made non-exempt gifts or transfers of money or property during the 5 years preceding the date of your application, you will be ineligible for Medicaid benefits for a period of time determined by the amount gifted or transferred. This is called the “penalty period.”

Asset transfers are permitted under New York law – they are not illegal or unethical.

If Assets Must Be Transferred to Achieve Medicaid Eligibility --



Should assets be transferred:

→ To an individual?

or

→ To a trust?



Transfers to Family Members or friends The Risks

Bankruptcy, lawsuits, debts

Divorce

If they predecease you, the assets are in their estate

Misuse of funds

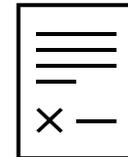
No “step up” in tax basis / capital gains tax

TRANSFERS TO AN IRREVOCABLE TRUST -- A SUCCESSFUL INTEGRATED PLAN

- ✓ The risks of transferring to individuals are avoided
- ✓ Your assets are protected during your lifetime
- ✓ You can obtain Medicaid and other benefits
- ✓ No probate proceeding, no court involvement
- ✓ Your assets are distributed according to your wishes, privately and without delay or expense
- ✓ Your beneficiaries avoid capital gains tax on the appreciation of your assets that accrued during your lifetime.



NY Statutory Power of Attorney



A Power of Attorney can be broad in scope or narrowly tailored, so that it reflects the powers you wish to give to your agent.

In Elder Law practice, it is usually appropriate to add powers in the “Modifications” section of the Power of Attorney to ensure that your agent(s) will be able to act on your behalf as needed.

Examples of actions that require a POA

when a person needs services, lacks capacity,
and cannot afford the cost of care

- Create or amend a trust and fund it.
- Transfer ownership of financial assets.
- Transfer a home (sign a deed or arrange for transfer of co-op shares).
- Obtain the documents needed for a Medicaid application and sign it on behalf of the principal.
- Hire and pay aides
- Access bank statements and bank accounts
- Sign to admit a person to an Assisted Living residence or a Nursing Home
(The Agent should always sign “As Agent,” not on their own behalf.)

When the principal needs, or might need, long-term care, the Agent typically requires a broad scope of authority in order to protect the interests of the principal.

Health Care Proxy



<https://www.health.ny.gov/publications/1430.pdf>

A legal document that authorizes someone you appoint (your “agent”) to make decisions regarding your health and medical needs, but only if you lack the capacity to express your own decisions.

In New York, you may appoint only one agent to act. It is prudent to appoint an alternate agent to act should your primary agent become unavailable.

It is critical for your health care agent to understand your wishes concerning your medical and health care, as it is your agent’s duty to express those wishes for you when you cannot do so.

Upon your loss of capacity or inability to act, this document allows your agent to make medical decisions you would have made if you had capacity.

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