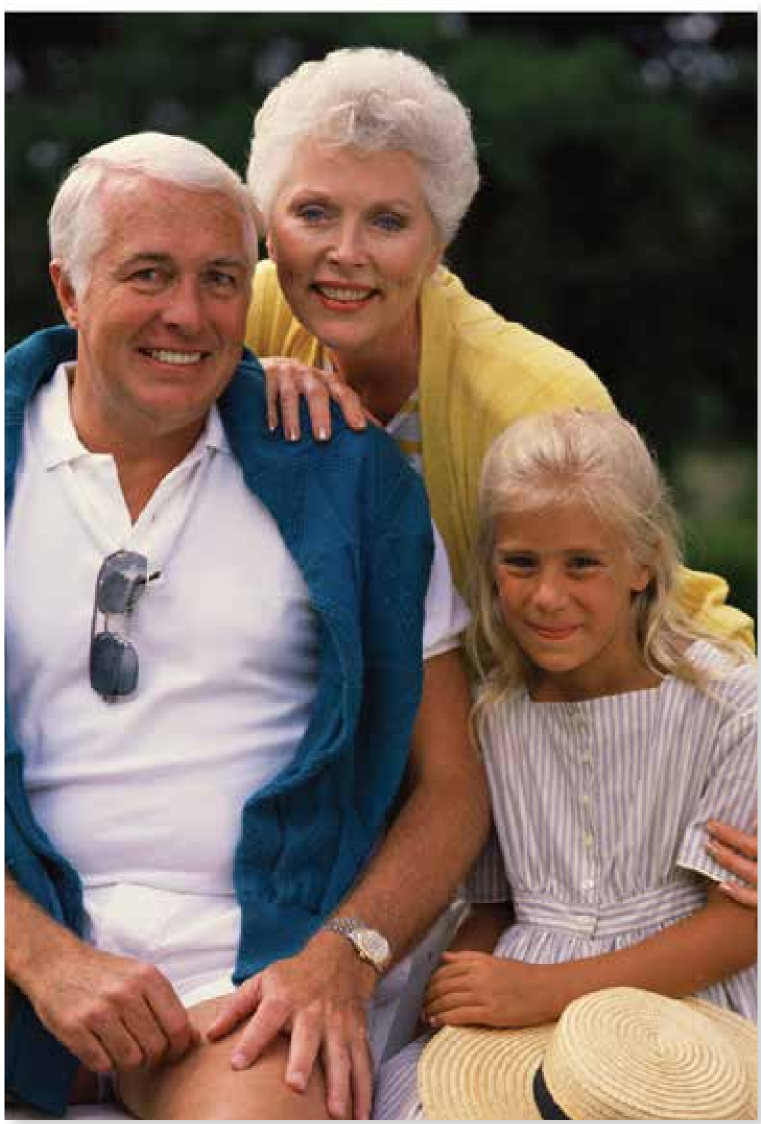
Your Guide to Elder Law and Estate Planning



Genser Dubow Genser & Cona LLP

Elder Law Counselors

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The Practice of Elder Law ♦ The Gift of Compassion

Your Guide to Elder Law and Estate Planning

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The information in this Guidebook is accurate as of the date of publication (January 2014) but is subject to changes in the law. Please consult an elder law attorney before taking any legal action.

If you have questions of a legal nature or would like legal advice, please call us at 631.390.5000. We are always available to help you.

Attorney Advertising

Contributors

Genser Dubow Genser & Cona LLP gratefully acknowledges the contributions, hard work and thoughtfulness of the following staff who contributed to the Guidebook:

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Introduction

Welcome to Genser Dubow Genser & Cona LLP!

Elder Law and Estate Planning are complex areas of the law. The federal and state laws regarding asset protection and tax planning are constantly changing. This makes for a dynamic and interesting law practice, but an overwhelming topic for our clients.

We have created this Guidebook to help our clients and their families wade through some of the confusion and to clarify various issues and planning options. The information is relatively easy to understand and free of all "legalese." We have selected the topics based on the most commonly asked questions and issues raised by our clients.

This Guidebook is an excellent educational tool but, by no means does it replace the valuable case-specific legal advice you will receive from your elder law attorney. Genser Dubow Genser & Cona LLP is always available to meet with you and your family to discuss your needs.

We hope you find the Guidebook informative and useful!

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Firm Profile

Genser Dubow Genser & Cona LLP (GDGC), a leading Elder Law and Estate Planning law firm established in 1968, offers unsurpassed expertise in estate and asset protection planning. The firm is recognized for its creative advocacy and unparalleled service in the areas of:

- Asset protection planning
- Medicaid planning
- Estate and tax planning
- Wealth transfer strategies
- Estate and trust administration
- Special needs planning
- Guardianships
- Estate litigation

Dedication, sensitivity and commitment to personalized service define GDGC, as does our reputation for maintaining the highest levels of advocacy, professional ethics and standards.

GDGC works closely with clients and their families to explain the health care, financial, tax and asset protection planning options available so clients can make the best decisions. Our attorneys keep up-to-date with the rapidly changing federal and state laws in order to keep clients informed and to be zealous advocates with cutting-edge planning techniques. GDGC implements effective strategies to protect clients' interests, stressing the importance of advance planning to preserve financial security. Committed to excellence, the firm develops a keen understanding of an individual's needs, providing personalized service carefully tailored to each client.

Firm Profile
(continued)

Genser Dubow Genser & Cona LLP has been featured in many publications, including the New York Times, the Wall Street Journal, Kiplinger's, CPA Wealth Provider, Newsday, the New York Law Journal, Long Island Business News, Reader's Digest and many others. Our attorneys contribute regularly to Newsday's Act II "Ask the Expert" column and have appeared as guests on WNBC-TV, CNNFN, News 12 Long Island, News 55, Channel 21, "Act II with Newsday", WBLI Radio, WBAB, WOR-"The Dolans" and WFAN. Acting as educators and advisors, the firm's attorneys frequently lecture at professional organizations, colleges and universities, assisted living facilities and senior citizen groups.

Please visit us at www.genserlaw.com.

GDGC Partners

Jennifer B. Cona is the managing partner of GDGC. Ms. Cona practices exclusively in the field of Elder Law. Ms. Cona's work involves asset protection planning and preservation of assets for both estate planning and government benefits eligibility.

Jack H. Genser is a partner at GDGC. Mr. Genser oversees the firm's litigation department, which includes health care facility representation, estate litigation and elder law litigation and appeals.

Melissa Negrin-Wiener is a partner at GDGC where she leads the firm's government entitlement benefits department. Ms. Negrin-Wiener advises clients regarding asset protection and supervises the preparation of applications for Medicaid nursing home benefits and home care benefits.

Ken Kern is a partner at GDGC. Mr. Kern leads the firm's health care reimbursement and recovery department, concentrating his practice in civil litigation, complex Medicaid eligibility matters, including Fair Hearings and Article 78 proceedings, guardianships and resolution of all issues related to resident financial accounts.

Top Ten Myths of Elder Law & Estate Planning

1. A revocable trust avoids estate taxes.
2. A joint account is not a countable asset for Medicaid purposes.
3. A power of attorney can make health care decisions.
4. An IRS tax-free gift does not count as a gift for Medicaid purposes.
5. A Will governs all assets, even accounts with joint titleholders or beneficiaries.
6. You can't own a home and be eligible for Medicaid benefits.
7. Life insurance is not part of your taxable estate.
8. An IRA is a countable resource for Medicaid purposes.
9. A young person does not need Advance Directives.
10. A disabled person cannot inherit money without losing government benefits.

Find out why all of the above are incorrect and get all the right answers inside this Guidebook.

Medicaid Planning

Many people believe their long-term health care costs will be paid for by Medicare. Others believe their private health insurance will cover such costs. Generally, neither is the case. Neither Medicare nor private health insurance benefits cover long-term health care needs.

So how does the average senior meet the looming costs of long-term health care without exhausting all assets? Many families engage in Medicaid planning for the purpose of qualifying an individual for Medicaid benefits.

Medicaid is a joint state and federal program that covers long-term health care needs for the elderly and disabled. Medicaid is a government entitlement program and, as such, an individual must qualify both medically and financially for benefits. In order to qualify financially for Medicaid benefits, an individual may transfer assets in order to reduce his or her accounts to the level permitted by Medicaid.

Many people have the misconception that they must wait five (5) years before they are eligible for Medicaid benefits. This is simply not the case. Medicaid has the right to know your financial history for the past five years, which is known as the look-back period. But a senior may be eligible immediately for Medicaid benefits or may have to wait for a specific period of time — anywhere from one month to five years — depending on the family situation and the amount of assets transferred.

There are different rules for transferring assets based upon family composition and the type of care required. Spouses have special rules that allow for exempt transfers of assets. There are also more lenient rules when applying for Medicaid home care benefits, as opposed to nursing home benefits. Special rules govern the protection of the family home as well. Your situation must be fully explored with your Elder Law Attorney.

The Nursing Home Admission Process: What to Expect

The nursing home admission process can be overwhelming, especially when juggling the emotional impact of placing a loved one in a nursing home. Knowing what to expect can help alleviate some of the stress.

When a hospital is ready to discharge a patient who needs rehabilitation or residential health care services, a nurse will complete a Patient Review Instrument (PRI). This assessment is required for admission to any nursing home in New York State. Family members and loved ones will be asked to identify six skilled nursing facilities of their choosing for their loved one's admission. The PRI will be sent to the selected facilities which will determine if the individual is suitable for admission to his/her facility.

When an individual has a three-day hospital stay immediately prior to being transferred to a skilled nursing facility or rehabilitation center, s/he will be entitled to a maximum of 100 days of Medicare coverage if all eligibility criteria are met and so long as the individual is making progress and/or maintaining his/her skill level due to the therapy or rehabilitation services provided. The first 20 days in the facility will be paid for in full by Medicare and days 21-100 will be subject to a co-pay, which can be covered by supplemental Medicare insurance (i.e. Medigap coverage) or other private health insurance.

If the individual is no longer progressing and/or maintaining their skill level with therapy or rehabilitation, their Medicare coverage will end and another payment source will be required.

The Nursing Home Admission Process: What to Expect

(continued)

The cost of nursing home care is extremely high, averaging tens of thousands of dollars per month. As noted on the previous page, Medicare covers a *maximum* of 100 days of nursing home care and regular health insurance plans do not cover long-term health care needs such as care in a nursing home. Accordingly, there are only three ways to pay for nursing home care: payment from your own assets and savings, long-term care insurance or Medicaid.

When you are admitted to a nursing home, you will be asked to sign an Admission Agreement. If you cannot do so, an agent under a Power of Attorney or other designated representative can sign the agreement for you. If you have assets, you will be asked to pay a security deposit. For those applying for Medicaid benefits, your monthly income (Social Security benefits, pension, etc.) must be paid to the nursing home each month (which is called Net Available Monthly Income or "NAMI").

It is important to plan ahead and prepare for the costs of such care. Your Elder Law attorney can review your asset protection options but keep in mind that the earlier you plan, the more assets you can save.

Medicaid Nursing Home Benefits

Many people believe that they are not eligible for Medicaid benefits because they did not give away their assets five years ago. This is a common misconception of the law.

The Medicaid laws impose a penalty period upon individuals who have transferred assets to someone (other than a spouse or other exempt person) within five years of the date of application for Medicaid nursing home benefits. This penalty period is a period of time during which that individual is not eligible for Medicaid benefits. The penalty period is based upon the value of the assets given away divided by the average cost of nursing home care in the county where the nursing home is located. The penalty period can be anywhere from one month to five years. If an application is prematurely submitted, the penalty period can be even greater than five years.

Experienced elder law attorneys use a specific formula to calculate penalty periods. The calculation determines how much money an individual can give to his or her family members and how much must be spent down on the cost of care during the period of ineligibility.

With early planning, a family can preserve more assets and will have many planning options available. However, even with "crisis planning," there still may be opportunities available to preserve assets.

Medicaid Nursing Home Benefits
(continued)

The applicant may also take steps to protect the family home from a Medicaid lien in the future. There are several options available for protecting the home, including transferring the home with a life estate or transferring the home to a trust.

There are different rules for transferring assets based upon family composition and the type of care required. Spouses have special rules that allow for exempt transfers of assets. In addition, the laws governing Medicaid Home Care benefits are different from the laws governing Medicaid nursing home benefits.

You should always consult with an elder law attorney before engaging in any Medicaid planning.

Medicaid Home Care Benefits

Everyone is familiar with the five-year look-back period when applying for Medicaid benefits. Most people believe they are not eligible for Medicaid benefits because they did not give away their assets five years ago.

True or False: You can give away all your assets today and be eligible next month for Medicaid Home Care benefits.

The answer is TRUE.

This is one of the significant differences between the laws governing Medicaid Home Care benefits and the laws governing Medicaid institutional (nursing home) benefits.

Believe it or not, you can divest yourself of all assets and be eligible the following month for Medicaid Home Care benefits.

As with all applications for Medicaid benefits, you must be both medically and financially eligible. Financially, your assets may not exceed the current year's resource allowance. You may also own your home and remain eligible for Home Care benefits. With proper planning, you can protect your home from any future Medicaid liens.

Medicaid Home Care Benefits
(continued)

You may also keep your monthly income up to a maximum income allowance prescribed by the state. If you have income in excess of the allowable amount, you must spend down your excess income on the cost of your care. Your excess income will be used to pay for your care first. Once that money has been expended each month, Medicaid will pay for all of your care needs, including prescription drugs, medical equipment and home health aide costs, for the rest of the month. Alternatively, you may place your excess income into a Pooled Trust (see Pooled Income-Only Trusts section in this Guidebook).

These rules apply only to applications for Medicaid Home Care benefits. If you require nursing home benefits in the future, you may be ineligible for a certain period of time. However, with proper planning, you may reduce or eliminate any period of ineligibility.

As you can see, the laws are quite complex. You should always consult with an Elder Law attorney before engaging in any Medicaid planning.

Married Couples and Medicaid

Married couples are afforded great leniency under New York's Medicaid laws. A couple can transfer any amount of money or property from one spouse to the other without incurring a Medicaid penalty. For example, if a husband falls ill, the couple can transfer all assets to the wife's name and the husband will be eligible for Medicaid benefits immediately. There is no penalty or waiting period. This applies for both Medicaid nursing home benefits and home care benefits.

Under New York's Medicaid laws, spouses are protected by a special exemption that allows them to transfer money from one spouse to the other without incurring any penalty or waiting period whatsoever. Many people confuse the Medicaid look-back period with the Medicaid penalty period. The look-back means that an individual or married couple must provide documentation to the Medicaid agency regarding their finances for the past five years. While a married couple must provide this information to the Medicaid agency in order to be eligible for benefits, there will be no "penalty period" or period of ineligibility for the spousal applicant.

Married Couples and Medicaid
(continued)

The spouse who is not the applicant for Medicaid benefits (the "community spouse") is entitled to keep an income allowance each month. If the husband is the applicant and the wife's income is less than the allowance, when her husband enters the nursing home, she is entitled to keep a portion of her husband's monthly income to bring her up to a total permitted monthly income allowance. Further, she is entitled to keep assets up to a resource limit prescribed by the state. If, after transferring all of the married couple's assets to her name, the wife in our example has more than the permissible amount in assets, she can sign a "spousal refusal." This is simply a statement by the community spouse that he or she is not making assets available for the other spouse's care. Based upon that statement, the wife in our example can keep more than the resource allowance and her husband will still receive Medicaid benefits. The catch is that the Medicaid agency then has the right to initiate a lawsuit against the wife for monies expended on her husband's behalf (see Spousal Refusal section in this Guidebook).

These laws apply to married couples only. You should always consult with an elder law attorney before engaging in any Medicaid planning.

Spousal Refusal

Under New York law, spouses have a legal duty to support each other. Until the Medicare Catastrophic Coverage Act of 1988 ("MCCA") was adopted, many well (i.e., healthy) "community" spouses became impoverished as a result of the astronomical costs of long-term care for their ill spouse. The MCCA legislated that the ill spouse can freely transfer his or her assets to the community spouse and be eligible for Medicaid benefits immediately. If after making those transfers, the community spouse has assets above the resource allowance prescribed by the state, the community spouse can sign "spousal refusal" whereby the well spouse refuses financial responsibility for the other, leaving Medicaid to pay for the care. In this way, community spouses need not become penniless paying for an ailing partner's care and do not have to divorce their spouse to avoid impoverishment.

To secure Medicaid eligibility, married couples transfer assets from the Medicaid applicant spouse to the community spouse. There are no restrictions or penalty periods imposed on transfers of assets between spouses. For example, a Medicaid applicant with $150,000 in assets may transfer the whole amount to his spouse on Day 1 and be eligible for Medicaid benefits on Day 2.

Spousal Refusal
(continued)

The catch is that the local Departments of Social Services retain the right to sue the community spouse for the cost of the care paid for by Medicaid. Because local departments have different approaches to spouses who execute a spousal refusal, varying from aggressive pursuit of recovery of benefits including commencement of legal action to sporadic or non-existent recovery efforts, you must consult with an elder law attorney regarding your options and risks. When faced with the prospect of impoverishment and essential long-term care, many community spouses choose spousal refusal with the understanding that, at some point, the local department may seek reimbursement for monies expended under the Medicaid program on behalf of their spouse. Because Medicaid is only permitted to seek reimbursement at the Medicaid rate (versus the private pay rate), it is less expensive for your spouse to continue to receive long-term health care via Medicaid rather than for you to pay out of pocket for such care, even if such a lawsuit is pursued.

There are several tools available for dealing with spousal refusal lawsuits, which may enable the well spouse to negotiate the Medicaid lien. It is important to seek representation by an elder law firm that handles litigation and specifically spousal refusal litigation if recovery is sought.

Medicaid Exempt Transfers

Many people believe that when you engage in Medicaid planning, you must transfer all of your assets and wait five years to be eligible for Medicaid benefits. Oftentimes, this is not the case. There are some transfers that are exempt and therefore do not create any type of penalty period whatsoever.

Spousal Transfers

All transfers between spouses are exempt. This means that if one spouse becomes ill, he or she can transfer all assets to the well spouse and be eligible for Medicaid benefits immediately. This includes the ill spouse's interest in the family home.

Disabled Child Transfers

All transfers to a disabled child are exempt. If you have a child who is disabled, you may transfer assets and/or real property to that child without incurring a Medicaid penalty period. The assets may be transferred to the disabled child outright or into a supplemental needs trust. A trust is usually the preferred method as you must be careful not to disrupt the disabled child's benefits if he/she is on Medicaid.

Exempt Homestead Transfers

There are also special rules for transferring the homestead. An exempt transfer of the homestead can be made to certain qualified individuals, such as:

- Spouse
- Minor Child
- Disabled or blind child (of any age)
- Caretaker child — defined as a child who has resided with his/her parent in the homestead for at least two years prior to the parent's admission to a nursing home
- Sibling of the Medicaid applicant who has resided in the home for at least one year prior to institutionalization and who has an equity interest in the home.

Deficit Reduction Act of 2005: Impact on Medicaid Benefits

On February 8, 2006, the federal government passed the Deficit Reduction Act of 2005 ("DRA") which severely restricted Medicaid eligibility for the elderly and disabled by drastically changing the Medicaid asset transfer laws. Aimed at reducing Medicaid fraud, the law severely impacts the most vulnerable of our population.

There are four major changes wrought by the DRA: 1) increased look-back period; 2) new commencement date for penalty periods; 3) changes to the homestead exemption; 4) changes to the treatment of annuities.

The Look-Back Period

The DRA increased the look-back period from three years to five years. This means that all applications for Medicaid benefits must provide a full financial history of all accounts open during that five-year period, including an explanation of all transactions over a prescribed dollar amount.

The increased look-back period means that individuals and families must plan five years before a health care crisis. Short of a crystal ball, no one knows when he or she may suffer such a debilitating illness that long-term care is needed. Early planning, while individuals are relatively young and healthy, is now even more imperative. The trick, of course, is balancing the desire to protect and preserve assets versus giving up control of those assets.

Deficit Reduction Act of 2005: Impact on Medicaid Benefits

(continued)

It is important to note that the look-back period is the same, whether assets are transferred into a trust or are transferred outright to family members. In the past, families sometimes steered clear of transferring assets into an irrevocable trust if the value of said assets would ultimately increase the penalty period from three years to five. Now, the look-back period is the same five years across the board, thus making trusts far more attractive for asset protection and tax planning purposes with little or no downside.

The Penalty Period

The DRA postpones the commencement date for a penalty period based on gifts and asset transfers. Under this law, the penalty period will not commence until the applicant is both residing in the nursing home and below the resource limit.

An example will help illustrate how the penalty period is calculated. Mrs. Smith has liquid assets totaling $160,000. (She does not own any real property.) Mrs. Smith's children want to purchase a home and need help with the down payment. So Mrs. Smith gives $100,000 to her children on June 15, 2012 for the down payment. Mrs. Smith maintains the balance of $60,000 in her bank account. All is well until one year later, in June 2013, when Mrs. Smith suffers a stroke and goes into a nursing home. For purposes of our example, assume the "regional rate" (the average cost of nursing home care) is $10,000 per month.

Mrs. Smith spends down her remaining $60,000 on the costs of her care, which covers her for approximately six (6) months, that is from June 2013 through November 2013. As such, Mrs. Smith's penalty period on the $100,000 gift made in June 2012 does not begin until December 1, 2013 because that is when she is both under the resource limit and in the nursing home receiving care and services. Accordingly, the penalty period now runs from December 2013 through September 2014 — ten months based on the gift of $100,000 made in June 2012. The problem is, however, that Mrs. Smith does not have funds with which to private-pay during this 10-month period of time and she is not eligible for Medicaid benefits. She simply has no source of payment.

Many individuals entering nursing homes will have neither private-pay funds nor eligibility for Medicaid benefits. A senior who has transferred assets to children, made charitable gifts, etc. may not have access to those previously gifted funds and will be ineligible for Medicaid benefits for a period of months or years (depending on the value of the assets transferred) beginning sometime on or after the date of admission to the facility.

The Valuable House Rule

The DRA as implemented in New York provides that, if a person has equity in a home exceeding $750,000 (adjusted annually for inflation), they will be automatically ineligible for Medicaid benefits. The DRA left intact the categories of persons to whom the house can be transferred without penalty or who, if living in the house, could make the real property an exempt asset, such as a spouse, caretaker child, minor child, or a blind or disabled child (see the Medicaid Exempt Transfers section of this Guidebook).

This provision of the DRA seeks to force seniors and the disabled to either sell their homes or tap into the equity in their homes to pay for the cost of their care. The DRA specifically notes that seniors may take home equity lines of credit or take out reverse mortgages to reduce their equity.

This change in the law makes it even more important than ever for seniors and their families to engage in planning to protect the home. Transfer of title to the home should be considered, in some cases to a trust and in some cases with a retained life estate. As each situation is different, a comprehensive review of all Elder Law issues must be undertaken in order to determine the best way to transfer title to the family home.

Deficit Reduction Act of 2005: Impact on Medicaid Benefits
(continued)

Treatment of Annuities

The DRA changed the rules regarding the treatment of annuities such that the purchase of an annuity after February 8, 2006 will be treated as a gift and thus subject to a penalty period unless the state is named the remainder beneficiary of the annuity. If the annuitant has a spouse, minor or disabled child, the state may be named the beneficiary after such person. In the event a Medicaid applicant or the applicant's spouse fails or refuses to name the state as the remainder beneficiary, the purchase of the annuity will make that applicant ineligible for Medicaid benefits for a period of time. Further, as was the case with annuities under the prior law, the annuity must be irrevocable and non-assignable, actuarially sound, provide for payments in equal amounts during the term of the annuity and not contain any deferral of payments or balloon payments.

The annuity rules apply to all transactions after February 8, 2006, including not just the purchase of an annuity, but also any actions that change the course of payment or change the treatment of income and principal after February 8, 2006. Annuities purchased prior to February 8, 2006 will be governed by the prior laws.

Protecting Assets in a Crisis: Promissory Note Planning

The Deficit Reduction Act of 2005 severely restricted Medicaid asset protection planning (see the Deficit Reduction Act section of this Guidebook). The law was aimed at eliminating transfer of asset strategies at the so-called "crisis" phase, that is, last-minute transfers of assets just prior to or immediately after an individual's placement in a nursing home. However, the federal law left open one planning strategy in particular — planning via a promissory note.

With the promissory note strategy, it is still possible to protect one-half of an individual's assets, even if s/he is already in a nursing home. It works as follows:

> the nursing home resident transfers all of his/her funds (less the Medicaid-permissible resource allowance) to an individual/family member. The person receiving the funds signs a note promising to pay back approximately one-half of the monies transferred (the loaned assets), plus interest, to the nursing home resident on a monthly basis. The monthly amount to be paid back to the resident is calculated using the nursing home's daily rate less the resident's monthly income. Upon payment of the monthly amount to the resident, the resident writes a check for the same amount to the nursing home. The note repayment amount, together with the resident's income, covers payment to the nursing home during the penalty period (number of months) incurred by the transfer of the other one-half of the assets (the gifted assets). The loan payments are calculated to end at the same time that the penalty period on the gifted assets ends, thereby making the nursing home resident Medicaid-eligible on that date. The family member(s) will keep one-half of the assets (the gifted assets) free and clear.

Protecting Assets in a Crisis: Promissory Note Planning
(continued)

The following example will help illustrate: Mrs. Jones has $230,000 in assets. She transfers $220,000 to her daughter, $110,000 of which is a gift and $110,000 of which is a loan. Mrs. Jones' daughter signs a promissory note for the loan of $110,000 stating that she will repay the loan at the rate of $11,000 per month. The penalty period based on the gifted assets of $110,000 will run for 10 months (calculated by dividing the amount gifted by the regional rate in the county where the nursing home is located). The $110,000 loan will be repaid to Mrs. Jones over the 10-month period at $11,000 per month, which Mrs. Jones will use to pay the nursing home during that period of time, along with her other monthly income (Social Security, pension). After 10 months, the loan will be repaid, the gifted money will be protected and Mrs. Jones will be eligible for Medicaid benefits.

Promissory note planning is a complex strategy and every detail must be carefully calculated and followed for the strategy to work. Be sure to consult with your Elder Law attorney to ensure your plan is properly implemented.

Planning in advance is always recommended, but clients can take comfort in the fact that not all will be lost if a loved one has not planned early enough.

Protecting the Family Home

For many families, the family home is the largest asset. Many people are concerned about losing their home, and rightfully so. With the rising cost of health care, how can you protect your home?

There are many ways to protect your home, each of which has Medicaid planning consequences and tax consequences.

Outright Transfer

You may give your home to another individual, such as a spouse or child, by signing a new deed in that person's name. This will ensure that Medicaid can never place a lien on your home and that the value of your home will not be countable as part of your estate assets, thereby potentially reducing estate taxes. However, you may lose your real estate tax exemptions, such as Enhanced STAR or veterans' deductions, and you have no guarantee that you can continue to reside in the house. Further, the new owner may incur significant tax disadvantages, particularly if the house is not that person's primary residence. There will also be a Medicaid penalty period based upon the transfer of the entire value of the house.

Protecting the Family Home
(continued)

The Life Estate
You may give your home to another individual and retain a life estate. The retained life estate means that you have all rights and obligations regarding the property during your lifetime. For example, you have the right to reside in the home for life. You will also be responsible for all upkeep and taxes and you will keep all real estate tax exemptions. Upon your death, the property will pass to your designated beneficiary automatically (i.e. without the probate of your will). The transfer of the home with a life estate protects the home from Medicaid, as a lien can never be asserted against the home. Further, the penalty period assessed on the transfer will be reduced for Medicaid planning purposes. The life estate has a multitude of tax ramifications that must be considered (see the life estate section of this Guidebook).

Irrevocable Trust
You may transfer your home to a trust. An irrevocable trust will protect the home from Medicaid after five years has passed. Like the life estate, you will keep your real estate tax exemptions. Your heirs will get certain tax advantages and will inherit the home without the need for probate of your will. Unlike the life estate, the house may be sold without losing any capital gains exclusions.

Each method of transfer has tax consequences and Medicaid consequences. Make sure you seek legal counsel before taking any action.

Do I Need a Trust?

As you plan for your future health care needs, what steps should you take to protect your assets? Should you set up a trust? If so, how do you know what kind of trust is right for you?

There are many different kinds of trusts, each of which serves a different purpose. Some trusts reduce or eliminate estate taxes and other trusts are designed to avoid probate, such as when property is held in another state. A specific kind of trust is used for asset protection and specialized trusts are often used to manage money for minor children or disabled individuals.

There are four basic types of trusts: testamentary trusts, living trusts, revocable trusts and irrevocable trusts. Testamentary trusts are created in a will and do not hold any property until you pass away. Living trusts are created during a person's lifetime and property is transferred into the trust right away. Revocable trusts can be changed or terminated at any time during your lifetime. Irrevocable trusts cannot be changed or terminated, except in very limited circumstances.

Do I Need a Trust?
(continued)

In order to protect assets, such as for Medicaid eligibility purposes, a living trust must be irrevocable. You cannot have access to the principal of the trust, but you can maintain the right to receive income generated by the trust assets (dividends, interest, etc.). Almost any type of asset may be held in a trust, such as:

- Cash
- Title to your home
- Bank accounts
- CDs
- Stocks
- Brokerage accounts
- Mutual funds
- Annuities

The only asset which cannot be transferred to a trust is a qualified retirement account, such as an IRA, 401(k) or 403(b).

Once five years pass, the assets held in the trust are protected with respect to Medicaid. You will not be obligated to spend those assets on the cost of your care. Instead, the assets will pass to your heirs and beneficiaries.

Planning ahead to protect your assets is always smart but the strategy will be different, depending on your age, health, family composition, and total assets. It is never too early to plan and establishing an asset protection trust can be the first step.

Retirement Assets and Medicaid

In order to become eligible for any type of Medicaid benefits, an individual must have less than the resource allowance amount set by the state. To reach this asset limit, many people transfer their assets to family members. Such transfers may be subject to a penalty or ineligibility period wherein Medicaid benefits are not available for a calculated period of time.

When dealing with retirement accounts, the task of transferring assets can become very difficult. Many times, individuals will incur large penalties for pulling the assets out early or withdrawing a large sum at one time. In addition, there may be enormous tax consequences.

Fortunately, Medicaid treats retirement assets differently from other assets. Currently, IRA accounts (and other qualified retirement funds) in pay status do not count toward an individual's resource limit and do not have to be surrendered and transferred. What is pay status? Pay status generally means that the individual is 70 1⁄2 years old and is taking the required minimum distribution (RMD) from the account. Medicaid will require that a maximum monthly distribution be taken, but as long as the Medicaid applicant is in receipt of, or has applied for, periodic payments, the principal of the retirement fund will not be counted as a resource for Medicaid eligibility purposes. Accordingly, an applicant can be eligible for Medicaid benefits even if s/he has an IRA or retirement fund of any value — as long as the applicant is receiving a monthly payment.

If you are not 70 1⁄2 and / or have not elected a periodic payment but plan to apply for Medicaid benefits, be sure to request a maximum distribution (based on Medicaid's life expectancy chart) before you file an application for Medicaid benefits. It is important to make sure that periodic payments are in place (or an application for monthly payments made) prior to the first day of the first month for which Medicaid coverage is sought.

It is important to note that the monthly payment will be counted as income and will be budgeted by Medicaid — meaning that the monthly distribution will have to be paid to the nursing home or health care provider. However, this is a small price to pay to protect such an important asset.

Preparing an Application for Medicaid Benefits

Applying for Medicaid benefits can seem like an overwhelming task. However, with some simple preparation, you and your attorney can successfully complete the application process. The following items need to be gathered for both the applicant and spouse:

- Social Security and Medicare cards
- Private health insurance card and evidence of monthly premium paid
- Original birth certificate, passport or other proof of date of birth
- Marriage certificate
- Death certificate of spouse (if applicable)
- Evidence of military service (enlistment papers, discharge papers, etc.)
- Social Security award letter and pension benefits statement for current year
- Deed to home and tax bill for current year or rent receipt, check or lease agreement
- Last five years of bank statements from all accounts in which the applicant had or has a financial interest, whether alone or joint with anyone else, even if now closed
- Last five years of federal income tax returns
- Information regarding life insurance policies, including cash surrender value

Applicants are responsible for providing an explanation for and documentation of every financial transaction of $2,000 or more. This includes copies of cancelled checks, bills, receipts and copies of deposit and withdrawal slips.

Incomplete Medicaid applications are routinely rejected. Providing your attorney with complete information will lead to a speedier and more cost-effective Medicaid application process.

Medicaid Benefits for Elderly Immigrants

Mrs. S was an elderly woman who had entered the United States from Canada in the 1930s, before the Immigration and Naturalization Service existed. She married an American citizen, worked here all her life, voted in many elections, collected Social Security benefits and simply assumed she was a citizen.

However, when Mrs. S applied for Medicaid benefits after entering a nursing home, she learned that her status in this country was questionable. Unfortunately, she was not officially a citizen or legal permanent resident and the punishment was severe. Medicaid refused her application and her nursing home care was not covered.

What can you do to guard against this bureaucratic nightmare?

Keep accurate records. If you have lost your green card or other documents that identify your immigration status, send for replacements now.

If you are not a citizen or permanent legal resident, prepare an affidavit stating the circumstances surrounding your entrance to the United States and detailing your length of stay in this country. The affidavit must be sworn to and signed in front of a notary public. Keep this affidavit with your important papers.

Medicaid Benefits for Elderly Immigrants
(continued)

Ask a friend or relative who knows the circumstances of your entrance into the U.S. to prepare a similar affidavit on your behalf and have it notarized.

Apply for legal permanent resident status while you are able. This procedure is done through the Federal Registry. You must demonstrate good moral character (ask that friend again) and prove continuous residence. You might need to provide tax returns or other materials to prove you lived in the United States. Letters addressed to you in the United States over a period of time may also suffice.

You may need to consult with an immigration attorney. None of these procedures guarantees success, but they can help you if you need Medicaid to cover the costs of your long-term care.

Medicaid Home Care: Managed Long-Term Care

Most elderly and disabled persons who require long-term care would prefer to receive such care in their own homes. Fortunately, New York State has one of the most comprehensive government-financed home care programs in the United States.

The Medicaid Home Care program is complicated and often misunderstood by consumers, social workers, health care providers, and government officials. In New York, it is possible to receive anywhere from four to twenty-four hours of Medicaid-paid home care services, provided that such care is medically necessary and the individual's health and safety can be maintained in his/her home.

Once an applicant is approved financially for Medicaid Home Care benefits (see Medicaid Home Care Benefits section in this Guidebook), s/he must select a Managed Long-Term Care Plan. Each plan has a Plan Administrator, who will send a nurse to the individual's home to perform an assessment and determine the number of hours of home care services necessary for the applicant's health and safety to be maintained in their environment.

Medicaid Home Care: Managed Long-Term Care
(continued)

The number of hours of care recommended is determined in large part by the degree to which the applicant needs hands-on assistance to perform the activities of daily living, such as dressing, bathing, grooming, toileting, transferring, feeding and turning/positioning. The assessment will also consider the span of time in which the assistance is needed as well as the availability of informal caregivers (family members and/or household members) who can provide certain services.

Managed Long-Term Care plans offer many additional services not previously available under the traditional Medicaid Home Care program. These services include case management, transportation to doctor's appointments, dentistry, audiology, podiatry, optometry, social day care, in-home physical therapy, home-delivered meals, personal emergency response systems and even medically necessary home modifications such as ramps and grab bars.

While New York State offers extensive Medicaid home care programs to its residents, it is often necessary to call upon an Elder Law attorney to advocate for a maximum amount of hours and services.

Medicaid Home Care:
Choosing and Keeping Your Home Health Aide

A home attendant who helps an elderly or disabled person fulfill his or her basic care needs on a daily basis develops an unusually close relationship with the patient and their families. Therefore, it is of critical importance that a patient is able to utilize the services of a home attendant with whom they can be compatible. New York State offers a Consumer-Directed Personal Care Assistance Program that recognizes the value of choosing or keeping your own home health aide. This unique program allows a Medicaid recipient and their families to select and supervise their own home health attendants.

Under the traditional model for the provision of Home Care services through the Medicaid program, the county assigns an agency to service the patient. Although the patient and his or her family are permitted to request the assignment of particular aides and can request a change in aides if they are dissatisfied with their performance, agencies are not obligated to honor such requests, and frequently will not do so. It can be a very frustrating experience for an elderly or disabled patient and their family to be forced into a process of either continually changing home attendants or being forced to work with a person with whom you are not compatible.

Medicaid Home Care: Choosing and Keeping Your Home Health Aide
(continued)

The Consumer-Directed Personal Care Assistance Program (known in some counties as "Concepts of Independence") provides patients and their families with complete freedom of choice as to who shall provide personal care services and what tasks they are to perform. If the patient participates in this program, he or she is free to hire, fire, and supervise a home attendant of their own choosing. The only caveat is that the aide must be able to legally work in the U.S.

However, patients who elect to be serviced by the Consumer-Directed Personal Care Assistance Program must forego certain legal entitlements. The agency cannot be held liable for any negligent acts of the home attendant, unlike the traditional model. In addition, the patient and their families have sole responsibility for locating substitute home attendants in the event an aide fails to show up or quits. Under the traditional model, the agency is responsible for finding a replacement aide and otherwise providing the patient with services that have been approved by Medicaid. You must weigh your priorities: a participant in the Consumer-Directed Personal Care Assistance Program is granted much flexibility in terms of who shall provide services, but also must accept greater supervisory responsibility.

Power of Attorney: Who Will Control My Money?

The loss of control over your finances is a scary notion. A Durable Power of Attorney is one of the best defenses, and a powerful offensive tool, to protect your assets.

A Durable Power of Attorney is a legal document wherein a trusted family member or friend may be appointed to act on your behalf should you become incapacitated. Your appointed agent will have the authority to handle banking matters, real estate transactions and other matters of a financial nature on your behalf. A validly executed Power of Attorney is an important tool which will allow you to engage in estate planning and asset protection planning, even in the event you suffer a debilitating illness.

The New York law governing Powers of Attorney was amended effective September 1, 2009. The changes to the law were largely aimed at ensuring the principal understands the powers s/he is granting to the appointed agent as well as the consequences of such authority, particularly as it relates to gift giving and asset transfers. The desire to make gifts and other asset transfers for estate and Medicaid planning purposes is often the motivating factor behind the execution of a Power of Attorney. A principal wishing to grant authority to his appointed agent to make gifts and asset transfers must sign a Statutory Gifts Rider. In addition, the appointed agent or agents must also sign the Power of Attorney instrument accepting the appointment.

Power of Attorney: Who Will Control My Money?

(continued)

A Durable General Power of Attorney becomes effective immediately upon execution. It gives your appointed agent the authority to do anything with your property that you could do, including making gifts and asset transfers if the Statutory Gifts Rider is executed.

A Power of Attorney does not take away any of your power to act on your own behalf. For example, you will continue to handle your own financial affairs and you may revoke the Power of Attorney at any time. Unless revoked, the Power of Attorney will remain in effect until your death.

The Power of Attorney you execute should be a "Durable" Power of Attorney. A Durable Power of Attorney will remain in effect in the event you become disabled or incapacitated. A validly executed Power of Attorney avoids the necessity for a guardianship proceeding and court involvement.

Living Will and Health Care Proxy: Do I Need Both?

Any person with capacity can communicate their wishes to doctors or hospital staff with regard to their medical care but what happens if you temporarily or permanently lose capacity or are unable to communicate?

A Health Care Proxy and living will permit individuals to engage in advance medical care planning and are critical in the event of temporary or permanent incapacity.

The Health Care Proxy is used to designate someone, called your Health Care Agent, to make medical decisions on your behalf and to communicate your health care wishes to the doctors. If you have capacity and can express your own health care decisions, the Health Care Agent cannot override those decisions. A Health Care Agent is allowed to make decisions when your doctor has determined that you can no longer make those decisions yourself. You should specify in the proxy whether your Health Care Agent should have the authority to make decisions on your behalf regarding artificial nutrition and hydration. You should also be sure to appoint an alternate Health Care Agent should the first agent be unavailable or unable to act. Your Health Care Proxy should contain a HIPAA release authorizing your Health Care Agent to have access to your medical records.

The Living Will is a document in which you express your wishes regarding end-of-life care. In a Living Will, you specify your wishes regarding the use of life-sustaining treatments such as artificial nutrition and hydration, pain management, administration of CPR, etc. The Living Will works together with the Health Care Proxy and the agent named must be the same in both documents. You make your own medical care decisions known in the Living Will; your Health Care Agent simply sees to it that your wishes are carried out by their authority under the Health Care Proxy.

As with all Advance Directives, you should fully discuss your wishes with your family and your doctors.

Family Health Care Decisions Act

What happens if you don't have a Health Care Proxy and you become incapacitated? Who can make health care decisions for you? Who will the doctors listen to? The Family Health Care Decisions Act (FHCDA) provides a framework for surrogate decision making for individuals who lack capacity and who have not designated an agent in a Health Care Proxy.

First, the attending physician must determine that the patient lacks decision-making capacity and, depending on whether the patient is in a hospital or a nursing home, a second independent determination of incapacity may be required. If any disagreement arises during this process, the case must be turned over to the facility's Ethics Review Committee for resolution.

Second, the FHCDA sets forth a priority order of surrogate decision makers as follows:

- A legal guardian
- A person 18 years or older designated orally by the patient if made in the presence of two adult witnesses and those witnesses affirm that the patient reasonably appeared to have decision-making capacity make such a designation. The orally designated person can be further down on the priority list, provided a higher-priority person does not object.
- A person 18 years or older designated by a person of higher priority on the list, provided no other person in a higher priority position objects
- A spouse or domestic partner
- A son or daughter over the age of 18
- A parent
- A brother or sister over the age of 18
- A close relative or close friend

Family Health Care Decisions Act
(continued)

Decisions to withhold or withdraw life-sustaining treatment on behalf of a patient can only be made by a surrogate in limited circumstances and only with the concurrence of two physicians, one of whom must be the attending physician. Further, if the patient resides in a nursing home, the Ethics Review Committee will have to review and approve the decision.

The FHCDA will fill the decision-making gap for people who become incapacitated but who have not signed a Health Care Proxy. However, it is still far preferable to have a properly executed Health Care Proxy in place so that the person you choose can make health care decisions on your behalf. Consult your Elder Law attorney to review your health care/estate plan and keep these very important decisions in your hands.

Guardianship Proceedings

If a person has certain functional limitations that affect his or her ability to tend to his or her personal needs or make prudent decisions with respect to their property management and s/he has failed to appoint a person to handle such matters on his or her behalf via a Power of Attorney or Health Care Proxy, s/he will require the appointment of a guardian. Any concerned party may petition for guardianship on behalf of such person. In a guardianship proceeding, the person who is suggested to be in need of a guardian is referred to as an Alleged Incapacitated Person ("AIP"). The Petition for guardianship is brought in the Supreme Court in the county where the AIP resides. Whether a guardianship is sought for the personal needs or property management of a person or both, the Court must determine whether or not the AIP is actually an "Incapacitated Person" or a "Person in need of a Guardian."

Once a determination is made that a person is "incapacitated," the story is not over. New York State's guardianship laws center on the premise that every person's situation is unique and that not everyone's needs fit neatly into the same category. For that reason, if a Court determines that a person requires a guardian, the Court will tailor the guardian's powers to meet the needs of the incapacitated person while not being overly restrictive. Examples of personal needs powers include decisions regarding the medical care of the incapacitated person, including consenting to or refusing major medical treatments, whether the incapacitated person requires a home health aide or other services, and decisions regarding where the incapacitated person should live, including placement in a nursing home.

A guardian of the property may be granted authority to marshal an Incapacitated person's assets, pay their bills, create Trusts, sell real estate and other property management powers for the benefit of the incapacitated person. The guardian can also seek the power to engage in asset transfers and Medicaid planning on behalf of the incapacitated person. Effective Medicaid planning can protect the incapacitated Person's assets by making him or her eligible for government benefits.

In guardianship proceedings, a Court Evaluator is appointed to serve as a neutral party, capable of being the "eyes and ears of the Court." The Court Evaluator is usually an attorney, but can be a social worker or other professional qualified to serve. The Court Evaluator makes a report to the Court on a large number of issues, including whether or not the person is incapacitated and in need of assistance, whether a guardianship is in the best interest of the incapacitated person, and also whether the proposed guardian is the right person to serve as guardian for the incapacitated person.

Protection for the Disabled: Special Needs Trusts

All disabled adults receive some form of government benefits, such as Social Security benefits, Supplemental Security Income ("SSI") and Medicaid benefits. What happens if a family member wants to leave that disabled person an inheritance? What happens if the disabled person comes into some money, such as proceeds from a lawsuit or a lump sum payment from Social Security?

The law entitles disabled individuals to keep such monies in a special trust, called a Supplemental Needs Trust or Special Needs Trust, without eliminating or reducing their government benefits. An unlimited amount of money may be kept in a special needs trust — without affecting governmental benefits.

A Special Needs Trust is designed to provide a disabled person with extra things that are not paid for by government programs. A Special Needs Trust can pay for:

- Transportation, including purchase of a car or van
- Purchase of a home
- Modifications to a home, such as installation of ramps or wheelchair-accessible bathrooms
- Computer equipment
- Special medical or therapeutic equipment
- Personal caregivers or attendants
- Vacations
- Medical care not provided by government programs
- Clothing and personal care items

Protection for the Disabled: Special Needs Trusts
(continued)

Payment for such items must be made directly to the store or service provider — not to the disabled individual.

The money held in a Special Needs Trust can be used for any such items during the disabled person's lifetime. If a loved one establishes and funds the Special Needs Trust, any remaining money (upon the disabled person's death) may be distributed to other family members or beneficiaries. If the Special Needs Trust is funded with the disabled person's own money (for example, proceeds from a lawsuit or a lump sum disability benefit payment), any money remaining in the trust upon the disabled person's death must be used to reimburse the government first before any distributions can be made to the beneficiaries.

Understanding Special Needs Trusts

Special Needs Trusts (also called Supplemental Needs Trusts or "SNT") come in many forms for diverse purposes. SNTs are highly favored under the law, but have very particular rules. It is important to know which trust is right for you and your family as well as the consequences of each.

Self-Settled Special Needs Trusts

This type of SNT must be established by a parent, grandparent, legal guardian or the court on behalf of a person with special needs under the age of 65. The trust is funded with the assets of the special needs person, such as lawsuit proceeds, retroactive government benefits or an inheritance. The trust must be a payback trust and therefore any funds remaining in the trust upon the death of the beneficiary must be paid back to the government as reimbursement for the cost of care. A disabled adult may self-petition the court to establish this type of trust if there is no living parent or grandparent and if a legal guardian is not otherwise necessary.

Third-Party Special Needs Trusts

Living Trust — This type of SNT is established by a relative or other loved one with their funds for the benefit of a person with special needs. The trust is funded at the time it is established and the money is immediately available to the special needs individual, subject to rules regarding expenditures (see Protection for the Disabled: Special Needs Trusts section in this Guidebook). This trust is not a payback trust and therefore all trust assets remaining when the special needs beneficiary passes away can be bequeathed to other beneficiaries.

Testamentary Trust — An SNT may also be established under a Will. The trust will not exist until the relative (or other loved one) passes away and their Will is admitted to probate. This type of trust is funded through the loved one's estate and no assets pass directly to the person with special needs. It is not a payback trust and the remaining assets can be passed on to other beneficiaries.

Pooled Trusts — A pooled trust is a type of SNT that is maintained by a non-profit organization which pools the funds of a number of special needs individuals for investment and management purposes. A pooled trust can be funded by a family member, a loved one or the special needs beneficiary himself. The trust must be funded before the beneficiary reaches age 65 in order to avoid Medicaid penalty periods. While a self-settled trust must be a payback trust, the sponsor can elect to leave any remaining funds with the charitable organization instead of paying back the government.

Pooled Income-Only Trusts

While it is true that you can divest yourself of all assets and be eligible the following month for Medicaid Home Care benefits (see Medicaid Home Care Benefits section of this Guidebook), until recently, Medicaid recipients were required to contribute their "surplus" income to Medicaid before they would receive benefits. Specifically, an individual is only entitled to keep a maximum income allowance each month and any monthly income over this amount must be "spent down" before Medicaid will pay for the individual's care. However, qualified elderly and disabled individuals in need of home care or community services can now use all of their excess income to pay for their living expenses by participating in a Pooled Income-Only Trust.

Pooled Income-Only Trusts are a type of Special Needs Trust that are established and managed by not-for-profit, charitable organizations. Elderly and disabled participants contribute their excess income to the Pooled Income-Only Trust to be managed along with other participants' funds. The money in the participant's trust account can be used for the participant's living expenses, including mortgage payments, rent, food, utilities, recreational activities, clothing, etc. Like all Special Needs Trusts, disbursements from the trust are not issued directly to the individual but rather to the provider of the item or service (landlord, mortgagor, retailers, vendors, etc.). Upon the death of the participant, any balance remaining in the participant's account will be distributed to the not-for-profit, charitable organization that was managing the Pooled Income-Only Trust to further its charitable purposes.

All individuals who qualify as disabled pursuant to Social Security Laws are eligible to establish a Pooled Income-Only Trust. Pooled Income-Only Trusts allow a qualified individual to retain all of his or her income while remaining eligible for Medicaid community benefits. Elder law attorneys are available to counsel and assist you with regard to your eligibility, the completion and execution of the required enrollment forms, funding the trust, and compliance with Medicaid rules to properly avail the elderly/disabled beneficiary of the trust's benefits.

Pooled Income-Only Trust Assets: Covering Daily Expenses

You've established a Pooled Income-Only Trust and your excess monthly income (for Medicaid purposes) is being deposited to your trust account. For what can you, the beneficiary, use that money?

Each non-profit organization that manages Pooled Income-Only Trusts has its own rules, but generally speaking, the following items are approved expenditures from an individual's Pooled Income-Only Trust account:

- Groceries, toiletries and clothing purchased for the beneficiary
- Electronics and furniture purchased for the beneficiary
- Day trips, including the beneficiary's ticket/price of admission, meals and souvenirs
- Restaurant charges (the beneficiary's meal only)
- Rent/mortgage payments (but rent cannot be paid to a family member)
- Utility bills and real estate taxes on a home owned by the beneficiary
- Additional companion/aide that is not covered by Medicaid and is employed by a reputable agency
- Telephone bill or beauty parlor charges incurred in a health care facility
- Re-need, Irrevocable funeral plans
- Legal fees

Pooled Income-Only Trust Assets: Covering Daily Expenses
(continued)

The following items cannot be paid from an individual's Pooled Income-Only Trust account:

- Tobacco, alcohol or firearms
- Purchases not for the sole benefit of the beneficiary
- Gifts for others
- Bills/invoices/receipts not in the beneficiary's name
- Medical bills/Co-pays/Prescriptions
- Nursing home bills (spend down/surplus)
- Rent/mortgage after the beneficiary has been in a nursing home for three months

All eligible disbursements must be submitted with a disbursement form and a copy of the bill, invoice or receipt. Some clients prefer to charge all such expenses to a credit card and simply submit the credit card bill for payment. Note that these lists are for general information purposes only and are not exhaustive. Other expenses may be approved on a case-by-case basis.

Do I Need a Will?

Every competent adult should execute a Last Will and Testament. This document determines how your estate will be distributed upon your death. It keeps decision making in your hands, where it belongs. In the event you die without a will, your estate will be distributed pursuant to New York State laws.

If you do not have a Will, your estate will be distributed as follows: $50,000 and one-half of the balance of your assets will be given to your spouse. The other one-half of your assets will be given to your children. If your spouse has predeceased you, all of your assets will be given to your children. If you don't have children, your spouse will inherit your entire estate. If you do not have a spouse or children, your parents will be the beneficiaries of your estate, followed by your siblings if your parents have predeceased you.

As you can see, there is a very specific order to how your assets will be distributed. Certain relatives, such as your spouse and children, rank far above others in the inheritance of your money and property. Therefore, if you have a grandson to whom you would like to leave a bequest or a relative whom you wish to disinherit, it will not come to pass unless you have a Last Will and Testament.

Executing a Last Will and Testament allows you to make gifts to whomever you see fit. Whether it is a relative, friend or charitable organization, you may dispose of your assets however you choose.

Do I Need a Will?
(continued)

Keep in mind the following requirements and procedures involved in executing a Last Will andTestament:

- All Wills must be in writing.
- The testator (i.e., the person whose Will it is) must declare before at least two witnesses that the document he is about to sign is his Will.
- The Will must be signed at the end by the testator or, in the name of the testator, by another person in his presence and by his direction.
- The Will must be signed in the presence of at least two witnesses, who must also sign the Will.
- Your witnesses should sign an affidavit stating that the Will was validly executed. This generally avoids having to call your witnesses into Court.

Last Will and Testament Tips

Question: *I want to revise my Last Will and Testament but I don't want to spend a fortune on legal fees. Do you have any suggestions?*

Answer: Preparation is the key to saving money at your attorney's office. Clients make two costly mistakes: bringing too much information to their attorney or too little.

If an attorney must wade through thick envelopes of old records, the client must pay for the time spent. On the other hand, if critical information is not available, the client can lose as well.

Make sure to bring copies of deeds and financial account records to your first appointment.

Last Will and Testament Tips
(continued)

Gather all of the following information before making an appointment to meet with an attorney:

- Names, addresses and birth dates of all children and grandchildren, even if you don't want them to inherit.
- Names and addresses of others you wish to receive an inheritance.
- A list of collections, jewelry and other small valuables and their locations.
- Contents and location of your safe deposit box.
- Names and amounts of large gifts given in the past three years (over $10,000).
- Who is to receive the bulk of your estate? (If more than one person, list percentages or dollar amounts.)
- Who should manage your estate? (Name a successor as well.)
- Who should manage any trusts? (Name a successor as well.)
- Who should be guardian of any minor children? (Name a successor as well.)
- When should family members benefit from any trusts you want established under your Will?
- Do you foresee any problems with family members over the terms of your Will?
- Are there any special financial circumstances to be considered in the near future (such as settlement of a lawsuit or inheritance potential)?

Choosing Your Executor and Trustee

When it comes to managing your estate or financial affairs, you must choose wisely. Many people choose a family member as Executor of their Will or Trustee of their trusts so that fees for this service do not have to be paid. This may be a bad decision if your trust or estate has any complications.

Courts hold Trustees and Executors to the highest standards. The fiduciary must be prudent, wise and honest.

The Executor of your Will is responsible for the following duties:

- ♦ Locate the will and petition the Court for Letters Testamentary after all beneficiaries and distributees have been notified.
- ♦ Open a checking account for the Estate.
- ♦ Search your house for valuable papers and assets.
- ♦ Inspect all real estate and have it appraised.
- ♦ Examine and file claims for life insurance, Veterans' death benefits, union death benefits, etc.
- ♦ Contact banks, brokerages and other asset holders and collect all assets.
- ♦ Review old tax returns and make sure all income and estate tax returns are filed on time.
- ♦ Pay debts of the Estate.
- ♦ Invest/sell all assets wisely.
- ♦ File an inventory with the Court.
- ♦ Prepare an accounting of all assets and debts of the Estate.
- ♦ Distribute all assets.
- ♦ Obtain waivers from beneficiaries and file them with the Court.

Choosing Your Executor and Trustee
(continued)

This is not an exhaustive list. If complications arise, the procedure can become lengthy and costly.

Trustees have a shorter list, but their responsibilities can continue for decades. The Trustee must prudently invest trust assets. This can be unsettling, as criticism from beneficiaries is common. Trustees may also have to make crucial decisions as to the timing and amount of distributions. These decisions are frequently criticized as well.

You are preparing a Will and/or Trust so that your money goes where you want it to go. Be cautious about picking your money management team.

Executor and Trustee Commissions

You've chosen an executor for your will and a trustee for your trusts, so what exactly are they entitled to as compensation for their services?

Executors and Trustees are entitled to fees based on statutory law in New York State. The Surrogate's Court Procedure Act sets all such fees and commissions based on the value of the estate or trust. For Executors, the fee is based only on the value of the assets that pass under your will and not on assets that pass directly to your beneficiaries, such as an IRA, life insurance policy or joint bank account. The fee schedules are as follows:

Executor Commissions

5% of the first $100,000
4% of the next $200,000
3% of the next $700,000
2 1⁄2 % of the next $4,000,000
2% of all sums over $5,000,000

Annual Trustee Commissions

$10.50 per $1,000 on the first $400,000 of principal
$4.50 per $1,000 on the next $600,000 of principal
$3.00 per $1,000 on all additional principal

In addition, your Executor and/or Trustee will be entitled to reimbursement for reasonable and necessary expenses paid by him or her in the administration of your estate or trust. If you appoint two or more executors or trustees, each shall be entitled to a full commission, provided your estate is valued over $300,000 or your trust over $400,000. If it is not, then such commissions may be apportioned between your executors and trustees. Your executor and/or trustee can waive commissions and, when the estate is distributed equally amongst the children and there are no disputes, the executor often does waive his or her commissions.

Probate of a Will

Probate is the process the Courts use to supervise the distribution of your assets after you pass away. The Surrogate judge must be convinced that your Will is legitimate and that you meant to have your assets pass in the way that you describe. Most Wills that are drawn up today have an affidavit for the witnesses to sign, which makes it very easy for the Surrogate to determine that you were competent to sign a Will and that the Will reflects your intentions.

The Surrogate's Court first determines whether your Will is valid. If it is, the Court remains available to oversee the process under which your heirs inherit your assets.

The Executor you have chosen will be given "Letters Testamentary." These "Letters" authorize your Executor to collect your assets. For example, your Executor will close your bank accounts and re-title or liquidate your stock certificates. All assets may be deposited into a single-estate bank account. Once your debts have been paid, your Executor will distribute your assets pursuant to the terms of your Will.

Court fees for the probate of a Will are not prohibitive; they are on a sliding scale. The following is a schedule of probate fees (as of 2014):

Value of Estate or Subject Matter	Fee Rate
Less than $10,000	$45.00
$10,000 but under $20,000	$75.00
$20,000 but under $50,000	$215.00
$50,000 but under $100,000	$280.00
$100,000 but under $250,000	$420.00
$250,000 but under $500,000	$625.00
$500,000 and over	$1,250.00

Probate of a Will
(continued)

If you do not have a Will, the state laws determine how your assets will be distributed. This is called the Law of Intestacy. In that instance, the Court will appoint one of your heirs as the administrator of your estate and will give such person letters of administration authorizing your administrator to collect your assets. The Court will supervise the collection and distribution of assets under these laws. One of your heirs will do the actual work or the Court can appoint a Public Administrator.

If your heirs are at odds, each step of the way can be expensive, as the fighting is mediated by the Courts, with lawyers representing each party. But if your Will is drafted properly, many Will contests can be avoided.

Out-of State Wills: Advice for Snowbirds

Question: *I signed a Will in New York ten years ago. If I move to Florida, must I sign a new Will?*

Answer: Your Will, if properly executed, will hold up to scrutiny by the Florida courts. Proper execution in New York means that you had the capacity to make a Will and observed all the formalities that New York Courts require. if so, your Will will be valid in Florida as well.

In order to be valid, the Will must be signed at the end of the document, in front of two witnesses who were informed that the document is your Will.

Most Wills executed today contain an Attestation Clause which the witnesses sign to indicate that you are not signing the Will under duress, that you are over the age of eighteen (18) and that you are of sound mind. The Attestation Clause facilitates probate as it is difficult to dispute the validity of a will so executed.

Out-of-State Wills: Advice for Snowbirds
(continued)

Question: *What will happen to the bank accounts and real estate I left in New York?*

Answer: If your only assets in New York were bank accounts (and not any real estate), only the Florida Probate would be necessary as your Florida Executor could collect out-of-state bank accounts. However, if you had real estate in New York, your Executor would need to probate the Will in Florida and then request an ancillary proceeding in New York to gain jurisdiction over the New York real estate.

This means that the Executor will have to pay a fee to the Florida court and one to the New York court. If you prefer that your Will be probated in New York, under New York laws, you should state that in your Will. The surrogate is not forced to adopt your wishes, but generally your wishes carry great weight.

General Advice for "Snowbirds:"

- Keep careful records of your assets and let your attorney know where the assets are located, as well as the name(s) of the title holder(s).
- Do not keep your Will in your safe deposit box at the bank. The proper place for a Will is in your lawyer's safe deposit box.
- Do not make any notations on your Will.
- Do not unstaple or separate the pages of your Will for any reason.

Keeping Your Estate Plan Current

When and how often do you need to review and update your estate plan? The answer will vary from person to person, family to family, but a number of factors will be influential.

Estate Taxes

Any changes to the federal and/or New York State estate tax laws may impact your estate plan. Particularly, changes to the estate tax exemption amount may call for the dramatic revision of your estate plan. The exemption amount is the amount of assets which may pass to your beneficiaries tax-free upon your death (see the Estate and Gift Taxes section of this Guidebook). Your Will and Trusts may need to be revised to accommodate any increases or decreases in this exemption amount. Changes in federal and state tax rates may also impact your planning strategies.

Family Matters

Changes in your family composition may call for you to update your Will and estate plan. The birth of children or grandchildren, the death of a loved one, marriages and divorces of yourself or any of your beneficiaries, and health care changes for you or your loved ones may require an update of your estate planning documents.

Keeping Your Estate Plan Current
(continued)

Estate Plan Review

At a minimum, we recommend that our clients review their estate plans every two years or sooner if any of the above applies. Particularly, we recommend the following:

- Review your Credit Shelter Trusts and revise the funding formula or create disclaimer trusts.
- Review title to your assets and all beneficiary designations.
- Consider making lifetime gifts of the annual exclusion amount to each of your family members.
- Regularly assess the current gift tax rate to determine if it is cost-effective to make gifts above the annual exclusion amount.
- Consider other ways to financially benefit your heirs without incurring gift or estate tax consequences, such as investing in education savings plans or making direct payments of tuition and/or medical expenses on behalf of your heirs.
- Organize your records so that the cost basis of your assets is easily calculable.
- Consider including a provision in your estate planning documents that gives your Trustees or Executors the ability to allocate your increase in tax basis.

Pet Trusts: Providing for Your Furry Friends

Like countless pet owners, you may be concerned about what will happen to your pets after you pass away or even how they will be cared for if you should become incapacitated or require care in a health care facility. A Pet Trust can provide your pets with a smooth transition and afford you the peace of mind that your pets will be cared for as you see fit.

A Pet Trust can be created as part of your Will or as a separate living trust. In a Will or trust, you can name someone to be the caretaker for your pets and leave funds, in the care of a Trustee, to provide for your pets. A Pet Trust can do what a simple testamentary bequest cannot: it can ensure that your pets receive care in accordance with your instructions, which you outline for your pet's caretaker in a legally enforceable document.

In order to set up a Pet Trust, you must name both a trustee and a caretaker (who may or may not be the same person). The designated caretaker will be your pet's new legal owner and the person who will carry out your wishes concerning your pet's care and maintenance. The trustee will handle the money and will distribute the funds to the caretaker to be used for your pet in the manner you have dictated. It is important to select a backup for both positions in case your first choice is unwilling or unable to serve. When choosing a caretaker, you should think about the person's living situation, allergies, affinity for a particular kind of animal, etc.

Pet Trusts: Providing for Your Furry Friends
(continued)

The instructions to your pet's caretaker can be as simple or as detailed as you choose. You may want to incorporate such details as the brand of food your pet prefers, the name of the veterinarian and descriptions of favorite toys. When deciding how much money to fund the Pet Trust with, you should consider:

- The life expectancy of your pet
- Veterinary expenses, such as annual or more frequent check-ups
- Grooming expenses
- Transportation costs
- Housing

You may also wish to compensate your pet's caretaker. If you have multiple pets, you may want to provide the caretaker with a specific sum for each animal they take in, as this can serve as an incentive to keep your pets together.

Consult your Elder Law attorney to help you construct a Pet Trust that will ensure your pets are always cared for in accordance with your wishes.

The Life Estate

For many people in the New York metropolitan area, their home is their largest asset. Most families seek to protect the value of their home, but do not want to give up any ownership rights. The life estate can be one way to accomplish this goal.

By giving your home to another individual (or several individuals) and retaining a life estate, you retain all rights and obligations regarding the property during your lifetime. (See Protecting the Family Home section of this Guidebook.) In the event you decide to sell the house after transferring ownership and retaining a life estate, you would need the consent and cooperation of the person(s) to whom you transferred the house. You would be entitled to a portion of the sale proceeds as the life tenant and the person(s) to whom you transferred ownership would be entitled to the balance of the proceeds. The amount that you each are entitled to changes as you age (i.e., the older you are, the less your life estate is worth).

The life estate has several tax ramifications. First, you will continue to receive any Enhanced STAR or Veterans real estate tax benefits that you presently receive and, since you remain obligated to pay the real estate taxes, you can continue to take them as an itemized deduction on your personal income tax return. Secondly, if the house is sold during your lifetime, the cost basis in the house (i.e., the amount you paid for the house plus the value of capital improvements) will be apportioned between you and the person(s) to whom you transferred ownership. Provided the house was your primary residence for two of the last five years, you would not incur any income tax on the first $250,000 of gains if you are single, or $500,000 if you are married. If it is not the primary residence of the person(s) to whom you transferred ownership, they would incur income tax on their portion of the gain. As a result, if you are considering selling the house during your lifetime, transferring ownership to an irrevocable trust may be preferable since the income tax ramifications are more favorable. Alternatively, if the house is not sold until after you pass away, the person to whom you transferred the house will receive the value of the house at the time of your death as their cost basis, and so if the house is sold shortly thereafter, they will not have any gain and incur no income tax liability.

Lastly, the transfer of the house is a gift and so a gift tax return must be filed reporting the value of the portion of the house you gave away. Additionally, the house will still be included as part of your taxable estate. There is some interplay between the gift tax laws and the estate tax laws, for which you should seek the counsel of an experienced elder law attorney.

Living Trusts

Trusts can be one of the most effective tools in your estate and asset protection plan. Properly drafted trusts can avoid probate, create tax advantages, promote Medicaid eligibility and protect property from creditors. But what is a trust and how does it work?

Question: *What is a living trust?*
Answer: A trust is a legal agreement whereby one person, known as the trustee, holds legal title to specific property for the benefit of another person or persons, known as the beneficiaries. There are two categories of trusts: testamentary, which is a trust created by a Will, and living or *inter vivos* trusts, which are created and existing during the lifetime of the creator. Trusts can hold any kind of property or assets, including cash, bank accounts, stock, real estate and personal property.

Question: *Who can create a trust?*
Answer: Any person eighteen years of age or older may create a trust. An agent appointed under a Power of Attorney can also create a living trust if you delegate such authority.

Question: *How is a trust created?*
Answer: A trust is properly created if it is in writing, signed by the grantor and the trustee(s) and notarized by a notary public. The creation of a trust also requires there to be trust property (money, real estate or other property placed in the trust).

Question: *Can a trust be amended or revoked? If so, how?*
Answer: An irrevocable trust is a trust in which the grantor does not have the power to revoke or amend the trust. An irrevocable trust is used primarily in the context of asset protection and Medicaid planning. Unless the trust instrument expressly provides otherwise, all lifetime trusts are deemed to be irrevocable.

A revocable trust is one in which the grantor expressly reserves the right to revoke or amend the trust. This type of trust is used to avoid probate, protect privacy and for other estate planning purposes.

All trusts, revocable and irrevocable, can be revoked or amended by the grantor if all beneficiaries of the trust consent in writing. However, all trust beneficiaries must be over eighteen years of age and must have capacity – often a practical problem that makes revocation or amendment impossible.

Question: *Can a trust be challenged?*
Answer: Although more difficult than a Will contest, a trust may be challenged on grounds of lack of capacity, improper execution, undue influence and fraud.

Estate and Gift Taxes

Both New York State and the federal government impose an estate tax on the value of an individual's estate upon death. The federal estate tax exemption amount of $5,000,000 was made permanent in 2013 and is subject to annual adjustments for inflation. In addition, the law allows a surviving spouse to use any unused estate tax exemption amount of a predeceased spouse. While the New York State estate tax exemption amount is currently much lower, it may be raised to equal the federal estate tax exemption in the future.

The value of your estate for estate tax purposes includes everything that you own or hold in your name, whether individually or jointly with someone else, as well as everything over which you have control. This includes jointly held assets, life insurance proceeds (including group life insurance you receive through your union or employer), retirement accounts and assets in certain types of trusts that you created or that were created for your benefit. Your estate will receive certain deductions, such as expenses incurred while administering your estate, debts paid after you pass away (including funeral expenses), assets that are left outright to your spouse (so long as your spouse is a United States citizen), and any assets left to a qualified charity.

Gift Taxes

In addition to an estate tax, the federal government imposes a gift tax on gifts made by an individual during their lifetime. The gift tax is imposed on the person giving the gift, not the person receiving the gift. The estate tax exemption amount is also the lifetime gift tax exemption amount. This means that your estate tax exemption amount will be reduced by the total amount of gifts you made during your lifetime.

Annual Gift Tax Exclusion

Each year, you can make gifts to anyone you want, up to a certain amount per person, exempt from any gift tax. This amount is referred to as the annual gift tax exclusion. The annual gift tax exclusion amount began at $10,000 per beneficiary but is currently $14,000 per beneficiary after being indexed for inflation.

Please be aware, however, that the annual gift tax exclusion amount is a tax concept followed by the IRS. For Medicaid purposes, a gift of any amount can negatively affect your eligibility for Medicaid benefits. You should consult with your Estate or Elder Law attorney to confirm the current tax exclusion amounts before making any gifts.

Qualified Personal Residence Trusts

A Qualified Personal Residence Trust ("QPRT") is an irrevocable trust that is created to hold title to your personal residence for a period of years, after which title to the property passes to your designated beneficiaries, either outright or in further trust. A QPRT is primarily designed as an estate tax savings device.

When a QPRT is created, you select a trustee, a term of years during which you can reside in the house, and the beneficiaries who will receive the house at the end of the term of years. In creating a QPRT, you make a taxable gift equal to the current value of the house minus the value of your right to live in the house for the specified term of years. After the specified term of years, the residence will either be distributed to the designated beneficiaries outright or in further trust. If you survive the trust term, the residence, and all appreciation thereon, will pass to your beneficiaries at a substantially discounted estate and gift cost.

The amount of the gift you make will depend on your age at the time of the gift, the term of your retained interest, the value of the house and the federal midterm rate for bonds in the month in which the QPRT is established. However, the discount in the value of a house for gift tax purposes by using a QPRT can be upwards of 75%.

The main risk of a QPRT is the failure to survive the term of the trust. If this occurs, the entire value of the house will be included in your estate for estate tax purposes. (Of course, this is what would happen anyway if you did not create the QPRT.) Another drawback in establishing a QPRT is that, if you survive the term, your beneficiaries receive your cost basis in the property. If they instead inherited the property at your death, they would receive a stepped-up basis. However, since the federal and New York State estate tax rates currently range from 46% to 56% and the federal and New York State capital gains rate is currently 19% to 27%, it is generally still more beneficial to set up a QPRT.

It is also important to note that, after the trust term, you have no legal right to continue living in the residence. However, you can then rent the residence back from your beneficiaries (i.e., presumably, your children) for a fair rental value. This is actually beneficial from an estate and gift tax perspective, because it creates a legal obligation between you and your children and allows you to transfer additional funds to your children free from gift and estate tax, over and above the annual gift tax exclusion amount.

Irrevocable Life Insurance Trusts

As the name suggests, an Irrevocable Life Insurance Trust ("ILIT") is a trust created to hold a life insurance policy and is designed primarily as an estate tax savings device. Contrary to popular belief, a life insurance policy is part of your taxable estate, even though it may have little or no value to you while you are alive. This can be a very expensive consequence since it is not uncommon for a person to have a sizeable life insurance policy.

When you establish an ILIT, you either transfer ownership of an existing life insurance policy to the trust or the trust can take out a new life insurance policy on your life. In either case, the ILIT is named as the beneficiary of the life insurance policy. If the ILIT takes out a new policy, and certain formalities are met regarding the payment of the insurance premiums, the death benefit will not be included in your taxable estate. Alternatively, if you transfer ownership of an existing policy to the ILIT, you must survive three years after the transfer for the death benefit to be excluded from your taxable estate when you die.

When the ILIT is created, you select the trustees and the beneficiaries. If the creator of the ILIT has a surviving spouse, it is recommended that the death benefit remain in trust for the lifetime of such spouse, so it will not be included in the spouse's estate when he or she later dies. Thus, the death benefit can escape taxation in both spouses' estates. The ILIT can also contain provisions about the funds staying in trust after a spouse's death, such as for the benefit of young, disabled or elderly beneficiaries. In such instances, there would be provisions made regarding when and for what purposes property would be distributed to the beneficiaries. Because an ILIT is irrevocable, there are usually a series of contingent trustees and contingent beneficiaries to ensure that, if you outlive several of your beneficiaries, there are still provisions to govern the disposition of the death benefit when you subsequently die.

Regardless of whether a life insurance policy is in an ILIT or not, the death benefit can be paid without waiting for the probate of your Will or the appointment of an Administrator or Executor. The beneficiaries generally do not pay any income tax on the death benefit when they receive it. Further, an ILIT can even be funded with a life insurance policy that you have through your employer, regardless of whether you or your employer pays the premiums.

Caregiver Agreements

Many elderly and disabled people are cared for routinely by their family members. A family member often has to step in to take over certain daily activities of an aging senior, often to the detriment of their own job or other obligations. Now, there is a way to compensate such family caregivers for the services they perform. Pursuant to a Caregiver Agreement, you may hire a family member or friend to oversee, monitor, supervise, and in some instances, provide hands-on care for you and you agree to compensate that person for their services. This contractual arrangement can be a way to transfer and preserve assets for your family members without incurring negative Medicaid consequences.

The written agreement must set forth the caregiver's responsibilities, which can include securing health care services, monitoring and supervising health care, making living arrangements and even providing recreation and entertainment. A caregiver may provide home health aide services, such as assistance with bathing, grooming, dressing, feeding and transportation, and provide advocacy, safety monitoring and comfort care. Caregivers are also often involved with financial management, such as payment of bills, processing of health insurance claims and other bookkeeping functions.

The agreement must set forth the terms and conditions of the compensation to be paid to your caregiver. Compensation should be based on the prevailing market rate for similar services in your area. Different rates can be applied to different services, such as a rate for home health aide services, geriatric care manager services and accountant/bookkeeper services. The agreement should specify the hourly rate for such services and the weekly amount of hours those services will be provided in each category. The compensation to be paid to your caregiver cannot exceed a total figure based upon your life expectancy. This payment can be made to the caregiver in a lump sum based on that total figure.

Your caregiver must keep a logbook to record his or her activities on your behalf. Further, as the payments made by you to your caregiver are considered compensation for services, such payments are taxable income to your caregiver and must be reported as earned income on his or her income tax return.

A Caregiver Agreement may be a useful tool by which you compensate a loved one for services provided without affecting your Medicaid eligibility and, at the same time, ensure that you receive the medical, financial and personal care support and services you need.

Long-Term Care Insurance and NYS Partnership Plans

With the ever-changing landscape of Medicaid eligibility rules and the daunting notion of paying privately for your long-term care needs, long-term care insurance may be the best option in planning for your future care.

Whether you should buy a policy will depend on various factors including your age, health status, income, assets and family composition. For example, if you have pre-existing health conditions, the premiums may be too high or you may not qualify at all. Similarly, the older you are when you purchase a policy, the higher your premiums will be.

It is important that you understand what services your insurance policy will cover and what you can afford. For example, your policy may or may not cover the following: nursing home care; home health care; respite care; hospice care; assisted living facility; or adult day care services. The main financial components of any long-term care insurance policy are the lifetime maximum benefit (stated as a dollar amount), the daily rate to be paid for various services, the elimination period and the inflation provision.

The daily rate will vary depending on where you are receiving care (i.e., home, assisted living facility, nursing home). The inflation provision protects you against the rising cost of long-term care by increasing your daily benefit rate (and your lifetime maximum benefit) in proportion to the rate of inflation.

Long-Term Care Insurance and NYS Partnership Plans
(continued)

Some states have special long-term care insurance programs designed to share the cost of long-term care between the recipient and the government. These programs often are more affordable than a private Long-Term Care insurance policy. The New York State Partnership for Long-Term Care combines private long-term care insurance and Medicaid benefits to help individuals pay for nursing home care or home care.

When you purchase a partnership policy, you are covered for a specified period of time for care in your home or care in a nursing home (or some combination of the two). Thereafter, you will be eligible for Medicaid benefits regardless of your assets and despite any asset transfers you made during the look-back period. You will, however, have to spend down your monthly income on the cost of your long-term care after you become a Medicaid recipient.

Long-term care insurance should always be explored as part of your Elder Law Plan.

Veterans Benefits: Aid and Attendance

Aid and Attendance is a valuable pension benefit that can help a veteran and/or a veteran's spouse meet the costs of an assisted living facility or the costs of care at home. The benefit is a non-service connected pension benefit for veterans or their spouses who require the aid and attendance of another individual to perform functions required in everyday living, such as bathing, feeding, grooming and dressing.

Aid and Attendance Pension Benefit Requirements

To qualify, the veteran must be 65 years of age or older and must have had 90 days in service, one day of which must have been during a period of war. Even if the veteran never left the United States, s/he may still qualify as long as s/he meets these service requirements. Note, however, that a veteran dishonorably discharged is not eligible for the pension benefit.

As the pension program is need-based, no service-related disability or disability rating is required. However, the veteran must qualify financially for Aid and Attendance benefits. The applicant is subject to an asset limitation, which does not include the primary residence and car. Currently, there is no penalty for asset transfers. As such, with proper planning, a veteran can readily become financially eligible for the pension benefit.

Pension Benefits for a Veteran's Spouse or Surviving Spouse

A veteran's spouse or surviving spouse may be entitled to a veteran's pension if the veteran meets all of the above criteria. A current spouse must be married to the veteran for at least one year in order to qualify. A surviving spouse must have been married to the veteran at the time of the veteran's death and that marriage must have lasted for longer than one year. There is no age restriction for the widowed spouse. If the surviving spouse remarries after the death of the Vveteran, eligibility is terminated.

Aid and Attendance Benefit Amounts

The pension amount is based on need. Applicants must document their income (Social Security, pension, etc.) and their unreimbursed medical expenses, including insurance premiums, co-pays, the cost of assisted living, adult day care or home health aides. The pension amount is based on the shortfall between income and these unreimbursed medical expenses.

Proper estate and asset protection planning may be necessary for the veteran and/or spouse to qualify for Aid and Attendance benefits. Families must also be mindful of Medicaid look-back and penalty periods when engaging in such planning.

Putting Your Affairs in Order

You've signed a Will and prepared your advance directives. You breathe a sigh of relief. Your affairs are in order. Right? Not quite. Before you are truly done, you must review your assets and investments.

Insurance Policies and Annuities

Everyone should periodically review the beneficiaries they have named on their insurance policies and annuities. If your family circumstances or composition has changed, this is critical. Further, the ownership and beneficiary designations should be structured properly to minimize estate taxes. A trust or third party can be the owner of the policy while you are simply the insured. The beneficiary can be your estate, to provide liquidity to pay bills at the time of your death, or the beneficiary can be an heir, in order to equalize your gifting plan. In any case, your policy should be reviewed as part of your entire estate plan.

Retirement Plans

Many people have a significant portion of their assets in 401(k)s and IRAs.

These assets are not governed by your Will if you name beneficiaries. There are complicated tax and distribution rules to be dealt with when your heirs inherit. Many people name their spouse as beneficiary, but as you age, this can become a bad idea. Distribution tables are based on life expectancy, so you may want to name your children as beneficiaries if you and your spouse are over 60. It may also be wise to split your account into an account for each child, naming each as beneficiary.

Jointly Held Assets

Many of us hold our homes and bank accounts jointly with another person for convenience. This simple technique allows a surviving spouse or an heir to take their assets without the Probate of a Will. However, be aware that the person named on that account will automatically inherit that account — even if your Will says otherwise. Further, there can be serious tax disadvantages. Review of title to all bank accounts, stock certificates, and the deed to your home should be part of a comprehensive estate plan.

Accounts "In Trust For"

The Courts are especially strict about Totten Trusts. These are the accounts maintained in a bank or other financial institution with your name "In Trust For" or "ITF" a beneficiary. The beneficiary named in that account will inherit those funds, no matter what your Will says. Again, periodically review these beneficiary designations and make changes when necessary.

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