



## **ESTATE PLANNING, MEDICARE, MEDICAID, AND LONG-TERM CARE CONCERNS**

One of the most financially hazardous risks and worrisome concerns for any person approaching their so-called “golden years,” is that associated with providing for their long-term health care and living circumstances. We would all like to arrive someday at ninety years of age, full of vim and vigor, and die in our own bed while asleep. However, life does not always give us the option of how our later years may turn out. In many cases, individuals may plan their estates and accumulate wealth which they perceive to be reasonable to support themselves in their own home, retirement community, or other living circumstance, but are ill-prepared when sudden injury, stroke, or other debilitating disease strikes them, rendering them in need of significant health care services within or without their own normal living arrangement. This article will seek to address some of the initial concerns and issues that need to be explored in attempting to integrate traditional estate planning with that associated with providing for, and arranging your affairs in such a way as to handle the risks associated with long-term care living arrangements.

### **Traditional Estate Planning**

Most individuals are aware of the need to have in place during their adult lives, a Last Will and Testament, or Revocable Trust, possibly a Life Insurance Trust, and other more or less “typical” documentation that will control the management and distribution of their estate in the event of their demise. In addition, in anticipation of possible disability, most individuals will

seek to have an attorney prepare Durable Powers of Attorney for financial matters, as well as health care concerns, and will also frequently desire to have “end of life” decision making preplanned by executing a so-called “Advance Directive for Health Care” also called a “Living Will.” They will want to nominate a spouse, an adult child, or responsible family friend as agent (or attorney in fact) under the power of attorney or “proxy” under the Living Will. It is far better to prearrange our own affairs, and the law authorizes us to take the initiative to have such documentation put in place while we are competent and in reasonable health and soundness of mind to execute such documents. However, traditional estate planning and the documents just mentioned do not automatically provide for, or protect, the assets of an individual who is faced with the massive cost of long-term care services, either within their own home or, if required, living in a skilled nursing facility of one kind or another.

### **Medicare and Medicaid**

Many individuals assume that once they have reached the magic age of 65 years, that **Medicare** will provide for their long-term care expenses, in the event they find themselves required to live in a skilled nursing facility due to a stroke, disability associated with osteoporosis, or a host of other debilitating conditions. However, most people forget that Medicare, though an earned benefit program, having been paid for by premiums taken from their earnings, during their working years, only provides very limited benefits for an individual finding themselves in need of long term assistance. Basically, Medicare provides only a limited number of days per year for hospitalization or skilled nursing assistance. Normally, you might view the stay in a skilled nursing facility as that designed for “rehabilitation” rather than custodial care. Once the Medicare days have been consumed, the patient/resident is “on their own,” meaning that they must either have the ability to pay privately for the continued services in the skilled nursing facility, or must have some form of private insurance to assist in those payments.

**Medicaid**, on the other hand, is a welfare program not associated with an earned benefit as a result of withholdings from wages, and is limited to individuals who qualify both medically and financially. For one to qualify medically, it must be shown that the person is in need of skilled nursing services, although the Department of Human Services of the State of Oklahoma, can provide, in certain circumstances, in-home supports (i.e. the ADvantage Program), as well as services in a typical skilled nursing facility. However, the individual must also qualify based on limited income and limited resources. For a Medicaid applicant, his or her income cannot normally exceed \$2,094.00 per month for 2012 (an exception is the use of a “Medicaid Income Trust” allowing a person’s income to be up to \$3,000.00), and his or her non-exempt assets cannot exceed \$2,000.00. There are certain exceptions and certain exemptions of assets, such as prepaid burial, personal medical equipment, and in certain circumstances a personal vehicle, etc, and a few other minor exemptions. For married couples, the income limitations and exempted resources is much more favorable, since Congress desires to protect the spouse living in the community with sufficient income and resources to survive—at least “survive” by Congress’s definition. Congress has determined that the community spouse shall be entitled to keep one-half of the total assets of the couple that are otherwise not exempt, but no less than the first \$25,000.00, but not to exceed \$113,640.00 (for the year 2012). In addition, there is a minimum income (called the Minimum Monthly Maintenance Needs Allowance “MMMNA”), allowed to the community spouse and a maximum which is in the amount of \$2,841.00 (for the year 2012). This is designed to ensure that the community spouse has sufficient income and resources to survive while the so-called “institutionalized spouse” (the one in the nursing facility) is cared for partially or totally by Medicaid dollars. If the community spouse’s income is less than the maximum, a portion of the income (such as social security) of the institutionalized spouse can be given to the community spouse to increase his/her income up to but not to exceed the maximum. Many individuals may have a modest estate; nevertheless, their assets far exceed the limitation

permitted by Medicaid and, thus, much of their assets may be spent on the care of the spouse in the nursing facility. Certain procedures can be implemented to enhance, maximize, and protect additional assets for the benefit of the community spouse, and possibly, even assets may be protected for the sake of the children or other beneficiaries, but this requires careful planning and assistance of a knowledgeable elder law attorney familiar with the Medicaid rules.

Some individuals with foresight have obtained long-term care insurance, which is offered by many reputable companies today, and which will even provide services for in-home care if desired by the insured. Although the policies are more expensive the older you are when purchasing them, nevertheless, they should be considered since the average monthly cost of nursing care in Oklahoma is, typically, \$4,000.00 or more per month for a private room, but the premiums on a typical policy for a “healthy” 60 year old may be in the neighborhood of \$3,000.00 - \$4,000.00 per year, depending on the type of policy and extent of benefits provided. Thus, long-term care insurance is something that should be considered in a person’s overall estate plan.

### **Traditional Planning Sometimes Conflicts with “Medicaid Planning.”**

Many individuals seek to accumulate their assets for the purpose of protecting and providing for themselves in their declining or retirement years, without realizing the fact that, under the Medicaid rules, a person is not permitted to own excessive resources and still qualify for Medicaid. Because of this conflict, some individuals anticipate that they will “give away” their assets at the last minute and then apply for Medicaid. However, currently, subject to certain exceptions, Medicaid penalizes gifts or transfers of property to children or other persons within sixty (60) months of applying for Medicaid. The Deficit Reduction Act of 2005, signed in February of 2006 by President Bush, restricted certain commonly used “Medicaid planning” techniques, making the issue of “preplanning” for one’s later years even more urgent. The purpose of this new Congressional Act, of course, was and is to discourage people from doing

that which they seek to envision, that is impoverishing themselves for the purpose of qualifying for Medicaid. Individuals who utilize living trusts, or other types of trust arrangements, will also be subject to a five year, or sixty (60) month, look back or penalty period.

## **Conclusion**

Because we are, typically, living longer than in prior generations, in our final years we may find ourselves in either declining mental or physical health, though very much alive. Such a condition may require the assistance of family caregivers, and sometimes those are not readily available, or willing, or able to assist us. Of course, many Americans find themselves in this circumstance and family caregivers are the primary support of these individuals, as indicated by periodic national surveys. However, if those caregivers are no longer available or become exhausted from the stress of caring for us, we, again, may find ourselves required to seek additional professional services through some form of licensed nursing or other skilled care facilities. Again, this will mean either that we have obtained private insurance to pay for such caregiving assistance, or we must use our own resources, or we have arranged our affairs in such a way as to qualify for Medicaid.

Some, of course, would consider arranging their affairs and seeking Medicaid as unethical, or even morally repugnant. The purpose of this article is not to condone or condemn Medicaid planning, but simply to bring to mind the fact that we may be faced with the need for long term care somewhere in our aging years, and planning accordingly is advisable. It certainly seems wise, in the case of a married couple, to seek to protect as many assets as possible for the surviving spouse so that he or she is not impoverished to such an extent that his or her remaining years are unpleasantly lived out, or require additional dependence upon children or other persons for support. In addition, many individuals anticipate that their children will inherit the remaining assets of the parents, and the parents do not typically envision that their estates will be totally consumed by long-term care expenses which, unfortunately, often occurs.

It therefore seems appropriate to plan with anticipation that the need for long-term care may arise in the future, and to ponder the options that would be available to a person to deal with this concern. Certainly, investigating long-term care insurance is one approach that should be considered unless the applicant is already of such ill health that he or she could not qualify, or their age is such that the premiums would be too expensive in light of their current income or other assets. In the alternative, some thought should be given to the fact that Medicaid, particularly for a single person, requires the consumption of the “lion’s share” of the person’s estate, leaving them with few assets to provide special benefits to themselves in addition to the base level of care provided by Medicaid. In the case of a married couple, proper planning is even more essential in order to protect as many assets as possible for the non-ill spouse living at home. Thus, arranging or considering the use of various methods and techniques to fit within the ethical and legal rules of Medicaid while still maximizing the benefits allowed by law seems to be a wise course of action, which should be considered by any person contemplating comprehensive estate planning for their later years. You should consult a qualified elder law attorney in discussing these matters, to examine the various options that would be suitable in your circumstance, so that the best plan could be pondered and, perhaps, implemented. Although no one has a crystal ball and can foresee every possible event, obviously, thorough planning with wise and experienced legal counsel is better than no planning at all.

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