Serving An Aging Clientele: Medicaid and Other Planning

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A KEY ESTATE PLANNING GUIDE

Law Easy

ChronicIllnessPlanning.org

Serving An Aging Clientele: Medicaid and Other Planning

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Some Webinar Pointers

- The PowerPoint is available for download from the web console during the program.
- A recording of this program and the materials will be posted to www.shenkmanlaw.com/webinars. There is a growing library of 150+ webinar recordings there.
- There is a growing library of 200+ video planning clips on www.laweasy.com.
- There is no CLE or CPE for this program, but you will be sent a certificate of attendance from the webinar system. We cannot control those certificates so if there is an issue we cannot assist.
- If you have questions, please email the panel. All emails are listed on near the end of the slide deck.

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Pioneer of Elder Law

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Concentrates his law practice in the areas of Estate Planning, Estate and Trust Administration, Business Succession Planning, Elder Law and Special Needs Planning.

Mr. Pierro is Best Lawyers 2022, 2018 and 2014 **Lawyer of the Year** in Elder Law for the Capital Region.

Lehigh University and Albany Law School

Agenda

1. What is Elder Law?
2. The Long-Term Care Problem
3. Medicare vs. Medicaid
4. Medicaid for those in Crisis
5. Planning to Pay for Long-Term Care

Element #1:

Listen to Gretsky:

"Skate to where the
puck is going…”

Changing Landscape

- Baby Boomers began turning 65 in 2011 at the rate of 10,000 per day (Now turning 77)
- Persons over 65 today= 46 million
- By 2050, the U.S. Census Bureau predicts there will be 86.7 Million citizens age 65 and older living in the U.S. – 21% of the total population
- 1 in 5 Adults is a Caregiver of an older American
- Average net worth of older Americans in $232,000

Changing Landscape

- The Society of Actuaries current mortality tables show increased longevity for 65 year-olds:
  - 65 Year Old Males = 21.6 yrs. to age 86.6 (up from 19.6 yrs; 10.4% increase)
  - 65 Year Old Females = 23.8 yrs. To age 88.8 (up from 21.4 yrs; 11.3% increase)
- Are your clients prepared to face the challenges of living into their 80’s, 90’s and 100’s?

Most Can't Afford Care

One Month of Care…………	\$14000 x 12=	\$168,000
Stay at Home Spouse Needs	\$4000 x 12=	\$ 48,000
Total		\$216,000

Budgeting for Long-Term Care

Social Security	\$ 24,000
Pension Income	\$ 36,000
Income from investments…..(@4%)	\$156,000
	\$216,000

Most would need \$3m to \$4m to "self-insure"

In metropolitan areas that number goes up to \$6M or \$7M because the cost of LTC is ~\$15k to \$18k per month.

The Elder Law Profession

- Elder law places special emphasis on issues surrounding *long life* instead of death
- Health, isolation and financial problems ranked as the top worries when respondents were asked to describe the worst things about being over age 65 (AARP Survey)
- Concerns are rooted in our underlying cultural values of ***independence*** and ***autonomy*** and ***involvement*** and ***connection*** with family and community
- These values permeate nearly every aspect of an elder law practice

Elder Law Clients

Estate Planning Client

Tax Planning Client

Asset Protection Planning Client

Elder Law Planning Client

Proactive Planning vs. Crisis Planning

- Estate Planning –Trusts, Insurance, Advance Directives
  - Prospective LTC Planning
- Crisis Planning – Immediate need for care; options to pay for care including insurance, Medicaid and tax planning
  - Medicaid Applications
  - No margin for error

Highly Motivated Clients

- Health care Crises put families in a state of panic
- Hospital discharge planning, nursing home admissions, home healthcare options and assisted living alternatives are complex, costly and often catastrophic
- Clients are unprepared for the cost of long-term care – Medicare, like crime, does not pay
- Legal and financial documents are often not in place or inadequate

Gathering Information

- Use of a thorough questionnaire is essential
- Estate Planning Questionnaires **do not** ask the right questions
- Necessary information includes detailed health related data
- A sample questionnaire is included in the materials designed to elicit key information for Medicaid + VA eligibility

Medicaid vs. Medicare

Medicaid is the <u>only</u> government program that pays for LTC

Medicare does not cover LTC

But- a recent AARP survey showed nearly 90% of seniors say Medicare will cover it!

Medicaid Eligibility

Medicaid is a means-tested program, not an entitlement like Medicare.

Applicants must meet stringent asset ($2,000 in most states) and income limitations (varies by state)

Transfers of assets are subject to a five-year lookback period in all states for nursing home care

Rules governing home care programs vary by state

Transfer Penalties

Transfers within the 5-year lookback create a period of ineligibility

The penalty period is calculated by dividing the total $ amount of transfers by the average cost of nursing home care in the region

Example: $$\frac{\text{Total transfers } \$200{,}000}{\text{Regional rate } \$\ 10{,}000} = 20 \text{ months}$$

Transfer of Asset Exceptions

- In general, transfers to spouses, disabled and blind children are exempt
- Also exempt are transfers of a primary residence to one of the following:
  - Sibling with equity (ownership) interest
  - Caretaker child residing in residence for 2 yrs., enabling parent to remain at home

Commencement Date of the Penalty Period

For any transfers made after February 8, 2006 the penalty period <u>does not begin to run</u> until the following **three** conditions are met:

1. The applicant is in a nursing home, and
2. The applicant is “otherwise eligible” for Medicaid (assets under $2,000), and
3. A Medicaid application is actually filed

Crisis Planning = Medicaid NOW

- Medicaid Spend-Down
- Transfers of assets (rule of halves) using promissory notes or immediate annuities to pay for care during penalty period
- Medicaid applications – filing and perfecting
- Fair hearings & appeals if denied

Crisis Planning – Pre-Application

Spend Down of Assets

-Purchases (car, clothes, television, etc.)

-Attorney Fees

-Spend on Exempt Property such as home improvements

-Prepaid burials for self, spouse, children

-Purchasing home if option is available

-Pay down debt

Crisis Planning - Pre-Application

Caregiver Agreements – Families can get compensated (authority for lump sum payment)

Consider fair hearings to increase the Resource and/or Income allowances for Spouse

Execute exempt transfers:

-transfers to spouse
-transfers to blind or disabled children
-transfers of the home to exempt recipients

Purchase exempt rental property (Florida only)

Purchase an operating business

Crisis Planning - Filing the Application

- Lookback Period = 5 years

  - All financial records for the prior five years must be submitted with the application

- Assessment of the Penalty Period

  -All uncompensated, non-exempt transfers are aggregated

  -The sum of the transfers is divided by the average regional rate for nursing home care

Is the “Rule of Halves” alive?

- Jane has recently entered into a nursing home
  - No preparation done
- Jane’s assets total $202,000, income of $4,500/mo.
- Pre-Pay Funeral, Attorneys fees = $20,000
- Net countable assets $182,000
- Nursing Home will cost $14,500 per month
- Average Regional Rate = $10,000

P-Note Rule of Halves Example

- Jane will **gift** $90,000 to a trust or family member (Triggers 9 month penalty)
- She will **loan** $90,000 to her son, Robert
- Loan payments = $10,000 / month for 9 months
- $2,000 will be left in Jane’s name following the gift and note transfers
- $4,500 monthly income pays balance of cost

Total Assets Saved = $102,000 after 9 months

Rule of Halves Upheld
Annuity Example

- *Zahner v. Secretary Pennsylvania Department of Human Services*
- U.S. District court held "Short-Term Annuities" purchased by Medicaid applicants are assignable, and therefore countable assets
- 3rd Circuit Court of Appeals 9/2/2015 – Reversed District Court

3rd Circuit Ruling

- Holding: PA law purporting to make all annuities assignable was preempted by federal law
- Reversed the ruling that annuities are resources

  “Financial planning is inherent in the Medicaid scheme; annuities are not barred from the safe harbor, and the look-back period that considers gifts as resources for purposes of Medicaid assistance is of limited duration. Therefore, the definition of protected annuities is one best left to the policymakers in the legislative branch.”

CRITICAL INSIGHTS:

MOST OF YOUR CLIENTS ARE POTENTIALLY ELDER LAW PLANNING CLIENTS WHETHER YOU KNOW IT OR THEY KNOW IT.

Assessing Your Clients' Risks

- Losing Capacity
- Retirement Costs
- Health Care Costs
- Long-Term Care Costs- #1 cause of middle class impoverishment
- Outliving your money

Key Questions to Ask Clients

If you need Long-Term Care…

Where would you want to live?

Who would take care of you?

How would you pay for it:

Self-Insuring	**Private LTC and Life Insurance**	**Medicaid**

Empowerment strategy

“IMPOVERISHMENT”
strategy

“EMPOWERMENT”
strategy

Empowerment strategy

It’s about how we make life better and more fulfilling as we age, without fear of being pushed into a nursing home or dying broke as a ward of the state.

This will require a fusion of elder-law + financial strategies + tax planning

Insuring Long-Term Care Risks

- **Best way to fund costs of long-term care**
- **Variety of Products**:
  - Traditional LTC Insurance – Sales down 90% since 2002
  - Partnership (Dollar for Dollar Protection)
  - LTC/ Life Hybrid policies
  - Traditional Life with LTC Rider
- **Partner with high quality LTC agents**, OR
- **Get licensed and sell product**

Planning for Medicaid

- 7% of eligible purchasers own insurance to cover long-term care
- Of the other 93%, the vast majority cannot afford to pay for their own long-term care
- The only option left to pay for LTC is Medicaid
- Planning in advance to qualify for Medicaid and preserve assets involves trust, tax and financial planning

Typical Asset Protection Plan

Single Package:

- Medicaid Asset Protection Trust
- Revocable Living Trust
- Pour Over Will
- Asset Protection Letter (optional)
- Enhanced Power of Attorney
- Healthcare Advance Directives

Estate Planning Plus!

Medicaid Asset Protection Trust

CLIENTS

ASSETS

INCOME

- Trustee – manages trust assets
- Beneficiaries – income & principal
  - Client – income for life and rights to use real and personal property
  - Heirs = Remaindermen - inherit when trust ends
  - Grantor trust for income tax purposes

Medicaid Asset Protection Trust

Home
Bank Accounts
Stocks & Bonds
Annuities
Life Insurance
Business
Real Estate

- Income can be paid or accumulated
- Principal can NOT be given back to the Grantor directly
- Principal can be paid during lifetime to children or others (who can use it for any purpose)

Medicaid Asset Protection Trust

KEEP OUT

Cash
Bank Acct.
IRA, 401(k) – varies by state

Security Features

- Power to change Trustee
- Power to change beneficiaries
- Can revoke under most state laws with consent of beneficiaries

MAPT RESULTS

Long-Term Care costs will be covered by Medicaid

- Home and assets protected
- Wishes upon death will be followed
- No probate or court involvement
- Full step-up in basis for trust assets

What Are We Trying to Accomplish?

- Removing the assets from the reach of healthcare creditors for possible Medicaid applicant and spouse
- Providing more protection for family assets than an outright gift
- Tax Advantages: income taxed to the grantor, capital gains exclusion on the sale of the residence during lifetime and basis step-up at death

MAPT/Insurance Combined "Planning"

- Using LTCi/ MAPT Combination Plans to "bridge" the 5 year lookback

- Partnership Policies = Medicaid Protection in Part (Dollar-for Dollar)
  -MAPT gives same result, for 100% of the assets

- Enjoy the flexibility and benefits of LTC Insurance
  -Home Care & Assisted Living coverage
  -Asset *and* income protection
  -Choice of providers

- With the benefits of a Medicaid Asset Protection Trust

2 + 2 = 5

Parental Protection Trust

- Life insurance with an LTC rider has become the most popular choice in policies
- Parents are the insureds but ownership of the policy requires careful planning
- Consider the use of a Third-Party Supplemental Needs Trust (with a twist)

Trust Features

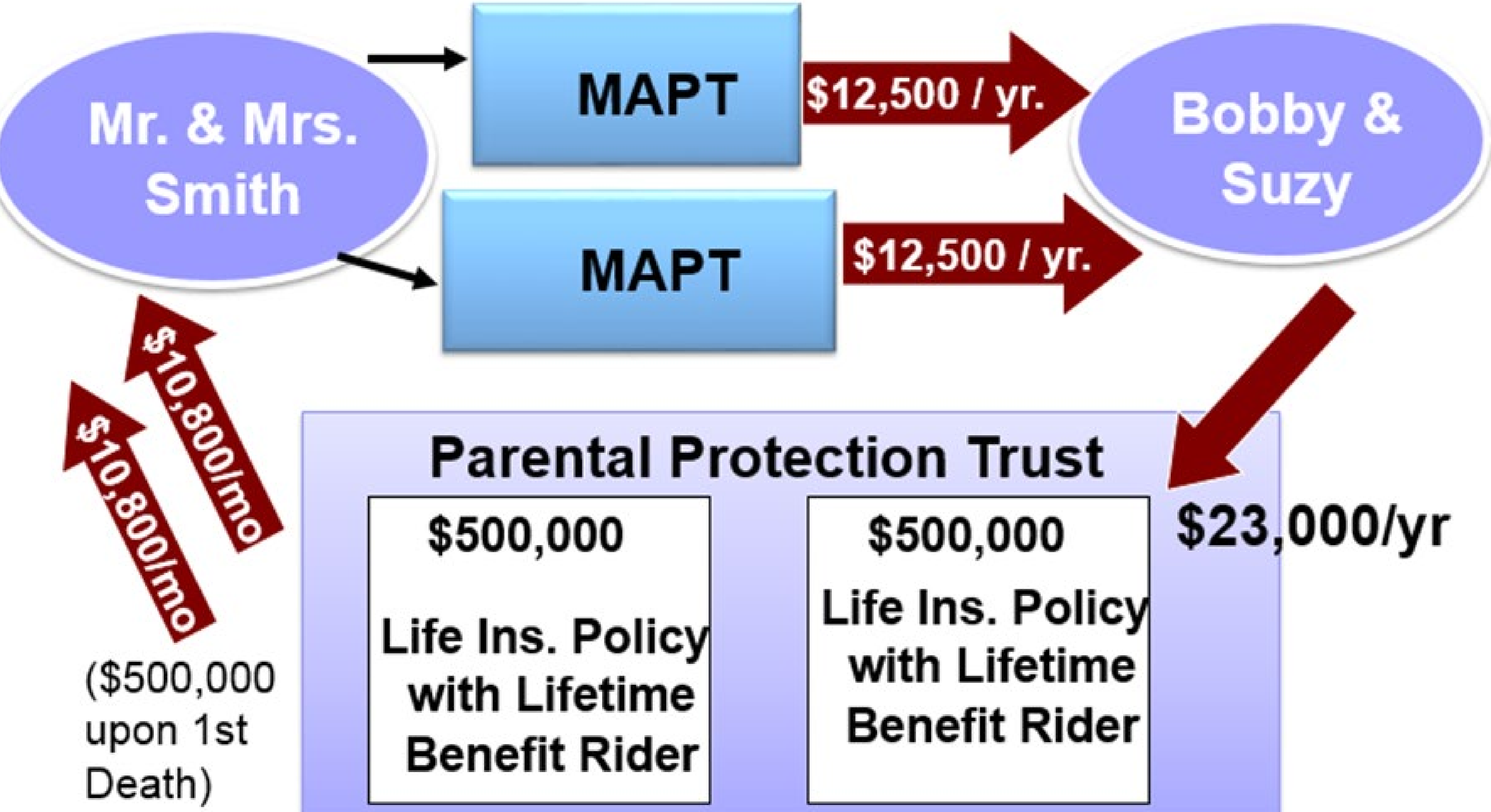
- Children create the trust and retain proportional limited powers of appointment
- Grantor trust as to the children
- Trust owns the policy on parents’ lives
- Long-term care benefits are payable to the trust (must be an indemnity benefit)
- Trustees have discretion to use assets of the Special Needs Trust for the benefit of the parents

Trust Features

When one spouse dies, death benefits are held in the Special Needs Trust for survivor

- Trust terminates when last beneficiary dies
- Death benefits are payable to the children or held in further trust
- The Parental Protection Trust can be combined with Medicaid Asset Protection Trusts to provide both insurance and Medicaid coverage

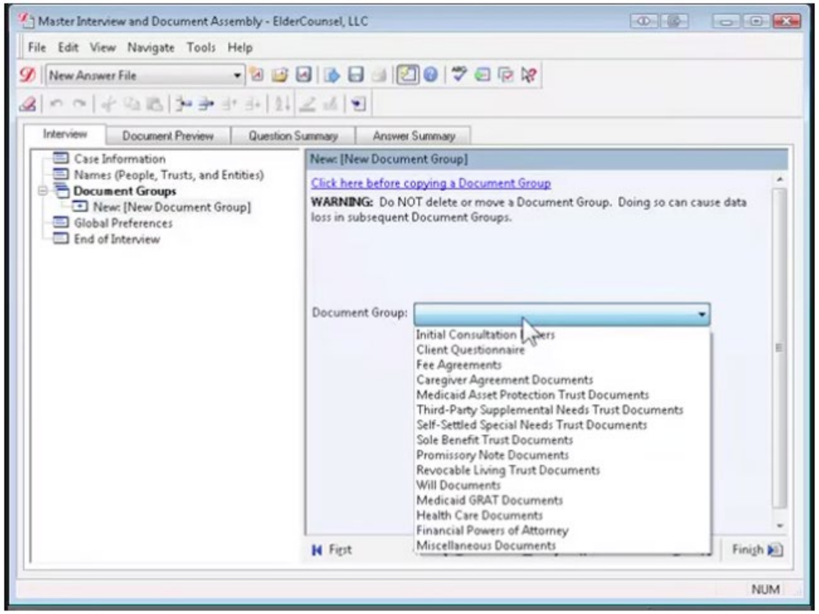
The Estate Optimizer™



ElderCounsel – a Resource

ElderDocx® Drafting Software

- Comprehensive elder law, special needs and veterans benefits planning software
- P-Note Calculator
- Design sheets for every trust document
- Expanded help screens
- Warnings for state specific issues
- Content support



Collaborations

- Elder Law Attorneys
- Financial Planners
- Accountants
- Insurance Professionals
- Geriatric Care Managers
- Banks & Trust Companies

Thank You!

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