Planning for Medicaid

4/20/2011
David E. Waterstradt

Medicaid planning is asset protection planning for those who wish to preserve assets for themselves or their families in the event expensive long-term care is needed. Some of our clients wish to plan for this in advance. In many cases, however, a family is dealing with an emergency situation where no plans have been made before their loved one suddenly faces the prospect of extended long-term care.

The Medicaid planner's toolbox has many tools, and determining which one is appropriate depends on the specifics of each situation. This article discusses a few of the available tools that are often used to achieve an individual's or a family's goals.

Advance Planning

A. Testamentary Trust for Spouse

The simplest form of advance planning for a married couple is for each spouse to create a trust under will (such as a testamentary trust) for the benefit of the surviving spouse in the estate plan. The trust must have a discretionary distribution standard so that the trustee has no obligation to use the trust assets to support the surviving spouse. The surviving spouse may not serve as sole trustee of this type of trust.

Currently, funding of a testamentary trust for the benefit of the surviving spouse is not treated as divestment by the State of Michigan and is, therefore, not subject to the rule that says asset transfers must take place five years prior to a Medicaid application in order to avoid a penalty.

B. Irrevocable Income-Only Trust

Another advanced planning method is the irrevocable income-only trust. This is a form of gift trust to which the Settlor might transfer assets, such as marketable securities, or real estate, such as a family cottage. These trusts allow the client to make substantial asset transfers and (i) choose the family member or other person who will manage the assets, (ii) protect the assets from creditors (including divorces) of his or her children and (iii) retain some rights in the trust assets, including the right to receive income.

Transfers to this trust are a gift for Medicaid purposes and, therefore, must take place five years prior to a Medicaid application in order to avoid a penalty. After the five-year look-back period has expired, the trust principal is no longer countable, although the income from the trust must be disclosed and included in the patient pay amount or diverted to a spouse as part of the community spouse income allowance.

Emergency Planning

Medicaid planning attorneys often meet with clients or their loved ones in an emergency situation. If the person requiring care is mentally incapacitated and has no power of attorney, it may be necessary to go to court to have a guardian and conservator appointed.

A. Asset Conversions

Families or individuals may convert countable assets to assets that are exempt under Medicaid law. Examples of this include spending cash on repairs to the home and prepaying funeral expenses. Our attorneys are skilled at preparing spend-down plans that allow for the safe spend down of remaining assets without incurring penalties.

B. Sole Benefit Trust

For married couples, the planning method most commonly used is a Sole Benefit Trust (also known as a Spousal Annuity Trust) for the benefit of the "community spouse" – the one who is not in long-term care. Transfers to a trust for the sole benefit of a spouse are not considered divestment under Medicaid rules if the trust meets certain requirements. There is no payback requirement with a Sole Benefit Trust. With proper planning, the assets in a Sole Benefit Trust may remain exempt, even if the community spouse dies before the spouse in the nursing home.

However, if the community spouse later requires nursing home care, the assets in the trust will be entirely countable to that spouse. At that point, it may be best to unwind the trust, either by exercise of trustee discretion or court order, and use the remaining assets to purchase exempt assets or engage in half-a-loaf gifting.

C. Half-a-Loaf Gifting

"Half-a-loaf" planning is usually used for single Medicaid applicants. It involves making a gift of approximately half the countable assets and then using the remaining countable assets to purchase a short-term annuity that, when combined with the applicant's other income, will be just under the nursing home private pay rate. The slight difference between the amount of the annuity and the nursing home rate will have to be paid out of the applicant's $2,000 that he or she is allowed to retain or paid by the donee(s) of the gifted funds. The amount that can be gifted requires careful calculations that take into account the applicant's income and the nursing home private pay rate.

D. Gift and Wait

If there are significant assets, it may be possible to save more by making a large gift and then waiting out the five-year look-back period. This strategy is often most effective if the client or the client's spouse was a veteran who served during a period of conflict. In that case, the large gift may result in the veteran being eligible for a special pension available from the U.S. Department of Veterans' Affairs for long-term care costs.

There are many other tools available to qualify an individual for Medicaid. If you have questions about options available for the payment of long-term care costs, contact David Waterstradt (dwaterstradt@wnj.com or 231.727.2698) or another member of the Trusts & Estates Practice Group at Warner Norcross & Judd.