YOUR FUTURE DESERVES

FORETHOUGHT

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Do I Really Need An Estate Plan?

"I don't need an estate plan. My situation is simple. I just need a basic Will." I wish I had a dollar for every time someone has said that to me.

Let me first say that whatever your situation is, it is not simple. It is yours, and it needs attention. Maybe you have minor children. Maybe you have adult children. Maybe you have a disabled child or grandchild. Maybe you have a blended family. Maybe you have a taxable estate. Maybe you have a child who is a spendthrift, has creditor issues or is divorced (or might be). Maybe you are concerned about future long term care costs. Maybe you have a son-in-law or daughter-in-law whom you can't stand. Maybe you have a son-in-law or daughter-in-law whom you adore. In any case, your estate plan should be reflective of your personal situation. It is not simple, it is yours, and you should control it.

Let us also demystify the term "estate planning." At its most fundamental level, an "estate plan" includes a Will, a Health Care Directive and a Durable General Power of Attorney. A Will governs who gets your "stuff" when you die and appoints someone to be in charge of the administration of your estate. A Health Care Directive appoints someone to make medical and end of life decisions for you in the event you are unable to make those decisions for yourself. Finally, with a Durable General Power of Attorney, you appoint someone to help you manage your financial affairs. Absent a Will, the state in which you reside will designate how your assets are to be distributed and who can serve as administrator of your estate at your death. That state imposed estate plan is not likely to be the "plan" that you would want. Absent Health Care and Durable General Powers of Attorney, in the event of your incapacity, guardianship proceedings may be necessary to have someone appointed to make decisions on your behalf; that someone may or may not be who you would want it to be. Take control of your affairs and make a plan.

Next, let me be crystal clear: tax planning does not happen on its own. You cannot rely on your loved ones to take steps to minimize death taxes after you are gone. If you do not take steps during your lifetime to help reduce (or, in some cases, eliminate) the estate or inheritance tax consequences which may result upon your death, your loved ones will not be able to do so after you are gone. Many of us are worth more dead than we are alive. We forget about all of those assets that add value to our estates, but which don't help us to pay our bills, like life insurance, retirement accounts and real estate. We may not feel like we need to consider tax planning, but if you are a New Jersey resident and your assets (either alone or combined with your spouse) exceed $675,000, then you need to consider some tax planning.

> Be proactive. Take away the ambiguity and the uncertainly of not having a plan. Reduce the potential for conflict and family feuding, and make a plan. Let us help you to craft an estate plan that is sensitive to your family situation and mindful of your estate tax exposure.

Medicaid Planning: Don't Go It Alone!

Last month, the New Jersey Appellate Division of the Superior Court considered two Medicaid issues which are constant thorns for Medicaid planners: Gifting and Penalties.

By way of background, let us remember that Medicaid is a poverty program. In most states, a person cannot qualify for Medicaid benefits to help pay for long term care costs unless their assets are reduced to less than $2,000. In addition, the Medicaid applicant's spouse may not have assets in excess of the Community Spouse Resource Allowance (currently, the lessor of $119,220 or 50% of the couple's combined assets), valued on the earlier to occur of the applicant entering a long term care facility or the date of the initial Medicaid application. Any gifts or uncompensated transfers to someone other than a spouse (or, certain other excepted persons) during the 60-month period preceding the Medicaid application will result in a penalty. The penalty period is calculated by taking the total amount of the uncompensated transfers and dividing it by the "penalty divisor." The resulting number is the number of months that the applicant will not qualify for Medicaid. The penalty divisor is indexed periodically for inflation and is designed to represent the current monthly nursing home cost. It is currently set at approximately $9,500 in New Jersey and $8,900 in Pennsylvania.

For example, let's say Mom gave Daughter $95,000 during the 60-month period prior to her applying for Medicaid in New Jersey. If Mom applied for Medicaid,

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the State would impose a 10 month penalty period ($95,000 of gifts / $9,500 penalty divisor = 10). Thus, for 10 months, Mom would be out of resources and Medicaid would not cover the shortfall in her long term care costs. This creates a significant hardship for families.

What if Daughter used part of–or even, most of–the $95,000 to pay for expenses on Mom's behalf? Would the State allow for a reduction of the 10 month penalty period?

According to the Appellate Division's recent holding in *C.W. v. Division of Medical Assistance and Health Services*, the answer to that question is conclusively no. The Appellate Court confirmed that there will be no reduction to a penalty period when some, but not all, of the gifts are returned. In the example above, if Daughter returned $50,000 of the $95,000 gift, the penalty would still be based on the full $95,000. No credit is given for a partial return of assets. And, no credit is given where the "gifted" assets are used to pay for items on behalf of the Medicaid applicant. Simply stated, a partial return of gifted assets does not result in a pro rata reduction of the penalty period.

This issue comes up all the time in Medicaid planning. Maybe Parent gives Child assets to hold, but then Parent runs low on funds so Child uses a portion of the money to pay for Parent's expenses or care costs. Maybe the balance of the funds transferred by Parent to Child were spent by Child (perhaps to pay for a grandchild's education) and are no longer available to be returned to Parent. Undesirable and, potentially costly, consequences then ensue.

With the court's decision in *C.W.*, we are again reminded of what a cold and unforgiving place the Medicaid world is. We implore you to not take on Medicaid or asset protection planning on your own. Let us help you to preserve assets where possible without running afoul of the Medicaid rules and regulations which could have undesirable and expensive consequences. Please contact us to discuss your long term asset protection options.

Medicaid Qualifying Annuities: What are they and why should you care?

In determining whether an institutionalized spouse qualifies for Medicaid, the couple's assets are pooled together and the "community spouse" (i.e., the spouse not receiving institutional care) is permitted to retain the lessor of fifty percent (50%) of the couple's assets or $119,220. The amount which the "community spouse" is entitled to keep is known as the "Community Spouse Resource Allowance" (the "CSRA"). In determining the CSRA, all "available resources" are considered. Thus, defining what is and what is not an "available resource" is critical to the planning process.

Federal law defines an "available resource" for Medicaid purposes as any asset that you own and could convert to cash, which cash could then be used for support or maintenance. Specifically, if you have the right, authority or power to liquidate the asset, it is considered available. 20 C.F.R.§416.1201, SSI Poms§SI0110.115. New Jersey law further defines an available resource as "any real or personal property which is owned by the applicant and which could be converted to cash to be used for his/her support and maintenance." N.J.A.C. 10-71-4.1(b). Thus, for an asset to be a resource, it must be able to be "converted to cash." Conversely, if the property cannot be liquidated and converted to cash, it will not be considered a resource.

In recent years in the Medicaid world, the use of annuities has been a point of contention between elder law attorneys and the Boards of Social Services who review applications for Medicaid on behalf of the State. Attorneys have argued, on behalf of their clients, that where certain types of irrevocable, non-assignable annuities are purchased by the Medicaid applicant's community spouse, such annuities should not be considered "available resources" because the community spouse cannot convert the annuity to cash to pay for support expenses. The State has disagreed and has argued, among other things, that where a person takes cash (or otherwise countable assets, including retirement accounts) and converts those assets into an irrevocable, non-assignable annuity, that the annuity should, nonetheless be considered an available resource.

Where structured properly, "Medicaid qualifying annuities" which (1) are irrevocable, (2) are non-assignable, (3) designate the State as primary beneficiary up to the value of the services expended by the State on behalf of the institutionalized spouse, (4) provide for equal monthly payments (and no balloon payments), and (5) provide for a term that is less than the actuarial value of the annuitant's life expectancy, have been upheld by courts in New Jersey and Pennsylvania. *Carlini v. Velez*, 947 F. Supp.2d 482 (D.N.J. 2013); *P.M. v. D.M.A.H.S. and Union County Division of Social Services; J.G. v. D.M.A.H.S. and Morris County BOSS*, (OAL Docket No. 07762-13, reversed, Dir. February 10, 2014); *James v Richman*, 547 F.3d 214 (3d. Circuit 2008), aff'd 465 F. Supp.2d 395 (M.D.Pa.2006); *Weatherbee v Richman*, 595 F.Supp.2d 607 (W.D.Pa. 2009), aff'd, 351 Fed. Appx. 786 (3d Cir. 2009).

Specifically, a community spouse can take assets which are otherwise at risk to long term care costs because they are "available resources," and purchase a Medicaid qualifying annuity (which satisfies the above

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Who's Money is it Anyway? Why it Matters for Medicaid.

Parents: How many of you have added a child to your bank account for convenience purposes? It happens all the time. You think that by adding a child as a joint owner to your bank account will make it easier for them to help you with your finances. But, this decision, made in an effort to resolve the practical problem of gaining assistance with your finances, could have unintended, and adverse, consequences.

A recent Pennsylvania appellate case reminds us just how inconvenient those joint bank accounts can be. In *Toney v. Department of Human Services*, decided August 25, 2015, the court ruled that a Medicaid applicant has the burden of proving that money in a joint account was not available to him. In that case, Samuel Toney, age 93, had a joint bank account with his son. The account held approximately $41,000. Mr. Toney entered a nursing home in May of 2014 and applied for Medicaid. The State denied the application, reasoning that Mr. Toney had too much money, attributing ownership of 50% of the value of the joint account to him.

Mr. Toney appealed the decision, arguing that the account belonged to his son. Mr. Toney's son claimed that the funds in the account came from the sale of his house, 10 years prior. The administrative law judge denied the appeal and Mr. Toney appealed. The Pennsylvania Commonwealth Court affirmed the State's decision, holding that the burden of proof was on Mr. Toney to prove who the funds in the account belonged to. According to the court, "no credible evidence was presented to rebut the presumption that [Mr.] Toney's share is presumed available to him for purposes of determining the availability of resources for his partial or total support."

In affirming the underlying decision, the court relied almost entirely on state law governing Medicaid applications in determining the ownership of the funds at issue. Specifically, the court cited 55 Pa. Code § 178.4(3)(3) and reasoned that "if it cannot be determined how much each owner contributed to a particular account, then each owner owns an equal share." Thus, in Pennsylvania, there is a rebuttable presumption that funds held in a joint account are available to all joint owners, equally.

Also, the failure to produce any documentary evidence at the initial hearing regarding the source of the funds was problematic for Mr. Toney. [Of course, the alleged sale of the son's home had occurred 10 years prior to the Medicaid application. Query how readily available records from that transaction were, considering the sale occurred 10 years prior?]

As an aside, in Pennsylvania, at Mr. Toney's death, when the account would revert in full back to his son, Pennsylvania would have assessed an Inheritance tax at a 4.5% rate on one-half (1/2) of the account value at that time, absent proof from the son that the assets in the account all belonged to him. Thus, the son would be paying taxes on assets that he contributed to the account. Again, not a desirable result.

Note that, in New Jersey, the result for Medicaid purposes would have been even less favorable. Under the facts of Toney, New Jersey would have treated 100% of the account as having belonged to Mr. Toney absent proof that the son contributed funds. Thus, all of the son's funds would need to be spent down on the father's care before he would qualify for Medicaid.

As an alternative to adding a child to your bank account, you should consider simply listing them as an Agent of the account pursuant to a Power of Attorney. As Agent, the child will still be able to access the account and aid you with your finances. However, as Agent, ownership of the account will not be attributed to

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Top 5 Reasons You Need A Trust In Your Estate Plan

1. To Reduce Taxes At Death. To be fair, not everyone needs to use a Trust to avoid taxes. But, if you are a New Jersey resident and your estate (either alone or combined with your spouse) exceeds $675,000, you should consider a Trust to help reduce the New Jersey estate tax. Or, if you are a Pennsylvania resident and want to reduce the Inheritance tax on assets passing to your children, you should consider a Trust. Or, if your estate (either alone or combined with your spouse) exceeds $5,430,000, you should consider a Trust to help reduce the federal estate tax. There are many different types of trusts that we can use to help you reduce taxes for you and your loved ones at your death. There are Disclaimer Trusts, which are established for the benefit of a surviving spouse and give the spouse a great deal of flexibility in funding after you have passed. There are also Credit Shelter Trusts, which are designed to soak-up the full amount of your estate tax exemption (for New Jersey or federal purposes) and provide you with a great deal of certainty and control. We also consider the use of Irrevocable Life Insurance Trusts to attempt to exclude life insurance proceeds from your taxable estate. We can also create Irrevocable Family Trusts, to transfer assets during your lifetime and either remove them from your estate completely or at least minimize their taxability upon your death.

2. To Protect Your Children. Parents want to protect assets for their children, whether the children are minors or adults with families of their own. When young children are involved, we use trusts to protect the assets which might pass to a minor child prior to that child being mature enough to handle the funds. When adult children are involved, there is a different set of considerations. For adult children, parents establish trusts to preserve the assets passing to their children and to protect the assets from the child's credi-

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requirements). Structured properly, the purchase of a Medicaid qualifying annuity converts otherwise countable assets into a non-countable asset (i.e., the annuity). Thus, planning with Medicaid qualifying annuities has become integral to protecting assets for our seniors where one spouse requires long term care.

In 2014, the U.S. District Court for the Western District Court of Pennsylvania held that federal law preempted a Pennsylvania law which made all annuities assignable, but further held that three separate Medicaid qualifying annuities with "short" repayment terms were sham transactions for less than fair market. Last month, the U.S. Court of Appeals for the Third Circuit affirmed the District Court decision that federal law preempted Pennsylvania's law making all annuities assignable, but reversed the District Court's decision that the short-term annuities were available resources. *Zahner v. Secretary Pennsylvania Dept. of Human Services* (3rd Cir., Nos. 14-1328, 14-1406, Sept. 2, 2015). The Third Circuit further held that an annuitant's motive in purchasing an annuity is not determinative of whether it is a resource.

The Third Circuit's holding in the *Zahner* case is another feather in the cap of elder law attorneys who desire to assist clients with protecting assets when one spouse is on the doorstep of long-term care. If you would like to hear more about Medicaid qualifying annuities, and if they can or should be part of your asset protection plan, please call our office to schedule a consultation.

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tors and in the event of divorce. Trusts for adult children can also help reduce death taxes on the child's death and can allow the parent to control how the assets are to be distributed at the child's death.

3. To Protect Assets From Long Term Care Costs.

We all fear that we will work and save our whole lives, and then have our life's savings spent on long term care costs in our later years. Irrevocable Family Trusts, which are created and funded during lifetime, can help to protect the assets transferred to the Trust from future long term care costs. When structured properly and proactively, the funding of an Irrevocable Family Trust can also allow you to still receive the benefit of Medicaid assistance to pay for long term care costs, while preserving the assets held in the Trust.

4. To Remove Life Insurance Proceeds From Your Estate.

At your death, the life insurance proceeds which are payable as a result of your death are taxable as part of your estate for New Jersey and federal estate tax purposes. Creating an Irrevocable Life Insurance Trust to become both the owner and the beneficiary of the insurance on your life (or of a second to die insurance policy) can result in that death benefit being completely excluded from your estate for estate tax purposes. (Note that life insurance is not taxable for Pennsylvania or New Jersey Inheritance tax purposes.)

5. To Preserve Government Benefits for Special Needs Loved Ones.

For anyone who has a special needs loved one, you know how tremendously important their government benefits (SSI and Medicaid, etc.) are to them. Many of the most valuable government benefits they may be receiving are needs based, which means that if your loved one has assets which exceed a very low threshold, they will no longer be eligible for their government benefits. If you pass away and you bequeath assets directly to this special needs loved one, or even leave assets to a "regular" trust for their benefit, you will jeopardize the very valuable government benefits that they may then be receiving. Instead, you should consider creating a Special Needs Trust and transferring the assets to such Trust for their benefit. The purpose of a Special Needs Trust is to "supplement, but not replace" the valuable government benefits that your loved one is receiving. By leaving assets to a Special Needs Trust, you are able to preserve their government benefits while also leaving them assets to supplement the services already being provided to them.

If you think that you or your family could benefit from the consideration of any one or more of the above, or if you have any questions about planning with Trusts at

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them, and the account will pass through your estate at your death, rather than to the surviving joint owner child. Finally, adult children should be mindful to not contribute their funds to a bank account where their parent has an ownership interest. No good can come of it—not for Medicaid, nor Inheritance Tax purposes.

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