How To Plan For Aging Parents

2022

Tully Law Group, PC

ELDER CARE LAW

HONOR & PROTECT

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TULLY LAW GROUP, PC

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Brian Andrew Tully, JD, CELA

Brian Andrew Tully is the founder of Tully Law Group, PC. He has been practicing elder law and estate planning since 1998 and has been certified as an elder law attorney since 2003.

Tully Law Group, PC focuses on helping elders and their families do three things: protect the most assets, get the best care possible and access Medicaid to pay for it.

Our comprehensive service is called Life-Care Planning, and this combines asset protection, Medicaid qualification, care coordination, nursing home advocacy and crisis intervention. The firm also provides traditional elder law, estate planning, special needs planning, probate and trust administration services.

On the national level, Brian is a member of the National Academy of Elder Law Attorneys, WealthCounsel, LLC, ElderCounsel, LLC and the Academy of Special Needs Planners.

On the state level, he is a member of the New York State Bar Association's Elder Law Section. He has also assisted in lobbying for long-term care reform and has served as a publication editor. In addition, he is a member of the New York Chapter of NAELA and an accredited attorney with the U.S. Department of Veterans Affairs.

Brian has been named to the prestigious Metro New York Super Lawyers list for 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019 and 2020 and Lawyers of Distinction for 2017, 2018 and 2019.

Publications include:

• American Institute of Certified Public Accountants' (AICPA) publication "The CPA's Guide to Long Term Care Planning"

• Wealth Counsel's "Estate Planning Strategies"

• "Health Care Decision Making in the Elder Law Practice," included in the Elder Law Portfolio Series, released by Aspen Publishers

• American College of Trust and Estate Counsel (ACTEC) Law Journal, "The Growth and Business of Elder Law", Volume 46, Issue 1

•Trusts & Estates Journal, "Elder Care: Wealth or Health?"

Other professional memberships include the Suffolk and Nassau County Bar Associations and the Christian Legal Society. Brian is also the president of the ElderCare Resource Center, Inc., which provides support, answers and expertise regarding advance planning and informed decision making about long-term health care. The Resource Center offers over 200 books and brochures, a website with over 2,500 links (www.ElderCareResourceCenter. Info) and a comprehensive referral database.

Brian Andrew Tully is certified as an Elder Law Attorney by the National Elder Law Foundation, which is not affiliated with any government authority. Certification is not a requirement for the practice of law and does not necessarily indicate greater competence than other attorneys experienced in this field of law.

Introduction

Do you know someone currently in a nursing home? Have you ever thought about going into a nursing home yourself? Most people answer the first question "yes" and the second question "no." It is one of those situations where we feel, "It could never happen to me." But studies show that approximately two (2) out of every five (5) people reaching age 65 will need some type of long-term health care. You are likely one of the many people who would prefer to stay at home, no matter what the cost, but, without the proper planning, the lack of available services and the staggering price tag may leave you with few alternatives.

The average cost of nursing home care in New York State is over $140,000 annually in the upstate area, and over $190,000 per year in the New York metropolitan area, and it is climbing each year!

If you choose to stay at home, where most of us would prefer to be, and hire home health aides, the cost of your care could be even more. In some cases, people pay over $200,000 per year for 24-hour-a-day home care. What many people fail to realize is that their health insurance and Medicare will not cover the cost of long-term care, whether at home, in an assisted living facility or in a nursing home.

The causes of our long-term care crisis are many: increasing costs, growing population of seniors, poor government management, medical technology resulting in greater longevity (whether in good health or bad) and the inability of families to care for our elderly at home. The result of the crisis is that we must all "rethink" the way we plan for the future, and take into consideration the very real possibility that long-term care may become a part of our lives.

The Cost of Long Term Care

On Long Island, the cost of nursing home care ranges from approximately $160,000 to over $240,000 per year. That is approximately $430 to $650 per day. Home health care costs vary widely, but agencies charge anywhere from $20 to $35 per hour for home health aides. Other areas of New York State and the country may differ slightly, but paying for long-term care has become a primary concern across our state and the nation.

Life Care Planning is The New Way to Plan

Due to the increase in chronic care illnesses, the Life Care Plan is a new specialty of elder law emerging around the country. While traditional elder law or "Medicaid planning" law firms focus on saving the elder's money for the next generation, Life Care Planning law firms focus on maximizing the elder's quality of life and independence. In essence, Life Care Planning helps people find and pay for good care for life by bundling asset protection, public benefits qualification, care coordination, nursing home advocacy and crisis intervention.

A Life Care Plan can provide the road map that allows an elder to follow through to achieve his quality of life and care and long-term care financing goals. There are three principal goals of the Life Care Plan that we help the elder and family develop and implement:

•We help make sure that you or your loved one gets good care, whether that care is at home or outside the traditional home setting. This is the most important of all goals, for it goes to the very heart of your quality of life in your later years. Your Life Care Plan is focused first on your good health, safety, and well-being.

•We help you make decisions relating to your long-term care and special needs. We are your resource of experienced, supportive, knowledgeable, and objective advisors.

•We help you find sources to pay for good long-term care. We work with you through the maze of choices and options to find the best or, often, the most comfortable solution to the asset protection problem created by the need to pay for quality long-term care.

Your Care Questions Answered

As your loved one ages, we will continually help you answer your questions about your long-term care and health care choices:

•What health care, chronic care, and long-term care services are available to me? How can I get the good care I need and desire, whether in my own home, in a residential community or assisted living facility,

in a child's home, or in a nursing home?

•How will financial and health care decisions be made for me if I cannot make them for myself? Who can I rely on to make sure that the decisions to be made are the right ones?

•If I can't take care of myself, who will make sure my spouse continues to have a good quality of life?

•If there is a health care crisis, what will we have to do? Where do we turn for the help we need?

•How do I know I am getting good care?

•Who will advocate and intervene for me, if necessary, to ensure my right to quality health care and long-term care?

Your Legal and Financial Questions Answered

A Life Care Plan also helps you and your loved ones answer other pressing questions as well:

•How do I ensure my financial security as I get older?

•What public benefits am I entitled to, and what do I have to do to qualify for them?

•Should I rely on Medicaid or other government benefits to help pay for my care? How do I apply for benefits?

•What kinds of insurance do I need? Should I buy long-term care insurance? Should I join a Medicare HMO?

•How and when should I distribute my assets?

•Can I save taxes and avoid probate?

•Do I have to spend all of my money on my care, whether in my home or in a residential care facility such as a nursing home? How can I protect my assets to take care of my spouse, to ensure I get good care, or to leave to my children?

•How do I provide for family members with special needs?

Who Benefits From Life Care Planning?

Any senior with a health condition that has the potential to impact their ability to care for themselves. Caregivers also benefit from the support offered by the Elder Care Coordinator in finding and securing quality care and having a knowledgeable person to turn to when problems arise.

What is An Elder Care Coordinator?

An Elder Care Coordinator is a professional, such as a social worker, counselor, nurse, or gerontologist, who specializes in assisting older people and their families to attain the highest quality of life, given their circumstances. An Elder Care Coordinator will:

•Help clients and families identify care problems and assist in solving them.

•Assist families in identifying and arranging in-home help or other services.

•Coordinate with medical and health providers.

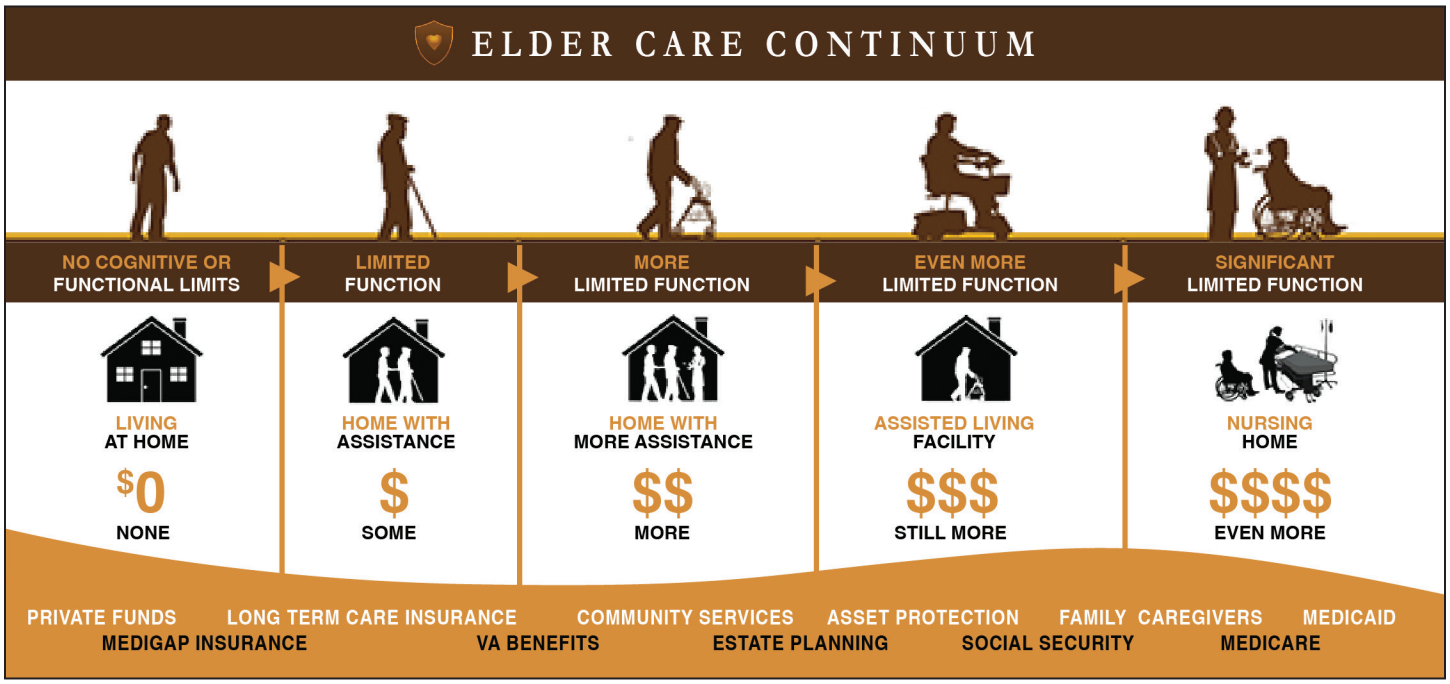
•Review medical issues and offer referrals to other geriatric specialists to provide appropriate care while conserving financial resources.

•Provide support, guidance, & advocacy during a crisis.

•Help with coordinating transfer and transportation of an older person to or from a retirement complex, assisted care living facility, or nursing home.

•Provide education.

•Offer counseling and support. The Life Care Plan utilizes the elder care continuum and connects your concerns about long-term health care as you go through the later stages of your life with the knowledge and expertise of an Elder Law Attorney and an Elder Care Coordinator who will be with you and your loved ones every step of the way to assist you in making the right choices.



Medicare

Contrary to the belief of many seniors, one cannot rely on Medicare for payment of long-term care costs. Although Medicare is available to most individuals age 65 or older, coverage is limited to: qualified medical expenses (80% of an approved amount for doctors, surgical services, etc.); hospitalization for 90 days per benefit period with a deductible of $1,556 (total) for the first 60 days and a co-payment of $389 per day for the remaining 30 days, and an additional one-time, lifetime benefit of 60 days, with a co-payment of $778 per day (for a maximum of 150 days); and post-hospital skilled nursing home care with payment in full for 20 days and a co-payment of $194.50 per day for 80 days (maximum of 100 days). Medicare only pays for nursing home care if the care provided is considered "skilled care," which is care provided under the supervision of a doctor requiring skilled professionals, as opposed to "custodial care," which provides basic personal care and other maintenance-level services. Home health care may be available in limited amounts, but only if "medically necessary," which is a very rigorous standard. For all Medicare benefits, there are deductibles and co-payments, which can be substantial. There are excellent insurance policies available to fill these "gaps" in Medicare coverage, appropriately called "Medigap" insurance, which must be purchased privately.

Medicare does not cover hospital costs beyond 150 days, skilled nursing home costs beyond 100 days and, more importantly, Medicare does not cover any custodial nursing home care or non-skilled home health care. It is difficult for a Medicare recipient to qualify even for the limited "skilled care benefits," and all others are considered "custodial" patients.

Private Long-Term Care Insurance

Long-term care (LTC) insurance has been around since 1974, but, in 1997, it gained widespread notoriety through federal legislation. New policies are very flexible, providing coverage for all levels of care, and should be considered part of a sound financial plan. New York State regulates LTC insurance and, in January 1992, strict regulations were put in place which set minimum standards for these policies, protecting consumers in New York.

Benefits to look for in a LTC insurance policy include: nursing home and home care coverage; sufficient daily payouts ($450 per day is a good start); elimination periods (the number of days you must be in the nursing home before benefits begin, typically 0 to 100 days); duration of benefits (two years, three years, five years, or a lifetime); renewability (make sure it is guaranteed renewable); waiver of premiums (allows you to stop paying premiums during the time you are receiving benefits); inflation protection; etc. As with life insurance, the older an applicant is, the harder it is to obtain a policy and the more expensive LTC coverage becomes.

New York State has also adopted a program which integrates long-term care insurance with Medicaid. A project funded by the Robert Wood Johnson Foundation studied long-term care insurance and its potential uses in New York State. The result was a proposal which was adopted by New York State in 1993, creating a public/private partnership between the State Department of Health and the insurance industry.

Insurance companies offer policies which bear the logo of the New York State Partnership for Long-Term Care, provided they meet certain minimum policy

requirements. The state has launched www.planaheadny.org to help educate consumers on the specifics and advantages of these types of policies. The minimum components of the policies are: a two-year benefit period for nursing home care (six years for home care); minimum daily benefits of $361 per day for nursing homes and $180 per day for home care (annually adjusted for inflation); a 3.5% compound annual increase in benefits; and other mandatory features. The inflation protection is optional for persons 80 years of age or older. If an individual purchases a policy of "Partnership Insurance," he or she will use the insurance proceeds, supplemented by the individual's income and assets, to pay for the first three (or six) years of care, which could be anywhere in the country. At the expiration of the applicable term, the individual will become automatically qualified for Medicaid, but only by New York State. All of the assets owned by that person will be exempt for Medicaid purposes, and the individual will be allowed to keep an unlimited amount of resources and still qualify for Medicaid. Income, however, continues to be available, and must be "spent down" to pay for the individual's care. The Medicaid rules and partnership rules can change annually and should be fully understood prior to buying a partnership policy.

Counseling clients on the use of long-term care insurance has become a sub-specialty of elder law, and an integral part of comprehensive estate planning.

Choosing a solid company, the right policy (partnership or traditional), daily benefit amounts, etc. calls for independent advice from a qualified professional or attorney, a service which we are pleased to provide.

Paying Your Own Way

"Self-insuring," or paying your own way, may be an option. However, on Long Island, you can expect to pay approximately $170,000 to $240,000 per year, with the average cost being approximately $200,000 annually for nursing home care, and more for better facilities. In the New York metropolitan area, the cost of care has risen dramatically, and is projected to increase at 4.4% per year. If a person has a sufficient fixed income and assets, which together produce a total annual income of $200,000 or more, this may be the way to go. But even then, what about the future well-being of the spouse, children, and families of those who need long-term care?

Medicaid

Medicaid is a government program which pays medical costs and long-term care costs. Unlike Medicare, however, Medicaid is designed as a payor of last resort, and, to qualify, you must meet strict financial and other eligibility requirements. The rules governing Medicaid are complex and require great care when planning and applying for benefits.

The following is a summary of the major points:

1. Look-Back Period: The qualification look-back period for a nursing home is 60 months, and applicants for nursing home Medicaid will need to submit five full years of financial records and documentation. There will eventually be a new look-back period for home care - please see page 12 for more information.

2. Delaying the Start of the Penalty Period: Applicants for Medicaid are assessed a "penalty" for the gifting of assets during the look-back period, which is actually a time period of ineligibility before acceptance into the program. The penalty period starts in the future when you need the nursing care and have already applied for Medicaid.

3. Counting Home Equity: Under the prior law, your home was generally treated as an exempt asset. Currently, as of January 1, 2022, if your house is worth more than $955,000, you may not be eligible for Medicaid because of your home equity. The home equity cap does not apply if the Medicaid applicant's spouse or child lives in the home. A reverse mortgage could be used to lessen the equity in your home, but the proceeds from that mortgage would probably have to be used first.

4. Annuities: Under certain circumstances, annuities would have to name the state as a remainder beneficiary.

While these changes have dramatically changed how an individual can be eligible for these benefits, some of the program's requirements have not changed. For example, an individual applying for Medicaid in a nursing home can have only $16,800 in total assets, plus an irrevocable burial fund of any reasonable amount and certain exempt assets (a car, clothing, jewelry, etc.). If the Medicaid applicant is married, and enters a nursing home while the other spouse remains in the community, the "community spouse" may keep $74,820 (or one-half of a couple's resources up to a maximum of $137,400) in assets, in addition to the home. Income must also be contributed toward the cost of care, and an individual in a nursing home is entitled to keep only a $50-per-month allowance. A "community spouse" is allowed a minimum income of $3,435 per month, with adjustments for certain items. Without proper planning, all assets and income above these levels must be spent on care or on exempt items before Medicaid can be applied for.

Individuals seeking to obtain long-term care services outside of a nursing home must utilize a different set of eligibility rules, depending upon the type of services required. One of the primary goals expressed by our clients is to remain in their own homes or at least in the most independent setting possible. Navigating the maze of community care requires an in-depth knowledge of the services available in the home, and of adult homes and assisted living facilities, and an ability to manage income and resources to maximize their value, while utilizing Medicaid services wherever available to

supplement the care provided by the individual and their family.

It is important to realize that the use of a spousal refusal in the context of community-based Medicaid is currently under severe scrutiny and may be eliminated in the near future.

Community-based Medicaid services are available through several programs, including The Personal Care Aid program, the Consumer Directed Assistance program and traditional home care. Generally, however, Medicaid does not pay for adult home or assisted living care (with limited exceptions, i.e., the ALP benefit), which, under existing rules, must be paid for privately. Please note that, as of 2013, New York began to implement a Managed Care Program that has modified the delivery of Home Care Services. This program requires more advocacy for your loved one, so please be sure to contact us if you have any questions. In addition, there now exists two health assessments which will dictate the amount of care your loved one will receive. Experienced advocacy during these assessments is crucial.

In order to access community-based care, an individual is allowed to keep $16,800 in total assets, but they may also retain the home in which they live, along with the other exempt assets listed above. Recipients of Medicaid home care are allotted an income allowance of $934 per month, although income over the $934 limit may be contributed to a "Pooled Trust," which can then be used to pay other expenses necessary to live in the community. A married couple is subject to extremely harsh rules in order to obtain community-based Medicaid, with a total allowance of $24,600 in combined assets, along with the home and other exempt property, and an income allowance of $1,367 per month combined. Detailed information on the various home care programs, and the planning available to access community-based Medicaid, is available upon request.

What if an individual gives assets away in order to qualify? As you might expect, there are old and new rules governing such transfers. When one gives money or property away, that individual and their spouse will be ineligible for "institutional" Medicaid for a certain number of months. Exceptions are made for any transfer to a spouse or a disabled child, and for certain transfers of the home to siblings or caretaker children. The transfer-of-asset rules for community-based Medicaid are undergoing significant changes. Please see page 12 for more details. While the penalty period for nonexempt transfers is still calculated the same way, the Deficit Reduction Act of 2005 has changed when the penalty period starts to run. The penalty is determined by dividing the total value of all property transferred by the average monthly cost of nursing home care in your area. The state determines this "average" each year for different regions across New York State. For example, if a Long Island resident transferred $140,120, he or she would have been ineligible for Medicaid for 10 months as $14,012 is the 2022 regional rate of nursing home care for Long Island. (Average costs in other regions are $13,415 in New York City; $13,399 in the northern metropolitan area; $11,884 in the Western New York area; $12,560 in the northeastern New

York region; $13,376 in the Rochester area and $11,328 in the Central New York area.)

Depending upon the fair market value of the assets transferred, the penalty period could extend well beyond five years. In that case, the "look-back" period will become relevant. When applying for Medicaid, the County Department of Social Services or the New York City Human Resources Administration will ask for financial records, bank statements, tax returns, etc. for a full 60 months. A thorough analysis of all transactions within the look-back period and the resulting penalty period must be undertaken prior to filing for Medicaid. Our firm provides services that include advice on Medicaid eligibility, preparation and filing of the Medicaid application, and advocacy and litigation services for Medicaid denials, spousal claims and estate recoveries.

Below are a few of the terms and concepts with which you should be familiar when considering the benefits of accessing the Medicaid system to help finance long-term care:

• **Look-Back Period.** The "look-back" period (i.e., the period of time prior to the Medicaid application for which you will have to provide financial information) is currently 60 months under the DRA. All transactions within the applicable look-back period will be examined for nursing home care, but not for community care.

• **Penalty Period.** There is no cap on the length of a penalty period imposed because of an uncompensated transfer of assets within the applicable look-back period, which is calculated by dividing the value of the transfer by the "regional rate." As such, an informed Medicaid applicant will wait a full 60 months from the date after larger post-DRA transfers were made before filing his or her Medicaid application, at which point the transfers need not be disclosed and, therefore, will not be taken into consideration for eligibility purposes. Regardless, it may be prudent to retain sufficient resources to pay privately during the penalty period or obtain long-term care insurance for this period to avoid using private assets to pay for nursing home care during this 60-month term. Again, there is no penalty for community-based Medicaid.

• **Jointly Held Assets.** If assets are held in an account by a Medicaid applicant and another individual as "joint" owners, and funds are withdrawn by either individual, it will count as a transfer against the Medicaid applicant. For example, withdrawal of funds from a "joint" bank account by the child of a Medicaid applicant will be treated as though the Medicaid applicant parent had transferred the funds to the child. In addition, funds held in a joint account in a bank or similar financial institution will be presumed to be owned entirely by the applicant. If both signatures are required to withdraw funds (i.e., some brokerage accounts require all named owners to sign), only half of the value will be counted as belonging to the applicant. Each asset should be evaluated to determine ownership and ownership rights.

• **Home Care Medicaid Benefits.** Significant changes are underway for Home Care Medicaid eligibility. Historically, Community Medicaid never had a look back period and therefore no penalties could be assessed upon application. While this is still the case, a new law was signed in 2020 creating a look-back period of 30 months for all home care applications filed after October 1, 2020. The implementation of this new law has been postponed due to the continuing Covid-19

pandemic. Please visit our website for up-to-date webinars addressing these continual changes. Once an implementation date has passed then all applications for Community Medicaid after that date will have a look back period to October 1, 2020 to a maximum of 30 months. The general recommendation is to undertake all asset protection and file for these valuable benefits before the new law is implemented.

• **Trusts.** If assets are held in a revocable trust, they are all available for Medicaid purposes. An individual who establishes an irrevocable trust (otherwise known as a "Medicaid" trust) will protect the assets held by the trust after the expiration of the applicable penalty period imposed as a result of the transfer of property into the trust. Income generated by assets held in the trust may be considered available to pay for the cost of long-term care. If assets are held by a community spouse, the state may have the right to recover all Medicaid paid on behalf of the applicant spouse. These rules are evolving and must be analyzed in each case.

• **Estate Recovery.** States are required to seek recovery of benefits paid to a Medicaid recipient from his or her estate. It has been left to each individual state to determine what assets will be included in the "Medicaid estate," which could conceivably include assets held in trust, and other partial transfers, such as deeds with retained life estates. New York State defines "estate" as the "probate" estate which is only those assets passing by will or by intestacy. However, as part of the 2011-2012 Governor's Budget, Medicaid Estate Recovery in New York was set to be expanded on July 1, 2012. Under that now-defunct law, New York was able to seek to recover Medicaid benefits paid during the recipient's lifetime against the following assets of a deceased Medicaid recipient: joint assets, retained life estates, revocable trusts, retirement accounts and undistributed income held within an irrevocable trust. Lastly, the law disallowed "grandfathering" of prior transfers. It is very important to realize that New York can always attempt to modify the law again to expand the definition of estate for recovery purposes.

• **Hardship.** New York State is required to establish procedures to determine whether the denial of Medicaid eligibility would work an undue hardship on an applicant. If an individual makes transfers "innocently," which disqualify him or her from receiving Medicaid, the state may waive the eligibility requirements. As a practical matter, these "hardship exceptions" are difficult to prove and are not often granted.

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Planning For Long-Term Care - The Irrevocable Trust

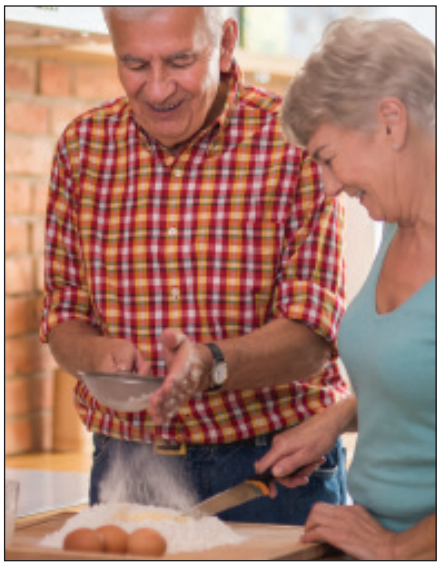
What can be done to plan for long-term care and ensure that a chronic illness will not erode an individual's security and dignity and still provide for family and loved ones? As you may have already gathered, the answer is not simple. A careful analysis of each individual's personal and financial situation must be done to formulate the proper plan. Factors such as income from Social Security, pensions and investments, the nature and value of assets, age and health, family situation, and other considerations must be evaluated in order to make the right choices. (A comprehensive questionnaire which we have prepared to assist our clients in gathering the information needed is available upon request.)

Based upon the current condition of the long-term care marketplace and Medicaid, if an individual is insurable and the long-term care insurance premiums are affordable, such policies should be integrated into an estate plan to provide protection without the need for transferring assets. If an individual falls in the "target range" for a New York State Partnership policy, the asset protection feature provided by automatic Medicaid qualification would be a valuable benefit. When income levels are high (we consider $150,000 for individuals and $200,000 for married couples to be "high" for the purpose of this analysis), or asset protection is not the only planning goal, traditional policies of long-term care

insurance using an indemnity benefit and increased home care coverage may be preferred. Again, it is important to analyze each individual's situation to determine the proper fit for a long-term care policy.

If long-term care insurance is not an option, and personal income and resources are not sufficient, one planning technique is to transfer assets into an Irrevocable "Medicaid" Trust, usually retaining the income for the "Grantor" and preserving the principal of the assets (the assets held by the Trustee) for the children or other beneficiaries of the Grantor. When properly drafted, the trust will provide asset protection, with significant tax benefits as well, including avoidance of gift taxes and elimination of capital gains taxes. In addition, trust assets will avoid probate. The trust allows the Trustee to access the principal of the trust during the Grantor's lifetime for the benefit of the Grantor's children or other beneficiaries, although the Trustee cannot give the principal directly to the Grantor. Most Grantors also choose to maintain the right (called a Special Power of Appointment) to change the ultimate beneficiaries of the trust by "reappointing" the assets to different family members at a later date. This power retains control for the Grantor and prevents transfers to the trust from being treated as taxable gifts.

A properly drafted "income-only" trust that gives a Trustee no discretion to distribute principal to the Grantor-Beneficiary, or to his or her spouse, is still a viable long-term care planning tool. Therefore, a senior doing estate planning may keep the income from an irrevocable, "income only" trust for himself or herself, with the remainder distributable to specific beneficiaries, and qualify for Medicaid without the assets in the trust being considered available by the state and county to pay for the cost of long-term care.



In addition, should the trust own your primary residence, you will have the exclusive right to occupy and enjoy the property and you should not lose any of the real estate tax exemptions you had prior to the transfer into the trust. Moreover, you can direct the Trustee to sell the residence and purchase another for you from the proceeds of that prior sale. Please note, however, that your homeowner's insurance company must be notified of the trust and that, while obtaining a traditional mortgage is not possible, a reverse mortgage may be obtained in certain circumstances.

Unlike a transfer of an asset to an individual, it is very important to note that, due to the legal protections of this type of a trust, if a personal issue should affect you, your Trustee or another beneficiary (such as divorce, premature death or court judgment), the trust property should be entirely protected, as none of these individuals have any personal ownership rights over the property within the trust.

Please be wary not to confuse a "Revocable Living Trust" with this irrevocable trust. While a revocable trust may have several benefits and uses, it is important to note that a Revocable Trust does not offer asset protection. A revocable living trust is typically implemented for asset management and probate-avoidance reasons.

While it may appear that existing planning opportunities have been limited by the enactment of the DRA, opportunities most certainly still exist, nonetheless. Several strategies have been created due to the DRA with the use of a DRA Compliant Promissory Note, becoming the most significant new tool. In addition, Caregiver Agreements, while complicated, may still be possible in the various counties. Proper advance use of the Medicaid transfer rules still allows an individual to provide

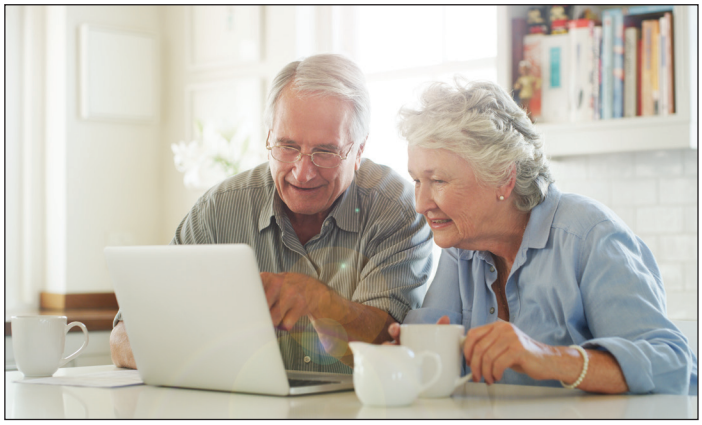
security for themselves and a legacy to their families while ensuring that they will receive long-term care.

One very important fact to remember is that, if an individual can live at home with the assistance of home health care, it is possible to transfer assets and qualify for Medicaid immediately to cover home care costs. Caution must be exercised, however, because home health care may be appropriate initially, but if the individual's condition deteriorates to the point where he or she cannot be safely maintained at home, then nursing home placement may be required. If this higher level of care is needed, a new application is required, and the Medicaid transfer rules will be imposed. Thus, when planning for home care, the possible need for institutional services must be evaluated before transfers are made.

The last caveat is that, since both New York and the federal government are attempting to modify the eligibility rules for both home care and nursing home care, timing and the proper advice are more critical than ever.

Potential Medicaid Recovery Issues

The state has mandated the counties to pursue recoveries from community spouses and the estates of Medicaid recipients and their spouses. Litigation by the Department of Social Services over the payment of Medicaid benefits is on the upswing. Once a spousal refusal has been submitted, there are issues which a community spouse should be aware of. The most significant risks to the effectiveness of your long-term care planning include the following:



1. The execution of a spousal refusal by an excess-resourced community spouse. A spouse who is deemed to have excess resources may be sued by the Department of Social Services for support on behalf of the institutionalized spouse. Even when this does occur, however, the community spouse almost always still comes out ahead because of the difference between the private pay rate and the Medicaid pay rate, which translates into a significant savings to the community spouse, even if full support is required.

2. Claims against the estate of the community spouse. A community spouse who is found to have had excess resources at the time benefits were paid may be found to have an "implied contract" with the state to pay back the benefits paid out on behalf of the institutionalized spouse. This implied contract may ultimately be enforced as a claim against the estate of the community spouse.

3. The spousal elective share right. If the community spouse dies before the Medicaid spouse, the Medicaid spouse will have a statutory right of election against the estate of the community spouse. A Medicaid trust of the community spouse will be considered to be a testamentary substitute and, therefore, included in calculating the net elective estate for elective share purposes. However, even if the Department of Social Services does move to enforce this right, only one-third (1/3) of the net elective estate is required to be paid out to the institutionalized spouse and, given proper planning, it may be possible to preserve up to fifty percent (50%) of the elective share amount for family members.

4. Transfers after Medicaid eligibility is determined. Once a spousal refusal Medicaid application is accepted, under current New York law, the community spouse may transfer assets without penalty. The federal Center for Medicare and Medicaid Services (CMS), however, has indicated that a state may treat any transfers or gifts made by the community

spouse as a disqualifying transfer for the Medicaid recipient. At this time, New York State's regulations do not adopt this policy, but there is a risk that the Department of Social Services may attempt to recover resources that have been gifted by a community spouse based upon New York's Debtor and Creditor Law, by alleging that the transfers are fraudulent. Therefore, any asset transfers done "post-eligibility" must be carefully planned and executed.

Although the risk of estate recovery exists as outlined above, in spite of gifting or utilization of an Irrevocable Medicaid Trust, these risks can be mitigated through proper planning. Despite the risks, the Grantor of an Irrevocable Medicaid Trust and his or her family is almost always better off having utilized the trust or a gifting plan. We are available to work with you to create a well-crafted and well-implemented long-term care plan.

What The Future Holds

The crisis in health care and long-term care will shape public policy for years to come. It has become clear that long-term care, such as nursing home and home health care, will not be a part of any new universal health insurance program, and that there will be continuing pressure to limit expenditures on existing programs, including Medicare and Medicaid. Therefore, it is imperative that seniors, those approaching retirement age, and the families of those needing long-term care take advantage of the planning opportunities that exist today and implement a Life Care Plan. Everyone's situation is unique, and it is impossible to discuss all of the planning opportunities in this outline. As with any planning, a good way to begin is to seek competent advice from a qualified professional. At Tully Law Group, P.C., we are dedicated to helping you find solutions to your long-term care concerns. Please call (631) 424-2800 for a consultation.

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