The Road to Peace of Mind:

Long Term Care and Asset Protection

We hope you find this quick reference helpful. For a free consultation or a full copy of our book "The Road to Peace of Mind: What You Need to Know About Estate Planning," please call us at (781) 784-2322, or click here to set an appointment for a call from a member of our team.

Introduction

The possibility of assisted living for you, your spouse, or your parents is very real. Thinking about how to pay for it can be overwhelming, but is extremely important to do.

The average cost of a private room in assisted living in Massachusetts is over $12,000 per month, and that number is expected to continue rising. This care is not covered by Medicare or regular health insurance. Though you can buy long term care insurance, those policies have become harder to get and much more expensive. If you do not have long term care insurance, it does not take long at $12,000 a month to eat away the assets you have spent a lifetime preserving for your family.

The good news is that there are ways to plan for this, and to protect some or all of your assets for your family while still qualifying for Medicaid assistance with the cost of care. This could include transferring real property and retaining a life estate or creating an asset protection trust. But you cannot wait too long- Medicaid will disregard any transfers you have made within five years of applying for benefits.

This means the time to act is now, not when you are facing an imminent need for assisted living. The rules can be complex, and you should get qualified legal advice about the right plan for your situation. We have provided some general information below to get you started.

It is important that you discuss the right plan for you with an experienced estate planning attorney. Even so, reviewing the answers to some frequently asked questions can help get you started on the road to the right plan.

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1. Who Pays for Long Term Care?

Assisted living or nursing home care is not covered by health insurance or by Medicare. The government program that does cover these costs is Medicaid, but you have to meet the strict Medicaid income and asset requirements in order to qualify. What that means for most families is that, without careful planning, the cost of long term care will be paid out of your assets until you deplete those assets sufficient to meet the eligibility requirements.

2. Can I just give away my assets in order to qualify for Medicaid/ Mass Health?

The answer to this question is both yes and no. There are ways to transfer assets out of your countable estate, but Medicaid/Mass Health will scrutinize any transfers within five years of the date you apply for benefits. This means that with some limited exceptions your planning for Medicaid should begin at least five years before you need it.

There are certain transfers you can make within the five year look back period. For example, if you purchase a prepaid, irrevocable burial plan, invest capital in making improvements to your home, or prepay certain home expenses those amounts spent will not be considered.

For the most part, however, if you want to protect substantial assets, you need to make the transfers at least five years in advance.

3. What is the five year look back period?

The look back period is a requirement of Medicaid, designed to prevent people from impoverishing themselves immediately prior to applying for Medicaid. If countable assets are transferred within that period, Medicaid will require you to find and use private funds to pay for care until you have "spent down" those assets. This is true even for charitable contributions, unless you can demonstrate that the contributions were not done in order to deplete assets for the purpose of Medicaid eligibility.

4. Can I reduce assets by deeding my house to my children?

So long as you meet the five year look back, you can make gifts outright to your family members, including transferring real property. There are some consequences, however, that you should consider.

First, you should be aware of the potential for gift tax liability for gifts to any one individual worth more than $15,000 in a single year.

Second, once you give your house away you lose all control over it, including whether you can continue to live there. For that reason, another strategy people sometimes use is to transfer the home to a child and reserve in the deed what is called a "life estate." In simple terms, this means that while your son or daughter owns the home, you have reserved a right for your lifetime to live in the home. This accomplishes two things: (i) when you pass your child will automatically have title to the home without having to go through probate; and (ii) if everything goes according to plan, it might protect your home from a Medicaid lien if you require nursing home care.

What does that mean? Technically when you have a life estate you do still have some ownership interest in the property, which means when you apply for

Medicaid/ Mass Health, Mass Health will put a lien on that property. If you pass while the home is still held this way, your interest disappears upon your death and so does the Mass Health lien.

The downside of using the life estate strategy is that it only works if the home is not sold until after your death. This can limit your options and the options of your family members while you are in care, and result in a significant loss if there is a reason the house must be sold prematurely.

5. What is an asset protection trust?

There are many different kinds of trusts, and they serve many different purposes. One kind is known as an income only irrevocable trust, which is specifically designed to protect your assets from being counted for purposes of Medicaid/Mass Health eligibility.

Assets put into a trust will belong not to you, but to the trustee. The transfer must be irrevocable- meaning you cannot later take those assets out of trust. You can, however, receive income from the assets in the trust during your lifetime. For example, if you place real property into trust and that real property generates rental income, the trustee may distribute that income to you. Similarly, if there is cash in the trust that is invested, the trustee can distribute the dividends on the investments to you.

There are certain terms that are required to meet eligibility requirements. Other than those, however, you can give the trustee as much or as little direction as you want, as with any kind of trust. For example, if some of the assets are eventually to go to children, you can specify the age at which they can receive those assets. Also like any other kind of trust, anything held by the trust at your death will pass outside of the probate court process.

6. Can I use any of the assets I put into trust?

Depending on the type of assets, yes. Most commonly the main asset placed into a trust is your home, and you can continue to live in the home and/or receive income from the rental of that property if you do not live in it. You can similarly continue to use and enjoy other assets in the trust, such as vehicles or a boat or an art collection. If the assets are money or investments, you can't "use" them directly, but you can receive income generated by those assets, such as interest or dividends.

7. Will transferring my house into trust trigger the "due on sale" provision in my mortgage?

Most mortgages or home equity loans contain a "due on sale" provision. This gives the lender the right to demand full payment of the loan if the property is sold or transferred. Federal law, however, bars the enforcement of these provisions for certain kinds of transfers, including a transfer into a trust that you make during your lifetime. So long as the trust is properly drafted, it should not trigger any acceleration by your mortgage company.

8. What if I put my house into trust and then want to move and/or downsize?

This is one of the many advantages a trust has over the simpler strategy of using a life estate. If your house is in trust and you want to move, the trust can sell your house and use the proceeds to buy a different home for you to live in or invest in something income-producing that can help pay for a rental.

9. Can I put other assets into the trust after I establish it?

Yes. Once you create the trust, you can add to it at any time. You should just know that the five year clock will start for each asset when it is added to the trust. For example, if you put your home into a trust on January 1, 2021, the five year requirement for that asset will be fulfilled on January 1, 2026. If you add another asset on January 1, 2022, the five year requirement for that asset will not be fulfilled until January 1, 2027. The second contribution will ***not*** restart the clock on the original asset placed into trust.

10. When is the best time to start thinking about Medicaid. Mass Health planning?

Because assets placed into this kind of trust cannot be taken back, it is important to balance your need for flexibility during your lifetime with the goal of asset protection. The ideal time to begin considering this kind of trust is when your children are grown and most large parental expenses (i.e., college, weddings) have been completed. For most people, this is an issue ideally addressed when you are between 55 and 70 years of age.

Whenever you create a trust, you want to be thoughtful about what to put in it, to ensure that you have sufficient means to maintain your quality of life for the years before long term care is needed. This is why many families put assets like real estate into trust and keep liquid assets, like cash, investments, or retirement accounts, outside of the trust.

Want to know more? We can help. Call us at (781) 784-2322 for a free consultation, or click here to schedule a call back from a member of our team.