

LEGAL PRE-PLANNING FOR MEDICAID ELIGIBILITY



INTRODUCTION

Incapacity planning is a broad area of law that covers how for if you become physically or mentally unable to care for yourself. The type of care could range from help with simple tasks such as buying groceries, paying bills, and handling financial matters, to making important decisions about selling real estate or gifting assets.

Incapacity planning also makes it possible to lay out a path for decisive steps toward obtaining Medicaid benefits. This means that certain provisions should be included in two types of estate planning documents: your durable property Power of Attorney and your revocable Living Trust.

If you become legally incapacitated (meaning you are unable to manage your own affairs), your trust with “medicaid triggers” comes into play by empowering your incapacity trustee to move forward with planning decisions that you are no longer legally competent to handle. . The types of decisions required in this area of planning can vary. For instance, you may outline instructions for a nursing home stay. Or you may direct that assets be repositioned to allow you to qualify for Medicaid without completely extinguishing the value of your estate, which is a decision that is not normally implemented until skilled nursing care is an inevitability.

Your Durable Property Power of Attorney document is also important for the same reasons. The POA Agent must take similar actions for assets that are not covered by your Living Trust until your death, such as life insurance, annuities, and retirement plans. Plus, the POA Agent may be the only person with legal authority to sign your name for legal purposes during the process of becoming qualified for Medicaid.

When you decide to move forward with this type of planning, it is necessary to work with a qualified estate planning attorney. This attorney will find the optimal solutions for you in the event of your legal incapacity. Because there is a 50-50 chance that the average adult will spend at least one year in a long-term care facility, it becomes painfully clear this type of planning is not only extremely important, but requires immediate attention to ensure that you and your family protect your assets.

FINANCIAL CONSEQUENCES OF AGING

Even with the knowledge that our life spans are increasing, many of us will encounter chronic or debilitating illness in our final years. While these medical challenges can change our lives dramatically in the physical sense, they can also wreak havoc in our financial lives if we haven't taken the appropriate measures to safeguard our wealth.

The average cost of nursing home care in Ohio today is between \$72,000 and \$78,000 per year, or more for high levels of care. It's easy to see how a long-term stay can easily impoverish all but the wealthiest families. Skilled nursing care in your own home is the preference for many people today, but the cost is still comparable to a stay in a facility.

The cost of long-term, skilled nursing care can even be financially challenging to relatively wealthy families. Since wealth may be invested or otherwise not liquid (i.e., not cash or near cash), there is usually a cost to making wealth liquid (cash or near-cash) so that funds are available to pay for skilled nursing care. This would include, for example, capital gains tax incurred in the sale of securities or real estate, or income tax from withdrawing funds from IRA's, 401k's, or annuities. Often there are liquidation costs as well. These costs add to the cost of the nursing care.

For example, Harry was a wealthy unmarried elderly gentleman who was suddenly incapacitated by a stroke. His wealth was all invested in stocks and mutual funds that he had owned for decades. He had a cost basis of nearly zero on his securities.

In the first year of his stay at a skilled nursing care facility, his cost of care was \$70,000, including his medications and miscellaneous matters. He only had about \$20,000 in cash, and an annual income of \$30,000. He needed an additional \$20,000 for his care, so his POA had to sell some stock and mutual funds. Estimating the combined federal and state capital gains taxes of 20%, his POA Agent liquidated \$25,000 of stock and mutual funds, so that after taxes Harry netted the required \$20,000. The total cost of the \$70,000 of care for the first year was therefore \$75,000 (\$20,000 cash + \$30,000 income + \$25,000 stock liquidation). For the sake of simplicity, this example ignores ordinary income taxes and assumes that Harry does not own a home.. In the second year, the cost would be greater, even assuming no change in the actual cost of care. That's because there is no cash left over. So, more stock would have to be liquidated, and there would be more capital gains tax to pay.

People rely on other types of assets for skilled nursing care. Many conservative investors favor Certificates of Deposit (CDs). The thinking is that a CD is secure because FDIC coverage protects the principal from loss. . This is true, but there is an interest penalty if

a CD must be liquidated before it matures in order to raise cash for skilled nursing care. So, CDs are not really liquid enough to rely upon.

Annuities are another example. Some newer annuity policies allow cash withdrawals for skilled nursing care expenses, but many people have older policies that don't include this escape clause. If you rely on cash from an annuity to pay for skilled nursing care (or even for lesser levels of care), you may be limited to certain annual sums if the annuity is already in pay-out status. You may also have to pay surrender charges if you try to take amounts that exceed these limits.

Retirement accounts can be a ready source of funds, but you will incur ordinary income taxation on withdrawals. This tax impact can be mitigated, fortunately, by the deductibility of the skilled nursing cost as a medical expense on income taxes. You should take care to balance the IRA withdrawals against the income tax deductions, however.

The point is that the cost of long-term nursing care can be burdensome even for those who think they can otherwise "self-insure" by paying for their care with their own resources. This is due to the hidden costs of paying for that care by liquidating estate assets. Moreover, self insuring depletes the estate for inheritance purposes if your income is not adequate for that purpose without invading your "nest egg."

Nursing insurance is and always has been the best way to protect your estate against for skilled nursing care costs. Today's policies are better than ever. One of the most significant improvements in long-term care policies is the coverage of in-home nursing services. But many people still have not purchased long term care protection, can't afford it, or don't qualify due to health or age. For those people, legal pre-planning for Medicaid --in case it is needed or desired later --is appropriate. "Medicaid Triggers" are the legal techniques to set the stage for Medicaid Eligibility later. Legal documents should include authorizations and powers to enable trustees and Power of Attorney Agents the ability to reposition assets, gift assets, or create trusts or other entities in the Medicaid qualification process.

With proper planning that accounts for Medicaid Triggers in your living trust and includes a durable property power of attorney, you may be able shelter assets and keep more of your family's wealth intact than if you do not plan ahead. Keep in mind that, since there is no "one size fits all" solution, a careful analysis of your situation by a competent legal advisor is your best route for incapacity planning.

REASONS TO CREATE A FORMAL LEGAL PLAN

The reasons for incapacity planning are not vastly different than the ones behind creating a will or a Living Trust. Let's review some of the general reasons why having a formal plan such as a Living Trust is so important. With a Living Trust, you can:

- ▶ Avoid the delay, time, cost and publicity of probate at death.
- ▶ Provide for a surviving spouse, other beneficiaries, or loved ones.
- ▶ Safeguard your children's inheritance from ex-spouses and creditors.
- ▶ Ensure that "special needs" beneficiaries who receive government benefits do not lose these benefits such as Medicaid, SSI and In-Home Supportive Services.

HOW IS THIS TYPE OF PLANNING DIFFERENT FROM ESTATE PLANNING?

In the arena of incapacity planning, there are legal measures you can take to ensure your wishes are honored, should you become legally incapacitated. The tools and techniques of estate planning become the tools for **asset preservation**, which is the essence of the Medicaid planning process. The estate planning tools that become the tools of Medicaid Planning include the following:

- ▶ **A Durable Health Care Power of Attorney (DHCPOA)** – This type of POA authorizes someone to make medical decisions that for you in the event of your incapacitation and inability to make your own health care choices.
- ▶ **A Living Will** – This document expresses your preferences about artificial life support and heroic measures if you are terminally ill or permanently unconscious. This critical document makes it possible for your wishes to die with dignity and to spare the agony and expense of keeping you alive on life support in a hopeless situation, can be honored by your doctors without fear of lawsuit or criminal prosecution.
- ▶ **A General Durable POA (PPOA)** – This type of power of attorney appoints your agent (also known as your Attorney in Fact) to take over your personal legal or financial affairs and to manage assets held outside your Living Trust upon incapacity (such as annuities, retirement plans, life insurance).
- ▶ **A Revocable Living Trust with Incapacitation Clauses** – This legal document appoints Incapacity Trustee(s) to take over management of your trust-owned assets for you in the event of your incapacitation.
- ▶ **Gifting Language** – This refers to special Trust language and PPOA language that may be drafted and included to outline your specific wishes. This may be important to prove

to the Medicaid agency later that gifts of assets made before applying were within the permissible actions of your PPOA agent and Incapacity Trustee.

- ▶ **Medicaid Triggers** – These “triggers,” or events, can authorize and put into motion the shift of assets out of the name of the person who is incapacitated. These are found in the Living Trust and perhaps the PPOA. Without these provisions, asset transfers to qualify you for Medicaid (“Medicaid spend down”) may not be within the legal powers of your Trustee or agent if the Medicaid agency must review them.
- ▶ **A HIPAA Authorization for Release of Protected Health Information** – The privacy regulations issued on April 14, 2003, as required by the Health Insurance Portability and Accountability Act of 1996, have created an additional requirement that can surprise consumers and professionals alike: no one other than you can receive medical information about you without a HIPAA Authorization form allowing that disclosure. Because your DHCPOA, PPOA and Living Trust require medical proof from one or two doctors that you are incapacitated before the legal appointment of your Agents or Incapacity Trustees, a HIPAA form is critical to your estate and Medicaid planning in the event of your incapacity.

All of these documents are essential to preparing for incapacitation regardless of whether there will be a Medicaid application. Medicaid triggers included in legal documents add another facet to estate planning, and are the first step to Medicaid planning.

Medicaid planning differs from estate planning because estate planning is mainly about protecting and preserving wealth by avoiding probate, minimizing death taxes, assuring the right people inherit, planning for special circumstances, and empowering someone else to care for the needs of a person who is incapacitated. Medicaid planning focuses on how to qualify for Medicaid with the lowest cost to the applicant. Despite their differences, the goals and tools of estate planning and Medicaid planning are related, and it is important to coordinate these processes.

ADDRESSING MISCONCEPTIONS

Now that you have learned about the process and rationale behind legal incapacity planning, it's important to know what your Trust with Medicaid triggers will *not* do for you:

- ▶ Your revocable Living Trust will not establish your eligibility for Medicaid, or serve as long-term skilled nursing insurance.
- ▶ It will not serve in and of itself to shelter trust-owned assets from being countable resources when applying for Medicaid.

- ▶ The income earned by trust-owned assets will not be exempt from counting in the Medicaid eligibility tests.
- ▶ The Medicaid eligibility rules are clear: assets owned by the applicant in a revocable Living Trust are countable resources. Income from living-trust owned sources is countable.
- ▶ Medicaid triggers will not guarantee your Medicaid qualification because eligibility and qualification are based on a number of financial variables and the type of illness you have.

Medicaid Triggers do not make your trust-titled assets non-countable. Rather, they authorize and outline how assets could be restructured to help you qualify for Medicaid.

If you are married, your Medicaid eligibility is not based just on your own assets. The assets of both spouses count toward eligibility. For a married person applying for Medicaid, there are planning opportunities to protect assets for the non-institutionalized spouse that do not present themselves to a non-married applicant. The rules avoid total impoverishment of the community spouse, but there are limits to be observed.

A fundamental advantage of having Medicaid Triggers included in your Living Trust and PPOA is the peace of mind that comes from knowing that the proper steps to apply for Medicaid benefits can legally be carried out on your behalf, just as if you were competent. Should a person become incompetent before including Medicaid triggers in his or her Trust and PPOA, it would likely mean these important steps may not occur, or may not be carried out as fully and effectively as if up-to-date Medicaid Triggers are included. This could lead to a loss of potential Medicaid benefits or a greater spend down of assets before you qualify for Medicaid. That's another reason to pay.

CONCLUSION

Regardless of how solid your health is today, there is no way to know what tomorrow brings. With the proper plan in place, you can rest easy knowing that you have formally outlined your wishes and made the best arrangements for you and your family, no matter what the future holds. Pay attention to this matter now, while you are still managing your own affairs.

ABOUT THE ZIMMER LAW FIRM

Zimmer Law Firm, LLC is a charter member of the American Academy of Estate Planning Attorneys. It is the only member firm in Southwestern Ohio. The Firm has been providing quality estate planning services since it was founded in 1993. The fastest growing demand for its services has been asset protection from the cost of long term nursing care. Whether

you need an Elder Law attorney, an attorney for general estate planning with trusts or wills, or an attorney to help settle an estate, our team of qualified staff are here to help you and your loved ones.

In these turbulent times, access to an experienced lawyer to protect your estate and accomplish your goals is more important than ever. If you or your family would like a complimentary consultation to discuss your estate plan or how to protect your estate from depletion to pay for long term nursing care, call us today at **513-721-1513** or visit our website at **www.zimmerlawfirm.com**. Check our website for upcoming seminars, or learn more about the firm at www.avvo.com where you will also find testimonials from our clients. See why *Cincinnati Magazine* recognizes us as a Five Star Wealth Manager. If you would like to receive email announcements for upcoming seminars, call to be added to our seminar mailing list.

A MESSAGE FROM THE FIRM FOUNDER



The goals of Zimmer Law Firm are to make asset protection and estate planning pleasant, easy, and understandable processes for clients. We believe that planning is much more than just creating legal documents. Rather it is about establishing relationships with clients and their family by providing a continuum of services through the passages of their lives. What we do makes an important difference and we take great professional pride and satisfaction in that.

If you or your loved ones would like a complimentary consultation to review your estate plan or to implement a plan, visit our website at www.zimmerlawfirm.com or call us today at 513-721-1513 (Toll-Free 1-866-799-4050) to schedule an appointment. See for yourself why *Cincinnati Magazine* has recognized the Firm as a Five Star Wealth Manager. For the latest news about estate planning or

upcoming law firm events, subscribe to our blog and “like” us on Facebook. Check our website for upcoming educational events. We continue to expand our capabilities and services to meet the demands of a complex and changing estate planning world. Our experience has shown us what was a solution yesterday may no longer be adequate to fully protect our clients today.

This report reflects the opinion of the Zimmer Law Firm. It is based on our understanding of state and federal laws and is intended only as a simple overview of the planning issues. We recommend you do not base your own planning on the contents of this report alone. Review your estate planning goals with a qualified estate planning attorney.

ABOUT THE ACADEMY

The Academy is a national organization dedicated to promoting excellence in estate planning by providing its exclusive membership of attorneys with up-to-date research on estate and tax planning, educational materials, and other important resources to empower them to provide superior estate planning services. The Academy expects members to have at least 36 hours of legal education each year specifically in estate, tax, probate and/or elder law subjects.. The Academy has also been recognized as a consumer legal source by *Money Magazine and Consumer Reports Money Adviser*, and its Education Department has been quoted by other consumer press.

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