Heritage
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Correcting Common Medicaid Misconceptions

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Medicaid planning is an extremely complex area of law, and it is no surprise that there are so many misunderstandings about how rules are applied. The following summary is intended to help you avoid falling into common Medicaid planning traps by correcting some popular misconceptions.

As you read along, bear in mind that, because of the high risk potential associated with any asset planning, you should seek the advice of an experienced elder law and Medicaid planning attorney before taking any action.

Misconception: I should transfer assets before applying for Medicaid.

For many people, the first impulse is to transfer assets before applying for Medicaid, incorrectly believing that, when they apply, the fewer assets they have, the better. But, by following this route, they may wind up spending down more than is necessary. Here's why.

The facts: When a couple applies to a state for Medicaid to support the needs of one spouse, the couple is allowed to protect a portion of their assets—limited by minimum and maximum amounts—for use by the healthy spouse. At the time one spouse enters a nursing home, Medicaid takes a snapshot of the couple's assets (i.e., an assessment). This assessment fixes the maximum share of a couple's assets that can be protected and how much of the assets must be spent down before an individual can qualify for Medicaid benefits.

In some states, a healthy spouse can retain up to $117,240. In other states, the healthy spouse is limited to 50 percent of the couple's assets, as long as that 50 percent does not exceed $117,240. Not knowing how your state's Medicaid eligibility works can hurt you. If you transfer assets before applying, your snapshot will reflect a reduced level of assets.

You may learn after you apply that you can only retain half of what you have left. This figure can be less than half of the amount you owned before you began any asset transfer.

For example: John and Jane have $215,000 in Medicaid countable assets. Before applying for Medicaid, the couple spends down $55,000 on expenses that are not penalized for Medicaid. Therefore, when John applies for Medicaid, he and Jane have $160,000. To qualify for Medicaid, the couple may be required to spend down 50 percent of what they own (i.e., 50 percent of $160,000), which leaves Jane, the healthy spouse, with $80,000. If John and Jane had applied for Medicaid before spending down their assets, they could have kept half of their original $215,000, leaving Jane with $107,500.

Misconception: Property held jointly, or in a spouse's name, is protected from Medicaid.

The facts: When determining the *resource allowance* for a healthy spouse, all of a couple's assets are pooled together, regardless of whether the assets are held jointly or individually or whether a prenuptial agreement exists. Furthermore, owning assets jointly may not protect those assets from being countable for Medicaid, especially in the case of bank accounts. Even assets held jointly by a parent and a child can be considered available to pay for nursing home care—unless the child can establish that the asset is inaccessible or did not originally belong to the parent. In some cases, the state may seek recovery for monies paid to the Medicaid patient or place a lien on certain jointly held property.

Misconception: Assets transferred to a trust are protected from Medicaid.

The facts: Perhaps . . . The use of trusts requires careful planning and a careful review of your financial needs and goals. You cannot transfer assets into a trust, retain control of those assets, and qualify for Medicaid. If you transfer assets to an irrevocable trust, you must give up complete control of those assets. Moreover, unless it is a Medicaid qualifying trust, you cannot have a right to receive trust assets. Under current law, if assets are transferred within 60 months before applying for Medicaid, they will generally be included in the Medicaid assessment, and the transfer may be subject to penalty.

In limited circumstances, state law permits Medicaid recipients to benefit from trusts, but, as mentioned above, the beneficiary is required to have no control over the assets. You can do this for yourself, which is more complicated, through a self-settled trust, also called a Miller trust, or through a special needs trust.

- *Miller* (or *self-settled*) *trusts* can help individuals with a high income and few assets qualify for Medicaid in very limited circumstances, usually in what the state deems a crisis situation. Distributions from the trust are restricted to paying for nursing home care. At the Medicaid recipient's death, some states require reimbursement from trust assets before the trust remainder can go to the family.
- *Special needs trusts* are typically established by a beneficiary with disabilities to receive settlement proceeds.
    - Special needs trusts may also be established to benefit someone else receiving Medicaid benefits. For instance, a grandparent may create a trust for a grandchild with disabilities to pay for all the extras not provided by government programs.

From a practical perspective, it is important to ask yourself a few planning questions before transferring property to a trust in anticipation of qualifying for government benefits. Are you willing to surrender complete control? Where will you obtain emergency funds? Are you willing to accept state aid rather than assume some of the benefits of privately paying for your care, such as the flexibility to choose a facility?

Misconception: Making gifts to my children is simpler and less expensive than creating a trust.

People make gifts to their children for many reasons, including protecting a parent's assets from being drained by health and long-term care costs or providing children with funds to support the parent.

The facts: According to Medicaid, any gift that a parent (i.e., the Medicaid recipient) made to a child within 60 months of applying for Medicaid assistance is available to help pay for the parent's (recipient's) care, regardless of intentions.

Misconception: Entering the nursing home as a private-pay patient requires me to use up all of my and my spouse's assets before I can qualify for Medicaid.

The facts: Many people erroneously believe that they have to be impoverished before the state will help them. Although Medicaid is for the needy, regulations are in place to protect assets for the healthy spouse. So, you are not required to exhaust all of your assets to pay out of pocket for nursing home care. Care facilities may pressure you to pay out of pocket, as they are paid less by the state. You should seek advice from an experienced elder law attorney before spending down a significant portion of your assets on the private-pay rate, particularly if your resources are limited.

Misconception: Entering the nursing home as a private-pay patient guarantees that I have a bed reserved in the same facility when I begin to receive Medicaid.

The facts: Not necessarily. Nursing homes and other long-term care facilities are required to set aside a minimum number of beds for Medicaid recipients, and unused beds cannot be reserved for and held in anticipation of future use. If a Medicaid bed is not available in the facility where you reside when your own funds run out, you may be transferred to a facility that has an available Medicaid bed. Therefore, you should give careful consideration to your needs when transferring assets. Make your intention clear to your family that, when Medicaid begins paying the bill for your care, you want to remain in the same facility.

Misconception: I can sell my house to my children for $1 and avoid a Medicaid transfer penalty.

The facts: Under Medicaid rules, transfers for less than fair market value are considered a gift. If you sell your house for less than fair market value, and you apply for Medicaid within 60 months, your benefits will be delayed until after the transfer penalty period ends. It is never a good idea to sell or gift your house in anticipation of Medicaid. If you meet certain conditions, you will not be required to sell your house in order to qualify for Medicaid.

Misconception: A reverse mortgage will protect my home from Medicaid and help provide for my care.

The facts: *Reverse mortgages* are financial arrangements that permit older homeowners to borrow from the equity in their house without having to make loan repayments. The loan is repaid when the last surviving borrower dies, sells the home, or permanently moves out.

Although the money that a homeowner receives from a reverse mortgage loan is not generally countable as an asset or income by Medicaid regulations, if your objective is to attempt to safeguard your home for your children, a reverse mortgage may not be a good idea. As soon as you (and your spouse) die, your children will have to pay off the loan, which may mean selling the home. Moreover, in some contracts, you may only stay in a nursing home for up to 12 months before the loan must be repaid.

Misconception: If I purchase an annuity, the assets in the annuity will be protected.

The facts: Often, applicants are incorrectly advised that, if an annuity is purchased, the annuity assets are no longer countable when applying for Medicaid. This is true only if the annuity meets strict standards.

An annuity purchased on or after February 8, 2006, will not avoid the Medicaid transfer penalty rules, unless it is irrevocable and nonassignable and equal payments are made over the actuarial life expectancy of the annuitant. Moreover, the state must be designated as the beneficiary—after certain exempt individuals—in order to reimburse the state for its Medicaid expenditures. Additionally, even if the annuity purchase is not considered a countable asset, the income paid to a Medicaid applicant is available to pay the cost of long-term care. As a result, an annuity is a better planning tool for a couple when the income stream is paid to the healthy spouse.

Misconception: Gifts that qualify for the annual exclusion, or gifts of tuition or medical expenses, are exempt from Medicaid transfer penalty rules.

The facts: An individual may give away up to $14,000 per individual, per year (in 2014), to as many people as he or she wants, and may make payments of tuition or medical expenses directly to the providers, without those assets being considered taxable. All gifts, even nontaxable gifts, are subject to the Medicaid 60-month look-back and penalty rules. In addition, gifts made to a 529 plan for which you are the custodian/owner are not completed gifts for Medicaid purposes and are included as resources when calculating Medicaid eligibility.

Misconception: My financial advisor and accountant can do my Medicaid planning, or I can do it on my own. I do not need to incur legal fees.

The facts: Although your advisor can help you navigate the process, it is important to seek the advice of an experienced elder law attorney. In the long run, your attempts to avoid the cost of legal fees could wind up costing you more—and be more complicated—than paying to work with your attorney.

[1]Minimum and maximum resource limits are established on a federal level and adjusted periodically. State regulations may make some modifications. For 2014, the federally established minimum amount is 23,448, and the maximum amount is 117,240.

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