

How to Plan Ahead to Avoid a Medicaid Crisis:

A Guide to Long-Term Care Planning

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PREFACE

If you or a loved one should need long-term care, but no planning in advance has been done to prepare for such an occurrence, we at Levandowski and Darpino have asset protection strategies that can make you or your loved one eligible for Medicaid to pay for long-term care without going broke in the process. In our practice, utilizing such strategies is called "Medicaid crisis planning" because they are utilized at the time of nursing home admission.

While very helpful, Medicaid crisis planning will never yield the best results. Only asset protection planning done in advance of the crisis can achieve the highest possible savings. In addition, it is quite possible, even probable, that the Medicaid laws and regulations that allow us to do Medicaid crisis planning today will change in the future making these asset protection strategies either more limited or nonexistent.

In our practice, planning in advance to avoid a Medicaid crisis is called "long-term care planning." This resource guide from Levandowski and

Darpino will provide you with an overview of how to plan ahead so that you can avoid a Medicaid crisis.

INTRODUCTION

Americans are living longer than ever before. At the turn of the 20th century, the average life expectancy was about 47 years. As we have entered the 21st century, life expectancy has almost doubled. As a result, we face more challenges and transitions in our lives than those who came before us.

Nobody wants to think that they might someday have to go to a nursing home but, with life expectancy increasing all the time, none of us knows what the future holds. If some day you do need nursing home care, why not utilize Medicaid which is accepted in just about every nursing home in our area. There are no “Medicaid nursing homes.” Planning ahead so that Medicaid is available is especially important for a married couple because each spouse wants to protect the other spouse’s financial well-being.

HOW TO PAY FOR NURSING HOME CARE

One of the things that concerns people most about nursing home care is how to pay for it. There are basically four ways that you can pay the cost of a nursing home:

1. Long Term Care Insurance - Even if you have this type of coverage, it will not pay the entire cost of the nursing home. With nursing home beds costing upwards of \$400 per day, the daily benefit of most long-term care insurance policies cannot keep up. Therefore, long-term care insurance is only a partial solution to the problem of high nursing home costs.

2. Your Own Money - This is the method most people use at first. Quite simply, it means paying for the cost of a nursing home out of your own pocket. Unfortunately, with nursing home bills averaging between \$11,000 and \$12,000 per month in our area, few people can afford a long- term stay in a nursing home.

3. Medicare - This is the federal health insurance program primarily for people 65 years of age and older. Medicare provides short-term assistance with nursing home costs, but only in certain limited situations, as explained below.

4. Medicaid - This is a federal and state funded and state administered medical benefit program which can pay for the cost of the nursing home if certain asset limits are met.

Since the first two methods of private pay (i.e. using your own money) and long-term care insurance are self-explanatory, our discussion will concentrate on Medicare and Medicaid.

WHAT ABOUT MEDICARE?

There is a great deal of confusion about Medicare and Medicaid.

Medicare is the federally funded health insurance program primarily designed for older individuals (i.e. those over age 65). There are some limited long-term care benefits that can be available under Medicare. In

general, if you are enrolled in the traditional Medicare plan, and you've had a hospital admission that lasted at least three days, and then you are admitted into a skilled nursing facility (often for rehabilitation), Medicare may pay for a while.

If you qualify, traditional Medicare may pay the full cost of the nursing home stay for the first 20 days and may continue to pay the cost of the nursing home stay for the next 80 days, but with a deductible of \$170.50 per day (in 2019). Some Medicare supplement insurance policies will pay the cost of that deductible. So, in the best case scenario, traditional Medicare may pay for up to 100 days. In order to qualify for this 100 days of coverage, however, the nursing home resident must be receiving daily "skilled care" and generally must demonstrate that the skilled care is actually doing some good.

While it's never possible to predict at the outset how long Medicare will cover the rehabilitation, from our experience it usually falls far short of the 100 day maximum. Even if Medicare does cover the 100 day period,

what then? What happens after the 100 days of coverage have been used?

At that point, in either case you're back to one of the other alternatives... long-term care insurance, paying the bills with your own money, or qualifying for Medicaid.

WHAT IS MEDICAID?

Medicaid is a benefits program which is primarily funded by the federal government and administered by each state. Sometimes the rules can vary from state to state.

One primary benefit of Medicaid is that, unlike Medicare (which only pays for rehabilitation in a skilled nursing facility), the Medicaid program will pay for long-term care in a nursing home once you've qualified. Note that Medicaid is not paying for medical care in the nursing home. Rather, Medicaid is paying for what is known as "custodial care." That means help with activities of daily living, such as dressing and bathing. Medicare does not cover custodial care.

WHY SEEK ADVICE FOR MEDICAID?

As life expectancies and long-term care costs continue to rise, the challenge quickly becomes how to pay for nursing home care. Many people cannot afford to pay \$11,000 to \$12,000 per month or more for the cost of a nursing home, and those who can pay for a while may find their life savings wiped out in a matter of months, rather than years.

Fortunately, the Medicaid program is there to help. In fact, in our lifetime, Medicaid has become the long-term care insurance of the middle class. But the ability to receive Medicaid benefits requires that you pass certain tests on the amount of assets that you have. The reason for long-term care planning in advance, in order to qualify for Medicaid when you need it, is simple. First, you need to provide enough assets for the security of your loved ones, those you want to protect. Second, the rules are extremely complicated and confusing. The result is that without planning and advice, many people spend more than they should and their family security is jeopardized.

LONG-TERM CARE PLANNING

At Levandowski & Darpino, we have a different perspective on writing Wills, financial powers of attorney and health care directives than attorneys who do not practice elder law. We know what actions a client's family will need to take as the client ages, especially if the client eventually requires long-term care. We include provisions in our estate planning documents that will maximize the opportunity for the family to preserve the client's home and life savings while, at the same time, getting the best possible care for the client and insuring that the client's wishes regarding their health care are understood and honored. This approach to estate planning documents, along with strategic use of an asset protection trust, is the essence of long-term care planning and it is what distinguishes us from traditional estate planners.

“Enhanced” Financial Power of Attorney

Few people realize how critically important the financial power of attorney is. Also, you should know that the documents available in the marketplace are not all the same, whether you get one online, at an office supply store, or from an attorney who does not practice elder law.

The person who signs a power of attorney is called the “principal.” The person appointed to handle their financial affairs is called their “agent.”

The agent only has the authority to do what is expressly permitted by the power of attorney document. Most power of attorney documents do not permit the agent to take the actions that may be necessary to preserve the principal’s assets in the event the principal needs long-term care. For example, our first priority when we plan for a married couple is to protect their home and life savings for one spouse if the other spouse needs long-term care. However, we have seen many power of attorney documents from other attorneys that do not permit the agent to take the actions necessary to accomplish that very important goal. If the power of

attorney is not sufficient, or if one has never been executed, the family must go to court to get a guardianship, after which all financial actions have to be approved by a judge. A judge does not supervise your agent under a power of attorney so no court action is required when the provisions of the power of attorney document are sufficient to accomplish the family's goals.

At Levandowski & Darpino, we offer an "enhanced" financial power of attorney that has specific language regarding gifting, trusts, beneficiary designations and other issues critical for asset protection purposes.

Under Pennsylvania law, your agent is not presumed to have these powers without express language in the document.

The gifting, trust and beneficiary designation powers contained in the "enhanced" power of attorney will give your agent all of the legal authority necessary to take actions to protect you and your assets in the future, if you are not able to do so because of a disability. Since no one

knows what the future holds, in terms of your circumstances, government programs that deal with long-term care, or laws governing long-term care, the only way to adequately protect yourself is to appoint a person who you trust to act for you if you are not able to act on your own. This is what the "enhanced" financial power of attorney does for you.

Medicaid Protection Wills for Married Couples

Most married couples have what can be called "I love you" Wills. Such a Will says that the surviving spouse will inherit everything, and then, at the death of the surviving spouse, the estate will go to other heirs, usually the children.

Here is a possible scenario that should be protected against: one spouse is in a nursing home and getting Medicaid benefits and the spouse living at home dies first. If this should happen with the couple having "I love you" Wills, the entire estate could be lost because Medicaid would force the spouse in the nursing home to spend down the estate. You might

think that this situation can be avoided by both spouses executing Wills saying that, if the surviving spouse is in a nursing home, the estate goes to other heirs, such as children. However, it is a little more complicated than that. Under Pennsylvania law, one spouse cannot completely disinherit the other; a surviving spouse always has a right to one-third of a deceased spouse's estate no matter what the Will says. Because of this law, Medicaid would force the surviving spouse to take "against the Will" which puts one-third of the estate at risk and creates a complication for the executor. In the Medicaid Protection Will which we provide for our clients, there will be language which can protect the entire estate and simplifies estate administration for your executor because the surviving spouse will be "bypassed" with respect to two-thirds of the deceased spouse's estate (meaning two-thirds of the estate goes to heirs other than the surviving spouse) and one-third goes to a special type of trust for the benefit of the surviving spouse.

Medicaid Asset Protection Trust

For our clients who are in good enough health that they don't expect to need nursing home care in the next five years, it is very wise to consider an asset protection trust. The purpose of such a trust is to protect the client's home and, possibly, other real estate and/or financial assets from Medicaid. Note that putting the home in an asset protection trust does not adversely impact the client at all because the client retains the right to live in the home for as long as they want and the client retains all the tax benefits of home ownership.

It is best to establish and fund your trust sooner rather than later because Medicaid has a five year look back. Five years and one day after the trust is established, the assets in it are safe and the client can get Medicaid benefits without Medicaid being able to consider the property in the trust. If the client should unexpectedly need nursing home care before the five years have passed, the long-term care plan and the trust can be modified, provided, however, that the client can still manage their own affairs (which is usually not the case if they are in a nursing home)

or the client's financial power of attorney document includes the necessary "enhanced" trust powers as discussed above.

You should be aware that what is commonly referred to as a "revocable living trust" does not protect assets from Medicaid. Some people have this type of trust as a substitute for a Will. Unfortunately, we have found that sometimes clients were sold a revocable living trust as a way to protect assets and to avoid Pennsylvania inheritance tax. It does neither.

The asset protection trust that we use in long-term care planning is an irrevocable trust. Note that the term "irrevocable" need not scare you. It does not mean that property you put into the asset protection trust is locked up forever and you lose all control over it. We can show you how an irrevocable asset protection trust can be changed if circumstances change and how property in the trust can be accessible.

You can even continue to receive income from property after you put it into the trust. For example, you can continue to receive rents from a rental property even though it is in an asset protection trust.

Also, you should beware of giving away assets to your children (or to anyone else) to hold for you for the purpose of protecting those assets from Medicaid. People who do this are often unaware of the risks involved. For example, we have seen many cases where someone has deeded their home to their son or daughter for \$1.00, but intended to still consider it their home and live there. After five years and one day (the running of the Medicaid look back) the home is protected from Medicaid. However, there are two problems with this strategy. First of all, the gifted assets would be subject to creditors of the recipient of the gift. If the recipient gets divorced or sued, goes bankrupt, or dies, the gifted assets could be lost because the property is legally owned by the recipient after you give it away. Also, if the home is sold, the capital gains tax exemption is lost. Using an asset protection trust to protect the home has neither of these problems.

Irrevocable Funeral Trusts

This is actually an insurance product set up in a trust to pay for future funeral costs. Setting up such a trust is not considered a transfer of assets by Medicaid and is not subject to the five year look back. We can provide this type of trust to clients who want to pre-pay funeral costs without creating any Medicaid problems.

Note that each county in Pennsylvania has its own limit on how much you can put aside for a funeral. It would be wise to consult with us before you make any arrangements to prepay a funeral.

Health Care Power of Attorney and Living Will (also called Advance Directive)

If someday you are in a health crisis and are unable to communicate your health care decisions, your doctor will turn to your loved ones for direction. At Levandowski & Darpino, we believe it is very important for each client to designate who will make their health care decisions if they cannot, and to rank the decision-makers in the order in which the

client would want them to serve. This is done in the health care power of attorney. The purpose of the ranking is to avoid the scenario where two people with equal decision-making authority disagree, in which case the family would be forced to go to court to have a decision-maker appointed by a judge. Of course, we hope your family members would all be in agreement but we have seen unfortunate situations where that was not the case.

We encourage our clients to discuss their wishes with their families. If the client feels they would not want “extraordinary measures” if they were close to death, we can provide a living will (also called an “advance directive”) in conjunction with the health care power of attorney. We like to tell our clients that they are giving their loved ones a gift by putting their wishes in writing.

WHY PLAN AHEAD?

The goal of long-term care planning is to avoid a Medicaid crisis. A Medicaid crisis is a situation where you or a loved one needs nursing home care either right now or in the near term without having protected assets ahead of time. Such a situation always puts a family under great financial stress. After all, not many people can afford to pay \$11,000 to \$12,000 per month for long without going broke. Planning ahead to make Medicaid available to pay for the nursing home will relieve the financial stress. Such planning will make Medicaid available without having to spend down all of your assets. Your spouse will not be impoverished. You will not be a burden to your children. You will be able to leave something to your grandchildren for their education.

Because of the five year look back you must plan when you are in good health. Also, having the luxury of time on your side gives you more control. You decide what assets to put into your asset protection trust and

you decide who will handle your affairs for you if you become disabled and are not able to do so.

HOW WE CAN HELP

The Medicaid laws and regulations are very complex. Levandowski and Darpino, as elder law attorneys, have devoted their practice over the last 20 years to the ever-changing complexities of Pennsylvania Medicaid and long-term care planning.

Here are the components of a long-term care plan:

- We gather and analyze all necessary information in order to determine what you need in your individualized long-term care plan.
- We draft and you execute "enhanced" financial powers of attorney.
- We draft and you execute Medicaid Protection Wills (for a married couple).
- We draft and you execute healthcare powers of attorney which include living wills if so desired.
- We create an asset protection trust customized to your needs.

-We fund the asset protection trust (we prepare and record deeds for real estate and assist you in dealing with asset transfer requirements of financial institutions).

-We review all of your beneficiary designations (insurance policies, retirement accounts, etc.) and we implement any changes that may be needed in order to coordinate with the long-term care plan.

-We hold as many meetings and/or telephone calls with you and/or your advisors as may be necessary to implement your plan.

The planning process begins with an initial consultation with Henry or Maria. [Click here](#) or call us at 610-446-9626 to schedule your initial consultation.

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