A BASIC OVERVIEW OF ELDER LAW PLANNING CONSIDERATIONS

by: Christine J. Sylvester*

Over the past decade, we have witnessed amazing movements in the area of health care wherein medical science has provided our clients with the ability to live longer. This is of particular relevance as the "baby boomers" prepare for retirement and seek information on how to sustain and preserve their quality of life. In addition, the growth in our economy has brought forth a new meaning of "middle class" while also moving family members away from their original family unit in search of employment and economic independence. This environment is certainly ripe for the elder law attorney as we prepare our clients and their families for the possibility of long term care. Statistics show that the fear many individuals have regarding long term care is not unfounded:

-43% of the population 65 and over will spend time in a nursing home;
-Half of those who enter a nursing home will average nearly 3 years;
-21% (1 in 5) of those who enter a nursing home will spend 5 years or more;
-70% of couples over 65 will experience nursing home care for one spouse or both;
-Nearly 2 million Americans wake up in a nursing home every morning; and
-Another 10 million Americans receive formal or informal care outside of a nursing home.

This presentation is meant to assist the advisor in identifying areas of need and to provide general guidance as you discuss the importance of long term care planning with your client(s) and their families. Preparing your client for this potential risk is a value added service that should be addressed sooner rather than later.

ESTATE PLANNING FOR THE ELDERLY

You are in your first consultation with a healthy middle-aged couple discussing the distribution and handling of their estate upon death. Great detail is brought forth regarding the children, their achievements and failures, and the manner in which they wish their family to manage and inherit their estate. Upon completion, it is now time to open a discussion about the distribution and handling of their estate during life. In this area of planning, there are several topics which should be addressed.

1. Legal Documentation

Currently, we have three legal documents which you can offer your clients which will prove invaluable during any period of incapacity.

a. Durable General Power of Attorney

This is by far the greatest tool in the area of elder law. However, it has been my experience that many individuals are fearful of this power in light of the abuse witnessed by the client with friends, neighbors or family members. It is therefore advisable to carefully discuss the scope of the power and possible inclusion of the following provisions:

-Gifting Powers – to whom and any possible limits
-Attorney-in-fact's ability to deal him himself/herself – lease
-Power to change domicile
-Power to renounce/disclaim
-Power to enact the agency position

b. Last Will and Testament

As attorneys, we are all aware of the basic provisions to be included in such documents regarding tax planning, if applicable, executor provisions and powers as well as distribution upon death. As an elder law advisor, we should also be mindful of the possible disability of the benefactor. This possibility brings forth further discussion on the following:

-Possible disclaimer by the agent of a disabled benefactor
-Discretionary trust for a disabled spouse
-Special needs trust for a disabled child (see attached, Exhibit A)

c. Health Care Power of Attorney

The Health Care Power of Attorney is the document wherein a client designates an agent who can make health care decisions whenever the client is unable to make or communicate such decisions. North Carolina has a statutory form which is very broad regarding these powers. When a client is prepared to execute such a document, it is advisable that the client fully discuss his/her specific desires with that chosen agent. Attached (Exhibit B) you will find a sample memo for discussion which this office presents to clients in addition to the executed Health Care Power of Attorney. We strongly recommend that the client use this tool to open discussion with their family regarding specific areas of concern and desire. You will also recall that North Carolina recently added a category regarding mental health to the statutory language. Before this language is included in your client's document, a thorough discussion of its impact is warranted and it has been my experience that inclusion of that language is inappropriate under most circumstances.

d. Declaration of Desire for a Natural Death (Living Will)

This is the document wherein a client declares that he or she does not want his or her physician to employ extraordinary means or artificial nutrition and hydration if the client is either terminally and incurably ill or is in a persistent vegetative state. In October of 1991, North Carolina provided the client with the option of specifically including or excluding artificial nutrition or hydration as extraordinary means of life support. If your client executed such a document prior to October 1991, their living will may not authorize the withholding of artificial nutrition and hydration. The North Carolina legislature is presently considering the establishment of a central registry for organ donations, living wills and health care power of attorneys. It appears that they will be accessible through the World Wide Web and there will be a user fee. This is still under discussion but anticipate a decision in the near future.

e. Revocable Trusts

For the client who financially expects to personally cover any potential long term care costs, the revocable trust is an excellent tool for purposes of asset management during lifetime and asset distribution upon death. In that the trust is revocable, the rules provide that all assets titled in the trust name remain accessible to the grantor for tax purposes and Medicaid purposes. This fact is greatly misunderstood by many elder clients and their advisors. Should a client anticipate the need for governmental assistance with long term care costs, provisions need to be included in the trust agreement providing the acting trustee with the authority to terminate the trust agreement if such termination is in the best interest of the grantor, or allow the acting power of attorney to remove assets from the trust agreement upon demand. In drafting these trust agreements for those clients who will benefit from its use it is also important to consider disability provisions wherein should the grantor become incompetent, the trustee is instructed to utilize the principle and income of the trust not only for his/her lifetime benefit but also for the lifetime benefit of his/her spouse or disabled child.

f. Irrevocable Trusts

In light of the great controversy surrounding the use of these trusts, the attorney must address the use of this vehicle with caution. There are tax planning reasons for utilizing these instruments and yes, there remain long term care reasons for utilizing these instruments. If the reason for consideration of this instrument arises from the concerns of possible long term care costs, the rules governing these agreements differ based on its accessibility by the grantor. Under existing law, if income and/or principal is made inaccessible when the trust is funded, there is a 60 month lookback period which can impose a period of disqualification if the grantor should apply for Medicaid within that lookback period.

If the trust principal is accessible to the grantor, the principal is an available resource. If the trust income is accessible to the grantor, the income is an available resource. If the trust principal or income is distributed to any other person other than the grantor, it is considered a transfer at the time of distribution and can increase the length of transfer sanctions imposed on such trusts. Under existing North Carolina law, a principal accessible trust does not impose a penalty on the grantor for Medicaid purposes in that the trust would be considered a countable asset. An income accessible but principal inaccessible trust would result in the income being countable and the principal being subject to the 60 month lookback rule related to when the principal first became inaccessible.

It is important to keep in mind that the rules continue to change regarding the use of such trusts. The prudent practitioner should consider the use of irrevocable trusts for Medicaid planning purposes, particularly irrevocable inaccessible trusts, as fraught with risk, unless the type of trust falls into one of several safe harbor trusts listed below:

-Special Needs Trust for Persons under 65; (d)(4)(a) trusts
-Pooled Trusts
-Testamentary Trusts such as a special needs trust for a disabled child
-Trusts funded with assets not belonging to a disabled individual

2. Long Term Care Insurance

For many clients, the idea of utilizing governmental funds for long term care costs brings forth an image of government control, loss of financial security for their family, crowded nursing home rooms and a loss of privacy. To the extent possible, it is the desire of most individuals to either build a financial portfolio capable of supporting those expenses or take out insurance to cover the risk of long term care. Long term care insurance has come a long way in the last ten years providing many options for consideration. As with any insurance planning, the sooner one considers the coverage, the better. A discussion on the various options, guarantees and coverage available is beyond the scope of this presentation. Nevertheless, it is prudent as elder law advisors to present this tool for consideration in light of the risks, fears and rising costs of long term care.

3. The Second Timers

It is not uncommon to be involved with the premarital planning of elderly clients who have lost a near-lifetime companion and discovered a renewed youth in the love of a new significant other. They sit across the conference room table displaying the giddiness of teenagers but with the obvious concern for preexisting family members. As the advisor, you discuss the importance of a premarital agreement so as to protect those family members against spousal dissent or divorce. Provisions are made for a life estate interest in the residence for the new spouse-to-be as he/she prepares to leave the old residence and move into the new. You then discuss the possible loss of the capital gains exclusion should the new spouse-to-be decide to sale the old residence after establishing the new. There is also a detailed discussion regarding the creation of one joint checking account wherein they both contribute separate monies to assist with joint expenses. Following this important discussion of asset allocation and premarital agreement protection, the last thing these giddy youngsters want to hear is "what about long term care?" However, it would be a disservice to overlook this issue in light of the risks involved, especially in that unique situation where the spouse-to-be is considerably less fortunate, financially, than his/her significant other. As you are well aware, the Medicaid rules do not differentiate between what is his or hers when it comes to the asset test. It is a shocking discovery for the community spouse to discover that the premarital agreement he and his now institutionalized love worked so hard on to protect their respective families has no bearing in the area of health care.

PLANNING FOR THE DISABLED CLIENT

Instead of the healthy elderly couple in your conference room, you are now meeting with a distraught spouse or family member regarding the imminent disability of a loved one. At this point, many previously discussed options are unavailable for the disabled individual such as creating legal documentation or applying for long term care insurance. Therefore, your guidance is needed regarding a possible application for Medicaid.

1. An Overview of Medicaid Eligibility for Nursing Care – the Two Part Test

To the extent possible, a nursing home patient is expected to pay for his or her care. Medicaid benefits are available only to patients who have limited income and resources. To qualify, an applicant must meet both an income test and an asset test.

a. The Income Test

If the monthly costs associated with nursing home care exceed an applicant's (institutionalized spouse's) countable monthly income, the applicant meets the income test.

Countable: wages, pension benefits, social security benefits, rental monies, and interest on savings or business interests

Non-Countable: \$30.00/month for personal needs, payments towards medical expenses not covered by the government, spousal allowance, dependent allowance, home maintenance allowance if nursing stay is less than 6 months and there is no spouse living at the home, income paid solely to the spouse, ½ of all joint income

Spousal Allowance: The community spouse (or at home spouse) may receive up to \$2,489 per month from the institutionalized spouse's income based on the reasonable amount necessary for living expenses. If the community spouse has sufficient income of his/her own to sustain living expenses, no allowance is allowed.

b. The Asset Test

Assuming the applicant passes the income test, we next move to the asset test which can be divided into two categories: Exempt and Non-Exempt. Only those assets which are considered non-exempt are to be used to pay for nursing home care. If the applicant has \$2,000 or less in non-exempt assets, he/she will pass the asset test.

Exempt Assets:

- -\$2,000 or less of non-exempt assets;
- -the residence if one of the following applies:
  - -if the owner expresses in writing an intent to return
  - -if the nursing stay is less than 6 months
  - -if the spouse is living at the home
  - -if there is a dependent minor child living at home
  - -if the home is rented and producing at least 6% in income
- -land used in a business
- -income-producing nonbusiness land
- -life estate interests or property held as tenants in common (subject to change)
- -burial spaces for applicant and spouse

- personal property including the following:
  - personal effects and household goods
  - one licensed vehicle
  - personal property used in the operation of a trade or business
  - personal property that is rented for a profit
  - cash value of whole life insurance where face value is less than $1,500
  - term life insurance policies
- retirement accounts that cannot be withdrawn in a lump sum payment (monthly payments are counted under the income test)
- irrevocable burial contracts
- certain annuities
- certain types of trusts

Non-exempt properties include everything else and must be spent down to $2,000 before a Medicaid application is approved. Careful consideration should be given to selecting which assets to spend down (IRAs, 401Ks, appreciated assets).

c. Married Couples and the Asset Test

If the applicant is married, the nonexempt assets of both spouses are counted, however, the community spouse is entitled to keep a portion of the nonexempt assets which is the greater of $19,908 or one-half of the total non-exempt assets, up to $99,540, or higher through appeal. The exact portion is based on numbers and calculations beyond the scope of this presentation. See the materials provided by Attorney Doug Sea.

2. Look Back Periods and Transfer Sanctions (Subject to Change in 2007)

If an applicant, an applicant's spouse, or the legal representative of either, transfers property within 36 months of applying for Medicaid, the applicant may be ineligible to receive Medicaid benefits for the number of months the transferred property would have covered nursing home costs. The ineligibility period is calculated using $4,800 per month for the cost of care. The look back period is extended to 60 months for transfers involving trusts and annuities. There are certain transfers which are exempt from such consideration:

- transfers to a spouse or disabled child
- any transfer for fair market value
- transfer of an exempt asset, other than the home
- transfer of the home to a spouse
- transfer of the home to a child under the age of 21
- transfer of the home to a disabled child
- transfer of the home to an adult child who has lived in the home for at least 2 years immediately prior to the applicant's institutionalization, and who has provided care to the applicant to keep him/her out of the nursing home (documentation needed)
- transfer of home owned as tenants in common

-purchase of an annuity if the applicant or other allowable person is expected to live on enough to receive an amount equal to or greater than the amount originally used to purchase the annuity

If on transfers assets more than three years prior to any application for Medicaid benefits, he/she can rest assured that under current law, his/her assets will be safely passed on to their family. However, transferring assets to family members comes with its own risks to the applicant and should be carefully considered.

3. Estate Recovery

After all is said and done and the applicant spends down the non-exempt assets to the required level, the exempt assets may still be lost to the state's ability to recover benefits from the estate of the deceased Medicaid recipients. Property that was exempt during the Medicaid recipient's lifetime may be used to reimburse the state for the amount of benefits it paid unless the recipient is survived by a spouse, a child under 21 or a disabled adult child living at home. It is important to note that presently, North Carolina estate recovery is against the PROBATE estate of the deceased Medicaid recipient. Certain interests are not considered part of the PROBATE estate:

-real property, unless sold to pay creditor's claims and expenses
-tenants by the entirety property
-property held in a revocable trust
-annuities or life insurance contracts

One option for bypassing estate recovery is to transfer all exempt property of the Medicaid recipient before death. Since transfers of exempt property are not penalized, there should be no effect on Medicaid eligibility, but you should notify the county DSS of such transfers.

4. Options to Maximize the Community Spouse's Assets and Income

In light of the above rules and restrictions, it is imperative that we discuss ways to maximize the protection of the community spouse within the limits of the law PRIOR to any application for Medicaid. Timing is crucial to any suggestions outlined below and waiting until all countable assets have been spent down or converted into noncountable property is too late. In addition, so as to avoid any misunderstanding of intentions, it is advisable to discuss the various options to be utilized by a client with your Local Department of Social Services or with the Department of Human Resources.

a. Equity Line

Where a homeowner has a debt free residence, an equity line is an option to consider so as to maximize the countable resources before the assessment date of a disabled spouse. This option may increase the amount of countable assets preserved for the community spouse (the maximum being $84,120) and provide liquidity for the community spouse to use during any spend down period. Those monies preserved can then be used to pay off the equity line, purchase irrevocable burial plots, remodel or improve the home, or purchase an automobile. This option takes time and should be considered by the client well in advance of entering a nursing home.

b. Reverse Mortgages

This option should be considered by a homeowner/community spouse to boost monthly income. A reverse mortgage is an agreement between a lender and a homeowner in which the lender agrees to make a lump sum payment or a regular periodic payment for a set period of time or until the death of the homeowner. At the time of death or at the end of the agreed to period of time, the home is sold and the lender is paid back. These payments to a homeowner are considered noncountable income as they are paid to the community spouse.

c. Annuities

Any purchase of an annuity will be scrutinized as a transfer subject to the 60 month lookback period. However, so long as the annuitant is the purchaser or spouse of the purchaser and the guaranteed payment period does not exceed the annuitant's life expectancy under the Medicaid tables, the purchaser should not be sanctioned for such a purchase. If the annuity guarantees payments beyond the life expectancy of the annuitant/community spouse, the purchaser would be sanctioned. Conversion of an IRA or other income-deferred accounts into an annuity is a way to avoid having to cash in and spend down those accounts which could result in excess income in any one year.

This option is important to the institutionalized spouse as a means of deferring the spend down by converting a nonexempt asset into a countable income stream. It is also important as between spouses where the institutionalized spouse is the primary income provider and the community spouse is in need of additional income. By converting nonexempt assets into an immediate annuity paying income for the community spouse's life, we provide income stability for the community spouse. It is advisable to hold off on the purchase of an immediate annuity for this purpose until after institutionalization begins unless the couple has total countable assets of over twice the maximum resource allowance of $84,120.

5. Planning Suggestions for the Community Spouse

Once the application process is under way and the spouse is institutionalized, we must then discuss the necessary planning for the community spouse.

a. Estate Planning

Be sure that all legal documents are in order for the community spouse. This may mean updating the durable power of attorney and advance directives to appoint someone other than the institutionalized spouse as agent or including gifting provisions. In addition, the last will of the community spouse should be revisited. If the community spouse should predecease the institutionalized spouse, the "I Love You Will" could result in disqualification. A new will may be in order including a testamentary special needs trust or an absolute discretionary trust for the spouse.

b. Transfers following Eligibility of Institutionalized Spouse

Once Medicaid eligible, the community spouse must retitle all non-exempt assets out of the name of the institutionalized spouse's name and into the name of the community spouse. Any exempt assets should also be transferred into the name of the community spouse to avoid estate recovery in the event the community spouse predeceases the institutionalized spouse. In addition, the community spouse may wish to later consider transfers to family members of exempt assets

CONCLUSION

As you can see, there are many issues to consider and rules to bear in mind when advising a client in the area of elder law. In addition, Medicaid law and state policy can change on a monthly basis. The information provided in this manuscript is general in nature and subject to conflicting interpretation.

One Final Note:

DHHS has posted their manuals online. Medicaid for Adults can be found at:

http://info.dhhs.state.nc.us/olm/manuals/dma/abd/man/index.htm