

My Spouse (or other loved one) is Heading Into a Nursing Home... What Should I Do Now?

By Louis W. Pierro, Esq.

If your estate planning clients are like mine, it takes time to educate them, and get them across the threshold, before they are willing to commit and pay the fees that you are looking to charge. On the other hand, by far the most motivated clients I have are those who are in crisis — they (or another family member) need nursing home care now, and are looking for help getting Medicaid, and saving some portion of their life savings. The value of our services is abundantly clear — and our clients rush to write the check that is going to immediately save them tens if not hundreds of thousands of dollars.

Can you handle crisis planning? If you can, the path to significant revenues lies before you, as increased nursing home costs have pushed people to seek help navigating the Medicaid system, and preventing total impoverishment. The rules are not simple, but they can be mastered, and there is help in the form of programs and software that will automate this area of your practice. For clients who are on the doorstep of the nursing home, following a few fundamental rules can save their families significant wealth, and boost your bottom line.

The first thing you will need is a thorough questionnaire, geared specifically for Medicaid planning. Once you have all the relevant information, it's time to look for exempt assets, and to spend-down nonexempt resources either on exempt purposes, such as improving an exempt home, pre-paying a funeral or buying a car, or on things like legal fees. That's right — getting your fees paid up front is actually in your client's best interest, as it counts as a spend-down item for Medicaid, so that the cost of your services is actually half of what it would otherwise be. You should also look for possible exempt



transfers, such as to a disabled child or caretaker child in the case of a residence, so that free asset transfers can be used. Once you have maximized the spend-down, and any exempt transfers, there will be nonexempt assets left, which will need to be protected.

As Medicaid is a means tested program, there are very detailed look back and penalty rules that govern transfers for Medicaid purposes. Generally, all states other than California have implemented OBRA'93 and DRA '06, which give us the rules applicable to giving assets away to qualify for Medicaid, including a 5 year look back period during which all transfers will be counted. California has yet to implement the 22 year old statute, so the look back there is 30 months, and there are other transfer rules that are more favorable than the other 49

states. Once the 5 years of financial records are submitted, the government does an audit, and any transfers made in that 5 year penalty are added together, and then divided by the average cost of nursing home care in your state or region. The result is a number of months of ineligibility, which under the DRA rules does not even begin to run until your client is in the nursing home, otherwise Medicaid eligible (under \$2,000), and applies for Medicaid. That is when the penalty starts, which then runs forward at a time that there are no assets left to pay the nursing home.

This is where the value of your services is amplified, as Congress has tried to shut down the ability of any individual going into a nursing home to save more than \$2,000, but creative planning is available to provide your client with much more.

The question then becomes, how can one who has excess resources become eligible for Medicaid without spending down their wealth or incurring a long penalty period? The answer is to use either a promissory note and gift plan or an annuity plan.

A promissory gift and note plan allows for roughly half of the amount of excess resources to be saved and gifted to the family of the Medicaid applicant. The mechanics of the promissory note and gift plan work like this:

- First, all of the applicant's available resources are totaled so that an accurate picture can be drawn as to how much overage exists. It is also necessary to calculate the amount of monthly income that the applicant receives.
- Next, roughly half of the total of assets is gifted away to a family member. The family is free to do with this gifted money whatever they choose, with most choosing to hold the money in trust or a separate account for the benefit of the Medicaid applicant. The gifting of the funds to the family will create a penalty period causing Medicaid ineligibility, but that is the expected outcome of the gifting transfer.
- The other half of the assets is then loaned to a family member through the use of a promissory note (or annuity). The loan will be repaid by that family member to the Medicaid applicant once a month; the amount of the promissory note monthly payment and the monthly income of the Medicaid recipient will combine to pay the cost of the nursing home for that month. This process will repeat for as long as the penalty period exists. Once the promissory note expires, the Medicaid recipient will then be fully eligible for Medicaid, and roughly half of their assets will have been successfully gifted away to the recipient's family.

- After the gift and loan transfers, most states allow an individual resource allowance of \$2,000.

In order to use a promissory note and not have the loaned amount also count as a transfer of assets for less than market value (and thus creating additional penalty period time), the note must meet certain criteria. The note must have a repayment term that is actuarially sound; the note must provide that payments be made in equal amounts during the term of the loan (with no deferral and no balloon payments being made), and the note must be prohibited from being cancelled upon the death of the Medicaid applicant/recipient.

In addition to the promissory note and gift plan, the purchase of an income generating annuity can be utilized by over-resourced couples where one spouse has to go into a nursing home and the other spouse remains in the community residence. Under this plan, an annuity is purchased by the community spouse to spend down excess resources, with the community spouse receiving monthly income from the annuity. Like a promissory note, an annuity purchase must conform to certain criteria to not constitute an asset transfer which would result in a penalty period of ineligibility.

Obviously, this is a very quick and simplified discussion of your crisis planning alternatives. Learn how to supercharge your practice with highly motivated clients with my new program entitled, "Last-Minute Crisis Planning for Seriously Ill Clients – In More Detail". This is the third part in my special 3-part series, "Everything You Need to Know About Adding Elder Law & Medicaid Planning to Your Practice".

[\[1\] Annuities and Medicaid Planning, ElderLawAnswers.com, http://www.elderlawanswers.com/annuities-and-medicaid-planning-12008.](http://www.elderlawanswers.com/annuities-and-medicaid-planning-12008)

ABOUT THE AUTHOR

Louis W. Pierro is the founder and principal of Pierro, Schaeffer & Connor, LLC, and concentrates his law practice in the areas of Estate Planning, Estate and Trust Administration, Business Succession Planning, Elder Law and Special Needs Planning. Mr. Pierro has been selected to the *Best Lawyers in America*, the *Best Lawyers in New York*, *Super Lawyers* of the Hudson Valley, Top 25 Lawyers in Upstate New York, NY Times Top Attorneys in NY, and he has maintained an *AV Preeminent* rating from the Martindale-Hubbell since 2001. In



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Mr. Pierro has served as Chair of the Estate Planning Committee, and Committee on Taxation of the Trusts & Estates Section, and the Elder Law Section, of the NYS Bar Association, and he is currently a member of the Elder Law Section Executive Committee. He is founder and Director of Elder Counsel, a national organization of Elder Law and Special Needs law firms, which provides proprietary document drafting software and education to over 800 member firms in all 50 states. He is also President & CEO of Advocates Planning Group LLC, an attorney membership organization dedicated to providing a range of support services to attorneys who prepare and maintain sophisticated trust plans for clients, with a focus on Delaware law. He is currently a member of the National Academy of Elder Law Attorneys; the American Bar Association, Probate and Trust Section; the NYS Bar Association Trusts and Estates and Elder Law Sections; and the Albany County Bar Association (Chair, Elder Law Committee 1993-1998). He has served as a Director of the Estate Planning Council of Eastern New York, Inc.; Senior Services of Albany, Inc.; Alzheimer's Association of Northeast New York, Colonie Youth Center and McAuley Residence.

A graduate of Lehigh University and Albany Law School, Mr. Pierro was admitted to the New York State Bar in January of 1984, and is licensed to practice in all New York State Courts, the US Supreme Court and the Second Circuit Court of Appeals.

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