<u>THINKING OF MEDICAID? WHAT ABOUT THE HOUSE?</u>

By Joseph A. Bollhofer, Esq.

You (or a loved one) need help. Activities of daily living are becoming difficult – maybe impossible – without it. These concerns may have hit suddenly or perhaps you could see them coming for some time. In any case, there is no long term insurance to pay for the care needed and it looks like you don't have the money to pay for a home health aide. Or even if you do, you would rather have Medicaid pay for your care. On top of that, despite everyone's best efforts, a nursing home might be needed in the future. What do you do?

A home health aide can cost between $2,000 and $12,000 each month depending upon how many hours of care are given. Nursing home care costs at least $10,000 monthly.

Long term care planning definitely is not "one size fits all." Individual health and functional concerns, assets (and types of assets), income, marital status, family and support network (and faith in their abilities, inclination to help and trustworthiness) all are important considerations. So are projections of likely medical and functional status, wealth and support network some years down the road. And so, of course, are your <u>desires</u>. The best plan in the world is no good if you are not comfortable with it.

I frequently am consulted by clients who were told to "give it all away so you could be eligible for Medicaid coverage." While it is true that Medicaid is for "poor people" (as opposed to Medicare, which everyone who worked enough is entitled to at a certain age), sometimes these clients are having second thoughts. Sometimes their second thoughts have come too late. They already gave it all away and are in desperate need of care, but are ineligible for Medicaid.

Often a Medicaid application is denied because of failure to provide all documentation requested. I will address that problem in a future article. Suffice it to say "keep your records."

In considering how to provide for long term care, if Medicaid is the goal, a very significant distinction exists between care at home or assisted living and care in a "skilled nursing facility" (nursing home). The law in New York allows you to become eligible for home care Medicaid in the month after you transfer virtually all of your property as gifts. Whether the property is given to individuals or under a properly written irrevocable trust doesn't matter. The treatment of income in a home care Medicaid application also is something to be considered, but is not the subject of this article.

On the other hand, when a Medicaid application is made for coverage in a nursing home, you will be ineligible for coverage if you gave away any property during the five years before the month for which you seek coverage. The length of time that you will be ineligible depends on how much you gave away. The more you gave away, the longer the "penalty" period. For example, if you gave away $100,000 within the last five years, you will be ineligible for nursing home coverage for almost nine months – beginning when you apply.

How, then, do we decide what to do? First, if you have a spouse, gifts to him or her will not result in a penalty. A gift of the house to certain other limited people also will not result in a penalty. Those people are: (1) a minor child, (2) a disabled or blind child of any age, (3) an adult child who has lived in the home with the parent as a care-giver for at least two years before the parent enters the nursing home, and (4) a sibling of the applicant who has resided in the home for at least one year before the applicant enters the nursing home and who has an "equity interest" in the home. However, most people do not have circumstances that allow for these limited exceptions; Often, even if they do, it is just not the right solution. For the majority of people considering Medicaid planning, a transfer of the house to a trust is the most logical solution.

The most common asset I see among my clients that they could afford to transfer is their home. Whether the transfer is to a properly written irrevocable income-only trust, or to family members while keeping a "life estate," depends on the circumstances. If the client states unequivocally that 1) the home will not be sold until after his or her death, 2) the client will never need any money from the home (by mortgaging it) and 3) the people who are to be the "remainder owners" on the deed will certainly transfer it back if requested, this client might benefit from a "life estate deed."

However, more commonly, clients can not state all this with certainty. They would better be served in Medicaid planning by a transfer of the house to a properly written irrevocable trust. Under the terms of this trust, they keep the equivalent of a "life estate." They can't be kicked out or charged rent. They keep their property tax exemptions (as with a life estate). They also could tell their trusted trustee to sell the house and buy another one for their benefit. Or buy a condo. Or keep all the money from the sale in the trust and pay rent for an apartment or assisted living. Any income the trust property earns belongs to the client.

As opposed to giving away money and/or other investments (which might pinch your pocketbook before five years runs out), transferring the house often is a sensible way to plan. Of course, if it looks like you will have to go a nursing home within five years after a house is transferred, you should be sure you have a way to pay for the nursing home during the balance of the five years. Making a Medicaid application within the five years would result in a penalty. The length of the penalty would be based on the value of your house! A big mistake.

Medicaid eligibility is often a concern for most people. However, the "big picture" requires that all ramifications of your action be considered. Simply put: whether you are married or single, Medicaid eligibility has to be looked at in the context of your entire circumstances. Don't do something just because your neighbor or friend did. Get good advice.

The rules regarding nursing home Medicaid eligibility are extremely complex, and many alternatives exist. Since each particular case has its own unique facts, the reader is cautioned that the above summary can not be considered legal advice and should consult with an appropriate legal advisor. Please also note that the monetary figures stated herein are applicable to applications filed in 2010, and might vary in later years.

Editor's Note:

Joseph A. Bollhofer, Esq., is an attorney who practices law in the areas of elder law, Medicaid, estate and business planning and administration, and real estate. He is a member of the Elder Law, Real Property, and Surrogate's Court Committees of the Suffolk County Bar Association and of the Elder Law and Real Property Law Sections of the New York State Bar Association. He has been serving area residents since 1985 and is admitted to practice law in New York and New Jersey. His office is located at 291 Lake Ave., St. James, NY. (584-0100)