

Planning for Long-term Care: The Ten Most Common Mistakes

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The need for long-term care is on the mind of all seniors. Many are concerned that such care will drain their finances. Those with spouses are concerned that their spouse's standard of living will be adversely affected by the cost of care. And most of all, seniors don't want to be a burden on their family members. As a result, many seniors take steps to plan for the possibility of long-term care. Unfortunately, many times action is taken without the advice of knowledgeable counsel and is insufficient or incorrect, resulting in denials of or delays in the ability to

receive governmental assistance such as Medicaid. Below are ten of the most common mistakes.

1. **Gifting of Real Property**: If real property is gifted within the five-year period prior to an application for Medicaid, the gift likely will result in a period of ineligibility for Medicaid. For example, homesite property and heir property often are not considered to be countable assets for Medicaid qualification. However, if such property is gifted within the five-year period prior to an application for Medicaid, the gift falls within the "look-back" period. A gift made during the look-back period will cause Medicaid to impose a wait period determined by the value of the gift, the date of the gift, the extent of other countable assets, and the timing of the need for care. So, the gifting of homesite property or heir property within the look-back period produces a worse result than if the property had not been transferred at all.

When done correctly and timely, the gifting of real property can be a wise planning technique. One of the many available planning opportunities is the purchase by a child of a 1% interest in real property as a joint tenant with right of survivorship. When done properly, this will convert countable real property to non-countable real property and also avoid estate recovery, which is a claim by Medicaid against the estate of a deceased Medicaid recipient.

2. **Gifting of Cash**: The same look-back period that applies to real property applies to cash gifts. It is important to seek advice prior to making cash gifts in order to structure the gifts in a manner that does not produce unintended consequences such as a lengthy wait period for Medicaid benefits.

3. **No Durable Power of Attorney**: If an individual becomes incapacitated and needs someone to handle the individual's legal and financial matters, a trusted family member, friend, or advisor acting as an attorney-in-fact under a Durable Power of Attorney can "step in" and handle such matters with relative ease. However, if no Durable Power of Attorney exists at the time of the incapacitation, it becomes necessary to institute an incompetency proceeding and request a court to appoint a person selected by the court to be the individual's guardian. An incompetency proceeding can be difficult emotionally to both the alleged incompetent individual and family members and loved ones. In addition, an incompetency and guardianship proceeding is much

more expensive from a legal fee perspective than the preparation of a Durable Power of Attorney.

Further, an attorney-in-fact under a Durable Power of Attorney typically is granted broader powers and is able to take more actions on behalf of the incapacitated individual without court approval than a court-appointed guardian is allowed to take. For example, most attorneys-in-fact are granted the authority to sell real property without court approval. However, a court-appointed guardian must seek court approval and follow a rigid process for court-ordered sales in order to sell real property.

4. **No Gifting Power under a Durable Power of Attorney** : Many planning techniques for long-term care involve the gifting of assets. If an individual is legally competent, the individual may easily make such gifts. However, if an individual is, or becomes, incompetent, then such gifts often are initiated by an attorney-in-fact under a Durable Power of Attorney. But, an attorney-in-fact may make gifts only if broad gifting power is granted to the attorney-in-fact under the terms of the Durable Power of Attorney. If the Durable Power of Attorney does not grant the power to make gifts, or the power to make gifts is limited (for example, a power to gift limited to only the value of the annual exclusion for gift tax purposes), the attorney-in-fact must seek approval from a court prior to making any gifts or gifts in excess of the limitation, as the case may be. When court approval is necessary, the attorney-in-fact may not be able to act timely due to the statutory processes that must be followed. In addition, seeking court approval for gifts will result in additional legal fees that could have been avoided if proper gifting language had been included in the Durable Power of Attorney.

5. **Irrevocable Elections**: Some investments offer certain elections that are irrevocable. For example, some annuities are "annuitized" in order to provide the owner with an income stream. Typically, annuities are annuitized over a certain number of years. An election to annuitize an annuity is irrevocable, which can create a couple of problems. First, if the annuity has been annuitized over a period longer than the individual's actuarial life expectancy, there might be a period of ineligibility for governmental assistance. Second, it may be difficult to gain access to the entire balance of the annuity for planning techniques.

6. **Titling of Bank Accounts** : It is not uncommon for an individual to transfer a bank account to a spouse or add a child's name to an account with the expectation that the funds will become protected. However, when an individual applies for Medicaid, the assets of both the individual and the spouse, if any, are considered. Likewise, all accounts in the individual's name – even if in a joint account with a child – are considered.

7. **Paying Cash for Caregivers and Other Expenses** : Many individuals engage the assistance of in-home caregivers prior to entering a facility for long-term care. Many caregivers want to be paid in cash. When cash has been withdrawn from accounts or when checks are written to "cash" in order to pay caregivers, there are no records to document how the funds were used. This will create a major problem if a Medicaid application is made. Specifically, during a review of a Medicaid application, all financial transactions for the prior five-year period are inspected. Any funds that are spent without proper documentation may result in a period of ineligibility. While this situation most commonly occurs with respect to caregivers, any cash transactions that cannot be documented with credible evidence will be treated in the same manner. This includes using cash for daily living needs.

8. **Paying Family Members for Care** : An individual may hire family members to assist with care. In some instances, a family member may quit his or her job in order to provide such care, so there is a need for such family member to be compensated. Any individual who hires a family member to perform care should enter into a properly-drafted Personal Needs Contract in order to document in writing the existence and precise terms of the financial arrangement. If there is no such written Personal Needs Contract, the payment for such care again may result in a period of ineligibility.

9. **Loans without Documentation**: Similar to the discussion above with respect to paying family members

for care, any funds loaned to another individual without a properly-drafted promissory note or other loan documentation may result in a period of ineligibility. It is important to document all loans even if the documentation occurs after the original transaction.

10. **Failure to Seek Advice as Soon as Long-Term Care Becomes Imminent** : There are many legal planning techniques that allow an individual's assets to be preserved for use by the individual's spouse and family members in order to enhance the level of long-term care for the individual. As soon as an individual learns that long-term care may be needed, advice should be sought immediately from competent Elder Law counsel. It is not uncommon for individuals to attempt to handle Medicaid applications without legal counsel. In some cases, by the time the Elder Law counsel is engaged, important deadlines have been missed and the options available are substantially limited.

Conclusion

Americans are living longer than ever imagined just a few decades ago. This is wonderful. But there is a dark side. The period between the end of productive employment and the onset of the need for intensive long-term care is also much longer, as is the time spent in long-term care prior to death. The need to plan for this sunset period of life is vastly more important than ever before, and so is the need for careful planning guided by experienced and competent advisors.

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For further information regarding the issues described above, please contact Gregory T. Peacock.

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