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## **Estate and Elder Care Planning for the Sandwich Generation and Beyond**

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# Estate and Elder Care Planning for the Sandwich Generation and Beyond

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**August 2022**

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# “Sandwich Generation”

- First coined by social worker Dorothy Miller in 1981, the generation bearing the financial burden of both elderly parents and adult children falls into the category of what is commonly referred to as the “Sandwich Generation.”
- According to the Pew Research Center, about 15% of some 2,500 U.S. adults aged 40-59 provided financial support to both an aging parent and a child.

# “Sandwich Generation”

- 60% of women and 40% of men in the Sandwich Generation struggle to balance their work and personal responsibilities.
- As more and more baby boomers become senior citizens, their families will be occupied with their care issues.
- Although modern medicine has allowed seniors to live longer, in many cases they are less healthy and require more care.

# Elder Care Planning

# Financial Considerations: Are there sufficient resources to pay for the senior's care?

Consider and evaluate options, such as:

- Long Term Care Insurance
- Reverse Mortgages
- Support from Family Members
- Medicare?
- Medicaid

# Medicaid Planning

- When is the perfect age to begin planning?
- Nursing Home versus Home Care
- Asset Threshold
- Income Tax (Who pays the taxes???)
- Estate Recovery Issues



# Overview of the Medicaid Asset and Income Requirements

1. Asset Rules
  - The Medicaid applicant may keep up to the state applicable Medicaid asset threshold (\$16,800 in New York) plus exempt assets
  - Community Spouse Resource Allowance
2. Income Rules
  - Varies by state (NY: \$50 in Nursing Home; \$934 at Home)
  - Pooled Income Trusts (Available for Home Care)/Qualified Income Trusts
3. A spouse can sign a Spousal Refusal – but again, beware of spousal suits!
4. The five-year look-back period applies to Nursing Home Medicaid
  - Will it apply to home care? Now we Know the answer!
  - Does the state have a home care program?
5. New 30-month look-back for Community-based Medicaid (Home Care) in New York

# Medicaid Transfer Penalties: Nursing Home Applications

- When an individual applies for Medicaid nursing home care, Medicaid will look back 5 years to see what assets the applicant and spouse (if any) had, and what assets were gifted away.
- If money was gifted during the look-back, Medicaid calculates a so-called “*penalty period*” that will cause the applicant to become ineligible for Medicaid coverage for a period of time.
- Period starts when applicant is institutionalized, applies for Medicaid benefits and is “otherwise eligible” except for gifts.
- For example, a transfer of \$140,1250 within the 5-year lookback period will create a 10-month period of ineligibility (for Nassau/Suffolk applicants using the Long Island regional rate).

# Tax Implications of Outright Transfers vs. Transfer to Trusts

- Transfers of Real Property Including Principal Residence
- Transfer of Liquid Assets
- Basis Issues

# Outright Transfers (Gifts)

- Carryover Basis
- No Sec. 121(a) for Donor
- Creditor Issues
- Pre-deceased child/Donee
- Divorce

# Transfers to Trust

- Basis Step-Up
- Sec. 121(a) is available for Grantor(s)
- Asset Protection

# Irrevocable Medicaid Asset Preservation Trust

- Trust Requirements:
  - Must be Irrevocable
  - Settlor should not serve as Trustee (best practice)
  - Any principal or income that can be distributed to the Settlor or Settlor's spouse will be considered available for Medicaid purposes
  - Discretionary payments to Settlor / Settlor's spouse will be available even if subject to an ascertainable standard
    - "HEMS" will not be acceptable for Medicaid purposes

# Irrevocable Medicaid Asset Preservation Trust cont.

- Advantages:
  - Considered a completed transfer for Medicaid purposes
  - Decision-making can be easier and more efficient
  - Can provide protection against children's creditors
  - Income tax benefits
    - Real Estate tax exemptions
    - IRC Section 121 Exemption can be maintained
  - Can preserve step-up in basis upon Settlor's death
  - Can reserve limited power of appointment to make limited changes to beneficiaries

# Irrevocable Medicaid Asset Preservation Trust cont.

- Disadvantages:
  - Loss of control/independence
  - More costly / complicated
  - Difficult to mortgage real estate
  - Excess income considerations – i.e. Does the trust provide income to the Settlor? Will that result in high spend-down if Medicaid is needed at a later date
    - If so, consider giving income to another beneficiary
    - Beware high trust income tax rates

# Transfers of Real Property Including Principal Residence to a Trust

- Ability to live in home
- Ability to receive rental income (if desired)
- May direct Trustees to sell property and exchange for new property
- Section 121 Exclusion
- Maintain basis step-up
- Asset included in estate of Settlor
- Limited Power of Appointment
- Maintain degree of control/independence



# IRC Section 121(a)

- Up to \$250,000.00 of gain excluded from gross income
- On sale/exchange of property
- Property **owned** and used as principal residence for periods aggregating 2 years or more

# Section 121- Ownership Requirement

- Single owner entity disregarded for federal tax purposes (i.e. single member LLC) satisfies requirement
- Grantor trusts – satisfies requirement
- Limited partnership – does not satisfy requirement
- Regs 1.121-1(c)(3)

# Transfers of Liquid Assets

- **Transferring Brokerage Accounts to a Trust**
- Low basis versus high basis assets will inform decision in many cases
  - Maintain step-up for low basis assets
  - Consider income tax consequences for beneficiaries
- Consider Grantor Trust so Grantor will pay income taxes regardless of who receives income
- Consider income being generated for Medicaid purposes

# Transfers of Liquid Assets

- **Transferring a Non-qualified Annuity to a Trust**
- Cash value is considered an asset for Medicaid purposes: non-exempt asset
- Certain pre-DRA 2005 annuity rules apply: Medicaid may treat as income stream and not asset, but must meet DRA requirements
- Goal is to maintain tax-deferred status
- May only be transferred to a grantor trust
- IRC Section 72(u)

# Annuity Contract- IRC 72(u)

- If held by a person who is **NOT A NATURAL PERSON**, generally not treated as an annuity contract
- **TRAP:** Income on the contract for any taxable year of the policyholder shall be treated as ordinary income received or accrued by the owner during such taxable year
- Exception: Will remain tax deferred if held by a trust “as an **agent** for a natural person.”
  - Will depend on the beneficial ownership – i.e. is the beneficial owner a natural person?
  - Legislative history and multiple PLRs suggest that where annuity held in trust for the benefit of a natural person, annuity is treated as owned by the natural person for tax deferral purposes.
- Consider two trusts in the case of a married couple

# **Tax Consequences of Medicaid Trusts**

- Income Taxes
- Estates Taxes
- Real Estate Tax Exemptions

# Real Estate Tax Exemptions

- Veteran's Exemption
- Senior Citizen's Exemption
- Enhanced Star Exemption

# Where Good Estate Planning Equals Bad Medicaid Planning

- Annual Gift Tax Exclusion – Be careful!
- Revocable Trusts
- Irrevocable Trusts
- Life Estates
- CSTs
- Certain Powers
  - Trustee Discretion
  - 5X5 Power
  - HEMS



# Planning for Incapacity

- Never too early to start planning
- Budgeting requires attention to expected and unexpected events
- Power of Attorney versus Guardianship
- Health Care Proxy/Living Will
- If possible, discuss with the senior their personal choices regarding care and end of life requests
- Is the patient already incapacitated?

# Advance Directives

- Power of Attorney
- Gifting Provisions
- Health Care Proxy
- Living Will
- DNR & Organ Donation Considerations

# The Power of Attorney

# What is a Power of Attorney?

- A legal document that grants someone, or multiple other people, the power to manage the financial affairs and make important decisions on someone else's behalf.

# Parties

- Principal
  - The Principal is the person who executes the POA
  - The Principal grants certain authorities to the agent(s)
- Agent
  - The Agent is the person who is authorized to make decisions on behalf of the Principal
  - The Agent must agree to follow the instructions of the Principal
  - If there are no specific instructions given, the Agent must act in the best interests of the Principal

# Is it “Durable”?

- The POA is durable if it remains in effect even after the Principal becomes incapacitated (unless the Modifications section specifically states otherwise)

# Capacity

- In order for the POA to be effective, the Principal must have capacity at the time of signing
- Section 5-1501 (NY GOL) defines capacity as the “ability to comprehend the nature and consequences of the act of executing and granting, revoking, amending or modifying a power of attorney, any provision in a power of attorney, or the authority of any person to act as agent under a power of attorney.”

# When is the POA effective?

- State-specific
- In NY, a specific agent can only act after that agent has signed the POA in the presence of a notary.
  - If there are two or more agents, who are designated to act TOGETHER, then the POA takes effect when all agents have signed in the presence of a notary.



# Who should have a POA?

- Anyone who can!
- 18+
- Avoid Guardianships, MHL Article 81
- Are gifting provisions really that important?
  - YES!!!
- Should also have a Health Care Proxy!

# The “Modifications” Section

- What types of Modifications should the attorney consider including?
  - Gifting
  - Estate tax planning provisions
  - Medicaid planning provisions
  - Trust provisions (creating, amending, revoking, funding, decanting, etc.)
  - Exercise of powers of appointment
  - Life estate – purchases, retain, etc.
  - Beneficiary designation changes
  - Compensation for the agent
  - Control over digital assets
  - Life insurance
  - Retirement accounts
  - Loans/promissory notes
  - Etc.

# The Modifications Section cont.

- Should I include a provision appointing a guardian if necessary?
  - IT DEPENDS!
  - Be careful with nominating a guardian of the person and/or property
    - Consider whether guardians of person should conform to the agent named in the Health Care Proxy, where applicable
  - Possible language:
    - “If it becomes necessary to appoint a guardian of my person (*or property?*), I hereby nominate pursuant to Mental Hygiene Law Section 81.17 JOHN DOE to serve as guardian. If JOHN DOE is for any reason unable or unwilling to serve as guardian, I nominate JANE DOE to serve as guardian.

# Health Care Proxy

- Health Care Proxies may be governed by state statute
- A Health Care Proxy solely covers the appointment of an agent to make **substituted health care decisions**, effectuating the wishes of the principal.
- Generally, a Health Care Proxy empowers an agent to make any and all health care decisions on behalf of the principal. These decisions may include issues relating to medications, therapy, the change of treating physicians, and any other issues that arise in the course of medical treatment.
- Under New York State law, **unless your agent knows your wishes** about artificial nutrition and hydration (feeding tubes), the agent will not have the authority to make decisions about these measures.
- The Principle may elect to make organ or tissue donations on their Health Care Proxy .

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# Planning for Our Children

- Age 18 – no one else can make decisions for them
- Power of Attorney
- Health Care Proxy
- Will
- Financial Advisor – time to get responsible and financially savvy



**Elizabeth Forspan** is a Partner with Forspan Klear LLP, a New York law firm. Elizabeth's areas of practice include Elder Law, Trusts & Estates and Taxation.

Elizabeth speaks throughout the United States on various aspects of Elder Care Planning, Tax Law and Estate Planning. She was the recipient of the prestigious Max Block Award for Outstanding Article in the Category of Technical Analysis, awarded by the New York State Society of Certified Public Accountants' CPA Journal for her article "Casualty Losses for Property Damaged by Hurricane Sandy".

Elizabeth has been named a Super Lawyers Rising Star in the areas of Estate Planning and Probate in 2016, 2017, 2018, 2019, 2020 and 2021. Elizabeth has been featured in New York Magazine, MarketWatch, and she has been quoted in the New York Times.

Prior to co-founding Forspan Klear LLP, Elizabeth was a Tax Manager with Ernst & Young LLP, where she focused on Mergers and Acquisitions and Executive Compensation.

Elizabeth earned her Juris Doctor from Fordham University School of Law and her B.A. from Queens College of the City University of New York, where she graduated *summa cum laude* and is a member of Phi Beta Kappa.

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