

ASSET PRESERVATION

AND

ESTATE PLANNING
FOR SENIORS AND THEIR
FAMILIES

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Anthony J. Enea, Esq. is a member of the firm of Enea, Scanlan & Sirignano, LLP of White Plains, New York. His office is centrally located in White Plains and he has a home office in Somers, New York.

Mr. Enea is the Past Chair of the Elder Law Section of the New York State Bar Association.

Mr. Enea is a Past President and a Founding Member of the New York Chapter of the National Academy of Elder Law Attorneys (NAELA). He is also a member of the Council of Advanced Practitioners of NAELA.

Mr. Enea is a Past President of the Westchester County Bar Association.

Mr. Enea is the President of the Westchester County Bar Foundation.

Mr. Enea is a Vice President of the Columbian Lawyers Association of Westchester County.

Mr. Enea is the recipient of the "Above the Bar Award" as the leading Eldercare attorney in Westchester County. This award is presented by the Westchester County Bar Association, Pace Law School, the Westchester Women's Bar Association, the Westchester County Business Journal and the firm Citrin Cooperman.

Mr. Enea has been selected as a Super Lawyer for the seventh consecutive year and for the 2009, 2010 and 2013 was selected as a Top 25 attorney in Westchester County.

Mr. Enea for the third consecutive year has also been selected for the "Best Lawyers in America" as an Elder Law Attorney.

Mr. Enea is an "AV" Rated Preeminent Attorney as rated by Martindale-Hubbell.

Mr. Enea is a member of the Guardianship Court Advisory Committee for the Office of Court Administration and is the former Co-Chair of the Guardianship Committee of the Elder Law Section of the NYS Bar.

Mr. Enea is Certified as an Elder Law Attorney by the National Elder Law Foundation as accredited by the American Bar Association. *He is a former member of the Executive Committee of the Trusts and Estates Section of the New York State Bar Association as a Vice-Chair of the Committee on the Elderly and Disabled.

Mr. Enea is also fluent in Italian.

Mr. Enea has practiced law for more than twenty three years. He concentrates his practice in Elder Law, Asset Preservation Planning, Guardianships, Trust and Estate Planning, Estate Administration and Trusts and Estates Litigation. In his practice he has represented numerous families that have loved ones suffering with disabilities and the special planning needs attendant thereto.

Mr. Enea is a frequent lecturer in Elder Law, Estate Planning and Guardianships. He has spoken for and chaired numerous continuous legal education programs for the New York State Bar Association (Trusts and Estates and Elder Law Sections) and Westchester County Bar Association.

Mr. Enea is a member of the Board of Ethics for the Town of Somers, New York. He is also a former Vice President and former member of the Board of Directors of the Association for Mentally Ill Children of Westchester, Inc., sponsor of the Clearview School in Briarcliff Manor, New York.

Mr. Enea is a Magna Cum Laude graduate of Manhattan College, Riverdale, New York with a B.A. in Political Science. He received his Juris Doctorate from Pace University School of Law, where he received the award as a Ranking Scholar.

*The National Elder Law Foundation is not affiliated with any Governmental authority. Certification is not a requirement for the practice of Law in the State of New York and does not necessarily indicate greater competence than other attorneys experienced in this field of law.

II. HIGHLIGHTS OF NEW YORK'S MEDICAID LAW

In 1965 the Medicaid Assistance Program commonly known as "Medicaid" was created as part of the same legislation that created the Medicare program. Medicaid was created as a health insurance program for the poor. It is a "means tested" entitlement program wherein individuals are entitled to benefits if they are financially categorically eligible. It is a jointly financed federal-state program.

Categories of Medicaid Coverage

1. Community Medicaid - Physicians, dentists, pharmaceutical, nursery services and other professional services provided to individuals on a clinical or outpatient basis for individuals who are eligible; and

2. Home Care Services - Home health services, such as personal care services, nursing, physical therapy, occupational therapy and home health aid services; and

3. Institution Medicaid - Hospitals, other medical facilities, nursing homes and services under the Lombardi long-term home health care program.

III. Eligibility for Medicaid

To be eligible for Medicaid, the applicant must be:

- (a) A U.S. citizen or permanent lawful resident; and
- (b) Age 65 or older or disabled as defined by the State's Medicaid provisions; and
- (c) Resident of the state and county where the application is made. Residency requires a physical presence within the state and the intent to remain.

Additionally, Medicaid is a "means tested" program, thus, there are both resource and income eligibility requirements.

For a Single Individual

Income: \$809.00 per month or \$9,600 per year (plus a \$20.00 "disregard") for senior citizen residing in the community; a nursing home resident is only allowed a \$50.00 per month "personal incidental allowance", not the \$809.00.

Resources: \$14,550.00 Assets - "Luxury Fund"
plus "Irrevocable Burial Trust Account"

For a Couple in the Community

Income: \$1,192.00 Per Month per couple plus one \$20.00 "disregard" or \$14,300 per year

Resources: \$21,450.00 Assets per couple

For the Community Spouse of an Institutionalized Patient

Income: \$2,931.00 Per Month

Resources: Minimum Federal Community Spouse Resource Allowance (CSRA) is \$74,820 Maximum CSRA is \$117,240

Resources are any assets of the individual and/or couple, other than exempt resources, including jointly held assets. Exempt resources are defined for example to be burial space, the home in which the applicant/recipient resides or if away to which he or she intends to return, household and personal effects automobile, jewelry (wedding and engagement rings), furniture, paintings, silverware and china.

Regional Rates for 2014

<u>Region</u>	<u>Monthly Regional Rates</u>
Long Island	\$12,112
New York City	\$11,423
Northern Metropolitan	\$11,135
Northeastern	\$9,212
Rochester	\$10,073
Western	\$8,971
Central	\$8,645

IV. The Deficit Reduction Act of 2005 - Effective 2/8/2006

On December 18, 2005, the U.S. Senate in a vote of 51-50 with Vice-President Cheney casting the deciding vote passed the Deficit Reduction Act of 2005 ("DRA"). As a result of some differences in the Senate and House versions, the legislation was sent back to the House of Representatives for a final vote. On February 1, 2006, the House of Representatives by a vote of 216 to 214 approved the DRA. On February 8, 2006, President Bush signed the legislation into law. New York State Department of Health on July 20, 2006, issued Administrative Transmittal #060MM/ADM-5 which implemented the provisions of the DRA in New York effective August 1, 2006.

The DRA affects Medicaid eligibility and the transfer of asset rules in three (3) significant ways:

1. Creation of a sixty (60) month look back period for all transfers of assets, irrespective of whether they are outright transfers or transfers to certain trusts. Thus, under the DRA, for transfers made on or after February 8, 2006, the look back period is 60 months.

2. The penalty period (period of disqualification for Medicaid) created by a non-exempt transfer of assets will commence on the later of (a) the first day of the month after assets have been transferred, or (b) the date on which an individual is both receiving institutional level of care (i.e., is in a nursing home) and whose application for Medicaid would be approved, but for the imposition of a penalty period at that time. Multiple transfers made during the look back period, including transfers that would otherwise result in a fractional penalty, are accumulated into one total amount to determine the penalty period.

In the event that the imposition of a transfer penalty would create an undue hardship for an applicant, an exception may be made to the application of the penalty. However, there are no substantive changes to the high standards of "undue hardship" as described in 96 ADM-8; however, the procedural requirements as required by the DRA have changed. Undue Hardship requests in the past have been rarely granted utilizing the standards of 96 AMD-8 ("exceptional circumstances resulting in significant financial distress").

Thus, the penalty period for a non-exempt transfer of assets made within the sixty (60) month look back period will commence when the applicant has \$14,550 or less, is receiving institutional care (in a nursing home), has applied to Medicaid for assistance, and the application would be approved, but for the penalty period imposed. This is the most onerous measure contained in the new legislation.

It should be noted that, pursuant to the provisions of the DRA, and as under the prior law no penalty period is imposed for transfers made by an applicant requesting community Medicaid (homecare Medicaid) and the Lombardi Long Term Home Health Care Program.

3. An applicant's Homestead (house, condo, co-op) with equity above \$814,000 in New York for 2014 will render an applicant ineligible for Medicaid. This provision does not apply if a spouse, child under age of 21, or a blind or disabled child resides in the house. Federally the amount is \$500,000, however, each state is given the ability to increase the amount of permitted home equity to an amount not in excess of \$814,000. Additionally, homeowners will have the ability to reduce their equity through a reverse mortgage or home equity loan.

Some of the other significant changes contained in the DRA with respect to Medicaid are that: (a) annuities will be required to name the state as a remainder beneficiary, and annuities that have a balloon payment will be considered a countable asset; (b) multiple transfers in more than one month must be aggregated; (c) the "income first" rule will be mandatory in all states (already required in New York); (d) penalty periods will be imposed for partial months (rounding down will no longer be permitted); (e) Partnership long term care insurance policies will be permitted in additional states other than the four presently permitted, including New York.

V. Transfer of Asset Rules

Because Nursing Home Medicaid is a "means tested" program, if assets are "transferred" e.g., given away without receipt of something of equivalent value in return ("uncompensated transfer"), this will usually trigger a period of ineligibility for Medicaid.

Assets that are transferred by gift within 60 months ("look back period") of the date of the application for Medicaid is made will cause the transferor to be ineligible for Medicaid for a period of time ("penalty period"). The penalty period is determined by taking the value of the gift and dividing it by the average cost of a nursing home per month in the county where the Medicaid applicant resides as determined by the Department of Social Services (Average monthly rate for nursing home care for Westchester County is \$11,135.00 as established by Department of Social Services for 2014). Thus, if a gift valued at \$100,000 was made, the transferor residing in Westchester County would be ineligible for Medicaid for approximately 9.31 months.

Transfers of assets by the spouse of a Medicaid applicant made within 60 months of the Medicaid application will also disqualify the applicant for the appropriate penalty period. Furthermore, the spouse of a Medicaid applicant who sets up a trust may well be making a transfer which could result in a period of ineligibility for the applicant. If a spouse makes a non-exempt transfer after the applicant has been approved for Medicaid and has been in a nursing home for 30 days, the transfer would not trigger a period of ineligibility for the spouse that has been approved. However, the spouse making the transfer has created a period of ineligibility for him or herself.

For a transfer made within the 60 month look back period, the penalty period will not commence on said transfer until the applicant is "otherwise eligible" for Medicaid.

Utilizing a Medicaid Crisis Plan

After keeping up to \$14,550 in separate bank account and paying for a pre-need irrevocable burial agreement, if the Medicaid applicant so chooses, the Medicaid applicant would gift 40-45% of his or her assets. Simultaneously, the applicant will lend to a family member/friend, his or her remaining excess resources, to be returned monthly pursuant to the terms of a

Deficit Reduction Act of 2005 (DRA) compliant promissory note. The Promissory Note will be treated as an uncompensated transfer (gift) of assets unless it satisfies the following criteria:

- (a) the repayment term is actuarially sound;
- (b) payments made in equal amounts during term of loan, with no deferral and no balloon payments made; and
- (c) prohibits cancellation of the balance upon the death of the applicant/recipient.

The gift of assets made by the Medicaid applicant will trigger a period of ineligibility for Medicaid covered nursing home care. The monthly promissory note payments will pay for the cost of nursing home care during the period of ineligibility.

The monthly payments are made to the Medicaid applicant as the "payee" under the promissary note from the "maker," the person to whom the Medicaid applicant loaned the money, pursuant to the DRA compliant promissory note. In turn the payee will pay the nursing home.

Once the Medicaid applicant's resources are below \$14,400, he or she should then be eligible for Medicaid in all respects, other than for the uncompensated gift made. A Medicaid application can then be filed with the local Department of Social Services (DSS). The application should be denied on the sole basis of the gift. The denial serves as formal notification that the Medicaid penalty period has commenced. The notice will state the length of the period of ineligibility for Medicaid-covered nursing home care.

The monthly promissary note payments paid by the maker coupled with the applicant's monthly Social Security and other income, such as a pension, will provide an income stream from which he or she will pay the nursing home during the Medicaid period of ineligibility. The total monthly income - the promissory note payment, Social Security income and pension, if you receive one - must total less than the private pay rate of the nursing home, amounting to a monthly shortfall. This shortfall amount should not be paid to the nursing home until the Medicaid application has been approved by Medicaid.

When the penalty period expires, a second Medicaid application is filed with DSS, which should be approved.

VI. Medicaid Home Care and Managed Long Term Care

The system for how Medicaid covered home care services are approved and delivered in Westchester County will be dramatically changing commencing January 1, 2013 due to the New York State mandate to transition Medicaid home care applicants and recipients from traditional home care Medicaid to Medicaid Managed Long Term Care (MLTC).

In short, prior to January 2013, a person applying for home care Medicaid in Westchester County would file a Medicaid Application with the Westchester County Department of Social Services (DSS). DSS would determine the applicant's financial eligibility for Medicaid. (This article will not address the requirements for financial eligibility for Medicaid. However, it should be noted that the transfer of asset rules with their five year look-back do not apply for Medicaid home care and that spousal refusal is also available.) Once the applicant was financially eligible for Medicaid, an application for home care services was filed with DSS. A DSS case worker and/or nurse would then complete an in-home evaluation of the applicant, and DSS would then determine the nature and extent (hours) of home care to be offered and authorized.

Commencing in January 2013, Medicaid recipients and applicants in Westchester County who are eligible for both Medicare and Medicaid (known as dual eligibles), who are over the age of 21 and are in receipt of or are in need of home care services for more than 120 days in a calendar year, will be required to enroll with a MLTC provider. Please be advised that as of this writing Westchester DSS has not yet publicly issued directives or guidance relating to the implementation of MLTC in the County.

There are three types of MLTC plans. The first, MTLC Medicaid Plans provide long term care services, being home care, home health care (skilled care) and adult day care. The person enrolled will continue to use traditional Medicaid for primary care services. The second type of plan is the Medicaid Advantage Plan, wherein a person who is on both Medicare and Medicaid will receive all Medicare and Medicaid services, primary care and long term care, through a managed care provider. The third type of plan is known as the Program for All-Inclusive Care for the Elderly (PACE). With PACE, as with the Medicaid Advantage Plan, a person who is on both Medicare and Medicaid will receive all Medicare and Medicaid services,

primary care and long term care, though a managed care provider. However, all Medicare and Medicaid services, other than home care, are provided at the PACE plan's adult day center.

However, it is our understanding that beginning in January 2013, a home care Medicaid applicant will file her Medicaid application with DSS. However, once Medicaid is approved, rather than DSS performing the home care assessment and authorizing home care services, the applicant will need to contact any/all of the MTLC providers in the County (for which DSS has not yet issued a list) and apply for home care services through the MTLC provider.

For individuals already receiving Medicaid home care services, within the first few months of 2013, it is anticipated that Medicaid home care recipients will be sent a notice from DSS advising them of the transition of home care services to the MTLC format. Recipients will then receive a second notice advising them that they must choose a MTLC provider or one will be chosen for them.

Once the home care recipient has chosen a MLTC provider, she will be transitioned to MLTC. For the first 60 days of MLTC, she will receive the same amount of home care hours received under traditional Medicaid home care services. Within those first 60 days, the provider will complete a home care assessment and determine the number of home care hours to be authorized. If the amount of hours authorized by the MLTC is different than those authorized by Medicaid home care services, the reduction in services can be effectuated on day 61. However, the Medicaid recipient has appeal rights and can appeal the reduction in services. During the pendency of this appeal, the recipient will have "aid continuing," meaning she will maintain the level of home care coverage she had prior to the transition to MLTC.

MLTC providers only authorize home care services for a period of six months. Before the conclusion of the six month period, the MLTCs must perform a reassessment of home care services. If the MLTC determines that the recipient requires fewer home care hours, or that she is no longer appropriate for home care services, the person must appeal first through the provider. Only after exhausting all internal appeals, the recipient may request a Fair Hearing through the Department of Health (the New York State agency that oversees the local Departments of Social Services) to challenge the reduction or

termination. During the pendency of the appeal process, there are no aid continuing rights. As such, the change in service will go into affect. If the appellant should win at any level, only then will services revert back to the prior amount of home care hours.

The MLTC provider is neither your client's friend nor advocate. In order to maximize the hours of home care services it is imperative that Medicaid applicant/recipient work with an experienced elder law attorney to help complete any and all forms required by the MLTC. The completion of the forms in a manner which advocates for the needs of the Medicaid recipient is of critical importance.

It is imperative that the elder law attorney work with the applicant and family to prepare them for the MLTC provider home visit. The elder law attorney must be knowledgeable of the various types of MTLC options, as well as the agencies who provide the services, to best advise the client of the most appropriate type of plan to ensure that the person receives the type of care necessary to maintain her in her home with appropriate home care services.

To further complicate the choosing of a MLTC provider, the MLTC is also responsible for the coverage of the cost of a nursing home if the Medicaid recipient is admitted to same for non-skilled/non-rehabilitation care. As such, the Medicaid recipient and her elder law attorney need to review the list of nursing homes in the MLTC provider's network, and thus, must now give thought to choosing a nursing home that she may need in the future.

The biggest issue with the implementation of MTLC is, though New York State had been committed to keeping seniors at home, the MLTC providers have a strong incentive to reduce home care costs and expenses as the MLTC provider is paid a set rate for each enrollee no matter what that person's home care needs are. For example, some 24 hour sleep-in and split shift care can cost more than nursing home care, so the providers have an incentive to reduce or terminate said services as the cost of care is too great, unless the recipient receives strong advocacy this may result in an increase in Medicaid recipients having to go to nursing homes.

*This section was written by Sara Meyers, Esq. is a Senior Associate of Enea, Scanlan & Sirignano, LLP with offices in White Plains, NY. She is experienced in handling Medicaid Applications (home care and nursing home) and Medicaid Fair Hearings and Appeals. She is a frequent lecturer for Elder Law Programs sponsored by the New York State and Westchester County Bar Associations on Medicaid and Elder Law issues. Ms. Meyers is a vice-chair of the NYSBA

PLANNING OPTIONS AVAILABLE TO PRESERVE REAL PROPERTY FOR THE FAMILY

Even before the enactment of the DRA, the decision to transfer the primary residence raised a number of important issues and concerns for both the attorney and client, for example; gift taxes, potential capital gains tax consequences and, of course, the transfers impact on the Medicaid eligibility of the senior. However, once the decision was made to transfer the primary residence to someone other than a spouse, for Medicaid planning purposes, there were generally three primary planning options available:

(a) Outright Transfer of the Residence Without the Reservation of a Life Estate.

Perhaps the least desirable option available, as the transferee of the property will receive the transferor's original cost basis in the property(original purchase price /value upon receipt plus capital improvements), and the outright transfer is a completed gift subject to gift taxes. For Medicaid eligibility purposes and pursuant to the DRA, the outright transfer of the residence would be subject to a 60 month look back period, and if the transfer of the residence was made within the look back period, the ineligibility period created would not commence until the individual was in the nursing home had applied for Medicaid and would otherwise be eligible for Medicaid, but for the transfer.

For example, the formula used to calculate the period of ineligibility created by a non-exempt transfer of assets would be to take the fair market value of the property transferred, and divide said amount by Medicaid Nursing Home Rate for County of Applicant's Residence ($\$500,000 \div 11,135$ Westchester County rate equals approximately 44.90 months of ineligibility). If Medicaid is needed within the 60 month look back period, the period of ineligibility would not commence until the applicant was receiving institutional care (in a nursing home), had applied for Medicaid and would have been approved but for the transfer made.

Additionally, from a tax perspective the use of an outright transfer of the residence results in the transferor losing the

Internal Revenue Code ("IRC") §121(a) principal residence exclusion for capital gains of \$250,000 (single person) or \$500,000 (married couple). However, if the transferee owns and resides in the premises for two out of the five he or she will be able to use said principal residence exclusion. Any Veteran's, STAR and Senior Citizen's Exemptions are also lost. It is necessary to obtain a fair market value appraisal of the premises gifted for purposes of calculating the federal gift tax credit (\$5,340,000 per person) utilized by the transfer.

(b) Transfer of the Residence with the Reservation of a Life Estate

If the transfer was made within the Medicaid look back period (60 months), the period of ineligibility would not commence until the applicant was receiving institutional care in a nursing home and was otherwise eligible for Medicaid, but for the transfer made. Thus, a transfer of real property by deed with a retained life estate will also require that the transferor not apply for Medicaid within the look back period to avoid an onerous period of ineligibility.

Pursuant to §2036(a) of the IRC, the transfer of a residence with a retained life estate permits the transferee of the residence to receive a full step up in his or her cost basis in the premises upon the death of the transferor, to its fair market value on the transferor's date of death. This occurs because the residence is includible in the gross taxable estate of the transferor upon his or her demise. This, of course, presumes the existence of an estate tax upon the death of the transferor. A "life estate", pursuant to §2036(a) of the IRC, is the possession or enjoyment of, or a right to the income from the property or the right either alone or in conjunction with another to designate the persons who shall possess or enjoy the property or income thereof.

The most significant problem in utilizing a deed with the reservation of a life estate results if the premises are sold during the lifetime of the transferor. A sale during the transferor's lifetime will result in (a) a loss of the step up in cost basis, thus, subjecting the transferee to a capital gains tax on the sale with respect to the value of the remainder interest being sold (difference between transferor's original cost basis, including capital improvements, and the sale price), and (b) the life tenant pursuant to Medicaid rules is entitled to a portion of the proceeds of sale based on the value of his or her life estate. This portion of the proceeds could be significant and will be considered an available resource for

Medicaid eligibility purposes, thus, impacting the transferor's eligibility for Medicaid or being an asset against which Medicaid may have a lien. The existence of the possibility that the premises may be sold prior to the death of the transferor(s) poses a significant detrimental risk that needs to be explored in great detail with the client.

If for tax planning purposes it is prudent to make the gift an "incomplete gift" for gift tax purposes, the reservation of a limited testamentary power of appointment to the Grantor should be considered.

It should be remembered that §2702 of the IRC values the transfer of the remainder interest to a family member at its full value without any discount for the life estate retained. Retention of a life estate falls within one of the exceptions of §2702.

If the transfer does not fall within §2702 of the IRC, or if one of the available exceptions applies (e.g. treated as a transfer in trust to or for the benefit of), calculation of the life estate is performed pursuant to IRC §7520, and the tables for the month in issue need to be consulted to determine the correct tax value of the remainder interest.

Pursuant to IRC §2702 if the homestead is transferred to a non-family member, the use of a traditional life estate will result in a completed gift of the remainder interest. It should also be remembered that the gift of a future interest (remainder or reversionary interest) is not subject to the annual exclusion of \$12,000 per donee for the year 2006.

(c) Transfer to an Irrevocable Income Only Trust a/k/a ("Medicaid Qualifying Trust"). From a purely Medicaid Planning perspective, the use of the Irrevocable Income Only Trust in my opinion may be the most logical option. As previously explained, irrespective of the fair market value of the residence transferred to the Trust, the period of ineligibility will effectively be five years (60 months). However, the properly drafted Irrevocable Income Only Trust will allow the residence to be sold during the lifetime of the transferor with little or no capital gains tax consequences, as it is possible to utilize the transferor's personal residence exclusion of up to \$500,000 if married, and \$250,000 if single, by reserving in the trust instrument the power to the Grantor(s) in a non-fiduciary capacity and without the approval and consent of a fiduciary to reacquire all or any part of the trust corpus

by substituting property in the trust with property of equivalent value. The Grantor(s) will be considered the owner for income tax purposes. See IRC §675(4). Additionally, the transfer to the Trust can be structured to allow the transferee to receive the premises with a stepped up cost basis upon the death of the transferor, through the reservation of a life income interest (life estate) to the Grantor. §2036(a) of the IRC.

While the lengthy Medicaid ineligibility period must be appropriately considered, however, the tax advantages and the continued flexibility of being able to sell the premises during the transferor's lifetime without income tax consequences, in my opinion, makes the Irrevocable Income Only Trust an ideal option in most circumstances.

The transfer of the residence to the Irrevocable Income Only Trust is a taxable gift of a future interest, no annual exclusion available. Full value of premises reported on gift tax return. If value over \$5,340,000 gift taxes are due.

If a limited power of appointment is retained, the gift to the trust is incomplete. Treasury Reg. 25.2511-2(b). No gift tax return is technically required, however, it is advisable to review with an accountant the filing of a gift tax return for informational purposes.

On the death of the Grantor of the Trust, the date of death value of all assets in the trust will be included in the Grantor's taxable estate pursuant to §2036(a) of the IRC, as a result of the life income interest retained by the Grantor.

Inclusion in Grantor's estate will result in a full step up in cost basis for all trust assets pursuant to §1014(e) of IRC, assuming an estate tax is still in existence at the time of the Grantor's demise.

The new law more than anything else severely punishes those who procrastinate in planning for their long term care. Whether it be the transfer of assets to an Irrevocable Income Only Trust, use of a deed with a life estate or the purchase of long term care insurance, it is clear that through advance planning one can limit the extent of his or her exposure to the costs of long term care.

VII. Exempt Assets and Transfers

There are gifts and transfers that can be made by the Medicaid applicant which will not trigger a period of ineligibility. For example, gifts regardless of amount, to or for the exclusive benefit of a spouse or a blind or disabled child will not result in the denial of Medicaid.

Under current law, a person's primary home (the "homestead") remains exempt and is not counted in determining eligibility, as long as the applicant, his or her spouse or a blind or disabled child resides there.

However, the rules relevant to transfer of the assets apply to the homestead, except for transfers to:

- (a) the spouse;
- (b) a child under 21 years of age, or a blind or disabled child;
- (c) a sibling with an equity interest in the home who has resided in the home for at least one year prior to applicant's admission to a long-term care facility; or
- (d) the child of the applicant who has lived in the home for at least two years prior to institutionalization and has cared for the parent ("caretaker exemption").

Under New York's Medicaid home care program, a person residing at home could transfer his or her assets and apply for home care Medicaid benefits immediately without any penalty period subject only to the income and resource allowances for eligibility. Fortunately, to date New York has not extended the transfer of asset rules to an applicant for Medicaid home care.

VIII. Use of an Irrevocable Trust in Medicaid Planning

Federal law provides that "an individual shall be considered to have established a trust if assets of the individual fund the trust and if any of the following individuals established such trust other than by Will: (I) the individual, (ii) the individual's spouse, (iii) a person including a court or administrative body, with legal authority to act in place of or on behalf of the individual or individual's spouse, and (iv) a person including any court or administrative body, acting upon the direction or on request of the individual or individual's spouse.

Once it is established that the trust meets the aforesaid test, the impact on Medicaid eligibility will differ depending on whether the trust is revocable or irrevocable.

The corpus (principal) of a revocable trust continues to be considered a resource "available" to the individual for purposes of the resource test for Medicaid eligibility, and payments to or for the benefit of the individual will be treated as income, and thus, be subject to income restrictions for eligibility.

However, the assets transferred to an irrevocable trust will not be considered an available resource for Medicaid eligibility once the assets transferred to the trust fall outside of the 5 year look back period for Medicaid. However, the income generated by the trust will be deemed available to the individual for purposes of Medicaid eligibility.

IX. Spousal Refusal in New York

As can be imagined the prospect of one's spouse being admitted into a nursing home can have both devastating emotional and financial consequences upon the spouse remaining at home. With the average daily cost of a nursing home in Westchester County ranging anywhere from approximately \$385.00 per day to \$400.00 per day (\$140,525 to \$146,000 per year), it should come as no surprise that many spouses often have no alternative but to elect what is commonly known as "spousal refusal." In years past a discussion of "spousal refusal," with a client would often elicit looks of horror from the client, which were rivaled only if I mentioned the possibility of a divorce. In recent years it has been my experience that my clients have been significantly more receptive and willing to elect "spousal refusal" as an option. Financial ruin is consistently a significantly less attractive option.

As part of the Medicare Catastrophic Act of 1988, Congress passed the "spousal impoverishment" rules. This allowed the spouse who remained at home ("community spouse") to retain resources and income above the levels ordinarily permitted to unmarried individuals without impacting the eligibility of the spouse applying for Medicaid. The statute created a Minimum Monthly Maintenance Needs Allowance (MMMNA), which for the year 2014 in New York is \$2,931.00 per month and a maximum Community Spouse Resource Allowance (CSRA) which for 2013 is \$117,240.00. More importantly, Congress permitted the community spouse to refuse to contribute his or her assets above the CSRA without jeopardizing the eligibility for the nursing home spouse,

provided that the State was assigned the nursing home spouse's ("institutionalized spouse") right of support.

The State of New York codified these "spousal refusal" rules in Social Services Law §366(3)(a). Section 366(3)(a) permits the community spouse to keep resources in excess of the CSRA once two documents are executed:

(a) A "spousal refusal" letter, signed by the community spouse, stating that he or she refuses to make available his or her resources to the institutionalized spouse; and

(b) An "assignment of support" which is signed by the institutionalized spouse, or if the spouse is unable to sign, a statement explaining the medical reason is to be provided.

The signing of the "assignment of support" authorizes the Department of Social Services ("DSS") to commence an action for support against the refusing spouse. DSS will be able to assert its claim against the refusing spouse once the application has been approved and Medicaid services provided.

From a practical perspective, the decision of whether or not to file the "spousal refusal" is more often than not a purely financial decision. Obviously, if the surviving spouse has income and resources only slightly above the MMMNA and CSRA, the community spouse may consider alternatives other than utilizing the "spousal refusal", e.g., funding an irrevocable burial trust, creating a "luxury fund" or making improvements to the homestead. However, when the resources and income are significantly in excess of the permitted amounts and the prospect of spending in excess of \$150,000 or more per year for the nursing home looms in the background, "spousal refusal" may be the only viable alternative. Additionally, the election of "spousal refusal" will allow the nursing home spouse to be eligible for Medicaid immediately without necessitating a spenddown of the community spouse's resources. This is especially important when the community spouse is younger than the institutionalized spouse, and necessitates significant resources to be able to continue to reside in the community in the future.

Historically, the Westchester County DSS has not with any regularity or consistency commenced support actions against refusing spouses; however, in recent years the rumblings of a change in attitude at DSS have appeared. The first indication of the change is the greater frequency in which DSS has issued demand letters to the refusing spouse. The demand letter delineates the specific amount Medicaid has paid to the nursing

home on behalf of the institutionalized spouse. It is the fact that Medicaid can only seek to recover the amount of Medicaid properly paid which continues to make "spousal refusal" a viable and attractive option. As long as Medicaid continues to reimburse the nursing home in an amount equal to approximately fifty (50%) percent of the nursing home's private pay rate, it will continue to make absolute sense for the community spouse to execute a "spousal refusal." The community spouse would not want to deplete his or her resources at the approximate rate of \$13,000 to \$15,000 or more per month, when in the worst case scenario, if DSS were to commence and successfully prosecute a support action, they would only recover 40% to 50% of the private pay rate. It should be noted that DSS has generally been willing to compromise its claim both at the time of the service of a demand letter and even once a support action has been commenced.

X. Estates Recovery Program

Federal statute requires every state to have an estate recovery program which will allow the individual states to seek reimbursement of Medicaid payments made on behalf of the recipient from all assets in which the Medicaid recipient had any interest, not just assets in the recipient's individual name (assets that pass to heirs under that person's Will). For example, the federal law refers to jointly owned assets and trusts where the Medicaid recipient is the life income beneficiary of the trust or real estate where the recipient had a life estate.

New York Medicaid seeks estate recovery of those assets that pass through the recipient's Last Will and are subject to probate.

XI. Long-Term Care Insurance

If it was the intent of those pushing for the enactment of the DRA to enhance the usefulness of Long Term Care Insurance, they have succeeded. Clearly, the DRA makes Long Term Care Insurance a much more important planning tool. Additionally, the DRA has enacted the provisions (§6021) expanding the State Long Term Care Insurance Program nationwide.

In 1988, New York was one of several states (CT, WI, IN, CA, NJ and MA) given planning grants by the Robert Wood Johnson Foundation. The purpose of the grants was to encourage states to design new alternatives for financing long-term care. In 1988, New York was given an additional grant to implement the

model design. Finally, in 1992, a long-term care insurance project was set in place which would allow New York's citizens to purchase certified long-term care insurance policies which are certified by the New York State Insurance Department.

Under the DRA the states are now again permitted to implement Partnership Long Term Care insurance policies.

The individual holding a certified long-term care insurance policy can qualify for New York's Medicaid program without any regard to his or her assets or any transfers made when all of the benefits under the policy have been exhausted by the policyholder. However, income must be applied towards the cost of care as it is under the regular Medicaid program, once the benefits under the policy have been exhausted.

As part of a federal law enacted of 5/14/93 the states were prohibited from enacting any insurance program after which would allow protection of assets through the purchase of a long term care insurance program. New York's program was not affected by the new federal law.

All states may now amend their state plan to provide for partnership program. The four original states (NY, CT, CA and IN) are grandfathered so long as they maintain consumer protection standards which are no less stringent than they were on 12/31/2005.

XII. Powers of Attorney

A. Defined - A Power of Attorney ("POA") is a written document wherein one individual ("Principal") appoints another individual(s) as his or her "attorney-in-fact" or agent. The attorney-in-fact or agent is given the authority to act on behalf of or in place of the principal for the purposes specified in the POA. A POA is effective immediately unless stated otherwise.

B. Purpose - Permits one individual to delegate to another the authority to manage his or her day to day affairs such as banking (e.g., check writing), bond and stock transactions, real estate transactions, business transactions, among others. Important in event of emergency or illness or when someone is away or on vacation.

C. Types of Powers of Attorney

1. Durable - Survives the incapacity or disability of the principal. It is extremely important that a POA be durable; if not, it will terminate upon the incapacity or incompetency of the principal. For example: POA should state " This power of attorney shall not be affected by the subsequent disability or incompetence of the principal."

2. Springing POA - Not effective immediately but becomes effective upon the occurrence of a specific future date or event, e.g., the incompetency of the principal. If POA becomes effective upon occurrence of a specific event, it will be activated only by a written statement that the event has occurred. A new form of Power of Attorney became effective on October 1, 1994.

3. General POA - Agent is given unlimited discretion to make all decisions for principal with exception of life sustaining medical decisions which requires execution of a Health Care Proxy in New York.

4. Limited POA - Agent's authority is limited to the specific activities stated in the POA, e.g., banking, real estate, etc.

Note: New York statutory short form Power of Attorney will not be effective to transfer real property in Florida unless it meets statutory requirements in Florida. For example, it must specify the exact real property in question, must be signed before two witnesses and notarized.

** For Gifting under a Power of Attorney- must be in "best interest" of the principal see Court of Appeals in Matter of Estate of Ferrara, 7 N.Y. 3rd 244, and the Statutory Gifts Rider (SGR) Section of the Power of Attorney must be executed.

XIII. Health Care Proxies

Defined - A written document which enables a competent adult ("principal") to designate an individual ("agent") to make all health care decisions for the principal when he or she is unable to make his or her own health care decisions, e.g., incompetency.

- Only document legally recognized in New York State regarding health care decisions, effective as of January 18, 1991, when New York State adopted "The Health Care Proxy Law."

Purpose - Allows individual to designate someone he or she trusts to make important health care decisions in the event of incompetency or inability to make such decisions.

- The Health Care Proxy will be effective as to life sustaining treatments, medications, or any other special needs specified. The agent will be unable to make decisions as to principal's intentions regarding artificial nutrition and hydration (feeding tubes) unless agent specifically knows said intentions or the Health Care Proxy specifies those intentions.

Effectiveness and Duration - A Health Care Proxy will not be effective until the principal's attending physician determines "to a reasonable degree of medical certainty" that a principal lacks capacity to make his or her own health decisions. To withhold life sustaining measures the attending physician must consult with a second physician that the principal lacks capacity.

- Proxy is in force indefinitely unless limited in document. Principal can revoke it any time orally or in writing.

- Only one agent at a time can be appointed, an alternate agent may be designated. The agent must be an adult with exception of an operator, administrator or employee of a residential health care facility or hospital in which the principal is a patient or resident.

- Agent will not be liable for health care decisions he has made if he has acted in good faith.

- In order to comply with the Health Insurance Portability and Accountability Act (HIPAA), the following language should be added to all Health Care Proxies:

In addition to other powers granted by me in this document, my agent shall have the power and authority to serve as my personal representative for all purposes of the Health Insurance Portability and Accountability Act. My agent is authorized to execute any and all releases and other documents necessary in order to obtain disclosure of my patient records and other medical information subject to and protected under HIPAA.

XIV. Living Wills

Defined - A writing evidencing an individual's intentions concerning health care decisions, e.g., artificial life sustaining procedures. It is unlike a Health Care Proxy which empowers the agent to act for all purposes.

- It has not been given legal statutory recognition in New York. Only serves to provide evidence of individual's intentions in a court of law of his or her health care decisions.

Purpose - Generally used to state an individual's intentions regarding withholding of artificial life sustaining measures, e.g., upon determination of two neurologists that one is neurologically brain dead.

- Specifies one's intentions as to the medical treatments and procedures that one finds abhorrent and wishes to be withheld, e.g., electrical or mechanical resuscitation of the heart, nasogastric tubal feeding.

- Pursuant to the U.S. Patient Self Determination Act which became effective on December 1, 1991, all hospitals are required to inquire if a patient wants to sign a Living Will even for routine procedures.

*U.S. Rep. Bill Archer "No one should have to visit the IRS and the undertaker the same day"

XV. LAST WILLS AND TESTAMENTS

A writing wherein you state your wishes as to how assets (real property, tangible personal property) which are in your name alone on the date of your death are to be disposed of upon your demise.

- A Last Will disposes of property either outright or in trust to named beneficiaries.

- A Last Will and Testament has no control over assets which are in joint name, in trust for accounts or have named beneficiaries (e.g. IRA's, Life Insurance, etc.)

- In your Last Will you will have to appoint someone to act as the executor or executrix of your Will. Person(s) responsible for executing upon the described dispositions stated in said Last Will.

- Executor or Executrix gathers all assets and pays all debts of the estate, arranges for filing and payment of any estate taxes due.

- A Last Will and Testament must be admitted to probate in the Surrogate's Court of the County where the decedent resides in New York before it is legally recognized as the valid Last Will and Testament of the decedent. Once the Last Will is admitted to probate, the Court will issue letters testamentary to the executor named in the Last Will.

**XVI. ESTATE TAXES AND UTILIZING THE
UNIFIED ESTATE AND GIFT TAX CREDIT
TO YOUR ADVANTAGE**

- Married couples who are U.S. citizens get a special break on estate taxes known as the "unlimited marital deduction". Husband and wife during their lifetimes and upon death can transfer unlimited amounts of assets and property to each other without any estate or gift tax consequences. However, upon the death of the second to die of husband and wife, estate taxes, if any are due, can be reduced or eliminated if proper use of the exemption amount has been taken advantage of during the lifetime of both husband and wife.

- The Unified Gift and Estate Tax Credit allows everyone to make taxable gifts or transfers of assets during their lifetime or upon their death which are exempt from estate and gift taxes:

2004 and 2005-	- - - - -	\$1,500,000
2006, 2007 and 2008	- - - - -	\$2,000,000
2009	- - - - -	\$3,500,000
2010	- - - - -	Repealed
2011	- - - - -	\$5,000,000
2012	- - - - -	\$5,120,000
2013	- - - - -	\$5,250,000
2014	- - - - -	\$5,340,000

- New York Credit is \$1,000,000

- Proper utilization of the exemption amount in both the estate of a husband and wife can save the estate of the second to die hundreds of thousands of dollars in estate taxes.

- Last Will and Testaments or Living Trusts which contain what are known as "Credit Shelter Trust Provisions" will allow both a husband and wife to take full advantage of the Exemption

amount in each of their estates upon their demise.

- Credit Shelter Trust provisions in a Last Will will be ineffective if there are not sufficient assets in the decedent's name alone on the date of death so as to utilize the exemption on date of death.

XVII. FINALLY SOME ESTATE TAX RELIEF FOR NEW YORKERS

Fearing a continued exodus of affluent New Yorkers to states that do not impose a state estate tax, the State of New York has finally enacted significant changes to N.Y. Tax Law §952.

The most significant change is the increase in the basic exclusion amount for the imposition of New York estate taxes. Thus, for individuals dying on or after:

- 4/1/14 and before 4/1/15 the exclusion is \$2,062,500 per person;
- 4/1/15 and before 4/1/16 the exclusion is \$3,125,000 per person;
- 4/1/16 and before 4/1/17 the exclusion is \$4,187,500 per person; and
- 4/1/17 and before 1/1/19 the exclusion is \$5,250,000 per person.

Clearly, the significant disparity that existed between the Federal estate and gift tax credit (\$5.34 million per person for 2014) and the significantly smaller New York exclusion (\$1 million per person) was a significant impetus for the enacted changes. It should be noted that after January 1, 2019 the basic exclusion amount will be indexed for inflation from 2010. This should allow the New York exclusion to be approximately equal to the federal amount.

Unfortunately, while Governor Cuomo and the State Legislature were in favor of increasing the basic exclusion amount, it appears that they believed that if a resident decedent's estate exceeded the basic exclusion amount by more than five (5%) percent, then the entire taxable estate will be subjected to a New York estate tax. With the top rate remaining at sixteen (16%) percent, this can result in significant New York estate taxes especially during the period prior to the exclusion amount reaching \$5,250,000 on April 1, 2017. Additionally, while under federal law the surviving spouse can

utilize the unused federal exclusion of the decedent spouse (\$5.34 million) pursuant to the "portability" provisions, no such "portability" provision exists under New York law.

While there was discussion of a significant add back to the taxable estate for taxable gifts made, its application was significantly limited to a three (3) year look back in the enacted legislation. N. Y. Tax Law §954(3) provides that the New York gross estate of a resident decedent will be increased by the amount of any taxable gift pursuant to §2503 of the Internal Revenue Code not otherwise included in the decedent's federal gross estate made during the three (3) year period ending on the decedent's date of death, but not including any gift made: (1) when the decedent was not a resident of New York state; (2) before April 1, 2014; or (3) on or after January 1, 2019. While this "add back" regarding taxable gifts may succeed in generating additional estate tax revenue, it could also result in New Yorkers seeking non-resident status if they wish to avoid the estate tax and are interested in sheltering assets from the cost of long term care.

Clearly, the aforesaid changes to the New York estate tax are welcomed. However, whether in the long run they will have the intended effect of preventing New Yorkers from moving to tax friendlier states is something only time will tell. It is definitely a step in the right direction.

XVIII. REVOCABLE LIVING TRUSTS

A Revocable Living Trust is an agreement between the Grantor(s) (Creator(s)) of the Trust and the Trustee(s) (Administrator(s)) as to how property transferred to the trust is going to be held, distributed and administered during both the lifetime of the Grantor(s) and upon the death of the Grantor(s).

- Grantor can also be a sole trustee of the Revocable Living Trust so long as the trust has remainder beneficiaries.

- To be effectively utilized, all of the assets of the Grantor(s) have to be transferred into the name of the trust during the lifetime of the Grantor(s).

- Advantages of a Revocable Living Trust

1. Avoids probate
2. Privacy

3. Can utilize all estate tax planning tools (e.g. Credit Shelter provisions) that could be taken advantage of by use of a Last Will.

- Disadvantages

1. Need to transfer all assets to trust during your lifetime.
2. Need to consult with your attorney to make any revisions to the trust regarding terms of administration during lifetime or death.
3. May still need to probate a Last Will if all assets not transferred to trust.
4. Has no special estate tax treatment - depending on size of estate may need to file Estate Tax Returns and pay estate taxes.
5. Higher standard of competency required than a Last Will.