WILLMS, S.C.

LAW FIRM

TO: Clients and Friends of Willms, S.C.

FROM: Attorney Jessica A. Liebau

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RE: Medicaid Planning Myths and Misconceptions

Introduction

On a regular basis, our clients come to us with incorrect or incomplete information regarding how to plan for long-term care expenses or how to qualify for Medicaid. The most common ones we hear include:

- If I think I'm going to need nursing home care, I should dispose of my assets so that I can get on Medicaid right away.

- If don't get rid of my assets, the nursing home or Medicaid will take my house and my business.

- If my assets are in a trust, they won't be counted when I apply for Medicaid.

- If I gave my assets away at least three years ago, they won't be counted for Medicaid.

- If I limit the amount of assets I give away to $14,000 per year, I won't get penalized when I apply for Medicaid.

- I have a prenuptial agreement with my spouse, so our assets are protected from one another's nursing home expenses.

- If I have a disabled family member or a spouse in the nursing home, I should disinherit them to make sure they stay eligible for Medicaid.

Although not a substitute for actual legal advice tailored to your particular situation, this article seeks to correct the record in relation to these common misconceptions.

Myth #1: If I need to pay for long-term care, I need to dispose of my assets and get on Medicaid right away.

Medicaid is a government-funded program that pays for long-term care expenses for people who cannot afford to pay for care themselves. If a Wisconsin resident can prove that (1) they are elderly, blind, and/or disabled, and (2) they do not have the financial resources to pay for long-term care, then they can qualify to have the government pay for their long-term care expenses for them, whether in the nursing home or in the community. Showing that you are financially eligible to receive Medicaid benefits generally means showing that you have a low level of monthly income and less than $2,000 in assets.

This does not mean you should get rid of your assets that exceed $2,000 and apply for Medicaid right away. Medicaid does pay for invaluable long-term care services to people who could not otherwise afford them. However, it does not necessarily pay for all the care you might need. Instead, it pays for the care that the government can afford to pay for, which means that it provides the care that the program administrators decide you need. On a practical level, accepting Medicaid means giving up some freedom to choose what kind of care you receive and where you receive it as compared to people who can pay for long-term care out of their own pocket or via long-term care insurance.

Therefore, if we meet with clients who have substantial assets, we do not advise that they spend their assets immediately or give all of their assets away solely to qualify for Medicaid. Instead, it may be advisable to use those assets to pay privately for care for a period of time, and then apply for Medicaid later if necessary. It may also be advisable to look into purchasing long-term care insurance if that is a viable option. Further, as discussed in the next paragraph, it is usually not necessary to "get rid" of your assets if you do need to qualify for Medicaid.

Myth #2: If I don't get rid of my assets now, the government will take everything I own when I need Medicaid.

For many people, becoming eligible for Medicaid benefits makes sense. Paying for long-term care is very expensive, and paying privately may not be possible unless you have substantial savings and substantial income. Not everyone will qualify for long-term care insurance, particularly if they have a pre-existing condition or are already advanced in age. Therefore, Medicaid is a necessity for many people.

In general, the Medicaid program requires that you have a low level of income and very low level of assets. However, the program exempts certain assets from being counted during the eligibility process, meaning that you can keep certain assets and still be eligible for Medicaid. These assets include, in most cases: your home, your car, and even certain business assets. For married couples, the spouse who does not need Medicaid benefits can keep much more than $2,000 in assets. There are also exceptions for certainly jointly-held assets and property that is for sale. Further, while the federal government has worked to curb the use of trusts in Medicaid planning, trusts may be appropriate and useful in certain situations.

These rules are very fact-specific and cannot be applied uniformly to each person, but it is important to understand that there are exceptions to the general asset and income limits rules. An elder law attorney will be able to review your financial situation and assist in maximizing these assets with an eye towards Medicaid.

Myth #3: If my assets are transferred to a trust, they will not be counted for Medicaid purposes.

One very common and very dangerous category of Medicaid myths are those related to trust assets. As mentioned above, trusts can be appropriate in certain situations to protect assets, but these are generally not the same trusts that are use for other non-Medicaid planning purposes.

The following types of trusts are <u>not exempt</u> from the Medicaid asset limits:

- **Revocable Trusts.** These are trusts where a person/married couple (the "grantor") creates a trust, puts their own assets in the trust, and then retains the right to receive distributions of income and/or principal from the trust. They can amend or revoke the trust at any time. When someone creates this type of trust, Medicaid treats the grantor as the owner of all the trust assets. The assets are not treated any differently than if they were not placed in the trust. No protection from Medicaid is provided.[1]

- **Irrevocable Trusts With Grantors as Beneficiaries**. These are trusts where a grantor, puts their own assets into an irrevocable trust that cannot be amended or revoked. Then, they give a third-party the right to make distributions of income or principal back to the grantors as necessary. Many people think this makes the assets and

[1] Revocable trusts may provide some protection from estate recovery, the process whereby Medicaid becomes a creditor of a decedent's estate after they pass away to recover the funds spent by Medicaid on their care. A more thorough discussion of that process is beyond the scope of this article, but could certainly be discussed in greater detail with the author.

income of the trust unavailable because the grantors cannot demand distributions. This is wrong. If a grantor creates a trust and there are any circumstances under the terms of the trust agreement in which income or principal can be distributed back to the grantor, the income and principal is treated as owned by the grantor, just the same as above. Further, if one spouse creates this type of trust for the other spouse as beneficiary, the assets are still treated as owned by both spouses for Medicaid purposes. No protection from Medicaid is provided.

These rules are very different from gift and estate tax rules, which is what makes Medicaid planning with trusts such a dangerous proposition. If a trust was created without Medicaid planning as a goal, there is a very high probability that the trust does not provide Medicaid protection.

There are certain types of trusts that can be created to provide Medicaid protection. They do require that a grantor relinquish control of their assets transferred to the trust, so they are not for everyone. However, an elder law attorney can explain these options to you and help you decide if the use of a trust makes sense in your particular situation.

Myth #4: If I gave my assets away at least three years ago, I will not be penalized when I apply for Medicaid.

This myth relates to the "divestment penalty". Medicaid is meant to provide long-term care to people who cannot afford it themselves. Accordingly, the government has put rules in place to penalize people who give away assets to qualify for Medicaid. The rule is that if you apply for Medicaid and meet all the financial and non-financial requirements, but you gave away assets previous to applying, Medicaid imposes a penalty. Medicaid looks at the amount of money you gave away, calculates how long that money could have paid for your care, and makes you ineligible from receiving Medicaid benefits for that long. If you have no assets left to pay for your care, this is a huge problem.

You are required to report all gifts that were made for 5 years prior to applying for Medicaid. This has been the rule since 2009, and does not matter if you make a gift directly to someone, or if you make a gift to a trust. There used to be distinctions whereby sometimes Medicaid only asked you to report gifts within 3 years. This distinction no longer exists. If someone tells you that there is a 3 year rule, they are wrong.

Myth #5: I can give away $14,000 per year to anyone without incurring a divestment penalty for Medicaid purposes.

This myth confuses gift tax rules and Medicaid rules. These rules have absolutely nothing to do with one another. Under the transfer tax laws, each person can give away $14,000

per year per recipient without having to use any of their lifetime gift tax exemption. This is called the "annual exclusion". This rule allows people to make gifts to children and other loved ones without incurring a transfer tax.

The transfer tax rules have nothing to do with Medicaid rules. That $14,000 gift made to a child will be sheltered from gift tax by the annual exclusion, but it will still count as a divestment for Medicaid purposes. If these gifts were made each year for the five years prior to applying to Medicaid, you would face a large divestment penalty that would prevent you from receiving Medicaid benefits when you most need them.

Myth #6: My prenuptial agreement will protect my assets from my spouse's nursing home care, and vice versa.

This is a myth that is, unfortunately, completely incorrect. When a married person applies for Medicaid, their assets and their spouse's assets are counted in the financial eligibility calculation. Medicaid disregards all marital agreements, whether they are prenuptial or post-nuptial (i.e. entered into before or after marriage). Therefore, even if you have kept all of your property separate from your spouse and everything is titled in individual names, it is still all counted as the same pot of assets in determining Medicaid eligibility.

However, as stated above, there are ways to maximize planning for married couples. A spouse who is not applying for Medicaid is allowed to keep much more than $2,000, and certain assets become except simply because they are owned by the non-Medicaid spouse. An elder law attorney can help you walk through this process and maximize assets for Medicaid eligibility purposes.

Further, marital agreements are still very useful planning tools, even in the Medicaid realm. After one spouse qualifies for benefits, the other spouse must be able to classify all of the assets they retained as their individual property. At that point, they are allowed to acquire additional property in excess of the initial asset limits, and are also able to convey those assets however they please. A correctly-drafted marital agreement is an essential component of that process.

Myth #7: Family members who are disabled or in the nursing home should be disinherited.

This myth is based on the theory that if Medicaid limits the amount of assets a person can have, then that person cannot inherit money from a loved one and should be disinherited. This can take the form of simply cutting them out of the estate plan, or more commonly, giving an extra share of assets to a sibling or other family member. Then that other family member is entrusted with providing funds to the Medicaid recipient.

This is one of the most unfortunate myths that circulate in regards to long-term care planning because there are so many options other than disinheriting someone who is on Medicaid benefits or planning to qualify for Medicaid benefits. If the intended beneficiary who is on Medicaid is not the donor's spouse, a trust can be set up to receive an inheritance, and this trust can be designed so that it does not at all interfere with the beneficiary's Medicaid benefits. If the intended beneficiary is the donor's spouse, the non-Medicaid spouse who has assets can pass those assets to a specially-designed trust for their spouse when they die so that they Medicaid spouse can benefit from those assets without being ineligible for Medicaid. Finally, there are pooled and community trusts that can be utilized for people who might not have the desire to set up and administer a stand-alone trust. This is an area where elder law attorneys excel at helping clients create solutions that they did not know existed.

Conclusion

This goal of this article was to address the most common myths we see regarding Medicaid planning and hopefully provide clarification on the applicable law. If this article did not answer your questions, or if you would like to learn more about any of the above-described strategies, or if you believe you have proceeded on incorrect information in planning for Medicaid in the past and would like to try to fix the problem, please do not hesitate to contact us. We would be more than happy to assist you.

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