

## MESSAGE FROM THE EDITOR

The planning and paying for long-term care and the many legal issues relevant to it is the subject of this edition of the *Elder Law Report*. Trying to understand the options available to help pay the costs of long-term care is a challenge for everyone involved. Our goal here is to make everyone's work easier with the information that follows on this page. It will serve as a reminder that as costly as long-term care may be, there are opportunities to access good health care without having to exhaust lifetime savings. ■



## LONG TERM CARE PLANNING: THE CHECKLIST

### MEDICAID

Individuals in need of home care or nursing-home care should understand that despite recent legislative changes made in Medicaid, they do not have to spend down their savings to qualify for Medicaid services. Many valuable planning options have been left in place and they are outlined here.

### COMMUNITY MEDICAID

There continues to be no penalty period for transferring assets to become eligible for non-institutional Medicaid. The virtually-free Medicaid services include home care; adult-day care; private-duty nursing; the Consumer Directed Personal Assistance Program; community managed long-term care; the Assisted Living Program and more.

### CONSUMER DIRECTED MEDICAID HOME CARE

Individuals who prefer their own aide when accessing the Medicaid home-care program may continue to employ that person within the Consumer Directed Personal Assistance Program under which the aide's salary is paid by Medicaid. The program is available for elderly and disabled individuals who are able to direct their own care or have someone who can assist them in providing that direction. The recipient of the service or his representative assumes responsibility for the hiring (and firing), training and supervision of the aide.

### POOLED-INCOME TRUSTS

Disabled persons of any age who are receiving community Medicaid including home care, adult-day-care and other non-institutional services may continue to use their income to cover their living expenses by participating in a pooled-income trust. After joining the trust they will qualify for Medicaid without having to give over to Medicaid that portion of their income which is in excess of the Medicaid allowed limit of \$787 (2011).

### NURSING HOME CARE

An individual who transfers assets to qualify for Medicaid institutional services may incur a penalty period during which time the individual will not qualify for Medicaid coverage in a nursing home. However, there is no penalty period if assets are transferred to a spouse; the individual's child under age 21; a blind or disabled child of any age; or a trust established for the sole benefit of any disabled person under the age of 65. Alternatively, an individual facing nursing-home placement, or one already in a nursing home, need not exhaust his savings: under the Medicaid rules approximately half of his savings can be conserved. Such an effort requires the assistance of an elder-law attorney.

### THE HOME

An individual's home – a house, cooperative or condominium apartment – remains an exempt asset for purposes of

determining initial Medicaid eligibility. However, ultimately, Medicaid may impose a lien on the sales proceeds of the property for all it spent on behalf of the Medicaid recipient. The transfer of the home will not incur a penalty period for nursing-home eligibility if the transfer is made to a spouse; a child who is blind, disabled or under age 21; a brother or sister who has an equity interest in the house and resided there for at least one year before the individual was institutionalized; a "caretaker" child who resided in the home for at least two years before the person was institutionalized and provided care to maintain the person at home.

### SUPPLEMENTAL NEEDS TRUSTS

Transfers of assets to a supplemental needs trust are not subject to a penalty period for nursing-home eligibility providing the assets were transferred for the benefit of: 1. The individual's disabled adult child; 2. An individual of any age who is disabled (does not have to be related to the person setting up the trust); 3. An individual himself/herself but only if the said individual is under the age of 65.

### ASSISTED LIVING PROGRAM

The Assisted Living Program (ALP) serves persons who are medically eligible for nursing-home placement but serves them in a less medically-intensive, lower-cost setting. ALPs provide personal care, room, board, housekeeping, supervision, home-health aides, personal emergency response services, nursing, and physical therapy, occupational therapy, speech therapy, medical supplies and equipment, adult-day-health care, a range of home-health services, and the case-management services of a registered professional nurse. To be eligible, both Medicaid recipients and private-payers must be medically eligible for, and would otherwise require, placement in a nursing home due to the lack of a home or suitable home environment. However, eligible ALP residents must not require continual nursing care, be chronically bedfast or chairfast, or be impaired to the degree that they endanger the safety of other ALP residents.

### MEDICARE

Medicare is health insurance for people who are either 65 years or older, under 65 years of age with certain disabilities or of any age with end-stage renal disease. It is important to remember that purely custodial care (the type of care that most persons at home or in a nursing home require) is not covered by Medicare. The only home-care or nursing-home services that Medicare covers are for skilled nursing or rehabilitation. Long-term-care insurance and Medicaid are the significant alternative sources to pay for long-term care.

### DURABLE POWERS OF ATTORNEY

The durable power of attorney is one of the most powerful planning tools that an attorney can recommend to a client,  
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### FREE PROGRAM NOW AVAILABLE PLANNING & PAYING FOR LONG-TERM CARE

The law firm is now offering a seminar, MEDICAID 2012! for professionals only, to be presented at social service agencies, nursing homes, adult-day-care centers, hospitals and assisted-living facilities. There is no charge for this program, which is presented by Martin Petroff. Topics to be covered include current Medicaid transfer of-assets rules, look-back and penalty periods, pooled-income trusts, supplemental-needs trusts for disabled persons, and the rules for primary residence.

To schedule a presentation at your office or to reserve a place for the same program at the law offices of Martin Petroff & Associates at 270 Madison Avenue, between 39th & 40th Streets, please call (212) 679-5800. ■

## Change Service Requested

not only for estate planning, but also for Medicaid and long-term-care planning. When a person (the principal) signs a power of attorney, he gives another person (the agent) the power to act in his place and on his behalf in managing his assets and affairs. The agent's powers may be broad and sweeping so as to include almost any act which the principal might have performed. A new power of attorney form became effective in September 2009. All powers of attorney executed prior to that date remain effective.

### REPRESENTATIVE PAYEE

A representative payee is an individual or organization appointed by the Social Security Administration (SSA) to receive Social Security and/or Supplemental Security Income (SSI) benefits for someone who cannot manage or direct someone else to manage his or her money. The main responsibilities of a payee are to use the benefits to pay for the current and foreseeable needs of the beneficiary and properly save any benefits not needed to meet current needs. When SSA requests a report, a payee must provide an accounting to SSA of how benefits were used or saved. NOTE: Having power of attorney for the beneficiary is not the same thing as being a payee. It does not give legal authority to negotiate and manage a beneficiary's Social Security and/or SSI payments. In order to be a payee, a person must apply for and be appointed by SSA.

### HEALTH CARE PROXY

Under New York law an individual may appoint someone she trusts, for example, a family member or close friend, to decide about treatment if she loses the ability to decide for herself. She can do this by using a health care proxy in which she appoints her health care agent to make sure that health care providers follow her wishes. Hospitals, nursing homes, doctors and other health care professionals must follow the agent's decisions as if they were the patient's.

### LIVING WILL

A living will is a legal document that a person uses to make known his or her wishes regarding life prolonging medical treatments. It can also be referred to as an advance directive, health care directive, or a physician's directive. A living will should not be confused with a living trust, which is a mechanism for holding and distributing a person's assets to avoid probate. It is important to have a living will as it informs your health care providers and your family about your desires for medical treatment in the event you are not able to speak for yourself.

### HOUSING BENEFIT

The Senior Citizen Rent Increase Exemption (SCRIE) Program offers eligible tenants an exemption from rent increases which may result in a reversion to rent paid under a previous lease or rent order. The owner of the building receives a corresponding credit against their real estate taxes from the City of New York. Applicants must meet ALL of the eligibility requirements: 1. Be 62 years of age or older; 2. Rent an apartment that is regulated by the Division of Housing and Community Renewal (DHCR) (i.e. rent controlled or rent stabilized apartments or hotel stabilized); 3. Have an annual household income of \$29,000 or less; and 4.

Pay more than one-third of the household's aggregate disposable income for rent. For applications received in 2011, income eligibility is established by the applicant's income from calendar year 2010. There is also a disability rent increase exemption (DRIE).

### A TENANT'S RIGHT

A senior citizen moving to a residence of a family member or entering certain health-care facilities such as nursing homes, assisted-living residences, or housing projects may terminate a residential lease without a penalty being imposed. This provision of the housing law applies to any lessee or tenant who is 62 years of age or older, or will attain such aged during the term of the lease or rental agreement, or a spouse of such a person residing with him or her.

### CREDITABLE DRUG COVERAGE

Creditable prescription drug coverage (for example, from an employer or union) is insurance that is expected to pay, on average, at least as much as Medicare's standard prescription drug coverage. People who have this kind of coverage when they become eligible for Medicare can generally keep that coverage without paying a penalty if they decide to enroll in Medicare prescription coverage later.

### WILL

Many people think that a Will is only for people who want to set up trusts or save on estate taxes. Those may indeed be important benefits for some people. The primary reason for making a Will, however, is to leave your property to those you care about in the manner and proportions you choose. If you die without a Will, the assets in your name in most instances will be distributed by a court-appointed administrator among your family members pursuant to a statutorily fixed priority. These rules, known as the "Distribution Rules of Intestacy", reflect what the New York State Legislature decided would likely be preferable in most situations. This allocation may very well differ from the distribution you desire. A properly drafted Will can enable you to direct the distribution of your assets in accordance with your wishes. ■

**ABOUT THE EDITOR:** The law practice of Martin Petroff & Associates provides a broad range of services concentrating on the rights of the elderly and disabled. Martin Petroff, formerly staff attorney for health affairs at the New York City Department for the Aging, is a member of the Executive Committee of the New York State Elder Law Section. He is a member of the Long Term Care Community Coalition where he serves as a director. He is also a member of the advisory councils of the Henry Street Settlement House Senior Companion Program and CIDNY-Independent Living Services.

The *Elder Law Report* is published to provide an informative summary of current legal issues and new programs affecting disabled individuals and seniors. Those persons concerned about legal issues discussed in this publication are advised to consult an elder-law attorney. ATTORNEY ADVERTISING pursuant to NY DR2-101(f). Copyright © Fall 2011. Martin Petroff & Associates. All rights reserved. ■