

Bloomingtondale Aging in Place

Ronald Fatoullah, Esq.

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www.fatoullahlaw.com

1-877-ELDER-LAW or 1-877-ESTATES

212-751-7600 - 516-466-4422 - 718-261-1700

- Get Your Legal & Financial Team Together -

Attorney

- Estate Planning
- Document Preparation
- Elder Care Planning
- Planning for Incapacity

Financial Advisor

- Wealth Management
- Investments
- **Maintenance of the legal and financial plan**
- Retirement Planning
- Projection of long term income and expenses
- Long Term Care Insurance

CPA

- Tax planning and preparation
- Financial record-keeping

Geriatric Care Manager

- Assess, plan, coordinate, monitor and provide services for the older adult

The Five Most Important Documents

- Last Will & Testament
- Elder Care Planning Power of Attorney
- Health Care Proxy
- Living Will
- Living Trusts
- These documents are **YOURS**. Do **NOT** be influenced by anyone **OR** by family dynamics

Last Will & Testament

- We are all confronted with our mortality to a greater degree as a result of COVID-19
- Where will your assets go when you pass away
- The Testator, Executor and Beneficiaries
- Beneficiaries can be individuals, family, friends, a charity, a testamentary trust, etc.
- Executor can be a beneficiary
- Tailor your will to your individual wants and needs
- Avoid a will contest if at all possible
- Spouse's Right of Election

Expanded Planning Power of Attorney

- We are also confronted with the possibility of our incapacity as we get older or as a result of the virus.
- A good Expanded Planning Power of Attorney is a document in which an individual gives the right to another individual(s) to handle their finances, protect assets, write checks, create, modify and revoke trusts, do Medicaid planning, do estate planning, make tax elections, disclaim assets, protect the family home, make gifts, etc.
- Control the family dynamics you want to see by appointing the agent(s) that you want to name;
- A POA is a Principal/Agency relationship;

Expanded Planning Power of Attorney

- Can name one or more agents, either together or successively;
- New Power of Attorney legislation passed the NYS Senate and Assembly last year, eliminated the Statutory Gifts Rider and will encourage institutions to honor the Power;
- Provisions that the Elder Law Attorney adds to the Power of Attorney are key;
- **A FORM POA IS NOT GOOD ENOUGH FOR ESTATE OR LONG-TERM CARE PLANNING**
- New Statutory POA effective June 13, 2021

New Power of Attorney Law Effective June 13, 2021

- Why reforms were needed:
 - Complicated for individuals and even attorneys
 - Not easy to sign correctly
 - Simply unwieldy
 - A minor error in the POA could have dire consequences
 - Banks sometimes refuse to accept statutory POAs

Major Changes - New POA Law

- Statutory Gifts Rider is eliminated
- The new law provides for substantial conformance with the statutory language instead of exact wording
- Signing requirement changes
- Acceptance and reliance requirements
- Damages and Attorney fees

Statutory Gifts Rider Eliminated BUT Beware

- Statutory Gifts Rider is eliminated, BUT
- In order to do most Elder Law and/or Estate Planning, gifting must be included
- Gifting authority to be included in the Modifications Section
- Under new law there is no need to separately sign and witness a gifts rider
- Signing requirement changes
- Acceptance and reliance requirements
- Damages and Attorney fees
- NOTE: If you name 2 agents to act but don't specify if they act separately or together, they must act together

Signing Requirements of New POA

- A Principal with capacity can direct a 3rd party to sign the POA. Important for a physically disabled individual
- Two witnesses are required but one of the witnesses can act as the notary
- A Principal or the potential recipient of a gift cannot serve as a witness

Acceptance and Reliance of POA

- A third party located or doing business in NY cannot refuse to honor the POA without reasonable cause for a statutory short form Power of Attorney that was correctly executed at the time of its signing
- Financial institution has a 10-day period to honor or reject the POA
- A rejection must be in writing and sent to the Principal and the Agent
- No deadline for the proponent of the POA to respond, BUT after a response, the financial institution has 7 days to accept or finally reject the POA
- Some exceptions to the Acceptance/Reliance Rule
- Once accepted, if a third party relies on a properly executed POA, that third party is held harmless

Planning POA is NOT a DIY Document

- A well-crafted planning Power of Attorney is a complex document and should be drafted by a qualified Elder Law and Estate Planning attorney
- Depending on an individual's situation, there may be dozens of additions that must be added to the Power of Attorney for the Power to be effective
- Without these additional provisions, Medicaid and/or Estate Planning likely will not be able to be done by the Agent, defeating the purpose of the POA to begin with
- NOTE: All existing, validly executed POAs will remain effective

Health Care Proxy and the Family Health Care Decisions Act

- Statutory form
- Unlike POA, can only name one individual at a time, but can have multiple successors
- Only takes effect when you are unable to make your own health care decisions
- Important to establish that you have discussed your wishes regarding artificial nutrition and hydration with your agent(s)
- Term should be indefinite
- The 2 witnesses should not be anyone named as an agent on the Health Care Proxy
- No notary needed

- Living Trust – The Gold Standard to Protect Assets

- Definition of a Living Trust
- The Grantor (Settlor or Creator), Trustee(s) and Beneficiaries
- Can protect assets for Long-Term Care while preserving tax advantages such as a tax basis step-up for capital gains taxes
- The \$250,000 Capital Gains Tax Exclusion will be preserved for the sale of a primary residence held by the trust
- Will avoid probate
- Can even provide for continuing trusts to protect assets after the death of the Grantor
- **BE AWARE:** No principal of the trust can go to Grantor

Revocable vs. Irrevocable

- Revocable Trust
 - A trust is revocable if the grantor retains the right to alter the terms of the trust and reclaim trust property
 - The grantor will typically be the lifetime income beneficiary and trustee or co-trustee of the trust
 - One of the main reasons individuals choose to create revocable trusts is to help their heirs avoid the probate process and thereby it addresses privacy concerns
 - A revocable trust will avoid ancillary probate if the grantor owns properties in multiple states
 - Individuals create revocable trusts to prepare for a situation where the grantor becomes incapacitated and can no longer manage his/her affairs on his/her own
 - Can be used to avoid Medicaid recovery in the right circumstances

Revocable vs. Irrevocable cont.

- Irrevocable Trust
 - An irrevocable trust is where the grantor relinquishes ownership of the trust property and the ability to cancel and amend the trust
 - An irrevocable trust can be revoked under certain circumstances
 - There are circumstances where the grantor may serve as trustee of his/her irrevocable trust, however it is not advisable
 - The grantor may be the lifetime beneficiary of the trust
 - A grantor retaining an income interest in the trust will mean that the trust corpus will be includable in his/her taxable estate
 - The 3 main reasons why people create irrevocable trusts are: to minimize their estate taxes, become eligible or continue to be eligible for means-tested government programs such as Medicaid, and asset protection from creditors
 - Under NYS law, if a trust does not specify whether it is revocable or irrevocable, it is presumed to be irrevocable

Who Pays for Long-Term Care?

- Private Pay - Unaffordable for most
- Medicare - Typically will not pay for LTC
- Long-term Care Insurance - Most don't have it
- Veteran's Benefits - Aid & Attendance Benefits watered down with 3 year lookback period for transfers and a potential 5 year wait as of October 18, 2018
- Family Caregivers- Will that caregiver/child be paid? Can that child/caregiver supervise other caregivers?
- Medicaid

Planning for the Medicaid Lookback Period

- Overview of the Medicaid Asset and Income Requirements
- ***NEW 30 MONTH LOOKBACK FOR HOME CARE LIKELY COMMENCING OCTOBER 1, 2022 – ADVANCE PLANNING IS ESSENTIAL***
- Medicaid Transfer Penalties
- Exempt Transfers
- Non-exempt Transfers

Overview of the Medicaid Asset and Income Requirements

Assets:

- The Medicaid applicant may keep up to \$16,800 (going up to over \$28,000 for an individual and over \$37,900 for a couple in 2023) plus exempt assets such as retirement accounts in payout status, the home in certain circumstances, irrevocable burial pre-need agreements of any amount, reparation payments, etc.
- The well spouse in the community may keep \$74,820 or ½ of the couple's assets, but no greater than \$137,400

Income:

- For Nursing Home care (Institutional Medicaid), a Medicaid applicant may only keep a \$50 personal needs allowance plus any cost of health insurance premiums
- The well spouse in the community can keep up to \$3,435.00 of the total household income
- For Home Care (Community Medicaid), a Medicaid applicant may only keep \$934/month (going up to approx. \$1,563 for an individual and \$2,106 for a couple in 2023) (currently \$1,367/month for a couple) + \$20 disregard for a total of \$954/month for an individual
- An Applicant for Home Care may keep income in excess of the Medicaid allowable limits through the use of a Pooled Trust

Overview of the Medicaid Asset & Income Requirements, Cont.

- A spouse can sign a Spousal Refusal – but beware of spousal suits that could be initiated by DSS or HRA (in NYC)
- The 5-year look-back period applies to nursing home Medicaid and currently there is no look-back period for Medicaid home care or community-based services
- However, effective October 1, 2022 (most likely), a 30-month look-back period will be applied to Medicaid home care and community-based services, for transfers made on or after October 1, 2020

UNPRECEDENTED PLANNING OPPORTUNITY – THE WINDOW WILL SHUT BY OCTOBER 1

VERY IMPORTANT: Implementation of the lookback for Community based Home Care has been postponed (most likely) to October 1, 2022, and asset transfers prior to October 1, 2020 will likely not be penalized.

What Does This Mean?

Unprecedented opportunity for planning if you are going to need Medicaid Home Care Services. You now just have a few months to make transfers and ensure financial eligibility. Don't wait take action NOW!

Medicaid Transfer Penalties

- 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 by the applicant (and spouse)
- As stated above, there will be 30-month Medicaid look-back for applications submitted on or after an implementation date of October 1, 2022 for home care and community-based services.
- 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
- For New York City applicants the regional rate for one month of care is \$13,415. So, if \$13,415 is gifted during the lookback, that would will create a one-month period of ineligibility

Medicaid Transfer Penalties, Cont.

- For institutional applicants, the look-back period starts when applicant is institutionalized, applies for Medicaid benefits and is “otherwise eligible” except for gifts that were made
- For home care and community-based applicants the look-back period commences when the applicant is receiving services for which Medicaid would be available based on an approved application, but for the transfer penalties. But, at home, an applicant can’t receive home care that Medicaid would cover until Medicaid is approved. So, obviously, there will need to be technical corrections to the new home care look-back changes
- For example, a transfer of \$134,150 by a NYC resident within the 5-year or 30-month lookback period will create a 10-month period of ineligibility

2022 Regional Rates Used To Calculate Medicaid Penalty Periods

- New York State Department of Health (DOH) issued Regional Rates to determine penalty periods for institutionalized individuals. Said rates change every year. Current rates for Medicaid applicants on or after January 1, 2022.
 - **New York City - \$13,415**
 - **Long Island - \$14,012**
 - **Northern Metropolitan - \$13,399**
 - **Northeastern - \$12,560**
 - **Central - \$11,328**
 - **Rochester - \$13,376**
 - **Western - \$11,884**
 - **RATES WILL NOW APPLY TO TRANSFERS MADE BY HOME CARE MEDICAID APPLICANTS**
- The rates have increased for 2022 in all regions. Higher regional rates translate into a shorter waiting or penalty period for Medicaid purposes
- Medicaid districts will use the rate of the region in which the facility is located. The Medicaid application is submitted in the Medicaid region of the applicant's residence

Exempt Transfers

- “Exempt transfers” refer to gifts made during the look-back that will not cause a Medicaid penalty period. Trust is typically not utilized for these transfers:
- Exempt transfers include:
 1. Transfers to the well spouse... but beware of spousal limits and spousal lawsuits
 2. Transfers to applicant’s blind or disabled child of any age... but beware of any effect on the child’s own benefits (e.g. Medicaid, SSI)
 3. Transfers for fair market value
 4. Transfers made exclusively for a purpose other than qualifying for Medicaid (difficult to get)
 5. Transfers that have been returned (“Return of Gift”)

Exempt Transfers of the Home

- Exempt transfers of the primary residence (the “Homestead”)
 1. Transfer of the home to a spouse
 2. Transfer of the home to a disabled, blind or minor child (but consider the child’s benefits!)
 3. Transfer of the home to a sibling of the A/R with an equity interest and who resided in the home for one year prior to institutionalization
 4. Transfer of the home to an adult caregiver child who resided in the home for at least two years prior to institutionalization (“Caretaker Child” exception)

Home Equity Limitation: The Deficit Reduction Act of 2005 signed by President Bush on February 8, 2006 expanded the look-back to 5 years and also provided for a limitation on the equity value of a home in order to qualify for Medicaid

- The equity limitation is currently \$955,000
- Value of homes, condos & co-ops in NYC, Westchester and Long Island often exceed \$955,000
- Equity limitation does not apply if there is a spouse or a minor, blind or disabled child living in the home

Pooled Income Trusts

- A trust organized and operated by a non-profit organization that pools the funds of many Grantors, and uses these funds to pay certain expenses of the various Grantors
- Permits Grantor/Medicaid applicant-recipient to reduce monthly income so that there is no spend down (income in excess of Medicaid income levels - \$934/mo. +\$20) plus health insurance premiums
- Without the pooled income trust, Medicaid recipient would have to spend down any excess income before Medicaid will pay for services

Pooled Income Trust cont.

- Trust must be irrevocable, but Grantor may leave the trust upon:
 - Death
 - Admission to a nursing home
 - Failure to make monthly deposits into trust
- Each month the Medicaid recipient submits expenses to the trust to be paid on his/her behalf
- Expenses the trust can pay include:
 - Rent or mortgage
 - Utility bills
 - Approved reimbursement for third parties who paid Grantor's expenses
 - Credit card payments (no past due charges)

Can A Pooled Income Trust Be Used After October 1, 2022?

- YES! BUT, care must be taken to avoid a gift of income into the Trust
- Transfer penalties apply to income as well as assets
So, monthly transfers of income to a pooled income trust are, indeed, considered transfers; however, it will not be considered a transfer if the income contributed is used for the benefit of the applicant that month
- However, a compensated transfer is not considered a gift, **and is therefore exempt from the transfer rules as long as the money in the pooled income trust *is used for the applicant***

New ADL Requirements for Home Care

- Applicants for personal care or CDPAP after 10/1/22 (likely start date) must need:
 - “Limited assistance with physical maneuvering with more than two” ADL’s (3+ ADLs) or
 - Persons with dementia or Alzheimer's diagnosis must need “at least supervision with more than one ADL” (2+ ADLs)
- People already receiving personal care, housekeeping, or CDPAP services as of 10/1/22 are “grandfathered in”
- After 10/1/22, a new Assessment Instrument will be used and it will be an evidence-based validation
- NY Medicaid Choice will use the new standard (ADLs) & new assessment instrument in the conflict-free MLTC determination, and local districts/HRA and mainstream Managed care plans will use it for those not eligible for MLTC

3 ADL Requirement of “Physical Maneuvering”

Proposed NY Senate Bill: S8007 – Seeks to eliminate these new ADL requirements

Unless the individual has dementia or Alzheimer’s diagnosis, an ADL will count toward the minimum 3 ADLs only if needs “at least limited assistance with physical maneuvering.”

• **Degrees of assistance:**

1. Independent
2. Independent, setup help only – Article or device placed within reach, no physical assistance or supervision in any episode
3. Supervision – Oversight/cuing. Will not count unless Dementia diagnosis
4. Limited assistance– Guided maneuvering of limbs, physical guidance without taking weight
5. Extensive assistance –Weight-bearing support (including lifting limbs) by one helper where person still performs 50% or more of subtasks
6. Maximal assistance –Weight-bearing support (including lifting limbs) by two or more helpers; or, weight-bearing support for more than 50% of subtasks
7. Total dependence – Full performance by others during all activity

New Standardized Task-based Assessment Tool Will Be Used to Determine Hours

- Tool will be “evidence-based” and used to assist the local DSS to make appropriate and individualized determinations for the number of personal care services and CDPAP hours of care each day
 - currently, the number of hours is determined by each plan using their own “tasking tool”
- The new tool should identify how need for assistance with ADL’s can be met through:
 - Telehealth- Unclear how telehealth may assist with assisting a consumer with transferring, dressing, and toileting
 - Family and social supports-- Now, their assistance is voluntary. Often plans wrongly presume family is available. Even if they are, their assistance must be acceptable to consumer. 18 NYCRR 505.14(b)(3)(ii)(b), 12 OHIP-ADM-01, GIS 97 MA/033

TREATING PHYSICIAN'S ROLE IN PRESCRIBING PERSONAL CARE OR CDPAP IS REPLACED

NEW: Personal care and CDPAP services must be prescribed by a “qualified independent physician selected or approved by” DOH. DOH may use Maximus (NY Medicaid Choice). This is scheduled to begin May 16, 2022.

Concerns:

- A contract physician lacks familiarity with the consumer's condition, compared to a long-time trusted physician and may not specialize in the consumer's particular diagnosis,
- Will add more delays to applying for services – must arrange an assessment by independent physician to apply
- Though a physician's order is now required for both personal care and CDPAP, MLTC plans have generally not required them for personal care, but have required them for CDPAP

“Independent Assessor” to Replace DSS, MLTC & Medicaid Managed Care Plans in Determining Hours

- The assessor will determine how much Personal care and CDPAP to be authorized.
- The law allows DOH to expand the Maximus contract to do conflict-free assessments and final determination

The local districts will make all home care determinations for those exempt or excluded from MLTC or Medicaid managed care, Immediate Need, and mainstream plan determinations of hours.

Extra Review of High-Hour Consumers to Determine Safely Living in the Community

For personal care recipients, the law goes a step further in its stated concern for “safety.” The law authorizes DOH to adopt standards and assessment of services for individuals “whose need for such services exceeds a specified level to be determined by DOH”:

- MRT recommended this level as 12+ hours/day
- Assessor will consider whether consumer, with the provision of such services, is capable of safely remaining in the community in accordance with the standards in *Olmstead*, 527 US 581 (1999)
- Who determines “safety?” What about the consumer’s autonomy – their right to the “dignity of risk” in choosing to accept some risks that may exist in the community in order to live at home as they choose- if provided enough hours of care, safety can be reasonably ensured

Immediate Needs Program

- Purpose of Immediate Needs is to implement and ensure safe and urgent care for the applicant when needed. This program has specific processes set up to abbreviate the normal requirements and evaluation of eligibility to implement services. *An applicant will be able to attest that no transfers were made during the look back period (unless the transfer was an exempt transfer).*

Medicaid Asset Preservation Trust – The Gold Standard

- 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 never distributed

Medicaid Asset Preservation Trust cont.

- Advantages:
 - Ability to live in home & receive income
 - 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 preserved
 - 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 changes to beneficiaries
 - May direct Trustees to sell property & exchange for new property
 - Can revoke trust under certain circumstances

Transfers of Liquid Assets

- **Transferring Brokerage Accounts to a Trust**
- Low basis versus high basis assets
 - Maintain step-up for low basis assets
 - Completed gift and no estate inclusion for high basis assets (less relevant now in NY given the high NYS exclusions)
 - Consider income tax consequences for beneficiaries
- Consider Grantor Trusts so Grantor will pay income taxes regardless of who receives income
- However, need to consider income being generated for Medicaid purposes

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

Estate and Gift Taxes

- Unified Credit/Exemption for Federal Gift/Estate Taxes - \$12,060,000 (scheduled to be halved January 1, 2026)
- Federal Estate Tax Rate: 40%
- Federal Gift tax Rate: 40%
- New York State Exclusion: \$6.11 million (with many added complications! e.g. the “Cliff”)
- NYS has No Gift Tax BUT has a 3-year rule
- Top NYS Estate Tax rate: Ranges from 3.06% to 16%
- Annual Gift Exclusion: \$16,000 (\$32,000 if married)

Minor's Trusts

- Look at the maturity of the beneficiaries;
- It may not be prudent to have an 18 year old inherit large sums of funds
- Can hold funds in Trust until a more appropriate age... YOU determine when the beneficiaries will receive the funds
- Can stagger payments using a Minor's Trust, Ex, 1/3 at the age of 21; 1/2 of the balance at age 25 and the balance at age 30
- The goal is to ensure if possible that the minor's future will be a financially stable one
- With a Minor's Trust, you can determine what will happen with the assets if the beneficiary passes away before all funds have been distributed
- Peace of mind that the funds in the Minor's Trust will be professionally managed until the funds distributed

Special Needs Trusts

- Codified in ETPL Section 7-1.12 A/K/A Supplemental Needs Trusts
- For the benefit of a special needs individual
- Assets in the trust can be used for services or items that would enrich the beneficiary's life, such as summer camp, recreational and cultural experiences, wheelchairs, handicap accessible vans and therapies not covered by insurance or public benefits
- Beneficiaries can still continue to receive public benefits such as Medicaid and SSI, but will have a war chest for supplemental needs such as those listed above
- Third Party Special Needs Trust. The SNT is funded by third parties such as parents, relatives, friends, but NOT the individual beneficiary's own funds. NO Medicaid Payback. Can be a testamentary or intervivos Trust
- Self-Settled Special Needs Trust. Also referred to as a '(d)(4)(a)' Trust. The SNT is funded with assets owned by the beneficiary and the trust is irrevocable. A typical scenario is when the beneficiary is about to receive a settlement from a negligence or medical malpractice lawsuit or an inheritance. The individual can remain on benefits, BUT the individual must be under 65 years of age, must be disabled, and there is a Medicaid Payback

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