



YOUR FUTURE DESERVES

FORETHOUGHT

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What Does the Recession Mean for Long-Term Care?

The current economic downturn is not going to affect the needs of some seniors to receive help with activities of daily living. However, it could affect where that help is provided: at home; in an assisted living facility; or in a nursing home. It could also affect who provides the care: a family member; a nurse; or a hired aid.

We are likely to see the following trends as a result of this financial crisis:

■ Most nursing home care and, increasingly, home care, is covered by Medicaid. This is a joint state-federal health care program for people who are determined to be, effectively, impoverished under a complicated set of federal and state rules. Even before this recession, the need for Medicaid assistance was growing and straining the ability of states to pay the cost of these health care expenses. This has caused states to restrict eligibility for benefits. We are likely to see, and have

started to see, these restrictions tighten even further.

■ With unemployment rates up, more individuals may be available to care for family members at home, perhaps delaying or avoiding the move to assisted living or a nursing home.

■ With money becoming scarcer for just about everyone, families will be more reluctant to pay for nursing home, assisted living or home care. This may result in more beds and services being available and a decrease in costs. In fact, according to the 2008 *MetLife Market Survey of Nursing Home & Assisted Living Costs*, over the past year the cost of semi-private rooms in nursing homes increased just 1.1 percent and the cost of private rooms did not change. This is in stark contrast to increases that substantially exceeded the inflation rate in most recent years.

■ We may also see bankruptcies of nursing homes and assisted living facilities increase if they cannot fill their beds, as anticipated, and Medicaid and Medicare reimbursement rates are insufficient to cover their expenses. Facility shut downs will be very disruptive to residents as well as to their families.

■ With alternative jobs less plentiful, the supply of qualified care providers should increase.

■ With resources already overextended, proactive planning is even more important; whether that means purchasing long-term care insurance, protecting assets to qualify for Medicaid, or simply making one's wishes known.

■ Even prior to the onset of the recession, many more alternatives to nursing home care were being developed, including

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Medicaid Planning:

Annuity Purchased to Benefit Community Spouse Is Available Resource

A New Jersey appeals court recently held that, under the Deficit Reduction Act of 2005 (the "DRA"), a state may consider the value of an annuity purchased for the sole benefit of the community spouse in

determining whether the institutionalized spouse is eligible for Medicaid. N.M. v. Div. Medical Assistance and Health Servs. (N.J. Sup. Ct., App. Div., No. A-0828-07T1, Feb. 26, 2009).

In the case before the court, N.M. (the "institutionalized spouse") had entered a nursing home and her husband, A.M. (the "community spouse"), purchased a non-assignable and nontransferable annuity that provided him with an income stream for 48 months. N.M. applied for Medicaid benefits in July 2006. The state took the income stream from the annuity into account and found that N.M. had excess available resources.

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Estate Planning for Parents of Children with Disabilities

Estate planning for parents (and grandparents) of children with disabilities presents special challenges. The goal of most parents who have a disabled child is to protect his or her assets in such a way as to enrich their child's life while preserving the government benefits available to the disabled child.

There are a number of government benefits available to disabled individuals. These include Supplemental Security Income (SSI), Social Security Disability Insurance (SSD), Medicare and Medicaid. SSI is a needs-based program under which benefits are paid only to persons who meet welfare limitations with respect to both income and resources. Persons receiving SSI in most states are automatically entitled to Medicaid. Consequently, the receipt of cash or other assets will frequently disqualify a disabled individual from receiving SSI and Medicaid. The loss of these benefits can be devastating.

Parents of disabled children have three options. They can either: (1) distribute assets outright to the disabled child; (2) distribute assets to the disabled child's

siblings with the understanding that they will hold the assets for the benefit of the disabled child; or (3) distribute assets to a Special Needs Trust ("SNT") for the child's benefit.

We do not recommend leaving assets outright to the disabled child because the child may then become ineligible for SSI and Medicaid. The second option is also not advisable because, although it will not disqualify the child from government benefits, assets distributed outright to siblings are legally owned by the siblings. Therefore, such assets are then exposed to creditors, divorce actions, misappropriation and/or mismanagement by siblings.

The third option, to establish a SNT, is the most prudent. The inherited/gifted assets held in a SNT are not considered "available" to the child. Accordingly, the existence of a SNT allows for the continuation of government benefits. The assets of a SNT are free to be used for purposes that will enhance the enjoyment and well being of the disabled child. The discretion to utilize the trust funds lies solely with the Trustee; not with the child.

A SNT can be established either at death (through a testamentary SNT) or during lifetime (through an inter vivos SNT). A testamentary SNT would be created at the death of the surviving parent. Therefore, a family member passing away prior to the death of the parents could not leave money to the SNT. By contrast, an inter vivos SNT offers a single vehicle through which parents and other family members can make gifts (either during life or at death) to the disabled child. For example, an aunt or uncle might be inclined to make a gift or a bequest to an existing SNT for a disabled child but might not be willing to incur the added expense and complication of establishing a SNT in their estate planning documents. According, the existence of an inter vivos SNT may result in more assets being available for the child.

If you have a disabled child or grandchild, special planning exists which can enhance the disabled child's quality of life. Without proper legal advice, these goals to enrich the lives of such children might never be achieved.

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assisted living, new home care models, community partnership programs, and increased Medicaid coverage of care provided in the community. Anyone providing care to a senior should do their homework to be sure that they are familiar with all of the available alternatives.

These changes are not all bad. As noted above, the increasing number of care choices available will allow many individuals to find a better fit for the care of a loved one who may not have been best suited for the traditional nursing home setting.

You should seek out the counsel of a qualified elder law attorney to help your family explore care alternatives and how to pay for them.

Medicaid Planning cont'd from page 1

N.M. appealed and an administrative law judge ("ALJ") concluded that, under the DRA, the state could consider the income a community spouse was receiving from an annuity as an available resource in determining Medicaid eligibility. According to the ALJ, the income stream was an available asset because it could be sold on the open market.

N.M. appealed. The New Jersey Superior Court, Appellate Division, affirmed the decision of the ALJ, holding that "under the DRA a state may now consider the value of an annuity purchased for the sole benefit of the community spouse in determining whether the institutionalized spouse satisfies the resource limits for Medicaid eligibility." The court found that

even though the annuity was non-assignable, according to a guidance document issued by the Centers for Medicare and Medicaid Services (a federal agency charged with administering Medicare and Medicaid), if the payee of an annuity may be changed, the annuity is considered assignable. For the full text of this decision, go to: <http://lawlibrary.rutgers.edu/courts/appellate/a0828-07.opn.html>.

This case is an example of how the DRA has made it more difficult for individuals to qualify for Medicaid benefits. It is now more important than ever for you to be proactive in asset protection planning if you believe that long term care might be in the future for yourself or a loved one.

Do You Have the Right Fiduciary?

When creating an estate plan, it is important to select the right fiduciaries. A “fiduciary” is a fancy legal term for the person(s) who will take care of your property for you if you are unable to do it yourself, either during your lifetime or after your death. A fiduciary includes the executor of your estate, the trustee of a trust you establish, or an attorney-in-fact for medical or financial decisions under a power of attorney. When naming a fiduciary, it is—of course—critical that you trust the individual you are appointing. For this reason, people often look first to family members to serve as fiduciaries. And, typically, that’s exactly where we would recommend that you start. However, your first instinct to appoint one (or more) of your children as fiduciary might result in conflict down the road.

Conflicts can arise where a child is appointed as a fiduciary for any one or more of the following reasons:

- Children cannot be completely objective.

- Children often disagree amongst themselves over issues concerning financial and medical decisions, how long your estate should take to complete, how assets should be disposed of, and the division of personal property.

- Children often don’t communicate with each other well.

- The appointed child(ren) may be entitled to compensation for serving as fiduciary and the other child(ren) might not think that compensation is appropriate. This issue of compensation will result in an unequal distribution of assets among your children.

One alternative to appointing a child as fiduciary is to appoint a disinterested family member or friend who can be more objective through the administration. This person would typically be entitled to a commission for their services (depending on what role they are serving), but—believe us—they will have earned it. Another alternative is to hire a professional. A

professional fiduciary can be a bank with trust powers, a certified public accountant, a trust company, or an attorney. A professional fiduciary would be immune to family feuding and can act objectively and in the best interest of your estate/trust. A professional fiduciary will charge a fee for the services provided, and that fee should be explained ahead of time.

When selecting a disinterested/professional fiduciary, in order to ensure that your family has some input in decisions which affect you and them, you can include a provision in your documents that allows one or more family members to discharge the fiduciary if they feel the disinterested/professional fiduciary is not doing a good job. This will allow your family to make sure the fiduciary is performing properly without burdening the family member(s) with the role of fiduciary.

If you would like to discuss your current fiduciary selection, or explore possibilities for someone new, feel free to call us.

What Happens If You Die Without a Will

We all know we are supposed to do estate planning, but not all of us get around to it. So what happens if you don’t have a will when you die? We always tell clients that when you don’t create your own estate plan, the state in which you reside will create one for you. That state imposed estate plan (the “intestacy laws”) may or may not be the plan you desire.

Dying without a will is called dying “intestate.” Each state has laws that determine what will happen to your estate if you don’t have a will. If you are married, most states award at least one-half of your estate to your spouse, with the rest divided among your children or, if you don’t have children, to other living relatives such as your parents or siblings. If you are single, most states provide that your

estate will go to your children or to other living relatives if you don’t have children. If you have absolutely no living relatives, then your estate will often go to the state.

The state’s intestacy laws will not afford you any tax planning, will not establish trusts for your minor children/grandchildren, will not consider special needs planning for a disabled child (and, therefore, may result in the disqualification in valuable government benefits), and will not provide for your partner. However, the intestacy laws may provide for a parent or a child for whom you would rather not provide. Additionally, if you do not have a will to designate someone as guardian of your minor child, a court will select a guardian for you. A court may also be called on to

appoint someone to serve as your executor to administer your estate.

Note that any jointly held assets, such as bank accounts or real estate, will not be governed by the intestacy laws and will, instead, go directly to the co-owner (assuming that the property is owned with “rights of survivorship”). In addition, any life insurance policies or retirement accounts will go directly to the beneficiary designated on the account. And, if you have a trust, any assets in the trust will go to the beneficiary designated in the trust document.

The best way to ensure your estate is distributed the way you want it, is to affirmatively plan your estate with a will and/or a trust.

YOU ARE INVITED!

Please join us at one of the following free seminars offered by the firm.

The seminars will discuss changes to the estate tax laws and the importance of having properly drafted legal documents.

THE SEMINARS WILL BE HELD AT THE FOLLOWING LOCATIONS:

PRESENTED BY DOUG A. FENDRICK, ESQ.

Thursday, June 11 • 10 am - 12 pm

The Mansion • 3000 Main Street • Voorhees

PRESENTED BY JAMIE SHUSTER MORGAN, ESQ.

Tuesday, June 9 • 10 am - 12 pm & 7 pm - 9 pm

Cherry Hill Library • 1100 Kings Highway North • Cherry Hill

Wednesday, June 10 • 7 pm - 9 pm

Moorestown Community House • 16 E. Main Street • Moorestown

Thursday, June 11 • 7 pm - 9 pm

The Mansion • 3000 Main Street • Voorhees

CALL OUR OFFICE TO RESERVE YOUR SPACE AT (856) 489-8388.

Join us for the following free seminars sponsored by Cadbury at Home

The Cadbury talks are to discuss issues of long-term care planning, wills, estates, trusts and powers of attorney.

**THE SEMINARS WILL BE HELD AT
THE FOLLOWING LOCATIONS:**

Tuesday, May 19 • 11 am - 12:30 pm

Cadbury at Cherry Hill / Oak Room
2150 Route 38 • Cherry Hill

Wednesday, June 10 • 11 am - 12:30 pm

Gloucester County Library
389 Wolfer Station Road • Mullica Hill

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