

# I. 2021 Illinois Legislation - Health & Aging Matters



# II. Crisis Estate Planning for Long Term Care

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# I. 2021 Illinois Legislation - Health & Aging Matters

- See Word Document Exhibit- attached
- As of the date of this writing, the pending bills (attached) have not been signed into law in the State of Illinois.

# II. Crisis Estate Planning for Long Term Care - Overview

- Introduction
- 1. Powers of Attorney for Property
- 2. Diminished capacity
- 3. Asset Inventories
- 4. Revising Wills and Trusts
- 5. Funding
- 6. Review Client's Admission Contracts To Facility(s)
- 7. Draft and Implement the Crisis Estate Plan Strategy(s)

# Introduction-

## What is “Crisis Estate Planning” for Long-Term Care?

- Crisis Estate Planning means taking steps that will stop, as soon as legally and ethically possible, the payment of high uninsured healthcare costs (such as the monthly nursing home private pay costs) of both spouses or the surviving spouse in the event one spouse dies
- We refer to this as “crisis estate planning” because the obligation of paying anywhere from \$6,000 to \$14,000 per month in Chicagoland area care facilities is usually a crisis for most middle-class taxpayers
- Therefore, the goal in crisis estate planning is drafting in a way to stop this devastating financial cash outflow for one or both spouses

# Context for Types of Estate Planning for Long term Care

- Estate Planning for long term care can be of 3 types:
- **Preplanning**- requires a time horizon where long term care will not be needed or can be funded for at least 5 years (60 consecutive months)
- **Wait & See Planning**- is considered where there is an introduction of a diagnosis of a chronic and debilitating illness, but no institutional care is required at the present time
- **Crisis Planning**- is required where immediate Institutionalization is required, and a solution must be found to avoid the obligation of paying anywhere from \$6,000 to \$14,000 per month in an institution. This requires massive action sometimes including repositioning of assets.

# Understanding the 3 Ways To Pay for Long Term Care?

- There are generally 3 ways to pay for long-term care:
  - 1. Long term care insurance- How many clients have it and how much coverage do they have?
  - 2. Private pay out of your pocket- May be prohibitive because long term care costs continue to escalate (often \$6,000 to \$14,000 per month in skilled care facilities)
  - 3. Become eligible for the Medicaid - Long Term Care Program - (a joint federal/state governmental entitlement). The key is to become eligible legally and ethically

# Demographics Related to Crisis Estate Planning for Long Term Care?

- There are currently over 40 million persons over age 65
- 69% of those turning 65 will need some type of long-term care, MorningStar.com 20 August 2018
- 50% of long-term care insurance claims are from those with Alzheimer's or other forms of dementia, Forbes.com April 1, 2019

# 1. Powers of Attorney for Property – A Starting Point

Are powers of attorney in place?

How robust in power is the Power of Attorney for Property?

Does it need expansion now that long term care is a crisis issue?

**Note:** This is such an important starting point because we know that without robust powers of attorney in place, no one may have the legal authority to act on the client's behalf



# Powers of Attorney for Property

Different types of powers of attorney for property and health:

Standard Illinois Statutory Short Form

POAs with broadened powers

POAs with narrowed powers

Is there any compensated or uncompensated asset transfer authorization in the POA for property, specifically for long term care planning?

Note: **Are there safeguards against rogue agents?** Consider as a precaution a concurrent delivery and review of all monthly statements by an independent 3<sup>rd</sup> party who automatically receives and reviews statements at the same time as the agent

## Did Client create their own powers of attorney?

They can, however they will not contain the necessary language that Attorneys put into such documents such as:

1. the power to make transfers
2. the power to remove and add assets to a trust, and
3. the power to apply for public benefits and then appeal any decision on public benefits

Unfortunately, standard form powers of attorney do not have these provisions built into them. Worse yet, if these additional powers are not built into the power of attorney, then you cannot engage in these powers under the power of attorney. They must be expressly listed in the power of attorney.

## 2. Diminished Capacity

In the previous slides, we mentioned how important it is to begin crisis estate planning (and traditional estate planning) with the execution of powers of attorney for both property and healthcare.

Quite often we take for granted the notion that these documents will be easy to have signed.

This not always the case.

# Diminished Capacity

When the client may have diminished capacity, the attorney may need to seek consultation from a medical professional or mental health expert, but also in keeping with the ethical requirements of Rule 1.14 of the IRPC

If a formal assessment is desired, the attorney usually attempts to obtain the consent and cooperation of the client, if that is possible

### 3. Asset Inventories

When someone is ill, Crisis Estate Planning depends on the ability to put together an asset inventory that is current, accurate and comprehensive

In cases involving single individuals who are looking for Medicaid to solve the health crisis, their asset level must be precisely calculated to confirm that they are down to a \$2,000 asset level. This requires complete understanding of the asset mix with confirmation of account balances from asset custodians.

Another impediment is that the movement of any tax qualified retirement account will trigger tax with few exceptions. Thus, an understanding of tax qualified assets is essential.

# Asset Inventories

## Additional notes:

Listing of debts, is also important because certain creditors have priority over other creditors.

There can be penalties associated with liquidation, depending on the time that you liquidate. For example, annuities sometimes have early withdrawal penalties and surrender charges.

In reviewing the asset inventory, scrutinize for prior transfers that are considered penalized uncompensated transfers of cash or property. These will carry with them eligibility problems when long term care type governmental benefits are sought.

## 4. Revising Wills and Trusts

It may be necessary to revise estate plan documents when doing crisis estate planning because well drafted traditional estate plan documents that leave assets directly to the surviving spouse on death may not be optimal when long-term care is a possibility for either spouse

As far as when it is wise to convert traditional estate plans to crisis estate plans, it is most often a function of diagnosis and not age

# Consider What Happens if the Healthier Spouse Dies First

- Consider setting up a testamentary supplemental needs trust (SNT), for the presumed LTC spouse (the chronically ill spouse)
- If you do not know which spouse will be the presumed LTC spouse, because it is not knowable at the time of drafting, then consider creating these SNTs for both spouses in each of their individual wills
- The benefit will be that a LTC (ill) spouse can receive an inheritance from predeceasing spouse without a complete spenddown on the cost of the LTC spouse's long-term care and still maintain Medicaid eligibility
- The SNTs must be "established by will" - meaning drafted in the body of the will, even if funded by a "pour-back" from the accompanying RLT or a pour-back from a beneficiary designated type of asset



# Consider What Happens if the Healthier Spouse Dies First- Legal Malpractice Case On Point

- Doyle v. Hood, 2018 Ill. App. 2nd 171041, 2018, was a legal malpractice /statute of limitations case. However, the underlying substantive legal issue was the fact that a predeceasing husband left assets for his surviving spouse in a supplemental needs trust (SNT). However, this supplemental needs trust was found in the predeceasing spouse's revocable living trust and not his will, and thus the trust was considered a countable asset and subject to spenddown on the cost of care before Medicaid would start for the surviving spouse. Under federal law, and under Medicaid law in Illinois, a testamentary SNT left for a surviving spouse must be “established by will” if the trust is to be treated as a non-countable resource. See 89 Ill. Admin. Code 120.347 (c).

# Elective Share and Spousal SNTs

- **Elective share, in general**: the surviving spouse has the choice of taking what was provided by will, or “renouncing the will” and taking a fraction of the probate estate (for example 1/3 or 1/2).
- **Elective share, in crisis estate plans**:
  - 1) Same states may allow the elective share to be transferred to and protected from a Medicaid spenddown in a spousal testamentary SNT
  - 2) Other states may require a Medicaid spenddown of the elective share, when there is no renunciation, and regardless of whether the elective share is in an SNT or not.

# Traps in Crisis Estate Planning for Spouses

- Notably, even the nonelective portion of the “leapfrog” funds may be penalized for Medicaid purposes and may be imputed to the institutionalized spouse who is seeking Medicaid
- Courts have held that if a transfer by RLT to the children resulting from the predeceasing spouse's death takes place before the surviving institutionalized (ill)spouse's determination of eligibility (after the filing of a Medicaid application), this too will be imputed to and treated as a penalized transfer by the Institutionalized spouse. This may result in the denial of the institutionalized spouse's Medicaid eligibility, because of the imposition of a penalty time period attributable to the imputed penalized transfer ( the transfer by the RLT of assets to the children upon the predeceasing spouse's death). Bezzini v. DSS, 49 Conn. App. 432, 715 A 2<sup>nd</sup> 791 (1998). It is possible that the same penalty will arise from other transfers to 3<sup>rd</sup> parties (i.e., children) when triggered by a POD, TOD, TODI, IRA or other type of beneficiary designated asset.

# Traps in Crisis Estate Planning for Spouses

- As stated above, If no crisis estate planning is done and the predeceasing spouse tries to disinherit the surviving ill spouse by leaving (leapfrogging) all assets to the children ( considered 3<sup>rd</sup> parties) thru their RLT or beneficiary designated assets, Medicaid may penalize the transfer of the leapfrog funds
- Worse yet, if the children who received the “leapfrog” funds cannot restore the funds, the surviving ill spouse who may be in long term care will be penalized for the transfer and thus possibly be made ineligible for Medicaid long term care benefits, without the ability to cure the ineligibility.

# Traps in Crisis Estate Planning for Spouses

- In crisis estate planning for long-term care don't fall into the trap of thinking that:
  - 1) if one spouse becomes ill, the couple can leave assets directly (leapfrog) to the children. As discussed above, this is a problem because this may create immediate ineligibility for governmental benefits to the surviving institutionalized spouse
  - 2) if one spouse becomes ill, we must completely disinherit the ill spouse or watch a complete spenddown of the couple's assets that are left to the ill spouse. That is not true either. The reason is, as discussed above, we are allowed to leave assets for the surviving spouse in an SNT found in the will of the predeceasing spouse

## 5. Funding in Crisis Estate Planning

Funding in crisis estate planning (like traditional estate planning) generally refers to either transferring assets into newly created estate planning vehicles, qualified recipients, or perhaps changing the beneficiary designation of an asset to be pointed towards a crisis estate planning tool

## What are some funding issues in crisis estate planning?

1. New FEIN- new tax filings
2. Income tax triggers- maybe premature
3. Breach of Contract Provisions- due on transfer clauses
4. Transfer Tax Issues- more taxation
5. Local Real Estate Taxation Issues- loss of exemptions
6. Timing of the Funding may be Problematical – within the 5-year Medicaid lookback

# Funding Procedures

- Crisis Estate Planners and Traditional Estate Planners have similar procedures when doing funding: gather recent financial statements for each asset in the inventory, gather all existing deeds for all real estate parcels, perform tract or title searches, inform the client that they need to obtain consent from the lender on loans to avoid any due on transfer clauses, prepare letter of instruction to the client and the funding target institution describing how the asset is to be held and titled, prepare all deeds for recordation reflecting the new funding target, follow-up and confirm that the changes have all been completed



## 6. Review Nursing Home and Other Facility Admission Contracts for Crisis Estate Planning Clients

When Client selects a facility, be cautious about:

1. Where they apply
2. What they sign
3. Who signs

Note: Long- term care facility contracts are most often new to the client's experience

First, consider retaining a care placement firm that specializes in matching the medical needs of your client with the capability of the facility they are seeking to enter

Second, recommend that every contract the client signs be reviewed by counsel first

Third, recommend that only the person receiving long-term care signs the contract, if possible

## **Some of the other issues to consider when reviewing contracts for long term care facilities:**

1. Deposits
2. Waiver of certain Due Process & Notice requirements
3. Waiver of any personal liability on the part of the facility
4. Understanding payment requirements

5. Nondiscrimination provisions
6. Procedures for involuntary discharge
7. Guarantee of payment requirements by third parties

9. Paying for “Bedhold”

10. Be aware that some facilities that identify themselves as Medicaid facilities, may only be Medicaid facilities in what is called “distinct part” - which means that not all beds are Medicaid certified

11. Mandatory arbitration clauses

Note: Nursing Home contract analysis is complex and requires further discussion in a separate venue

# **There Are 3 Choices the Client has for Facility Contracts with Problematic Provisions**

1. Accept the contract “As Is”
2. Negotiate the contract; or
3. If the facility is unwilling to negotiate the contract & the provisions are sufficiently objectionable, the family can shop for another facility

## 7. Draft and Implement the Crisis Estate Planning Strategy(s)

- The Goal-

Protecting assets in the face of a long- term care health crisis

Note: Some of the following strategies are used for Medicaid eligibility in Crisis Estate Planning, however, some are also used in Traditional Estate Planning

# If Medicare does not cover the cost of long-term care, how does the estate planner assist the crisis client?

- First, remember that Medicare is no help for long-term care
- Medicare is an acute care program for taxpayers, but not a custodial care program
- Medicare only subsidizes taxpayers for some skilled care following some hospitalizations
- Understand observation status versus admitted status regarding hospitalizations. This can have a direct impact on Medicare reimbursement for skilled care once a patient is transferred from a hospital environment to a skilled care facility for rehab.



# If Medicare does not cover the cost of long-term care, how does the estate planner assist the client?

- If the client doesn't have long-term care insurance, and the client does not continue to pay privately, **then the client must look into the Medicaid - Long-Term Care program**
- There are many Medicaid programs, but in Illinois you must look into the Medicaid – Long Term Care program
- There is also a Medicaid waiver program that subsidizes Supportive Living Facilities (similar in service to assisted living facilities)

# Medicaid for Long Term Care - Basics

- Confirm with the medical professionals that the client can become **medically eligible** for Medicaid on a health-based standing
- Assist the client in becoming **financially eligible** for Medicaid
- Generally, to become eligible for Medicaid for long-term care:
  - **A single person (without further planning)** has to be spent down to \$2,000 of assets and is allowed to keep \$30 a month of income
  - **In Spousal Cases** where only one spouse needs Medicaid for long-term care, the healthier spouse is entitled to keep (**without the benefit of further planning**) the home and \$109,560 of other assets

# Medicaid for Long Term Care – Basics

- **Single persons:** May transfer excess countable assets into non-countable assets such as prepaid burial arrangements, etc. , or may transfer assets to qualifying individuals such as disabled persons
- **Married persons:** May transfer assets to the non-institutionalized spouses to avoid spousal impoverishment
- Note: Robust POA's with asset transferring powers are needed in both cases

# Medicaid for Long Term Care – Basics

- In crisis estate planning, sometimes assets are transferred in trust or outright (the latter creating more risk for the transferor)
- Sometimes assets are transferred to self settled Medicaid OBRA payback trusts. This could be treated as a penalized transfer, in Illinois, if the settlor of the trust is 65 or older.
- **Caution**: transfers that are deemed to be uncompensated transfers may result in penalty time periods in which case the payment from the Medicaid program will be delayed until the penalty period is paid through by the client. **Query**: what if the client cannot pay through the penalty period and is denied Medicaid? Who has liability for such a disastrous result?

# Medicaid for Long Term Care – Basics

- In crisis estate planning, in order to pay through penalty periods created by prior transfers, funds are sometimes converted in the form of a Medicaid compliant income stream to pay through the penalty periods
- Note: this planning is complex and needs to meet strict technical Medicaid requirements. Further discussion of the issue is best reserved for another venue.

# Medicaid for Long Term Care - Basics

- If the estate planner is going to rely either on annuities, trusts or OBRA type trusts, it is recommended that you consult with the Illinois Administrative Code where you will find the requirements for trusts and annuities at 89 Illinois Admin. Code 120.347 and 120.388(w)
- Due to the changing nature of the Medicaid rules, trust protector provisions should be included in trusts in order to make the necessary adjustments based on changes in federal and state law

# Some Strategies in Crisis Estate Planning

Note: Some of the following strategies are used for Medicaid eligibility in Crisis Estate Planning, however some are also used in Traditional Estate Planning

- Spending down on allowed expenses (home repairs, prepaid burials, pay off debts, etc.)
- Curing prior penalized transfers
- Transfers to the well spouse, and other options available to married persons to avoid spousal impoverishment
- Transfer to disabled persons or to 3<sup>rd</sup> party SNTs for disabled persons

# Some Strategies in Crisis Estate Planning

- Divorce
- Pleading Hardship Waivers
- Transferring the home qualified recipients
- Transfers to self-settled OBRA payback trusts
- Purchasing long term care insurance for the well spouse



# Some Strategies in Crisis Estate Planning

- IRAs and IRA annuities – conversion to Medicaid compliant annuities
- Purchase of annuity for assets that exceed the community spouse (the well spouse) resource allowance
- Purchase of personal effects, vacations, purchase of prepaid burial and funeral plans that are Medicaid compliant
- Debt paydowns
- Payment of initial nursing home monthly costs to open the door at the facility - aka “key” money
- Make home improvements such as roof and windows to the principal residence
- Purchase a new car, purchase a larger principal residence
- Caregiver agreements for helpful family members that are Medicaid compliant
- Use of irrevocable trusts, private and OBRA type
- Buying a life estate in someone’s home
- Acquiring Medicaid compliant annuities and promissory notes

# A Note on Preplanning and Wait & See Planning:

- In a Preplanning or Wait and See mode, the estate planner may consider strategies involving trusts, if there are enough assets to carry either a single individual through the cost of long-term care for a five-year period, or in the case of a married couple, if there are enough funds to carry both spouses through the cost of long-term care for a five-year period
- Preplanning and Wait & See Planning are complex and require further discussion in a separate venue

Thank You