Protecting Your Family's Inheritance from the Nursing Home

(or really just protecting it from the nursing home bill)

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Paying the nursing home bill

- Someone will pay.
- Who will it be?
- Where will the money come from?
- Is it payable now (or near future)?
- Or are we planning for a bill that will be payable many years from now (we hope)?

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Paying the nursing home bill

- How much will it be?
  - Assisted living
  - Full nursing care
- Can it be paid out of current income?
  - Social Security
  - Pension benefits
  - Farm cash rent

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Paying the nursing home bill

- Should it be paid from cash rent?
  - Should the cash rent be used for other farm expenses, like adding tile?
  - Should the farm structure be changed so that the cash rent is used to pay a Manager's salary?
  - Should the cash rent be reduced to the low end of the fair market value range instead of the high end?

Paying the nursing home bill

- What if current income is not enough? What/who covers the shortfall?
  - Long-term care insurance
  - VA benefits
  - Your assets
  - Medicaid

Long-term care insurance

- Determine the availability of long-term care insurance.
  - Many people do not qualify.
  - For others, it is too expensive.
- Long-term care insurance benefits are likely to be there in the future (but not always) even though today's Medicaid eligibility planning techniques may not be.
- Long-term care insurance insulates assets in second marriage situations where prenuptial agreements and typical Medicaid-eligibility planning may not.
- May offer Asset Protection from Medicaid resource limits and estate recovery.
- Hybrid policies that also have a death benefit are now available.

VA Benefits

- Only veterans with service during wartime periods and their dependents qualify.
- There are income and asset tests for eligibility.
- Qualifying to receive Medicaid benefits may reduce VA benefits.
- There is a look-back period for disqualifying gifts.
- An irrevocable trust may be used to hold assets that would otherwise cause ineligibility but should be established by another person.
- That trust should not pay its income to the person who is applying for VA benefits .
- Go to va.gov and click on Benefits tab for more information or check with your local Veterans Service Officer.

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If you pay from your assets?

- From which assets?
  - Your life savings?
  - Life insurance cash value?
  - Your self-funded operating line?
  - A sale of a farm?
- For how long?
  - Until all of your assets are gone?
  - A specific time period, maybe one or two years?
  - Until cash and other liquid assets are gone?

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Medicaid

- Medicaid pays the nursing home bill after all of your resources are gone (not normally the plan) or you've paid what you planned to pay.
  - It's available for home care and assisted living in limited situations.
  - Eligibility for Medicaid requires satisfaction of both an income and an asset test.
  - There is a 5-year lookback rule that applies to major gifts.

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Medicaid

- 5-yr Look-back Period
  - Gifts made in the last 5 years before applying create a period of ineligibility.
  - Length of the period relates to the amount of the gift and the cost of nursing home care (currently $6,681/month - 405 IND. ADMIN. CODE 2-3-1.1(g) .
  - A gift of 200A worth $8,000/A for a total gift of $1.6M creates nearly 20 years of ineligibility. But no gift tax unless the exemption is reduced from its current level of $11.58 M to $1.0M.
  - Ineligibility period begins at the time of the Medicaid application, when the applicant is in the nursing home and otherwise eligible for Medicaid - 405 IND. ADMIN. CODE 2-3-1.1(c), not when the gift is made.

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Medicaid

- More information can be found at Indiana's website: http://in.gov/fssa/index.htm
- The Indiana Health Coverage Program Policy Manual can be found here: http://in.gov/fssa/files/Medicaid_Combined_PM.pdf

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Medicaid Scenario #1

- One spouse is in nursing home and one is at home
  - Step 1 – spend down countable resources as of snapshot date (1st day of at least a 30-day stay in a health care facility) to the lesser of $128,640 or ½ of total countable resources (but not less than $25,728) - 405 IND. ADMIN. CODE 2-3-14(c)(3) (2016).
    - Non-countable Resources:
      - Income-producing real estate, Home, Furnishings, Vehicle, Funeral, Business Assets, IRA of non applicant spouse (for a limited time)
    - Spend Down Options:
      - Funeral Home (*Ind. Family & Soc. Servs. Admin. v. Culley*, 769 N.E.2d 680 (Ind. Ct. App. 2002))
      - Home Repairs
      - Immediate Annuities
      - Nursing Home Costs
      - Farm Land/Equipment/Debt Reduction(mortgage or operating line)
      - Newer Home/Vehicle
      - But you can't make gifts to kids to spend-down

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Medicaid Scenario #1

- One spouse is in nursing home and one is at home (continued)
  - Step 2 – transfer assets to spouse at home (but tax on IRA transfers/loss of basis step up at nursing home spouse's death
  - Step 3 – revise estate plan of spouse at home to reduce benefit to nursing home spouse and possibly to include an irrevocable trust for their long-term care financing plan.

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Medicaid Scenario #2

- Surviving spouse is in the nursing home or both spouses are in the nursing home
  - Must spend down resources to $2,000 or less for surviving spouse or $3,000 or less for a couple.
  - Remember that monthly income still goes to the nursing home.
  - There is no spouse so no transfer possibility or spend-down.
  - But some assets do not count against Medicaid eligibility, such as income-producing real estate (farm land).

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Medicaid Scenario #2

- But the farm land is still at risk, even if it doesn't prevent Medicaid eligibility.
- Following the Medicaid recipient's death, Medicaid's resource recovery rights allow it to recoup all advances against the recipient's remaining assets.
- Might not be as bad as expected because monthly income goes to nursing home and Medicaid pays at a different (possibly lower) rate than private pay.

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Medicaid Scenario #2

- Techniques for reducing the risk to the farm land.
  - Long-term lease can preserve opportunity to farm at a reasonable rental amount.
    - Should be in fair market value range with typical lease provisions.
    - But lease payments will go to nursing home
    - Land itself is not protected from Medicaid recovery

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Medicaid Scenario #2

- Techniques for reducing the risk to the farm land.
  - Long-term sale contract can preserve land at a reasonable purchase price.
    - But purchase price payments will go to the nursing home.
    - Payments remaining at death are subject to estate recovery by Medicaid- IHCPPM 4650.00.00, et seq.
    - The duration of the land contract must not exceed the life expectancy of the seller, or the principal will be a countable resource.
    - There will be tax on the capital gain from the sale.

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Medicaid Scenario #2

- Techniques for reducing the risk to the farm land.
  - Consider granting an option to purchase, exercisable following death of Medicaid recipient.
  - Price can be locked in but should be within fair market value range.
  - Must be payment for the option (but can be similar to solar/wind power options).
  - Preserves basis step up because sale not complete until after death if option exercised (but check with accountant).
  - Preserves purchase opportunity for farmer, but payments still subject to recovery.

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Medicaid Scenario #2

- Techniques for reducing the risk to the farm land.
  - Contribute to an LLC.
  - LLC Manager can control farming arrangement.
  - Multiple contributors becoming Members is better.
  - Operating Agreement of LLC will apply to Medicaid if there is resource recovery.
  - Proceeds from buyout of Medicaid's recovery interest still go to Medicaid.

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Shielding Farm Assets

- Four techniques used to shield farm-related assets from the future costs of long-term care
  - Outright gifts
  - Gifts of land with a retained life estate
  - Transfers to irrevocable trusts
  - Transfers to a limited liability company (LLC) and then gifts of the interest in the LLC

However, none of these can be easily reversed or changed

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Outright Gifts

- Good:
  - Completed with only a deed
  - Less likely to be affected by law changes
- Bad:
  - Takes the income with it
  - After an outright gift there is no right to live in the principal residence
  - Removes control of the asset from the donor (who can rent and on what terms)
  - Carries with it the donor's basis and there is no basis step up at the donor's death

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Gifts of Land with a Retained Life Estate

- Good
  - Completed with a deed
  - After the gift, the donor:
    - Retains the income from the land
    - Retains the right to live in the home
    - Retains control of the decisions about the land
  - Those who receive the gift get a basis step-up at the donor's death
  - There is no Medicaid estate recovery on the remainder interests
- Bad
  - If the land is sold, those who received the gift are entitled to a portion of the sale proceeds (and must sign the deed)
  - If the land is used as collateral, those who received the gift must sign the mortgage (but not the promissory note)
  - Restricting subsequent transfers by those who received is not easy (their divorce can cause major problem)
  - The exemption from resource recovery is not recognized in all states

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Transfers to Irrevocable Trusts

- Good:
  - The income from the land and the right to live in the home can be retained (unless there are VA benefits).
  - If the income is retained, there can be a basis step-up.
  - The trust can be used to control the succession of the farm after the donor's death.
  - If the land is sold, the sale proceeds stay in the trust.
  - While the land is in/owned by the trust, those who will eventually receive it cannot transfer/lose/mortgage it.
- Bad:
  - The settlor no longer controls the asset.
  - Costs more than simple gifting options.

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Transfers to a Limited Liability Company (LLC)

- Good
  - Insulates farm assets against outside liabilities, such as accident liability or nursing home cost.
  - Also can be used as part of the overall farm succession plan or for death tax reduction planning.
  - May preserve control and income for the one setting up the LLC.
- Bad
  - LLC's can be more complicated and expensive than irrevocable trust.
  - LLC interest of owners attachable by creditors/ex-spouse/ Medicaid estate recovery, but outsiders do not get right to vote.
  - Future gifts of an LLC as part of a succession plan can create new gifts that count against Medicaid eligibility.

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BLUFFTON | FORT WAYNE | HUNTINGTON | ROCHESTER

888.299.9377 | gordonlegal.net