The Potential Pitfalls of Giving Away Your Assets

There are many reasons for transferring assets during life. No matter what your reason may be for wanting to transfer your assets, it is my job to consider the relevant factors and possible implications of such transfers. Below are some examples of common transfers made with specific planning objectives that could lead to big problems if you eventually need long term care such as that offered by an Assisted Living Facility or Nursing Home.

Tax Planning vs. Healthcare Planning

"My accountant/friend/relative said that I can make gifts under $14,000 per year without consequences. Can I use this technique to start transferring my assets to my children now to lower the value of my estate and reduce estate taxes?" Rarely does a day goes by that a client does not ask me this question. For many of us, the real issue is not whether you *can* make gifts to your children to lower the value of your estate, but whether you *should*. I would not be a true attorney if I did not tell you that the answer to this question depends. But it is the truth: my advice to you would depend on many personalized factors, including the amount of your assets and your goals with respect to preserving them.

It is true that there is currently a $14,000 annual exclusion for gifts. This means that an individual can give up to $14,000 per recipient per year without triggering the requirement to file a federal gift tax return. But unless there is a possibility that you may transfer a combined amount during your life and at death in excess of $5,250,000 (the federal unified gift and estate tax exclusion amount), you need not be too concerned about federal estate and gift taxes under current legislation.

For the rest of us who are not likely to make transfers over $5,250,000, we should shift our focus away from tax planning and toward a strategy for our long term care as we age. The goal of healthcare planning is to protect assets in the event that an individual or his/her spouse needs assisted living or nursing home care. There are three main sources of payment for long term care: 1) long term care insurance; 2) out-of-pocket,

Pamela A. Quattrone is an attorney with the Law Offices of Nancy M. Rice, focusing in the areas of Elder Law, Estate Planning, Estate Administration, and Estate-Related Litigation, including Guardianships.

Pamela earned a Bachelor's of Science in Finance from Rowan University and completed both her law degree and MBA at the University of Denver. She is licensed to practice law in both New Jersey and Pennsylvania.

Pamela@RiceElderLaw.com

private funds (or "self-insured"); and 3) Medicaid. Medicaid covers long term care costs for those who meet certain financial and medical eligibility requirements. To qualify financially for Medicaid, an applicant's income and assets must be within designated limits.

Under the New Jersey Medicaid rules, if an individual makes a less than fair market value transfer of his/her assets to anyone (including gifts to children or transfers to a trust) other than a spouse within five (5) years of applying for Medicaid, the transfer will trigger a Medicaid "penalty period." This means that from the date of the Medicaid application until the end of the penalty period—the length of which depends on the value of the transfer—Medicaid will not pay for the applicant's care even if the applicant has insufficient assets and income to pay himself/herself.

This five-year Medicaid look-back means that the annual gifts suggested above with an eye toward tax planning could be disastrous if you (or your spouse) need Medicaid to pay for your long term care within five years of making such transfers. Just because these gifts are permitted under federal tax laws does not mean that they are safe under state and federal Medicaid rules and regulations. This is not to say all transfers within the look-back period interfere with Medicaid eligibility. In fact, there are several exceptions in the Medicaid rules that allow for certain transfers without a resulting transfer penalty.

I am frequently able to use vehicles like Trusts, Life Estate Deeds and Powers of Appointment to preserve my clients' assets when planning for their long term care needs. It is important to note, however, that there is no "one-size-fits-all" strategy; what may have worked for your friend or relative may not have the same result for you depending on such factors as the amount and types of your assets, the amounts and sources of your income, your age, your health and whether or not you are married, among other important factors.

Veteran's Aid & Attendance Eligibility vs. Medicaid Eligibility

If you are a Veteran or a surviving spouse of a Veteran, you may be eligible to receive Veteran's Aid and Attendance benefits. Such benefits increase your monthly Veteran's pension benefits if you meet certain medical eligibility requirements, similar to the medical eligibility requirements of Medicaid. Like Medicaid, Aid and Attendance also sets limits on the assets and income an applicant may have to qualify for benefits, albeit more flexible than the Medicaid limits. Unlike Medicaid, however, Aid and Attendance does not currently impose a look-back period (however, this is likely to change). Without a transfer look-back period, a Veteran or surviving spouse who would otherwise qualify for Aid and Attendance but for assets in excess of the allowed amount, could transfer assets today and qualify for Aid and Attendance tomorrow.

While the absence of a look-back period is great news for those who would otherwise qualify for Aid and Attendance benefits, it can be risky to transfer assets for the purpose of qualifying for Aid and Attendance. Aid and Attendance rarely covers the entire cost of long term care, particularly where an individual requires higher levels of nursing care. Even with Aid and Attendance benefits to supplement an individual's income, he/she can quickly run out of assets and require the assistance of Medicaid. If the transfers made to qualify for Aid and Attendance are made within five years of a Medicaid application, the applicant is likely to have the same penalty problems described above.

But as above, this is not to say that I never recommend transfers to Veterans seeking Aid and Attendance eligibility. There are many moving pieces and my advice always depends on a complete picture of your unique situation and individualized circumstances.