

The Estate Planning Advisor

Protecting Your Assets if Care is Needed *Today*

By Richard J. Shapiro, J.D.

Since the enactment of the Deficit Reduction Act (“DRA”) in February 2006, we have used various techniques to help clients protect assets from depletion due to the high cost of long-term care (full-time care at home or in a nursing home can run \$300 per day or more). Such techniques might include long-term care insurance, an asset protection trust, or a combination of these strategies. Experience tells us, however, that relatively few people will have engaged in preventative planning prior to the time they are in need of long-term care.

The good news is that even absent an existing asset protection plan, most people can preserve a significant portion of their assets even if they need long-term care immediately. In this article I will describe a planning technique that has become the cornerstone Medicaid planning technique for institutional (e.g., nursing home) Medicaid qualification in New York.

If a person is already in, or is about to enter, a nursing home, they will only qualify for the Medicaid program after their non-exempt assets have been reduced to \$13,800 or less. While the applicant’s residence will remain “exempt” so long as they have expressed an “intent to return home,” if there is no spouse, minor child, or disabled child living in the home, the Department of Social Services (“DSS”) is permitted to impose a lien against the residence for an amount equal to the amount of Medicaid paid on behalf of the homeowner. Once DSS has determined that it is not feasible for the person to return home, that lien will be paid off when the house is eventually sold.

To avoid a complete “spend down” of the client’s assets to the \$13,800 maximum, we will typically employ a planning technique that entails gifting a portion of the prospective Medicaid applicant’s assets to children or other family members, with the remaining assets being loaned to the same persons. The repayment obligation for the loaned proceeds is documented in a promissory note. The “promissory note” technique is attractive because the DRA sets forth specific “safe harbor” guidelines. Here’s how the promissory note technique might be used (for this example, assume the applicant is not married):

The Medicaid applicant will make a gift of approximately one-half of their assets to children or other designated recipients. The amount of the gift will determine the length of the Medicaid “penalty period” for which the client will remain on a private pay basis (for instance, a \$100,000 total gift will create an 10.5 month private pay period for an Orange County resident). The applicant will immediately loan the remaining half of their assets to one or more persons, leaving the applicant with no more than \$13,800 of assets. The loan is memorialized by a promissory note that must be irrevocable, non-assignable, cannot be canceled upon death, and must be paid out in equal installments

over a period no longer than the lender's actuarial life expectancy. A reasonable rate of interest must be charged; we will typically use a rate of interest roughly equivalent to the applicable federal rate, or AFR (currently, the short-term AFR for loans with a repayment term not to exceed three years is astonishingly low at 0.82%). Upon completion of these transactions, the client will be "otherwise eligible" for Medicaid, and will submit a Medicaid application. Submission of a valid application will trigger the commencement of the period of Medicaid ineligibility. The promissory note payments, combined with the client's other income, are used to cover the cost of the nursing home care during the penalty period. After the promissory note is fully paid, the client would be eligible to receive Medicaid benefits.

Richard J. Shapiro is a partner with the Middletown law firm of Blustein, Shapiro, Rich & Barone, LLP. Mr. Shapiro is a member of the National Network of Estate Planning Attorneys, the National Academy of Elder Law Attorneys, the New York State Bar Association (Trusts and Estates and Elder Law Sections), and the Hudson Valley Estate Planning Council. He can be reached at (845) 692-0011 or at rshapiro@mid-hudsonlaw.com. The information in this article is for general information purposes only and is not, nor is it intended to be, legal advice, including legal advice for Internal Revenue Code purposes as described in IRS Circular 230.