

The Estate Planning Advisor

By Richard J. Shapiro

What if the “Well” Spouse Dies First?

When a person is facing a long-term health care crisis, their family’s focus naturally turns to the needs of the person requiring care. In most cases, the family will be seeking Medicaid coverage to help pay for that care. The “well” spouse and children are often consumed with the task of compiling the requisite financial and medical records necessary to attain Medicaid eligibility, and may overlook the need to protect the well spouse’s assets.

In order to qualify the ill spouse for Medicaid coverage, he or she must have assets valued at or below \$13,750. In situations where one spouse remains in the community (the “community spouse”), obtaining Medicaid approval for the ill spouse requires that ownership of virtually all the couple’s assets will need to be transferred to the community spouse alone.

While shifting assets to the community spouse is essential for obtaining Medicaid eligibility for the ill spouse, it is a big mistake to ignore the community spouse’s planning needs once the Medicaid application is approved. The majority of couples who have a basic estate plan have what are referred to as “I love you” wills; these wills typically provide that upon the death of the first spouse, all of the assets will pass outright to the surviving spouse. If, as in the majority of cases, the ill spouse passes away first, the “I love you” will presents no practical problem, as the community spouse will simply retain the assets previously transferred into his or her name. But what if the unexpected happens and the community spouse dies first? If the community spouse had never changed his or her “I love you” will, then the ill spouse would inherit all of the couple’s assets, and therefore forfeit his or her Medicaid eligibility.

A simple solution is for the community spouse to update his or her estate plan when the ill spouse obtains Medicaid coverage. One option to maintain Medicaid coverage might be a new will or trust that provides that if the community spouse were to predecease the ill spouse, the assets will bypass the surviving spouse and instead pass directly to the couple’s children, either outright or in trust. If the community spouse is not comfortable disinherit the ill spouse, the community spouse’s estate plan could provide that, upon his or her death, some or all of the community spouse’s assets would be held in a “supplemental needs trust” for the benefit of the ill spouse, with the assets to pass to the children upon the ill spouse’s death. Supplemental needs trusts are planning tools authorized under New York state law in which assets can be held for the purpose of supplementing the needs of a disabled person, while permitting the disabled person to remain eligible for various governmental benefits, including Medicaid.

One caveat: whether assets are left in a supplemental needs trust for the surviving spouse or instead are left directly to the children or other beneficiaries, if the surviving spouse is receiving Medicaid, then New York State is entitled to enforce the ill spouse’s statutory “elective right” to receive approximately one-third of the community spouse’s assets. If a supplemental needs trust is used, the community spouse’s will should

provide that if the elective right is exercised, then either the remainder of the community spouse's assets will remain in the supplemental needs trust for the duration of the ill spouse's life, or the remaining assets will pass to the children or other beneficiaries.

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