Legal Matters®

Elder Law
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Applying for Medicaid benefits on your parents' behalf: What you need to know

In most cases, a person who is applying for Medicaid to cover long-term care expenses has to apply for their own benefits. But in certain instances, if a parent can no longer complete the application on their own, a child can apply on their behalf. If you think you may be in that situation, here are a few useful things to know.

First, you can't apply for Medicaid on your parent's behalf without legal authority to make important legal and financial decisions for them. The easiest way for your parent to give you such authority is to execute a power of attorney. A POA is only enforceable, however, if your parent has the capacity to knowingly and voluntarily give you that power. If they have that capacity now, it may be a good idea to discuss creating a POA in case it becomes necessary later.

If your parent already has reduced decision-making abilities, you would need to seek a court appointment as their legal guardian. Courts will often agree to this if you can prove your parent is incapacitated and you can overcome objections from other interested parties. An elder law attorney can assist with either process.

Assuming you have the power to act for your parent, you also need to ensure they're eligible for Medicaid benefits, which means you can prove their income and total assets are below your state's eligibility limits and that they actually need long-term care.

This requires gathering all sorts of documentation, including proof of income, bank statements, deeds and mortgages, loan information, insurance policies and medical records. It can be overwhelming, which is another reason why it's a good idea to sit down and talk with your parent and get organized ahead of time. The best thing to do is create a system so you can access all this information quickly if and when the time comes.

Meanwhile, if your parent's income and assets put them above eligibility limits, you and your parent could meet with an attorney to discuss setting up a long-term trust or annuity to help preserve

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Passing your home on to a family member tax-free

Passing along a home to your children may be one of the best gifts you could give. It's a means of providing them financial security and a place to live going forward without having to worry about a mortgage or rent, which enables them to build up their savings.

If you are thinking of doing this, you should set up an appointment with an elder law attorney to discuss the best way of passing on the property without also creating a big tax liability for your kids. In the meantime, here's a very basic rundown of some of your options:

The most straightforward option would be simply to leave your house to your children in your will. But this depends on the size of your estate. Currently, the federal estate tax kicks in at just above $13 million. If the total amount of your estate is lower, no federal tax will be due. But about a dozen states have an estate tax of their own. Typically, their estate taxes kick in somewhere between $1 million and $6 million, depending on the state. Since many people's homes are their biggest asset, passing along your home in your will could be the difference between your estate being taxed at the state level or not.

Another option is to sell your home to your kids. If you sell for less than you could get on the open market, the IRS will treat the difference between market value and the sale price as a gift. The government lets you gift an individual up to $18,000 a year tax-free, or $36,000 to a couple. Alternatively, you could sell them the home at full market value but still hold a note on the property (instead of them taking out a mortgage) and then gift your child the amount of the gift tax exclusion each year to help them pay down the note.

A third option is to put the house in a trust, naming your children as beneficiaries. This takes the home out of your estate altogether, so there are no potential estate taxes when you pass away. However, if the house is sold in the future, the sale proceeds have to stay in the trust, under the supervision of the trustee appointed to manage the trust, instead of going directly to your children.

A final option is just to gift the home to your children outright. But this also creates the potential for a gift tax. If your children later decide to sell the home, they could be forced to pay capital gains taxes on the increase in value, which can be hefty. Also, transferring your home could impact your Medicaid eligibility should you need long-term care within the next five years.

These are all important things to consider. An elder law attorney can help you figure out the best option based on your individual circumstances.

Contingent beneficiaries: What are they and do I need one?

When you take out an annuity or life insurance policy or open a 401(k), 403(b) or IRA account, you generally designate a beneficiary who will receive the asset when you pass away without having to go through the long, complicated and expensive process of probate.

Unfortunately, not everyone thinks to name a contingent beneficiary to receive the asset or assets in question if their named beneficiary either predeceases them, can't be located, or refuses to take the asset. But it's very important to do this because, otherwise, if the primary beneficiary is unavailable or unwilling, the asset goes back into the estate and is subject to probate after all. This means the asset could be distributed according to your state's laws on lines of succession if there's no will instead of having it go to someone you would have wanted to have it.

If you're not sure who to name as a contingent beneficiary, keep in mind that it doesn't have to be an individual. You could name a charity, an organization or an existing trust as the contingent beneficiary if you wish. You could even arrange for a child or a pet to receive the asset, although not directly since they would likely have no legal ability to accept it. Instead, the child would need a guardian to accept it for his or her benefit and a pet would need a trustee to put the funds toward its care during its lifetime.

Additionally, it's important to note that it's always a good idea to review your accounts and policies periodically and update both your beneficiaries and contingent beneficiaries as circumstances change.

Protecting your child's inheritance from a future divorce

For most people, seeing their child grow up and get married is a joyous occasion. But sometimes marriages don't work out, which could place your child's inheritance at risk in their divorce.

That's because if they get divorced, the Family Court in many states will pool together all of the couple's assets, whether it's accumulated cash and investments, vacation and family homes, and even family heirlooms, and divide up the marital property in a manner that it deems fair under the circumstances. If your child inherits such assets while he or she is married, the value of those assets could be thrown into the pot and split in a way that deprives him or her of the benefit.

In the worst cases, valuable assets and heirlooms could ultimately wind up in the hands of the ex's new spouse and stepchildren.

So, what can you do to reduce the risk of that happening?

One option is to have a candid conversation with your adult children encouraging them to execute a prenuptial agreement, under which your child and their spouse agree in writing that should they get divorced, certain property they own or expect to receive will not be subject to division. This can be an uncomfortable thing to bring up, but it's important to remember that this is for their protection.

Trusts are another way of protecting a child's inheritance. Instead of distributing an asset directly to your child, it's overseen by a trustee who is charged with distributing the wealth it generates to your child. In many states, trusts can be written to ensure that your child's interest in the trust can only be passed on to your grandchildren and that it cannot be subject to division in case of a divorce.

On the flip side, you want to make sure that you don't disinherit anyone by mistake. For example, let's say you have a very loving, close relationship with your child's spouse, and you actually want them to inherit your child's interest in a trust in the event of your child's death. You would need to make sure the trust states that explicitly (perhaps with a caveat that they would not have inheritance rights in the trust should they and your child divorce).

These are, of course, complicated issues, and a conversation with an elder law attorney who has estate planning experience can provide further insight.

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their assets while qualifying for Medicaid.

Assuming your parent is, in fact, Medicaid-eligible, and you do have the power to complete the application on their behalf, you still need to familiarize yourself with the different types of long-term care that an elder can seek so that you can make the right decision for your parent. For example, if they need continuous medical supervision and can't manage daily tasks on their own, they might need to move into a nursing home or assisted living facility. If their needs are less intense, you could arrange for in-home care in which a caregiver comes to the house to help them with certain daily tasks and medication. Medicaid can also cover the cost of adult day care, in which they can have daytime care outside the home, benefitting from social interaction while giving their usual caregiver a much-needed respite.

Whichever option you choose, it is a good idea to work with a local elder law attorney who is familiar with the Medicaid application process and eligibility requirements and can help you navigate or even avoid many of the roadblocks that the Medicaid program is so frequently associated with.

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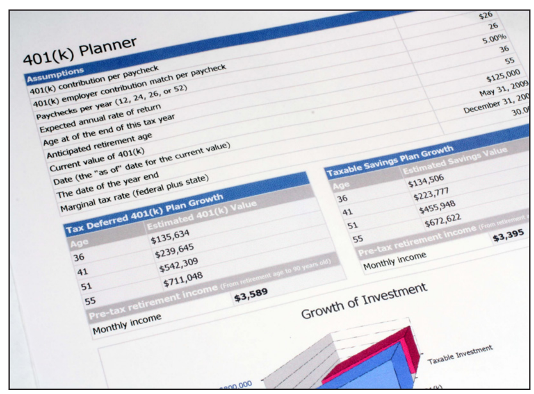
Should I put off taking my ‘required minimum deductions’?

The federal government requires individuals saving for retirement who reach a certain age to make annual “required minimum deductions” from tax-deferred retirement savings plans such as IRAs, 401(k)s and 403(b)s. This is to ensure the government that these savings, which use pre-tax earnings, become taxable income at some point.

Currently, you are required to begin taking annual RMDs in an amount based on the fair market value of your savings, your age, and your life expectancy at age 73 if you were born between 1951 and 1959. Individuals born in 1960 or later must begin taking them at age 75. Failure to do so can result in a penalty.

For 401(k)s, however, the government lets you postpone your withdrawals without a penalty past age 73 if you continue to keep working. This lets your funds continue to be invested tax free for longer. Of course, this applies only to work-related retirement plans. You would still need to take withdrawals from IRAs.



If you’re thinking of doing this, understand that your individual plan might not let you postpone taking RMDs even if the government says it’s OK, so you need to check your plan language.

Additionally, if you have more than a 5-percent ownership stake in the company you’re working for, you can’t postpone RMDs without a penalty.

This is just a very basic overview, however. There are additional complexities, so it’s a good idea to consult with an elder law attorney about your own situation.