page 2
Proving the hardship exception to the Medicaid penalty period

Family dispute illustrates need for long-term care plan

page 3
How Medicare and employer coverage coordinate

page 4
Use your will to dictate how to pay your debts

Legal Matters®

Elder Law
winter 2018

Four provisions people forget to include in their estate plan

Even if you've created an estate plan, are you sure you have included everything you need to? There are certain provisions that people frequently forget to put in in a will or estate plan that can have a big impact on their heirs.

1. **Alternate beneficiaries**

One of the most important things an estate plan should include is at least one alternative beneficiary in case the named beneficiary does not outlive you or is unable to claim under the will. If a will names a beneficiary who isn't able to take possession of the property, your assets may pass as though you didn't have a will at all. This means that state law will determine who gets your property, not you. By providing an alternate beneficiary, you can make sure that the property goes where you want it to go.

©fotoluminate

2. **Personal possessions and family heirlooms**

Not all heirlooms are worth a lot of money, but they may have sentimental value. It is a good idea to be clear about which family members should get which items. You can write a list directly into your will, but this makes it difficult if you want to add or remove items. A personal property memorandum is a separate document that details which friends and family members get which personal property. In some states, if the document is referenced in the will it is legally binding. Even if the document is not legally binding, it is helpful to leave instructions for your heirs to avoid confusion and bickering.

3. **Digital assets**

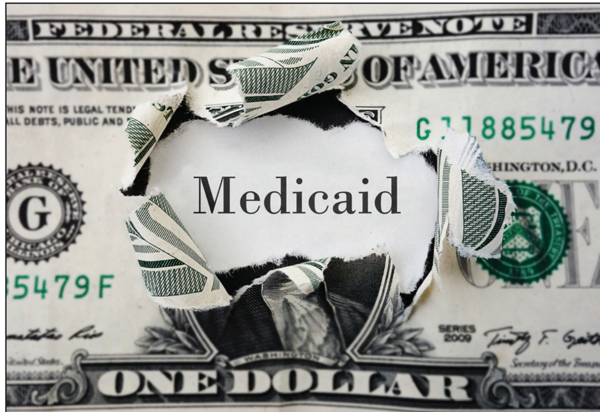
We are all conducting more and more business online, but there

continued on page 3

Correira & Correira LLP
800-699-5040 | CorreiraLaw.com

20 Park Plaza, Boston, MA, 617.723.5040
20 Cabot Boulevard, Mansfield, MA, 508.991.5040
1010 GAR Highway, Swansea, MA, 508.679.5040
1415 Panther Lane, Naples, FL, 239.649.5040
127 Dorrance Street, Providence, RI, 401.454.5040

Proving the hardship exception to the Medicaid penalty period



©zimmytws

If you transfer assets within five years of applying for Medicaid, you will likely be subject to a period of ineligibility. There is an exception, however, if enforcing the penalty period would cause the applicant an "undue hardship." This exception is difficult to prove and rarely granted, but it may be available in certain circumstances.

Under federal Medicaid law, the state Medicaid agency must determine whether an applicant transferred any assets for less than fair market value within the past five years. If there are any transfers, the state imposes a penalty period, which is a period of time in which the applicant will be ineligible for Medicaid benefits. The length of the penalty period is calculated by dividing the amount transferred by what Medicaid determines to be the average private pay cost of a nursing home in the state.

A Medicaid applicant can fight the penalty period by arguing that enforcing it will cause an undue hardship. Federal law provides that an undue hardship exists if the penalty period would deprive the applicant of: (1) medical care necessary to maintain the applicant's health or life; or (2) food, clothing, shelter, or necessities of life. The burden is on the applicant to prove that hardship exists. A nursing home can pursue a hardship waiver on behalf of a resident.

Proving an undue hardship is difficult because the applicant needs to show that he or she can't afford nursing home care during the penalty period and that without nursing home care, his or her health will decline. In addition, states are free to define "hardship" as they see fit and courts vary on how they enforce the exception.

If you believe you may be entitled to an undue hardship waiver, contact your attorney.

Family dispute illustrates need for long-term care plan

A recent New Jersey court case demonstrates how important it is for families to come up with a long-term care plan before an emergency strikes.

The case involved two brothers who got into a fight over whether to place their mother in a nursing home. R.G. was the primary caregiver for his parents, as well as their agent under powers of attorney. After R.G.'s mother fell ill, R.G. wanted to place her in a nursing home. R.G.'s brother objected, but R.G. went ahead and had his mother admitted to a nursing home without his brother's consent. R.G.'s brother sent angry and threatening texts and emails to R.G. as well as emails expressing his desire to find a way to care for their parents in their home. Eventually the men got into a physical altercation in which R.G.'s brother shoved R.G.

R.G. went to court to get a restraining order against his brother under New Jersey's Prevention of Domestic Violence Act. A trial judge ruled that R.G. had been harassed and assaulted and issued the order. But a New Jersey appeals court reversed the trial court, ruling that R.G.'s brother's actions did not amount to domestic violence. According to the court, there was insufficient evidence that R.G.'s brother purposely acted to harass R.G.

If the brothers had sat down with their parents before either of them needed care to explore options and determine their wishes, this drawn-out and costly dispute might have been avoided. Putting a long-term care plan into place before a crisis develops can help avoid family conflicts like this one.

Putting a long-term care plan into place before a crisis develops can help avoid family conflicts like this one.

This newsletter is designed to keep you up-to-date with changes in the law. For help with these or any other legal issues, please call our firm today. The information in this newsletter is intended solely for your information. It does not constitute legal advice, and it should not be relied on without a discussion of your specific situation with an attorney.

Four provisions people forget to include in their estate plan

continued from page 1

are some steps you can take to help your family deal with your digital property. You should first make a list of all of your online accounts, including e-mail, financial accounts, Facebook, and anywhere else you do business online. Include your username and password for each account. Provide access information for your digital devices, including smartphones and computers. Finally, make sure the agent under your durable power of attorney and the personal representative named in your will have the authority to deal with your online accounts.

4. **Pets**

Pets are beloved members of the family, but they can't take care of themselves after you are gone. While it's not possible to leave property directly to a pet, you can name a caretaker in your will and leave that person money to care for the pet. Don't forget to name an alternate beneficiary here as well. If you want more security, in some states you can set up a pet trust, under which the trustee makes payments on a regular basis to your pet's caregiver and pays for your pet's needs as they come up.

©fotoluminate

Contact your attorney to make sure your will and estate plan takes care of all your needs.

How Medicare and employer coverage coordinate

Medicare benefits start at age 65, but many people continue working past that age. That makes it important to understand how Medicare and employer coverage fit together.

Depending on your circumstances, Medicare is either the primary or the secondary insurer. The primary insurer pays any medical bills first, up to the limits of its coverage. The secondary insurer covers costs the primary insurer doesn't cover (although it may not cover all costs). Knowing whether Medicare is primary or secondary to your current coverage is crucial because it determines whether you need to sign up for Medicare Part B when you first become eligible. If Medicare is the primary insurer and you fail to sign up for Part B, your eventual Medicare Part B premium could start going up 10 percent for each 12-month period that you could have had Medicare Part B but did not take it.

Here are the rules governing whether Medicare coverage will be primary or secondary:

- If your employer or your spouse's employer has 20 or more employees, your employer's insurance will generally be the primary insurer and Medicare will be the secondary payer. If your employer or your spouse's employer has fewer than 20 employees, Medicare will generally be the primary insurer and your employer's insurance will be the secondary insurer.
- If you are retired but still covered by your employer's group health insurance plan, Medicare pays first and your former employer's plan pays second.
- If you receive both Social Security Disability Insurance and Medicare and your employer has 100 or more employees, your employer's insurance pays first. Some employers are part of a multi-employer plan; if at least one employer in that plan has 20 employees or more, the employer's insurance pays first. If your employer has fewer than 100 employees, Medicare will pay first.
- If you have end-stage renal disease (ESRD) and are in the first 30 months of Medicare coverage of ESRD, your employer's plan pays first. After the first 30 months, Medicare becomes the primary insurer. It does not matter how many employees your employer has.
- If you are self-employed and have a group health plan that covers you and at least one other person, Medicare pays first. Note that if you are self-employed, you may be able to deduct Medicare premiums from your income taxes by including the premiums in the self-employed health insurance deduction.
- If your employer's insurance is the primary insurer, the employer must offer you and your spouse the same coverage that it offers to younger employees. It also cannot deny you coverage, cancel your coverage once you become eligible for Medicare, or charge you more for premiums, deductibles, and co-pays.

We welcome your referrals.

We value all our clients. And while we're a busy firm, we welcome all referrals. If you refer someone to us, we promise to answer their questions and provide them with first-rate, attentive service. And if you've already referred someone to our firm, thank you!

Correira & Correira LLP
20 Park Plaza, 4th floor
Boston, MA 02116

Use your will to dictate how to pay your debts

The main purpose of a will is to direct where your assets will go after you die, but it can also be used to instruct your heirs on how to pay your debts. While generally heirs cannot inherit debt, an estate's debt can reduce what they receive. Spelling out how debt should be paid can help your heirs.

If someone dies with outstanding debt, the executor is responsible for making sure those debts are paid. This may require selling assets that you would have preferred to leave to specific heirs. There are two types of debts you might leave behind:

- *Secured debt* is debt that is attached to a piece of property or an asset, such as a car loan or a mortgage.
- *Unsecured debt* is any debt that isn't backed by an underlying asset, such as credit card debt or medical bills.

When you leave an asset that has debt attached to it to your heirs, the debt stays with the property. Your heirs can either continue to pay on the debt or sell the property to pay off the debt. If you believe this would cause a burden for your heirs, you can leave them assets in your will specifically designated to pay off the debt.

In the case of unsecured debt, although your heirs will not have to pay off the debt personally, the executor will have to pay the debt using estate assets. You can specify in your will which assets to use to pay these debts. For example, suppose you have a valuable collectible that you want one of your heirs to have. You can specify that the executor use assets in your bank account to pay any debts before selling the collectible. If you want to leave certain liquid assets, like a bank account, CD, or stocks, to an heir, you should designate in your will what you would like your executor to use instead to satisfy debts.

Not everyone needs to spell out how to pay debt in a will. If your debt is negligible or your entire estate is going to just one or two people, it may not be necessary. Contact your attorney to formulate a plan.

©creisinger