

25

Strategies to Prevent Financial Ruin from Long-Term Health Care Costs

“About 70 percent of people over age 65 need some type of long-term care during their lifetime. More than 40 percent need care in a nursing home for some period of time.”

(U.S. Department of Health & Human Services)

A Special Report By David A. Cutner, Esq.

Updated **3rd** Edition

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What clients say about Lamson & Cutner...

“My mother’s assets would have been wiped out”

My 90 year old mother was confined to a nursing home upstate and her Medicare benefits had run out. . . . I did my best to fill out the forms, gather all the supporting documents, and submit them to the local DSS office. . . . I realized I was in over my head, even though I am a practicing attorney. I took a look at the Lamson & Cutner website and called for an appointment. . . . L&C was able to rehabilitate my flawed application and ultimately got it approved. Medicaid paid \$40,000 of the \$42,000 nursing home bill. My mother’s assets would have been wiped out, had they not succeeded. I have since referred some of my own clients to them, and they, too, are pleased with the compassion, sound advice, and good service they have received at Lamson & Cutner.

Karen Lukas

“The money spent was saved many times over”

David, Thank you just doesn’t quite cover it but I will say it again THANK YOU!!! Thank God I was referred to your firm 5 years ago. I am proud to say that thanks to you and Karen Mom had a wonderful life here with me. You made that possible with your Estate planning, Trust creation and advice. The money spent was saved many times over. I still remember the day I received the call that Mom had been approved for coverage and care at home 10 hours/day SEVEN DAYS/WEEK. I had to pull over because I was shaking and I cried!! I hadn’t expected to get approved for that many hours and for that many days. I’d been paying for 2 years AND I covered weekends myself. I was beyond exhausted. It was your calm demeanor and your explanation that convinced Mom to go ahead and engage your Firm. THANK YOU again. . . It is clear you have a passion for what you do and that you genuinely care about your clients. May God bless you and keep you always!!

Sincerely, Millie Torres - a grateful client

“They treated me with dignity and respect”

I retained the law firm of Lamson and Cutner to handle my father’s affairs when moving into a nursing home. At the time I had just terminated a very bad experience with another elder law attorney and I was a bit hesitant to trust anyone. From my first appointment at Lamson and Cutner I could tell that this was going to be a positive experience. They treated me with dignity and respect in every interaction from beginning to end. They always had time to answer my questions and they always responded in a timely fashion. It was a very positive experience and I highly recommend them.

Carol R.

“Please share our story with your clients”

Thank you ever so much for the way your firm protected our family and made sure we were treated in a fair manner during the time in our lives when we needed to admit our parents into their nursing home and apply for government assistance. . . . I took it upon myself to complete their admission application along with what I felt was a clear delineation of my parents’ assets along with documentation of their finances, bank statements etc. . . . [but our application was] denied. As a result, the nursing home billed us for the unpaid fees, in an amount that eventually hit \$111,000.00. My parents had less than \$40,000 in total assets. We enlisted the help of Lamson and Cutner to resolve this issue. When the attorneys met with the Department of Social Services and presented my father’s situation with legal documentation, only then did the Department of Social Services agree to approve the Medicaid expenditure for my father, and the bill was satisfied. Thank you and thank the staff of Lamson and Cutner for a job well done.

Sincerely, G.W.

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Prior results obtained by the firm do not guarantee a similar outcome in future cases.

25 Strategies to Prevent Financial Ruin from Long-Term Health Care Costs Updated 3rd Edition

*A Special Report for Seniors, the Disabled,
and their Families*

By David A. Cutner, Esq.

Today's astronomical medical and health care costs are often overwhelming for those with chronic illness or serious injury. Protecting your money, income and assets is a primary concern if you need long-term care. Yet surprisingly, few people realize how quickly financial danger can sneak up and overtake them, wiping out their life's savings and the lifestyle they're accustomed to.

Their potential need for long-term care, and the cost of the services that they are likely to require, constitute the greatest financial risk most seniors face today. According to the U.S. Department of Health and Human Services: "Someone turning age 65 today has almost a 70% chance of needing some type of long-term care services and supports in their remaining years," with women typically needing care longer than men. About 40% will need care in a nursing facility.

If you need care either at home or in a nursing facility, you've probably already discovered just how expensive it can be. If you have to pay without the advantage of Medicaid benefits, home care can cost up to \$8,000 a month, at times exceeding even that figure. Nursing facility care could easily be as high as \$18,000 per month or more.

Individuals and families are rarely able to support these costs for very long without being thrust into poverty. Without proper planning, eventual impoverishment is a certainty. Many people erroneously believe that Medicare will cover these costs. This is a common misconception. Medicare does not pay for long-term care.

The only program that will pay for long-term care is Medicaid, and it is a means tested program. In other words, Medicaid will not provide benefits until you meet strict financial eligibility requirements, i.e., until you have almost no money left.

There are effective solutions to these difficulties that most people are unaware of. They can allow you to keep all or a good portion of your money, investments and property

working for you, while Medicaid pays your medical and long-term care bills. These methods are available through an attorney or law firm with an Elder Law practice.

A major focus of Elder Law is on planning and paying for long-term care required by seniors and people with disabilities, and obtaining Medicaid eligibility for them. A common misconception is that you have to be poor or completely deplete your income and assets to get Medicaid. This comes from a lack of understanding of what Federal and New York State laws permit. Elder Law attorneys serve a wide spectrum of clients with varying financial profiles, including some who have substantial reserves.

Some may question the ethics of asking Medicaid to pay for your health care when you still have money of your own. But the truth is that most elderly or disabled people need to protect their assets in order to pay their living expenses and survive in the community. People are living longer – some much longer than expected. Without protecting some of their assets in order to allow them to pay their bills and meet their obligations, an already vulnerable population will become even more vulnerable. Some may feel pressure to enter a nursing facility simply because they cannot afford to pay their living expenses. Equally dramatic are the all-too-common situations where a married couple's assets are depleted providing for the care of one spouse, leaving the other spouse in a desperate position.

With proper planning, you can achieve Medicaid eligibility and maintain your financial status and lifestyle. You don't have to be destitute or spend down all your assets; you simply have to qualify by meeting certain financial criteria. That is accomplished with a variety of planning strategies, including transferring assets, setting up trusts, creating annuities and using various other legal tools. A lawyer who is proficient in applying these techniques can gain many excellent benefits for you and your loved ones, often far beyond what you might think is possible.

Following is a series of time tested and proven strategies for obtaining this advantageous outcome, all clearly explained. They address care both at home and at nursing facilities, for seniors and the disabled. You'll find specific, practical techniques that directly apply to your situation. Keep in mind that successful planning requires a particular mindset about how to approach your finances and future. In addition to workable procedures, this discussion is designed to impart a way of thinking about how to preserve what you have. It's critical to comprehending the larger picture of effective planning.

Please understand that the ideas, concepts and strategies in this Special Report are not legal advice. Medicaid planning is complex. Each case has unique facts that can affect the outcome, and requires individual attention and analysis. So while these are general principles that may apply in many situations, realize that your individual circumstances need to be thoroughly evaluated by a knowledgeable lawyer before you take any action.

While many of the ideas in this Special Report might be of general interest, the report is oriented to residents of New York State. If you live elsewhere, you'll need to consult an Elder Law attorney in your state to determine how its laws specifically apply to your circumstances. Medicaid laws in particular vary considerably from state to state. Also, the focus of this Special Report is on the population aged 65 years and older, who are subject to long-standing rules regarding Medicaid eligibility. Those under the age of 65 who have low incomes may be able to qualify for Medicaid under the Modified Adjusted Gross Income ("MAGI") test provided in the Patient Protection and Affordable Care Act ("Obamacare").

With that understanding, here are 25 ways to make sure you get the most comprehensive financial protection available, full coverage of all your medical and health care costs, and a much more comfortable future.

1 You Can Qualify.

Many people have the false impression that Elder Law planning is not worth finding out about, because they think they're not eligible for Medicaid. They feel they have too much income, money and other assets to qualify, or believe that some of the specialized trust strategies used for asset protection are for rich people only. This is simply untrue.

With effective planning, most can qualify for Medicaid benefits. Elder Law strategies allow you to protect your home if you own one, as well as the monetary resources you've built up over a lifetime. The alternative is to deplete your reserves almost completely paying for your own care, which Medicaid would otherwise have covered.

Additionally, many people who could be eligible for Medicaid payment of home care or nursing facility care think they will be blocked by the "look back" and "penalty" periods. This results from a faulty understanding of these terms, which are explained in detail in this report. In New York, the look back and penalty periods apply only to Medicaid Nursing Home applications, and not to Medicaid Community or Home Care or Assisted Living applications. And even with these limitations, in many instances, you can be approved by Medicaid for nursing facility care and have it fully paid.

It pays to sit down with an Elder Law attorney and review the details of your unique situation. You may find it to be one of the wisest things you've ever done for yourself and your family. You can continue to benefit from your savings, income and assets, and maintain your quality of life. When you pass on, it's a great gain for your family members who may inherit what would otherwise be lost to the cost of your care.

If you've applied for Medicaid and have been denied benefits, it's quite possible to have the decision reversed. There are many reasons for a denial and a variety of strategies for

addressing them. Common reasons include excess assets, lack of documentation, improper transfers, or spousal issues. An experienced Elder Law firm can help with these roadblocks, and in many cases successfully initiate procedures to qualify you. Often, it's simply a question of correctly implementing the methods described in this report.

Be proactive in pursuing government benefits you're entitled to, and have contributed to with your tax dollars.

2 Be Clear on the Downside.

Understandably, no one likes to think about the prospect of suffering from a medical condition that sets off a prolonged decline physically, emotionally and financially, or that might strike a loved one. So instead of taking steps to prepare for potential problems in the future, most people delay or take no action at all. The consequence of this "wait and see" approach is often tragic.

Be aware of what can happen without good planning. If you need long-term care and you have money, property or other economic resources, Medicaid will insist you use them up almost completely before it pays any benefits. This is sometimes referred to as the "spend down." If you own your home, Medicaid won't force you out as long as it's your primary residence, but it has the right to enforce a lien against it after you and your family members move out equal to the cost of the benefits it provided. The end result is already predetermined: there will be virtually nothing left of your home equity.

Here's an example of what can be accomplished, in a case Lamson & Cutner handled for an elderly couple with a significant net worth. Their assets and financial reserves were worth hundreds of thousands of dollars, and the husband, who was approaching 90 years of age, needed nursing facility care. We arranged for the transfer of several properties to his wife, along with other liquid assets. We then filed a Medicaid application for nursing home services. The planning steps we'd first taken allowed the husband to qualify, and he was approved.

The outcome is that his care is now fully paid by Medicaid, and his wife's financial needs are provided for. We then did estate planning for the wife, to provide the best protection for the assets in her possession. Now, regardless of what the future may bring in terms of her own medical and health needs, she is in the strongest possible financial position. In most cases involving married couples, further planning should be done to protect the assets in the hands of the well spouse to the extent possible. (See strategy No. 18.)

This couple won't lose all that they worked for because of ruinous health care expenses. The well spouse also has the financial ability to make her husband's stay at the nursing home as pleasant as possible.

3 Plan While You're Still in Good Condition.

Even if you're in good health now, you and your loved ones can achieve the best financial security by planning early for both home and nursing facility care. If you need assistance in the future, you'll gain the benefit of reducing your medical and health expenses by having Medicaid cover whatever your insurance doesn't.

By planning for your care now, even when you don't presently need any, you could eventually save 100% of your money, income and assets, which Medicaid would otherwise require you to pay towards your own long-term care. When nursing facility services are required, advance planning can save all of your assets, even though in most cases you will not be able to protect your income.

It's best to anticipate the need for home and nursing facility care simultaneously. That way, if you need to enter a nursing home in the future, you will be financially prepared. The reason is that unlike the requirements for home care, Medicaid has "look back" and "penalty" periods that apply to nursing home applications. Here's what the look back and penalty periods are, and how they work.

When you apply for nursing home benefits, Medicaid will evaluate your financial data going back five (5) years. This is called the "look back" period. If there has been any transfer of money or assets to someone other than your spouse (or minor, blind, or disabled child) within the look back period, Medicaid will impose a "penalty period" during which you will not be eligible to receive Medicaid benefits.

Medicaid calculates the length of the penalty period by taking the total amount of the transfers made during the five year period, and dividing this amount by the "regional rate" applicable to your geographic area. The product of this arithmetic is the number of months that you will not be eligible to have Medicaid pay your nursing home bill. The regional rate for New York City in 2015 is \$11,843, and the regional rates for other geographic areas are set forth in the Medicaid Quick Summary Chart on the insert to this Special Report. Note that the actual cost of a nursing home is usually higher than Medicaid's regional rate.

Here's an example of how it works. If you gave your child a gift of \$300,000 within the five year "look back" period, and you entered a New York City nursing home in 2015, Medicaid would divide \$300,000 by \$11,843, resulting in a penalty period of about 26 months. The penalty period starts as soon as you enter the nursing home, apply for Medicaid, and are otherwise eligible for Medicaid "but for" your transfer of assets. During the penalty period, the nursing home's bills will have to be covered on a private pay basis.

Using the above example, if the nursing home's private pay rate is \$16,000 per month (many facilities currently cost this much or more), the Medicaid penalty would cost about \$416,000. If you enter the nursing home prior to the time the penalty period actually begins, it could cost you an even greater amount. A financial disaster like this can be avoided with good planning, yet most people don't do it. Don't make that mistake yourself.

If you transfer cash and assets out of your name during the look back period, it will be too late to save 100% of your assets. However, in many cases, with good Elder Law planning, you will still be able to save 40% to 50% of your assets.

If you're healthy now, you'll benefit even more by planning ahead. Losing half or all of your net worth to long-term care expenses, and possibly ending up penniless and in poverty, is not only extremely painful for you and your family, it's also unnecessary.

As you can see, the optimal results of asset protection strategies are gained with advance planning, before you need home or nursing facility care. A good example is a case in which we helped a healthy client who does not currently need assistance. We transferred his house to an irrevocable trust, so that in the event he requires Medicaid benefits, his home will not be subject to a Medicaid lien.

By planning early we increased his chances of moving past the look back period. If he eventually needs nursing home care once the look back period has expired, his transfer will not be subject to any penalty. That means the equity in his home will never have to be used to reimburse Medicaid for the cost of his care. Instead, it will be fully available to support or supplement his lifestyle and care, and then benefit his heirs after he passes on.

Take steps to preserve your finances and dignity while you're still healthy, and not in need of professional care to help with your day-to-day living needs. Having the financial ability to maintain the lifestyle you're used to, and your self-respect, is a kind of "medicine" that might be as vital to your well-being as anything you receive from doctors.

4 Understand the Difference between Medicare and Medicaid.

Medicare and Medicaid are both medical and health programs provided by government entities to pay benefits to senior citizens and the disabled. Other than that, they differ in significant ways, and each has its own rules and regulations. Many people confuse the two, but their functions are quite distinct.

Medicare is medical insurance for seniors and the disabled. It's just like any other medical insurance, except that the federal government provides it. It pays expenses related to short-term illness or injury, acute care and rehabilitation.

Medicaid covers medical services, and provides benefits for those needing long term care who are permanently ill, injured or disabled, and who qualify financially under the Medicaid rules. Medicaid will assist people who have difficulties with performing the “activities of daily living,” such as bathing, dressing, eating, and going to the toilet, as well as those who need skilled nursing care. Medicaid also covers most medical expenses that are not covered by Medicare or other insurance. Medicaid is a federal, state, and locally funded program, and the rules regarding eligibility and implementation vary widely from state to state.

A major benefit of being approved for Medicaid is that it will pay for long-term care expenses, which Medicare doesn’t cover. You may also gain access to additional services such as adult day care, transportation, or special programs such as the Traumatic Brain Injury Waiver Program.

Lamson & Cutner represented a single man who received a settlement after being injured in a serious car accident. He suffered many injuries, including a traumatic brain injury. We shifted his settlement proceeds to a protective trust, so that the funds could be used to pay his living expenses. He qualified to receive Medicaid benefits, and to be placed on the Traumatic Brain Injury Waiver Program list, which provides extra services for his special needs.

So remember: your Medicare or other medical insurance is for acute medical needs and rehabilitation only. In our experience, a significant number of people assume that their Medicare or other medical insurance will cover the cost of their long-term care, which is entirely incorrect. Also, while Medicare and supplemental insurance provide “up to 100 days” of coverage in a nursing facility for short-term rehabilitation from a given injury or illness, actual coverage may be far less if rehabilitation is achieved earlier, or if you are not making progress. Many patients are surprised to find themselves obligated for large out-of-pocket costs for care following an illness or injury. This can easily happen when you have no more “Medicare days” and need continuing care, but are not ready to resume your former lifestyle.

New York City, Nassau, Westchester, and Suffolk Counties are participating in a joint federal-state “demonstration project” to determine whether “dual eligibles” (those persons eligible for both Medicaid and Medicare) should have all of their care covered under one all-encompassing plan. These plans are called “Fully Integrated Duals Advantage” plans, otherwise known as FIDA plans. It is too early to say how this demonstration project will eventually affect the delivery of care to the elderly and disabled. Watch Lamson & Cutner’s website (www.lamson-cutner.com) for continuing updates on this subject.

5 It's Not Too Late.

Even if you're already in a nursing home and are paying for care privately, it's not too late to initiate effective planning so that Medicaid covers your bills. In most instances, there are still procedures you can use to shield a substantial portion of your money and assets. You may be able to save as much as 40% to 50% of what you have.

Similarly, if your physical condition has deteriorated to the point where it's now obvious you'll need home or nursing facility care, steps can be taken to preserve your financial resources, and to protect your house, condo or co-op. In fact, you're likely to be surprised by the advantages that remain available to you.

Here's an example of a case in which we helped a couple protect significant liquid assets. These results were obtained even though the planning was done after it became clear that professional care was necessary. Our client was in her 80's, suffering from Parkinson's Disease. After a number of strokes, seizures and other serious complications, she became uncommunicative. Up to this point, the couple's assets were held jointly. We arranged for the transfer of all of the assets to the husband.

We then filed an application for Medicaid nursing home benefits for the wife, which was approved. The assets held by her husband were then placed in a special trust. The beneficial end result: the couple did not have to private pay for the wife's care, and the funds remained available to supplement the wife's care in the nursing home, and to help maintain the husband in the community. All of these advantages were obtained with asset protection strategies that were implemented "at the last minute."

In cases involving married couples, the "community spouse" may be subject to a Medicaid claim for reimbursement of the cost of care of the institutionalized spouse, if the community spouse's assets exceed Medicaid's allowance (the maximum in 2015 is \$119,820). If a claim for reimbursement were made, it would be calculated at Medicaid's dramatically reduced rates, rather than at the private pay rate of the nursing home. Also, in many cases, it is possible to negotiate an even more favorable settlement.

6 Only Hire an Elder Law Attorney for Medicaid and Long-Term Care Issues.

Medicaid has a maze of complex rules and regulations that most people find almost impossible to understand and navigate. Unless they are Elder Law practitioners, even attorneys are generally ill-equipped to provide accurate advice about the Medicaid system and the strategies that can properly be used to protect clients' money, property, or income. Wrong or incomplete advice can result in the loss of your hard-earned savings, and put you and your family in a difficult position. As an example, in a number of cases we have reviewed documents drafted by other law firms that created trusts for clients, which supposedly

protected their assets from Medicaid's "spend down" rules. Unfortunately, we found that the language in some of these trust agreements allowed the clients access to the principal in the trust, thereby nullifying any protection the trusts might have provided. Trusts established for long-term care planning require very specific, tightly-worded provisions in order to function properly, and to gain Medicaid acceptance.

An Elder Law attorney is not the same as an estate planning lawyer. This is a recurrent fallacy, based on a misunderstanding of the difference between Elder Law and trusts and estates law. Elder Law planning seeks to preserve your money, income and assets, to be used for your benefit and care while you're still alive. Estate planning focuses on distribution of your assets, typically in a tax-advantaged manner, after you die.

While Elder Law strategies often include estate and tax planning, the two practices are different. If you want to plan for long-term home or nursing facility care, and take care of your estate plan at the same time, your needs will best be served by an Elder Law attorney.

Another important consideration: an Elder Law firm will have unique and in-depth insight into the rights and needs of senior citizens. For example, in one case we handled, a major bank had convinced a client to put a substantial sum into an annuity. This investment was totally inappropriate for an elderly person in his financial circumstances. Normally, once money is placed in an annuity of the sort our client invested in, the cash cannot be withdrawn for several years without incurring a penalty. However, we contacted the bank, and informed them that our client needed his money for Elder Law planning. We explained our position that the bank's recommendation was improper, and asked for the funds to be returned to our client without any withdrawal penalty. The bank complied without a fight.

In another case, a husband and wife both needed nursing home care. The main source of their income and savings was German war reparations, which are exempt from having to be paid toward the cost of one's own care. Lamson & Cutner helped them qualify by first proving to Medicaid that most of their money was from war reparations. With their reparation income and assets secure from having to pay for the cost of their care in the nursing home, the couple was now able to get fully-paid nursing home care at no cost to them. Their liquid assets were then transferred to their children without any Medicaid penalty.

Consequently, the couple and their children gained a series of advantages that could not otherwise have been duplicated in a cost effective way. Not only are their medical and health care costs fully covered, but in addition their money and assets are safely in the family's possession, shielded from exposure to "spend down" requirements under government regulations.

The moral of these stories: there's no substitute for getting the right advice.

7 Don't Fill Out Your Own Application, or Use Unqualified Advisors.

Some people think they can save money on legal fees by preparing their own Medicaid applications. However, the application is a complicated document that most find very confusing. Eligibility can often only be won with complex legal and financial planning to overcome Medicaid obstacles. Even nursing home professionals, who deal with Medicaid on a daily basis, frequently refer prospective residents to an Elder Law firm for this reason.

Trying to complete your own application can be daunting. If you make mistakes due to unfamiliarity with government regulations, you may compromise or lose your ability to qualify for benefits. Loss or even a delay of eligibility can have a devastating financial impact on you. So it's generally unwise to handle it yourself. Get professional assistance.

There seems to be a growing cottage industry, particularly in the New York City area, of independent paralegals, social workers, and geriatric care managers, who have gone into the business of preparing Medicaid applications and advising clients on Medicaid planning. While their fees are no doubt less than the fees of Elder Law attorneys, it will likely be imprudent for a client who has any significant assets to retain their services. Clients are poorly served when non-lawyers provide services that are not within their area of competence or expertise. While someone does not have to be a lawyer to prepare a Medicaid application, non-lawyers should not be giving legal advice about Medicaid planning, or preparing legal documents such as Trusts, Wills, Powers of Attorney, Caregiver Agreements, Annuities or Promissory Notes.

Lamson & Cutner recently assisted a family that had been advised by a social worker on Medicaid planning. The social worker advised that Mom, who was in a nursing home, should transfer about half of her assets (a few hundred thousand dollars) to the children, and retain the other half to private pay the nursing home during the penalty period that would result from the transfer. Unfortunately, the social worker didn't realize that the penalty period would not start until Mom had spent down almost all of the money that she retained. If the family had relied on the social worker, they would have wound up losing all of Mom's money, including the amount that had been transferred to the children.

In another example, a family consulted with Lamson & Cutner regarding their father who needed home care. Their problems could easily have been solved, except for the fact that the father had Alzheimer's Disease, and lacked mental capacity. The family thought they would nevertheless be able to implement a Medicaid plan because they held their father's Power of Attorney. Unfortunately, the document had been prepared without the advice of an Elder Law attorney, and did not give the agents adequate powers to do anything useful. As a result, the family was relegated to filing a Guardianship Petition with the Court, which turned out to be very frustrating and very costly.

8 Trusts Shield Your Home and Property.

A trust is a legal structure that allows you to preserve income or assets that you would otherwise be forced to spend on your care. Trusts are among the main workhorses of Elder Law planning, and some of its most powerful tools. Here's an example of how they function to protect your home or any other property you hold.

Let's say you own a house, condominium or cooperative apartment worth \$500,000 in today's market. You bought it 40 years ago for \$35,000, and your mortgage is paid off. Now you need long-term home care. Your primary residence is an 'exempt asset' for eligibility purposes; however, Medicaid may eventually require that the equity be used to reimburse the cost of your care. They'll do that by placing a lien against your property when you move out permanently or by recovering from your estate when you die. The lien will be equal to the amount of benefits paid on your behalf.

Long-term care is extremely costly. After just a short time, the equity in your home could be exhausted by the amount of the lien Medicaid may eventually enforce. In effect, you'll be leaving your home to the government to repay Medicaid, instead of to your children or other family members.

A trust strategy eliminates the entire problem. By transferring your home to a trust, you are no longer the owner. The house legally belongs to the trust. And your property is safe from being subject to a Medicaid lien. (Of course, transfers within the "look back" period will still be subject to a penalty, if nursing home care is required. See Strategy No. 3.)

In many instances, parents plan to leave homes to children in their Wills. Using a trust can be a better vehicle than a Will for this purpose. That's because the trust achieves Medicaid eligibility and, at the same time, protects the home's value. Your home can eventually be distributed from the trust to your children or other beneficiaries, rather than be lost to the government. The trust agreement can state that you have a legal right to live there for the rest of your life.

It's important to know that implementing trust strategies for Medicaid planning is a complex process. Every client situation has individual characteristics and differences, which is why you need a qualified Elder Law firm to make a competent evaluation.

Once the firm's assessment is complete, your Elder Law attorney can draft a trust that is appropriate for you. You then appoint a Trustee, the person who manages the trust, who is usually one of your children, or a relative or friend. Professional trustees are also available for hire if there's no one with whom you feel completely comfortable.

9 Use Trusts to Guard Cash, Income, Investments and other Assets.

A) Irrevocable Medicaid Trusts

Trusts can be used to protect real estate, cash, other financial assets, and even valuable tangible assets such as art or jewelry. For example, if you own bank accounts, certificates of deposit and securities, Medicaid will insist you use almost all of these to pay for your care before it provides even a dollar of benefits. By transferring these financial reserves to a trust, they can no longer be regarded as your “resources” for Medicaid purposes. The assets in the trust will be protected.

Irrevocable Medicaid Trusts are structured so that the income generated from the assets in the trust will be paid to you. That means the income can be spent to maintain the lifestyle you’ve worked hard to create. While you will have no right to access or demand principal from the trust, your trustees can be given the discretion to distribute principal to beneficiaries who can use this money for your benefit.

Aside from protecting your assets from Medicaid eligibility requirements, transferring assets to a trust is almost always preferable to transferring money to children directly. Here’s why. Most trusts protect the money from exposure to future creditors, lawsuits and legal liability. If a child is holding your money, and gets in an auto accident and is at fault, suffers a business failure or a divorce, or even dies before you, the money could be exposed to potential loss. Money placed in most trust structures will be better protected than funds held by individuals.

B) Pooled Income Trusts

Yet another use of trusts is to protect income you receive. Most senior citizens receive Social Security every month and many have pensions and receive income distributions from their retirement accounts. For 2015, Medicaid limits income to \$825 (plus a \$20 disregard) per month for an individual. (This number usually increases by a small amount each year.) If you’re an individual who needs home care, every dollar of monthly income in excess of \$845 would have to be contributed to the cost of your care. Few people in New York can live on \$845 per month. Once again, trusts come to the rescue. With a Pooled Income Trust, you can retain the benefit of all your income and have Medicaid pay for home care. Here’s how it works.

Pooled Income Trusts can be established with certain non-profit organizations that are authorized to operate them for the benefit of disabled persons. If you are over 65 years of age, and need care, you will almost surely qualify for this type of trust. For investment and management of funds, your income is “pooled” together with the resources of other participants. However, your contributions are held in a separate account, segregated for

your needs only. Once your income is deposited into your Pooled Income Trust account, the trustees will pay your bills using this money. As an example, let's say you receive \$1,845 a month in Social Security and pension benefits. The excess amount of \$1,000 over Medicaid's \$845 ceiling, is sent to the trust every month, which will follow your instructions on what expenses to pay.

Through the Pooled Income Trust, your "surplus" income can be used for food, monthly rent or mortgage, phone, utilities, home repairs – just about anything you'd normally pay for (except medical insurance and many medical bills). The non-profit organization essentially functions as a bill paying service, and takes a small monthly processing fee. When you pass on, whatever is left in your account will be used by the organization for charitable purposes.

The net result of using a Pooled Income Trust is that you're able to protect your surplus income and spend this money as you would if it were in your own bank account. If you didn't do this, Medicaid regulations would require you to contribute everything except \$845 per month to the cost of your care. With a Pooled Income Trust, you retain your lifestyle while still qualifying for Medicaid benefits.

The Pooled Income Trust comes with one important limitation – the money in your trust can only be spent on you, for your own expenses and needs. However, you should not be shy about asking the trustees to pay for anything you want. Again, the only real limitation is that the expenditure is required to be for your benefit, not for anyone else.

In an actual case involving a single woman who was legally blind and hearing impaired, and who was in need of home care after a fall, we first protected her monthly income with a Pooled Income Trust. Next, all of her assets were transferred to a second protective trust. Then a Medicaid application was filed for home care assistance, which was approved. The result: she obtained and continues to get assistance in her own home. In fact, we recently assisted with obtaining more home care hours due to her increasing needs. Just as important, she is able to remain comfortably in her own home, maintaining her quality of life and her dignity.

C) First Party and Third Party Supplemental Needs Trusts for Disabled Persons

Disabled people can gain special advantages through Supplemental Needs Trusts when the direct receipt of funds would make them ineligible for government benefits. This type of trust can protect you from becoming ineligible for government benefits. For example, if you're disabled and have received a sum of money through a personal injury lawsuit, an inheritance, or a gift, your receipt of these funds can and often does result in the loss of your government benefits. Without an asset protection strategy, Medicaid will require you to use up these assets to pay for your care. Compounding this difficulty, you'll lose

any Supplemental Security Income (SSI) you may be receiving from the Social Security Administration, until the entire amount is spent down to the SSI eligibility limit, currently \$2,000 in assets. Transferring the money to someone else doesn't solve the problem either – if you do, you can lose your SSI for up to three years. So that means instead of your cash windfall supplying a lifelong financial and quality of life improvement, you now have significant out-of-pocket medical expenses Medicaid used to cover, and you've lost income that you used to receive. Here's a trust strategy that gives you a way around it.

If you qualify, you can have a First Party Supplemental Needs Trust set up for your benefit. With this type of trust, your own assets are used to fund the trust, and you must be under 65 years of age. By federal law, this structure will protect your assets without jeopardizing Medicaid or SSI benefits. One condition you'll have to accept is that these are "pay back" trusts, meaning that, if anything is left in the trust after you pass on, Medicaid will be reimbursed for the cost of your care from the remaining balance. Another important condition is that you cannot create this type of trust yourself. It must be set up by a parent, grandparent, guardian, or a court.

If the funds that are to be placed in the trust are not your own, then there's another variation of the strategy. It's called a Third Party Supplemental Needs Trust. If a relative or other person wants to provide money for your benefit, whether as an inheritance or as a gift, then the funds should go into the trust rather than to you directly, and you get to keep your government benefits. With this trust, your age doesn't matter, and there's no "pay back" provision. Any person who wants to assist you financially can create this type of trust while he or she is alive, or have the trust become operative after he or she dies according to the terms of a Will. If the creator of the trust is your spouse, he or she must set it up in a Will.

Additionally, just as with most of the other trust vehicles already mentioned, a Third Party Supplemental Needs Trust gives you excellent protection against future creditors, not just Medicaid. If you end up in a lawsuit, the money is more effectively sheltered than it would be outside a trust, giving you greater peace of mind about your financial security.

Here's a specific example of how these proven methods can be used to safeguard your benefits and preserve the money you may receive for your long-term financial support:

In a case Lamson & Cutner handled, a mother wanted to make sure that her disabled son's government benefits would not be jeopardized upon her passing. L&C assisted the mother with the creation of a trust that distributed any remaining assets to a Third Party Supplemental Needs Trust for the benefit of her son upon her death. The mother also retained L&C to create a "pourover" Will that transferred (poured over) any estate assets to the trust. The mother can rest easy, knowing that her son's SSI and Medicaid will not be jeop-

ardized when she dies, and that any inheritance will be managed on his behalf. Once again, every case is individual and unique, and you'll need proper advice on what trust configuration will deliver the maximum advantage. Different trust strategies apply to various economic and family situations, and according to whether you need home or nursing facility care. The bottom line is that in order to qualify for Medicaid benefits, money and assets have to be moved out of your name. Trusts are the most effective way to do it, and they're fully authorized for this purpose under Federal and New York State laws.

If you already have a trust created for estate planning purposes, your trust should be evaluated by an Elder Law attorney. Typically, this type of trust will be a revocable trust, or a so-called "living trust." These trusts work well if the only goal is estate planning. However, they are not asset protection trusts, and the assets held in such trusts will be counted as your own resources for Medicaid eligibility purposes.

10 Cooperative Apartments Require Special Handling.

If you are currently a shareholder in a co-op and want to implement an asset protection strategy that involves transferring your shares and proprietary lease to a trust, you will need the co-op board's approval. This is another good reason to retain an Elder Law firm experienced in addressing these matters. If the board says no, a knowledgeable attorney may still be able to persuade them to change their mind and allow you to move ahead with the plan.

There are several approaches we've found that have a track record of success with co-op boards:

- explaining the Elder Law plan and why it is important to change the title to the apartment
- proving ability to pay the co-op maintenance
- agreeing to put money in an escrow account to cover a certain amount of maintenance
- entering into an agreement that the trust will be responsible for the co-op's collection expenses if there's a problem regarding payment
- making a commitment that any occupant of the apartment will be subject to the advance approval of the co-op board
- agreeing that the apartment will be sold after the current occupant dies, or transferred only to someone approved by the co-op board.

The goal is to convince the board that the transaction doesn't hurt the co-op, and can be consummated in a way that won't expose the building to any additional risk. While no firm can guarantee getting board approval every time, a competent Elder Law attorney should succeed in a large majority of cases.

11 Evaluate your 401k or IRA Carefully.

Medicaid will count your IRA or 401k as an available source of funds to pay for your care, unless it is in “payout status.” Payout status means that you are taking at least the required distribution out of your plan every year. The required distribution for Medicaid purposes is not always the same as the required distribution for IRS purposes, so you need to be very careful when you determine this amount. Calculation of the required distribution may differ depending on the county of your residence.

If the account is in payout status, your retirement assets are not counted as resources. However, the monthly payments that you receive are treated the same as any other income. If you are receiving Medicaid home care benefits, any surplus income can be protected by a Pooled Income Trust (discussed in Strategy No. 9B). If you’re married and receiving Medicaid nursing home benefits, your monthly income can be given to your spouse to bring her up to the Medicaid maximum (the “MMMNA”) and you keep a personal needs allowance of \$50 per month. If you’re unmarried and receiving Medicaid nursing home benefits, the nursing facility is entitled to all of your monthly income except for \$50.

In some cases, when life expectancy is long, it may be beneficial to withdraw funds from the retirement account, pay the income taxes owed, and then transfer the net proceeds to an asset protection trust, even if the retirement account is in payout status.

On the other hand, when life expectancy is short, there may be a financial advantage to leaving the retirement plan in payout status and allowing the nursing home to collect the income from your IRA or other plan while you are still alive. Upon your death, your named beneficiaries can withdraw the balance in a lump sum or over time. As you can see, finding the best solution for retirement assets demands careful analysis.

12 Take the Lump Sum Option.

If you are approaching retirement, and have an option to receive either a stream of income or a lump sum distribution from a pension or retirement account, it is sometimes better to take the lump sum. Here’s why.

If you eventually need nursing home care, any income you receive from your pension, deferred compensation, or other plan, will go to the nursing facility. It’s a Medicaid requirement, and a way of forcing you to pay for at least part of your care. If you take the lump sum option, you’ll have the opportunity to protect that money by putting it in a trust.

Taking a lump sum from a pension allows it to be treated as an asset that you can transfer to a protective trust (of course, keeping in mind the five year look back period). Otherwise, your pension income stream will be vulnerable to nursing home contribution.

Legally, once the money is in a trust, you don't own it anymore. Yet the trust can be constructed so that money can be distributed by the trustee to beneficiaries of the trust, who can use those funds to help maintain your quality of life. Whatever is left after you pass on will go to the beneficiaries you have chosen.

By transferring your lump sum distribution to a trust, you may no longer have to use that money to pay for a nursing facility. Then you'll be eligible for Medicaid to pay all or a significant part of the cost, depending on whether the transfer was made beyond the "look back" period (see Strategy No. 3), or other planning was done (see Strategy No. 14).

In a case involving a married couple who consulted us for advance planning, the husband was at risk of needing nursing home care in the near future. Unfortunately, most of the couple's assets were held in the husband's retirement account. In order to protect these funds for the benefit and support of the wife, we advised the husband to withdraw a large lump sum and transfer it to his wife, thereby avoiding the risk that the distributions from the retirement account would go to the nursing home later on. In this case, the benefits to the wife significantly outweighed the resulting tax liability and the other risks involved.

13 Choose your Trustee Wisely.

When an applicant for Medicaid decides to transfer assets into a trust, the trust must be irrevocable. That means you no longer have control of whatever money or assets you place in it. If you could control your assets, that would indicate to Medicaid that the assets are still yours, and you would not be eligible for Medicaid benefits.

You'll appoint a trustee to manage the trust and make decisions on investing and disbursing your funds. Choose someone who you are confident has your genuine best interests and welfare at heart. To use an analogy, a trustee is like the president of a corporation. He or she is the boss. If you're going to put your money in a trust, you need to choose somebody you can count on.

Control is a big issue for many people, especially if they're currently in good health and have their wits about them. However, if you become ill and need home or nursing facility care, all of your assets will be at risk. At a certain point you will have two options: either transfer your money to a third person such as a trust, or lose it. Putting the money into a trust protects it for your future. If you don't transfer your money or put it into a trust, you'll be forced to spend it on your long-term care or other uninsured health care expenses. You will rapidly deplete your financial base and you may end up with nothing. Considering these factors, you'll be in a far better position if you create a trust and appoint a trustee in whom you have confidence. There are legal restrictions on all trustees. They owe a duty of loyalty and good faith, and must exercise a high standard of care in managing another's money or property.

In some families, people are not comfortable turning over control of their money and property to a relative or friend, for a variety of reasons. Certainly, if the person you have in mind doesn't have a history of being responsible, it's not a good idea to make him or her the trustee of your trust. First and foremost, you must have confidence in the person you select as your trustee.

If you can't rely on your relatives or friends, you may be able to hire a professional trustee. Retaining a professional trust company is also a good way to avoid conflict in a family, and break a deadlock when there's an argument or concern about who will be the trustee. In addition, trustees have strict legal and fiduciary duties, so you can depend on a professional to have a better understanding of what the law requires. Of course, you'll have to pay a professional trustee. A typical fee would be in the vicinity of 1% of the value of assets managed per year.

In one of L&C's cases, a client entered a nursing home without having engaged in any pre-planning. He had significant assets in his name, but no close family that he could call upon to assist with gathering the documents and initiating a Medicaid plan. He had one old friend who he trusted, and he appointed her as his agent and Trustee. The friend had some trepidation about managing the trust on her own, so we suggested that she hire a professional trustee to assist her with her duties. Both the client and the friend agreed that having the oversight and assistance of a professional trustee would make them both more comfortable. The friend worked with the professional trustee to gather the client's financial documents and fund his trust. The professional trustee is providing management and investment advice that the friend now relies on.

14 Private Annuities can Reduce the Medicaid Penalty.

An effective method to protect cash and assets for someone who needs nursing home care, and who has transferred assets within the "look back" period, is to use a private annuity strategy. It usually preserves approximately 40% to 50% of your resources, if any transfers have been or are going to be made during the "look back" period. This strategy is based on a Federal statute, so it's one we use frequently, with great confidence that it will provide a beneficial result for our clients.

As an illustration, let's say you'll be entering a New York City nursing home. You have \$100,000 that needs to be transferred during the "look back" period. It's a two-step plan to protect a good portion of your savings.

We first have to reduce your "countable resources" to below the eligibility level of \$14,850 (in 2015) right away. The first step of the plan involves transferring about half of your assets to a trust or third party (for example, a child, sibling, or close friend). This gift will result in a Medicaid penalty, but it will ultimately be the portion of your money that is saved.

The penalty is the period during which Medicaid will not pay for your nursing home care. (See Strategy No. 3 regarding how the penalty period is calculated)

The second step of the plan is to use the portion of your assets that is not transferred to buy a private annuity. An annuity is a contract (with a family member or friend) that makes specific payments at set intervals. This particular private annuity will be structured so that the monthly installments cover your nursing home costs during the penalty period that you incurred from making the gift. If the private annuity is properly drafted to comply with the law, your purchase of the private annuity will not incur a Medicaid penalty. It is considered a “purchase,” not a “transfer.” During your “penalty period,” the private annuity will provide you with a cash flow that will be used, together with any other income you have (Social Security, pension, etc.), to pay for your nursing home care.

The end result of this strategy: instead of using almost the entire \$100,000 to pay for nursing home care, which Medicaid would otherwise require before paying any benefits, \$40,000 - \$50,000 has been protected. You’ve transferred it to a trusted source, who can use it on your behalf while you’re in the nursing home. Whatever is left after you die can go to your loved ones.

Some Elder Law firms will use a promissory note, instead of an annuity, for this strategy. Our use of annuities doesn’t imply that promissory notes don’t work. The law currently allows either to be used. However, we believe a properly prepared immediate annuity is a safer vehicle because of its well-established history of being a contract for a stream of income, with no ability to demand return of principal.

In representing an 85-year-old widow who had numerous investments, assets, and property in Florida, we arranged for the transfer of everything she owned to her daughter. Next, we prepared a private annuity in an amount equal to approximately 50% of the value of her holdings, to offset a “penalty period” imposed on her by Medicaid for making a gift to her daughter of the other half. The net result was that we were able to save about half of her financial resources, which her daughter can now use for attending to her mother’s needs, and making her stay at the nursing home as pleasant as possible. After her mother passes on, the daughter will keep whatever is left. Her mother would not have been as well cared-for, and she would never have been in a position to receive an inheritance, had these planning steps not been taken.

15 A Caregiver Agreement Could be Very Useful.

A Caregiver Agreement is a legal contract between an individual who needs various support services and the party who is to provide them. The caregiver can be a son, daughter or other family member, a friend, a geriatric care manager or a home care agency. Caregiver Agreements offer a number of advantages and can play an important role in

effective planning. First, they're an excellent way to keep your assets working for you, helping to reduce or eliminate the Medicaid penalties already discussed.

Second, they offer a way for a Medicaid recipient to receive additional care that wouldn't be covered by Medicaid, and that is outside the scope of what home care attendants or a nursing facility can provide.

And third, they provide a way for a parent to give financial assistance to children or family members who are providing care, and may be out of work and need to supplement their income, without feeling as if they're taking a handout. In this instance, Caregiver Agreements help to preserve personal dignity on both sides of the contract. Further, it helps avoid resentment and guilt where one sibling is providing the care, and other siblings can't or don't want to help out.

The arrangement works as follows: the patient pays the caregiver in advance for services to improve the patient's well-being and quality of life. The keys to creating an agreement that will be accepted by Medicaid are:

- the contract must specifically define the services provided and hours to be worked by the caregiver
- the lump sum payment must be calculated using a reasonable life expectancy and legitimate market rates for the services
- a daily log of actual services rendered and hours worked must be maintained, along with written invoices
- upon the death of the patient, any unearned amounts must be paid to Medicaid to reimburse it for the services that it provided to the patient

As an example of how these arrangements actually work, Lamson & Cutner drafted a Caregiver Agreement for a client who resided in a nursing home, and needed extra care and companionship beyond what the facility could provide. Her niece was willing to supply the services, and the firm drafted a Medicaid-compliant contract that allowed her to be compensated with an up-front payment. The happy result was that our client got the extra care she needed, her niece benefited from the additional income, and the family gained peace of mind.

16 Keep your Medicare Insurance.

With Medicare, in most instances, you'll have access to a wide range of doctors. Even if you're on Medicaid, you'll probably want to keep your Medicare insurance because you'll have a broader selection of doctors, and in many instances you'll be paying for supplemental insurance with dollars that you would otherwise have to contribute to the cost of care.

For some individuals, a Medicare Advantage plan may be preferable to traditional Medi-

care because supplemental insurance will not be needed, and overall costs may be lower. However, these plans require you to stay “in network,” which means that you may have to change doctors or other medical providers.

“Dual eligibles” – those individuals who are eligible for both Medicare and Medicaid - especially those receiving long-term care, are among the costliest beneficiaries of these programs. The government has been actively trying to bring down these costs by redesigning the implementation of Medicaid. Those receiving long-term care benefits have already seen the advent of managed care programs.

Traditionally, long-term care providers that were licensed by Medicaid were paid on a “fee for service” basis. The provider billed Medicaid for the specific services rendered to each patient, and Medicaid paid for these services.

There has been a shift to a managed care system under which providers are paid a “capitated” rate. This means that Medicaid pays a flat amount to the managed care plan for each person who is enrolled in that plan. New York State made enrollment in a Medicaid Managed Long-Term Care Plan mandatory for dual eligibles receiving community-based care in 2012. The program was rolled out over several months, starting first with New York City, and then to the other counties.

Two types of Medicaid Managed Long Term Care (“MLTC”) plans were offered. The first type covered the long-term care (and other coverage) provided by Medicaid, but not the health and medical coverage provided by Medicare. The second fully integrated participants’ Medicare and Medicaid plans. Many individuals opted for the first type of plan, because it gave them more freedom to see doctors outside of the Medicaid plan’s network.

Now, New York State is looking to go even further with the managed care model that integrates both Medicare and Medicaid under the umbrella of one plan. Under a new joint Federal-State “demonstration project,” dual eligibles who are enrolled in an MLTC will have all of their medical, health, and long-term care needs covered and coordinated in one all-inclusive plan. The plans will be paid one capitated rate that covers the cost of both Medicare and Medicaid services.

This new Federal-State partnership is called the Fully Integrated Duals Advantage demonstration project, or FIDA. However, there are exceptions, such as individuals enrolled in the Assisted Living Program (ALP), or in the Traumatic Brain Injury (TBI) waiver program. FIDA plans will include all the services that are covered by the existing Medicare and Medicaid programs. However, those enrolled in FIDA plans will be limited to the providers within their plan’s network.

For now, those who do not wish to participate in a FIDA will be permitted to “opt out” and keep their Medicare coverage separate. However, Medicaid services will still be provided under a MLTC plan.

The manner of implementation of benefits under Medicare and Medicaid will likely continue to evolve as the Federal Government and the states gain experience under these new systems.

17 Not Just any Power of Attorney.

A Durable Power of Attorney is a legal document that allows a trusted person to make decisions for you, even if you lose mental capacity. While many people already have a Power of Attorney, most are unaware that their particular version may be ineffectual for Elder Law planning purposes.

Effective September 1, 2009, New York State implemented a new law that dramatically changed the form, content and procedures for executing a Durable Power of Attorney. The law was updated in September 2010 with further changes. The new document is lengthy and complicated. Lamson & Cutner strongly recommends you seek legal advice from an experienced Elder Law firm before signing one. Relying on a “simple” form available at your bank, or obtained from a stationery store or the Internet, could affect your rights in unexpected and undesirable ways. In order to be valid, any Power of Attorney executed after September 1, 2009, must be prepared using the New York State Statutory Short form. Powers of Attorney executed before this date are still valid, but there may be other reasons for updating them.

One of the important requirements instituted by the 2009 and 2010 changes is the inclusion of a “Statutory Gifts Rider.” This rider authorizes your agent to make gifts and transfers that are in your best interests. Since the gift rider may allow your agent to set up trusts, open new bank accounts, and make gifts to family members, or even to the agent himself, it is essential that you clearly understand its meaning and scope before signing it. In fact, the agent is now required to sign the Power of Attorney as well, acknowledging his or her responsibilities in handling your money and property.

As a fundamental element in Elder Law planning, your Durable Power of Attorney is simply too important not to give it the attention it deserves. The bottom line is, you may be authorizing another person to do anything you could do with regard to your money and property. There are few decisions in life with more serious implications than that.

Many feel that by signing a Power of Attorney they are losing control or power over their own lives. In fact, the opposite is frequently the case. Effective planning gives you more influence over what will happen in the future than you’d otherwise have. If you do not

have a comprehensive Durable Power of Attorney for Elder Law planning purposes, and you become unable to manage your own affairs, decisions will still have to be made for you. Except then, they'll be made only after expensive and time-consuming guardianship proceedings in court, which can cause a lot of frustration and anxiety.

Additionally, going to court means that a judge, who is a distant and unrelated third party, will be making decisions about your welfare. In that instance, you have less control than you would have had by effectively planning now for circumstances in which you become mentally incapacitated.

For these reasons, we believe that in most cases the advantages of a Durable Power of Attorney may outweigh the risks of potential abuse. Needless to say, you'll want to choose someone you trust to carry out your wishes. One way to be secure and feel more comfortable with the arrangement is to retain the document in your possession, and advise the person you appoint as agent where it can be found if it is needed. It is not necessary to deliver it to him or her immediately. In any case, your agent is legally required to act in your best interests.

A Durable Power of Attorney is a cornerstone of all effective elder and special needs planning. It allows you to specify who you'd like to be in charge, in the absence of being able to make your own choices. Having one that's properly drafted creates options for the best possible action to be taken on your behalf in a difficult situation, as opposed to closing off support and creating problems for your family.

18 Elder Law Planning and Estate Planning Go Together.

Effective Elder Law planning can save all of your cash and assets if you plan early enough, or a substantial portion even if planning is done at the last minute. Keep this in mind: if you're on Medicaid, it will cover all or nearly all of your medical and health expenses. If you are in a nursing home, then Medicaid is also paying for your room and board, and all the other services you are receiving in the facility. So it's likely that you'll have enough money to supplement your care and have the best possible quality of life, and still have something to leave to family members after you pass on.

Good planning anticipates that scenario, and includes specific measures to address the distribution of your resources when you die. Remember, according to the U.S. Department of Health and Human Services, more than one out of three people will need nursing home care. Since trusts are a central feature in many plans, you can gain three special benefits that simple Wills do not provide.

First, when you die and your cash, investments, or real property are held in trust, these assets are not included in the probate of your estate. Probate is an involved legal process

of collecting, accounting for and distributing a person's money and property after death. It is time-consuming and expensive. Your children or other beneficiaries might not get the proceeds for months, or even years. With a trust, the trustee can make distributions quickly after you pass on. It's very clean and efficient.

Second, if there are disgruntled relatives who disagree with your bequests and wish to pursue litigation, trusts afford greater protection than Wills. They are harder to attack and dismantle. One of the main reasons most trusts are a strong shield against future lawsuits is that the money or assets in them do not belong to you or the trustee. They're owned by the trust, which legally is a separate and distinct entity.

Third, trusts offer more privacy than Wills. Your wishes can be kept secret, and carried out without knowledge of uninvolved parties. That's because in most cases you are not required to file trust documents with the courts, unless you have a "Pourover Will" that transfers your probate estate to the trust you had established.

When planning involves a married couple, in most cases it's critical to do estate planning for the wife or husband who is well, at the same time Medicaid benefits are being sought for the spouse who is ill. There's a common misconception that arises in these scenarios, which is vital to understand. It involves a concept called "Spousal Refusal."

By law, each spouse has an obligation of financial support for the other. This allows Medicaid to require the well or "community" spouse to contribute to the cost of care from available assets. Legally however, in New York and several other states, Medicaid cannot deny benefits or halt the application process because a husband or wife refuses to provide monetarily for his or her ill spouse. This is why, from an Elder Law planning perspective, a legal document referred to as a "Spousal Refusal" is employed. By signing it and refusing to contribute your assets to your spouse's care, it permits the application process to continue so that your wife or husband can qualify for benefits. At the same time, it also keeps your assets intact, so that estate planning strategies can be initiated to protect them.

Signing a Spousal Refusal doesn't mean you're automatically exempt from economic support of your husband or wife. It just means Medicaid can't deny benefits to your spouse because you've refused support. In these cases, Medicaid can and often does pursue legal remedies to enforce your obligation and recoup the cost of benefits, to the extent possible. With effective planning, it may be possible to retain the benefits of a significant portion of your assets, or sometimes even all of them. At the very least, you will get the benefit of Medicaid's discounted rates, rather than the higher private pay rates. Also, in many cases, it is possible to negotiate a settlement for a lower amount with Medicaid. Needless to say, you are better off having those negotiations handled by experienced Elder Law legal professionals than going it alone.

19 Health Care Proxy, not a Living Will.

A Health Care Proxy is a legal document that authorizes someone you appoint to make medical and health care decisions for you, if you are unable to make them yourself. These include end of life decisions. The idea behind a Health Care Proxy is that someone makes the decisions you would have made, had you been able.

Therefore, it's critical that your health care agent clearly understands your wishes concerning your medical and health care, and the circumstances in which you may choose not to have your life sustained.

Health Care Proxies are valuable for another important reason. They prevent and help resolve disputes within families. The health care agent has sole authority in making decisions, and is operating based on your philosophy about medical choices. Legally, family members who disagree will find it extremely difficult to interfere.

The Family Health Care Decisions Act underscores the importance of the Health Care Proxy. This law gives family members, and others deemed in close relationship to you, the right to make medical and life-sustaining decisions on your behalf, if you become mentally incapacitated. The legislation contains a number of ambiguities, and it also permits others to object, which can lead to delays and litigation.

Since you want to avoid potential court proceedings that could arise from a dispute, a Health Care Proxy is still essential to good planning. You can choose the specific health care agent you want, instead of leaving it to a statutory scheme and the discretion of others. Decision-making becomes an easier and more streamlined process.

A Living Will is another vehicle for having your wishes carried out, but it can be problematic. With a Living Will, you spell out your instructions regarding end-of-life decision making in writing. The difficulty is in its interpretation. Common phraseology such as "if there is little hope of recovery, I would not want heroic measures to be taken to preserve my life," may mean different things to different family members. Where one sees a hopeless situation, another believes there's a chance of recovery. Heroic to one, is ordinary to another. Consequently, there is simply no reliable way of writing a Living Will that is unequivocal, and that covers all possible medical contingencies and viewpoints.

Instead, pick someone you trust and feel will be committed to making the decisions you would make. No document can replace the informed judgment of an intelligent, compassionate person.

20 If You're Not Satisfied, Hire Another Firm.

You need to be comfortable with the firm handling your work. After all, they'll be developing strategies that affect your entire life's savings and every asset you own. Your attorneys should inspire your confidence. If for any reason you don't feel they're the best advocates for you, find another firm.

Not every Elder Law firm uses precisely the same methods. The firm you choose should be able to clearly explain the rationale behind its approaches. If you don't understand what your attorney is planning to do, or if you sense you're not receiving the kind of service you should be getting, get a second opinion and consider changing firms.

A good firm will be able to adapt proven methods to suit your circumstances. For example, we represented a client in her 80's who needed extensive and very costly dental procedures. We worked out an arrangement with her dentists where her liquid assets were applied to two prepaid medical caregiver contracts. This approach covered the dental treatment, and also allowed her to qualify for Medicaid nursing home care services. Medicaid now pays all of her long-term medical and health care expenses.

Had we not used these procedures, Medicaid might have required her to use the money to pay for her own nursing home care, until her funds were exhausted. In that scenario, it's likely she would not have been able to use the dentists she wanted, and instead would have been forced to choose one from providers who accept Medicaid. We achieved a double benefit for her: we protected her assets so she could engage the dental professionals of her own choosing, and we obtained Medicaid nursing home benefits for her at the same time.

Here's a critical point you should also consider. It's to your advantage to choose a firm that can provide tax advice. Any time you engage in financial transactions, you may be at risk of creating adverse tax consequences. The big question is: how do you accomplish your Medicaid objectives, without creating a tax liability that reduces the benefits you gained?

For example, whenever you plan to transfer appreciated property, you have a capital gains tax issue to deal with. Elder Law solutions must be integrated with tax considerations. If the firm's attorneys are able to provide tax advice, you'll get more sophisticated tax treatment to enhance your planning.

21 Streamline your Financial Affairs.

If you apply for nursing home care either now or in the future, Medicaid will request detailed information about your prior financial transactions. Every one of your banking and investment accounts that was open at any time during the "look back" period will be scrutinized. They all need to be documented on your application. Medicaid will want to see if you transferred any of your money or assets to others.

If you have a number of accounts, preparing your application becomes a lot more complicated and time consuming for you and your attorney. It's likely to increase the amount of your legal fees. Many banks offer gifts and other incentives to open an account. Some people create numerous accounts, even though they may not have a substantial amount of money, or adequate financial justification. If you don't need the additional accounts for a good reason, close them. When it comes to dealing with Medicaid, the cleaner and simpler, the better.

Also, the process of gaining approval for Medicaid benefits, and protecting your assets, will be considerably faster and easier if you organize your records. In particular, this includes bank accounts, IRA's, annuities, stocks and bonds, certificates of deposit, 401(k) plans, money market and mutual funds, insurance policies, tax returns, 1099 and K-1 forms, pension information, and Social Security award letters.

The best system is to place each of the last five years' worth of records from each financial institution in its own file. Arrange each category of statements chronologically, from the oldest to the most recent.

If you do nothing else, then at least keep all statements and receipts for each year in a box or folder. This way you'll have a basic annual level of organization, and all of the documents that may be needed later on.

22 Consider Staying in or Moving Back to New York.

If you're planning to move out of state and anticipate needing long-term care, think twice. If you've already moved to another state and are now in need of home or nursing facility care, returning to New York may be best, both medically and financially. That's because New York laws are more generous in providing for long-term care needs than most other states.

This is especially true for home care. Many states have very limited home care programs, and eligibility for their programs may be difficult to establish. New York, on the other hand, has a huge home care program. There is a lot of funding for home care, and many providers.

We've had clients who retired to Florida. When their health started failing, they returned to New York because they just couldn't get the kind of health care in Florida they could find here.

Another reason New York is favored with regard to home care is that there's no "look back" period to check for transfers. There is also no penalty for transferring assets, which could otherwise hinder your ability to qualify for Medicaid. In New York State you can do

effective planning, shift assets as needed and very quickly become eligible for home care paid for by Medicaid. If you initiate an asset protection plan, you can often become eligible much sooner than you think.

23 **Competent Counsel Means a Better Shot at Quality Care.**

If you require nursing home care, you'll have to choose a nursing facility. Experienced Elder Law attorneys can suggest homes in your area you may want to consider. An established firm may also have relationships with some of the better residences, which may facilitate your acceptance at one of them.

Capable firms often receive referrals from many nursing facilities, to assist their prospective residents with preparing successful Medicaid applications. There are lawyers who have worked with quality homes often, and who maintain a strong rapport with their staffs.

One of a nursing home's primary concerns is getting paid for its services. When a competent Elder Law attorney says a client will get Medicaid, a facility will generally regard it as a reliable recommendation. The nursing home staff knows that if skilled lawyers handle your application, they can be more confident of Medicaid approval. Consequently, there's an increased chance of the home accepting you as a resident.

It's like any other business relationship. An attorney can present a solid application on behalf of a client. If there are two applicants for a vacancy, will a home be more responsive to someone whose case is handled by a law firm they know and trust, or a complete stranger? There's no guarantee of course; however, it's another benefit of working with experienced Elder Law professionals, and stacks the deck in your favor.

Here's an example that shows how these relationships can work to your benefit. Lamson & Cutner represented a widow who was residing in a nursing facility on Long Island. We secured her assets and obtained Medicaid approval to pay the cost of her care. Just as important for this client, due to the strong relationship we had with the staff, she was able to keep a room she loved because of its extraordinary view.

Your attorney can help you become a new resident with "Medicaid pending" status. Then, even though Medicaid may take several months to process your application, the establishment may still feel comfortable enough with potential approval and retroactive payment from Medicaid that they will accept you.

In instances of pending applications, you can see that if a nursing facility is dealing with a law firm they don't know, or with a person who files his or her own application, the admissions staff may worry about Medicaid approval. If they let you in and Medicaid rejects your application, they will be exposed to costs and risks that they would prefer to avoid.

Nursing homes don't want problem cases. If you're not going to pay for the care yourself, they want to know that you're eligible for Medicaid. This is another reason why it's to your advantage to have your application professionally prepared.

If you need home care, these same principles can work on your behalf. Some lawyers have excellent relationships with home care providers as well.

24 Long-term Care Insurance May Not Solve the Problem.

For many people, long-term care insurance is a wasteful expenditure of funds that could be better used elsewhere. With rates currently ranging between approximately \$6,000 to \$13,000 a month for 8 to 24 hours per day of home health services, and \$15,000 a month or more for nursing facility care in the New York City area (less, but still expensive in other geographic areas), the policy you'll need for full coverage is going to be expensive. Unless you can afford enough insurance to cover these stratospheric costs, you may require Medicaid assistance anyway.

Without asset protection strategies, you'll still be in a situation where Medicaid will force you to spend down your resources to pay for whatever the policy doesn't cover, before they provide benefits. That means eventually you'll be in poverty anyway, and the policy will not have benefited you.

If you're sufficiently wealthy, can afford a large enough policy, and don't intend to avail yourself of Medicaid, long-term care insurance could make good sense. Otherwise, you'll probably get a better return on your money by hiring a competent Elder Law firm to create a plan that allows you to retain the benefit of all of your money, investments, and property or a substantial portion. Medicaid will then pay for your home or nursing facility care, and most medical expenses that your Medicare insurance doesn't cover.

Here is a case history that illustrates this point. A married couple came to us for Elder Law planning, having previously purchased long-term care insurance. Their policies provided coverage of only \$163 per day. The husband needed nursing home care that cost \$300 per day. Since the insurance left a shortfall of \$137 per day, the couple had out-of-pocket costs of over \$4,100 per month. They could not afford to pay this amount without rapidly depleting their savings and jeopardizing the wife's ability to support herself independently.

The solution to their problem was to qualify the husband for Medicaid using the methods discussed in this Special Report. With the strategies employed by Lamson & Cutner, Medicaid will cover the rest of the husband's long-term care expenses. Unfortunately, only Medicaid will benefit from the long-term care insurance, which will reduce its costs in paying for the husband's care. The high premiums that the couple had paid for many years did not help them at all, and all of this money could have been saved.

25 Quality of Life is Paramount.

Elder Law planning is an efficient means to a worthwhile end: your future quality of life. Asset protection strategies ultimately serve two functions.

First, they allow you to retain your financial wherewithal, so that you can continue to maintain your lifestyle. The alternative is the dreaded Medicaid “spend down,” compelling you to relinquish nearly every dollar of your money and assets for the cost of your own care. The inevitable impoverishment has a devastating emotional impact, and doctors will tell you that stress makes everything worse. Do you know people who suffered a major financial blow and subsequently got sick, or whose medical conditions then became worse? Don’t let it be you.

Second, good planning creates options that may avoid serious consequences for your manner of living. For example, by having an Elder Law attorney set up a plan that provides Medicaid coverage of adequate home care, you may avoid or delay eventually having to enter a nursing home. Wouldn’t you rather spend the rest of your life in the comfort of your own home?

Here is an example of how Elder Law planning can make a real difference with quality-of-life concerns. We helped a client who has a terminal illness, is incontinent and needs assistance with all of her activities of daily living. At the time she retained us, she’d already employed a home care assistant she was comfortable with, and was paying for out of her own funds. We filed a Medicaid application for home care, which was approved.

One of the most important benefits to her was the fact that we were able to “vendorize” her attendant. Through contacts at the home care agency, we arranged for her attendant to become certified and accepted as its employee. The cost of her salary ended up being fully paid by Medicaid.

The happy result was that our client got the home care help she needed and retained her preferred assistant, all completely covered by Medicaid.

Of course, it’s not always possible to avoid a nursing facility stay, because sometimes your health declines to the point where it’s just not safe to stay at home. Yet in other cases, around-the-clock home care can supplant the need for a nursing facility. The peace of mind you experience in your own surroundings may have a psychological effect that contributes to keeping your disability stable, so that you never need to enter an institution.

Also keep in mind that if you do have to reside in a nursing home, the availability of extra cash that would otherwise be lost can be a significant factor in making things more comfortable for you there.

These are options that only good asset protection planning can provide. The rule is: investigate everything that's available to you. It can make all the difference in the world for your peace of mind and material comfort in your remaining years.

Good Planning Equals a More Secure and Comfortable Future.

You devoted a lifetime to building up your savings and acquiring a home, investments and other assets. Don't be a financial victim, and lose it all due to fear and inertia. That's what stops most people from taking powerful steps to protect what they have.

While these strategies are complex, competent Elder Law attorneys know how to use them to your best advantage. Yes, many procedures, laws and regulations are involved that need to be adhered to. However, the approaches are straightforward, valid under Federal and New York State law, time-tested and effective. They can make a major difference in the way the rest of your life works out, and how much peace of mind and comfort you'll enjoy.

These methods can also supply advantages that are of supreme importance to your loved ones. They want the best life that's possible for you, and asset protection planning is a way to achieve it. It also enables you to have something to leave to them, because the more you save now, the greater your legacy will be.

These strategies have provided financial security and a vastly improved lifestyle for many senior citizens and disabled people. They can work for you too, if you employ them.

If you need help, contact us. Representation of the elderly and disabled is our only practice area.

About David A. Cutner, Esq.

David Cutner is one of the founders of Lamson & Cutner, P.C., a preeminent Elder Law firm with offices in New York City and Westchester County. The firm's practice is devoted to creating reliable and cost-effective health care and estate plans for seniors and the disabled. The firm's clients find Mr. Cutner to be an experienced and compassionate advisor and advocate for them. He is the author of numerous articles and special reports for seniors and their families; and is the author of the first chapter in *Elder Law Client Strategies in New York* published by Thomson Reuters, and of a soon-to-be-published book entitled *25 Strategies to Protect Your Savings and Maintain Your Lifestyle*. He is sought out by the media for his comments on Elder Law issues, and regularly appears on radio and television outlets, and in print and online media. For more information regarding Mr. Cutner and his firm, see www.lamson-cutner.com.

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This Special Report is offered free of charge by Lamson & Cutner to seniors, the disabled, and their families for informational purposes only. It is not intended to provide, or to be relied upon as, legal advice concerning your individual situation. Although a group or collection of cases may be said to involve similar themes or fact patterns, every case has its own unique facts. These unique facts may call for a different approach or strategy than other cases which may appear - at least superficially - to be similar. Only an experienced attorney, giving individual attention to the specific facts of your case, is in a position to provide you with reliable legal advice.

In addition, Federal and New York State laws and regulations are constantly changing through new legislation and rules, and through new decisions and interpretations handed down by administrative law judges and courts. Reliable legal advice must take these changes into account. Sometimes, these changes are subtle or affect only a small number of cases, and thus are not necessarily included in a general informational discussion. These are further reasons why general discussions can never substitute for concrete, individualized legal advice regarding your specific situation.

Individuals who reside in, or who are subject to the laws of other states, should be aware that this Special Report is designed primarily to inform residents of New York State. The laws and rules governing programs for the care of the elderly and disabled may differ in your state.

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Getting results for clients is what it's all about at Lamson & Cutner. Here's what you can expect to receive when you hire the firm:

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Are You Prepared?

Most people today are completely unaware of the financial crisis that could befall them if they, or a member of their family, should need long-term care, at home or in a nursing home. Many prefer not to think about this issue, and hope or assume they will somehow avoid the problem.

The risks are much higher than most people imagine. About two of three over the age of 65 will need long-term care at some point in their lives, and one of three will need nursing home care. When long-term care is required, financial ruin is often part of the picture. Medical insurance, including Medicare, will not cover the costs. Many who have long-term care insurance may find their benefits inadequate. Simply stated, your life's savings will rapidly be depleted, and even your home may be in jeopardy.

Fortunately, knowledgeable Elder Law attorneys can provide effective solutions to avoid or minimize these risks. Clients are frequently surprised that cost-effective strategies can be put in place to protect their assets and income, while they receive high quality care paid by government programs such as Medicaid. This is always a tremendous relief for them – both financially and emotionally.

In this informative Special Report, Elder Law attorney David Cutner consolidates years of experience accumulated by Lamson & Cutner's

attorneys, sharing practical knowledge gained from advising thousands of clients. All the key principles you need to know to protect your money and property are clearly explained in this fast-reading, easily understandable, report.

David Cutner's compassion for the elderly is personal, as well as professional. He lived through the same turmoil and stress experienced by most seniors and their families when illness or injury results in a need for long-term care. When faced with his own mother's physical and mental decline, he spent many years dealing with hospitals, home care aides, nursing homes, and Medicaid.

Mr. Cutner quickly dispels the myth that you need to be poor, or to deplete your life's savings in order to qualify for Medicaid benefits. Step-by-step, he introduces you to the legal strategies that can be used to build a financial fortress of protection for the elderly or disabled, and their families, throughout the entire time when ruinously expensive care is needed. Using these strategies, Lamson & Cutner has achieved a consistent track record of delivering outstanding results to grateful clients.

To request additional complimentary copies of this Special Report, or to learn more about the firm's services, contact Lamson & Cutner at 866-524-1818. It's a toll free call, or you can visit on the web at: www.lamson-cutner.com

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