

Who Should Consider Medicaid Planning?

Relevant Law vs. Plan Design

Summary of What We Covered

Week 1

- ✓ Medicaid Planning Profile™
- ✓ Qualification Standards
- ✓ Income Allowance (MMMNA)
- ✓ Misc. Income Allowances (PNA, Utilities, Health Ins.)
- ✓ Asset Allowance (CSRA)
- ✓ Max State vs. Range State
- ✓ Snap Shot Date

Week 2

- ✓ Look Back Date/Period
- ✓ Spend Down
- ✓ Transfers
- ✓ Penalty Period

Summary of What We Covered

Week 3

- ✓ Exemptions
- ✓ Case Study
- ✓ Miscellaneous Rules

Week 4

- ✓ Determining the Spend Down Method
- ✓ Spend Down Methods
- ✓ Case Study: Miss Brown Crisis

Week 5

- ✓ Crisis v. Pre-Planning Methodology
- ✓ Break Even Point for Pre-Planning
- ✓ Case Study: Miss Brown Pre-Planning
- ✓ Funding Issues to be Aware of

This Week We Will Cover

- Estate, Disability, Tax & Asset Protection Plan Design
- Relevant Law vs. Plan Design
- Tax Treatment of Trusts
- Irrevocable Trusts
- Power of Appointment

Now that we know when the client can qualify, how do we create the trusts for them to qualify?

Estate, Disability, Tax & Asset Protection Plan Design

- Legal Issues Are...
 - What you need to know about the law to be able to counsel your Client on solutions to their problem.
- Design is...
 - The provisions you draft to make the documents legally sound.
 - The provisions you draft to ensure the documents accomplish the Client's goals.

Relevant Law vs. Plan Design

- Relevant Law – Reference Law Review Article
 - Common/Trust Law
 - Tax Law
 - Asset Protection and Medicaid Law
 - Post Death Administration
- Plan Design
 - Who Controls (Trustee)
 - Who Benefits (Beneficiary)
 - When (Timing)
 - During life
 - After disability/death
 - After spouse disability/death
 - Ability to Amend

Meet Mr. & Mrs. Richards

- Age: 75
- 3 Children
 - Robert Jr.
 - Married w/ 5 Children
 - Doctor & Financially Well Off
 - Patricia
 - Married w/ 3 Children
 - Teacher, Husband on 3rd Business
 - Philip
 - Married, No Children. Has MS (No Symptoms Currently)
 - Do Not Care For His Wife

Mr. & Mrs. Richards Goals & Concerns

- Healthy & like to travel
- Have helped Philip & Patricia financially in past
- Want to remain in control and independent
- Concerned about losing assets to a Nursing Home if health concern arises
- Income from pensions and assets support lifestyle
- Want to keep assets “in the family”

Current Financial Condition

| | |
|----------------------|-------------|
| • Income | \$3,251/mo. |
| • Assets | |
| ▪ Money in Banks | \$152,540 |
| ▪ Brokerage Accounts | \$250,000 |
| ▪ Home | \$150,000 |
| ▪ Miscellaneous | \$25,000 |
| • Total Assets | \$577,540 |

Distinguishing Trusts & Uses

- Revocable Living Trusts
 - Avoid Probate
 - Disability Planning
- Irrevocable Trusts
 - Tax Avoidance
 - Asset Protection
 - DAPT's
 - Irrevocable Pure Grantor Trusts

Tax Treatment of Trusts

- Non Grantor Trust
 - Used for Tax Avoidance
- Grantor Trust
 - Not Taxed Separately
 - Grantor Taxed on Income
 - Grantor Taxed in Estate
 - “Pure” Grantor (Both)

Tax Treatment of Trusts

- Defective Grantor Trust
 - Grantor Taxed on Income
 - Separate Entity for Estate Tax
- Split Interest Trusts
 - Treated Different at Different Times (GRAT/GRUT, QPRT)

Features of Irrevocable Trusts

- Tax Planning
 - No Control
 - No Access or Use
 - No Ability to Change
- Asset Protection
 - DAPT's
 - Indirect Control
 - Some Access/Use
 - Limited Ability to Change

Features of Irrevocable Trusts

- Asset Protection (cont.)
 - Irrevocable Pure Grantor Trusts
 - Grantor as Trustee
 - Direct Access (Limited)
 - Full Use of Assets
 - Ability to Change Everything Except...

That which you want to protect

Irrevocable Trusts for Asset Protection

- Common Law
 - Whatever you have access to, your creditors and predators (Medicaid) has access to
- Restatement Second of Trusts §156
 - “Where a person creates for his own benefit a Trust for support or a discretionary Trust, his transferee or creditors can reach the maximum amount which the Trustee under the terms of the Trust could pay to him or apply for his benefit.”

Irrevocable Trusts for Asset Protection

- Uniform Trust Code §505
 - “With respect to an irrevocable Trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlors benefit”

Irrevocable Trusts for Asset Protection

- Domestic Asset Protection Trust
 - Based on State Law (14 States) *
 - Directly Contrary to Common Law, UTC, and Restatement
- Irrevocable Pure Grantor Trusts
 - Comply with Common Law, UTC, & Restatement
 - Not Concerned with Tax Planning (99.7%)
 - Complete Asset Protection

* Alaska, Colorado, Delaware, Missouri, Nevada, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Wyoming, Hawaii, Virginia, and New Hampshire

Irrevocable Pure Grantor Trusts

- Features
 - Grantor as Trustee
 - Ability to Retain Rights (Limited)
 - Use of Assets (i.e. Home)
 - Ability to Change: Beneficiaries, Timing Manner & Method of Distribution, Trustee's, Trust Protectors, etc.
 - Irrevocably Give up Right to Principal
 - (But can Benefit Family)

Irrevocable Pure Grantor Trusts

- Grantor as Trustee:
 - Restatement Second of Trusts
 - §98 – One of Several Beneficiaries of a Trust can be Sole Trustee of the Trust
 - §100 – The Settlor of the Trust can be the Trustee of the Trust
- Markham vs. Fay 74 F.3d 1347 (1st Cir. 1996)
 - When trustee is beneficiary, she holds legal title to entire trust for all beneficiaries (including herself)...and does not hold legal title of any trust property free of trust...

Irrevocable Pure Grantor Trusts

- Grantor as Trustee

- US vs. Baldwin 391 A.2d 844 (Md. 1978)

- “Baldwin's retained right to appoint everyone including himself as trustee, does not confer upon him ownership of Trust property... he may create a Trust of his own property and name himself Trustee”
- “As Trustee, Baldwin would have the same fiduciary duties as any other Trustee...”

Irrevocable Pure Grantor Trusts

- Ability to Retain Rights
 - Income Only
 - Not Protected
 - Considered “Available”
 - Not Principal
 - Power of Appointment

Irrevocable Pure Grantor Trusts

- Power of Appointment
 - General (No Protection)
 - Non-General
 - Limited
 - Exclude spouse from class if Medicaid planning
 - Bynum vs. Campbell *419 So. 2d 1370 (Al. 1982)*
 - Creditors cannot attach the interest of a beneficiary or third party who holds a power of appointment unless it is general power of appointment

Power of Appointment

- General Power of Appointment
 - Power to change Beneficiary including to Power Holder
 - Included in Taxable Estate of Power Holder
 - Grantor can't have lifetime power (unless RLT)
 - Spouse can't have lifetime power (if Medicaid Concern)
 - Trustee/others can't have lifetime power (assets may be at risk to Power Holder's liabilities)

Power of Appointment

- Non-General Power of Appointment (Default in iPug® Trusts)
 - Power to change Beneficiary to anyone other than Grantor, his Estate, or Creditors (must also exclude Spouse if Medicaid concern)
 - Not Included in Estate of Power Holder
 - Grantor can have power
 - If Granted to “other,” must exclude “other,” their Estate, and Creditors (and spouse if Medicaid) in addition to Grantor from power

Power of Appointment

- Limited Power of Appointment
 - Power to change Beneficiary to specific person or class
 - Not included in Estate of Power Holder (unless in class)
 - Grantor can have power (as long as not in defined class)
 - Spouse can have power (as long as Grantor not in class and exclude Spouse from class)
 - Trustee can have power (as long as not in class)
- Rip Cord to Terminate Trust
 - State Law to Modify Irrevocable Trust
 - Consent of all Parties
 - Change to one “Friendly” beneficiary

Irrevocable Pure Grantor Trusts

- Power of Appointment
 - Spetz vs. NY Dept. of Health
737 NYS2d. 524 (2002)
 - Verdow vs. Sutkowy
209 F.D.R 309 (N.D.N.Y 2002)
 - Est. of German vs. US
7 Ct.Ct 641 (1985)

Irrevocable Pure Grantor Trusts

- General Concerns
 - Fraudulent Conveyance
 - Bankruptcy
 - Dominion & Control
 - Whose Benefit
- Apply to ALL Irrevocable Trust Planning

Irrevocable Pure Grantor Trusts

- Types of Irrevocable Pure Grantor Trusts
 - Income Only
 - Control Only
 - Third Party

Irrevocable Pure Grantor Trusts

- Additional Benefits
 - Separate Asset Protection Trusts for Beneficiaries
 - Two Generation Planning
 - SNT Options
 - Family Objectives Met
 - Medicaid Compliant

- What are the Different Trusts Available to Solve Clients Needs?
- How do you Ensure you Don't Forget Anything (What is your Design Strategy?)

Today we concluded:

Who Should Consider Medicaid Planning?

- ✓ Week 1: Learn and Identify the Rules
- ✓ Week 2: Learn and Identify the Rules Cont'd
- ✓ Week 3: Determining Eligibility or Excess Spend Down
- ✓ Week 4: Determining the Spend Down Method
- ✓ Week 5: "Crisis" vs. "Pre-Planning"
- ✓ Week 6: Relevant Law vs. Plan Design

Upcoming Topics:

- Vision Clarifier (2 week series)
- Design Template