



# Current Issues in Elder Law

Focus On:  
**Preserving Assets,  
Ensuring Benefits**

Courtesy of **FREEDMAN FISH & GRIMALDI LLP**  
Elder Law Attorneys

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## ASSET PRESERVATION STRATEGIES: MEDICAID OPTIONS

### Income Only Trusts

#### *Reducing Income Contributions to Medicaid*

New Yorkers with income over Medicaid's poverty level of \$659.00 per month can now create "income only" trusts. The New York City Medicaid Program which is administered by New York City's Human Resources Administration approved these special trusts allowing Medicaid recipients to "pay" their "excess" income, to an approved trust managed by a not-for-profit organization.

#### **Who can benefit from funding an "Income Only" trust?**

1. Individuals 65 years of age and under who are receiving Medicaid benefits either at home or in a nursing home.
2. Individuals of any age who are only seeking "community-based Medicaid services" including in-home care.

#### **How does the "pooled trust" work?**

The Medicaid recipient must select a "pooled trust fund" to receive their excess income. Generally, non-for-profits oper-

ate such funds. The Medicaid recipient will initially deposit two (2) month's worth of surplus income; one month as a deposit, one as a working fund. The "pooled trust fund" pays the beneficiary's expenses such as food, rent and other living expenses. The fund pays the bills to the third parties directly.

#### **What happens to the money remaining in the "pooled trust" at death?**

All unspent "pooled trust" funds which remain in the trust to benefit other disabled individuals or to be paid back to Medicaid. The income received is subsequently paid out for expenses each month, therefore, only a modest amount is retained in the "pooled trust".

#### **What are the costs to set up and manage the "pooled trust"?**

Generally, there is a modest initiation fee to participate in an established "pooled trust". There is also a nominal monthly service fee to cover the

administrative costs of operating the trust and paying the monthly bills.

#### **How do I apply to join or create an "income only" trust?**

The Medicaid recipient must sign an agreement to join the not-for profit trust. If the beneficiary wishes to set up their own "income only" trust, they will absorb the legal fees to draft such a trust. If the individual wishes to set up an "income only" Trust, it must be established by the parent, guardian or approved by a court.

#### **Important Considerations**

The income savings resulting from funding a pooled trust is limited to New York State Medicaid benefits. Federal programs such as Social Security, SSI, Veterans & Worker's Compensation have not accepted the "pooled trust" as an option for sheltering monthly income. ■

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### Longer Life Requires a New Understanding of Government Benefits

#### **Life Expectancy extends to 90+**

Significant advances in medical science allow most Americans approaching their retirement years to live well into their 80's & 90's. This welcomed increase in life expectancy however, can present challenges surrounding health care and finances to individuals and families, and society overall. Over the past twenty years, Freedman Fish &

Grimaldi LLP has developed a breadth of knowledge in these areas, providing sound and practical advice on legal and financial planning for these critical later years. The scope of this legal counsel includes direction on asset protection and accessing government benefits under Medicare and Medicaid.

The exorbitant cost of care at home or in a nursing home continues to escalate and can

often outstrip most individual's insurance coverage. This leaves hard-earned family savings and property at risk. In this situation, more and more older and disabled persons in need of long term care, consider Medicaid to fund their care costs. Medicaid is operated jointly by the federal and state governments and has a myriad of complex and frequently changing rules. Elder law *cont'd on page 2*



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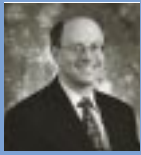
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*This newsletter is intended to provide general information about Freedman Fish & Grimaldi LLP and its' areas of practice in elder law which may be of interest to our current and potential clientele. Our firm practices in New York, therefore none of the information contained herein should be deemed to apply in other states. The newsletter content is not intended to give legal advice to anyone on any subject. Legal advice may only be rendered by attending a complete consultation with one of our elder law attorneys. Information obtained through the newsletter does not create an attorney-client relationship and the reader should not rely on same.*

**Hello** We are pleased to announce that our firm name is now FREEDMAN FISH & GRIMALDI LLP in recognition of Judith Grimaldi's sustained and ongoing contribution to the firm. Many of you have met and worked with Judie, and so it will come as no surprise to learn that she has been added to the partnership name. Her knowledge and skills in the critical issues confronting our elders along with all of the firm's partners and staff will continue to benefit our clients and the communities we serve. Our firm continues to provide essential legal strategies to protect the rights of the elderly and the disabled. Estate planning, trusts and long term care issues are complex and the decision process can seem overwhelming at best. This is where we can best meet your legal needs, and this issue of our newsletter is just one way to accomplish this goal.

This issue of *Current Issues in Elder Law* focuses on the importance of protecting you and your family's hard earned assets as advancing age and health concerns need attention. Included in this issue are discussions on: asset transfer to satisfy Medicaid eligibility requirements, establishing an "income only trust" to reduce income contributions to Medicaid, and strategies for protecting retirement funds. It is our hope that these articles will prompt you to consider your personal circumstances and schedule time to meet with us to discuss the options applicable to you. Meeting with your elder law attorney about legal options prior to a health care crisis can best serve your needs and legally protect your assets for you and your family. When working with our clients and their families on these crucial issues we strive to offer our expertise in a kind, caring, and compassionate manner. Our philosophy is "In legal matters, people matter." Sincerely,

*The Partners of Freedman Fish & Grimaldi LLP  
Elder Law Attorneys*

## Retirement Funds May Exceed Investments and Savings

### Implement Protection Plans

Retirement funds represent a valuable asset and thus are an important segment of a retired person's income picture. Freedman Fish & Grimaldi LLP are uniquely qualified to assist you and your family in maximizing your retirement benefits.

#### Income tax issues

Retirement accounts such as IRAs, 401Ks and 403Bs are tax-deferred savings and are an important source of income. Funds deposited into retirement accounts are not subject to income tax and thus grow income tax free. Taxes are paid at the time of distribution. It is generally best to defer income distributions as long as possible. Distributions can begin at age 59½ without penalty, however, income tax will be due. If you are younger than 59½, and want to take a distribution, you may do so without penalty in special circumstances, such as to pay medical expenses. This may be done only if certain requirements are met. As such, properly timed distribution can result in maximizing these assets and minimizing the tax.

Minimum distributions from retirement accounts are not required until April 15th of the year after a person turns 70½. Generally, it is advisable to take only minimum distributions. However, in a year when substan-

tial medical deductions will be taken, it may be advisable to take a larger distribution, as the deduction can offset the tax. Consult with a financial planner or with the attorneys at Freedman Fish & Grimaldi before taking this step. We can offer sound counsel before you take large retirement fund distributions.

#### Designating a Beneficiary

Retirement funds provide for naming a beneficiary upon death. It is imperative that you regularly review the designation of beneficiary on each account and confirm that each financial institution has the correct designation of beneficiary form on file. Each account should designate both a primary and a contingent beneficiary. It is almost never advisable to designate the Estate as the beneficiary. This results in an accelerated income tax at death on the full amount in the retirement account.

Most married couples are advised to designate their spouse as primary beneficiary, as the spouse has the unique ability to roll over the IRA into his or her own IRA, and also to designate new beneficiaries. This gives the survivor (spouse) a second chance to postpone the income tax payment during the survivor's lifetime. Only a spouse can roll an account over into his or her own IRA. In certain circumstances, a Trust can be a benefi-

*cont'd from page 1*

cary of an IRA, but special drafting is required. attorneys at Freedman Fish & Grimaldi LLP are knowledgeable about Medicaid's nuances and offer invaluable advice to our clients for preserving the family's assets while ensuring eligibility for benefits. Freedman Fish & Grimaldi LLP recommends putting an asset protection plan in place now, before a health care crisis occurs. Government benefits such as Medicaid can be a vital part of the plan.

#### Medicaid Eligibility

Medicaid is the primary source of catastrophic and long-term care coverage for the poor, disabled and elderly in our country. Eligibility for this program is limited to individuals with low income and minimal assets. In 2004, the →

ary of an IRA, but special drafting is required.

#### Medicaid Planning

Medicaid applies special rules to retirement accounts. The principal held in a retirement account can be exempt when the Medicaid recipient receives a regular income distribution. Our firm can help to protect these valuable retirement accounts by coordinating retirement and Medicaid planning.

If the spouse is a retirement account beneficiary and also on Medicaid, Freedman Fish & Grimaldi can determine an optimum alternate plan. Designating the children as the beneficiaries of the retirement accounts may be a better option. If the designated child is disabled, a Special Needs Trust, for this beneficiary, should be established. Again, our firm has substantial expertise in the establishment of Special Needs Trusts and can balance the benefits and cost of each option.

#### Estate Planning

In summary, IRAs have become a great source of family wealth and provide income stability during the later years. Decades of deferred income tax savings allowed retirees to build a savings nest egg. We welcome the opportunity to partner with you to make the most of your retirement savings. ■

eligibility limits are: a \$3,950 in resources and \$659 in monthly income. New York State residents with a higher monthly income can qualify by "spending down" their excess income on medical services.

**Medicaid offers services at Home & in a Nursing Home**

New York State's community-based services that include home care are generous. An individual can be eligible for home care and/or community vices one month after assets have been legally transferred or sheltered. Medicaid's community services include: home care, prescription drugs, transportation to medical appointments, medical supplies and equipment and adult day care services. These resources are essential to the elderly and can offer meaningful support to families trying to keep their family member in the home.

To establish eligibility for Medicaid's nursing home coverage, assets must be legally transferred well in advance of the anticipated need. Applicants will undergo a required three year review of their finances. If asset transfers are found to have occurred during this three year period, Medicaid will assess a waiting period for eligibility. The greater the amount of assets transferred, the longer the wait. In New York City, at this time, transfers of approximately \$313,000 will result in a three (3) year wait for Medicaid coverage or nursing home care. If individuals have funded Trusts, the wait could be up to five (5) years.

Clearly, the goal in a Medicaid asset protection plan is to transfer assets early, minimizing or eliminating the waiting period assessed by Medicaid. Freedman Fish & Grimaldi LLP will select the most advantageous time to apply for Medicaid benefits after asset transfers are completed.

**Conclusion**

With advancing age and the possibility of deteriorating health, planning for your long term health care needs to safeguard your savings and avoid financial burden is important. Our elder law attorneys can help you save the "well spouse's" income and resources, draft a trust to shelter "excess" income from Medicaid, or create a plan to provide home care.

The most important step is the first step . . . give us a call so we can apply our years of experience to your plan. ■

# What Is An Elder Law Attorney?

Elder law attorneys are a unique and specialized group of attorneys who focus on the legal needs of the elderly. The specialty of elder law evolved in the mid 80's as the number of elders increased and their legal and financial needs became more complex. An elder law attorney must consider the ever changing federal, state and local laws affecting such programs as: Medicare, Medicaid, Social Security and SSI when advising the elderly

and their families and caregivers. This is an ongoing challenge.

The National Academy of Elder Law Attorneys is the professional association representing the 4,000 elder law attorneys. NAELA offers a special certification for elder law attorneys. A certified Elder Law Attorney (CELA) must meet certain experience eligibility requirements, pass a daylong exam, and provide

references from their peers. Recertification is required every five years and to date there are only 300 Certified Elder Law Attorneys nationwide. When selecting an elder law attorney you may reference The National Academy of Elder Law Attorneys web site [www.naela.com](http://www.naela.com). Under the "Locate an Elder Law Attorney" feature, you will find Freedman Fish & Grimaldi LLP listed with two CELA's attributed to our firm.

**Key Questions to Ask the Attorney**

- How long have you practiced elder law?
- What percentage of your practice is devoted to elder law?
- Are you a member of the National Academy of Elder Law Attorneys or an elder-law section of the local bar association?
- Are you a Certified Elder Law Attorney (CELA)?

Finally — and this is not a usual question to ask an elder law attorney:

- Do you make "house calls" or visit your clients in a nursing home?

**Ways an Elder Law Attorney Can Help You**

- Structure your assets to minimize taxes and avoid the inconvenience of probate
- Develop a plan to efficiently use available health insurance options including Medicare and Medicaid
- Establish trusts to protect assets and reduce inheritance taxes
- Organize a house transfer to ensure your family keeps your home
- Develop a management plan to handle your finances including using Power of Attorneys, joint accounts and Trusts
- Complete medical advance directives as applicable to your state

- Coordinate your care team to provide home care, assisted living, or nursing home care.
- Advise you of local, state, and federal programs. For example, the New York State Medicaid consumer directed home care program and EPIC, New York State's prescription drug program.

Elder law attorneys, familiar with the medical and psychological issues associated with aging, typically work with other eldercare professionals to help you to access additional services to create a team approach. Included in this "care team" might be the person's doctor, social worker, geriatric case manager, accountant, financial planner and insurance agent. Your elder law attorney can serve as the coordinator of these other professionals all focused on providing you with a personalized plan that best meets your needs.

## Caregiver Tip: Medicare Drug Cards

The availability of life saving and life enhancing medications has resulted in increased costs of medications to consumers. Older persons, often on multiple chronic medications are especially burdened by these increased costs. Following extensive public debate Medicare began the first stage of providing prescription drug coverage by introducing the Medicare Discount Drug Card. In June, 2004, Medicare recipients could buy a card to receive approximately a 15% discount on all drugs purchased at the retail level. Medicare approved over 46 different discount cards, presenting a somewhat confusing situation.

In deciding which Medicare discount card might be best for you to purchase, consider the following:

- Only one card can be purchased.
- Create a list of the medications you will want to purchase using the card, along with the associated medication costs. The card selected must cover the required prescription.
- Even if you have medications on two different cards, you must select only one card.
- The cards currently being sold now expire in December 2004. Cards for 2005 will go on the market in November 2004.

For More Information about the Medicare Discount Drug Program Contact:

[www.medicare.gov](http://www.medicare.gov)  
Medicare Hotline:  
1-800-633-4227

Be ready with the names and the dosages of all of the drugs you take.

- New York State offers a prescription drug discount program called EPIC which provides a superior discount to any of these new cards offered. EPIC's income ceiling is generous:
  - \$35,000 for single persons
  - \$50,000 for couples.
- For an EPIC application call 1-800-332-3742 or contact Freedman Fish & Grimaldi LLP.

# Top Ten Legal Checklist for Later Years

**1 Health Care Proxy** allows you to choose your “agent” to make medical decisions on your behalf if you are unable to make decisions on your own.

**2 Living Will** spells out your wishes, particularly with regard to end-of-life issues. Most Living Wills advocate for pain relief but no aggressive treatment when there is little chance of recovery. The laws on Living Wills vary from state to state so it is important to have one prepared by an attorney in the state where you live.

**3 Power of Attorney** appoints an “agent” or an “attorney-in-fact”, who is authorized to pay bills, sell assets, file taxes, submit insurance claims, etc. and generally handles your financial affairs.

**4 Last Will and Testament** provides instruction on the distribution of your assets upon your death. Without a Will, your assets will be distributed according to the laws of the state where you reside. This may not be the same as your

personal wishes. A will should be reviewed and possibly updated every few years to adapt to changes in your family situation, your assets or the state laws.

**5 Retirement Funds, IRAs, and Income Tax Issues:** It is important to review your retirement funds, to update your investments and your beneficiaries. These assets can be very valuable. Distributions from these types of accounts have income tax liability.

**6 Medicare and Medigap Policies:** Medicare offers hospital and medical benefits primarily to those age 65 and older or permanently disabled. In addition, to “Original Medicare” people in many states can now select Medicare + Choice Plans. The two plans offered are Medicare Managed Care and Medicare Private Fee-for-Service. These plans and what they offer change frequently so it is essential that they be reviewed each year. Medigap policies can be purchased to off-set or help pay the hospital and medical costs not paid for by Medicare.

Beginning in 2006, Medicare will provide some prescription drug coverage.

**7 Joint Assets and Designated Beneficiaries:** Joint assets are a useful way to avoid the probate process. When two people hold title jointly to an asset, the person who survives becomes the sole owner. It is important to review your joint assets and designated beneficiaries to be sure they make sense for you and your estate plan.

**8 Living Trust:** A trust is a written agreement into which a person can transfer assets and property. A Living Trust can be important for estates with substantial or complicated assets held in multiple states, or if it is anticipated that there may be a challenge to the validity of the Will. Trusts avoid probate. The Irrevocable Trust also permanently shelters the assets from creditors.

**9 Long Term Care Insurance:** Nursing home or care at home may last many years and possibly cost tens of

thousands of dollars a year. Long-term care insurance is a planning option available to meet the catastrophic costs of long term care. Consider purchasing this type of insurance during the early retirement ages. The policies offered are continually improving and changing. It is strongly advised that you seek the advice of your attorney or financial advisor before purchasing.

**10 Gift and Estate Tax Planning:** Wealth passing after death may be subject to federal and state, estate taxes. Estates which exceed the federal or state exemption amounts at more than one million dollars will be subject to a federal estate tax which ranges between 37–55%. Estate planning can reduce this tax burden. Exempt gifts to children and or other beneficiaries in the amount of \$11,000 made before death is advised when the estate is valued at more than the federal estate tax exemption. In 2004, the exemption amount is \$1.5 million. This is scheduled to increase in 2006 and beyond. ■

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Focus On:  
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