DO YOU QUALIFY FOR FINANCIAL ASSISTANCE FOR NURSING HOME CARE?

The Consumer’s Guide to Medi-Cal Planning

This Guide is brought to you courtesy of The Law Offices Of

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INTRODUCTION

The decision to move a family member or loved one into a nursing home is one of the most difficult decisions family members face.

Perhaps the move is being made because the family member can no longer care for himself or herself, suffers from a progressive disease like Alzheimer’s, or has experienced a stroke or heart attack.

At times like these, it is important that you pause, take a deep breath and understand that there are things you can do. Good information is available, and you can make the right choices for you and your loved one.

The Consumer’s Guide to Medi-Cal Planning is designed to help provide you with that information as well as to answer some of the questions you will be asking. These are questions which our firm deals with on a daily basis.

Our clients have found this Guide to be a valuable resource, and we hope you will find it useful, too. This Guide is offered,

With Dedication To Our Parents Who Showed Us The Way

and

With Appreciation To Our Clients And Their Families Who Have Shared Their Lives And Taught Us Much

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Gene and Hilary Osofsky
Hayward, California
2015
THE CHALLENGE OF LONGEVITY

Americans are living longer than ever before. At the turn of the 20th century the average life expectancy was about 47 years. As we enter the 21st century, life expectancy has almost doubled. As a result, today we face more challenges and transitions in our lives than did our parents and grandparents who came before us.

As life expectancies and long term care costs continue to rise, the challenge quickly becomes how to pay for these services. Many people cannot afford to pay $7,500 per month or more for the cost of a nursing home, and those who can pay for a while may find their life savings depleted very rapidly.

THE FOCUS OF THIS GUIDE
Financing The Cost of Nursing Home Care

For the very wealthy, concerned about passing family wealth to future generations with minimum taxation, there is traditional estate planning. For middle income persons, concerned with financing the cost of Long Term Care, there is Medi-Cal planning. Medi-Cal planning may enable middle income persons to finance the Long Term Nursing Home Care of a loved one without depleting a lifetime of saving. Through such planning, an ill spouse may avoid impoverishing his or her well spouse at home, and parents may preserve a legacy to leave to their children.

In brief, this Guide addresses the challenge of paying for Nursing Home Care without going broke.

By Nursing Home Care we mean care in a facility for persons who are substantially unable to care for themselves and need assistance with most of the activities of daily living. It may include skilled nursing or long term custodial care. To be sure, there are less intensive levels of care, such as In-Home Care, Assisted Living Care, and Residential Facility Care. However, Nursing Home Care is usually the only level subsidized by the Medi-Cal program. By the same token, it is usually the most expensive and therefore of most concern to elders and their families. The focus of this Guide is on planning options available to qualify for a nursing home subsidy under the state Medi-Cal program.

However, there is one important exception to the Nursing Home only Medi-Cal subsidy: For those Elders residing in certain Bay Area counties who desire to remain in their homes yet still receive care funded by Medicare and Medi-Cal, there is a pilot program that may be available. This program is called the PACE program, which stands for “Program For All Inclusive Care for
the Elderly” and is an alternative to nursing home placement. For those persons able to qualify and willing to join, the Medi-Cal funding option discussed in this Guide will apply. This PACE Program might be of interest to residents of San Francisco County and parts of Alameda, Contra Costa and Sacramento Counties. The essential feature of this pilot program is that the Elder must be transported for the day by van, at least three days per week, from home to a central community facility where he or she would receive all medical and dental care, therapy, meals for the day, and related programming services. The “downside” is that the Elder must give up all of his current doctors and rely exclusively upon those at the “PACE” Center.

**VETERANS DISABILITY PENSION BENEFITS**

There is another very important benefit for Veterans who have served honorably during a period of declared wartime. This benefit is designed to help veterans with low monthly income and low net worth (not counting the home) pay for their care at home or in assisted living facilities. It is called the Veteran’s Non-Service Connected Disability Pension, and is sometimes known as an “Aid & Attendance Veteran’s Pension”. Entitlement is not dependent upon service-connected or wartime injuries, which are themselves handled under the Veterans’ Compensation program. Rather, entitlement to the Non-Service Connected Disability Pension depends upon the need of the Veteran or his/her surviving spouse to rely upon care by others for daily living. The Pension is awarded for non-service connected needs stemming, for example, from dementia, frailty, multiple sclerosis, Parkinson’s Disease, or any other illness or disability which requires the Veteran or spouse to need care in order to live safely. In 2015, the maximum monthly benefit is $2,120 for a married Veteran and $1,788 for a single veteran. The surviving spouse of a Veterans is entitled to a maximum pension benefit of $1,149 per month. Qualifying for this additional income can often prolong the ability of the Veteran and/or spouse to continue to live at home or in an Assisted Living Facility. For more information, please visit our website at [www.LawyerForSeniors.com](http://www.LawyerForSeniors.com) and click on “Veterans Benefits”.

In this Guide, we have sometimes used the word “Elder” to refer to the person of advanced age in need of long term care. However, all of the principles discussed in this Guide apply equally to younger persons who may, by reason of disability, also need nursing home care.

**HOW TO PAY FOR NURSING HOME CARE**

One of the things that most concerns people about nursing home care is how to pay for that care. There are basically four ways of paying for the cost of a nursing home:

1. **Private Pay: Use of Family Funds.** At the outset, many people find themselves in the position of having to pay for the cost of a nursing home out of their own funds. Unfortunately, with nursing home bills averaging $8,500 per month in our area, few people can afford to privately finance a long term stay in a nursing home.

2. **Long Term Care Insurance.** If available, Long Term Care (“LTC”) Insurance benefits
may go a long way toward paying for the cost of a nursing home. Certain specially qualified LTC insurance policies, called “Partnership Policies”, may even permit, after these insurance benefits run out, the retention of increased savings when later applying for Medi-Cal. However, most Elders do not have such insurance, either because the cost of premiums was prohibitive when they considered it or because they could not qualify due to health problems.

3. Medicare. This is the national health insurance program which provides short-term assistance with nursing home costs, if the applicant meets Medicare’s strict qualification rules. However, this assistance is designed to cover a short term nursing home stay while recovering from an acute illness or injury following discharge from a hospital. It is primarily intended for people 65 years of age and older, certain younger disabled people and people with kidney failure.

4. Medi-Cal. This is the federal and state funded and state administered medical benefit program which can pay for the cost of prolonged nursing home care. Eligibility primarily depends upon financial inability to pay for the cost of such care; it is designed to cover long term custodial care for those who meet Medi-Cal’s financial eligibility requirements.

Our discussion will concentrate on Medicare and Medi-Cal as payment sources.

MEDICARE VS MEDI-CAL

There is a great deal of confusion about Medicare and Medi-Cal. As indicated above, in the context of nursing home care it is helpful to think of MEDICARE as the federal program designed to cover short term recovery from an acute illness requiring hospitalization, such as recovery from a broken hip, heart attack or mild stroke. All persons aged 65 or over are eligible, regardless of financial means.

By comparison, MEDI-CAL is the program designed to cover long term custodial care for those who qualify financially for this subsidy. Medi-Cal’s asset and value tests must be met in order to qualify.

The following chart illustrates the differences:

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MORE ABOUT MEDICARE
For Short Term Convalescence Following Hospitalization

In order to receive nursing home care under the Medicare program, a patient would first need to be hospitalized for at least three days and then be directly discharged to a nursing home. Coverage during the following period of convalescence is limited to short term stays; as the chart shows, Medicare benefits do not continue indefinitely.

Once in the nursing home, benefits are limited to a maximum of 100 days for the same “spell” of illness. Medicare will pay 100% of the cost for the first qualifying 20 days of care, but only 20% for qualifying days 21 to 100. The balance must be paid by the patient. As of January, 2015, the portion payable by the patient for days 21–100 in the nursing home is $157.50 per day, but Medicare will only pay its share if the patient continues to meet Medicare requirement.

Medicare coverage includes a continuing eligibility requirement: The patient must generally show a continuing need for skilled nursing care or daily rehabilitative or occupational therapy. Under former law, the resident needed to show that the care or therapy was improving his or her function, and Medicare benefits would often be terminated when a resident “plateaued”. However, under the current standard, a patient need only show that he or she continues to require skilled nursing care or therapy in order to maintain his or her highest level of functioning. Where even this requirement can no longer be satisfied, Medicare benefits will terminate even before the 100 day mark. That termination is, however, subject to appeal. An appeal of an early termination of benefits should always be considered where continued skilled care or therapy will help a loved one “maintain” his or her highest level of functioning.

Because Medicare covers only skilled nursing care or ongoing therapy, patients who suffer from certain conditions which do not require such ongoing skilled care or therapy can find themselves without coverage. By way of example, Medicare regards long term stays in a nursing home caused by Alzheimer’s or Parkinson’s disease as “custodial” care, even though the patient may also receive some medical care. Medicare generally does not pay for the cost of care in these situations. Since Medicare does not pay for a custodial nursing stay, then the cost must be paid from the private resources of the patient or family or by Medi-Cal.

While it is never possible to predict at the outset how long Medicare will cover the nursing home stay, we can say from our experience that coverage usually falls far short of the one hundred day (100) maximum. The average is 24 days. Even if Medicare does cover the entire one hundred day period, what then? What happens after the one hundred days of coverage have been used, but the patient continues to need custodial care?

At that point, we are back to one of the other alternatives: Paying the bills with family assets or other resources or qualifying for Medi-Cal.

MORE ABOUT MEDI-CAL
For Long Term Custodial Care

MEDI-CAL (called Medicaid in other states) is the California benefits program which is funded by both the federal and state governments. Although each state’s program is similarly funded, the rules sometimes vary from state to state.

One primary benefit of the Medi-Cal program is that, unlike Medicare, Medi-Cal will pay for long term care in a nursing home once the patient has qualified, even if it is only considered “custodial” care. There is no requirement that the patient need ongoing skilled nursing care or rehabilitative therapy. As a result, Medi-Cal will continue to subsidize a qualified resident even if the patient only needs ongoing assistance with daily functioning, for example, help with meals, taking medications, toilet assistance, turning and the like.

WHY SEEK ADVICE FOR MEDI-CAL?

Fortunately, when the need for long term nursing home care arises, the Medi-Cal program is there to help. In fact, in our lifetime, Medi-Cal has become the long term care benefits program for the middle class. But eligibility for Medi-Cal benefits requires that certain financial tests be met regarding the applicant’s monthly income and the nature and value of his or her assets.

If an applicant’s financial profile does not immediately meet Medi-Cal’s requirements, Medi-Cal will likely tell the applicant only that he or she does not qualify for benefits and must first “spend down” his or her savings on care until those savings are reduced to permissible limits. Only then may he or she re-apply.

Unfortunately, that is often not the best advice. There may, indeed, be other options. We find, however, that these options are not generally known by the Medi-Cal Eligibility Workers who review the applications, or, if known, are rarely discussed. This is not to disparage the dedicated service of so many well-intentioned Eligibility Workers; it is merely to say that informing applicants of other options and planning strategies is not part of their job and is generally not part of their training. Indeed, some Eligibility Workers, knowing their limitations, will themselves sometimes suggest that an applicant consult an Elder Law attorney before re-applying.

Keep in mind that planning for Medi-Cal is really part of a broader plan that includes: (1) Establishing Eligibility, (2) Minimizing the applicant’s Share of Cost, and (3) Avoiding a Recovery Claim after death. Too often, the focus of persons applying for Medi-Cal only takes account of the eligibility concerns, overlooking all others. Further, such planning should also be combined with the following Estate Planning goals: (4) Avoiding probate after death, (5) Providing for future mental incapacity, (6) Making provision for the needs of an Incapacitated Spouse, (7) Minimizing taxes, and (8) Coordinating retirement benefits with the overall plan design. An integrated plan, which takes account of all aspects, is essential and can result in
substantial savings and peace of mind to the Elder and his or her family.

WHAT ARE THE REQUIREMENTS FOR MEDI-CAL ELIGIBILITY?

To qualify for Medi-Cal coverage for nursing home care, applicants must pass some fairly strict tests regarding the nature and value of their assets. Briefly, a single individual cannot own more than $2,000 in “countable assets” (example, savings). However, if the nursing home resident is married, then, as of January 1, 2015, the resident and the At-Home spouse may together retain $121,220 in combined savings between them, allocated as follows: up to $119,220 in the name of the ‘At-Home’ spouse and $2,000 in the name of the Ill Spouse. These amounts are considered the Medi-Cal “resource ceilings”: Countable assets must not exceed those ceilings in order to qualify.

“Spend Down”: Is It Really Necessary?

If a person’s or couple’s countable assets are greater than the allowed ceilings, the advice often given by Medi-Cal is that the applicant first “spend down” the excess before applying for benefits. In this context, the advice to “spend down” generally refers to spending excess savings on care, i.e., by privately paying for nursing home care until the individual’s or couple’s savings drops below the permissible ceiling(s). This form of spend down can rapidly deplete a lifetime of savings, leaving the individual nearly impoverished and the At-Home spouse with a dramatically reduced “nest egg” and feeling financially insecure.

The good news, however, is that there may be alternatives to spending down a lifetime of savings on care. This Guide addresses some of them. Where their use is appropriate, these alternatives can preserve assets, avoid impoverishing the At-Home spouse, provide some savings to pass on to children and, most importantly, provide peace of mind to the Elder and his or her family.

An Important Point Of Clarification

(A) Medi-Cal For Persons Living Outside Of Nursing Homes

Many people confuse the eligibility rules for Nursing Home Medi-Cal with those for Community Based Medi-Cal, with which many are more familiar. The latter provides coverage for those persons who are living independently at home in the community and only need Medi-Cal coverage for occasional visits to doctors and hospitals. For single individuals, the Community Based Medi-Cal ceiling is $2,000, (the same as for Nursing Home Medi-Cal), but the resource ceiling for a married couple is only $3,000. Further, there are income limitations that must be met in order to qualify.
By contrast, for married couples where one spouse is in need of nursing home care, the Medi-Cal resource ceiling is much more liberal: For year 2015, the couple in that situation may retain up to $121,220 in non-exempt assets between them and sometimes more. The purpose of this larger resource ceiling is to avoid impoverishing the At-Home spouse while the other resides in a skilled nursing facility. It comes as a surprise to many that there are no income limits to qualify for this program. Many people confuse the eligibility rules for these two distinct types of Medi-Cal benefits. This Guide addresses the rules and planning options with respect to Nursing Home Medi-Cal.

**HOW MEDI-CAL WORKS**

To understand these planning options, we must first understand how Medi-Cal works. Eligibility is based upon the manner in which Medi-Cal characterizes the nature of one’s assets. Generally speaking, Medi-Cal divides one’s assets into three categories: (1) EXEMPT, (2) UNAVAILABLE and (3) NON-EXEMPT. Exempt and Unavailable assets are those which Medi-Cal does not take into account in determining eligibility. They can be of any value. On the other hand, Non-exempt assets are those which Medi-Cal does take into account and whose combined values cannot exceed the maximums noted above. A list of the primary Exempt, Unavailable, and Non-Exempt assets is provided below. However, please note the following comment concerning California’s recovery process:

_**Caution: Exempt Asset May Still Be Subject To Reimbursement Claims At Death**_

Even though Medi-Cal may treat an asset as “exempt” for purposes of eligibility for nursing home benefits, Medi-Cal may, nevertheless, later seek reimbursement for the cost of these benefits from these very same assets after the death of the beneficiary. In effect, the exemptions expire at death (unless the beneficiary is survived by a spouse or other qualified dependent). As a result, an asset such as a home, which might otherwise be exempt for eligibility purposes, may still be subject to Medi-Cal reimbursement claims following the death of the owner. This is called “recovery”. Nevertheless, with timely planning, there are strategies to avoid this recovery as well. See discussion later in this Guide under the heading “WILL I LOSE MY HOME”.

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EXEMPT ASSETS: NOT COUNTED

Exempt assets are not counted toward the resource ceilings of the Medi-Cal applicant or spouse. The principal Exempt Assets are:

1) **Home.** For *married* couples and those with a qualified dependent still living in the home, the home is exempt regardless of value. However, for *single* individuals the rule will soon be different: Once the newly enacted “Deficit Reduction Act of 2005” is fully implemented in California, the home of single individuals will only be exempt up to a $750,000 equity ceiling, adjusted by an annual inflation factor. For these singles, home equity greater than this ceiling will disqualify them from Medi-Cal unless steps are taken to reduce the equity, such as by taking out a loan against the home. Also, at the time of entry into the nursing home, the applicant must declare an intent to return home even if this return home never actually takes place.

2) **Personal belongings and household goods.** This category would include jewelry of any value in the case of a married couple, but only up to $100 in value for a single individual.

3) **One car or truck,** if used in accordance with Medi-Cal Guidelines.

4) **Retirement accounts of the Well Spouse at home.** This category includes IRAs, Keogh, 403(b), 401K, and other retirement plans in the name of the Well Spouse, even if not paying out benefits. If in the name of the ILL Spouse, they can be converted to an “unavailable” asset once they begin paying out benefits to the ILL Spouse. See comments below.

5) **Burial plot** and certain related items for the applicant and spouse.

6) **Prepaid Irrevocable Burial Plan** of any amount and an additional **$1,500 in designated burial funds,** which must be kept segregated from all other funds.

7) **Whole life insurance if face value is $1,500 or less.** If it exceeds $1,500 in total face amount, then the entire cash value in these policies is counted. However, term life insurance (without cash value) is totally exempt.

8) **Existing business** if relied upon for self-support plus a reasonable reserve for the operation of the business.

9) Up to **$2,000 in cash** for a single person.

10) **Community Spouse Resource Allowance** for the spouse at home of **$119,220** for the year 2015, *and possibly more.* See discussion below.
UNAVAILABLE ASSETS: NOT COUNTED WHILE “UNAVAILABLE”

Unavailable assets are treated the same as Exempt Assets for so long as these assets remain unavailable. The principal assets that fall into this group are the following:

1) **Rental real property** while it is listed for sale. However, once it is sold, the proceeds become available and are then counted toward the permissible resource ceilings.

2) **Promissory Notes or Deeds Of Trust** owned by the applicant, but only while listed for sale.

3) **Retirement Accounts** (IRA’s, Keogh plans, 401K and/or 403B Plans) owned by the ILL Spouse if paying out periodic payments of interest and principal. However, the amount of the monthly or other periodic payment will be counted toward the applicant’s Share of Cost. The remaining funds, however, will not be counted.

4) **Certain Immediate Annuities** if paying out current benefits according to strict Medi-Cal guidelines. Note: Deferred payout annuities generally do not meet this test.

5) **Real property** where there is a legal impediment to sale. *Example:* Property that cannot be sold because of an existing legal dispute.

NON-EXEMPT ASSETS: COUNTED

All other money and assets is generally considered Non-Exempt and will be counted by Medi-Cal. These Non-Exempt assets cannot exceed in value the permissible ceilings noted above. These assets include:

1) Cash, savings, and checking accounts, credit union share draft and draft accounts.

2) Certificates of deposit.

3) U.S. Savings Bonds.

4) Prepaid funeral contracts which can be cancelled.

5) Non-Exempt Assets in Revocable “Living” Trusts

6) Real estate (other than the principal residence).
7) More than one car.

8) Boats or recreational vehicles.

9) Stocks, bonds, or mutual funds.

10) Promissory notes obligating others to pay the applicant, but which are not listed for sale.

THE PROBLEM AND THE SOLUTION

If an individual or couple owns Cash or other Non-Exempt assets with combined values above the maximums permitted, they will generally be told by Medi-Cal that they must first “spend down” their excess resources on nursing home care until their savings drop below those ceilings, and only then will Medi-Cal be able to help. Faced with that advice, many individuals and couples grow despondent and fear the loss of their life savings to the cost of care.

Fortunately, there may be other options. In many cases, there are alternatives to this “spend down” which may protect all or a substantial portion of these savings.

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But first, let’s address common questions that usually come up at this juncture.

WHAT ABOUT GIFTING EXCESS ASSETS TO CHILDREN?

**Question:** Can I just give all my assets away to my children?

**Answer:** No. Many people wonder if they can just give their assets away to their children in order to qualify for Medi-Cal. The law has severe penalties for people who simply give away their assets to create Medi-Cal eligibility. In California, every gift of $8,093 made within 2.5 years (soon to be 5 years) of the Medi-Cal application will result in one month of ineligibility. For example, an outright gift of $150,000 made within 2.5 years of application will result in approximately 18 months of ineligibility for Medi-Cal benefits. Further, once federal legislation called the “Deficit Reduction Act of 2005” becomes fully effective in California, the 18 month penalty in this example will not even begin to run until the Elder/Donor has already spent his savings down to $2,000 and is already in, or ready for entry into, a nursing home. This situation can raise real problems for the Elder,

1 For the year 2015. This number changes every year.

2 See the discussion later in this Guide about the “Deficit Reduction Act of 2005".
as he will then be nearly out of savings but will find himself disqualified from a Medi-Cal subsidy to help with the cost of care!

However, with careful attention to the gifting rules this harsh result may sometimes be minimized or avoided altogether, but the gifting program must be carefully planned in advance. Therefore, for those persons considering gifting as a means of "spending down," it is essential to have expert guidance from a knowledgeable Elder Law attorney. Making gifts without careful supervision and attention to legal requirements could be devastating: In the worst case scenario, the donor may have no money left to pay for care and no Medi-Cal benefits to come to the rescue!

**Question: Can I give up to $14,000 per year to each of my children without any problem?**

**Answer:** No. The $14,000 ceiling applies only for purposes of avoiding any Gift Tax. Medi-Cal rules and tax rules are quite different! One has little to do with the other. Thus, for every $14,000 gifted within 2.5 years of application (eventually to be 5 years), the donor will still incur at least one month of disqualification from Medi-Cal. Remember: Tax rules and Medi-Cal rules are different.

**Question: If I have added my childrens’ names to my bank accounts will all of the money in those accounts still count?**

**Answer:** Yes. The entire amount is counted as part of cash resources, except to the extent that you can prove that some or all of the money was originally owned by your children and contributed by them to the joint account(s) for convenience.

**ARE THERE LEGAL WAYS TO ACCELERATE MEDI-CAL ELIGIBILITY WITHOUT FIRST EXHAUSTING SAVINGS ON CARE?**

Fortunately, **Yes.** There are various legally acceptable planning techniques that may be used to minimize or eliminate “spend down” so as to accelerate Medi-Cal eligibility without first “going broke.” These plans are important for family security: There is need to provide enough assets for the security of loved ones - - they, too, may have a similar crisis. Without planning and knowledgeable advice more money than is necessary may be spent on Nursing Home care, leaving the family’s financial security in jeopardy.

A good plan for avoiding spend down takes into account the particular situation of the individual

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3 In these calculations, Medi-Cal rules currently provide that fractions of whole numbers are always rounded down. However, this ‘rounding’ approach will soon be eliminated, so that eventually the resulting disqualification will include partial months of disqualification.
or couple. The following is one example of a plan for married couples.

**ENLARGING A MARRIED COUPLE’S “NEST EGG”**

Married couples have access to a plan that may be used where one spouse is in need of nursing home care and the other is able to remain at home in the community. In appropriate cases, this plan may be used to substantially increase the amount of savings the At-Home spouse may keep and still qualify the ILL Spouse for Medi-Cal. We like to think of this plan as “enlarging the spousal nest egg.” It is actually more correctly called expanding the Community Spouse Resource Allowance, or “CSRA.” Indeed, where properly implemented it can, in appropriate situations, be used to minimize the need for “spend down” or in some cases avoid the need altogether! In cases where the At-Home spouse has a relatively low monthly income, but the couple nevertheless has substantial lifetime savings, this plan can in some cases successfully shield a couple’s entire life savings. Remember: the goal here is to protect family savings and ensure the financial security for the At-Home spouse even after the death of the ILL Spouse.

While the recently enacted “Deficit Reduction Act” will make it more difficult for some couples to protect an enlarged Community Spouse Resource Allowance, yet this protection may still be available for many couples, depending upon the amount of their incomes and their particular situation. An Elder Law Attorney will be able to analyze a couple’s situation and determine whether that protection may be available.

**CASE STUDY: MEDI-CAL PLANNING FOR A MARRIED COUPLE**

Ralph and Alice were high school sweethearts who lived in Hayward, California, their entire adult lives. Two weeks ago, Ralph and Alice celebrated their 51st wedding anniversary. Yesterday, Ralph, who has Alzheimer’s, wandered away from home. The police found him, hours later, sitting on a street curb, talking incoherently. They took him to a hospital. Now the family doctor has told Alice she needs to place Ralph in a nursing home. Ralph and Alice grew up during the Depression. They always tried to save something each month. Their assets, totaling $1,000,000, are as follows:

- Savings accounts: $250,000.00
- Home (no mortgage): $750,000.00

Ralph gets a social security check and pension in the combined amount of $1,500 per month; Alice’s social security check is $750 per month. Alice grows increasingly anxious and worries that, by paying $8,500 to the nursing home every month, their entire life savings will be gone in less than two years. What’s more, she is afraid that she will not be able to pay her own monthly bills, because a neighbor told her that the nursing home would be entitled to all of Ralph’s social security check. But there is good news
for Alice: Medi-Cal may be able to help!

To apply for Medi-Cal, Alice will have to submit an application to the Department of Public Social Services (“DPSS”). The challenge is that Ralph’s entitlement, under these facts, cannot be accomplished at the caseworker level. In fact, DPSS will initially tell Alice that Ralph does not qualify, because the couple’s Non-Exempt resources are over the permissible limits.

However, with proper planning and advice, Alice may successfully navigate the Medi-Cal system, qualify Ralph for a subsidy, avoid spend down and retain all of their savings that she and Ralph worked so hard to accumulate. For example, Alice may be able to (1) successfully convert Non-Exempt cash assets into Exempt assets in order to bring her countable savings down below the spousal resource ceiling, OR (2) she may be able to seek an Order from a Judge that permits her to expand her limited Community Spouse Resource Allowance up to a level that protects their entire savings.

By implementing an appropriate plan she would not only be allowed to keep their entire savings of $250,000 and their home, but also all of both her own Social Security Income and all of Ralph’s Social Security and Pension income as well. In short, Alice may be able to retain for her own needs all of their combined monthly incomes and all of their combined assets. In addition, all of Ralph’s ongoing nursing home care would still be covered by Medi-Cal. This process may take a little time, but the end result will be worth the effort.

By implementing an appropriate plan, Alice will no longer fear impoverishment, she will know that Ralph’s needs are being met, and she can continue to live in her home as before with dignity and peace of mind.

However, Alice will need help navigating the Medi-Cal system. An Elder Law attorney can assist her in evaluating her options, converting excess savings into exempt assets where appropriate and/or requesting and conducting a hearing before an Administrative Law Judge or a Superior Court Judge to achieve these results.

Of course, proper Medi-Cal planning differs according to the particular facts of each family’s circumstance, as well as the current state of the law. Remember that each person’s situation must be evaluated and the proper course of action determined by a knowledgeable Elder Law attorney.

**CASE STUDY: MEDI-CAL PLANNING FOR A SINGLE INDIVIDUAL**

Dick is a single man, aged 66, living in his own home, but is experiencing early symptoms of Alzheimer’s Disease. He has three loving children who look in on him daily and assist with shopping, medical appointments and the like. His physician advises that Dick may need Assisted
Living Care within the six months, and will likely progress to needing Skilled Nursing Care in about one year. His $1,500 monthly income from Social Security is adequate for his current needs at home. Dick’s assets consist of the following:

<table>
<thead>
<tr>
<th>Asset</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Home</td>
<td>$650,000</td>
</tr>
<tr>
<td>401K Plan</td>
<td>$250,000</td>
</tr>
<tr>
<td>IRA</td>
<td>$125,000</td>
</tr>
<tr>
<td>Savings</td>
<td>$100,000</td>
</tr>
</tbody>
</table>

**TOTAL:** $1,125,000 Dick’s Total Estate Value

By way of pre-planning for Dick’s future needs, he might consider the following: While he is still competent, he should create a **Durable Power of Attorney with special provisions** to permit his agent to perform asset shifting and other strategies, as necessary in order to help qualify Dick for Medi-Cal when the need later arises. He should also prepare at least a simple **Will**, naming his three children to receive his estate upon his demise. He might then consider the following:

1. **Using some of his savings to make certain improvements** to his home. Properly structured, money invested into those home improvements would then be considered “Exempt”.

2. Since his devoted children are already spending time monitoring his well-being, he might consider entering into a **Personal Care Contract** with them. Remember, if he had to pay others to do this work, he would be obliged to pay for their services; his children are no less entitled to payment for their efforts. Done correctly, the amount he pays his children under a properly designed Personal Care Contract would not be considered a gift and would not result in a disqualifying period for Medi-Cal benefits.

3. When nursing home entry appears imminent, he should take steps to render his **IRA and 401K** legally “unavailable” for Medi-Cal purposes, so that the funds in these retirement assets will not be counted by Medi-Cal toward his $2,000 permissible cash resource ceiling. He can do this by starting the periodic payout of principal and interest, using the Minimum Distribution Rules set by the IRS. The monthly pay out will go toward his share of cost once he is in a nursing home, but the remaining funds will not be counted. Of course, he may benefit from professional guidance in selecting the proper amount of periodic distribution.

4. **He should take steps to avoid a later Medi-Cal recovery claim after his death.** If the home remains in his name at the time of his death, Medi-Cal will then seek to recover the benefits

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4 Note: Unfortunately, most Durable Powers of Attorney that clients bring to our firm for review do NOT include such provisions and need to be revised.
paid out during his lifetime. However, there are presently ways to avoid such a claim, providing that appropriate steps are taken during Dick’s lifetime. Dick may either take steps, himself, to do so now, or, he may delegate the power to one or more of his trusted children to do so later on his behalf, by creating now special powers in his Durable Power of Attorney. (See the discussion, below in regard to the Home.) However, the Durable Power Of Attorney must contain appropriate powers to authorize such action. If it does not, then there may still be a remedy while Dick is alive, but this will require a Petition to the Superior Court and a Court Order.

As a result of taking the foregoing steps, Dick will now be able to live in his recently improved home (perhaps for a longer period if he opts for live-in home care), he will have insulated most of his assets from the later cost of nursing home care, and he will ultimately be able to leave his devoted children more of his estate upon his death. Such planning may, itself, bring greater peace of mind to Dick and enhance his outlook and sense of well-being.

WILL I LOSE MY HOME?

Eligibility vs. Recovery

Many people who apply for Medi-Cal assistance ask this question. For many, the home constitutes the most significant portion of their assets. Often, it is the only asset that a person owns to pass on to his or her children.

Under the Medi-Cal regulations, the home can qualify as an Exempt asset during lifetime. This means that, subject to the equity ceiling for single individuals mentioned above, it is not be taken into account when calculating eligibility for Medi-Cal. But in 1993, Congress passed a little-debated law that affects hundreds of thousands of families with a spouse or elderly parent in a nursing home. That law permits the states, upon the death of the Medi-Cal beneficiary, to recover the cost of Medi-Cal benefits paid out during his or her lifetime. Medi-Cal calls this “Recovery.”

Recovery means that, after a Medi-Cal beneficiary’s death, the state must try and recover the value of Medi-Cal payments previously paid out during his or her lifetime. Recovery efforts target those assets owned by the beneficiary at the time of death. In California, recovery efforts usually target the home, as well as any other real property owned at death. There is also some movement to broaden the recovery to reach other assets owned by the beneficiary including residual interests in annuities. The state will initiate recovery by sending a bill for the cost of care to those family members (or others) who inherit the deceased beneficiary’s home or annuity. Thereafter, if suitable arrangements are not made to pay that bill, the state may force the sale of the home or claim the remaining pay-outs in the annuity in order to reimburse itself for payments previously made. Such claims can force sales of family homes just to handle that obligation.
There are some exceptions to the state’s right of recovery, for example: (1) where the Medi-Cal beneficiary is survived by a disabled child (even if an adult), (2) where the surviving family member(s) still living in the home can prove financial “hardship” under some very strict, and rarely granted, state hardship rules and (3) where the beneficiary leaves a surviving spouse. However, in the case of a surviving spouse, recovery is not eliminated but is only deferred until the death of the survivor. Presently, California’s pursuit of recovery claims against surviving spouses is sporadic; sometimes it neglects to pursue such deferred claims after the survivor’s death. However, it is always possible that this relaxed approach against surviving spouses’ estates may change in the future. Hence, planning to avoid such claims is still important.

Note: California seeks recovery, even if the beneficiary only owns a partial interest in the home or other assets. If, for example, Dick received lifetime Medi-Cal benefits worth $100,000 and at death owned a one-third (1/3) interest in a home worth $210,000 and held in co-tenancy with others, the state would seek to recover the value of benefits paid on his behalf, but not exceeding the value of Dick’s one-third interest, i.e., $70,000 in this example. However, if Dick left a surviving spouse, the recovery claim against his interest would then be deferred until the survivor’s death.

However, with proper planning, it is possible under current rules to fully protect the home against Medi-Cal recovery claims after death, providing that appropriate steps are completed during the lifetime of the Medi-Cal beneficiary. This can be done by transferring the home to loved ones, but in a very special way. One such way is to set up a special kind of Irrevocable House Trust to hold title to the home, while still providing all the benefits of continued home ownership to the Elder.

Under current law, a properly designed Irrevocable House Trust would (1) permit the Elder the continued use and enjoyment of the home during lifetime as before, (2) fully protect the home from Medi-Cal recovery claims after death, (3) eliminate any capital gains tax problems associated with lifetime transfers or sales, (4) avoid probate and (5) allow title to pass easily to the Medi-Cal beneficiary’s loved ones after death. Caution: Creating such a trust must be completed during the lifetime of the Medi-Cal beneficiary. If one waits until after the beneficiary’s death, it is too late. Further, this trust is not the same as a “Living Trust” with which many persons are familiar, and the document drafting must be handled with special care.

Furthermore, if the Elder has set up a properly designed Durable Power of Attorney which expressly permits creation of such a trust, this arrangement could be created by the Elder’s agent even if the Elder were not then able to do so on his or her own, providing that it was completed during the Elder’s lifetime. But, in order for this trust to be set up by an Agent, this specific power must be expressly granted in the Durable Power Of Attorney document. It cannot be implied from general powers that are worded broadly.
Many people with “Living Trusts” believe that their trusts will shield their assets from being considered if they need to apply for Medi-Cal. Many are surprised to learn that this is actually not the case!

A Living Trust can be very useful for avoiding probate following death, but is generally of no help if one needs to apply for Medi-Cal during life. Indeed, the terms of a Living Trust may even undermine Medi-Cal planning! This problem arises because the fiduciary provisions of most such trusts require the trustee (usually the well spouse) to continue to apply trust income and principal for the benefit of the ill spouse. These provisions would include the duty to pay the nursing home expenses of the ILL Spouse from trust assets. Thus, if that ILL spouse would have otherwise qualified for Medi-Cal, then this fiduciary duty would, instead, probably require that trust assets be used to pay for that care. This trustee’s duty would then eliminate, or at least substantially reduce, the potential Medi-Cal subsidy for the ILL Spouse. As a result, Trust assets would be consumed instead. Additionally, such trust provisions may impair the Well Spouse’s right to a spousal income reallocation from the ILL Spouse and/or to an expanded resource allowance (“CSRA”) to protect the couple’s savings. For these reasons, it is often necessary to revoke and/or to modify existing trusts when applying for Medi-Cal.

Our firm has designed special plans for couples that enhance the traditional Living Trust, Wills, and companion estate planning documents to accommodate the possible future need for a Medi-Cal Long Term Care subsidy. They do this by providing “stand-by” special powers to enable asset preservation and Medi-Cal qualification for the ILL Spouse in the face of possible future long term care nursing home costs. We call these plans our “Spousal Protection Plans”.

THE DEFICIT REDUCTION ACT (“DRA”) OF 2005

On February 8, 2006, President George W. Bush signed a new law called the “Deficit Reduction Act of 2005 (“DRA”), which will – when fully implemented in California – make sweeping changes in the manner in which persons may qualify for Medi-Cal. Once implemented, it will (1) impose severe disqualification penalties upon persons who give away their cash assets within five (5) years of Medi-Cal application, (2) render single persons ineligible for Medi-Cal if their home equity is worth more than $750,000 (based upon assessed valuation and annually adjusted for inflation), (3) limit the use of immediate annuities in some situations as a Medi-Cal planning device, (4) make it more difficult for couples to protect their excess savings, and (5) generally restrict the ability of seniors to shelter assets when faced with the high cost of long term care.
Further, once fully implemented, the DRA penalties associated with gifts will then apply to any
gifts regardless of the purpose. Thus, a grandparent’s gift to help a granddaughter with wedding
expenses, to a grandson to help with college expenses, donations to one’s church, synagogue or
charities, or even contributions to political parties will all be subject to the gifting penalties. Thus,
the reach of the DRA has dramatic implications for Elders who may, within five (5) years of any
such gifts, find they need Long Term Nursing Home care. The California statute adopting the
Deficit Reduction Act became law in January, 2009. However, the good news is that many of its
provisions will not be fully effective in California until implementing state Regulations are
adopted. As of September, 2015, these regulations had not yet been adopted. Therefore, there
may still be a window of opportunity available to Californians for planning under the Pre-DRA
law. . . but it will be closing soon.

The further good news, however, is that even after the DRA is fully implemented, there will still
be advance planning opportunities available, but “crisis planning” will be more difficult.

**Example Of How The Post - DRA Gifting Penalty Will Work**

The soon to be implemented DRA prohibition on making gifts is particularly onerous. Consider
the following example, which illustrates the application of the new rule:

**Current Rule:** In March, 2015, John, a widower in apparent good health, decided to make a gift
of $60,000 to his son to help him start a business. One year later, in March, 2016, John has a
stroke and needs nursing home placement. Under the old rule, the “gifting penalty” period of
approximately 7 months ($60,000 / $8,093 \(^5\) ) would have started running on the date of the gift
in March, 2015, and would have already expired when John needed Medi-Cal help one year later.
So, under the pre-DRA rule, as soon as John’s savings fell below the permitted $2,000 ceiling,
he would immediately qualify for Medi-Cal; there would be no funding “gap”in his ability to
cover the nursing home cost.

**New Rule:** However, under the new DRA rule, John will not immediately qualify for Medi-Cal
benefits and there will be a significant funding “gap”. Under the DRA, the disqualification
penalty “clock” will not start running, as before, on the date of John’s gift. Instead, it will not
start until after John has BOTH (1) entered the nursing home AND (2) spent his savings down to
the $2,000 resource ceiling. Only then will the penalty “clock” begin to run. However, at that
point John will be facing Medi-Cal disqualification for 7 more months into the future! The
“Catch –22” is that he will then be nearly out of funds but will not be able to look to Medi-Cal for
help! Who will pay for his care during those remaining 7 months? The answer is unknown and
the DRA does not give us any guidance. This scenario is the “bad news”.

The good news is that Elder Law Attorneys around the nation have put their collective minds

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\(^5\) This the penalty for 2015 and is used for illustration. It changes each year.
together and have created what we believe to be new, DRA compliant strategies to help Elders plan their affairs, including the making of family gifts using new strategies. Our goal is to continue to help the middle class avoid the devastating cost of long term care. However, it will now be more important than ever to plan ahead, especially for those who wish to preserve family assets when a loved one needs care and avoid the “Catch –22” scenario described above.

PLANNING AHEAD

There are steps that can be taken to plan ahead should an individual or couple anticipate the need for long term care in the future. Such steps may include the following:

(1) **Create A Durable Power of Attorney for Financial Matters.** Set up a properly designed Durable Power of Attorney for Financial Matters *with appropriate provisions to permit an agent, in the future, to engage in long term care and Medi-Cal planning, including asset re-allocations, intra-family gifting, changes to retirement accounts, creation of special trusts and other financial arrangements appropriate to the individual’s circumstances.* Remember: most of these powers must be expressly granted in the Durable Power Of Attorney in order to be effective. Unfortunately, most standard form Powers, and even many attorney-drafted Powers, brought to our firm for review do not contain such provisions. A properly designed Durable Power of Attorney which does grant these special powers is essential.

(2) **Re-Design Your Will or Trust.** Give consideration to a “back up” plan in the event the Well Spouse predeceases the ILL Spouse. If the ILL Spouse may soon need nursing home care, re-designing a Will or Trust to provide for an alternate inheritance plan may be the wise thing to do. This may be a kind of “stand-by” plan in the Will or Trust, to be implemented only if, for example, the Well Spouse dies before the ILL Spouse. The concern is that if the ILL Spouse were then on Medi-Cal, the sudden infusion of monies from the Well Spouse’s estate over to the ILL Spouse would then cause the ILL Spouse to exceed the Medi-Cal resource ceiling and be immediately bounced from benefits. The ILL Spouse would then be obliged to spend down all of those newly inherited funds on his or her own nursing home care until those funds were nearly exhausted. Instead, the alternate plan might provide that the inheritance going to the ILL Spouse in that situation, might go instead to the couple’s children, who might then be charged with looking after their surviving parent. Still another arrangement might be for the Well Spouse to leave his or her share to a **Special Needs Trust in a Will** for the benefit of the ILL Spouse for the duration of his or her lifetime: if properly structured, these funds would then supplement, but not replace, Medi-Cal benefits and after the death of the ILL Spouse, any unused funds might then go to the couple’s children. For more on this topic, go to [www.LawyerForSeniors.com](http://www.LawyerForSeniors.com), click on “Blog”, then click on “Elder Law” and navigate to the article entitled “Planning For An Incapacitated Spouse”.

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(3) For the same reason, consideration should also be given to changing the beneficiary designations on IRA’s, 401K Accounts, and the like, although professional guidance may be necessary to address the legal requirement of “spousal consent” to these changes.

(4) If nursing home entry is imminent, or if a loved one is already in a facility, take appropriate steps to avoid a later Medi-Cal recovery claim if Medi-Cal benefits will be relied upon to subsidize the cost of care.

(5) Healthy Couples: For couples where both are in reasonably good health, but wish to plan for their future by creating in advance a Long Term Care Estate Plan to protect each other, we have created a very special plan entitled the "Spousal Protection Plan". For more, go to www.LawyerForSeniors.com, and at the home page under “Practice Areas” click on “Spousal Protection Planning”.

LEGAL ASSISTANCE

Proper estate and long term care planning should accomplish the following: Make adequate provision for funding the cost of Long Term Care; Vest a spouse or trusted agent with Powers to accelerate eligibility for Medi-Cal if it later becomes necessary; Avoid Probate; Plan for Mental and/or Physical Incapacity; Minimize Capital Gains Taxes; Avoid Medi-Cal Recovery Claims; Minimize Share of Cost For Nursing Home Care; and, lastly but equally important, provide peace of mind so that the Elder and his or her loved ones may continue to live with dignity.

It is always best to seek the aid of a knowledgeable Elder Law Attorney in connection with the matters discussed in this Guide. We hope this information is helpful to you and your family. If our firm may be of assistance to you in regard to these matters, we would be pleased to help.

The Law Offices Of Osofsky & Osofsky
Disclaimer: This Guide is only intended as a general guide to foster discussion and not as advice regarding any individual’s decision or specific course of action, nor to predict any particular result. Each person’s specific circumstances must be evaluated by a competent Elder Law attorney before deciding on a course of action. Laws in this field do change and it is therefore essential to ascertain the current state of the law at the time one plans on taking a particular action. The penalty divisor used to calculate the disqualification period for gifting changes every year, as does the amount of the Community Spouse Resources Allowance and the Minimum Monthly Maintenance Needs Allowance. Furthermore, the information in this Guide is intended to have general application only and is limited to those persons residing in the State of California, as the laws differ among states. Requesting, downloading and/or reviewing this Guide does not create an attorney–client relationship, which can only be created by further written agreement between the prospective client and the law firm of Osofsky & Osofsky.

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Helping Your Loved Ones
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Our office sponsors a monthly newsletter on Elder Law topics via E-Mail. If you would like to subscribe, please send us an e-mail. There is no charge for this subscription.

“ELDER LAW NEWS“

Note to Social Workers & Financial Professionals

We are available to present In-Service Training programs as a public service to groups of social workers, care professionals, financial planners and others who are called upon in their professional work to assist clients with the difficult task of funding the cost of Long Term Care.