

Medicaid Planning for Loved Ones with Disabilities and Special Needs

**JANKOWER LAW FIRM, L.L.C.
Steven M. Jankower
Attorney & Counselor at Law**

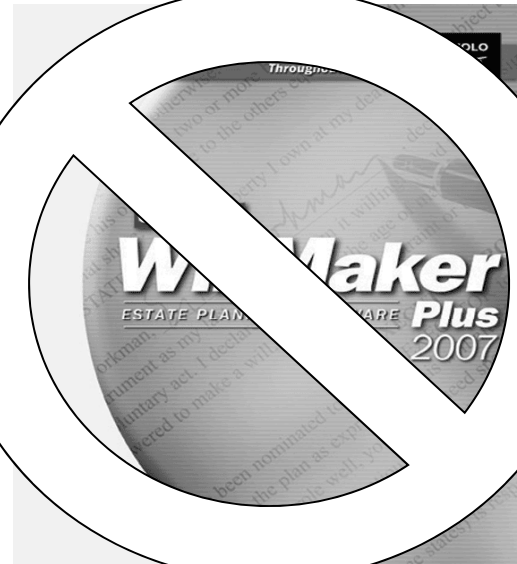
110 Exchange Place, Suite 101 ~ Lafayette, Louisiana 70503 ~ www.Jankower.com

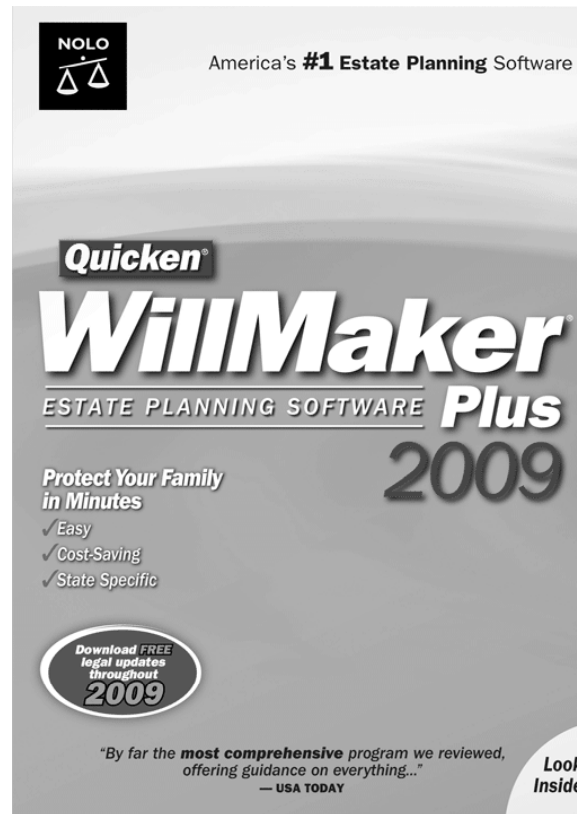
Forget Everything You've Heard About Medicaid Planning

- Why??? Because the vast majority of what you hear “off the street” about Medicaid is ***inaccurate***
- Medicaid planning without the best advice available is ***“like walking blindfolded through a minefield”***
- It can be extremely difficult and ***costly*** to undo Medicaid planning that is not carefully thought out in advance.

Medicaid Planning is More Important in Louisiana Than in Any Other State

WHY???





Estate planning documents not valid in Louisiana

Medicaid Planning is More Important in Louisiana Than in Any Other State

- What is meant by “forced heirship”?
- Who are forced heirs after 1995?
 - Typically developing children are forced heirs until their 24th birthday
 - Children with disabilities or special needs are forced heirs FOR LIFE
 - Children with incurable illnesses or conditions that may become disabling in the future are also forced heirs FOR LIFE
 - Grandchildren can become forced heirs of grandparents

Louisiana's Medicaid Planning Dilemma

- Medicaid is a “means tested” program.
- Individuals seeking Medicaid eligibility must prove that they have countable resources valued at less than \$2,000.
- Louisiana's unique forced heirship laws require children with disabilities or special needs to inherit at least a portion of their parents' estates
- This dilemma makes Medicaid planning more important in Louisiana than anywhere else in the United States.

Medicaid in Louisiana - Individuals in Need of Benefits Can Qualify if They are Willing to Wait

- What is Medicaid?
- Individuals can become eligible for Medicaid benefits in many different ways.
 - Supplemental Security Income (SSI)
 - Medicaid spend-down programs
 - Waiver programs
 - Admission to long-term care facilities

Medicaid Waiver Programs Provide Long-Term Care Options

- Louisiana's community and home-based waiver programs
 - Provide long-term care in home and community settings
 - Waive certain eligibility requirements
 - Examples
 - New Opportunities (NOW) waiver
 - Children's Choice
 - Elderly and Disabled Adults Waiver
 - Supports Waiver
 - Waiver programs are "slotted programs", i.e., eligible recipients must wait for slots to open before they can receive benefits

Alternative Medicaid Options for Long-Term Care

- Institutional care facilities
 - Group homes
 - Nursing care facilities
 - Institutions
- Prior to 1981, Medicaid long-term care was only available in institutional care facilities
- Federal legislation in 1981 allowed waiver programs as options for long-term care in community and home based settings

Benefits

- Physicians and hospital care
- Prescription drugs
- Respite care and personal care attendants
- Skilled nursing
- Dental care
- Case management
- Eyeglasses
- Hearing aids
- Assistive devices

Long Term Care

Medicare and Medicaid – They May Sound the Same But They’re Not

- Medicare
 - There is one Medicare program in the United States, entirely funded and administered by the federal government
 - Currently provides coverage to approximately 40 million Americans.
 - Medicare is the national health insurance program for people age 65 or older, certain individuals under age 65 with disabilities, and persons with “end-stage renal disease”

Medicare and Medicaid – They May Sound the Same But They’re Not

- Recipients of Social Security disability benefit are entitled to receive Medicare after two years.
- Medicare is not a means-tested program, i.e., eligible participants generally do not have to demonstrate a lack of financial means in order to achieve eligibility.
- The Medicare Modernization Act of 2003 now allows prescription drug coverage for eligible recipients.
- Medicare provides ***limited long-term health care benefits*** in the form of skilled nursing care that do not exceed a maximum of one-hundred days.

How Many Medicaid Programs Are There in the United States?

- Medicaid
 - There are ***50 Medicaid programs in the United States***, one for each state.
 - Medicaid is “means-tested”
 - Medicaid is also unique insofar as the way that it is funded and administered
 - Subject to federal guidelines
 - Federal government provides funding
 - States put up matching funds
 - 100% state administered
 - Each state operates its own “version” of Medicaid

Medicaid Eligibility Requirements are Stringent

Individuals with disabilities must demonstrate:

- That they meet disability requirements under Social Security rules
- That they meet stringent income and asset limitations
 - Asset limitations - \$2,000 limitation on countable assets
 - Income limitations - \$2,022 per person (2009-2010 cap limits)
 - Spend-downs are inapplicable to persons receiving benefits through waivers

Medicaid Resource Rules are Complex

- “Countable” Resources
 - General rule – All income and resources are deemed countable unless spent down or an exception exists
- “Non-Countable” Resources
 - Claimant’s principal place of residence
 - One automobile
 - Prepaid irrevocable burial contracts and burial plots
 - Wedding and engagement rings
 - Life insurance (within limits)
 - ***Assets placed in a properly drafted special needs trust.***

“Why Can’t We Give It Away?” – Donating Assets Can Trigger Stiff Medicaid Penalties

- Medicaid applicants can be penalized for disposing of assets in order to achieve Medicaid eligibility
- Penalties apply to transfers of property for “less than fair market value”.
- What are “look back” rules?
- How are transfer penalties computed?

Medicaid Estate Recovery – When the Government Wants It Back

- Federal rules require states to seek recovery of benefits paid to certain Medicaid recipients.
- These requirements only apply to probate assets.
- The requirements only apply to nursing home and home based services paid by Medicaid at age 55 or thereafter.
- Estate recovery can only be sought after the death of the surviving spouse or when there are no children under 21 or disabled children.

Medicaid Estate Recovery – When the Government Wants It Back

- The State must assert its right to seek recovery of assets from a Medicaid recipient's estate.
- The State's claims are subject to a number of defenses.
 - The State cannot seek estate recovery if the amount of the assistance to be recovered is economically inappropriate in relation to the expenses of the recovery.
 - The State cannot institute estate recovery on the first \$15,000 or one-half the median value of the homestead in each parish whichever is higher.
 - The State is authorized to compromise, settle or waive any recovery of medical assistance authorized by this Section upon good cause shown.

Congress Passes Sweeping Changes in Medicaid Eligibility Rules – the Deficit Reduction Act of 2005

- The Deficit Reduction Act of 2005 made significant changes to existing rules regarding Medicaid eligibility.
- These changes were primarily targeted at the nation's elderly population.
- Changes included:
 - Extending “look-back” period to five years
 - Changes in ways transfer penalties are imposed
 - Capping the value of a home as a non-countable resource at \$500,000

Common Myths and Misconceptions About Medicaid Planning

- Myth: An individual cannot have more than \$2,000 in assets in order to be eligible for Medicaid.
- Myth: If an individual owns a family home, it needs to be sold and/or taken out of his or her name in order to achieve Medicaid eligibility.
- Myth: If a Medicaid recipient's name is on a joint bank account, the funds in the bank account can be withdrawn by the non-Medicaid recipient in order to get the funds out of the name of the Medicaid recipient and maintain eligibility.

Common Myths and Misconceptions About Medicaid Planning

- Myth: If an individual has more than \$2,000.00 in his or her name, the only way that the individual can become eligible for Medicaid is to spend the funds and/or assets down below \$2,000 or donate them away.
- Myth: It is not necessary to seek assistance and counsel from persons skilled and experienced in Medicaid planning to help an individual become eligible for benefits.
- Myth: It is better to refrain from telling Medicaid about all funds and resources in the name of a Medicaid applicant, rather than to disclose such information.

Unique Legal Issues Facing Families with Disabled and Special Needs Members

- Who will take care of my child when I am gone?
- Who will make legal decisions for my child when he or she becomes an adult?
- What happens if my child is already an adult – can I make legal decisions for that child?
- Can my child grant me power and authority to act on his or her behalf through a power of attorney?
- Should my child have authority to make decisions regarding personal and legal affairs?

Options for Families

- **Continuing Tutorship** – Permits a child between the ages of 15 and 18 to be declared by the court to be a permanent minor
- **Interdiction** – Proceeding for limiting the legal rights and authority of an individual deemed legally incapable of handling and managing own affairs
- **Durable Power of Attorney** – Allows an individual who has sufficient legal capacity to designate someone who can be given power and authority over business, financial, real estate, personal, and/or medical affairs of an individual

Interdiction or Continuing Tutorship?

- **Continuing Tutorship**

- Allows a child under the age of 18 to remain a legal minor once the child turns 18.
- May only be used for children between the ages of 15 and 18.
- Child must possess “...less than two-thirds of the average mental ability of a normal person of the same age, evidenced by standard testing procedures administered by competent persons...”

Interdiction or Continuing Tutorship?

- Continuing tutorship
 - The need to place the child under continuing tutorship requires the concurrence of the coroner.
 - A formal hearing is not required and the child to be placed under continuing tutorship does not have to be personally served or personally represented by legal counsel.
 - Continuing tutorship is a much less costly and less time consuming procedure than interdiction.

Interdiction or Continuing Tutorship?

- Continuing tutorship
 - Renders the child a legal minor indefinitely
 - Grants the tutor (guardian):
 - Authority to consent to medical treatment or procedures
 - Authority to obtain medical, educational, or other records
 - Limits the tutor's liability for acts of the minor

Interdiction or Continuing Tutorship?

- Interdiction
 - Legal proceeding to have an individual declared incompetent (incapable of handling and managing affairs)
 - Places individual's affairs under control of a curator
 - Can be a full interdiction or a limited interdiction
 - Once a child reaches the age of 18, continuing tutorship is no longer available

Interdiction or Continuing Tutorship?

- Legal requirements
 - Lawsuit must be filed and person sought to be interdicted must be named as defendant and personally served
 - Attorney must be appointed for person to be interdicted
 - Court hearing is required
 - Burden of proof – clear and convincing evidence

Interdiction or Continuing Tutorship?

- Which proceeding is better to use?
 - For a child between the ages of 15 and 18, continuing tutorship is better
 - Less expensive and time consuming
 - Doesn't require all the formalities of interdictions
 - Interdiction is much more expensive and time consuming (particularly where contested)
 - Interdiction may be only available remedy for many

Health Care Issues for Family Members with Disabilities

- Health insurance is costly.
- Family members with disabilities may not be able to get health coverage.
- Health insurance doesn't cover long term care.
- Medicaid is a lifeline for these families.
- Qualifying for Medicaid is extremely difficult because of severe income and asset limitations.

Who May Need Medicaid?

- Families with children with disabilities
- Families with elderly members in need of long term care
 - Long term care problems
 - Prescription drug costs and other expenses not paid by Medicare
- Victims of personal injury claims
- Need for proper planning of estates and handling of personal injury settlements

Problems with Medicaid

- Stringent eligibility requirements
- Limited slots and long waiting lists
- Re-evaluation of qualifications after slots open up
- Tenability of programs due to availability of funding
- Proving eligibility through administrative appeals
- Expenses incurred while waiting to become qualified
- Rights when benefits are denied
 - Due process
 - Administrative appeals

Families Have Limited Options

Disinheritance

Gifts

Transfer of funds to relatives or third parties to be used for the benefit of a family member with disabilities or special needs

Establishment of special needs trust

Special Needs Trusts Are “Quality of Life” Trusts

- What are “special needs trusts”?
 - Such trusts permit expenditure of funds for a beneficiary’s special or supplemental needs
 - Funds cannot be used to pay for things provided by programs such as Medicaid and SSI
- Special needs trusts are “*quality of life*” trusts.
- Special needs trusts allow funds to be placed under the control of a trustee instead of the beneficiary in order to prevent such assets from being counted against the beneficiary for Medicaid eligibility purposes.

Complex Federal Rules Affect Medicaid Eligibility

Omnibus Budget Reconciliation Act of 1993
(OBRA '93) – 42 U.S.C. § 1396p

- President Clinton's "tax increase" legislation
- Made "Medicaid qualifying trusts" illegal
- Attempt by the federal government to "curb Medicaid fraud"

Can Trusts Still Be Used Under OBRA '93

42 U.S.C. 1396p(d)(4)(a) – Referred to as a “d(4)(a) trust” or “Under Age 65 Disability Trust”

- Assets placed in this type of trust are ***non-countable*** for Medicaid purposes
- This type of trust is used for sheltering of assets *already in the name of and/or owned by a individual with disabilities*
- The beneficiary of the trust ***must*** be under the age of 65 and disabled within Social Security disability definitions
- The trust must be created by a parent, grandparent, legal guardian, ***or a court*** and cannot be created by the individual with disabilities

Medicaid Must Be Repaid

- Funds held in a (d)(4)(a) trust are not counted by Medicaid
- PROVIDED that Medicaid must be reimbursed out of remaining trust funds at the death of the disabled beneficiary
- After the beneficiary reaches age 65
 - Assets in the trust are still non-countable by Medicaid
 - However, additional assets added to the trust after age 65 are deemed to be countable assets

Establishing Special Needs Trusts with the Assets of an Individual with Disabilities

- “Under age 65 disability trusts” can be useful in the following circumstances:
 - Personal injury settlements
 - Funds inherited from third parties who did not engage in other Medicaid planning
 - Where an individual with disabilities otherwise already has assets in his or her own name.
- Notwithstanding the aforesaid, Medicaid repayment requirements can counteract the desirability of such trusts

Establishing Special Needs Trusts With Assets of Parents or Third Parties

- How are third party special needs trusts established:
 - May be created as an “inter vivos” (living) trust or as a “testamentary” trust (one created in a will)
 - Medicaid may try to construe an inter vivos special needs trust as a (d)(4)(a) trust and require payback provisions to be included even though there is no legal basis for such requirement.
 - Medicaid does not view testamentary special needs trusts the same way since such trusts are specifically exempted under the express language of the OBRA ‘93 requirements.

Establishing Special Needs Trusts With Assets of Parents or Third Parties

- Bottom line - Where feasible, it is always desirable to establish a third party special needs trust as a testamentary trust rather than a living trust.
- A third party special needs trust established as a testamentary trust represents a “**safe haven**” because the provisions in OBRA '93 regarding the treatment of trusts specifically exclude trusts established “...by will...” See 42 U.S.C. §1396p(d)(2)(A) and Section 3259.1(A)(1) of HCFA Transmittal 64.

When Seeking Medicaid Benefits, Always Remember...

The importance of being a “squeaky wheel”

Not to accept “no” for an answer

That the “Golden Rule” applies

**He who has the
gold makes the
rules!**



Final Thoughts

- Rules governing Medicaid are in a constant state of flux.
- Solutions that may work today may not work tomorrow, or six months from now, or five years from now.
- Critical that wills, trusts, and other planning techniques be revisited on a regular basis.
- Questions concerning the drafting and construction of such trusts should be discussed with an attorney familiar with the constantly changing Medicaid rules.

For more information, please visit:

www.Jankower.com