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Experience Counts!

All too often, we meet with clients who, with the best of intentions, have tried to effectuate Medicaid planning themselves or with an attorney whose practice concentrates in other areas of the law and not elder law. Invariably, we are asked to fix the mistakes that were made. Regrettably, there are some mistakes that cannot be easily corrected.

We recently met with a family: mother and her adult children. Mother always expected all of her children to maintain a close and harmonious relationship. She had not anticipated that her children might grow apart. In 2010, she had decided to transfer her home to her children and retain a life estate in order to protect her largest single asset from the devastating costs of long-term care. She understood that transferring the house would make her ineligible for Medicaid nursing home care for up to five (5) years.

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Berwitz & DiTata LLP Welcomes Marie

Marie Elizabeth Villefranche earned a bachelor's degree, *cum laude*, in History from Hunter College and a Master's degree in History from Rutgers University. Thereafter, she obtained a law degree from the Benjamin N. Cardozo School of Law. During law school, Marie was the recipient of the New York Bar Foundation Trusts and Estates Law fellowship and interned for the Honorable Ronald L. Ellis, Southern District of New York, and the Honorable Robert J. Gigante, Surrogate of Richmond County. An article based on Marie's research

has been published in the New York Law Journal. She is admitted to practice law in New York. Marie is a member of the New York State, Nassau County, and New York City Bar Associations. She practices in the areas of elder law, estate planning, and estate administration.

In her spare time, Marie loves to read, watch foreign films and shows, and spend time with her husband and two children.



Why Estate Planning is Important for New Parents

Expecting and new parents have a lot on their minds and estate planning should be among them. From the anticipation of the arrival of their baby to the sleepless nights with a newborn, becoming a new parent carries new responsibilities. A Last Will and Testament is the only legal way to designate a guardian for your minor child(ren). If you do not have a Will that designates the person whom you desire to be your child's guardian in the event that something happens to you and your spouse, the court will appoint a guardian. You run the risk that grandparents, aunts, uncles, cousins and/or friends may be fighting over this appointment -

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Federal law requires each state to attempt to recover the benefits paid by Medicaid from the estate of a Medicaid recipient after the recipient's death. While Medicaid planning is permissible, and Medicaid even promulgates rules to help us plan for future eligibility, many people do not recognize the benefits or avail themselves of these

rights. If planning is not instituted in advance of an application for benefits, a Medicaid recipient's home may be sold to settle Medicaid's claim.

After the death of a Medicaid recipient who was at least 55 years of age when they received benefits, or of any age when they were permanently institutionalized, the state may seek recovery, from their estate, for benefits paid for nursing home care, home and community-based services and other related hospital and prescription drugs services. This means that property that is held in the name of the Medicaid recipient alone is, at their death, subject to recovery for services rendered within 10 years of recipient's death.

In addition to the right to recover from the estate of the Medicaid recipient, Medicaid may place a lien on real estate owned by the recipient during his or her lifetime if determined "permanently institutionalized" unless certain dependent relatives are living in the property. Medicaid may not impose a lien if a spouse, a disabled or blind child, a child under age 21,

or a sibling with an equity interest in the house is living in it.

Once a lien is placed on the home, and if the property is sold while the Medicaid recipient is living, not only will he or she become ineligible for continuing Medicaid benefits upon receipt of the proceeds of the sale, but Medicaid will require reimbursement for the cost of the benefits already provided.

There are circumstances under which the value of a house can be protected from Medicaid recovery. Medicaid cannot recover as long as it is not a probate asset. If the house is in a revocable or an irrevocable trust, if it has been transferred to another individual or the Medicaid recipient relinquished his or her ownership interest, Medicaid will not be permitted to recover any portion of the benefits it paid. It is important to know your rights and to understand how to protect your assets before an application for Medicaid is prepared and submitted. Berwitz & DiTata LLP can review your plan to advise how best to protect your assets and minimize estate recovery.

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and creating ill feelings among the very people that your little one will need to rely on. Worse yet, the Court may appoint an independent guardian who doesn't even know your child.

New York law prohibits a child under the age of 18 years from directly inheriting and controlling money and/or property. The guardian will manage the money and/or property until the child attains the age of 18, when he/she

becomes a legal "adult." Without meaning to disparage your favorite 18-year old, "adult" is not usually the first word that we think of to describe them! Moreover, once your minor beneficiary reaches the age of 18, he/she attains complete control over their inherited assets. Even the most responsible 18-year old would be devastated by the impact of losing one or both parents and may suffer emotional setbacks and even regress to the point of fiscal irre-

sponsibility. It is usually preferable to delay control over the assets for some time, which can be accomplished by the terms of a well-crafted Will, so that your minor beneficiary does not receive their inheritance in a lump sum at the age of 18.

These are just some of the reasons Berwitz & DiTata LLP has developed a special program for new parents whereby we offer services at a discounted rate. We strongly encourage all families to implement Last Wills and Testaments when they have a minor child.

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But, at the time, she was healthy and hoped to remain so for many years to come. She did not understand that she would continue to be obligated to pay all of the expenses of the house even if she could no longer reside there, including property taxes, insurance, maintenance and repairs. She also did not know that she would be entitled to a share of the proceeds of any future sale.

Mom should have engaged an experienced elder law attorney to assist her. Had she done so, that attorney would have identified potential pitfalls of transferring any part of her home to her children and could have suggested alternatives to protect the house without the risks. What could go wrong? Well, firstly, not all children cooperate with their parent's expectations. Assuming that her children had the very best of intentions, many issues can and do arise: children sometimes predecease their parents; children sometimes have their own financial problems which can expose their parents' assets to *their* creditors; children can divorce. Any of these unfortunate life experiences could significantly de-rail Mom's planning. Her "family" attorney, the person who helped her purchase her home, did not have the experience to identify these issues. He did not know how to accomplish her goals and minimize the potential problems. Instead, when she asked him to prepare a deed transferring the house to her children subject to her life estate, he did so.

Fast forward to 2020, when one of her sons moved in with her after his divorce. He was a heavy smoker but respected Mom's wishes that he

not smoke in the house. He did not contribute to the expense of running or maintaining the house. Early in 2021, Mom's condition deteriorated and she moved in with one of her daughters who was able to provide assistance to Mom with bathing, dressing, toileting and other activities. Her son had made it plain that he could not provide sufficient care for her. When a Medicaid application needed to be submitted, again, rather than engage an elder law attorney, the family used a service. While they secured Medicaid benefits for Mom, the service was not equipped to counsel the family as to how to go about maintaining the house, paying the expenses or protecting Mom's share of the proceeds of any future sale.

During all of 2021, the divorced son lived in the house alone. He no longer concerned himself with the effects that his chain-smoking would have on Mom or on her house. He no longer left the house to smoke. Instead, he placed ashtrays in the kitchen, his bedroom, the bathroom and the living room next to his favorite chair in front of the television (where he spent most of his days because he did not work). Of course, he still refused to contribute to the cost of maintaining the house, and a brother and sister paid for all of the expenses, including utilities that he refused to pay. The siblings kept meticulous records and, by year's end, they had spent over \$30,000.00. Moreover, when a contractor had been brought in to make repairs, he advised the siblings that the extreme smoke conditions had infiltrated the walls and were causing damage to the house that will cost thousands of dollars to correct. While all of the siblings, with the exception of the



divorced brother, recognized that the house would have to be sold, the divorced son would not agree. Because he was a part owner of the house, it could not be sold without his cooperation.

The family finally sought our advice and counsel and this is what they learned: there is a way to remove the divorced son from the house and compel its sale but it involves suing their brother in Court. This could take years and the legal fees could be significant. In the interim, they must maintain the house and insure it in order that it holds its value for sale. When they finally have the ability to sell the house, they must eradicate the smoke which will continue to worsen the longer it takes to remove their brother. Mom's share of the proceeds of the sale will disqualify her from receiving continuing

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Medicaid benefits. Ideally, some of her share of the proceeds should reimburse those of her children who have been carrying the house. Unfortunately, Medicaid considers payments children make on behalf of their parents to have been made “out of love and affection.” Repayment of those expenses will be considered by Medicaid to be a gift to those children and that will cause Mom to become ineligible again for nursing home benefits should her condition deteriorate. All of the problems this family is facing could have been avoided had we been involved from the outset.

This is a cautionary tale. Seek advice from those who have experience. Beware of attorneys who think they can do everything. They do not know what they don’t know and, more often than not, they do not even anticipate the problems that are likely to arise. Please do not make the same mistake. Our practice concentrates in elder law, Medicaid, estate and special needs planning, estate and trust administration and litigation in those areas. Please help us to help you by speaking with us when you need guidance, not after the mistakes have been made.

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