

Asset Sheltering

by Jim Schuster Certified Elder Law Attorney



Asset protection?

What is it?

I often hear professionals talk about "asset protection" as though it were some exotic land they never visited. I wonder "Do they know what they are talking about?" Something is missing in their solution. What are we protecting assets for? What are we protecting against?

Let us put the question of asset protection in context. In general when we speak of asset protection we are addressing a particular threat. There is no one thing we can do to protect all assets from all harm. For example fire insurance on our home protects our assets from loss due to fire. We have home owners insurance to insure or "protect our assets" from claims of those who may be injured on our property. Multi-millionaires may protect their assets from taxes by using tax strategies or loopholes in the tax law.

Nursing home cost

In the context of the elder

conversation the term asset protection usually means we are protecting assets against the high cost of nursing home care. That means that the government program Medicaid will pay for the cost of care. But Medicaid is a "means tested" or asset limited program. A single person can have no more than \$2,000 in "countable assets." Even a person with only \$3,000 in life savings is not eligible.

Medicaid's "loopholes"

When Congress enacted the Medicaid laws, it provided many allowances or "loopholes." These allow significant asset protection to the applicant and family. For example, a home and motor vehicle are exempt from the required spending of assets. So are business assets. The program allows for protection of spouses, dependent or disabled children. The program allowances make asset protection possible and may be relied upon when applying for Medicaid.

However, when many "advisors" talk about "asset protection" they contemplate action by people years away from a nursing home stay. They imply a scheme to somehow make assets disappear while we still enjoy them. These strategies have serious drawbacks, risks and unintended consequences.

Give it all away?

Perhaps the stereotypical long-time-frame Medicaid asset protection scheme is the "give it all away" strategy. The idea is to give the assets to a trusted person years before a nursing home is needed. As crazy as it sounds – and it is – it has a germ of common sense truth. Many elders have a nest egg that they will not touch until absolutely necessary, such as long term care in a nursing home. So, the theory goes, give the savings to a child who will let it grow untouched. Apart from the obvious questions of how we may ensure the safety of the funds, we may identify a core problem with this strategy by asking a familiar question. "How can you have your cake and eat it too?"

How do we live without assets?

For example suppose Mr. Smith, an 80 year old gentleman in reasonably good health, gives away \$200,000. Suppose a year later he needs a new roof at a cost of \$7,000 or a new car at \$20,000? Where does the money come from? Suppose two years later he has a stroke and his home needs major alterations to make it accessible for a wheelchair? Where does the money come from? What if he needs to move to an assisted living community? The monthly rent can exceed \$5,000 per month. What if the person he gave the money to uses the money to pay the bills? Does that destroy all or just part of the “gift”? The presumptive answer is “yes.” If he applies for Medicaid the entire \$200,000 transfer may be found a sham and that the money is available to pay the nursing home bills.

What if the law changes?

There is another fundamental problem with many long-term Medicaid asset protection schemes. They must be based on the Medicaid law. If that changes the scheme may be worthless. For example “Medicaid friendly” annuities were sold for years to “protect assets from the nursing home.” The idea was that the purchaser could have the money at any time, but if nursing home care was needed then the annuity would switch to a limited monthly payment. This scheme is now worthless. On February 8, 2006 President Bush signed the law that made the government the final beneficiary in Medicaid annuities. The funds in the annuity either go to the

nursing home or the government. The asset protection turned into smoke.

The 2006 law also changed the “look back” of Medicaid from three years to five years. That means an extra two years of scrutiny into financial transfers. The way it works is that any gifts made during the five year period will be considered to be made the date of application. If a person needed a nursing home after less than five years, the applicant would not receive assistance. It is likely that many people who made plans based on a three year look back will be denied assistance.

And, if we’re successful, we get a nursing home.

If the scheme works then Medicaid will pay all of our nursing home bills. But, who wants to go to a nursing home? Medicaid will not pay for in-home care services. Nor will it pay for “assisted living” residential apartments. It will pay for a nursing home. Perhaps if we had our assets we could afford to pay for an alternative to the nursing home. But no money – no alternative.

We still have a problem

The moral so far is that the plan can fail just when we need it. We can be in a nursing home with no way to pay the bill. How long before we would be dumped and eventually end up at the only nursing home that would take us? What kind of a future is that?

Asset Protection that really protects

It can be done. There are no simple strategies since life is not

simple. Anything can happen.

Real protection takes a strategy that provides the highest quality of life with the most protection no matter what happens. It must take into account the kind and type of assets that are available. It must identify risks and consequences. The plan must provide for alternatives to nursing home placement.

The asset protection plan must be personal and individual. That is it must protect the person as well as the assets. It must identify the resources available both human and financial. It must dictate the standard of care and provide instruction to those who will be assisting. The plan must consider the needs of the individual spouses, which may be quite different. The plan must address our desire to leave an inheritance or not and if so, what will be the terms. The plan coordinates the response of the client’s family and professionals. The plan may contemplate long term care insurance or reverse mortgage for alternatives to the nursing home. It may contemplate compensating family members for taking time from employment to be a part of the solution.

The elder law attorney’s role is to fashion the strategy that pulls everything together and create the legal structure by specialized legal documents needed to make the plan a success.

Asset protection is not easy. But, it can be done. When the threat is the ruinous cost of long term care, contact an experienced elder law attorney.