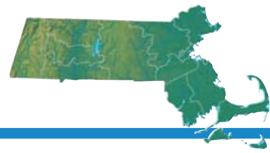
HOW TO PROTECT YOUR LEGACY FROM THE NURSING HOME

by Donald H. Sienkiewicz, Esq.

A Guide for Massachusetts & New Hampshire Residents



Everyone says:

I'll never go to a nursing home

But nursing homes are full of people who never planned to be there.

In America, we have a mixed policy about taking care of our elders: we have some publicly-supported programs that everyone is entitled to (Medicare, Social Security), but we also force people with money to contribute to their own care, up to a point. That's how Medicaid works: it will pay for your care in a nursing home, but only after you've contributed your own money, to the extent you can. **The big exception? People who hire lawyers to plan in advance can keep hundreds of thousands of dollars out of the hands of the nursing home and in the hands of their family.**

By the way, how do you tell Medicare and Medicaid apart? Medicare is the health insurance we get from the government when we turn 65, whether we're rich or poor. MedicAID pays for healthcare for poor children, certain disabled adults, and also pays for long-term care at home or in an institution for elders who cannot pay for such care themselves.

Sometimes those of us in the profession say the "AID" in Medicaid stands for "All Investments Depleted." However, that doesn't have to be the case if you plan ahead with an "Elder Law" attorney. Be sure to find one who specializes in Medicaid eligibility, a VERY complicated area of law most estate-planning lawyers don't work in. The trade organization NAELA (National Academy of Elder Law Attorneys) has a directory on its website – that's a good place to start.

The sad fact is that two identically-situated people can leave vastly different legacies to support their spouses and children, if one of them hired a lawyer before ending up in a nursing home and the other one didn't. The difference can be hundreds of thousands - even more than a million dollars.

There are 3 WAYS TO PAY for long-term care:

1 YOUR MONEY

2 INSURANCE MONEY

3 THE GOVERNMENT'S MONEY (MEDICAID)

If you have ten thousand dollars to your name, you don't really have a problem, because you will qualify for Medicaid almost immediately and you weren't going to leave much to your spouse or children anyway. If you have ten million dollars, you also don't have a problem, because you can pay for a very good facility for several years, and still leave a nice legacy to your children.

But if you're one of the huge number of American families in the middle, you have a problem, **and a lot to lose.** You worked hard and saved all your life and want to leave something behind to help your spouse, children, and grandchildren have an easier time of it. Your care in a nursing home today would cost between ten and fifteen thousand dollars a month, on average, and costs keep rising. At $120,000 per year, that will erode your legacy very quickly.

According to The U.S. Department of Health and Human Services, two thirds of us – you, me, and everyone we know – will need long-term care at the end of our lives:

- Someone turning age 65 today has almost a **70% chance** of needing some type of long-term care services and supports in their remaining years
- **Women need care longer** (3.7 years) than men (2.2 years)
- One-third of today's 65 year-olds may never need long-term care support, but **20 percent will need it for longer than 5 years**[1]

The take-home point:

THE NEED FOR LONG-TERM CARE AT THE END OF LIFE IS THE BIGGEST AND MOST LIKELY THREAT TO MIDDLE-CLASS ESTATES.

BIGGER THAN TAXES

STOCK - MARKET CRASHES

Bigger than fraud, theft, and unscrupulous advisors charging unreasonable fees. More likely than your spouse remarrying a wastrel or a thief and blowing your hard-won savings (though that does happen pretty often).

How does Medicaid work?

Imagine you and your spouse are living happily in your home. Then you fall and break your hip. You go to the hospital and get a titanium joint installed. They send you to the rehab center, where after thirty days or so of hard work, it becomes obvious that you won't be able to live independently anymore, or your spouse won't be able to care for you in your home. The rehab center administrator says "**Medicare** only pays for the first hundred days in a long-term care facility, so you've got seventy days left. How do you plan to pay our bill after that?"

If you have **income** from a pension, Social Security, retirement account required minimum distributions, and/or interest and dividends on your investments sufficient to pay the $10,000 per month nursing home bill, you pay from that. If you don't have enough income, you start eating into your **assets** to write that check every month.

When you get toward the end of your savings, you fill out a Medicaid application. It asks you, "what sources of **income** do you have; what **assets** do you have; and what have you **given away** (or put into an irrevocable trust) in the last FIVE years. This is the infamous **"five-year lookback."** The Medicaid application is submitted to your State's Department of Health and Human Services (Medicaid for long-term care is a Federal program, paid for half by the Feds and half by the States). If the State decides you qualify, it approves your application, and begins paying the nursing home on your behalf.

The State won't take your word on the application, by the way. It will require you to submit FIVE YEARS of monthly statements from every checking, saving and brokerage account you own, as well as information about annuities and life insurance policies that may have cash value.

If you're single, everything you own is fair game, and you have to "spend down" your own resources until you only have $2,500 left before you will qualify for Medicaid.

If you're married, everything BOTH of you

[1] http://longtermcare.gov/the-basics/how-much-care-will-you-need/

owns is fair game – even retirement accounts in the healthy spouse's name only. This is why people sometimes get "Medicaid divorces," though that is a bit of a radical strategy. It may be more useful for unmarried couples to get a "Medicaid marriage," because there is a big exemption for a healthy spouse: up to $119,220 in liquid assets PLUS a residence.[2] The State also allows us to shift SOME income (called a minimum monthly maintenance needs allowance) from the nursing-home spouse to the at-home (or "community") spouse. After all, Congress doesn't want spouses living in poverty just because their other half is in a nursing home.[3]

That's right. As long as there is a spouse in the house, the State will never take it, nor even put a lien on it. The problem comes after the first spouse dies, by which point the "spouse in the house" may herself be in a nursing home, or too elderly to have the will and clarity of mind to take meaningful planning steps on her own.

How does the Five-Year Lookback Work?

Here's how the five-year look back works. You've applied for Medicaid and disclosed every gift you've made (that you can remember) over the past five years. The State's assigned caseworker goes through your bank statements and says "here's a check for $19,930 that you wrote to your child four years ago. What's that for?" The State will assume that any gift you made was intended to remove assets and qualify you for Medicaid – they call that a "disqualifying transfer." At that point the State says **"you are NOT qualified for Medicaid; go away and don't re-apply for TWO months."**

Where do they come up with that number? Well, every year the State surveys nursing homes that accept Medicaid reimbursement and publishes the average cost of a private-paid "bed" in that facility. That cost in New Hampshire is currently $9,965 (and higher in Massachusetts). The State then divides that number into the amount of the "disqualifying transfer" (gift) – which I made to be exactly double, so the arithmetic is easy ($9,965 x 2 = $19,930).

Now you're in a pickle: you've run out of money, the nursing home is sending you bills, and the State has denied your application for Medicaid. At this point you or your adult children may decide to hire someone like me to appeal the decision to a higher authority, which is an expensive and uncertain proposition. **This is why it's very important to hire an experienced Elder Law attorney to prepare your Medicaid application,** so we can go through all of those bank statements in advance and make the best case possible for approval (see Strategy number 7 below).

This is also why it's important to meet with an Elder Law attorney **before** making significant **gifts** to your children if you have an inkling that you may be headed for a long-term care facility in the next five years. **By the way, people are often confused about the $14,000 annual exclusion amount.** That's the amount you can give to anyone in one calendar year without having to report it to the IRS – a totally different issue. As a practical matter, when you apply for Medicaid, the State (not the Feds) will ask you to **justify every check you write over $500** (or any series of checks you've written, to the same person, that adds up to that amount).

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[2] https://www.nhbar.org/uploads/pdf/MedicaidPamphlet.pdf
[3] Same as Footnote 1, above, at Page 5. The spouse is entitled, currently, to a maximum maintenance allowance, including from income of the nursing home spouse, of $2,981 per month, depending on housing costs. For our Massachusetts clients, it's the same, even though cost of living in the Commonwealth is often higher: http://www.mass.gov/eohhs/docs/masshealth/memlibrary/figures-used-to-determine-minimum-monthly-maintenance-needs-allowance.pdf

How do you know if an Irrevocable Trust is right for you?

Is it important to you to leave your children an inheritance? **If you don't mind using all of your assets to pay for your own care at the end of life**, then maybe you shouldn't try to save anything for them. Nursing homes are businesses, they are expensive to run, and someone has to pay to care for our elders. In America, we've decided that it's going to be a combination of the nursing home residents themselves and their fellow taxpayers.

If, however, you are determined that your children will inherit SOMETHING, an irrevocable trust may be right for you.

If you've investigated long-term care insurance (See Strategy 1, below) and it's too expensive, you can't get coverage, or it leaves exposure that you're uncomfortable with, an irrevocable trust could be the next step.

Read on to learn my Seven Strategies for ensuring your children receive the inheritance, not the nursing home.

Seven Strategies for Saving your Legacy from the Nursing Home

1. 10-20 years prior to nursing-home admission.

Look into **long-term care insurance.** This is a good strategy for you if you're between fifty and seventy. Younger than that and you're likely to pay premiums for a long time without seeing a benefit (unless you've got a health condition, like diabetes or a degenerative disease, that increases your risk of becoming unable to live independently at a younger age). Older than that and you may be too high a risk for an insurance company to take on, unless they charge you a very high premium.

There are two flavors of long-term care insurance. The first is **"traditional" insurance**, in which you pay an annual premium, usually several thousand dollars. If you stop paying the premium, you lose the insurance – just like your auto, home, or health insurance.

The second "flavor" is a **hybrid contract.** For example, you give an insurance company $100,000, and they lock up your money for a few years while they go invest it and try to make a profit for themselves in the stock market. If you get cold feet and want your $100,000 back, some companies will give it back (without interest) after a lock-out period. Or, if you (or your spouse) need long-term care, they'll pay for some multiple of your investment – say $300,000, or about two and a half years in a facility. If you die instead, they'll pay a $200,000 death benefit to whomever you designate.

If you don't know anyone who sells long-term care insurance, ask your Elder Law attorney for a recommendation.

2. 3-20 years prior to nursing-home admission.

Create an **Irrevocable Trust.** Unlike the common REVOCABLE trust many middle-class Americans use to avoid probate and protect their CHILDRENS inheritance from bad people, bad choices, and bad luck, an IRREVOCABLE trust will, if done right, protect your OWN assets from people you owe money to – including a nursing home.

However, an Irrevocable Trust is a lockbox: you put a chunk of money (or real estate, or mutual funds – whatever) into it, and you cannot get it out. The Trustee (which can't be you) CAN pay you the net **income**, for example if it's a rental property or a portfolio of dividend-paying stocks. **But you need to be sure that you won't want or need that money back in retirement.**

The courts have given some guidance about the **"magic words"** successful irrevocable trust agreements must contain. Equally important, however, is ensuring that you choose a **knowledgeable trustee**, and that the trustee **"administers" the trust properly** over the next five years of the potential "lookback" period. That means, if you put your home into the trust, that all expenses related to the home (snowplowing, lawn care, property taxes, utilities, the new roof, the upgraded kitchen) are paid by the Trustee out of the Trust checking account, and not by you personally.

In fact, the most conservative of us Elder Law attorneys are advising our clients to pay a reasonable rent to the Trustee, who is effectively the landlord. This is because the Courts have frowned on clients who lock up their houses in an irrevocable trust, benefit from rent-free shelter, and then ask their fellow taxpayers to pay for the nursing home when they can't stay in their house anymore. Paying rent on your own home may seem strange, but once you realize that the money is just paying the property taxes that you would have paid anyway, and that any surplus goes to your kids when you die, you realize it's just a different way of keeping the books.

When a client inquires about an irrevocable trust, we run the numbers carefully. Are you likely to need nursing-home care during the next five years? If so, how much are you determined to leave to your children, and how much do you need to leave OUT of the trust so you can pay for your own care during the remainder of the five-year lookback? And what are the best assets to put into the trust – your residence, other real estate, brokerage accounts, etc.?

3. When you want to move in with the kids, but may or may not need care:

Often, parents move in with their adult children to be close to the grandchildren and provide daycare. Or, Grandma or Grandpa may need some company or help getting around. This is often a win-win situation and a wonderful opportunity for the family. **If you pay to build an addition or in-law apartment, or modify the house to make it accessible**, the State may view that as a gift to your children if you apply for Medicaid within five years, **and deny your Medicaid application, leaving the cost of your care a burden on your children.**

The safest course is to **hire an Elder Law attorney to prepare a contract BEFORE spending a dime on the renovation or addition.** In this contract the attorney will help you document all of your expenditures. It may be advisable to hire an appraiser to determine the effect on the value of your child's home, and it may even make sense for you to **purchase the right to live in that home** for the rest of your life. **Capital gains taxes** and other estate-planning goals need to be considered carefully.

4. When you need some daily care and have a child who can provide it:

If you move in with your adult child, or she moves in with you, and provides you with care that would otherwise have to pay a stranger for, **that has economic value.** It may seem strange to pay your child a wage for giving care that she would provide out of love alone, but if you wait until you've applied for Medicaid to try to reimburse her for those years of care, **the State will disallow it, and if you already paid her, they will deny your Medicaid application.** On the other hand, the State will

honor a written Caregiver Agreement **signed in advance** that **properly** documents the "Activities of Daily Living" you need assistance with and pays your child a **reasonable** hourly rate.

5. When you know you will need to go to a nursing home soon, or have been admitted to one:

DON'T PANIC! Much can still be done to save assets IF YOU GO SEE A QUALIFIED ELDER LAW ATTORNEY. "Qualified" is the key word here. I recently was consulted by the adult children of a woman who had had deeded her home to those children many years before, outside the five-year lookback. She was in a nursing home and they had gone to a **well-known, big-firm es-**

tate-planning lawyer and had him prepare a “release” of her life estate, which she had signed. I couldn’t believe my eyes – with the help of their lawyer, they had just committed a mistake which was going to cost them over a hundred thousand dollars in lost inheritance. **PLEASE - DON’T DO ANYTHING WITHOUT CONSULTING A LAWYER WHO PRACTICES IN THE AREA OF MEDICAID ELIGIBILITY.**

6. After a nursing-home admission, but while you still have money to pay for your own care:

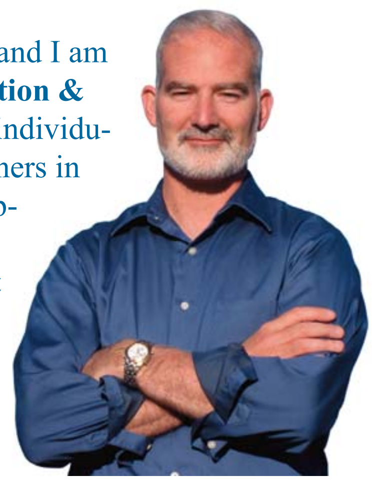
Come see an Elder Law Attorney to help you apply for a “Resource Assessment” and plan a strategic spend-down of your assets to the state limits. At this point we can still use the rules to your advantage. For example, the community spouse is allowed to have a motor vehicle. We may advise you to take $30,000 out of a retirement account and buy your spouse a new, reliable car for cash. Not a Bugatti, though – the State will fight you on that (this actually happened! The Bugatti was an antique. Probably any German or Italian sports car is risky…).

7. After a nursing-home admission, when it becomes clear you will not have enough money to pay for your own care for the rest of your life:

Hire an Elder Law attorney to prepare your Medicaid Application. The nursing home social workers, as well as the State’s own social workers, will be happy to help you with this. **But their job is NOT protecting your assets for your family – it’s obtaining Medicaid reimbursement for the nursing home.** Please think twice before trying to do this on your own, or hiring an estate planner, general practitioner, social worker or “Medicaid Specialist” not affiliated with an Elder Law firm.

Nothing is a bigger threat to your middle-class legacy than the cost of long-term care, and the Medicaid rules are very complicated. The few hundred dollars you spend on a personalized consultation with an Elder Law attorney could be the most effective insurance against asset loss you’ll ever buy.

About Donald H. Sienkiewicz, Esq.



I am **Donald H. Sienkiewicz** and I am the owner of **Estate Preservation & Planning Law Office.** I help individuals, families, and business owners in Massachusetts and New Hampshire avoid unnecessary taxes, legal entanglements, and asset loss while preserving the security and freedom you have worked so hard to achieve.

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