

# Maximization of Benefits: Working with an Attorney Focused on Elder Law to Protect Your Clients and Your Practice by Matthew T. Smith, JD, MBA



Now that the baby boomers reach retirement age, more people are receiving disability benefits. And the impact of them living longer is that they will require more and more services. As a country, we are not prepared for this massive cost increase. It is simple math: the more people needing services

means there will be more competition for those services. When providing services for our clients, it is imperative that we are not endangering them, by inadvertently risking the loss of vital benefits that are increasingly harder and harder to secure. It is therefore necessary to have, at the very least, a basic understanding of the landmines that await you in the realm of public benefits.

According to the Genworth Cost of Care Survey of 2015,<sup>1</sup> seventy percent (70%) of Americans over the age of sixty-five (65) will eventually need some type of long-term care. Unless demographics change radically, by the year 2030, more than one-fifth of the United States will be over the age of sixty-five.<sup>2</sup> As of January 2018, there were more than 4.8 million people receiving Supplemental Security Income (SSI) in the United States.<sup>3</sup> For purposes of this article, we will not be discussing Veterans Aid and Attendance benefits but will focus on Medicaid Benefits for Skilled Nursing.

There are some who will simply ignore these issues, seeing them as merely ancillary to their chosen area of law. Be advised however that courts have held that not considering and planning for the clients means-tested government benefits can result in a legal malpractice claim<sup>4</sup> for "a breach of fiduciary duty or dereliction of duty if not considered by a fiduciary or approved by a court."<sup>5</sup> The Kentucky Bar Association has opined on the matter of attorneys assisting clients in the area of qualifying for government Medicaid benefits by stating:

***The Kentucky Rules of Professional Conduct do not create an ethical prohibition on a lawyer assisting a client to structure their financial affairs so as to qualify for government Medicaid benefits. Furthermore, it would appear that the failure to so advise a client might be considered below minimum professional standards.***<sup>6</sup>

This article examines how well-intentioned legal problem solving can negatively impact your clients in the future and the ways in which an attorney who focuses in Elder Law can provide solutions to these issues.

## Personal Injury

You have just settled a large personal injury case for a twenty-year-old woman who will most likely require medical attention the rest of her life. You are now waiting on the insurance company to pay. You were diligent and made sure that Medicaid and Medicare liens were paid and that there are no unforeseen subrogation issues. In speaking with your client prior to the disbursement of proceeds, it comes to your attention that your client is currently receiving SSI and Medicaid. After some research, you realize that the proceeds of the settlement will force your client to lose her SSI and Medicaid benefits. What do you do?

An attorney focusing on Elder Law can guide you through the maze of public benefits and may be able to help establish a special needs trust that would help preserve your client's benefits, while at the same time using the settlement proceeds to improve their quality of life.

What do you do when your client receives a settlement while still in a nursing home? Your sixty-six-year-old client has been receiving Medicaid Long Term Care benefits for the past three years while living at Kentucky Nursing Home (KNH). You have just litigated a \$100,000 settlement for your client. You now have a problem! Kentucky Medicaid long term care recipients can only have \$2,000 in resources. Your client, once they receive their settlement, will lose Medicaid and be required to privately pay the nursing home at the cost of \$7,500 a month. This means that in less than eighteen months your client will have given their entire settlement back to the nursing home. Your client has a couple of possible options. They can use their proceeds to fund a pooled special needs trust where assets from other disabled people are pooled together for investment purposes. Pooled trusts can be funded after age sixty-five where first party special needs trusts cannot. Pooled trusts, like first party trusts, generally have some type of payback provision for Medicaid, as well. A good resource for pooled special needs trust is Life Plan based in Lexington, Kentucky<sup>7</sup> or Secured Futures/Toughest kids.<sup>8</sup>

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Another planning tool that can work is implementing a gifting and planning strategy with the help of either a trust, promissory note, or annuity, wherein your client can usually save about half of the proceeds from the settlement to be held for the benefit of your client while at the same time not having many of the legal restrictions as transferring the funds to a pooled trust. This strategy is highly involved and in the case where the client does not have capacity, court supervision of the transfer is a good policy to avoid questions regarding any fiduciary issues.

### Estate Planning

How do you protect public benefits from being lost due to the outright inheritances left to disabled children by your clients? You can transfer the property to a Supplemental Third Party Special Needs Trust<sup>9</sup> for the benefit of your child. Why a Third Party, why not transfer the property to your child, and then have them transfer the property? Once your child technically owns the property their property would have to be placed into a First Party Special Needs Trust.<sup>10</sup> The key difference between a first-party and a third-party trust is that any funds remaining in a First Party Special Needs Trust upon the death of the special needs beneficiary must be paid back to Medicaid for any services provided during the beneficiary's lifetime.<sup>11</sup> Therefore, it is critical to control who has actual ownership of any property that is to be used for the benefit of the person with a disability.

The use of revocable trusts is often a helpful tool for protecting against the cost of probate, but what about the use of revocable trusts for the protection of public benefits? Property placed into a revocable trust is still countable as a resource for purposes of Medicaid, Social Security, and the Veteran's Administration. Revocable trusts can accomplish many things for your clients but it does nothing to protect them from the possible costs of long-term care.

A comprehensive power of attorney (POA) is also important when dealing with public benefits. Currently a universal power of attorney bill<sup>12</sup> has been proposed in the Kentucky House of Representatives, but has not yet been adopted, so in the meantime Kentucky attorneys are still forced to use very generic guidelines for powers of attorney.<sup>13</sup> Issues arising from generic powers of attorney deal generally with the authority to draft trusts or gifting, wherein many POAs only allow gifting up to the annual gift tax exclusion, which does little for those needing to transfer real estate or large amounts

of resources in a short amount of time. If your POA is not comprehensive enough at the time when you finally need to use it, then your client may be forced into guardianship court to take the required steps to protect their loved one's assets.

### Property

Most practitioners are aware of the 60-month (5-year) look back for purposes of being approved for Medicaid benefits.<sup>14</sup> Knowing this, attorneys with clients who want to protect their homes but want to be able to live in their homes as long as possible often draft deeds transferring their home to their children but retaining a life estate in the property. This would seem to accomplish both the goals of keeping the client confident that they can remain in their own home as long as they want but also removing the property from being a countable resource for purposes of Medicaid eligibility. For your client, the retained life estate is an exempt resource for Medicaid eligibility purposes, but the value of the life estate the moment before death is subject to estate recovery.<sup>15</sup> Medicaid has their own calculation table to determine the actual value of the Life Estate.<sup>16</sup> What that means for your client is that after they pass away, Medicaid has the authority to recover from their estate the value of the life estate right before the death of your client.

So what happens if your client decides to simply transfer the property to their child and not retain a life estate? Well outside of the obvious issues that an outright transfer can have (eg. the child going through a divorce, filing bankruptcy, being sued themselves, or simply selling the property and keeping the proceeds themselves), there are a few more subtle issues not considered. An outright transfer to a child in most instances will cost your client their Homestead exemption<sup>17</sup> for property taxes, which, depending on the value of the home can cost your client thousands of dollars a year in unnecessary property taxes. Also, if your client has accumulated value in their home since the date that they purchased the property, then the outright transfer to their child without a sale could cause the loss of your client's step up in basis on the home,<sup>18</sup> causing unwanted capital gains for your client's heirs.

Being aware of these issues can help your practice and your clients avoid putting public benefits at risk. Seeking out and utilizing an attorney who focuses on elder law can add an entirely new dimension of value to your clients and your practice. Ultimately, this can improve the overall quality of life for not only your clients, but also for their parents and children.

<sup>1</sup> <https://www.genworth.com/corporate/about-genworth/industry-expertise/cost-of-care.html>. <sup>2</sup> *Calculators: Life Expectancy, SOC. SEC. ADMIN.*, <http://www.ssa.gov/planners/lifeexpectancy.html> (last visited February 17, 2018). <sup>3</sup> [https://www.ssa.gov/policy/docs/quickfacts/stat\\_snapshot/](https://www.ssa.gov/policy/docs/quickfacts/stat_snapshot/) (Last Visited February 17, 2018). <sup>4</sup> *Grillo v Pettiette et al.*, 96-145090-92(96th Dist. Ct. Tarrant Cty., Texas); and *Grillo v. Henry Cause*, 96-167943-96,(96 Dist. Ct., Tarrant City, Texas). <sup>5</sup> Department of Social Services v. Saunders, 247 Conn. 686, 724 A.2d 1093(1999). <sup>6</sup> *Faller, Bernard. Kentucky Elder Law. "Letter from Sheldon Gilman to Mr. Bernard Faller, dated December 18, 2007."* Section 9:31, p.406-410 (emphasis added). <sup>7</sup> <http://lifeplanofky.org>. <sup>8</sup> [www.toughestkids.com](http://www.toughestkids.com). <sup>9</sup> 42 U.S.C. §1396p(d)(4)(A) and (C). <sup>10</sup> 2 U.S.C. §1396p(d)(4)(A). <sup>11</sup> 42 U.S.C. §1396p(d)(4)(B)(ii). <sup>12</sup> HB 11, Session 2018. <sup>13</sup> KRS 304.27-080. <sup>14</sup> KAR Section 1(3)(a) 1. <sup>15</sup> 907 KAR 1:585 (b) All real and personal property or other assets in which the deceased recipient had legal title or interest at the time of death, to the extent of the recipient's interest, whether the asset was conveyed to a survivor, heir or assign of the deceased recipient through joint tenancy, tenancy in common survivorship, *life estate*, living trust or other arrangement. <sup>16</sup> Kentucky Medicaid Policy Manual MS 2055&2056 Volume IVA OMTL-517, 8/15/17. <sup>17</sup> KRS 132.810. <sup>18</sup> 26 USC §1014.