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Legal Insights

Protect Your Assets the Smart Way: Consider an Irrevocable Medicaid Trust Instead of Family Gifts

By Jaclyn T. Kramer, Esq.

As people age, a major concern in their life becomes how to best protect their assets for their family against the extraordinary costs of long-term care. For many people, this can be an overwhelming topic because they simply feel uncertain about the best way to approach it: should they transfer assets to an irrevocable trust, or gift them directly to a family member? Stories from friends or information found online often leaves them feeling confused and conflicted.

As a result of the confusion, many people often take the “easier” route of transferring their assets directly to a family member. They trust their loved ones implicitly, and therefore, this option just seems simple and sensible to them. However, what seems simple and well-intentioned can result in significant and unforeseen problems.

The Risks of Gifting to Family Members

When you transfer assets directly to another person, you give up control over those assets. If you want to make changes in the future, such as removing or adding a family member as an owner, or deciding to sell the asset, or reclaiming the asset, you must get the consent of the new owner. Not only may this put you in an uncomfortable position, but it may also be impossible to obtain consent depending on the family dynamics. The new owner may not consent to your desired changes, which could undermine your entire plan, and create further family conflict.

Furthermore, once you make an outright gift of assets, even to family members you love and trust, unexpected life events can create serious consequences for you. For example, if your child experiences an unforeseen situation—such as divorce, bankruptcy, a lawsuit, or creditor claims—your assets could be vulnerable.

There are also tax consequences to consider in transferring your assets directly to a family member. People often overlook tax implications when deciding how to transfer assets, which can have serious consequences for their loved ones. For example, if you

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transfer ownership of your home to your children’s names, and the home is sold during your lifetime, your children could be liable for large capital gains taxes.

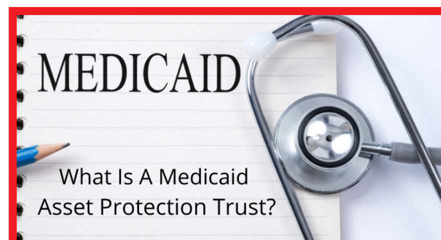
A Safer Solution: The Irrevocable Medicaid Asset Protection Trust

Fortunately, a properly structured Irrevocable Medicaid Asset Protection Trust can provide you with the asset protection you desire while offering a surprising level of flexibility and control. On its surface, the word “irrevocable” may sound intimidating; it sounds like the terms of the trust can never be changed, and the trust can never be revoked. Despite these common misbeliefs, this type of irrevocable trust is quite a flexible planning tool if it is structured correctly.

With the Irrevocable Medicaid Asset Protection Trust, you can retain the ability to remove and replace the trustees and add or remove trust beneficiaries without the consent of anyone else. Also, you do not need to worry about your assets being exposed to potential unforeseen situations of your loved ones since the trust is the owner, not your loved ones. If your family members are designated as Trustees, they merely own the property in a fiduciary capacity, not an individual capacity.

Additionally, the trust is typically structured in such a way that benefits you from a tax perspective. Although the trust owns the assets, you, as the creator of the trust, are still considered to be the owner for tax purposes. This means that you are responsible for any income taxes and capital gains taxes generated by the trust assets, not your loved ones. If the trust owns your primary residence, then you remain liable to pay your real estate taxes and maintain any real estate tax exemptions (e.g., STAR, enhanced STAR, senior exemption, etc.) that you may be receiving or are entitled to receive.

Therefore, transferring assets to an Irrevocable Medicaid Asset Protection Trust offers significantly greater control, protection and flexibility in estate and Medicaid planning than a simple transfer of assets to a family member. Before taking the “easy way out,” consider discussing your options with an experienced elder law attorney to determine the best fit for your individualized plan.



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Futterman Lanza, LLP is an elder law and estate planning law firm with staffed offices in Smithtown, Bay Shore, Melville and Garden City, New York. Jaclyn Kramer primarily works in the Smithtown office, where we have celebrated our 21st anniversary serving the local community. The firm’s holistic approach anticipates and provides solutions in the ever-changing landscape. You can learn more about Jaclyn Kramer and Futterman Lanza by visiting www.trustedattorneys.com.