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Asset Preservation for Married Couples Using Last Wills and Testaments

When people become chronically ill or disabled, they may need long-term care (LTC) services. Given the very high cost of LTC services, many people will apply for MaineCare (Maine Medicaid), which pays for some types of those services. The application of the MaineCare rules vary based on whether the applicant is married and what category of LTC is needed. In general, the MaineCare rules are more favorable to married couples than to unmarried people. However, if one spouse is receiving MaineCare LTC benefits and the healthy, "community" spouse dies, then the favorable asset rules that came from the marital status no longer apply, and a spend-down may be needed if advance planning was not done.

This article discusses the benefits of testamentary supplemental needs trusts (SNTs). Even when both spouses are healthy, married couples who are concerned about protecting assets from LTC expenses can consider Wills that include spousal SNTs. It is even more important when one or both spouses have a condition that could lead to or currently requires LTC services. The couple will also likely re-title certain assets so that they can be directed to the SNT upon the death of the first spouse.

How Do the MaineCare Rules Apply to Married Couples? How Can a Spousal SNT Provide Protection?

Medicaid is a federal and state partnership to help financially eligible individuals obtain medical care. Each state has some discretion in creating its eligibility rules. In Maine, the Medicaid benefit is administered by Maine's Department of Health and Human Services and called MaineCare. MaineCare pays for a variety of types of care. The LTC services it pays for include:

1) residential care/assisted living/boarding home facility care,
2) nursing home level care in the home (through the Home and Community Based Services waiver), and
3) nursing home facility care.

When a person applies for MaineCare LTC benefits, regardless of marital status, certain assets are considered "non-countable." Those include items like: up to $750,000 of equity in a Maine personal residence; one (and potentially two) motor vehicles of unlimited value; household goods: furniture, jewelry, clothing, etc.; $8,000 in an interest-bearing account (and more if both spouses receive benefits); irrevocable mortuary trust of $12,000 or less and a burial plot; whole life insurance with a face value of up to $1,500 (total of all policies on the insured); term life insurance; income-producing property that generates at least 0.22% of the net fair market value of the property if it has been in operation for three years or more; property listed for sale; certain jointly-owned property if the joint owner refuses to sell; life lease (not a life estate); and a Medicaid-compliant annuity.

In addition to these non-countable assets, a community spouse may have additional assets in his or her own name. When the applicant spouse needs care in a nursing home, the Community Spouse Resource Allowance (CSRA) applies; it is $126,420 as of 2019[1]. When the applicant spouse needs care in a residential care facility or medically qualifies for nursing home level care at home, the community spouse can have unlimited assets in his or her name. Also, many people are surprised to learn that assets can be transferred between spouses without triggering the MaineCare transfer rules. There is no penalty for transfers between spouses within the five years preceding the MaineCare application.

In brief, a married person can qualify for MaineCare LTC, even if significant assets are retained by the community spouse. But what if the community spouse dies first—whether suddenly or from an illness that did not require LTC? In many cases, the couple's "excess" countable assets will flow back into the name of the spouse who had previously qualified for MaineCare LTC. He or she will now be "over-asset" and ineligible for benefits. The chart below contrasts these asset rules.

Level of Care	Married Couple: 1 Spouse Receiving MaineCare LTC	Unmarried Person
Residential care/ boarding home/ assisted living	Non-countable assets (inc. $8,000 savings) + Individual: $2,000 Spouse: Unlimited	Non-countable assets (inc. $8,000 savings) + $2,000
In-home nursing home level care (HCBS waiver)	Non-countable assets (inc. $8,000 savings) + Individual: $2,000 Spouse: Unlimited	Non-countable assets (inc. $8,000 savings) + $2,000
Nursing home facility care	Non-countable assets (inc. $8,000 savings) + Individual: $2,000 Spouse: $126,420 (at application time)	Non-countable assets (inc. $8,000 savings) + $2,000

1 There are legitimate strategies to protect a married couple's countable assets when they exceed the allowed $10,000 for the applicant spouse and the $126,420 CSRA for the community spouse for an application for nursing home facility care.

The first way a spousal SNT can help is when the first spouse dies. When one spouse needs LTC, the community spouse's Will should include a spousal SNT for the benefit of the surviving spouse, and most of the couple's assets should be transferred to the community spouse. If the community spouse dies first, his or her probate assets will flow to the SNT, not to the surviving spouse. The assets in the SNT will not be countable to the surviving spouse and not disrupt his or her MaineCare eligibility. It is important to note that the SNT must be established upon the death of the first spouse through his or her Will to avoid a penalty calculation. It cannot be established during life or through a revocable trust per subsection 1382b(e)(2) of Title 42 of the United States Code.

The second way that a spousal SNT can preserve assets is by protecting them from estate recovery. Federal law requires that each state seek reimbursement from the estates of people who died at age 55 or older if they received medical assistance through the Medicaid program, including LTC benefits. Assets that were considered non-countable during lifetime for eligibility purposes are exposed to estate recovery upon death, which is pursued by a claim against the MaineCare recipient's estate unless the estate is too small or an exception applies. Assets held in a spousal SNT—rather than in the name of the second spouse to die—are protected from estate recovery. Even if both spouses need to apply for MaineCare LTC benefits, spousal SNTs may still be appropriate to protect a portion of the personal residence or other non-countable real estate from estate recovery.

Meet Mr. and Mrs. X

Let's consider how different scenarios may affect a hypothetical Mr. and Mrs. X and how a spousal SNT can help preserve assets. Assume that Mr. and Mrs. X have net assets of $700,000, which include a jointly owned personal residence worth $200,000; a camp worth $100,000 in Mrs. X's name; jointly owned cash of $100,000; and $100,000 (face and cash value) in whole life insurance with Mr. X as the insured. Also assume that they pay their credit card bill in full each month and have no other debt. Mr. and Mrs. X are fortunate to have two healthy adult children. Mr. X dies and, either before or after his death, Mrs. X needs MaineCare LTC benefits. Finally, we will also assume that no real estate is sold during Mrs. X's lifetime.

SCENARIO 1

NO ASSET PRESERVATION PLANNING

First, consider what happens if Mr. and Mrs. X do basic estate planning, but not planning that is geared toward preserving assets against LTC costs. In this scenario, it would be fairly common for Mr. and Mrs. X to have "I Love You" Wills that give all assets to the surviving spouse outright (not in trust) and for Mr. X's life insurance beneficiary designation to leave all assets to Mrs. X outright. Therefore, upon Mr. X's death, all assets are now in Mrs. X's name individually.

To obtain or regain MaineCare LTC benefit eligibility, Mrs. X will:

- Keep $10,000 ($2,000 in countable assets allowed; $8,000 savings exclusion);
- Establish a $12,000 irrevocable funeral trust and do other spend-down;
- List the camp for sale or lease it to a family member to make it a non-countable asset during her lifetime; and
- Use a strategy called reverse-half-a-loaf gifting to preserve approximately half of the value of the combined value of the real estate and remaining liquid assets, if Mrs. X has a financial power of attorney (FPOA) that allows gifting.

Adding together the effects of obtaining or maintaining eligibility and estate recovery, the following amounts will be saved or is at risk, as shown below.

Outcome	With Broad FPOA	Without Broad FPOA
Save	~$361,000	~$12,000
Risk	~$339,000	~$688,000

SCENARIO 2

SOME ASSET PRESERVATION PLANNING

Next, imagine that, instead of the outcome in Scenario 1, Mr. and Mrs. X have done some asset preservation planning. They have Wills that upon their deaths give 100% of the assets in each spouse's name to a SNT for the other spouse. Because they were both healthy when these Wills were done, jointly held assets or assets in one spouse's name alone were re-titled so that those assets are now owned 50-50 (as tenants in common). Mr. X's life insurance beneficiary designation was also updated so that half of the proceeds would pass to the SNT for Mrs. X and half to their children2.

However, between Mrs. X receiving a diagnosis that turns out to eventually need LTC services, such as Alzheimer's, and Mr. X's death, they do not return to their attorney to see whether any further changes were needed. An attorney likely would have recommended that more assets be transferred into Mr. X's name to ensure that a greater percentage of the assets transfer into the trust. Instead, Mrs. X will use the crisis planning strategies in the bulleted list under Scenario 1 with the addition that the camp can also be made a non-countable asset by obtaining a letter from the trustee of the SNT that the trustee refuses to sell the trust's 50% interest in the camp.

2 This split of the life insurance proceeds between the SNT for Mrs. X and the children is given as an example. Mr. X could also choose to have the entire amount pass to the SNT for Mrs. X. Either choice would cause it to be protected for MaineCare purposes, so that choice would not modify the example.

Reviewing the chart below, more assets are preserved in sceniario 2, but a significant amount of assets remain at risk.

Outcome	With Broad FPOA	Without Broad FPOA
Save	~561,000	~$400,000
Risk	~$139,000	~$300,000

SCENARIO 3

COMPREHENSIVE ASSET PRESERVATION PLANNING

In this final example, Mr. and Mrs. X have done the initial asset preservation planning described in Scenario 2. The difference is that when Mrs. X received her Alzheimer's diagnosis, the couple returned to their attorney and updated their plan. At that point, Mrs. X (or her agent under a FPOA with gifting authority) transfers her assets above $22,000 to Mr. X[3]. When Mrs. X applies for MaineCare LTC benefits, she will keep just under $10,000 in her name ($2,000 countable assets allowed plus the $8,000 savings exclusion) and put up to $12,000 into an irrevocable funeral trust or do other spend-down.

Outcome	With Broad FPOA	Without Broad FPOA
Save	~700,000	~$561,000
Risk	~$0	~$139,000

COMPARISONS: SCENARIOS 1, 2 & 3

Placing these three scenarios side-by-side in the chart below[4] highlights the importance of asset preservation planning through a spousal SNT in a Will as well as follow-up planning when health conditions change. The difference between Scenarios 2 and 3 (with a broad FPOA with gifting authority in case Mrs. X has already lost the mental capacity to make these follow-up transfers) is $139,000. The cost of one or two follow-up meetings with an attorney and possibly some additional deeds to transfer Mrs. X's remaining interest in the real estate is modest in comparison to the amount of additional money that could be saved.

It is unlikely that Mr. and Mrs. X would have met with an attorney for asset preservation who did not additionally recommend a broad FPOA with gifting authority. However, that comparison is included in these scenarios to show the value of comprehensive planning.

3 The most aggressive asset protection would be to leave only $22,000 in Mrs. X's name. However, she might find keeping that little in her name unpalatable, especially if most assets have been jointly owned during the marriage. The closer the amount left in her name is to $22,000, the greater the likelihood that all appropriate assets will transfer into the spousal SNT and be protected from LTC costs.

4 Under Maine law, a surviving spouse is entitled to claim a portion of his or her deceased spouse's estate if the deceased spouse's Will does not grant a certain amount directly. That guaranteed minimum is called the spousal elective share. It is equal to one-half of what the Maine Probate Code calls the "marital-property portion of the augmented estate." The size of the marital property portion varies drastically depending on the length of the marriage. When a surviving spouse is on MaineCare and has not received the spousal elective share, the MaineCare rules provide that he or she will have transferred assets. The "transfer" is subject to a transfer penalty, which is a period of time that the surviving spouse will be ineligible for MaineCare. The law on this issue is complicated and currently in flux. Consult an elder law attorney about how the spousal SNT will be treated in this scenario.

Effect of Broad FPOA	Scenario#1: No asset planning	Scenario#2: Initial planning, no follow-up	Scenario#3: Initial planning & follow-up
Broad FPOA	Save: $361,000 Risk: $339,000	Save: $561,000 Risk: $139,000	Save: $700,000 Risk: $0
Without Broad FPOA	Save: $12,000 Risk: $688,000	Save: $400,000 Risk: $300,000*	Save: $561,000 Risk: $139,000*

Re-titling of Assets

As the above examples show, including Will language that establishes the spousal SNT upon the death of the first spouse to die is only one part of the process. To ensure that the greatest amount of assets are preserved, the couple must consider whether and how to re-title their assets as part of the initial planning and also what further steps to take if one spouse becomes chronically ill while the other spouse is still alive.

If both spouses are equally healthy when the initial planning is done, dividing assets so that there is an equal division of value between the two spouse's individual names would likely be recommended. The couple could also choose to leave their assets as they are if there is a broad FPOA in effect that will allow gifting and beneficiary designation changes later, though that has risks. If one spouse is already diagnosed with a significant condition, the attorney would recommend moving more assets into the name of the healthier spouse.

Because there is no MaineCare penalty for asset transfers between spouses, these changes will not bar benefit eligibility. An attorney can analyze the couple's finances and map out the different funding possibilities. There is no absolute way to predict which member of the couple will pass on first, so funding decisions may ultimately be not entirely perfect, but the couple will be much closer to achieving their goals than without asset preservation planning.

Administration of the SNT

When assets are re-titled between the couple, one member may be giving up control over the assets in the legal sense, but it may feel like a modest imposition given that the asset is being moved into the other spouse's name. However, implicit in creating this type of trust is the acknowledgement that after the death of the first spouse, the surviving spouse will be giving up even more direct control over the couple's assets.

This category of estate planning is different from other types of trusts that couples sometimes draft for each other. The surviving spouse cannot serve as trustee of this type of trust. The Will might instead name an adult child, another relative, a friend, or a professional trustee, such as a bank trust department. Whoever serves as trustee, the trustee must have sole and absolute discretion over distributions to, or for the benefit of, the surviving spouse who is the beneficiary of the SNT. The trustee must have the power to deny any requests from the beneficiary. That level of discretion is essential, because it makes the trust assets unavailable to the surviving spouse for MaineCare eligibility purposes. Given this framework, the couple must obviously have a very high level of trust in who they will name for a trustee and back-up trustee.

When the trustee makes distributions of trust assets, those distributions must be structured to supplement any needs-based public benefits the surviving spouse is receiving, not supplanting them. For example, funds could be used to purchase a new TV or clothing, but not for medical services that should be paid for by MaineCare. Whether any distributions are made to the surviving spouse directly (as opposed to payments made to services providers, stores, or other third parties for the surviving spouse's benefit) as well as the amount depends on whether he or she is receiving any needs-based public benefits.

If the trustee terminates the trust while the surviving spouse is still alive, the trust must provide the trust assets are turned over to the after-death beneficiaries, such as descendants, as if that spouse was no longer living. This language keeps DHHS from arguing that the trust assets are in any way available to the surviving spouse. Terminating the trust while the surviving spouse is still alive might happen if the trust assets have become too small to make managing the trust practical.

Conclusion

Although having assets pass to a spousal SNT reduces the surviving spouse's direct control, including this language in a Will can preserve the couple's assets for the next generation. The appropriate method(s) for paying for LTC depends on the couple's assets, income, family situation, work history, care preferences, and goals. An attorney experienced in these issues can help determine how these considerations apply to the situation.