July 2019

Dear Listener:

Thank you for requesting a copy of our *Top Misconceptions about Medicaid Irrevocable Trusts* guide, which has been prepared by Cushing and Dolan, P.C. The attorneys at Cushing & Dolan provide sound strategies and comprehensive planning for estate, gift and income tax issues, as well as helping seniors to plan for nursing home care and the preservation of family wealth as they age.

We hope our show and the enclosed information is helpful to you. To better serve your needs and answer any additional questions you may have after reading the enclosed material, Cushing and Dolan will be teaming up with Armstrong Advisory Group to offer free estate planning and investment portfolio consultations.

The advisors at Armstrong Advisory Group have over 80 years of combined experience and we manage over $750 million in client assets. We have offices located conveniently throughout New England.

If you would like to take advantage of a free estate planning consultation from Cushing and Dolan, or if you have at least $400,000 in investable assets and would like a free portfolio and financial consultation with Armstrong Advisory Group, we invite you to call (800) 393-4001 to schedule an appointment with either firm. It would be our pleasure to help you and your family pursue your estate planning and financial goals.

We look forward to meeting you soon.

Sincerely,

Todd Lutsky & Susan Powers
The Legal Exchange
Top Misconceptions about Medicaid Irrevocable Trusts

"I can’t change my beneficiaries once I draft my irrevocable trust.”

While the trust is irrevocable, it nevertheless can be changed through the use of a limited power of appointment. This is a power in the trust in which the Donor is granted the ability to change the beneficiaries of the trust but generally are limited to a class consisting of the Donor’s children of all generations. In the event you do not have any children, you can make the class be of siblings, nieces and nephews, or cousins, etc. This power also enables the Donor to retain a significant degree of flexibility to adjust their wishes as life events unfold after the creation of the trust.

For example, a Donor may wish to leave a little more assets to grandchildren or perhaps may find that one child is doing extremely well financially while another child is struggling and may desire to reallocate the percentages in which the children are to receive assets, all of which can be done through the use of exercising this limited power of appointment. However, while you may change the amount of a gift going to a member of the original class of beneficiaries or eliminate any such beneficiary all together, you cannot add a new beneficiary who was not a member of the original class of beneficiaries.

Finally, the Donor, by the very definition of a limited power of appointment, would be prohibited from exercising it in a manner that would benefit the Donor, his creditors, the Donor’s estate, or the creditors of the Donor’s estate.

“"I live on the income from my assets and I can’t use the income from my trust.”

Nothing could be further from the truth as the trust itself is referred to in the legal world as an irrevocable income only trust. The very terms of the trust state that during the life of the Donor the trustee shall pay all the income from the trust to the Donor or the creator of the trust. For example, if you put a portion of your investment portfolio into the irrevocable trust and it generates interest and dividends, they will be paid out of the trust to you for you to spend them as desired. This is generally important to clients as they may be using such investment income to supplement their other retirement income. In other words, your income level or cash flow does not change after you contribute assets to the irrevocable trust. Finally, you do not need to involve the
trustee in this distribution as you can have the institution automatically transfer the income to your personal account.

“If I run out of money I won’t be able to get any back out of the trust.”

In order to fully understand these trusts, we generally must do an income analysis and make a clear distinction between what is principal and what is income. Principal is generally the home or the actual real estate in the trust or the investment or bank account placed inside the trust. The trustee must be prohibited from distributing principal directly to the Donor as this is the paragraph that provides the protection from the costs associated with long term care. For example, there was a recent fair hearing in which the state challenged an irrevocable trust because it did not specifically prohibit distribution of principal and instead was simply silent on this issue. The result was that the assets in the trust were deemed available for the nursing home and the applicant was denied benefits. Remember, as mentioned above, income is the interest, dividends, and or rent generated from the assets (i.e. the principal) transferred to the trust and is in fact paid out to the Donor.

Generally, this arrangement is not a problem for most of the people who use these irrevocable trusts as they are usually living off of their income. Remember, the income, such as social security, pensions, any interest and dividends generated from assets inside the trust, rent generated from real estate transferred to the trust, and, of course, any IRA type assets which are outside the trust, are all available to the Donor after the trust is established. This flow in income is the same as it was prior to the establishment of the trust and is generally enough to allow the individual to continue to maintain the lifestyle they were used to prior to establishing the trust. In fact, in most cases, the family indicates that they do not touch principal anyway as they live off of their income which as noted above will not change after the trust is established and funded.

In the event extraordinary events arise or maybe the family just wants to buy a new car, take a vacation, or simply spend more money on the grandchildren and principal is needed in the future, the Donors of the trust generally look to assets that were left outside of the trust to spend. The largest asset that is generally outside of the trust is the individual retirement account. These assets will remain at risk and therefore should be spent down and leave the assets in the trust as they would be protected from the cost of long term care and preserved for and used by the surviving spouse. Remember, this type of planning is often times done to ensure that the surviving spouse is not impoverished when one spouse gets sick and enters a nursing home. IRA type assets must stay outside the trust for if they are withdrawn to put them in the trust that will result in an adverse income tax consequence.

While withdrawals from retirement accounts will always be taxable, if they are made in small increments as needed to live on verses all at once, the tax implications will be much smaller. Furthermore, individuals generally are at an age where they have to take out required minimum distributions any way and these withdrawals can be applied to such required distributions.

“"I’ll have to sell everything in my portfolio before I can make a transfer to an irrevocable trust. I don’t want to pay all those taxes.”

In general, the funding of an irrevocable trust does not result in any income tax related issues whatsoever. In other words, when a trust is funded, it generally means nothing more than retitling the existing assets to the
name of the trust. If you have an investment account, you are likely to receive a statement each month or quarter and it generally comes in your name, which is indicated in the upper left hand corner of the statement.

Once the account has been successfully retitled to the name of the irrevocable trust, you, as Donor of the trust, will continue to receive these same statements, except in the upper left hand corner of the statement will appear the name of the irrevocable trust along with the trustee’s name and all of the investments that were listed on that statement prior to transferring it to the trust. Therefore, there are no adverse income tax consequences associated with retitling assets to the trust as nothing was sold prior to the transfer. The only difference is that there will be a new tax identification number for the trust instead of your social security number, which your attorney should get for you.

“If I am not serving as trustee I won’t be able to invest the same way in the trust that I did before or make investment decisions.”

The trustee of a trust has all of the same investment options that would be available to an individual and therefore are not limited by having the assets invested inside a trust. However, the trustee should follow the prudent investment rule as a guide towards making investment decisions. The only caveat, of course, is that there are no individual retirement accounts owned inside of an irrevocable trust as mentioned above. You are also able to maintain your current investment advisor if you need help with investment choices.

While it is true that the trustee can make these investment decisions, he does not have to. Your investment broker in most cases can grant you, as the Donor of the trust, something known as limited trading authority over the trust investments. This will enable you to continue to talk with your broker about all trade and investment decisions just like you used to prior to transferring your investments to the trust. Your trustee really need not be involved in your day to day trust activities at all, thus really keeping you in control of your investments and irrevocable trust assets.

“I’ll have to pay higher income taxes on the assets in my irrevocable trust.”

If the trust has income, then these trusts are in fact required to file a separate income tax return known as a Form 1041, as well as possibly a corresponding state trust income tax return. It is also important that the trust obtain a separate tax identification number for this purpose. In addition, having this separate tax identification number also helps maintain the integrity of the trust for Medicaid eligibility purposes. However, since the trust is a wholly owned grantor trust for income tax purposes, the trust will effectively not pay any separate federal income taxes. Instead, this grantor trust status causes the Donor to be treated as the owner for income tax purposes and essentially flows the income through the trust and causes it to be reported on the individual Donor’s income tax return, Form 1040, just like it used to be prior to the establishment of this irrevocable trust. This income gets reported on the Donor’s personal return even if the income is not actually distributed out of the trust. Therefore, these Medicaid irrevocable trusts are known to be income tax neutral, resulting in no increase or decrease in income tax liability to the Donor. The Donor will continue to pay the same tax as he or she did prior to the establishment of the irrevocable trust. Please make sure your irrevocable trust is a grantor type trust otherwise there can be adverse income tax consequences each year. The real question is how does one know if their trust is a Grantor trust or not? While there are many ways this can be accomplished, one common way is the use of a limited power of appointment. This is the power for the Donor to direct who gets

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the income or principal of the trust during his life but is generally limited to children of all generations, as described above.

“**I have highly appreciated assets. If I transfer them to an irrevocable trust my kids won’t get a step up in cost basis when I die.**”

The general rule is that if a person dies and the assets of the decedent are included in the decedent’s estate for estate tax purposes, then the basis of those assets, i.e. real estate or investments, will get a new cost basis equal to the fair market value as of the date of the decedent’s death in the hands of the beneficiary pursuant to Code section 1014 of the internal revenue code. In the case of this irrevocable trust, because the Donor retained the right to change the beneficiaries and the right to the income from the trust, as mentioned above, the assets even though owned by the irrevocable trust on the date of death of the Donor, will still be included in the estate of the Donor pursuant to IRC 2036 and will get the full step up in cost basis as mentioned above.

Therefore, the beneficiaries of the trust will get the benefit of having a full step up in cost basis, thereby reducing and possibly eliminating any capital gains tax consequences associated with the sale of the property by them shortly after the death of the Donor. This can be a very important benefit especially with regard to real estate that may have been purchased a long time ago for a very small amount of money, which would, but for this step up in basis, have resulted in a very large capital gain and corresponding tax liability to the beneficiary upon sale by them. Remember, the new federal capital gains tax rate is 20% along with a 3.8% tax on investment income over $250,000, plus the Massachusetts tax of 5%. This is why gifting away appreciated assets during life is generally not a good idea as those gifted assets will not get the benefit of this step up in basis. One must always balance the estate tax liability against the corresponding capital gains tax liability prior to gifting any appreciated assets during life. Think twice before gifting such assets to your children and sticking them with a large built in capital gains tax liability.

“**I won’t be able to take my property taxes as an income tax deduction after the home is transferred into the irrevocable trust.**”

The property taxes can be paid by the trustee of the trust provided money has been transferred to the trust. If the only asset in the trust is the home, then the Donor of the trust can just pay the real estate taxes right out of their personal account just like they have done in the past. Either way, since the trust is a grantor trust, as mentioned above, all of the income and deductions associated with the trust assets will be reported on the Donor’s personal income tax return just like it was prior to the creation of the trust. The Donor will continue to get to deduct the real estate taxes on his or her personal return. You can even pay all related expenses on a rental or vacation property transferred to the trust right out of your personal account. There has been a recent fair hearing decision that approved the payment of real estate expenses out of personal funds and went on to say that control over the real estate does not amount to countability for Medicaid eligibility purposes.

“**I’ll have to pay gift taxes when I transfer assets to the irrevocable trust.**”

Not true. Treasury Regulation 25.2511-2(c) provides that a transfer is an incomplete gift for gift tax purposes if the Donor retains the right to designate the final beneficiaries. As mentioned above, the Donor in these trusts is given the power to appoint the principal and income to children of all generations or a class of beneficiaries you select which is known as the limited power of appointment described above; therefore, the transfers made to

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these trusts are incomplete gifts and will not generate any gift tax liability. While this gift is incomplete for gift tax purposes, it is complete for Medicaid eligibility purposes and will begin the running of the five year Medicaid clock to protect the assets from the costs of long term care.

“I’ve heard I’ll have to file a gift tax return after I transfer assets to the trust and this sounds complicated. Do I have to file one?”

The answer probably should be yes, but only to provide disclosure. If the Donor retained a provision in the trust rendering the gift incomplete, the Regulations provide that the gift should be disclosed on a return, but a failure to file would not render the taxpayer subject to any penalties or gift tax. In most cases, no gift tax return would have been filed. The risk is that the transfer was not incomplete and a gift tax would have been due giving rise to penalties and interest. Specifically, Regulation 25.6019-3(a) provides: “If a Donor contends that his retained power over property renders the gift incomplete and hence not subject to tax as of the calendar quarter or calendar year of the initial transfer, the transaction should be disclosed in the return for the calendar quarter or calendar year of the initial transfer and evidence showing all relevant facts, including the copy of the instrument of transfer, shall be submitted with the return.” However, even if for some reason the gift was complete and a tax would have been due, the individual would simply utilize some of their current $11,400,000 gift tax exemption to eliminate any such potential gift tax liability.

“If I sell my home I’ll lose my capital gains tax exclusion.”

This capital gains tax exclusion enables married people to shelter the first $500,000 of capital gains on the sale of their primary residence, while allowing single people to shelter the first $250,000 of capital gains on the sale of their primary residence. The rule simply states that you must have owned and used the property as your primary residence for two of the last five years in order to take advantage of this capital gains tax exclusion upon the sale of the property. Since the trust is designed as a grantor trust for income tax purposes, the individuals transferring the property to the trust will not lose their ability to take advantage of this capital gains exclusion once the property is sold from the trust.

As mentioned above, the term “grantor trust” means that the Donors, or creators of the trust, will be considered the owner of the trust for all income tax purposes and, therefore, will be eligible to maintain their capital gains tax exclusion on the sale of the property from the trust. The trust is a grantor trust because the Donor has retained the ability to direct where the principal and/or income of the trust can go during the Donor’s lifetime. In accordance with Internal Revenue Code Section 674(a), this retained power is what makes the trust a grantor trust for income tax purposes, thereby preserving the capital gains tax exclusion along with all other personal income tax benefits.

“If my home is owned by my irrevocable trust I can never sell it.”

You can absolutely sell your home after it has been transferred to the irrevocable trust. Generally, the Donor simply tells the trustee that the house is to be placed on the market and sold. The trustee of the irrevocable trust would sign the purchase and sale agreement, deed, and all related paperwork in order to complete the transaction. Selling the property from the irrevocable trust in no way complicates the transaction nor adversely impacts the buyer. Upon completion of the transaction, the buyer would cut a check made payable to the trustee of the irrevocable trust who then would in turn deposit the check into a bank account that is established in the

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name of the irrevocable trust. It is important to insure that the Donor does not receive the money personally, but instead the money is transferred directly into the irrevocable trust bank account. This transaction will not reset the five year waiting period provided the proceeds are not deposited into the personal bank account of the Donor. Finally, the house can be sold any time after it is transferred to the trust, even if it is during the initial five year period from the date of transfer.

“Since I’m not the trustee, I will need my children’s permission in order to sell the home after it is in the irrevocable trust.”

You, as Donor of the trust, will simply instruct the trustee to place the home on the market for sale or to purchase a new home following the sale of the previous home. In the event the trustee does not comply, you, as Donor of the trust, retained the ability to remove and replace the trustee at any time and would thereby simply remove the trustee and put in a trustee who is willing to complete your requested transaction. However, you cannot serve as trustee of your own trust. Therefore, you do not technically need the children’s permission to complete the purchase or sale of a new home after it has been transferred to the irrevocable trust.

“I will not be able to buy and sell the real estate inside the trust until the expiration of the five year look-back period.”

Not true. The five year look-back period starts to run on the date in which the real estate is transferred into the trust. If during the five year look-back period the Donor wants to sell the property and downsize and buy a property, in say Florida, such a transaction would not restart the five year waiting period because nothing new was transferred to the trust. The transaction resulted in simply changing an asset from real estate to cash and then reinvesting that cash into another piece of property. This is also true when the trustee buys and sells stocks or bonds. The five year look-back period is unaffected because nothing new went into the trust, instead there were just changes in the investments that were already in the trust.

“I can’t transfer my rental property into a trust because I need the rental income to live on.”

Not true. The Donor of these trusts always retains the right to all the trust income and rent is in fact income. After the property is in the trust, a trust checking account should be opened up and the rent will be deposited into that account. Once the money is in the account, you can have the account set up to automatically transfer the rent check to the Donor’s personal checking account to be spent any way the Donor desires just like prior to transferring the rental property to the trust. The Donor also retains the right to make decisions regarding rental increases, decreases, and make decisions regarding removal of existing tenants, as well as the ability to sell the rental property any time they wish. Remember, these were all decisions that were made by you prior to transferring the property to the trust. Rental property can be transferred to these irrevocable trusts and there would be no adverse tax implications upon doing so.

“Since I cannot get the principal from the trust then where am I going to get the money to make capital improvements on any of the real estate that is inside the irrevocable trust?”

While it is true that you cannot get principal out of the trust directly back to you, the principal in the trust can be used to maintain existing trust assets. For example, if the rental property needed a new roof, the trustee could use the trust money to pay the contractor to fix the roof or put a new bathroom in or any capital improvement.

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The trust principal just cannot be deposited directly into the Donor’s pocket. These type of transactions also would not have any impact on the Medicaid five year look-back period.

“I’m going to sell my home in a few years. I’ll wait till then to fund my irrevocable trust.”

Your primary residence, as well as rental or vacation property, can be sold and the proceeds can in fact be used to purchase another piece of property at any time during or after the five year look-back period, so why wait. There would also be no adverse income tax consequences associated with any such sale, as shown above. In other words, you would continue to pay all of the same capital gains taxes associated with the sale of rental property out of the trust as you would if you had sold the property from your own name. There is no reason to wait to move real estate into your trust, even if you plan to sell it. In fact, it is always better to get the five year look-back period started then to take a chance on a property selling in a timely fashion in this volatile real estate market.

For example, if I transfer my property to the trust and begin the sale and repurchase process and this process takes one year to complete, then my new home will be protected from the nursing home in four years because one year will have already expired. It is very important to remember that this sale and repurchase of the new property does not reset the five year look-back period for Medicaid eligibility purposes provided the proceeds from the sale go back to the trust and are not deposited in the account of the Donor. If on the other hand I waited to transfer the property until the buying and selling was complete, then I will have effectively wasted one year as the five year clock will have not started running until the new home had been transferred to the trust.

“I am too old or my health is too bad and I’ll never make it 5 years. Why bother doing a trust at all?”

There is always a benefit to getting the five year clock started. People often times think it is too late to begin planning, but that is just simply not true. Regardless of your age, you will always be better off for having got this look-back period running than you would be if you never started it, so please do not wait any longer to plan.

For example, you transfer your $500,000 home to the trust, along with say $200,000 of investments, while you kept outside the trust your $200,000 IRA today, and get sick in three instead of five years. What happens? The rule is that the assets in the trust are still not protected for another two years. However, since there is $200,000 still outside the trust in your IRA that could not have been transferred to the trust anyway due to income tax consequences, I would suggest to the family that these asset be spent on the nursing home for the next two years in order to save all the assets in the trust worth approximately $700,000. I would be happy to spend $200,000 in order to save $700,000, what a win. Finally, income tax liability associated with any such withdrawals from the IRA will likely be somewhat offset by the corresponding medical deductions associated with paying the nursing home.

“I heard they will be changing the look-back period. If I do my trust it will be wasted.”

The rules regarding transfer penalty periods did change from three years to five years under the Deficit Reduction Act of 2005 effective February 8, 2006 and so there is always the chance that the government can change the rules again going forward so planning is critical. In fact, currently there is house bill # 6300 that is being considered to change the look-back period to ten years but has not yet been approved. However, when
the rules changed in 2006, the folks that did their planning prior to the rule change were all grandfathered into the old rules. With history as our guide it appears that if you plan now there is a strong likely hood that you will be grandfathered in under the current seemingly more Medicaid friendly laws so please do not wait to plan, act now.

“I want to protect my home but not sure about putting any money into the irrevocable trust and may want to add these assets to the trust later, since that will reset the five year Medicaid look-back period I will just wait till I am ready to put a larger amount in.”

Assets can be added to the irrevocable trust at any time after the trust has been created. However, the addition of assets to the trust will result in the creation of a new five year look-back period, but the look-back period will be associated only with those new assets that were transferred. The creation of this new look-back period for those newly transferred assets will in no way affect the look-back period for previously contributed assets. In other words, if you had contributed assets to the trust five years earlier and only now wish to put additional assets into the trust, the assets that were put into the trust five years earlier will remain protected from the cost of long term care and this new look-back period will only apply to these newly added assets. Nevertheless, the preferred planning approach would be to put as many assets into the trust as you can all at one time so as to only have one five year clock to contend with.

“I’ll be moving to another state when I retire and selling my home. I’ll need that money to buy a new house and I don’t want to restart the five year look-back period.”

The five year look-back period is unaffected, and, in fact, not reset by the selling of a home from the irrevocable trust and buying a new one inside the trust since nothing new was placed into the trust. The five year look-back period starts to run on the day an asset was transferred from an individual’s own name into the irrevocable trust and not the day the trust sells the property and buys a new one.

For example, if the Donor establishes an irrevocable trust and transfers the property into the trust on January 1, 2014, and then, on January 1, 2017, the trustee of the trust sells the property and in exchange the trust receives the proceeds, which are promptly deposited into the irrevocable trust bank account. That transaction will have no impact on the initial five year waiting period that began on January 1, 2014 when the home was transferred to the irrevocable trust. If the trust then purchases a new home on the same day, that new home will be protected from the nursing home in two years since three years have already expired from the date the original home was transferred to the trust.

In other words, if no new home was purchased and instead the proceeds from the sale of the home are just deposited in the trust, they will be protected from the cost of long term care in two more years, which represents the balance of the number of years remaining from the initial transfer of the home to the trust on January 1, 2014. Again, since nothing new was placed into the trust, there is no new five year waiting period created. In this case, the trustee simply reinvested the assets that were already inside the trust from real estate to cash or any other investment.
“My estate is too small to do any estate planning.”

Many people do not realize just what is includable in their taxable estate. If you add in your home, your retirement accounts, checking and savings, and the death benefit of your life insurance, you may find that your estate is larger than you realized and may even quickly exceed $1,000,000. If your estate is worth more than $1,000,000, you will be subject to estate taxes at least here in Massachusetts since we only have a $1,000,000 exemption. The real problem is that if you exceed this exemption amount, then your family will pay taxes on the total amount of the estate and not just the amount over the exemption. However, by doing estate planning you could reduce or maybe even eliminate estate taxes and, if married, up to the first $2,000,000 of assets could be sheltered from estate taxes. This same kind of planning works in the other New England states but their exemptions are different. For example, Connecticut’s exemption is $3,600,000, Rhode Island’s exemption is $1,561,719, Vermont’s exemption is $2,750,000, and Maine’s exemption is $11,400,000, while New Hampshire does not currently have an estate tax.

However, even if your estate is not that large there are many benefits to having an estate plan, including avoiding probate, bloodline planning, creditor protection, and potential nursing home protection if you utilize an Irrevocable Medicaid Trust. An individual who passes away and owned assets in their own name, without a designated beneficiary, will subject all of those assets to the costs associated with the probate process. By establishing an irrevocable or even revocable trust and, most importantly funding the trust with assets, will enable the assets that have been retitled to the name of the trust to avoid the costs associated with the probate process as well as ensure proper bloodline planning for your family. You can even design the trust to protect assets from future divorces of your children.

Many times it is more important to preserve a smaller estate, simply to ensure that you do not impoverish your spouse should one of you have an extended stay in a nursing home. Regardless of the size of your estate, protecting what you have from the nursing home may always be an important goal, so advanced planning as always worth looking into

“I can’t do both estate tax and asset protection planning at the same time.”

Since the federal estate tax exemption has been increased to $11,400,000 but the Massachusetts exemption amount has remained at $1,000,000, or plug-in your own state exemption listed above, more and more married couples want to do both estate and asset protection planning at the same time. These irrevocable Medicaid trusts can do that by utilizing both exemption amounts at your death. If you are married, your estate is $2,000,000 or less, or double whatever your state exemption amount is, you can create two of these trusts and split the assets between them, then upon your demise, the trust assets will avoid probate and will get to your family federal and Massachusetts estate tax free as well as be protected from the nursing home following the expiration of the five year look-back period.

For example, if you have an estate worth $1,500,000 and the only estate planning documents you have in place is a will, then upon the death of the surviving spouse while there would be no federal estate tax due since you are under the exemption amount, your family would owe approximately $64,200 to Massachusetts. If instead these irrevocable trusts were implemented and the estate did not grow above the $2,000,000 level, there would
be not tax due as each trust would be under $1,000,000 exemption and not taxed in the surviving spouse’s estate, thereby eliminating the Massachusetts estate tax. In addition, five years after these trusts are funded with your assets they will also be protected from the nursing home and will avoid Medicaid estate recovery provisions upon your demise. All this can be accomplished with little or no loss of control over the trust assets and as explained above with no adverse income tax consequences during your life. A detailed discussion of how the trusts utilize these estate tax exemptions via a marital share and a remainder share is beyond the scope of this article.

“I can only put my primary residence in the trust but I really want to protect my vacation property.”

Second homes and vacation properties are countable assets and will prevent an institutionalized individual from becoming eligible for Medicaid benefits. Typically the state will place a lien on these properties and then force you to sell them and to use the proceeds to pay for your nursing home care. This is why advanced planning through the use of irrevocable trusts is essential in order to save these family lake or cape vacation properties.

These properties can be transferred to the irrevocable trusts and you, as the Donor, can continue to use the properties and enjoy them just like you did prior to placing them into the trusts for you will retain all the rights including selling and renting them out as explained above. These assets will then be protected from the costs of long-term care following the expiration of the five year look-back period. As mentioned above, a recent Massachusetts Supreme Court case known as Daley Nadeau held that continuing to live in your property in a trust without the right to have such assets paid out to the Donor is not enough to make them countable for Medicaid eligibility purposes.

“I heard it was difficult to transfer real estate to the trusts and such transfers have lots of fees associated very difficult with them.”

Transferring your primary, secondary, or rental properties into your irrevocable trust is a simple process that your estate planning attorney should handle. They would create a Quitclaim deed and simply transfer the property directly to the Trustee of the irrevocable trust. Make sure this is all done on the same day you sign your irrevocable trust documents as this transfer is what will start the five year clock for Medicaid eligibility purposes. Remember that the creation of the trust is not what starts the five year clock running, it is the funding of the trust which starts the clock.

“I have a homestead on my property so I do not need an irrevocable Medicaid trust.”

Not true. The first problem is that the homestead only protects you up to $500,000 of equity in your home from certain creditors but if your home is worth more than that the balance would remain at risk. The other problem is that one of the creditors that the homestead does not protect you against is nursing home costs. Also, there may be other assets that you want to protect like your vacation home or maybe just some of your investment portfolio all of which the homestead will not protect. Advanced planning is always the best approach, so please do not wait to get your five year look-back period running today.

“I have the minimum required long term care insurance under the new law so my home is protected therefore I do not need an irrevocable Medicaid trust.”
It is true that if you meet all the requirements of the new long term care insurance rules your home should be protected from the costs of a nursing home, specifically the policy must pay out $125/day for two years to qualify. Certainly if you have such a policy it is worth keeping. However, a few problems are that getting long term care insurance has become harder and harder and more and more expensive especially with all the companies getting out this business. There has also been a rash of premium increases by the insurance companies that have remained in the business which can make it harder for the folks who already have the insurance to maintain it. Finally, the only asset that is protected is your home and not your vacation home or rental property or even your investment portfolio. Finally, if you have a hybrid life insurance and long term care policy this may not even protect your home from the nursing home as they are not recognized by the Medicaid regulations as true long term care insurance. Please look at all your assets before you decide not to plan and make sure you are truly covered because if you wait too long to act it could be too late.

“If I transfer assets to an irrevocable trust I will have to wait out a five year look-back period before the assets are protected but if I just transfer them to my children I would only have to wait three years.”

Under the old rule, which was changed by the Deficit Reduction Act of 2005, there was only a three year wait when assets were transferred to an individual versus a five year wait when assets were transferred to an irrevocable trust. However, today any amount of assets transferred to either an individual or to an irrevocable trust will all result in the triggering of five year look-back period which must expire before the assets transferred will be protected from the nursing home. Please do not wait to do your advanced planning as it really does take some time to fully protect your assets and last minute planning is not always available and may not be able to save all the assets.

“I heard I will have to file a separate income tax return for the irrevocable trust and pay taxes at a higher rate.”

The irrevocable trust does have to file its own income tax return, a Form 1041 along with a potential corresponding state income tax return. However, as discussed above these irrevocable trusts are designed as grantor trusts. A grantor trust means that you, as the creator of the trust, are deemed to be the owner for all income tax purposes. In other words, all of the trusts income and deductions will be reported on the Donor’s personal income tax return, Form 1041 just like it was done prior to the creation of the trust. This rule applies whether the income was taken out of the trust or not. These trusts are effectively income tax natural.

“I heard I will lose my real estate tax abatement if I transfer my home to an irrevocable trust.”

While each town treats these real estate tax abatements differently, it is possible that this abatement could be lost when property is transferred to these trusts. However, one way to save this real estate tax abatement in every town is to make sure you retain a legal life estate in the home and transfer only the remainder interest to the irrevocable trust. The Massachusetts Supreme Court in the Daly decision recently declared retaining a life estate with the remainder interest being a Medicaid irrevocable trust will not make the trust assets countable.