

Do Irrevocable Trusts Protect Assets?

by Attorney Michael Hooker

I believe that death is not the worst thing to happen to an elder. A catastrophic illness or disease that saps your ability to enjoy life's pleasure while costing you tens of thousands of dollars for care....that is a harder pill to swallow. When I hear from clients that they want to protect their assets it generally translates to "I don't want the state or nursing home to get them". They are not thinking of protecting their assets from the taxman because the estate tax threshold is \$1,000,000 for the Commonwealth and over \$5 million for the IRS. There are few folks in the Happy Valley who meet those criteria.

There are, however, many middle class clients who are concerned about nursing home costs which Medicare (federal health insurance) doesn't cover. A common nursing home asset protection strategy employed by my colleagues, (many of whom are general practitioners), is to have the client create and fund an Irrevocable Trust. It has its own tax id#, you name the children as Trustees and you only have the right to the income. If either spouse ends up in a nursing home your argument is that you no longer have the asset and are therefore eligible for Medicaid aka Masshealth.

I do not like Irrevocable Trusts. Why not? Because Medicaid, the agency that funds nursing home care sees these trusts as a red flag. I have had a couple of cases recently where houses and assets had been transferred into these trusts where the Trust contains language to the effect of "if I end up in a nursing home give the money to my kids". Medicaid has denied eligibility because such Trusts have been found by the Supreme Judicial Court of Massachusetts to violate public policy.

From my perspective, if your goal is asset protection the cleaner way to do it is to directly gift assets to one or more of your children and get the "clock" ticking on the 5 year look back. The problem with this is if your child (ren) become estranged, get divorced, get sued or have a gambling addiction. You are essentially giving the child your money as the custodian, or Trustee on a handshake. Not everyone is comfortable with such a situation. **IT SHOULD NOT BE UNDERTAKEN LIGHTLY.** But if you opt for an Irrevocable Trust instead, and retain some interest or control over a Trust, it will be scrutinized by Medicaid even though you may have funded it 15 years ago. Maybe it will fly. Maybe it won't. But it will definitely make things bumpier if and when you ever need to apply for Medicaid. Such is not the case if you simply deeded it to junior six years ago. You will be past the five year look back and Medicaid can't gripe about that.

If you have transferred your house or other assets into an Irrevocable Trust read the document and make sure it doesn't contain language to the effect of "if I end up in a nursing home give the money to my trustees or kids". That is likely defective for asset protection. To fix the situation the asset may have to come out of that trust and go directly to the child(ren) or to a trust that doesn't contain that spoiling language. This would restart the five year clock. It may be a hassle, but at least you won't be blindsided 10 years from now when Medicaid scrutinizes your trust and possibly denies eligibility.

On a related subject, revocable trusts **DO NOT** put assets out of Medicaid's reach under any circumstances no matter how long the revocable trust has been in place.