



# "Giving" Advice



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## ABOUT YOUR FOUNDATION

Since 1973, the **Toledo Community Foundation** has provided individuals, families and businesses interested in the well-being of our community with an *efficient, effective, low-cost, professionally managed* mechanism to achieve their charitable goals.

For philanthropists wishing to maximize the impact and life of their charitable gifts, the Foundation provides *resources for thoughtful giving*. Using its expertise and personalized services, **Toledo Community Foundation** helps donors transform their philanthropic impulse to measurable

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## Make Moves to Benefit Family You Leave Behind

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Couples often wonder how they should arrange their finances once one of them is diagnosed with a terminal illness. Of course not all diagnoses are correct and we do certainly always hope for the best, but there often becomes a time when the family realizes their loved one will die soon. One of the many questions often asked is how should their assets be transferred so as best to protect their spouse and their children.

They should realize that they can make gifts that will avoid the federal gift tax. There is both an annual gift tax exclusion of \$13,000 per recipient, as well as a lifetime exclusion of \$1 million, which will result in a corresponding deduction from their lifetime exclusion or unified credit.

In a modest estate any gifts made within the last five years could disqualify the ill spouse for Medicaid, when they could otherwise qualify. This includes gifts made by either spouse. For those seeking Aid and Attendance from the Veterans Administration, there is no penalty for gifting prior to application for benefits. It is so interesting how three different segments of our federal government see things so very different.

Those individuals of higher net worth have hopefully provided financial protection through the purchase of life insurance to provide that necessary income replacement, assuming they can still medically qualify.

It seems common, as death nears, for the couple to put everything in the well spouse's name, to avoid probate. This may be another good reason for the couple to opt for separate trusts, since the well spouse would have to give inventories and annual accountings to no one for the assets in the surviving spouse's trust, as opposed to possible accountings required by the new Trust Code to all qualified beneficiaries of the deceased spouse, which might include children and grandchildren.

community impact. Beyond the gifting of assets, the Foundation helps donors identify issues of importance to them and *inspires engagement* with community organizations addressing these issues, thereby maximizing the impact of charitable gifts and creating a greater sense of fulfillment.

Further if the ill spouse died with a lot of creditors, more than the \$2,000 Medicaid allowed him to keep in assets, the assets of the well spouse would not be in jeopardy since the well spouse has no obligation to pay for the medical bills of the ill spouse.

If one spouse eventually enters a skilled care nursing home, an often neglected part of Medicaid planning is the Last Will of the well or community spouse when the ill or institutionalized spouse has qualified for Medicaid.

The goal of Medicaid planning is to qualify for Medicaid before a couple has completely exhausted their finances. Because the well spouse needs assets and income to maintain the home and live on, the spouse living at home is legally entitled to retain some funds, plus the home and car and various other non-countable assets. We generally assume the sick spouse will die first. However, that does not always happen, especially when both spouses are about the same age.

Most community spouses realize the need to execute a new Last Will or to amend their trust to allow their assets to pass directly to their children or other beneficiaries, rather than pass to their spouse. Why? The ill spouse's inheritance may result in the ill spouse having more than the allowed \$2,000 in assets, which would result in loss of Medicaid benefits. To qualify for Medicaid, the ill person must meet, and continually meet, both asset limits and income limits.

For persons dying after October 1, 2001, Florida's Elective Share law is applicable. That law was designed to prevent the disinheritance of a spouse, even a sick spouse.

However, in the case of a Medicaid recipient, it may result in complete loss of public benefits. If the ill spouse inherits, say \$80,000, and the cost of nursing home care is \$5,000 a month, the inheritance would only last 16 months. Then the children would receive nothing. If the ill spouse has a guardian who files for the elective share and takes 30 percent or \$24,000, it would be consumed by nursing home costs in less than five months, and not pass to the children.

Many attorneys thought that if a child served as the guardian, the child could just fail to file the election against the Last Will, so nothing would pass to the ill spouse.

We now believe that the Florida Medicaid takes the position that if a person does not take the 30 percent elective share, it will be deemed a gift to the beneficiaries of the Will. A gift while receiving Medicaid benefits will disqualify an otherwise eligible person from receiving public benefits, just as a gift would do during the "look back" period.

However, there is a solution. The elective share law allows the well spouse to establish a Special Needs Trust in the Last Will of the well spouse. Due to federal law, it does not allow a revocable trust to be

established during life, like a popular Living Trust to avoid probate. This Last Will with Special Needs Trust has some very technical requirements, which your Elder Law attorney should be familiar with. But a simple Will or the standard living trust can no longer do the job. The will is generally more expensive than a simple living trust, but the financial benefits far outweigh the costs.

Basically, the Special Needs Trust would be funded with 30 percent of the well spouse's total estate. The trustee would use these funds for the special needs of the institutionalized spouse. The receipt of these funds would not disqualify the ill spouse from Medicaid benefits and after the death of the surviving ill spouse, the balance would pass to the children, who received the first 70 percent. If it is done right, it is good for all involved, especially for the institutionalized surviving spouse.

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