

COVID Survivorship

A TRIGGER FOR HEIGHTENED NEED FOR LONG-TERM CARE PLANNING?

Richard R. Marsh Flaherty Sensabaugh Bonasso PLLC

COVID has dictated our lives during the never-ending year that is 2020. Moreover, the virus is clearly going to overshadow everything in the upcoming months. However, we will eventually put the matter in our proverbial rear-view windows and return to the “old” normal. What that “old” normal will look like post-COVID is another question and what changes it will bring. Some of those changes will be readily apparent, as retailers keep plastic barriers in place, some employees remain working from home, and a portion of the general population continue wearing masks when ill.

Less readily apparent changes will be the long-term health effects on COVID survivors. Medical researchers are beginning to discover that COVID creates the possibility of long-term health problems. As with any COVID discussion, these findings are an ever-evolving target. Potential issues include heart and lung damage and ongoing chronic fatigue. It is too early to tell, but there are preliminary indicators that the disease could increase the risk of stroke, Parkinson’s disease, and Alzheimer’s disease. And it is important to note that current research is not strictly focused on

survivors of severe cases of COVID: the concern is present for those who experience mild symptoms. As of this writing, one out of almost forty-four people in the United States has contracted COVID. That is a significant population who may suffer from latent long-term negative health effects.

The possibility of latent long-term effects creates the question: does being a survivor of COVID increase your risk for long-term care and correspondingly increase the need for long-term care planning? The short answer to this is “yes” based upon existing guidelines. The National

Institute on Aging recognizes that it is difficult to predict if a person will need long-term care and if a person does, then the intensiveness of the care necessary. Factors that increase the risk of needing long-term care (and more intensive care) are age, gender, marital status, lifestyle, health and family history. COVID would slot into the health history category. For example, we know that diabetes creates a higher risk of needing long-term care, not necessarily because of the disease itself, but because of the potential complications. I assert that COVID, with its potential increased risk of latent long-term effects, should be a catalyst for considering long-term care planning, similar to how someone who has a family history of Alzheimer's or who is single should be engaged in the same sort of planning.

The takeaway is that being a COVID survivor should act as a prompt to start planning. Frankly, everyone needs to plan for this possibility. It is also not an assertion that being a COVID survivor should prompt you to qualify yourself for Medicaid if you need to become a nursing home resident. Rather, it is an assertion that you should take stock of your current health, financial situation, and overall support system to determine what steps you should take now to secure some protections.

You can either easily put several protections into place now or begin to formulate so that they will be ready to go if they are needed. The first and most basic is the creation of powers of attorney. Every person needs a financial power of attorney and medical power of attorney. These powers of attorney can be executed at any time; there is no downside to having them in place. The financial power of attorney allows you to nominate an agent to manage your finances if you cannot. Further, a properly drafted financial power of attorney will allow your agent to make transfers of your assets for creditor and Medicaid protection purposes. A medical power of attorney allows you to name an agent to make medical decisions on your behalf. It also allows you to dictate future directives based upon predictable issues, such as whether you desire to continue to receive life support in a vegetative state or factors to consider before committing you to a nursing facility.

The next protection to explore is long-term care insurance. Most long-term care insurance policies are structured to pay a maximum amount per day for a maximum time period. To purchase a sufficient policy to pay for the entirety of your care is likely not cost-effective. However, it is important protection because it can increase the num-

ber of assets you can protect and qualify for Medicaid. Generally, the percentage of principal you can protect in Medicaid planning is significantly based on your passive monthly income. Therefore, the higher your monthly passive income is, the more principal you can defend. By adding the income flow of the long-term care policy, you will be able to place more of your assets into a Medicaid trust, which you keep, and less in a Medicaid annuity, which you do not, and still ultimately qualify for Medicaid.

One of the problems with qualifying for Medicaid is the dreaded "look-back" period. The most succinct summary of the look-back period is that if you have transferred any assets for less than fair market value within the five years before your Medicaid application, then you are going to be disqualified from receiving long-term care Medicaid benefits for a period of time. This penalty period is based upon the total fair market value of the assets transferred less any consideration received for them divided by the average monthly cost of a nursing home in a particular state, referred to as the penalty divisor. The penalty divisor is different in each state. For example, in 2020, the penalty divisor in West Virginia is \$6,482. Therefore, if you gave your son \$16,000 three years before your Medicaid application date, then you would be disqualified from receiving long-term care benefits for 2.47 months.

The penalty period trips people up in several ways, one of which is transfers to family caregivers. It is extremely common for a family member to care for a loved one to avoid a nursing home. Occasionally, the family member is paid for this. However, if done improperly, this creates a transfer that triggers the penalty period. Planners get around this issue by having the client and the family caregiver enter into a personal care agreement. With a proper personal care agreement, the transfer does not trigger the penalty period. A key to the agreement is that it must be entered into before the caregiver services are rendered. Often, clients begin paying for the caregiver services and then want an agreement after the fact, which is generally a no-no. The agreement should be similar to one you would make with a third party, such as detailing expectations of services and hours. In terms of planning, nothing stops you from contemplating this agreement ahead of time.

Planning on how or when to transfer assets is another early planning opportunity. Generally, if you are interested in creditor or Medicaid protection, the rule is the more control you give up, then the more protection you have. And timing in-

fluences what benefits you can receive from a transfer. Normally, assets having minimal liquidity and having minimal desire to sell are candidates for early transfer. The best example of this in my area is the family hunting property that has been in the family for years. In other areas, it could be a vacation home that you want the kids to have. Those are assets that may be worthwhile to move to a trust early. On the opposite end of the spectrum, someone active in day trading certainly would not want to transfer stock to a trust. By reviewing these assets early and considering how, when, and if to transfer them, you will put yourself in a position to maximize your creditor and Medicaid protection while also balancing your need for control of the asset.

The final reason for planning now is to develop a relationship with the appropriate professionals early. An attorney versed in estate planning will be able to walk you through the potential benefits and pitfalls of your plans. Importantly, by returning periodically to the same attorney, you will develop a relationship with the attorney that may help you later. Unfortunately, a growing problem is elderly financial exploitation. Having a third-party professional who is familiar with your assets and your desires may help thwart wrongdoing. These types of relationships can extend to your insurance agent, financial planner, and others. For that reason, taking that first step in contacting someone is worthwhile.

Looking towards the future, COVID will continue to dictate many aspects of our lives. For people who have recovered from COVID, even those who suffered mild symptoms, the disease may reappear in unexpected ways by having caused damage to the heart, lungs, brain, or other organs. These potential long-term latent effects mean that COVID survivors are at a higher, albeit unclear, risk of needing long-term care in the future. For that reason, COVID survivorship should act as a catalyst to begin estate planning, with an eye towards long-term care planning.



Richard Marsh is an attorney with Flaherty Sensabaugh Bonasso PLLC. He focuses his practice in the areas of trust and estate planning, administration and litigation; real property; general business representation; and bankruptcy and creditor representation. Richard may be reached at rmarsh@flahertylegal.com.