

Estate Planning Myths Explained

Gina M. Barry, Esq.



Myth #1 – “If I have a valid Will, my estate does not have to go through probate.”

The assets in your probate estate are those that are held in the decedent's

name alone that do not have a designated beneficiary. Thus, whether probate is needed is not based upon whether you have a Will; rather, it is based upon how your assets are owned when you die. If you leave probate assets, then in order for your Will to “speak,” a probate estate must be opened.

Myth # 2 – “I can give away \$10,000 to as many people as I want each year, but if I give more, then I have to pay gift tax.”

This myth emanates from the federal gift tax system. There is currently no gift tax in Massachusetts. In 2013, you may give up to \$14,000 to as many people as you want without having to file a federal gift tax return. The amount that can be gifted is stated incorrectly in the myth as most people remain unaware of the ongoing increases to the allowable gift amount. Also, under the current rules, even if a gift tax return must be filed because more than \$14,000 is given to one person, the gift giver will not pay any gift tax until they have gifted more than \$5.25 million during their lifetime. All gifts that exceed the gift tax exclusion will reduce the donor's estate tax exclusion available at death. Thus, if you have \$114,000 and you give all of it away in one year to one person, then you will need to file a federal gift tax return. You will not owe any gift tax because the gift does not exceed the lifetime

threshold, but when you die, the amount of assets that you would have been allowed to pass without paying estate tax will be reduced by \$100,000 (the amount of the gift that exceeded the annual exclusion amount).

Myth #3 – “I can give away assets when I enter a nursing home and still obtain Medicaid benefits.”

When faced with a nursing home bill of approximately \$10,000 per month, many people wish to obtain Medicaid benefits to pay for this care. In order to obtain Medicaid benefits, an asset limit must be met; therefore, assets valued above this amount must be reduced to the asset limit before benefits will be granted. Many people believe that they can give away the excess assets due to the gift tax exclusion explained in Myth #2; however, the Medicaid program is not governed by the gift tax rules. The Medicaid program imposes a penalty when any assets are given away within 5 years of the application for benefits, except in very specific circumstances. This penalty results in you being unable to obtain Medicaid benefits for at least 5 years after such a gift is made.

Myth # 4 – “If I need nursing home care, Medicare will pay for my care.”

In some part, this myth is perpetuated due to the fact that “Medicare” sounds very much like “Medicaid,” which does pay benefits for nursing home care. Medicare Part A will pay for medically necessary inpatient care in a skilled nursing facility, but only following a 3 day hospital admission. Medicare will also pay for up to 100 days of skilled nursing care or rehabilitation services. The actual length of benefits could be much shorter than 100 days if those services are no longer required.

When Medicare benefits are paid, Medicare pays 100% of the cost for the first 20 days, but only 80% of the cost for the next 80 days. Most Medicare recipients also have Medigap insurance, which will pay the balance not covered by Medicare. When Medicare benefits are exhausted, an alternative payment source is needed to pay for ongoing nursing home care.

Although the above myths remain popular, they are not accurate. The best estate planning legal advice comes from a qualified estate planning attorney, who will explain the options that best suit your unique situation and help you find peace of mind while putting your affairs in order.

Gina M. Barry is a partner with the regional law firm of Bacon Wilson, P.C., Attorneys at Law. She is a member of the National Association of Elder Law Attorneys, the Estate Planning Council, and the Western Massachusetts Elder Care Professionals Association. She concentrates her practice in the areas of estate and asset protection planning, probate administration and litigation, guardianships, conservatorships and residential real estate. She can be reached at 413.781.0560 or via email at gbarry@baconwilson.com.