Hauptman & Hauptman, PC

GUIDING FAMILIES THROUGH LIFE'S TRANSITIONS

Elder, Estate, & Special Needs Law

The Consumer's Guide to Medicaid Planning

How to Save Your Home, Protect Your Assets & Finance Your Care Without Going Broke

-Revised-

Updated to reflect recent changes in the law

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INTRODUCTION

The decision to move a family member or loved one into a nursing home is one of the most difficult decisions you can make.

Perhaps the move is being made because the family member can no longer care for himself or herself...or has a progressive disease like Alzheimer's, Parkinson's or ALS...or has had a stroke or heart attack.

No matter the reason, it is a time of great transition. Those involved are almost always under great stress.

At times like these, it's important that you pause, take a deep breath and understand that there are things you can do. Good information is available and you can make the right choices for you and your loved one.

This Consumer's Guide to Medicaid Planning is designed to help provide you with information and answers to some of the questions you will encounter. These are questions which we, as elder law attorneys deal with on a daily basis.

Our clients have found this guide to be a valuable resource, and we hope you will find it useful too.

This guide is brought to you as a service of

Hauptman & Hauptman, P.C.
Yale S. Hauptman, Esq.
Laurie A. Hauptman, Esq.
354 Eisenhower Parkway
Plaza I, 2nd Floor
Livingston, NJ 07039
973-994-2287
Website: www.HauptmanLaw.com
Email: Yale@HauptmanLaw.com
Laurie@HauptmanLaw.com

Americans are living longer than ever before. At the turn of the 20th century, the average life expectancy was about 47 years. As we entered the 21st century life expectancy had almost doubled. As a result, we face more challenges and transitions in our lives than those who came before us.

One of the most difficult transitions people face is the change from independent living in their own home or apartment to living in a long-term care facility or "nursing home." There are many reasons why this transition is so difficult. One is the loss of a home...a home where the person lived for many years with a lifetime of memories. Another is the loss of independence. Still another is the loss of the level of privacy we enjoy at home, since nursing home living is often shared with a roommate.

Most people who make the decision to move to a nursing home do so during a time of great stress. Some have been hospitalized after a stroke, some have fallen and broken a hip, still others have progressive dementia, like Alzheimer's disease, and can no longer be cared for in their own homes.

Whatever the reason, the spouse or relative who helps a person transition into a nursing home during a time of stress faces the immediate dilemma of how to find the right nursing home. The task is no small one, and a huge sigh of relief can be heard when the right home is found and the loved one is moved into the nursing home. For many, the most difficult task is just beginning: *How to cope with nursing home bills that may total between $13,000 - $15,000 per month or more?*

How to Pay for Nursing Home Care

One of the things that concerns people most about nursing home care is how to pay for that care. There are basically five ways that you can pay the cost of a nursing home:

1. **Long-Term Care Insurance -** If you are fortunate enough to have this type of coverage, it may go a long way toward paying the cost of the nursing home. Unfortunately, long-term care insurance has only started to become popular in the last few years and most people facing a nursing home stay do not have this coverage.

2. **Pay with Your Funds -** This is the method many people are required to use first. Quite simply, it means paying for the cost of a nursing home out of your own pocket.

Unfortunately, with nursing home bills averaging $13,000 to $15,000 per month in our area, few people can afford a long term stay in a nursing home.

3. **Veterans Administration** – The United States Veterans Administration operates over 100 nursing facilities. Nursing home care is provided without cost to veterans with service-connected disabilities. For other Veterans there are eligibility factors, including an income limit. The New Jersey Veterans Administration operates 3 homes for New Jersey Veterans and their families. Eligibility requirements vary for veterans, their spouses and parents.

4. **Medicare -** This is the national health insurance program primarily for people 65 years of age and older, certain younger disabled people, and people with kidney failure. Medicare provides short term assistance with nursing home costs, but only if you meet the strict qualification rules.

5. Medicaid - This is a federal and state funded and state administered medical benefit program which can pay for the cost of the nursing home if certain asset and income tests are met.

Since the first two methods of private pay (i.e. using your own funds) and long-term care insurance are self-explanatory and the third method is only available to a small segment of the population, our discussion will concentrate on Medicare and Medicaid.

What About Medicare?

There is a great deal of confusion about Medicare and Medicaid.

Medicare is the federally funded health insurance program primarily designed for older individuals (i.e. those over age 65). There are some limited nursing home benefits that can be available under Medicare. In general, if you are enrolled in the traditional Medicare plan, and you've had a hospital stay of at least three days, and then you are admitted into a skilled nursing facility (often for rehabilitation or skilled nursing care), Medicare may **pay for a while.** (If you are a Medicare Managed Care Plan beneficiary, a three-day hospital stay may not be required to qualify.)

If you qualify, traditional Medicare **may** pay the full cost of the nursing home stay for the first 20 days and **can** continue to pay the cost of the nursing home stay for the next 80 days, but with a deductible that's $200 (2023) per day. Some Medicare, supplemental insurance policies will pay the cost of that deductible. For Medicare Managed Care Plan enrollees, there is no deductible for days 21 through 100, as long as the strict qualifying rules continue to be met. So, in the best-case scenario, the traditional Medicare or the Medicare Managed Care Plan may pay up to 100 days for each "spell of illness." In order to qualify for the 100 days of coverage, however, the nursing home resident must be receiving daily "skilled care" and generally must continue to "improve." (Note: Once the Medicare and Managed Care beneficiary has not received a Medicare covered level of care for 60 consecutive days, the beneficiary may again be eligible for the 100 days of skilled nursing coverage for the next spell of illness.)

While it's never possible to predict at the outset how long Medicare will cover the rehabilitation, from our experience, it usually falls far short of the 100-day maximum. Even if Medicare does cover the 100-day period, what then? What happens after the 100 days of coverage have been used?

At that point, in either case you're back to one of the other alternatives. . . long-term care insurance, paying the bills with your own assets, or qualifying for Medicaid.

What is Medicaid?

Medic<u>aid</u> is a benefits program which is primarily funded by the federal government and administered by each state. This means that the Medicaid rules can and do vary from state to state. The information in this guide deals only with New Jersey's Medicaid program.

One primary benefit of Medicaid is that, unlike Medicare (which only pays for skilled nursing), the Medicaid program will pay for long-term care in a nursing home once you've qualified. Medicare does not pay for treatment for all diseases or conditions. For example, a long term stay in a nursing home may be caused by Alzheimer's or Parkinson's disease, and even though the patient receives medical care, the treatment will not be paid for by Medicare. These stays are called custodial nursing home stays. Medicare does not pay for custodial nursing home stays. In that instance, you'll either have to pay privately (i.e. use long term care insurance or your own funds), or you'll have to qualify for Medicaid.

Why Seek Advice for Medicaid?

As life expectancies and long-term care costs continue to rise, the challenge quickly becomes how to pay for these services. Many people cannot afford to pay $13,000 - $15,000 per month or more for the cost of a nursing home, and those who can pay for a while may find their life savings wiped out in a matter of months, rather than years.

Fortunately, the Medicaid Program is there to help. In fact, in our lifetime, Medicaid has become the long-term care insurance of the middle class. But the eligibility to receive Medicaid benefits requires that you pass certain tests on the amount of income and assets that you have. The reasons for Medicaid planning are simple. First, you need to provide enough assets for the security of your loved ones – they too may have a similar crisis. Second, the rules are extremely complicated and confusing. The result is that without planning and advice, many people **spend more than they should** and their family security is jeopardized.

New Jersey's Medicaid Program

New Jersey's Medicaid program pays for nursing home level care in a nursing home, assisted living or the applicant's own home (although only in a nursing home will it pay for 100% of the care needed). Applicants must have no more than $2,000 in assets. There is an income limitation as well ($2,742 per month in 2023), although applicants with income greater than the income cap can qualify by placing excess income into a qualified income trust (Miller trust).

Exempt Assets and Countable Assets:
What Must Be Spent?

To qualify for Medicaid, applicants must pass some fairly strict tests on the amount of assets they can keep. To understand how Medicaid works, we first need to review what are known as *exempt* and *non-exempt* (or countable) *assets*. Exempt *assets* are those which Medicaid will not take into account (at least for the time being). In general, the following are the primary exempt assets:

- **The Home** (for a single applicant equity up to $955,000 is exempt (in 2023)). The home must be the principal place of residence. The nursing home resident may be required to show some "intent to return home" even if this never actually takes place. However, in some situations, a lien can be placed against the home.

Also, the home is no longer exempt following the death of the nursing home resident and any spouse.

- **<u>Personal Belongings and Household Goods</u>** up to $2,000 (although in practice New Jersey has not strictly enforced this requirement).
- **<u>One car</u>** is totally excluded if necessary for employment or as a means of transportation for medical treatment.
- **<u>Medical devices,</u>** wheelchairs, prosthetic devices and similar equipment unless others in the household use them as well.
- **<u>Burial spaces</u>** for applicant and his/her spouse or any other member of his/her immediate family and funds set aside for burial expenses of the applicant and his/her spouse not to exceed $1,500.
- **<u>Irrevocable prepaid funeral contract.</u>**
  - **<u>Cash value of life insurance</u>** if face value is $1,500 or less. If insurance is term insurance then the entire amount is exempt regardless of the face value.

All other assets are generally *non-exempt*, and are countable. Basically, all money, property, and any item that can be valued and turned into cash, is a *countable asset* unless it is one of those assets listed above as exempt. This includes:

- Cash, savings, and checking accounts, credit union share and draft accounts
- Certificates of Deposit
- U.S. Savings Bonds
- Individual Retirement Accounts (IRA), Keogh plans, 401k and 403b accounts
- Nursing home accounts
- Prepaid funeral contracts which can be canceled
- Trusts (depending on the terms of the trust)
- Real estate (other than the residence)
- More than one car
- Boats or recreational vehicles
- Stocks, bonds, or mutual funds
- Land contracts or mortgages held on real estate sold

While the Medicaid rules themselves are complicated and tricky, it's safe to say that a single person will qualify for Medicaid as long as he/she has only exempt assets plus a small amount of cash and/or money in the bank, up to $2,000.

Some Common Questions

I've added my kids' names to my bank account. Does Medicaid still count all the money in the account?

Yes. The entire amount is counted unless you can prove some or all of the money was contributed by the other person who is on the account. This rule applies to cash assets such as:

- Savings and checking accounts
- Credit union share and draft accounts
- Certificates of Deposit
- U.S. Savings Bonds

Can't I Just Give My Assets Away?

Many people wonder, "Can't I give my assets away?" The answer is, maybe, but only if it's done just right. The law has severe penalties for people who simply give away their assets to create Medicaid eligibility. Legislation enacted February 8, 2006 extends the "look back period" from 3 years to 5 years (and in some ways the "penalty period"), aggregates all gifts (even small ones) made during the "look back period" and imposes other harsh new penalties for gifts made after February 8, 2006. (Gifts made before this date are "grandfathered" under the law that existed before February 8, 2006).

Under the current rules, for example, every $374.39 (2023) given away during the five years immediately preceding a Medicaid application creates a period of ineligibility – and that period of ineligibility does not begin until the person has "spent down" their assets and otherwise qualifies for assistance. So, even though the Federal Gift Tax law allows you to give away up to $16,000 (2023) per year without tax consequences, a $16,000 gift could result in a significant period of Medicaid ineligibility.

Giving under the current rules may be possible; however, it is critically important that you have the advice of an attorney well-versed in this new law.

Though some families do spend virtually all of their savings on nursing home care, Medicaid often does not require it. There are a number of strategies which can be used to protect family financial security.

Medicaid Planning for Married Couples

Division of Assets is the name commonly used for the Spousal Impoverishment provisions of the Medicare Catastrophic Act of 1988. It applies only to couples. The intent of the law was to change the eligibility requirements for Medicaid where one spouse needs nursing home care while the other spouse remains in the community, (i.e., at home). The law, in effect, recognizes that it makes little sense to impoverish both spouses when only one needs to qualify for Medicaid assistance for nursing home care.

As a result of this recognition, division of assets was born. Basically, in a division of assets, the couple gathers all their countable assets together for a review. Exempt assets, discussed above, are not counted. The countable assets are then divided in two, with the at-home or "community spouse" allowed to keep one half of all countable assets to a maximum of $148,620 (in 2023). The other half of the countable assets must be "spent down" until less than $2,000 remains. The amount of the countable assets which the at-home spouse gets to keep is called the Community Spouse Resource Allowance (CSRA).

Each state also establishes a monthly income floor for the at-home spouse. This is called the Minimum Monthly Maintenance Needs Allowance. This permits the community spouse to keep a minimum monthly income ranging from $2,288.75 (in 2023) to $3,715.50 (in 2023). (These amounts increase every year to keep pace with inflation.) If the community spouse does not have at least $2,288.75 (in 2023) in income, then he/she is allowed to take the income of the nursing home spouse in an amount large enough that, when added to his/her own income, reaches the Minimum Monthly Maintenance Needs Allowance (i.e. up to at least $2,288.75 (in 2023).

The nursing home spouse's remaining income goes to the nursing home. This avoids the necessity (hopefully) for the at-home spouse to dip into savings each month, which would result in gradual impoverishment. To illustrate, assume the at-home spouse receives $800 per month in Social Security. Also assume that her needs are calculated to be the minimum of $2,288.75. With her Social Security, she is $1,488.75 short each month.

$2,288.75	at-home spouse's monthly needs (as determined by formula)
$800.00	at-home spouse's Social Security
$1,488.75	shortfall

In this case, the community spouse will receive $1,488.75 (the shortfall amount) per month from the nursing home spouse's Social Security and the rest of the nursing home spouse's income will then go to pay for the cost of his care.

This does not mean, however, that there are no planning alternatives which the couple can pursue. Consider the following case studies:

Case Study: Medicaid Planning for Married People

Tom and Mary were high school sweethearts who have lived in Northern New Jersey their entire adult lives. Two weeks ago, Tom and Mary celebrated their 51st anniversary. Yesterday, Tom, who has Alzheimer's, wandered away from home. The police found him, hours later, sitting on a street curb talking incoherently. They took him to a hospital. Now the family doctor has told Mary that she needs to place Tom in a nursing home. Tom and Mary grew up during the Depression. They always tried to save something each month. Their assets, totaling $120,000, not including their house, are as follows:

Savings account	$35,000
CDs	65,000
Money Market account	17,000
Checking account	3,000
Residence (no mortgage)	300,000

Tom gets a Social Security check for $800 each month; Mary's check is $300. Her eyes fill with tears as she says, "At $13,000 to the nursing home every month, our entire life savings will be gone in less than three years!" What's more, she's afraid she won't be able to pay her monthly bills, because a neighbor told her that the nursing home will be entitled to all of Tom's Social Security check.

There is good news for Mary. It's possible she will get to keep most of their assets and all of the income...and still have the state Medicaid program pay Tom's nursing home costs. The process may take a little while, but the end result will be worth it.

To apply for Medicaid, she will have to go through the Division of Medical Assistance and Health Services (DMAHS). If she does things strictly according to the way DMHAS tells her, she will only be able to keep about half of her assets plus she will be entitled to a minimum monthly income to pay her expenses. But the results can actually be much better than that.

But the results can actually be much better than the traditional spend down, which everyone talks about. Mary may be able to protect more of the couple's assets through the use of the equity in their home. Before Tom enters the nursing home, she could take a home equity loan or line of credit of $115,000 and place that money into their bank account. For purposes of the Medicaid spend down their assets are now $235,000, of which she is entitled to keep $148,620 (2023) (rather than the $60,000 she could keep without taking the loan). Once Tom enters the nursing home, she can pay down the loan as part of the spend down of assets required by Medicaid.

Please note this will not work in every case. That's why it is important to have an elder law Attorney guide you through the system and the Medicaid process to find strategies that will be most beneficial in your situation. So, Mary will have to get advice from someone who knows how to navigate the system. But with proper advice, Mary will be able to avoid the spend down and keep more of what she and Tom have worked so hard for.

Medicaid laws, like tax laws, are complex. So, like smart families who save on their taxes, help from an advisor who has knowledge of the rules and how to apply them can be used to resolve Mary's dilemma.

Of course, proper Medicaid planning differs according to the relevant facts and circumstances of each situation as well as the current state law.

For example, some children never gain independence - they remain dependent on their parents. What can be done in such a case?

Case Study: A Trust For A Disabled Child

Margaret and Sam have always taken care of their daughter, Elizabeth. She is 45, has never worked, and has never left home. She is "developmentally disabled" and receives SSI (Supplemental Security Income). They have always worried about who would take care of her after they die. Some years ago, Sam was diagnosed with dementia. His health has deteriorated to the point that Margaret can no longer take care of him. Now she has placed Sam in a nursing home and is paying $13,000 per month out of savings. Margaret is even more worried that there will not be any money left for the care of Elizabeth.

Margaret is satisfied with the nursing home Sam is in. The facility has a Medicaid bed available that Sam could have if he were eligible. Medicaid would pay his bill. However, according to the information she received from the social worker, Sam is $180,000 away from Medicaid eligibility. Margaret wishes there was a way to save the $180,000 for Elizabeth after she and Sam are gone. There is.

Margaret can consult an elder law attorney to set up a *"special needs trust"* and put the $180,000 in the trust to provide for Elizabeth. As soon as she does, Sam will be eligible for Medicaid. Elizabeth won't lose her benefits, and her security is assured.

Of course, all trusts must be reviewed for compliance with Medicaid rules. Also, failure to report assets is fraud, and when discovered, will cause loss of eligibility and repayment of benefits. Still, some people question making gifts before entering a nursing home.

I Heard I Can Give Away $16,000 Per Year. Can't I?

As discussed earlier, many people have heard of the federal gift tax provision that allows them to give away $16,000 (2023) per year without paying any gift taxes. What they do not know is that this refers to a gift tax exemption. It is not an absolute right where Medicaid is concerned. Having heard of the exemption, they wonder, **"Can't I give my assets away?"** The answer is, maybe, but only if it's done within the strict allowance of the law.

So even though the federal gift tax law allows you to give away up to $16,000(2023) per year without incurring tax, those gifts could result in a significant period of ineligibility. Still, some parents want to make gifts to their children before their life savings are all gone. Consider the following case study:

Case Study: Financial Gifts to Children

After her 73 year old husband, Harold, suffers a paralyzing stroke, Mildred and her daughter, Joan, need advice. Dark circles have formed under Mildred's eyes. Her hair is disheveled. Joan holds her hand.

"The doctor says Harold needs long-term care in a nursing home," Mildred says. "I have some money in savings, but not enough. I don't want to lose my house and all our hard-earned money. I don't know what to do."

Joan has heard about Medicaid benefits for nursing homes, but doesn't want her mother left destitute in order for Harold to qualify for them. Joan wants to ensure that her father's medical needs are met, but she also wants to preserve Mildred's assets.

"Can't Mom just give her money to me as a gift?" she asks. "Can't she give away $16,000 (2023) a year? I could keep the money for her so she doesn't lose it when Dad applies for Medicaid."

Joan has confused general estate, gift and tax laws with the issue of *asset transfers* and *Medicaid eligibility.* A "gift" to a child in this case is actually a transfer, and Medicaid has very specific rules about transfers.

At the time Harold applies for Medicaid benefits, authorities will look back five years to see if any gifts have been made. They will not let the applicant just give away their money or their property to qualify for Medicaid. Any gifts or transfers for less than fair market value, which are uncovered in the look back period, will cause a delay in Harold's eligibility for Medicaid benefits.

In addition to the changes in the "look back" period from 3 to 5 years, the new law also states that all gifts and asset transfers must be aggregated and the resulting "penalty period" will not begin until the Medicaid applicant is in the nursing home and has already spent down his assets. This will frustrate the gifting plans of most people.

So, what can Harold and Mildred do? They can institute a plan, save a good portion of their estate, and still qualify for Medicaid benefits. But they have to set the plan up just right; the rules are very "nit-picky." They should consult a knowledgeable advisor on how this may be done.

Will I Lose My Home?

Many people who apply for medical assistance benefits to pay for nursing home care ask this question. For many, their home constitutes much or most of their life savings. Often, it is all the couple has to pass on to their children.

Under the Medicaid regulations, the home is an exempt asset. For a single applicant the exemption is limited to $955,000 of equity (in 2023). This means it is not taken into account when calculating eligibility for Medicaid. But in 1993 Congress passed a little-debated law that affects hundreds of thousands of families with a spouse or elderly parent in a nursing home. That law requires states to try to recover the value of Medicaid payments made to nursing home residents.

Estate recovery does not take place until the recipient of the benefits dies (or until both spouses die in the case of a married couple). Then, the federal law requires that states attempt to recover the benefits paid from the recipient's probate estate. Generally, the probate estate consists of assets that the deceased person owned in his or her name alone without beneficiary designation. Some believe the federal law permits states to go even further and recover from non-probate assets, including assets owned jointly or payable to a beneficiary.

The net result is that the state can and will file a lien on the home and other property of the Medicaid recipient and also file a claim against the recipient's estate. In some cases, the state may go after real estate or other assets in the hands of children or other third parties.

About two-thirds of the nation's nursing home residents have their costs paid in part by Medicaid. Obviously, the Estate Recovery law affects many families. The asset most frequently caught in the Estate Recovery web is the home of the Medicaid recipient. A nursing home resident can own a home and receive Medicaid benefits without having to sell the home. But upon death, if the home is part of the probate estate, the state may seek to force the sale of the home in order to reimburse the state for the payments that were made.

The challenge is to not only implement a plan which will accomplish the client's immediate goals of preserving assets and qualifying for Medicaid benefits, but also one which will avoid the trap of liens and estate recovery.

Since the Medicaid rules are constantly changing, you will need assistance from someone knowledgeable about these rules and who deals with Medicaid frequently.

Legal Assistance

Aging persons and their family members face many unique legal issues. As you can tell from our discussion of the Medicaid program, the legal, financial, and care planning issues facing the prospective nursing home resident and family can be particularly complex. If you or a family member needs nursing home care, it is clear that you need expert legal help. Where can you turn for that help? It is difficult for the consumer to be able to identify lawyers who have the training and experience required to provide expert guidance during this most difficult time.

Generally, nursing home planning and Medicaid planning is an aspect of the services provided by some, but not all, elder law attorneys. Consumers must be cautious in choosing a lawyer and carefully investigate the lawyer's credentials.

How do you find a law office that has the knowledge and experience you need? You may want to start with recommendations from friends who have received professional help with nursing home issues. Who did they use? Were they satisfied with the services they received? Hospital social workers, Alzheimer's, Parkinson's and other support groups, accountants, and other financial professionals can also be good sources of recommendations.

In general, a lawyer who devotes a substantial part of his or her practice to nursing home planning should have more knowledge and experience to address the issues properly. Don't hesitate to ask the lawyer what percentage of his practice involves nursing home planning. Or you may want to ask how many new nursing home planning cases the law office handles each month. There is no correct answer. But there is a good chance that a law office that assists with two nursing home placements a week is likely to be more up-to-date and knowledgeable than an office that helps with two placements a year. Ask whether the lawyer is a member of any elder law planning organizations. Is the lawyer involved with committees or local or state bar organizations that have to do with nursing home planning?

The leading national organization of elder law attorneys is the National Academy of Elder Law Attorneys (NAELA). While mere membership in the Academy is no sure sign that the attorney is an experienced Elder Law practitioner, membership does at least show that the lawyer has some interest in the field. In addition, the Academy runs educational sessions to help lawyers stay current on the latest aspects of elder law and nursing home planning. Attending these sessions takes time and commitment on the part of the lawyer and is a good sign that the lawyer stays up to date on elder law issues. You may want to look for an attorney who is a member of NAELA and, has recently attended one or more of its educational sessions.

In the end, follow your instincts and choose an attorney who knows this area of the law, who is committed to helping others, and who will listen to you and the unique wants and needs of you and your family.

CONCLUSION

There are a number of strategies that can be used to qualify for Medicaid benefits and still preserve some or all lifetime savings. The spouse and family also can be protected.

These strategies are legal. They are moral. They are ethical. A person who meets the criteria of the program is legally entitled under Title 19 of the Social Security Act to the benefits of the program. As the wife of one of our clients said,

> "My husband worked hard all of his life. He always played by the rules, paid the bills, and did without so we could put a little aside when we could. He has paid his dues!"

You have the right to choose which options you will use and which you will not. However, the Medicaid rules are complex, and the strategies for dealing with those rules are difficult to implement. Medicaid planning requires a great deal of knowledge of the current rules and practices of the system. Work with a knowledgeable and experienced elder law attorney – one who knows the rules and has had substantial experience dealing with the Medicaid system who can advise you accurately in order to maximize the benefits to which you and your loved ones are entitled, and who can handle the Medicaid application, documentation and verification process as well.

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354 Eisenhower Parkway
Plaza 1, 2nd Floor
Livingston, New Jersey 07039
973-994-2287 (phone)   973-535-0662 (fax)
www.HauptmanLaw.com