

**ELDER LAW AND LONG-TERM CARE:
ASSET PROTECTION
AND TAX PLANNING**

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I. INTRODUCTION:

A HIGH-INCOME FAMILIES AND CHALLENGES OF CARING FOR OUR ELDERS

Wealth, a highly relative term, presents numerous challenges when we consider the aging process. Most want to remain at home as long as possible. The cost of being cared for at home, if disability strikes, can be greater than the cost of a long-term care facility. Particularly problematic can be the expectation that wealth brings with it greater quality of care and greater quality of life for family members who suffer from physical and/or mental deterioration. This can be the case, but only with careful planning and knowledgeable supervision.

We must be careful about our assumptions. A "high-income individual" may or may not have substantial underlying wealth. Wealth may be illiquid, primarily consisting of a residence and a retirement plan. The individual may have children or other family members with special needs. The individual may have personal health concerns or personal experiences that lead to great financial conservatism and insecurity about the future. For these reasons, and many more, many individuals with high incomes and significant wealth are concerned about the cost of caring for themselves or for their elders. With the monthly cost of care in skilled nursing facilities ranging from \$4,000 to \$15,000 per month, seemingly large estates can face serious erosion. While many suggest that paying the cost of care in old age is a purpose of acquiring wealth, many feel resentment and a desire to protect assets notwithstanding the need for quality care.

Harmonizing a multitude of objectives -- asset preservation, quality care, clear consciences, financial security for multiple generations within a family -- is the challenge estate planning and elder law attorneys routinely face.

B OPPORTUNITY FOR AND RESPONSIBILITY OF CPA PROFESSION

Representatives of the insurance industry have many contacts with their clients throughout the years. Perhaps uniquely, such individuals will become aware of increasing health difficulties encountered by their clients.

As insurance industries consider appropriate insurance policies, such as long-term care insurance, they should also consider alternative approaches to paying for the cost of care. This is particularly appropriate for individuals who may not qualify for long-term care insurance or who are in a position where they cannot afford such insurance. All planning opportunities should be explored.

For example, client questions about tax deductions for medical bills means that there has been a major health problem in the client's family. Follow up questions may reveal that even more significant medical care will be needed in the future. If that care could involve a nursing home, in particular, that client needs to know about alternative means of paying the cost of such care. As explained more completely in other portions of these materials, the cost of long-term care can quickly exhaust the estates of all but the wealthy.

It is, then, the responsibility of the CPA profession to help clients identify the planning needs they have and to guide them to sources of assistance. The legal profession bears a similar responsibility when it encounters myriad tax issues and the need for CPA involvement becomes transparent.

II. TAX, ESTATE, AND MEDICAID PLANNING ARE ROUTINELY INSEPARABLE

The traditional world of tax and estate planning is conceptually identical to the world of Medicaid and public benefits planning. The former relies on diverse bodies of law and applies them for the financial protection of clients who seek such advice. Fortunes in tax can be avoided, family businesses can be saved, and inheritances can be protected for following generations.

The latter does precisely the same thing. It relies on federal and state legislation for the protection and well-being of individuals, couples, and families who may otherwise lose their entire estates. It looks to legislatively established benefits and legislatively established planning opportunities to preserve assets, avoid taxes, and save inheritances for following generations. It offers a cushion or safety net to individuals -- typically older and in failing health -- who would otherwise lose everything and become utterly dependent on the public benefits system.

Bifurcation inappropriate. Notwithstanding these similarities, many practitioners seek to bifurcate the two. They seek to practice in only one area, suggesting that the other is a separate area of specialization.

Such practitioners do their clients a disservice. At minimum, attorneys who choose to focus on tax and traditional estate planning must be familiar with the salient issues and opportunities presented by the related world of public benefits planning. Attorneys who choose to focus on public benefits planning must be familiar with certain tax, trust, and other estate planning opportunities that present themselves.

III. FINANCING MEDICAL CARE COSTS

A. Private Payment.

B. Medicare.

Neither Medicare nor standard "Medigap" or other private health insurance covers long-term care. Home care is also limited under Medicare; requirements such as "intermittent" "part-time" skilled care as a precondition to covering non-skilled nursing aide assistance.

C. Insurance, (including LTC).

1. The quality of products has improved. Home care options are more liberal and some policies contain investment return options.
2. Public-private partnership plans created by the Robert Wood Johnson Foundation in conjunction with the Health Care Financing Administration ("HCFA") are available in five states, including California and New York.

<< California's public-private long-term care insurance initiative, funded in large part by the Robert Wood Johnson Foundation (RWJ) has generated new insurance products, which are now available through most companies in the State.

D. Medicaid.

Note significance of potential home care benefits provided by Medicaid without Medicare limitations as those described above.

E. Other.

Life insurance, veterans benefits.

IV **LONG-TERM CARE INSURANCE**

A. Overview

Long-term care insurance helps defray the staggering costs of nursing home care and home health care.

1 Who Needs Long-term Care Insurance?

- a. People with few assets do not need long-term care insurance, since they can qualify for Medicaid-financed nursing home care.
- b. People with a great deal of wealth do not need long-term care insurance, since they will be able to privately pay for nursing home care.
- c. People with moderate wealth are those who need long-term care insurance because they will not qualify for Medicaid and cannot afford to see their assets depleted by the costs of prolonged nursing home care.

2 When should you purchase long-term care insurance?

- a. The longer you wait to purchase long-term care insurance, the higher the annual premium. Purchasing a policy at age 70, for example, can be more than double the premium of the same policy purchased at age 50.
- b. Deteriorating health can make you uninsurable or significantly increase the premium.
- c. On the other hand, purchasing a policy at age 70, and soon thereafter entering a nursing home will prove to be a bargain.

B. Choosing the Best Insurance Company and the Best Policy.

1. Consider the financial stability and rating of the company.
2. Determine whether the contract is an indemnity or reimbursement type.
3. Determine the benefit limits. Research the amounts charged by nursing homes in the area before buying a policy.

4. Determine what inflation options exist. Determine whether Cost of Living Adjustments (COLAs) are automatically included without having to opt for an inflation rider.
 5. Determine options for reducing the premium and whether discounts are available.
 - A. Consider purchasing a lifetime benefit policy that does not start paying benefits until one year after deemed eligible (the elimination period) in exchange for dramatically reduced premiums. Consider shorter “elimination periods” other than one year.
 - B. Consider purchasing a policy that only covers a limited number of years in exchange for dramatically reduced premiums.
 - Roughly 20% of those admitted to nursing home care stay for five or more years.
 6. Determine the extent of and rate at which premiums increase. A large number of policies are cancelled when they are most needed because the insured, who is on a fixed income, cannot afford the increased premiums.
 7. Determine what riders are available.
 8. Determine how benefit’s eligibility is determined. Is it based on mental function or ability to perform activities of daily living? Does your doctor make the determination or does the insurance company’s doctor?
 9. Determine how and the extent to which assisted living facilities are covered.
 10. Determine how and the extent to which home health care is covered. Is it for professional (licensed) or informal (unlicensed) care?
 11. Determine whether upgrading privileges are available.
 12. Determine whether your employer provides long-term care insurance.
 13. Determine whether the insurance plan offers public-private partnerships plans offered in some states, including California and New York.
 - A. When the benefits run out on a partnership long-term care plan, the beneficiary is automatically eligible for state Medicaid assistance.
- C. Tax Implications of Long-Term Care Insurance
1. Benefits received under a long-term care policy are not taxable income to the extent payments exceeding \$220 per day do not exceed the actual cost of care.
 2. A portion of the premium payments for long-term care insurance qualifies as a deductible medical expense. The deductible amount is determined according to a

table adjusted for inflation annually. For 2004, the deductible amounts as a medical expense are as follows:

A.	Age 40 or under	\$250
	Age 41 to 50	\$470
	Age 51 to 60	\$940
	Age 61 to 70	\$2,510
	Age 71 or over	\$3,130

B. As with all medical expenses, the deductible portion of long-term care insurance premiums can only be deducted to the extent the deductible amount, when added to other medical expenses, exceeds 7.5% of Adjusted Gross Income.

3. Like other business expenses, employers can deduct long-term care insurance premiums paid on behalf of employees.

A. Amounts received by an employee through accident or health insurance for personal injuries or sickness must be included in gross income to the extent such amounts are attributable to contributions by the employer which were not included in the gross income of the employee or are paid by the employer. Priv. Ltr. Rul. 200204021

4. Self-employed persons can treat long-term care insurance as “health insurance” to obtain a 100% deduction in 2004.

V. **MEDICAID OVERVIEW**

A. Objectives.

Medicaid is a federally based, means-tested program designed to provide fundamental health care to elders (65+) and disabled persons who qualify in terms of income and assets.

B. Federal-State Participation.

1. Administered through a local state or county health or social service agency.
2. There are federal minimum standards and requirements, but states are allowed choices and flexibility on a wide variety of issues: income and asset eligibility, benefits, and recovery. There are numerous state differences in scope of coverage and services provided.

C. Sources of Law.

1. See 42 U.S.C. §1396 et seq.

2. HCFA issues regulations. See 42 C.F.R. §430 et seq.; 42 C.F.R. §435 (eligibility in the States and D.C.); 20 C.F.R. §416 (SSI rules).
3. See Medicare Catastrophic Coverage Act of 1988 (MCCA), 42 U.S.C. §1396p(c). Also consult Medicaid Assistance Manuals, Medicaid program memoranda, and transmittal notices to state agencies.
4. Omnibus Budget Reconciliation Act of 1993 (OBRA §93). Public L. No. 103-66, 103d Cong., 1st Sess., §13611(a) (August 10, 1993).

D. Local Implementation.

1. State. Each state has its own:
 - a. Statutory authority.
 - b. Implementation regulations -- state agency promulgates.
 - c. State Plan -- Developed by each state for federal approval.
 - d. State agreements with medical providers to treat Medicaid beneficiaries.
 - e. State Medicaid Manual, which should contain all written materials pertaining to state Medicaid eligibility.
2. Local offices, to which elders look for information and at which potential Medicaid recipients must apply, are subject to human vagaries. The value of getting to know a Medicaid supervisor cannot be overemphasized. For example, it is not uncommon for state directives, legislation, and/or implementing regulations to be interpreted in a way which is inconsistent with federal law.

**VI. MEDICAID COVERED SERVICES: STATE OPTIONS AND VARIATIONS.
42 U.S.C.A. §1396d(a).**

- A. Long-Term Care.
- B. "Medically Necessary" Services.
- C. Adult Day Health Care.
- D. Home Health Care.

VII. POTENTIAL "COST" OF MEDICAID COVERAGE.

- A. Fewer Options, Providers, and Services.
 1. Medicaid providers may not seek to collect the difference between private pay rate of nursing home and the amount of the Medicaid established amount.

2. Nursing homes are not required to admit an individual without regard to ability to pay. Federal law does require the following:
 - a. The right not to be discharged or transferred. Payment at Medicaid rates is considered full payment and cannot be basis of discharge for nonpayment. 42 U.S.C.A. §1396r(c)(2)(A)(v).
 - b. Policies regarding transfer and discharge must be "identical . . . for all individuals regardless of source of payment." 42 U.S.C §1396r(c)(4)(A).
 - c. A nursing home may not require the applicant to waive Medicaid benefits' rights, nor ask for an assurance of non-eligibility or that the applicant will not apply for Medicaid benefits. 42 U.S.C §1396r(c)(5)(A)(i).

B. Quality of Care Considerations.

1. Economics.

In most states, nursing home providers receive substantially less monthly income for Medicaid recipients than for those who pay the private rate. The differential can be as much as \$1,000 per month and could be larger in the future. To the extent that extra funds are devoted to extra staffing, this can have an impact on quality of care. It is not, however, this simple.

2. "Cookies and Thorns."

Quality is an elusive factor. In many facilities, quality of care for an individual resident is heightened when that individual has many visitors who establish good relationships with staff members and who are simultaneously attentive to quality of care considerations. This may be referred to as the "Cookies and Thorns" approach.

C. Medicaid Rules, Coverage May Change.

This is a time of flux. It is acknowledged that "business as usual" is no longer acceptable. Eligibility restrictions may tighten or the Medicaid program may be thoroughly revamped.

D. Psychological Impact on Elders.

Many elders view Medicaid as "welfare," and are strongly averse to establishing eligibility. Implicit in eligibility is the loss of assets and, thereby, the loss of power and control over one's life.

VIII BASIC RULES OF ELIGIBILITY

A. Status.

1. "Categorically Needy."

Recipients of Aid For Families With Dependent Children (AFDC), pregnant women and children up to age 6 with income less than 133 percent of the federal income poverty guidelines, and all SSI recipients (see below regarding Section 209(b) states) automatically qualify for Medicaid.

Some states have opted for Section 209(b) status, which has the effect of eliminating some current SSI recipients from mandatory "categorically needy" Medicaid coverage.

2. "Medically Needy."

States may allow Medicaid coverage for individuals who fail to qualify for AFDC or SSI because of income in excess of minimum levels. See 42 U.S.C. §1396a(a)(10)(c).

3. A condition of eligibility is that the individual be a citizen or legal alien.

B. Resources.

1. Exempt Resources.

Some resources or assets are "exempt" and are simply excluded when determining the eligibility of a Medicaid applicant.

2. Resource Limits.

"Countable assets" are strictly limited. The applicant can typically have no more than \$2,000 in his name at the time of obtaining Medicaid eligibility. Some states allow a slightly higher level of resources. New York, for example, allows a qualifying individual to have up to \$_____.

3. Community Spouse Resource Allowance (CSRA).

When one spouse is institutionalized, the other spouse (the "community spouse") may retain the CSRA established in her state. The maximum CSRA for 2004 is \$92,760.

4. Transfer of Assets.

As discussed below, the transfer of certain assets may generate a period of Medicaid ineligibility.

C. Income.

1. Special income rules apply when there is a community spouse. This is the "Minimum Monthly Maintenance Need Allowance" (MMMNA). When the institutionalized spouse qualifies for Medicaid, the community spouse shall retain the greater of income arriving in her name ("name on the check rule") or the MMMNA. This income minimum may be no larger than \$2,319 per month in 2004.

2. "Income-cap states" deny eligibility to individuals with incomes that exceed 300 percent of the SSI income level. In these states, Medicaid coverage is denied, regardless of assets, if monthly income exceeds this amount. These states include Colorado, Florida, and New Jersey. There are some twenty states that rely on some variation of this approach.

A. "Waiver" Requests

Three states (Connecticut, Massachusetts and ## have submitted requests to the federal Medicaid Program to dramatically restrict planning. If granted, court challenges are inevitable.

IX. EXEMPT RESOURCES

A. Residence and Essential Adjacent Property.

1. "Intent to return home" has been, and continues to be, sufficient to protect a residence unoccupied by the applicant in most jurisdictions. Others are less forgiving. New York presumes that a person is in "permanent absent status" if for six months he is in a nursing home, in an acute care hospital, or in transitional care resulting in nursing home placement.
2. Exempt status secure if any of the following persons live in the residence: a minor, blind, or disabled child, a spouse, or a sibling who has an equity interest and who has also resided in the property for one year prior to the applicant's institutionalization.
3. The applicant may own only a partial interest.
4. A duplex may be a legal residence.

B. Property Used in a Trade or Business.

There is no limit to the value of property that may be retained as an exempt asset so long as it is used in a trade or business (and so long as the applicant is not in a Section 209(b) state). 42 U.S.C. §1382b(a)(3). Cash retained in business accounts may also be exempt as operating expenses.

C. Personal Effects and Household Items.

D. Burial Insurance, Trust, Plots.

E. Automobile, regardless of value.

F. Accounts Holding German and/or Austrian Reparations.

G. Restitution Funds held by Japanese Americans.

H. Agent Orange and Seneca Nation Settlement Funds.

- I. Pension Funds – all states protect community spouses accounts; some also allow protection of applicant.
- J. State-Specific Variations.

X. TRANSFER OF ASSETS

A. Address Client Misconception.

One may not give away \$11,000 per year without Medicaid eligibility problems. This type of gift is the "annual exclusion," which pertains to gift tax planning. IRC §2503(b). Clients must understand that transfer rules in the context of Medicaid have nothing to do with transfer rules in the context of tax.

B. The Criminalization of Legal Advice

In past years, some members of Congress have sought to criminalize certain aspects of Medicaid planning. Rather than merely lengthen the "look-back period," for example, these individuals sought to make it a federal felony.

The criminalization of assets transfers as introduced by the Kennedy-Kassebaum bill (known as the Health Insurance Portability and Accountability Act of 1996), has effectively been effectively repealed. Section 4734 of the Balanced Budget Act of 1997 amended and effectively deleted the provision that criminalized asset transfers in certain situations.

In its place was a provision which sought to impose criminal liability on any individual who, for a fee, counseled or assisted a Medicaid applicant in making transfers in certain circumstances. This provision was deemed unconstitutional and is no longer in effect.

Notwithstanding the demise of these provisions, their significance must not be lost. Congress and federal legislation may be increasingly inhospitable to such planning in the future.

C. Protected Transfers.

Some transfers of assets have no negative impact on Medicaid eligibility.

- 1. In California, transfer of an exempt asset does not generate a period of ineligibility.

*This planning opportunity may end at any time.

- 2. Transfer of Residence.

In all jurisdictions, protected is the transfer of a residence to a spouse, to a blind, disabled, or minor child, to an adult child who has resided with the applicant for two years prior to institutionalization and contributed to the parent's ability to avoid institutionalization, or to a sibling with an equity interest in the residence and who has lived there at least one year before the applicant became institutionalized. See 42 U.S.C. §1396p(c)(2)(A).

3. Any transfers to a blind or disabled child, the community spouse, or other limited classes of persons are protected. 42 U.S.C. §1396p(c)(2).
4. Other Protected Transfers.

Although typically difficult to establish, outright gifts may be protected if it can be shown that the resulting denial of Medicaid coverage would work an "undue hardship." 42 U.S.C. §1396p(c)(2)(D).
5. In some jurisdictions, removal of funds from joint accounts has been a protected act. It is now clear that such action will be treated as a transfer of assets. 42 U.S.C. §1396p(c)(3).
6. Transfers by the community spouse after the nursing home resident has qualified for Medicaid have no adverse impact on the latter's eligibility.

D. Transfer of Non-Exempt Assets.

1. Gifts completed on or before August 10, 1993 are covered by MCCA. The transfer of cash and other non-exempt assets will generate a period of Medicaid ineligibility that is the lesser of thirty months or the number of months the gifted money would have paid for care if the grantor retained those funds. See predecessor 42 U.S.C. §1396p(c)(1).
2. Gifts concluded after August 10, 1993, are covered by the proscriptions of OBRA §93.
 - a. "Look back period" extended from thirty to thirty-six months; sixty months if transfer is to or from a trust 42 U.S.C. §1396p(c)(1)(A) and (B).
 - b. The 30-month cap on the period of ineligibility is eliminated. There is no "cap." 42 U.S.C. §1396p(c)(1)(E).
 - c. "Consecutive gifting" has been eliminated. 42 U.S.C. §1396p(c)(1)(D).

< California is one state that has not yet implemented transfer provisions of OBRA §93.

E. Duration of Ineligibility Period is Determined by First Learning the Amount of State's "Average Private Pay Rate" (APPR).

The APPR is better known as the average cost of nursing home care in a particular state. A \$30,000 gift will generate a ten-month period of Medicaid ineligibility if the APPR in the state of residence is \$3,000. ($\$30,000 \div \$3,000 = 10$). California's APPR for 2004 is \$4,472.

F. Penalties for SSI Eligibility Reinstated.

Prior to December 14, 1999 an individual could have given away an unlimited number of dollars so as to qualify for Supplemental Security Income (SSI). There were no

transfer penalties whatsoever. 42 U.S.C. §1902(a)(5)(B). The allowable asset level for SSI eligibility is \$2,000.

Remember that SSI status automatically qualifies the person for Medicaid in most states.

On December 14, 1999, the law was amended to impose penalty periods for asset transfers in the context of SSI. The applicable "look back" period is 36 months. The amount of the transfer is divided by the SSI monthly benefit to determine the period of ineligibility. 42 U.S.C. §1382b(c).

- G. Practical and Ethical Issues.
 - 1. Tax implications of transferred assets.
 - 2. Psychological impact.
 - 3. Who is the client?

XI. TREATMENT OF INCOME

When an institutionalized person has a "community spouse," there are significant protections provided in MCCA. See 42 U.S.C. §1396r-5(d). These provisions were unchanged by OBRA §93.

- A. "Name On The Check" Rule.

At minimum, the community spouse may retain all income arriving in her name once the institutionalized spouse becomes eligible for Medicaid. There is no upper limit on this income.

- B. Minimum Monthly Maintenance Need Allowance (MMMNA).

Each state must establish a Minimum Monthly Maintenance Need Allowance for community spouses. For 2003, that figure is no larger than \$2,267. The minimum is 133 percent of the poverty level. In states using this maximum income figure, it will be typically larger than income that the community spouse would retain in sole reliance on the "name on the check" rule.

- C. Increase Income by Fair Hearing or Court Order.

See 42 U.S.C. §1396r-5(e)(2)(c).

- D. Income-Cap States Deny Medicaid if Income Exceeds Cap.

XII. TREATMENT OF ASSETS

- A. Community Spouse Resource Allowance (CSRA).

As indicated above, the community spouse may retain the state-determined Community Spouse Resource Allowance. The 2004 maximum CSRA is \$92,760.

- B. CSRA Must be in Name of Community Spouse.

Title must be changed to satisfy this requirement.

1. Holding assets in a revocable trust may be a problem.
2. Pensions and CRT income require special attention.
- C. May Increase CSRA by Court Order or Fair Hearing.
See 42 U.S.C. §1396r-5(f).
- D. Retirement Accounts in the Name of Community Spouse -- Always Protected -- of Institutionalized Spouse -- Sometimes Protected.
- E. Assets Acquired By Community Spouse After Institutionalized Spouse Obtains Medicaid Will Not Interfere With Eligibility.

XIII. ASSET PRESERVATION STRATEGIES

- A. Spend Money.
- B. Convert Non-Exempt Assets to Exempt Assets.

"Safe harbors" may include a residence, an appropriate business, an automobile, personal property.

- C. Repair or Improve Exempt Assets.
- D. Pay off Debts on Exempt Assets.
- E. "Spend Down" Includes Attorney Fees.
- F. The "Reluctant Spouse."

A New York favorite, MCCA provides that the institutionalized spouse shall not be deemed ineligible for Medicaid when the community spouse simply refuses to spend money that she holds in excess of the CSRA. This route to Medicaid eligibility also requires that:

1. the community spouse assign to the state the right of support from the community spouse,
2. the state has the right to independently bring a support action without such assignment, or
3. when denial of eligibility would result in an undue hardship. 42 U.S.C. §1396r-5(c)(3).

- G. Giftting Exempt Assets/Gifting Assets to Allowable Recipients.

1. Major gifting can present psychological, sense of pride, and other difficulties. It may also expose elders to economic and quality of care risks.
2. Transfer of home to eligible recipients.
3. Note new OBRA §93 restrictions. Carefully weigh and plan for impact on eligibility.
4. Tax implications – Capital gains, estate and gift tax issues abound.
5. Escape estate claim for reimbursement of Medicaid benefits paid.
6. Court approval for single transaction.

H. Gifting Non-Exempt Assets.

1. Calculate and accept ineligibility period.
2. "Undue hardship" and other protections.
3. Consecutive gifting eliminated.
4. Avoid large gifts from revocable trusts.

I. Gifting Income.

Gifting income in the month it is received means it will not become an asset.

J. Purchase of Annuity.

The future of annuities is secure as a possible Medicaid planning option in appropriate circumstances. HCFA, which administers the federal Medicaid program, issued Transmittal No. 64 in November of 1994 and, inter alia, instructed state Medicaid administrators about the use and impact of annuities on eligibility.

HCFA stated, in effect, that the purchase of annuities will not be treated as a "transfer," and will not have any impact on Medi-Cal eligibility so long as the annuity is actuarially sound.

For example, a single person about to enter a nursing home may have \$80,000 and therefore be ineligible for Medi-Cal because she is well over the \$2,000 limit. If she is 65 years old and purchases a ten-year term certain annuity with her \$80,000, she will immediately qualify for Medi-Cal. This assumes, of course, that her increased income is still insufficient to cover the cost of nursing home care.

If the person is 90 years old and purchases the same ten-year annuity, such annuity will not be deemed actuarially sound because her life expectancy is less than ten years. The value to be distributed in months and years beyond her life expectancy would be deemed a transfer and she would be ineligible for Medi-Cal for a number of months.

Annuities are viable, but do not typically have the effect of preserving significant resources for the elder. Moreover, it appears that state Medicaid programs will soon assert estate claims (to recover Medicaid benefits paid on behalf of the annuity purchaser) against any residual value in such annuities. See Letter from HCFA Region IX office on January 24, 2000 to the California Department of Health Services. It describes the approach HCFA will take on a national basis with regard to annuities.

K. Court Order or Fair Hearing to Establish Higher CSRA.

1. Rationale: Resources needed to generate extra income for the community spouse.

Best established by demonstrating need to hold assets to generate increased income to establish MMMNA. See 42 U.S.C. §1396r-5(e)(2)(c).

Caveat: In some states, this approach is compromised by Medicaid rules requiring inclusion of the institutionalized spouse's income in the MMMNA calculation. See *Chambers v. Ohio Dep't of Human Servs.*, 145 F.3d 793 (6th Cir. May 27, 1998); (*Wisconsin Dept. of Health and Family Services v. Blumer*, Certiorari to the Court of Appeals of Wisconsin, February 20, 2002, Supreme Court of the United States.) Under this restrictive approach, no CSRA increase will be allowed if the spouses' combined income exceeds the MMMNA. This is known as the "income first" rule.

2. Demonstration of need.

L. Court Order or Fair Hearing to Increase Income (MMMNA).

Must establish "exceptional circumstances resulting in significant financial distress" in fair hearing. 42 U.S.C. §1385r-5(e)(2)(B).

M. After-Acquired Assets.

For planning purposes, note that receipt of assets by gift, inheritance, or as a result of sale of assets will not interrupt eligibility of institutionalized spouse if assets received are solely in the name of the community spouse. See 42 U.S.C. §1396r-5(c)(4).

N. Divorce.

Note that many jurisdictions provided more protection to the community spouse before MCCA became law in late 1988. Separate property is no longer given special protection, as it was under previous law. Particularly where there is a second marriage and the well spouse brings significant assets to the marriage, divorce may be one of the few options.

1. QDRO. A Qualified Domestic Relations Order (QDRO) may be the only approach available to shift a pension (which might disqualify an applicant in an income-cap state) to the community spouse.
2. Elder law as divorce law?

O. Disclaimer by Institutionalized Spouse.

If Medicaid recipient may inherit assets, consider disclaimer. Differing results in different jurisdictions. Note that disclaimers may be eliminated as a planning option by OBRA '93. See 42 U.S.C. §1396(c)(2)(A).

P. Planning in Income-Cap States.

1. Where an individual's fixed income disqualifies him from receiving Medicaid in an income-cap state, that person traditionally faces a dead-end.
2. One option is the Miller Trust. Established in the state of Colorado, this trust is created to receive all income that would otherwise go to the older individual. The trust, in turn, pays the individual beneficiary an amount of income that is under the income-cap figure. Retained income becomes a trust asset, and its use is restricted under terms of the trust.

Q. Advance Planning: Incorporate Necessary Powers in Durable Powers of Attorney and Revocable Trusts.

XIV. USE OF TRUSTS IN MEDICAID PLANNING

A. Medicaid Qualifying Trust (MQT).

See Consolidated Omnibus Budget Reconciliation Act (OBRA) at predecessor 42 U.S.C. §1396a(17)(B). These rules apply to such trusts created on or before August 10, 1993.

A Medicaid Qualifying Trust is an inter vivos trust created by the applicant or the applicant's spouse. Assets and income that may be distributed to the beneficiary in the discretion of the trustee are deemed available to the recipient for Medicaid purposes.

Generally, trusts are discouraged in Medicaid planning. They are disfavored in many states.

B. Creation of Trust by Someone Other Than Applicant or Applicant's Spouse is Outside the Ambit of MQTs.

C. Community Spouse May Create "Income Only" Trust Irrevocable Trust for Self Ineligibility Period May be a Result.

D. OBRA '93 Eliminates MQT Rules, Expands Proscriptions.

1. OBRA '93 includes "any legal instrument or device that is similar to a trust." 42 U.S.C. §1396p(d)(6). These rules apply to all trusts created other than by will after August 10, 1993.
2. Covered are trusts established by an individual, the individual's spouse, a court or administrative body acting with legal authority for the person or spouse, or acting at the direction or upon the request of either spouse.
3. Such trusts are deemed available assets regardless of:

- (a) their purpose;
 - (b) whether trustees have discretion;
 - (c) restrictions on the use of distributions.
4. Protected are some trusts:
- (a) A trust created for a disabled person under 65 years of age if the trust provides for state reimbursement upon death.
 - (b) A special "income trust" that has no relevance in California.
 - (c) A trust for a disabled person established and managed by a non-profit association if the trust provides for state reimbursement upon death.
5. Undue hardship may allow eligibility notwithstanding new rules. 42 U.S.C. §1396p(d)(5).
6. Applicant may create "income only" trust and face only a period of ineligibility.
7. Special Needs Trusts remain viable in many circumstances. Such trusts allow ongoing public benefits eligibility, notwithstanding the existence of a funded trust for the benefit of a disabled person.

XV. ESTATE RECOVERY CLAIMS AND LIENS

A. Liens (42 U.S.C. §1396p(a)).

- 1. Liens are allowed in very few and very limited circumstances. Moreover, a lien was and is dissolved if the Medicaid recipient returns home from previous institutionalization. 42 U.S.C. §1396p(a)(3). See also Cal. W & I §14006.7(d)(3).
- 2. California's lien laws were revoked in 1995.
- 3. OBRA §93 allows a lien on real property if recipient "cannot reasonably be expected to be discharged . . . and to return home. 42 U.S.C. §1396p(a)(1)(B)(ii). This approach is used in New York when a person is in a "permanent absent status" from the residence. See Part VIII.A.1., supra.
- 4. Opportunity for hearing before imposition of lien; notice required. 42 U.S.C. §1396p(a)(1)(B)(ii).

B. Estate Recovery Claims.

- 1. Under OBRA §93, states are required to assert claims against estate of certain Medicaid recipients. 42 U.S.C. §1396p(b)(1). See Cal. Welf. & Inst. Code §14009.5(a).

- a. Federal Law: Estates of persons who received benefits after age 55. 42 U.S.C. §1396p(b)(1)(B).
 - b. State law allows estate claims if benefits were received after age 65 or if benefits were received while a nursing home resident. Cal. Welf. & Inst. Code §14009.5(b)(1).
2. State law allows claim against estate of surviving spouse up to "the value of any of the decedent's property received by the surviving spouse through distribution." Cal. Welf. & Inst. Code §14009.5(b)(2)(A). No statute of limitations is to apply.
 3. Term "estate" broadened. 42 U.S.C. §1396p(b)(4).
 - a. States now have the option of including assets held in joint tenancy, transferred subject to a life estate, and held in a living trust.
 - b. QUERY: What must the state do to exercise this option? Some action is needed.
 - c. Residual value in annuities will soon be the object of state Medicaid collection actions. See Part XII.J., supra.
 4. RWJ insurance program protected. 42 U.S.C. §1396p(b)(1)(C)(i).
 5. "Undue Hardship" waiver. 42 U.S.C. §1396p(b)(3). Standards forthcoming from the Secretary of Health and Human Services.

XVI. TAX AND FIDUCIARY IMPLICATIONS OF SELECTED PLANNING OPTIONS

- A. Complete Transfers to Protect Assets and/or to Escape Reimbursement Claim.
 1. Timely, outright transfer of stock or other appreciated property will escape claim but will result in loss of stepped-up basis.

<< Note that the right to transfer the home without a penalty period appears to be intact in California.
 2. Transfer real property with retained life estate technically ineffective in avoiding estate claim. 42 U.S.C. §1396p(b)(4). Yet, practice may differ. Basis step-up secure. IRC §2036.
 3. Reliance on joint tenancy to avoid estate claim will not be successful.

- B. Irrevocable trust.

Transfer to appropriate irrevocable trust with sufficient retained powers allows for stepped-up basis. IRC §§674, 2036, 1014; Treas. Reg. §25.2511-2(b).

C. Ignorance of Medicaid as Breach of Fiduciary Duty.

Medicaid and asset preservation is mainstream law. There are, therefore, standards of practice with which estate planning attorneys must be familiar.

Similarly, fiduciaries (conservators, guardians, trustees) must be fluent with asset preservation options. This concept is fundamental to tax planning. It must apply no less vigorously to Medicaid and to other public benefits planning. See *In re Connor*, 170 Ill.App.3d 759, 525 N.E.2d 214 (Ill.App. 5th Dist. 1988).

XVII. COORDINATION WITH OTHER PLANNING TOOLS

A. Revocable Trust May Interfere with Asset Preservation Planning.

1. Couple's trust may run afoul of requirement that CSRA must be in the name of "community spouse."
2. Typical requirement that all assets be used to support ill or incapacitated settlor may supersede basic Medicaid asset protections, including the CSRA.
3. Transfers from trust subject to 60-month look back period, rather than 36-month look back period.

B. Discounting of Transfers through Grantor Retained Income Trust (GRIT) and Family Limited Partnership May Minimize Medi-Cal Penalty Periods.

*Caveat re tax advice with Medicaid implications.

C. Durable Power of Attorney May Authorize Transfers, Trust Amendment, Other Planning Steps if Long-Term Care Imminent.

XVIII. AN AFFIRMATIVE MODEL FOR ADVISING HIGH-INCOME INDIVIDUALS

A. Rules of "Ethics"

Traditional ethics rules and canons operate on many levels. They are fundamentally negative, in that they impose limits and restrictions. To a large extent, they exist to protect the client and the attorney from a litany of perceived abuses and/or problems.

B. A Positive, Affirmative View of Ethics Is Needed

In a more positive sense, attorneys have a set of ethical responsibilities that are no different than any ethical individual.

1. May view as an opportunity
2. Attorney as true counselor
3. Acknowledge our role as a key person, a key professional, in their lives.

- C. Assist Client in Considering the Purpose of Estate Planning
 - 1. Why preserve an estate?
 - 2. Why preserve autonomy and control?
 - 3. Why do we pay taxes?
- D. Consider the Impact of Estate Planning
 - 1. On clients
 - 2. On children
 - 3. On other relatives
 - 4. On persons with special relationships
 - 5. On community
 - 6. On client's business
- E. An Alternative Model: Attorney as Counselor With Focus on Values Development
 - 1. Values identification
 - 2. Family mission statement
 - 3. Linking values with plan
 - a. Multi-generational
 - b. Integrating family with community

XIX. RESOURCES AND PUBLICATIONS

- A. Regan and Gilfix, *Tax, Estate & Financial Planning for the Elderly: Forms & Practice* (Matthew Bender 1991, updated annually).
 - << Written for the "hands-on" practitioner, this volume contains scores of practical checklists, planning notes, warnings, and forms. Model language for Durable Powers of Attorney, client letters, court petitions (Medicaid-oriented), and trusts is offered throughout.
 - << Addresses every subject of concern to the active practitioner.
- B. Regan, J., J.S.D.; Successor Authors: Morgan, Rebecca C., J.D., English, David M., J.D., *Tax, Estate & Financial Planning for the Elderly*, (Matthew Bender.)

- C. Gilfix, M., La Poll, F.A., Tate, D.W., *Medi-Cal and Asset Preservation Planning* (Gilfix Legal Publishers, annually updated).
- D. Russo, Vincent J., Rachlin, Marvin, *New York Elder Law Practice* (West Group, 1998).
- E. Strauss, Peter J., Robert Wolf and Dana Shilling, *Aging and the Law* (Commerce Clearing House, 1990)
- F. Reporting Service: (Emphasis on Medicare) *Medicare and Medicaid Guide*, (Commerce Clearing House, Inc., Chicago, Illinois).
- G. Newsletters
 - 1. *Gilfix Elder Law NewsAlert*, Gilfix Legal Publications, Michael Gilfix, Executive Editor. 4151 Middlefield Rd., Suite 213, Palo Alto, CA 94303.
 - 2. *The ElderLaw Report*, Little, Brown, Ed. Harry Margolis.
 - 3. Newsletters are published by many, including the National Senior Citizens Law Center, National Academy of Elder Law Attorneys, National Health Law Program, and California Advocates for Nursing Home Reform, which is in San Francisco, California.

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