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REFORM

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Briefing Paper #3:
Medicaid Planning for Long-Term Care

What is Medicaid Planning?

As explained in Briefing Paper #2 of this series, on "Medicaid Long-Term Care Eligibility," the program's income and asset means tests are very generous and elastic. Nevertheless, people with substantial income and assets sometimes exceed those limits and are thus disqualified.

Medicaid planning or Medicaid estate planning is often called "artificial self-impoverishment." It involves manipulating one's or a client's income and assets so that an individual who would otherwise not qualify for Medicaid LTC benefits can slip in below the financial eligibility limits and qualify after all.

What Are the Principal Methods of Medicaid Planning?

Over the years, as explained below, the state and federal governments have tried to discourage Medicaid planning. For each eligibility loophole they've closed, however, a very creative Medicaid planning bar seems to open several new ones. Among the techniques most popular today are:

- Purchase of exempt assets such as personal belongings, home furnishings, an automobile, prepaid burial plans, or a more expensive home.
- Early planning through asset transfers in any amount done before the current 5-year transfer of assets look-back penalty period
- Irrevocable income-only trusts into which assets including home equity have been transferred early in anticipation of future LTC expenses
- Medicaid friendly annuities through which assets are transferred, often between spouses, replacing countable cash with cash flow from an annuity of equal economic value, but without causing ineligibility because income rarely disqualifies applicants.

- Life care contracts, whereby elders transfer assets to family members or others in exchange for their promise to take care of the elder until he or she needs heavy LTC.
- The reverse half-a-loaf strategy, whereby the ailing elder gives away half his or her assets, purchases a promissory note with the other half, lives on the proceeds of the note until the transfer penalty on the gift expires, and thus qualifies for Medicaid in half the time and at half the cost intended by Congress.
- Life estates whereby the elderly Medicaid applicant transfers the remainder interest in a home to an heir (usually an adult child) while retaining a life estate, *i.e.*, the right to live in the home until death, including the right to mortgage, sell or convey an interest in the property, *i.e.*, "special powers." Although this could be considered a transfer of assets, the Centers for Medicare and Medicaid Services (CMS) have allowed it.
- Commonplace in New York and Florida is spousal refusal whereby healthy spouses of institutionalized Medicaid recipients are encouraged to refuse to make their lawful contribution toward the ill spouse's care and are rarely held to account.

Who Does Medicaid Planning?

Books, articles and websites that advocate Medicaid and explain how to transfer or shelter income and assets are common. An internet search for "Medicaid planning" will reveal hundreds of examples. See for example "The Medicaid Planning Guidebook" advertised here: http://www.thewpi.org/pdf_files/state.laws.mediciad.planning.pdf.

Ordinary people have easy access to published materials urging them to plan early in order to qualify for Medicaid if and when they should experience high LTC expenses. Simple techniques such as transferring wealth at least five years before applying for Medicaid or purchasing exempt assets after expensive care is already needed are well within the ability of many elderly people and their families.

People who have hundreds of thousands of dollars in various kinds of financial instruments beyond the value of their homes may need to employ more sophisticated Medicaid planning techniques with the help of special "elder law" attorneys. Although there is no practical limit on how much money such Medicaid planners can protect on behalf of clients, multi-

millionaires may find that other estate planning considerations, such as gift taxes or capital gains deferral, may take precedence over getting Medicaid to pay for LTC.

Medicaid Planning Quotes

The following advertising extracted last year from a Pennsylvania Medicaid planner's website is very typical. For numerous additional examples, search the internet for "Medicaid planning techniques" or go to "Medicaid Planning Quotes" here: http://www.centerltc.com/medicaid_planning_quotes.htm.

"For all practical purposes, in the United States the only social 'insurance' plan for long-term institutional care is Medicaid. . . . Medicaid . . . is a form of welfare - or at least that's how it began. So to be eligible for Medicaid, you must become 'impoverished' under the program's guidelines."

"Those who are not in immediate need of long-term care may have the luxury of distributing or protecting their assets in advance. This way, when they do need long-term care, they will quickly qualify for Medicaid benefits."

"Levandowski and Darpino specializes in elder law and elder care planning. Let us help you to:

* Plan in advance to limit the devastating expense of long-term care.
* Protect your home and life savings.
* Preserve the financial security of your spouse and dependents.
* Legally transfer assets to children and grandchildren.
* Minimize private payments of nursing home costs.
* Maximize public benefits from Medicare, Medicaid, and other programs.
* File the complicated Medicaid application. . . .

"If you wait, it may be too late to take some of the steps available to preserve your assets."[1]

How Common is Medicaid Planning?

Janice Eulau, a Medicaid eligibility supervisor in New York state for 36 years, testified under oath on September 21, 2011 before the U.S. House of Representatives Oversight and Government Reform and Healthcare

Subcommittee, that approximately 60% of the people who apply for Medicaid LTC in her office have done some form of Medicaid planning. She further testified that the average successful applicant for Medicaid LTC has $300,000 in assets, but that half a million is not unusual and over a million does happen. She said the amount of money makes little difference.

In Ms. Eulau's office, eligibility workers told researchers that 75% of nursing home applications are completed by attorneys or para-legals; half of all applications include asset transfers; 25% to 30% include trusts; nearly every case with a community spouse involves "spousal refusal"; 75% have prepaid burial expenses to reduce countable assets; 35% transferred a home years in advance of applying.[2] Similar levels of Medicaid planning have been reported by eligibility workers in other states. Rhode Island workers said 85% of applications are filed by someone other than the applicant and that 60% are processed without face-to-face contact with the applicant. In Rhode Island, 75% to 80% of applicants purchase prepaid burials to reduce assets.[3]

For many more examples of Medicaid planning techniques and estimates of their frequency of use, see the numerous state-level and national reports linked at http://www.centerltc.com/reports.htm.

How Much Does Medicaid Planning Cost Taxpayers?

No one knows for sure what the full cost of Medicaid planning is. The few studies conducted have looked only at "asset transfers." Waidman and Liu concluded "pursuit of transferred assets would recover only about 1 percent of total Medicaid spending for long-term care."[4] Total Medicaid LTC expenditures in 2009 were $114 billion which suggests the cost of asset transfers alone is at least $1.1 billion.

But asset transfers are only one--and not the most important one--of the many Medicaid planning techniques used to divest or shelter financial resources from income and asset eligibility tests. No government agency or think tank has ever studied the financial impact on Medicaid of the full range of Medicaid planning techniques including the most common and expensive ones, *e.g.*, purchase of exempt assets, trusts, annuities, life estates and promissory notes.

Given that these techniques of Medicaid planning are commonplace according to state Medicaid eligibility workers, it is likely that a study aimed at measuring their financial impact would deliver dramatic results probably in the tens of billions of dollars per year. Nevertheless, as large as the potential savings from curtailing Medicaid planning may be, it is important to note that such egregious self-impoverishment is not the biggest financial problem facing Medicaid. It is only the tip of the iceberg. The bigger problem, as explained in Briefing Paper #2 on "Medicaid Long-Term Care Eligibility," is the fact that most people qualify for Medicaid LTC easily without spending down significantly and without having to employ lawyers or fancy Medicaid planning legal techniques. Only the wealthiest need Medicaid planning to qualify.

What Has the Federal Government Done to Discourage Medicaid Planning Abuses?

The federal government has tried for decades to close loopholes and discourage the abuse of Medicaid LTC benefits by affluent people and their legal advisors.

The first major measure in this direction was the **Tax Equity and Fiscal Responsibility Act of 1982**, or TEFRA '82. TEFRA authorized state Medicaid programs for the first time to (1) penalize asset transfers done for the purpose of qualifying for Medicaid, (2) place liens on real property in order to hold that property in a recipient's possession during their period of Medicaid eligibility, and (3) to recover the cost of their care from the estates of deceased recipients. The critical thing to understand about TEFRA '82 is that it was entirely voluntary.

In 1985, in the **Consolidated Omnibus Budget Reconciliation Act**, Congress took the next step by putting a stop to "Medicaid qualifying trusts." MQTs had become the technique of choice for elderlaw attorneys to impoverish their affluent senior clients and qualify them for Medicaid nursing home care.

The **Medicare Catastrophic Coverage Act of 1988** (MCCA '88) was mostly about Medicare, but it did have some provisions that affected Medicaid long-term care eligibility. The most important change was, for the first time, to require state Medicaid programs to penalize asset transfers for less than fair market value done for the purpose of qualifying for Medicaid

long-term care benefits. MCCA '88 required state Medicaid programs to look back 30 months for inappropriate asset transfers. It established an ineligibility penalty equal to the amount of assets transferred for less than fair market value for the purpose of qualifying for Medicaid divided by the average cost of a nursing home in the state. MCCA '88 also established a limit of 30 months as the maximum penalty for asset transfers.

In 1993, the **Omnibus Budget Reconciliation Act** (OBRA '93) implemented most of the recommendations from the DHHS Inspector General's 1988 "Medicaid Estate Recoveries" report [http://oig.hhs.gov/oei/reports/oai-09-86-00078.pdf]. OBRA '93 extended the look-back period for asset transfers to a full three years (36 months) for most improper transfers and to five years for transfers into or out of a trust. The law also eliminated the time 30-month limit on the eligibility penalty.

In 1996, in the **Health Insurance Portability and Accountability Act** (HIPAA '96 or the Kennedy/Kassebaum Act), Congress made it a crime to transfer assets for less than fair market value for the purpose of qualifying for Medicaid. To do so, according to HIPAA '96 would be punishable by a fine of up to $10,000 and a jail term of as much as a year. Senior advocates called this the "throw granny in jail law" and Congress repealed it a year later.

But Congress replaced the throw granny in jail law with the **Balanced Budget Act of 1997**, AKA the "throw granny's lawyer in jail law," which made it a crime to recommend asset transfers to a client for a fee. Attorney General Janet Reno refused to enforce the law on the grounds that an attorney could not be held legally culpable for recommending a practice that was legal again after the "throw-granny-in-jail law" was repealed.

The next and latest law to restrict Medicaid planning was the **Deficit Reduction Act of 2005** (DRA '05) which extended the transfer of assets look back period to five years, capped the Medicaid home equity exemption for the first time ever at $500,000 or $750,000 at each state's option, and ended the single most common Medicaid planning technique at the time, the "half-a-loaf" strategy, whereby people could give away half their assets, hide the rest, and qualify for Medicaid in half the time intended by the earlier law.

What Needs to Be Done?

Clearly, nothing 15 Congresses and five Presidents have done over the past 30 years has succeeded in eliminating the practice of Medicaid planning or the problem of people with substantial wealth co-opting Medicaid's scarce LTC resources.

The idea behind OBRA '93 was to retain generous eligibility rules but enforce estate recovery so that people stricken by long-term chronic illnesses would not be devastated financially, but neither would they avoid paying the cost of their care in the end. That strategy didn't work because the generous eligibility rules remained but estate recovery was never implemented fully by most states, nor was it enforced strongly by the federal government.

The best approach now is to eliminate or radically reduce Medicaid's $500,000 to $750,000 home equity exemption so that people who require LTC consume their own wealth first, through formal or informal (family) reverse mortgages or through sale of the home, before they qualify for Medicaid. The potential savings to Medicaid of $30 billion per year are explained in Briefing Paper #5 of this series on "Dual Eligibles and Long-Term Care."

End Notes

[1] Levandowski & Darpino, LLC, 17 Mifflin Ave., Suite 202, Havertown, PA 19083, information extracted July 26, 2010 from http://www.levandowskidarpino.com/medicaid.php4.
[2] Stephen A. Moses, "Long-Term Care Financing in New York: The Consequences of Denial," Center for Long-Term Care Reform (Seattle, WA) and Empire Center for New York State Policy (Albany, NY), March 2011, p. 17ff; http://www.centerltc.com/pubs/NY-Consequences_of_Denial-CLTCRfull.pdf.
[3] Stephen A. Moses, "Doing LTC RIght," Center for Long-Term Care Reform (Seattle, WA) and Ocean State Policy Research Institute (Providence, RI), January 2010, p. 14; http://www.centerltc.com/pubs/Doing_LTC_RIght.pdf.
[4] Timothy Waidmann and Korbin Liu, "Asset Transfer and Nursing Home Use: Empirical Evidence and Policy Significance," Urban Institute, published April 2006 by the Kaiser Family Foundation, p. 1; http://www.kff.org/medicaid/upload/7487.pdf.