MEDICAID ESTATE PLANNING IN KENTUCKY:
How to Identify, Measure and Eliminate Legal Excesses

Submitted

by

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I. **Introduction**

Medicaid is a means-tested public assistance program, i.e. welfare. It was originally intended to ensure access to mainstream health care for the poor, especially needy women and children. Today, however, the program fails to cover two-thirds of the elderly poor and half of all poor children even for acute or emergency care. Nevertheless, Medicaid's benefits for nursing home care are readily available to affluent seniors who retain the right attorneys.

Throughout America, people can ignore the risks of long-term care, avoid the premiums for private insurance, wait to see if chronic long-term illness strikes, and--only if necessary--shift the catastrophic financial liability of nursing home care to the taxpayers within 30 days (days, not months!). This feat costs less in legal fees than one month of private care or one year of insurance premiums. Under the circumstances, we should not be surprised that two-thirds of all nursing home patients in the United States receive Medicaid benefits although only 12 percent of the elderly are poor or that only four percent of the elderly purchase private long-term care insurance. Why plan ahead or take personal responsibility if the government is ready and willing to pay?

How did this situation develop? What are the major "loopholes" in Medicaid nursing home eligibility? How do

Medicaid estate planning attorneys take advantage of elasticity in the rules to benefit their affluent clients? What are the best ways to document the frequency and magnitude of these practices? What measures can states take to control Medicaid planning and limit financial expenditures to affordable levels? This paper will answer these questions as succinctly as possible.

II. **Background**

When Congress authorized Medicaid in 1965, the program was little more than an afterthought to Medicare. No one expected it to be as large or to grow as fast as the health care program for seniors. Medicaid's long-term care benefit in particular was expected to begin and remain nominal. But "form follows funding" and with government money available to pay for nursing home care, thousands of nursing facilities were constructed. Since the turn of the century, economic prosperity and medical science have rewarded Americans with 27 additional years of life which allowed them to live long enough to need long-term care. Thus, frail and infirm elders filled long-term care facilities as quickly as they could be built.

In time, this expansion of nursing homes and extended length of patient stays became very expensive to individuals and to the government. Gradually, Congress and state legislatures relaxed Medicaid eligibility criteria to reduce "catastrophic spend-down" and "spousal impoverishment." But generous eligibility criteria drove up government costs explosively. To control costs, government turned to health planning and "Certificate of Need" programs on the reasoning that "we don't have to pay for a bed that doesn't exist." But caps on supply exacerbated pressure on demand, which led to high occupancy and rate inflation.

Government then responded by controlling nursing home reimbursement rates, but also acknowledged under judicial pressure the necessity to provide adequate payment (Boren Amendment). Commensurately, however, lawmakers and consumers demanded improvements in quality. This was demonstrated by Kentucky's nursing home reform law, first enacted in 1978 and strengthened in subsequent years, and the passage of sweeping federal quality-of-care reforms (OBRA 1987).

Thus, Kentucky's government and the long-term care industry find themselves in the following public policy pickle. Today, Kentucky nursing homes have 75% Medicaid occupancy. To survive, these nursing homes shift uncompensated costs to a dwindling supply of private payors. On the other hand, state and federal quality guarantees combined with increasingly generous eligibility criteria have made qualification for Medicaid benefits without spend-down highly desirable and readily achievable. This encourages Medicaid estate planning. Consequently, across America today, private pay nursing home census is plummeting as private payors convert to public assistance, Medicaid costs are skyrocketing, and Medicaid estate planning is growing exponentially.

III. **"Loopholes?"**

Given the diagnosis above, the necessary treatment (a huge infusion of new, private financing) is relatively painless and easy. Before we can prescribe the cure and explain how to bring it about, however, the symptoms of the current malady require closer examination.

One person's "loophole" is another's generous eligibility rule. Properly speaking, there is no ethical distinction between Medicaid income and asset limits as originally intended by Congress and as subsequently stretched by Medicaid planners in Kentucky to encompass the affluent. An attorney's responsibility is to get a client everything the law allows as creatively as possible. Neither the attorney nor the client nor the heirs have an obligation to improve upon social policy by sacrificing available benefits at their own expense. Public policy which encourages prosperous people to rely on welfare may be perverse, but the attorneys and their clients who take advantage of it are not. The job of public policy experts is to eliminate the need for socially detrimental Medicaid estate planning by fostering universal access to top quality care for rich and poor alike. That goal, and a method to achieve it, guides this paper.

What are the features of Medicaid which allow people to qualify for nursing home benefits while retaining substantial income and assets?

1. Medically needy income criteria allow recipients to receive unlimited income as long as medical costs, including nursing home care, are high enough to offset all but a small personal needs allowance.
2. Even income cap states permit $1302 per month (as of 1993) in income which is three times as much as the Supplemental Security Income (SSI) limit ($434 per month) that poor seniors, women and children must meet to qualify for acute care.
3. The Medicare Catastrophic Coverage Act eliminated spousal impoverishment by assuring that spouses of Medicaid recipients may retain up to $1769 in monthly income plus half of joint assets up to $70,740 (income

and asset limits as of 1993.)

4. A home and contiguous property is exempt regardless of value if a qualifying dependent relative remains in residence or if the Medicaid recipient expresses a purely subjective intent to return.
5. Numerous other property exemptions also pertain including an automobile, personal property, life insurance, burial trusts, etc. Some dollar limits are placed on some of these items under some circumstances.

Most of us think of these property exclusions as routine eligibility criteria, not loopholes. The truth is, however, that the median senior in America (based on income and assets) can qualify for Medicaid nursing home benefits using these exclusions alone. Expensive advice and fancy planning techniques from attorneys are unnecessary. This is true because most seniors are "cash poor and house rich." They may have Social Security, a private pension, and interest income, but their combined income will usually be too low to disqualify them for Medicaid nursing home benefits, especially in "medically needy" states. Sixty-nine percent of the net worth of the median elderly household is in a home and the home is exempt for purposes of Medicaid eligibility regardless of value. The median elder's few remaining assets can be converted to exempt status easily by paying off a mortgage, remodelling a house, buying a new car or by any of numerous other similar means none of which require sophisticated legal advice. (The argument in this paragraph is fully substantiated with Census and Social Security Administration data in a monograph entitled The Myth of Medicaid Spend-Down available from the address on the cover.)

The fact that most seniors can qualify for Medicaid even without fancy legal planning is little known and absolutely critical to long-term care financing policy. But it is not a bad thing. We want Kentuckians to receive the care they need without suffering financial destitution. Nevertheless, serious problems arise when eligibility rules become so generous that the incentive to pay privately or plan ahead is diminished and people end up on Medicaid by default. That is what's happening today in Kentucky. The well-intentioned but extraordinarily damaging interventions of Medicaid estate planners are tipping our financially vulnerable Medicaid long-term care program over the fiscal edge.

IV. **Medicaid Estate Planning**

Medicaid planners start with the generous eligibility rules described above and search for statutory and regulatory elasticity to accommodate ever-wealthier people. The average Medicaid planning client has $100,000 to $400,000 in assets. For net worths over $600,000, most planners consider estate tax avoidance more important than qualifying for Medicaid. The more sophisticated planners, however, know how to preserve estates in excess of $1,000,000 while dodging all the negative tax consequences. Rather than put words in the attorneys' mouths, we will quote examples of their modus operandi and their specific techniques culled from law journal articles, legal treatises, and self-help books written over the past 12 years. A far more inclusive list including bibliographic references is provided in the Appendix.

> Careful planning even under adverse state law will still be able to achieve the goal of excluding an applicant's resources for purposes of determining Medicaid eligibility. (Talis, 1981, p. 94)

> With long-range planning, the cooperation of relatives, some good health, and maybe a little luck, couples will be in a position to negotiate between the rock and a hard place that Congress has placed in the Medicaid path. (Deford, 1984, p. 139)

> ...many individuals find it desirable to shelter their income and assets in order to remain eligible for

public assistance. A trust is often recommended to achieve such a shelter....Trust mechanisms have been and will continue to be an important aspect of planning for Medicaid eligibility. (Martin, 1987, pps. 185, 208)

So is there any practical way to juggle assets to qualify for Medicaid--before losing everything? The answer is yes! By following the tips on these pages, an older person or couple can save most or all of their savings, despite our lawmaker's best efforts. Here are the best options: Hide money in exempt assets... transfer assets directly to children tax-free...pay children for their help...juggle assets between spouses ...pass assets to children through a spouse...transfer a home while retaining a life estate...change wills and title to property...write a durable power of attorney ...set up a Medicaid Trust...get a divorce...." (Budish, 1989, p. 34, emphasis in the original)

Extreme though the strategy may be, for some couples divorce may be preferable to depleting the estate... particularly if the nursing home resident spouse is beyond comprehending the circumstances. (Young, 1990, p. 227)

While there are rules against giving away most assets, there are no prohibitions against simply spending money... options might include travel to visit relatives or see the world, or one last tour of Reno's finest establishments. (Gilfix and Woolpert, 1990, p. 42)

A new amendment to the Social Security Act allows an exemption for the family business, farm or ranch from countable assets for Medicaid eligibility. The advocate should take maximum advantage of this exemption to achieve immediate or very rapid eligibility for clients in need of Medicaid assistance. A considerable amount of resources can be excluded including the value of land and buildings, equipment, livestock, inventory, vehicles, and liquid resources

> used in the business. The attorney should also counsel his clients on the best method of transferring the business, farm or ranch to avoid the imposition of liens and recovery from the estate for amounts spent for Medicaid. (Hales and Shandrick, 1992, p. 15)

> It is true, almost to the point of being a cliche, that benefit programs, whether public or private, are bonanzas for lawyers. (Frolik and Barnes, 1991, p. 715)

The bottom line is that virtually anyone virtually anywhere in the United States (including Kentucky) can qualify for Medicaid nursing home benefits quickly and without spend-down by retaining the right attorney. For detailed descriptions of the techniques Medicaid planners use, see Brian O. Burwell, <u>Middle-Class Welfare: Medicaid Estate Planning for Long-Term Care Coverage</u>, Systemetrics/McGraw-Hill, Lexington, Massachusetts, September 1991 and Stephen A. Moses, <u>The Senior Financial Security Program: A Plan for Long-Term Care Reform in Wisconsin</u>, LTC, Incorporated, Kirkland, Washington, 1992.

V. **Program Assessment**

If Kentucky policy makers suspect that generous eligibility rules and aggressive Medicaid planning may be contributing excessively to long-term care costs, the state Medicaid program should take the following steps:

A. Ask front line nursing home eligibility workers in Kentucky if Medicaid estate planning is a problem, and if so, which techniques predominate. State staff in Massachusetts reported that "long-term care units are barraged by [Medicaid planning] attorneys...it goes on all day...the system leaks all over the place...the laws and policy set us up for failure...the workers feel intimidated...it gets outrageous...it is morally terrible." (Stephen A. Moses, Medicaid Estate Recoveries in Massachusetts: How to Increase Non-Tax Revenue and Program Fairness, LTC, Incorporated, Kirkland, Washington, 1990, p. 5.)

B. Examine a valid random sample of Medicaid nursing home eligibility cases in Kentucky, document examples of legal and illegal income and asset shelters and transfers. Estimate statewide impact by statistically projecting to the entire caseload. (See Stephen A. Moses, Transfer of Assets in the Medicaid Program: A Case Study in Washington State, Office of Inspector General, Office of Analysis and Inspections, OAI-09-88-01340, San Francisco, California, 1989.)

C. Interview Kentucky social service managers, hospital discharge planners, nursing home and home health providers, Area Agency on Aging directors, senior advocates, legal services and private Medicaid planning attorneys, etc. concerning the frequency, magnitude, and most commonly used techniques of Medicaid estate planning.

D. Review Kentucky laws, regulations and policies with an eye to provisions that encourage or permit excessive Medicaid planning. Focus especially on burial accounts, annuities, multiple divestment, intent to return, purchase of exempt assets, and joint tenancy with right of survivorship. For federal law, see Stephen A. Moses, Medicaid Loopholes: A Statutory Analysis with Recommendations, LTC, Incorporated, Kirkland, Washington, 1991.

E. Poll other states on their perception of and response to the Medicaid estate planning problem. Many states are moving aggressively already to close loopholes, implement lien and estate recovery programs, and encourage the purchase of private long-term care insurance. Some examples include, Michigan, Kansas, Colorado, New Jersey, New York, Connecticut and Indiana.

A Medicaid estate planning program assessment on this model does not need to be expensive or time-consuming for Kentucky. The project cited above which set the direction for reform in Wisconsin (The Senior Financial Security Program) required only two weeks of field work and was completed and published in one month altogether.

VI. **Corrective Action**

The result of the program assessment recommended above is predictable. Several such studies have been done and they all conclude the same thing: Medicaid nursing home benefits are readily available to affluent people with access to good legal advice. The key question therefore is: What should be done about Medicaid estate planning?

Fundamentally, Kentucky policy makers have two options. First, they can close the "loopholes" and enforce strict eligibility rules as severely as possible. Federal law places limits on this option through numerous safeguards which protect Medicaid clients. Nevertheless, substantial tightening of eligibility rules is possible for states acting independently. One problem with this approach, however, is that the Kentucky public and especially senior advocacy groups will object. Another problem is the difficulty and cost of enforcement of tighter eligibility security. A third problem is that Kentucky's public programs are supposed to help people in their time of need; slamming the doors to eligibility shut in their faces does not achieve this goal.

A different approach was recommended in two studies conducted in the late 1980's by the Office of Inspector General (OIG) of the U.S. Department of Health and Human Services. (See the Bibliography for references.) The OIG recommended retaining generous eligibility criteria while tightening controls on divestiture, securing property in a recipient's possession through liens, and recovering benefits paid from the estate of the last, surviving, exempt, dependent relative. The benefit of this approach is that it permits states to provide assistance to families when they need help without compelling catastrophic spend-down. Because the family must ultimately pay the benefits back, however, the system generates substantial nontax revenue to the state, discourages people from relying on public assistance if possible, and encourages people to plan ahead for long-term care costs. Once the public in Kentucky realizes that Medicaid nursing home benefits are not free, but must ultimately be paid back, seniors, families and heirs will purchase insurance, subsidize their loved one's private care, or provide care themselves in order to avoid dependence on public assistance and to keep their estates and inheritances intact. The methods and merits of this approach are described in several publications including the OIG and Wisconsin studies cited above and referenced in the Bibliography.

VII. **Conclusion**

We do not have a long-term care financing crisis in Kentucky. We have a public policy crisis. The fundamental problem is that people do not plan ahead for the risk of long-term care. Unlike their behavior toward every other major catastrophic risk--death, acute disease, or fire for example--people do not routinely purchase private insurance against the risk of chronic long-term illness. This is not a mystery. People will not buy insurance against a risk that does not exist.

The answer is to attract more private financing to the system while retaining generous public benefits for the genuinely needy. The approach recommended in this paper achieves that goal while reclaiming the moral high ground for Medicaid's long-term care benefit:

> We have very limited dollars available for welfare; we must take care of the poor and disadvantaged first; the middle class and well-to-do should pay privately for nursing home care or purchase insurance; prosperous people who choose to rely on public assistance should reimburse the tax payers before giving away their wealth to heirs.

VIII. **Postscript**

Based on research conducted in other states, Kentucky could reasonably expect to generate **$13.5 million** per year in estate recoveries and to save a total of **$54.0 million** annually by implementing the program recommended in this paper. A complete study similar to the research conducted in Wisconsin would be necessary, however, to substantiate such estimates specifically for the state of Kentucky.

APPENDIX

1. "It is true, almost to the point of being a cliche, that benefit programs, whether public or private, are bonanzas for lawyers." (Frolik and Barnes, 1991, p. 715)

2. "A key element in Medicaid planning is to render property unreachable by the state either during the client's lifetime or after the client's death." (Barreira, 10/90, p. 1)

3. "The most common problem put to the elderlaw practitioner is how to keep an older person's assets within the family and yet allow the person to qualify for Medicaid." (Regan, 1990, pps. 275-6)

4. "Planning for Medicaid qualification is not viewed my many commentators on health care for the elderly as immoral, unethical, or fraudulent. Today many middle-class Americans view Medicaid as an entitlement program designed (whether or not intended) to preserve assets to provide for either the support of the community spouse or an inheritance for children...This presents an opportunity for law firms to provide pro bono services to those needing such assistance and unable to pay for it. In addition, an effort should be made to provide low-cost services in this area so that middle-class individuals will be able to obtain the services of qualified advisors at a reasonable fee." (Mezzulo, 1991, pps. 12, 16)

5. "Just as there is no illegality or fraud involved in taking maximum legitimate tax deductions, there is not illegality or fraud in maximizing governmental benefits. For example, giving away property to qualify for Medicaid benefits easily can be analogized to making gifts in contemplation of death to reduce estate tax. Neither is an ethical question necessarily raised by taking steps, short of illegality, to maximize benefits. The comprehensive literature on the subject rarely raises the issue of the appropriateness of this type of planning." (Herman, 1990, p. 152)

6. "It is important to emphasize to the older client, who may be reluctant to utilize Medicaid because of pride or possible stigma, that participation in Medicaid is not a gratuity but an

entitlement like use of a public library or a public park." (Regan, 1991, p. 2-44)

7. "Careful planning even under adverse state law will still be able to achieve the goal of excluding an applicant's resources for purposes of determining Medicaid eligibility." (Talis, 1981, p. 94)

8. "There continue to be a number of ways that a single person can structure his or her ownership of assets so that assets can be shifted to other people on relatively short notice to achieve Medicaid eligibility." (Young, 1990, pps. 226-7)

9. "This article discusses the criteria for, and planning to achieve, eligibility for Medicaid, as the alternative to private pay long term care, and approaches to maintaining an individual's assets for family use while Medicaid-eligible....Disinheriting the Medicaid applicant is a simple and effective option for the estate plan of an applicant's spouse, parent or child...." (Longenecker, 1990, pps. 131, 138)

10. "...assets can be reduced by consecutive transfers much more rapidly than by one single transfer." (Gilfix and Woolpert, 1990, p. 56) The authors explain how "Generous George" can qualify for Medicaid, while disposing of $80,000, in 8 months instead of 19 months, as intended by federal law, by giving away his assets in small monthly increments instead of all at once.

11. "By helping clients plan before the occurrence of disability, by advising clients to make permissible transfers of assets, and by making them aware of relevant administrative regulations on deeming, lawyers can aid in preserving funds to the greatest extent possible." (Oriol, 1985, p. 216)

12. "With long-range planning, the cooperation of relatives, some good health, and maybe a little luck, couples will be in a position to negotiate between the rock and a hard place that Congress has placed in the Medicaid path." (Deford, 1984, p. 139)

13. "Once Medicaid eligibility is established, the community spouse may acquire unlimited assets in her own name. Such assets

might be received by gift, inheritance, or by selling the home and, thereby, converting an exempt asset into a non-exempt asset (cash) with impunity." (Gilfix, 1990, p. 45)

14. "A potential planning technique would be for the community spouse to reallocate his or her assets into forms that pay less income. For example, money market funds could be used to buy zero coupon bonds, gold, or growth stocks, all of which pay no income at all. The community spouse could then legitimately argue that he or she requires a larger allocation of income up to the Monthly Maintenance Needs Allowance." (Wilcox, 3/91, p. 12)

15. "The careful practitioner asks if an institutionalized spouse or unmarried institutionalized person may inherit any assets, since such inheritance could cause a loss of [Medicaid] and other forms of public benefits eligibility." (Gilfix and Woolpert, 1990, p. 65)

16. "Many people assume that a family's resources must be virtually exhausted before any help will be available through the Medicaid program. In fact, people in Washington who need nursing home care can benefit from medicaid without devastating their families." (Greenfield and Isenhour, 1986, p. 29)

17. "Perhaps the best advice under current law is simply to transfer all assets to, and alter the estate plan of, the community spouse. This maneuver would not cause any disqualification period for the institutionalized spouse....Of course, it would be foolhardy for someone to leave an inheritance (by will, trust, or the laws of intestacy) to the institutionalized spouse after the date of a Medicaid application, for the inheritance could end up being spent for nursing home care that would otherwise have been paid for by the state Medicaid program....For couples who are concerned about nursing home costs and wish to take preventive action well in advance of any need for nursing home care, you may be able to suggest transfers that will preserve a large amount of their assets for their future use or for eventual inheritance by their heirs." (Barreira, 1990, pps. 90-91, see pps. 91 ff. for pre- and post-institutionalization Medicaid sheltering techniques)

18. "The Medicare Catastrophic Coverage Act of 1988 (MCCA)

limited the Medicaid penalty for transferring assets to those applicants who are institutionalized. As a result, those applicants living in the community may freely transfer resources away in order to achieve Medicaid eligibility. This exception also applies to most hospital residents, including long-term patients in chronic hospitals." (The ElderLaw Report, 11/92, p. 8)

19. "One way to transfer assets prior to institutionalization and still retain the use of the assets is to transfer the assets to a trust. An increasing number of people are using discretionary trusts to insulate non-exempt assets from Medicaid eligibility requirements." (Brent Mitchell, 1991, p. 94)

20. "...many individuals find it desirable to shelter their income and assets in order to remain eligible for public assistance. A trust is often recommended to achieve such a shelter....Trust mechanisms have been and will continue to be an important aspect of planning for Medicaid eligibility." (Martin, 1987, pps. 185, 208)

21. "Changes in the Medicaid program enacted by MCCA suggest that spouses concerned about the possibility of an extended stay in a nursing home take action as soon as possible to preserve their accumulated wealth....The estate planner may be serving the best interests of the couple and their children by suggesting the use of a Medicaid trust well in advance of its perceived need." (Barreira, 1989, pps. 109-10)

22. "Where current law permits, the client may also be able to retain an income interest as a beneficiary of the trust without causing the trust principal to be a Medicaid qualifying asset." (Barreira, January/February 1990, p. 45)

23. "Recent judicial and administrative agency glosses on the federal regulation on the treatment of trusts appear to have created a legal planning tool which removes virtually all restrictions upon familial wealth retention....Planned impoverishment has been collapsed into a last minute pit stop at an attorney's office to erect a trust shield around assets." (Bagge, 1992, p. 16)

24. "A trust may be created to insulate personal injury proceeds so that the fund is not available for consideration by the public agency providing for an injured person's support. For example, under the Medicaid statute, such a trust would not disqualify a party from the right to receive that program's benefits." (Kruse, 1990, p. 2187)

25. "Transferring a principal residence to a trust may be desirable for Medicaid or estate tax planning. This article shows how a trust can be used without sacrificing the tax benefits from the sale of a principal residence." (Bowe, 1991, p. 276)

26. "By paying off a mortgage, they can magically change assets like cash, which would be lost to a nursing home, into assets that can't be touched....Since there's no limit on the value of a house that they can buy, they may be able to hide most or all of their assets with this one simple technique. This is a giant loophole, which they should feel free to take advantage of." (Budish, 1989, p. 38)

27. "If a couple has a second vacation home, consider having the couple rent that home and then claim the rental income as necessary for maintaining the community spouse's minimum monthly maintenance needs allowance. If the vacation home is considered necessary for this purpose, it is no longer a countable resource." (Regan, 1993, p. 10-68)

28. "Whenever an aging person requires a period of nursing home care, all of that person's assets are at risk of loss. Unless one of the safe harbors or loopholes contained in MCCA is exploited, however, chances are that last-minute planning will not succeed and that the home will be lost. Many clients therefore should be persuaded to transfer their homes earlier than they would otherwise have wished." (Barreira, March/April, 1990, p. 107)

29. "If the person is married, household goods, a car and personal effects are protected without regard to their value!....For example, oriental rugs or paintings that appreciate in value may be worthwhile investments that add beauty and hide assets at the same time." (Budish, 1989, p. 39)

30. "Here's another loophole that a nursing-home resident may want to consider. He or she could buy a brand-new--and expensive--ring right before going into a nursing home. After all, the law doesn't limit this exclusion to rings purchased at the time of a wedding or engagement." (Budish, 1989, p. 39)

31. "In regard to assets owned by the welfare recipient, the estate planner needs to be familiar with the number of exemptions and exclusions available under the various federal and state public benefit programs which will shelter assets or income and continue the eligibility of the recipient...Converting assets into exempt assets is a primary goal in planning the estate of the public benefit recipient." (Palmer, 1988, p. 44)

32. "An alternative to resource gifting and conversion is the purchase of an annuity....the Medicaid estate can usually be reduced by the amount of countable assets used to purchase an annuity." (Forster, 1991, p. 2)

33. "A new amendment to the Social Security Act allows an exemption for the family business, farm or ranch from countable assets for Medicaid eligibility. The advocate should take maximum advantage of this exemption to achieve immediate or very rapid eligibility for clients in need of Medicaid assistance. A considerable amount of resources can be excluded including the value of land and buildings, equipment, livestock, inventory, vehicles, and liquid resources used in the business. The attorney should also counsel his clients on the best method of transferring the business, farm or ranch to avoid the imposition of liens and recovery from the estate for amounts spent for Medicaid." (Hales and Shandrick, 1992, p. 15)

34. "The new amendment to the Social Security Act (Pub. L. No. 101-239, 103 Stat. 2465, <u>amending</u> 42 U.S.C. 1382b(a)(3)) allows for the exemption of <u>all</u> income-producing property used in a trade or business....In other words, there is now an <u>unlimited</u> exemption for such property....Property used in a trade or business is excluded regardless of its value or rate of return....Critical provisions for advocates to note are that liquid resources used in the trade or business may be excluded from countable resources, and that no limit is placed on such

resources (POMS SI 01130.501C.5). Thus, advocates may exclude large amounts of cash in business operating accounts, trust accounts, and the like, that are necessary for use in the business...Ultimately, Medicaid recipients will want to transfer their property to avoid the imposition of a lien and recovery from the estate for Medicaid expenditures. Since business, farms, and ranches in current use are exempt property, they can theoretically be transferred without penalty. No restrictions are placed on the transfer of this exempt property, unlike the transfer of a home (42 U.S.C. 1396(c))." (Shandrick, 1992, pps. 1-4, emphasis in the original)

35. "In some states a limited form of life estate retaining lifetime rights of use and occupancy to a family residence transferred to the next generation will protect the property from being considered available for purposes of Medicaid eligibility." (Dench, 1993, pps. 1-3)

36. "While the public policy issues raised by such a suggestion are obvious, divorce may offer the community spouse more economic protection than do the supposedly protective terms of MCCA." (Gilfix, 1990, p. 46)

37. "Extreme though the strategy may be, for some couples divorce may be preferable to depleting the estate... particularly if the nursing home resident spouse is beyond comprehending the circumstances." (Young, 1990, p. 227)

38. "...a common misconception among applicants is that excess resources must be spent only on doctors, hospitals, nurses, medication, and nursing homes. Nowhere in the law is this indicated. Quite literally, an applicant could spend all of his or her assets on something 'frivolous,' such as a 90th birthday celebration of Ziegfield Follies proportion and this should not be cause for denial of Medicaid, because the applicant received 'value' for his or her money." (Schneider and Huber, 1989, p. 142)

39. "...while the Department of Public Welfare may seek recovery for payments made on behalf of elderly recipients from their estates, careful planning can lawfully defeat the Department's ability to obtain indemnification." (Talis, 1981, p. 90)

40. "It is substantially easier to obtain placement of a patient in a well regarded nursing home if the patient is or appears to be able to pay privately for six months to a year, than if a patient is unable to do so. Therefore, the goal of financial planning may be to leave the potential patient with adequate funds to pay privately for at least six months." (Delbaum, 1984, p. 373)

41. "While a number of asset preservation strategies have been already suggested, numerous others exist and will undoubtedly be developed in the creative practice of elder law." (Gilfix, 1990, p. 46)

42. "It's common...for people to have undocumented and untraceable assets, such as cash and bearer bonds. If these items were to be surreptitiously transferred, their existence would probably not become known to the authorities. No doubt it is improper to <u>tell</u> clients to make such transfers, but the temptation to hint at them, or to scrupulously avoid finding out if the client <u>has</u> a safe deposit box or undocumented assets, however reprehensible, is strong." (Strauss, Wolf, Shilling, 1990, p. 16)

43. "The Transfer of Assets procedure to prevent spousal impoverishment has been clearly endorsed as public policy in the United States, based on both federal and state law. Individuals and families should not hesitate to draw upon this public policy to prevent hardship and to serve the wishes of those involved." (Mitchell and Mitchell, 1991, p. 109)

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