Long-Cerm Care Planning

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Estate Planning for Everyone.

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Rehabilitation Ass'n of Virginia v. Kozlowski, 42 F.3d 1444 (4th Cir. 1994)

- "There can be no doubt but that the statutes and provisions in question, involving the financing of Medicare and Medicaid, are among the most completely impenetrable texts within human experience. Indeed, one approaches them at the level of specificity herein demanded with dread, for not only are they dense reading of the most tortuous kind, but Congress also revisits the area frequently, generously cutting and pruning in the process and making any solid grasp of the matters addressed merely a passing phase."

What We Will Cover

- Planning for Long-Term Care
- Excluded vs Countable Assets
- Qualifying Asset Transfers
- Liens, Estate Recovery and Hardship Waivers

3 Ways to Pay for LTC

- Private
- Third-Party
- Public

Private Payments

- $340 Billion spent on LTC in 2015.
- Costs of SNF range considerably. $15,000 per month is common
- Common duration of LTC is about 2 years ($360,000)
- Most residents cannot personally finance LTC costs and those who can must be prepared to incur substantial costs

LTC Insurance

- Newer product and developing products
  - Indemnity
  - Death Benefit
- Not for Everyone
- Under-insured may still need public assistance

Public Assistance

- Medicare – very limited
- VA – select participants only
- Medicaid – single largest payer of LTC expenses nation-wide.

Medicaid Application

- Time-consuming, lengthy process
- Very valuable benefits, so the State has an interest to making sure eligibilty is certain
- May have limited retro-active applicability.
- Three-part test
  - Level of Care
  - Income
  - Assets

Medicaid Asset Test

- Variety of different Medicaid Programs
- Some have asset tests, and some don't.
  - Adult category has no asset test; only MAGI
  - Long-term care Medicaid, Aged, Blind or Disabled, and waiver programs, have an asset test

Medicaid Asset Test

- Limit of countable assets - $2,000.
- Timing. Asset limit is tested as of the first moment of the month. Anything that comes into the estate after that is *income*.

Community Spouse Resource Allowance ("CSRA")

- Situation may arise in which one spouse requires institutionalization and the other remains healthy enough to remain in the community
- Legislation is in place to help protect the healthy spouse from becoming impoverished due to the institutionalization of the sick spouse. This legislation is referred to as the Medicare Catastrophic Coverage Act of 1988.

CSRA Asset Allocations

- Institutionalized Spouse – the spouse that needs long-term care services.
  - Assets are subject to testing and may not exceed $2000
- Community Spouse – healthy spouse who will continue to reside in the community after the spouse is admitted to long-term care facility.
  - Assets are subject to testing and may not exceed $119,220 for Hawaii (2016).
  - States may set the allowance, but may not be below $23,844, nor exceed $119,220 (2016).

CSRA Income Limits

- Community spouse is allowed to "draw" from the institutional spouse's income in certain situations. This is intended to enable the community spouse to maintain a certain quality of life.
- In brief summary, the income would work as follows:
  - IS keeps about $50/month for personal needs allowance
  - CS may take as much of IS remaining income to bring CS income to $2,980 (2016, Hawaii).
  - Remaining income of IS applied to LTC bill
  - CS' income is otherwise disregarded for IS eligibility purposes

CSRA Reminders

- Remember, the CSRA is an evaluation that is made at the time the IS applies for Medicaid.
- After the eligibility of the IS is established, CS resources are no longer evaluated for continuing determination of IS eligibility.
- Income changes would need to be continuously reported, however, as the amounts of the allowance may vary.
  - Difficult to track if the CS has fluctuating income

Annuities

- Be cautious about annuities. From experience, Medicaid does not especially like annuities and tends to make things difficult in cases involving these arrangements.
- General goal of annuity is to convert a countable asset into income

Annuities

- Countable as assets if annuity is revocable, assignable or is silent as to whether it is revocable or assignable
- Funds used to purchase an annuity that is irrevocable and not assignable are EXEMPT.
- Funds used to purchase an annuity are subject to penalty periods for being transferred IF
  - Dept. is not named as remainder beneficiary in 1st position or after community spouse or minor/disabled/blind child up to value paid for institutional spouse
  - Actuarially sound
  - Irrevocable, non-assignable and cannot be sold
  - Makes equal payments
  - Cannot be cancelled upon death of either spouse

Benefit of Annuities

- Converting an asset into a stream of income may accelerate eligibility and reduce overall costs of LTC
- E.g… Single person converts $100K of countable assets to an income stream of $100/month for 1000 months. This saves on the PRIVATE PAY RATE, by increasing cost share by $100 a month
- E.g…Married couple converts $100K of countable assets into an income stream of $100/month for 100 months for community spouse. Institutional spouse qualifies and community spouse re-accumulates the initial principal.

Elements of Exempt Annuities

- Purchase of annuity is transfer of assets, subject to penalty period UNLESS the annuity
  - Names the state as remainder beneficiary in 1st position for the total amount of medical assistance provided on behalf of the **institutionalized individual** OR in the second position after the community spouse or minor or disabled child and in first position if spouse or such child could dispose of annuity at less than FMV
  - Is irrevocable and non assignable
  - Is actuarially sound
  - Provides for equal payments with no deferral and no balloon payments

Burial Contracts/Funeral Trusts

- 1 space per household member is exempt
- Bona fide funeral/burial plan per household member is exempt.
- All should be individually designated

Household Goods

- Generally exempt – furniture, appliances, clothes, etc.
- LIMITED VALUE – no qualifications, though
- Essential for day-to-day living. What is essential?
- Electronics have been scrutinized, but the POMS states not to impose a limit.

Insurance Settlements

- Tort liability recovery. Conditional payments may be made by Medicaid and state has a right to recover those payments from the 3rd party.
  - Recovery may be made from the tortfeasor OR recipient of the settlement funds.
  - State may impose a lien against all settlements
  - Usuallyy liens may be resolved for 1/3 of the settlement and may not exceed the full amount of the recovery.

Insurance Settlements

- After payment of conditional liens, etc., the insurance proceeds for the Medicaid recipient would be income in the month received and an asset thereafter. Options may include
  - Structured Settlement
  - Spend down
  - Special needs trust
  - ineligibility

Life Estates

- HRS - "value of property that is allocated between a life tenant and the remaindermen"
- HRS -"life estate holder who is entitled to certain property rights and the right to reside on the property for the duration of the holder's life or the life of another"
- Value based on a Life Estate and Remainder Interest Table corresponding with the age of the life tenant

Life Estate Impact

- Although a life estate interest is generally considered an asset for determining Medicaid eligibility purposes, the value may be exempt if the life estate qualifies as the applicant's home property
- If, however, the life estate owned by the Medicaid applicant was purchased from another party on or after February 8, 2006, the funds used to purchase the life estate will be considered transferred and penalized if the Medicaid applicant did not reside on the property for at last one year after the date of purchase

Life Estate Benefits / Risks

- Exempt asset if Home
- May limit Lien to date of death value
- Step up in basis?
- Helps ensure a place for applicant to live
- Real property tax benefits?
- Funds used to purchase may be considered transferred in some situations
- Lien may still be collected

Vehicles

- Exempt assets, as long as not watercraft or air transportation.
- No specific limitation on number, value or actual use. These limitations apply to household goods, but not vehicles.
- Vehicle title must be in name of the applicant.

Trusts

- With the exception of testamentary trusts, an individual is considered to have established a trust if the individual's assets are in the trust
- Only the assets in trusts that were contributed by the individual or the individual's spouse would be considered and assets contributed by third parties are excluded

Irrevocable Trusts

- assets in irrevocable trusts are countable to the extent that payments could be made to or for the benefit of the individual
- Assets that could not be used for the individual are no longer countable, but will be used to calculate a penalty period for a transfer of assets.

Special Needs Trusts

- Type of trust designed to preserve a beneficiary's Public Benefits and improve quality of life.
  - Assets owned by the trust do not count against a beneficiary's eligibility (if administered properly)
  - The ability to shelter resources to benefit a family member with disabilities
  - The ability to help the beneficiary live more comfortably and productively than is usually possible on public benefits
  - The ability to provide financial management

Two Types of SNTs

- Two types
  - First- Party (Self-Settled)
  - Third-Party (Created by someone else)
  - "Pooled Trusts" could be either First Party or Third Party; currently none in Hawaii

First-Party vs. Third-Party

First-Party	Third-Party
- Funded with Beneficiary's OWN assets - Must be created by Parent, Grandparent, Guardian or Court (or if Pooled Trust, by the person with a disability) -Must be for sole benefit of a disabled beneficiary - Must be funded by age 65 (possible exception for Pooled Trusts) - Pay-Back Provision	- Funded with any property NOT owned by beneficiary - No pay-back provision - More flexible, but fewer statutory protections

The “special needs trust”

- 42 USC 1396p(d)(4)(A).
- This is the payback trust.
- Established by parent, grandparent, or court.
- Beneficiary under the age of 65.
- Maybe a good option for “emergency” planning.
- No transfer of asset penalty, as long as trust is funded prior to age 65.
- “Sole Benefit Rule”
  - Beware of Hobbs

SNT Establishment

From the Fact Guide for National Trust Training:

"E. WHO CAN ESTABLISH THE TRUST?

- **Parent or Grandparent**
  - ***For legally competent, disabled adults:*** A parent or grandparent may establish a "seed" trust to allow for the disabled individual to transfer his/her own assets into the trust.
- **Legal Guardian**
  - A person establishing the trust must have legal authority to act with regard to the assets of the individual.
  - An attempt to establish a trust account by a third party with the assets of an individual WITHOUT the legal right or authority to act with respect to the assets of that individual will generally result in an invalid trust.
- **Court**
  - Creation of the trust **MUST** be required by a **court order**.
  - **Approval by the court is insufficient."**

The “pooled special needs trust”

- 42 USC 1396p(d)(4)(C)
- Pooled special needs trusts are a type of first party trust that is managed by a nonprofit agency
- Assets in the trust are exempt for Medicaid purposes, and transfer of asset penalties do not apply to funds transferred into this trust.
- Assets remaining in the trust upon the death of the beneficiary may remain in the trust or may be used to pay back Medicaid
- No pooled special needs trust currently operating in Hawaii.

Third-Party Special Needs Trusts

- Traditional Special Needs Planning for clients who wish to leave something of financial value to a beneficiary who has a disability.
- Trustee to have discretionary powers over the trust funds with only precatory language to apply funds for the beneficiary's "special" or "supplemental needs", taking the Beneficiary's public benefits eligibility into consideration

The forgotten trust

- 42 USC 1396p(c)(2)(B)(iv)
- “sole benefit trust”
- HCFA Transmittal No. 64.

Sole benefit trust requirements

- Trust must provide that the beneficiary is the only person who will benefit from funds in the trust, both at the present and at any time in the future
  - Trust distributions must be "actuarially sound"
  - No payback provision required
  - Beneficiary must be community spouse, individual's child who is under 21, blind or disabled, or to a disabled beneficiary under age 65 (HAR 17-1721-57(2))

ABLE Accounts

- Beneficiary must be a resident of either the state that maintains the program or of a contracting state
- Beneficiary must be the owner of the account
- Beneficiary must be "disabled" prior to reaching the age of 26
- Contributions to an ABLE Act Account may be made by any individual, including the account Beneficiary
- Contributions to the account may not exceed a total of the annual gift tax exclusion for the tax year ($14,000 for 2015, adjusted for inflation periodically)
- Distributions from an ABLE Act account must be for "qualified disability expenses
- ABLE Act accounts may be rolled over into other ABLE Act accounts
- Upon the death of the beneficiary, any amounts remaining in the account must be used to re-pay Medicaid benefits received by the beneficiary and remaining amounts may be distributed to the deceased's estate or designated beneficiary, subject to income tax on investment earnings.
- ABLE Act accounts will be exempt for Medicaid purposes, but amounts in ABLE Act accounts in excess of $100,000 are considered resources for SSI purposes.
- *See* IRC Se. 529A(c)(1)(B)(i) stating that Qualified Disability Expenses are any expenses related to the individual's blindness or disability and include education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management, legal fees, expenses for oversight and monitoring, funeral and burial expenses and other expenses as approved by the Internal Revenue Service. Amount of distributions that are not for such expenses may be included in an individual's gross income for tax purposes. Further, it is possible that certain distributions may impact an individual's benefits in other public benefit programs (*e.g.* payments for housing would be subject to the PMV test for SSI purposes).

Qualifying Asset Transfers

- Deficit Reduction Act (old news) makes timing of transfers important.
- 5 year lookback.
- Lookback and penalty period are NOT the same.

Transfer of Asset Penalty

- The transfer of asset penalty is the period during which an individual will not receive long-term care Medicaid benefits as a result of a transfer of an asset during the applicable look-back period
- To calculate a penalty period, total the cumulative uncompensated transfer of all assets during applicable look-back period and divide that value by the average monthly cost of nursing home services in the state in which a person will receive care

Penalty Period

- Value of Gift / $8850 = Penalty Period
- Period begins as of date of eligibility, if otherwise eligible
- Subsequent gifts can have penalty begin immediately or as the date a negative action could be taken

Running of the Penalty Period

- An established Penalty Period continues to run, regardless of whether the individual continues to be eligible for assistance or even in need of LTC services
- A penalty that results in a partial month penalty shall not be rounded down or disregarded.

What is a gift?

- a gift is a transfer of assets for less than fair market value within the five years immediately prior to application for long-term care services
- "Gift" does NOT have the same definition as the tax code
- Gift applies to gifts of applicant and applicant's spouse
- Transfer of INCOME is also considered a gift
  - If an individual transfers either a lump sum of income received in a given month or the right to receive income from another source, the total expected value of the funds transferred will be used to calculate a penalty period

Cure of Gift

- Returning the gift will "cure" the penalty period.

“Exempt Transfers”

- Transfers that are NOT penalized

Home – Exempt Transfers

- Spouse
- Child under age 21
- Blind child
- Disabled child
- Sibling with equity interest in the home who has resided in the home for at least one year immediately prior to the individual's institutionalization
- adult child who has resided in the home for at least two years immediately prior to the individual's institution and who provided care allowing the individual to remain in the home

Concerns with Home Transfer

- Where to live?
- Property taxes?
- Capital gains taxes?
- Disinheritance issues?
- Estate recovery?

Other Exempt Transfers

- Spouse
- Child under age 21 or a trust for such child
- Blind child or a trust for such child
- Disabled child or a trust for such child
- Special needs trust for disabled person
  - Does this exemption apply if it is an SNT for the APPLICANT?
  - What about a post-65 birthday transfer to a pooled "(d)(4)(C)" SNT?

Spending vs. Gifting

- A gift is a transfer for less than fair market consideration; spending is a transfer for equal consideration.
- Spending results in no transfer penalties

Spend Down Examples

- Paying off an existing mortgage or line of credit on an exempt asset
- Buying a car
- Renovating home
- Purchase of other "exempt" assets, such as a funeral plan, necessary electronics, clothes.
- Payments for services.

Purchase of a life estate

- Life estate in “home” is exempt because of the home exemption
- This can be used to effectively transfer significant countable resources to an intended beneficiary.
- Must be purchased for fair market value at most
- REQUIRES the purchaser to reside at the subject property for at least one year.
- Subject to estate recovery.
  - But 2 year solution?

Half-Loaf Technique

- Traditional Half-Loaf
  - Applicant gives away the penalized amount each month until applicant is Medicaid eligible. Penalty period would start as of the month of the gift, so at the end of each month the penalty on that gift would expire. (Or give away ½ of estate and use the remaining ½ to pay for penalty period)
- No longer effective. DRA eliminated this planning strategy by having penalty period begin as of date of eligibility, rather than date of gift.

Reverse Half-Loaf

- Applicant would give ENTIRE amount away, apply for Medicaid and immediately start the penalty period. Donee then has the money to pay for applicant's care during a penalty period.
- Much riskier – there can be no requirement that the donee actually pay or this is a trust-like device.

Reverse Half Loaf Example

Applicant has $885,000 in cash and no other assets or income. Applicant gives the full amount to his daughter, who is his only child and sole intended estate beneficiary. The state average cost of care is $8850, and is, in fact, the applicant's long-term care bill. Applicant then applies for Medicaid and is found eligible, but penalized 100 months due to the transfer of assets (885,000/8850 = 100). Daughter then pays $8850 each month for dad's care for 50 months. Daughter then reports to Medicaid that $442,500 has been returned to dad. Medicaid re-calculates the penalty period to be 50 months and finds that dad has already waited 50 months and Medicaid eligibility begins immediately.

Reverse Half-Loaf Justification

- An established penalty period shall continue to run, regardless of whether the penalized individual is receiving long-term care services or even eligible for Medicaid post transfer. *See* H.A.R. § 17-1725.1-57(d).
- A penalty period shall not be applied when the transferred asset has been returned. *See* H.A.R. § 17-1725.1-56(5).

Protect the Community Spouse

- Maximum Monthly Maintenance Needs Allowance:
  - Community spouse has no income. Institutional spouse has income of $4,000 per month. Upon qualifying for Medicaid, institutional spouse keeps $50 a month as a personal needs allowance. $2,980 then goes to the community spouse. The remaining $970 will go towards the institutional spouse's long term care. Medicaid will pay the remaining balance to the care facility for the institutional spouse's care.

Community Spouse Resource Allowance

- CSRA - $119,220 in 2015.
- Monthly income allowance to community spouse is $2,980

Testamentary Special Needs Trust

- If sick spouse is anticipated to predecease healthy spouse, the sick spouse may want to set up testamentary special needs trust for the surviving spouse
- Unlike a (d)(4) trust, there is no payback or estate recovery

Testamentary SNT

- HAR 17-1725.1-18(a) – "An individual shall be considered to have established a trust if assets of the individual form all or part of the corpus of the trust and if the trust was formed *other than by a wil*l" (emphasis added)
- (b) - "If a trust contains assets of persons other than the individual, only the portion of the trust that contains the assets of the individual will be considered in this section"

Estate Recovery/Liens

- As a condition of allowing people to qualify for Medicaid, the Government has the right to attach a lien to home property
- Under certain conditions, the government can re-collect every dollar they paid for your LTC needs
- No recovery shall be made for correctly made assistance except for individuals in **Nursing facilities**, or **ICFMR**, or **other medical institutions**, OR **INDIVIDUALS AGE 55 OR OVER**.
- Recovery shall be from the deceased recipient's estate

Estate defined

- Haw.Admin.Rules § 17-1700.1-2 defining "Estate" as "the real and personal property included in an estate under the State's probate law and any other real or personal property and other assets in which the individual had any title or interest in at the time of death (to the extent of such interest). This includes assets conveyed to a survivor, heir, or assign of the deceased through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangements."

Estate recovery

- The State may place a lien on real property after a determination by the Department of Human Services that the individual cannot reasonably be expected to be discharged and return home.

Lien Recovery

- Precluded against home IF the following
  - Surviving spouse residing in home
  - Dependent child in home
  - Sibling with equity interest in home (1 year prior to admission)
- No Recovery while
  - Surviving spouse or dependent child
  - Non-dependent child or sibling residing on property continuously from admission

Lien dissolution

- Lien is dissolved upon return home.
- Presently, no recovery for foster care

How Do I Avoid a Lien?

- Sell Home?
  - Selling your home will avoid a lien, BUT it will mean you won't be able to qualify for medicaid until your sale proceeds are spent.
- Gift Home?
  - Gifting your home will avoid a lien, but it may mean that you will not qualify for Medicaid for a long period of time

Gifting Home

- From the date that you apply for Medicaid, the government will look back 60 months (5 years) to see if you made any gifts during that time.
- If any gifts were made, they will total the value of the gifts and calculate a penalty period.
- The penalty period is the number of months that you will not qualify for LTC assistance starting on the date that you are in a nursing home and otherwise qualify for assistance

Gifting Home

- If your home is worth $885,000 and you gift it, you may not qualify for LTC assistance for about 100 months
- Gifts must be made outside of the lookback period (60 months) or to "exempt" individuals

Exempt Transfers

- Gifting the Home will not be penalized if you gift it to:
  - Spouse
  - Minor/blind/disabled child
  - Sibling with equity interest who has lived at the home for at least 1 year prior to SNF
  - Adult child who has lived in home for at least 2 years prior to SNF
  - Special Trust for benefit of person with disability

Hardship Waivers

- State may waive recovery.
- For the hardship waivers to apply, the property against which a lien is imposed should be the sole income-producing asset of the survivors and the estate is a family farm or business and the income produced does not exceed the federal poverty guidelines for the survivors. Another exception provides that estate recovery may be waived if the property is the homestead of modest value, which is occupied by survivors who have continuously resided at the property at least three months prior to the Medicaid recipient's institutionalization, do not own other real property and have limited income *See* Haw.Admin.Rules § 17-1702-56(e)(1).

Long-Term Care Insurance

- Estate recovery is limited to the amounts that the State paid for a Medicaid recipient's long-term care. A recipient who had long-term care insurance would therefore, have recovery only on the amounts not covered by the long-term care insurance policy and personal cost share

Claim Reduction

- Possible to limit recovery from (d)(4) trusts – First Capital Surety case.
- Life Estates
  - Limited to value per table NEW interpretation.

Questions?

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