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Estate, Tax and Wealth Planning for Advisors and Clients

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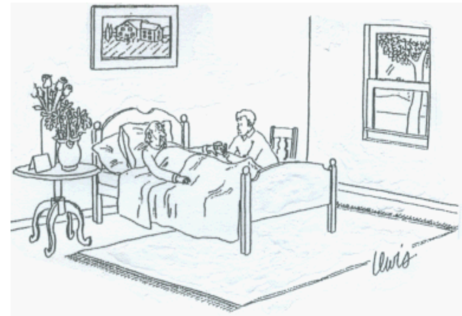
Asset Protection and Medicaid Planning In Washington: *New Math 101*



"I should have bought more crap."

Asset protection planning takes many shapes. An increasingly important asset protection goal for many clients is planning effectively for Medicaid eligibility. "Planning effectively" in this case means adopting a strategy that maximizes the value of assets staying in the family and minimizes the value of assets diverted (i.e. lost) to the government and private health care providers. While this important form of planning is legal, it has undergone increasing scrutiny by state governments throughout the country. The "morality" of spending down an estate to qualify for Medicaid has been vigorously debated, but won't be addressed here.

New landscape. Very recent changes in Washington state law effective April 1, 2003 dramatically alter the landscape, making it even more important for advisors to make sure their clients receive proper counseling in this increasingly sensitive asset protection planning area.

Elder clients often need long-term nursing home care or in-home care but don't have the assets to fully fund private care or don't have long-term care insurance benefits. The joint federal/state Medicaid program covers such expenses.

The program covers elders (those over 65) and disabled, blind, or terminally ill persons. Each state administers its own program and sets eligibility criteria. The Department of Social and Health Services (DSHS) administers the Medicaid program in Washington and makes rules governed by RCW 74.08.090.

Gifting. Since the program is available only to people who have assets less than $2,000, many elders are too wealthy by program standards to qualify for Medicaid assistance.

The Medicaid program recognizes this dilemma and allows elders with assets to "gift" or transfer away their assets in order to reach the threshold assets requirement.

New rules just adopted in Washington affect how gifts should be structured to maximize Medicaid eligibility. Advisors should be generally familiar with these rules and direct their clients to attorneys who are knowledgeable in this area and can help the clients plan appropriately. To that end, here's a brief recap and a look at *the new math 101*:

The basics. Certain personal belongings are exempt from the $2,000 maximum allowable assets permitted a Medicaid recipient under Washington Administrative Code (WAC 388-513-1350). If the Medicaid recipient is married, his or her spouse is allowed to keep an additional $90,660 of other property and cash as "exempt resources" for a total of $92,660 per couple. (*Beware:* The Washington state House and Senate just passed legislation that would lower the amount a Medicaid recipient's spouse can keep from $90,660 to $40,000.) The rest of the assets of both single and married persons must be "spent down". This spend down involves not just using the assets to pay for care but also gifting assets away to other people. The assets aren't permitted to exceed the threshold level on the first day of the month in which Medicaid coverage is desired.

When spending down, in each month that total gifts exceed $1,000 the person is ineligible for Medicaid in that month. (WAC 388-513-1364). For outright gifts, this transfer penalty only applies to gifts made within 36 months before the date of application for benefits. But transfers to revocable trusts and most irrevocable trusts involve a look-back of 60 months. The length of this penalty period varies with the way in which gifts are structured.

The old math. Under the old rules, the total value of all gifts made within a month was divided by 4,689 (This figure represents the current average cost in Washington state for skilled nursing care: $4689.) Any fractions were rounded down and the resulting number was the number of months of Medicaid ineligibility that resulted from the gift. The penalty period did not begin until all penalties from prior gifts had expired. Here's an example: assume that gifts totaling $10,000 are

"He that won't be counseled, can't be helped."

-Benjamin Franklin

What business entity should I choose?

If you or your clients are confused about the pros and cons of C or S corps, LLCs or partnerships, contact Chuck Farrington, J.D., LL.M. at Price & Farrington. He'll help you design and implement the entity of choice based upon your circumstances and goals.

made on January 1 and gifts totaling $8,000 are made on February 1. The $10,000 gift will result in a disqualification for January and February ($10,000÷4,689=2.13, which is rounded down to 2 months). The February gift of $8,000 will add another month ($8,000÷4,689=1.7, which is rounded down to 1 month), which will not begin to run until March, after the earlier penalty period expires.

But watch this: if the gifts were structured as two gifts—$9,000 each month—the rounding down of the fraction would result in only one month's penalty for each gift ($9,000÷4,689=1.92; round down to 1 month.) This makes the Medicaid applicant eligible *one full month earlier* (March 1). Under this method, an annual gift of $108,000, given in monthly suns of $9,000, results in just 12 months of ineligibility. By comparison, a lump sum gift of $108,000 would create *a 23-month period of disqualification* ($108,000÷4689=23).

The new math. The new rules appear at first to be simply a change in mathematical formula, but they actually result in *a much longer penalty period* (i.e., period of ineligibility) depending on how gifts are structured.

The new rules for calculating Medicaid eligibility now focus on *the number of days* that the Medicaid recipient is ineligible for benefits. The total value of all gifts in a month is now divided by 163 rather than 4689. The divider represents $163, the current average cost of one day's private care in Washington. Again, the total is rounded down if the resulting number is a fraction. For example, under the new rules effective April 1, a gift of $9,000 now triggers a penalty period of 55 days, or nearly two full months (9000÷163=55.2, rounded down to 55). Plainly, the rounding down under the new system has far less impact when applied to a day rather than to a whole month. It therefore increases (i.e., lengthens) the ineligibility period.

The difference between the two results is stark. By changing from a monthly determination to a daily determination, the person making the same $9,000 gift has gone from eligibility after 30 days to eligibility only after 55 days. For a person in dire need of care, this difference can be dramatic, and could affect not only quality of life, but perhaps life itself in cases where, for example, elders are unable to properly dose their medications without assistance.

We agree that it might be a legitimate goal of the Washington state legislature to reduce the number of people on Medicaid by tightening up the gifting process. But tinkering subtly with the formula in order to shrink the Medicaid rolls creates considerable confusion.

Bottom line. Medicaid planning can be an effective way to protect and preserve assets for the family. Is proactive planning a better strategy, e.g., by helping your clients purchase appropriate long-term care insurance in advance so it's there when they need it? Of course. But at whatever stage it's done, smart planning can be an opportunity for you to work in tandem with an attorney who can help you achieve your clients' asset protection planning goals. This is a winning result for everybody involved.

As always, please let us know how we can best help you and your clients accomplish important goals through proper planning.

Glen D. Price

Pensioner's *"Do Not Resuscitate"* Tattoo

Retired nurse Frances Polack has taken an extraordinary measure to ensure doctors do not try to prolong her life against her wishes.

Ms. Polack, 85, from Hampshire, England is so concerned about unwanted medical care that she has invested in a £25 tattoo across the front of her chest. It reads "Do Not Resuscitate" in capital letters and is set around a red heart with a line through it. She feels it is the only way to ensure that doctors take account of her wishes, and that anybody opening her blouse to try to restart her heart will stop immediately.

There have been instances of "Do Not Resuscitate" instructions being found in patient notes after they've received emergency care. Ms. Polack is concerned that the living will she carried in her handbag might go unseen by medics busy trying to save her life. She also fears that plans to put more than 700 defibrillators in public places will increase the likelihood of a well-meaning stranger trying to give her a few more years. Says Ms. Polack: "I don't want to die twice. By resuscitating me, they would be bringing me back from the dead only for me to have to go through it again."

There is enormous pressure on doctors and paramedics, often from relatives, to try to revive patients at any cost, even when the patient has made their wishes clear on hospital notes. "I'm not afraid of dying. But I am afraid of living when I should be dead," says Mrs. Polack

Her years as a nurse had left her well aware of just how hard doctors will try to keep a patient alive. "By having this tattoo, nobody can be in any doubt. It's not something I've done on a whim, it can't be washed off and I won't change my mind," she said. Her granddaughter, who is a physician, told the BBC her grandmother was right that the medical profession did not discuss the issue of resuscitation enough. "It's her way of easing her anxiety," she said.

Recent guidelines from the General Medical Council in England recommend that people should be involved in all decisions about their medical care.