Medicaid Planning

Introduction
A person facing the prospect of long-term care with moderate income and assets may eventually have to rely on Medicaid to pay part or all of the cost of care.

Medicaid planning, using a qualified elder law attorney, allows you to correct inequities in the system. Medicaid planning has gotten a bad name because some individuals, who would normally have too many assets to ever qualify for Medicaid, deliberately use it, many years in advance, to give away everything to their family so as to qualify for Medicaid. It is wrong to abuse the system in this way and to use taxpayer dollars to insure an inheritance for the family. And if that person is not anticipating immediate care, this strategy is just plain dumb.

Income Annuity in the Name of the Community Spouse
This technique relies on two Medicaid rules. The first rule is that income between couples is attributed to the spouse who owns the income. Unlike assets which have to be shared for Medicaid eligibility, income does not have to be shared. For example if the Medicaid recipient has a total income of $500 a month and the community spouse has a total income of $4,000 a month the community spouse is not required to contribute any income towards the care of his or her spouse. Medicaid will cover the bill less the $500 a month, which, less a monthly allowance must be spent towards the cost of care. The second rule allows a spouse to transfer any amount of assets to another spouse without penalty of losing Medicaid eligibility.

Using these two rules, here is how a Medicaid annuity strategy works.

The person needing long-term care -- the institutional spouse -- applies to Medicaid in order to receive Medicaid services. In this case suppose the couple has $100,000 of cash equivalent assets and owns a home and a car. As long as the healthy spouse -- the community spouse -- lives in the home she can keep the home and the car and those assets do not prevent the institutional spouse from receiving Medicaid help. In this example, the institutional spouse must spend $50,000 of the couple's assets down to less than $2,000 and have an income insufficient to cover the cost of care and then Medicaid will take over.

Once the Medicaid application has been submitted, instead of starting the spend down to $2,000 and then receiving approval and having Medicaid pick up the balance of the cost, the institutional spouse transfers his $50,000 to his wife. This is allowable and will not disqualify the Medicaid approval process but it does not yet take away the responsibility to spend down the cash. The community spouse then uses the money to purchase an immediate income annuity for a period equal to or less than the allowable life expectancy in the HCFA transmittal 64 table. Assets have now been converted to about $800 a month in income. The income belongs to the community spouse and does not have to be shared with the institutional spouse. Therefore the spend down has been avoided. Evidence of this transaction is presented to Medicaid and because the institutional spouse no longer has any attributable assets, Medicaid starts paying its share of the bill.

This strategy serves two purposes. First, it may give the community spouse a larger income than she otherwise would have had under Medicaid rules. Second, even though it represents income, the community spouse has managed to keep $50,000 that would normally have to be spent.

In the past, some planners have set up annuities that provide a remainder payout should the community spouse die too soon. This is usually paid to the children and in the past was used as a way to transfer assets to the children without penalty. Under the Deficit Reduction Act of 2006, the state must be named as beneficiary for any remainder payout. This new rule discourages the use of these annuities to transfer assets to the next generation.

It is important for the planner to follow Medicaid guidelines in order to avoid a penalty. If the payout period of the annuity exceeds the life expectancy in Medicaid tables, then the excess amount of total income payment over the life expectancy becomes a transfer for less than value and represents a penalty. This in turn results in a penalty period equal to the amount of excess divided by the monthly Medicaid rate in that state. Medicaid will not start paying for care until this penalty period has been met with someone else paying for that care. It's important to use a qualified adviser to make sure you do all of this properly.

Prepaid Funeral Instead of or in Addition to Burial Funds
Federal rules allow a person on Medicaid to keep up to $1,500 for funeral expenses. Most states allow a recipient to buy a prepaid funeral plan. The limit for such a plan is usually higher than the $1,500 allowed by Federal rules. As an example, if your state allows $7,000 for a prepaid funeral plan then you should use the full amount you have money for to buy a plan.

Your state may also allow additional costs such as the burial plots, caskets and vaults to be tacked on, thus raising the limit.

Use of Spend Down Resources
People assume money being spent down for Medicaid eligibility needs to be applied to care costs. In reality, Medicaid is only interested in seeing the potential Medicaid recipient's resources reduced to less than $2,000. How the money is spent is only questioned if there has been a transfer for less than value.

In order to qualify for Medicaid more quickly, you may want to use some of the spend down money to pay off debt, trade in the old car and buy a new one. (Medicaid typically allows a community spouse to retain just one car), or fix up the house.

Intend to Return Home
If a single person receiving Medicaid care in a facility has a house, that property could be subject to sale to pay for Medicaid expenses. The house is only protected if a qualifying child or dependent lives there or if the recipient intends on returning home. Some states require a medical doctor to certify a return home, but in many states it only requires the signature of the recipient whether that recipient has justification or not. In the states that allow it, always have your loved one sign an intent to return home. At least you have use of the property while your loved one is still alive.

Most families sell the home and end up with a large amount of cash that must be spent down before the loved one qualifies for Medicaid. Keeping the home avoids losing the entire value of it to spend down. By retaining the home, Medicaid recovery may not come after the full value of the home when the loved one dies.

Potential rental income from the house would also go towards paying the the facility cost and reduce the amount that Medicaid would have to pick up. This could mean that Medicaid recovery using this strategy might go after a smaller share of its cost in the recovery process.

Medicaid treatment of a Home
If the community spouse lives in the home then the home is exempt from determining Medicaid eligibility. It does not count as an asset and prevent the institutional spouse from receiving Medicaid help. On the other hand any other real estate property, not the primary residence, will have to be converted to cash and spent down before Medicaid will start paying the bill.

If the community spouse living in the home does not in turn need Medicaid help in the future then one of two things can happen to the house after the death of the institutional spouse. Legally Medicaid has a claim against the property for recovery services. And in some states a lien against the property, called a TEFRA lien, can be filed in anticipation of Medicaid's cost. The lien can be filed before the death of the care recipient but only a few states actually do that. States that have authority to file these liens often don't so until after the death. At the death of the community spouse, the property cannot be sold until the lien is satisfied. But in states where there is no lien, if the community spouse dies after the institutional spouse it's unlikely that state Medicaid recovery will use the property as an asset for recovery.

And in many states if the property is inside a trust, the state may not consider the house an asset for recovery even though most states have altered their definition of estate to include a trust. Many states still rely on filing a claim in probate court to initiate recovery. The bottom line is very few states are efficient at recovery especially when it comes to a primary residence. Always contact and work with a competent adviser when dealing with recovery issues. You can never assume what your state recovery program will actually do.

Special Home Exemption Rule
It's often the case that a daughter will move in to take care of Mom or Dad or both. In this case Medicaid has a special leniency rule to allow transfer of the home to the daughter and not result in a penalty for a transfer for less than value. If the child provides care for a parent in a parent's home for at least two years, and that care kept the recipient out of a nursing home, the property can be transferred to the child without penalty and the property will not be a subject asset for Medicaid recovery. Medicaid will require some proof of this. Typically an affidavit from a third-party care provider such as a doctor or an agency stipulating that the care was given for at least two years and resulted in keeping the care recipient out of a long-term care facility, will be sufficient evidence. It's important to use a legal adviser to make sure you do this properly.

Joint Tenancy
Many people anticipating Medicaid services are tempted to put a child's or sibling's name on property titles to avoid probate and Medicaid recovery. It may not be a good idea.

There are at least four problems.

• If the other person on the title becomes subject to a judgment, even one arising from an accident, then at least 50% of the property can be lost to the judgment.

• The other person on the title must consent to any disposition of the property. He or she might not be in accordance with what the original owner wants to do.

• Redoing the title must occur at least 3 years prior to claim in order to avoid look back rules and a sanction on a gift to a non spouse owner.

• The person assuming joint ownership has received a gift and loses the step-up in basis at death. Capital gains taxes may have to be paid. And if the property is not the principal residence of the new tenant, the capital gains exclusion cannot be used either.

Transfer Title of the Property to The Community Spouse
Transfers to a spouse of any assets are exempt from Medicaid eligibility rules. An institutional spouse, anticipating Medicaid, can transfer title in the home to the community spouse and it has no effect on Medicaid eligibility. This can be done either with a quit claim deed or through a trust. With the asset no longer in the name of the care recipient, Medicaid recovery cannot use the house as a basis for recovering its costs. And the community spouse can transfer the house to a member of the family and as long as this is done beyond the five-year look back period, then Medicaid can't assess a penalty period for a transfer of assets for less than value. It's important to use a legal adviser to make sure you do this properly.

Trust to Avoid Probate
Common trusts to avoid probate are called "living" or "inter vivos" trusts. A trust never dies, thus it is not subject to probate. Most arrangements make the trust the owner of the property with the original owner(s) as trustee(s) (caretaker as it were) and beneficiaries(s). Thus the property reverts to the estate at death. Most people initiate these trusts to avoid probate. Assets in these trusts, other than a primary residence, are transparent to Medicaid. These trust assets are subject to Medicaid spend down rules.

The trust can be used in states where Medicaid recovery only uses primary residences passing through probate as being subject to recovery. However, a growing number of states do not recognize these arrangements to avoid probate estate recovery and go after primary residences in revocable trusts regardless of ownership.

To do it right for these states requires an irrevocable trust with no life interest, set up 5 years or more before a Medicaid claim. Very few people are willing to do these kinds of trusts.

Some people also include a so-called "life interest" in property in arrangements where property is gifted or in irrevocable trusts. The life interest gives them use of the property until their death even though they don't own it. Medicaid in many states does not recognize life interest and the property is considered to be in the ownership of the person who gifted it and subject to look back rules and recovery.

Move Loved One Needing Care to Another State
A person needing Medicaid covered care in one state may not qualify under that state's rules but might qualify under the rules of a neighboring state. Of particular concern are candidates suffering from dementia or Alzheimer's. It's difficult to quantify their need for care and in some states, those people who are cognitively impaired might not get help with Medicaid even though their needs might be greater than the needs of those who are physically disabled.

Families should consider moving loved ones who have been declined in one state, to live with a member of the family in another state and possibly qualifying in that state. In addition the new state may be more lenient with Medicaid recovery procedures.

A second reason may be that the current state of residence has a very tight supply of Medicaid beds and there is a waiting list. Moving the loved one to a state where there are more available Medicaid beds may avoid the family having to temporarily cover the cost of a non-Medicaid nursing home bed while waiting for one to become available.

Give Away Assets
We have already discussed the moral implications of using Medicaid planning strategies for unfairly qualifying for Medicaid and shifting the burden of cost to the taxpayers. New look back rules under the Deficit Reduction Act have effectively done away with gifting strategies used in the past to accelerate eligibility for Medicaid. This does not mean that gifts cannot be used, but planning must be done many years in advance. Under these new circumstances the whole concept of gifting in order to qualify for Medicaid probably makes little sense.