

# MAJOR COMPONENT OF ELDER LAW: ESTATE AND RESOURCE PLANNING FOR DISABILITY AND LONG-TERM CARE

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# Long-Term Care Statistics

- 70% chance that at least one marriage partner over age 65 will need LTC
- Alzheimer's - 60%-65% of Dementias
  - 3% of 65-75 age group
  - 19% of 75-85 age group
  - 47% of Over 85 age group
- National average LTC stay is approximately 2.3 years
- Average LTC costs for those over 65 range from approximately \$140,000 to \$400,000
- Two thirds (2/3) of LTC residents are on governmental assistance; mostly Medicaid/40% paid by federal government and 40% by state; Medicaid costs approximate \$750,000,000,000 a year

# Three Components of a Medicaid Plan

- A. Qualifying applicant for Medicaid
- B. Proper Estate Planning for Married Persons
  - For both spouses
  - Particularly including addressing situation if “well spouse” dies first/35% of the time
- C. Avoiding Medicaid claim against estate at death of Medicaid recipient of single and surviving spouse if married
- **Overriding Principle: There is nothing simple about Medicaid or Medicaid planning! Misinformation prevalent; clients tend to rely on advice of friends and neighbors.**

# Medicare Insufficient for LTC

- Requires 3 prior days in hospital
- 20 days of skilled care
- 80 days of approximately \$100/day co-payment

# Medicaid a “Need-Based” Program

- Those qualifying for “categorically needy programs” such as Supplemental Security Income (SSI) automatically receive medical card (“Medicaid”)
- Otherwise, must be “medically needy”
  - Residency in LTC facility necessary
  - No less costly alternatives available
  - Persons who are 65 or older considered medically eligible
  - Person under 65 must be disabled under Social Security Act (SSDI)
- Also must be “financially needy”
- Income (includes Social Security and pensions) must be less than Medicaid reimbursement rate

# Medicaid a “Need-Based” Program (cont’d.)

- All recipients must meet resource test
- Exempt resources under resource test (Kansas)
  - Home and usually contiguous acreage (limited in value under Deficit Reduction Act '05 and possibly state limitations)
  - One vehicle
  - Household goods
  - Keepsakes
  - Burial space and casket
  - Pre-paid funeral plans within certain value limitations

# Medicaid a “Need-Based” Program (cont’d.)

- Term life insurance
- Cash value of life insurance with \$1,500 death benefit or less
- Certain income producing property (e.g., farmland, rental properties, operating businesses) can sometimes be exempt under state law, often limited to trade or business property
- IRA of “well spouse”
- \$2,000 of other resources
- **Note: Any assets held in a revocable trust not deemed exempt by state!**
- Recipient’s income (e.g., Social Security, pension) goes for LTC (except for small amount for incidental needs); facility bills state for difference up to Medicaid reimbursement rate for facility
- No limit on income of recipient’s spouse not in LTC

# Home and Community Based Services (HCBS)

- Ancillary program if resources available under what is termed a “frail and elderly waiver”
- Same asset test as **regular** Medicaid
- Facilities don’t have to be licensed for long-term care, e.g. assisted living facility
- Income over \$2,742.00 must help pay for health care portion
- Facility usually accepts income up to \$2,742.00 for regular rent and negotiates ancillary health care services, payments from state



# Division of Assets Test for Married Recipients

- “Well spouse” may keep 1/2 of non-exempt resources up to certain amount
- “Financial snapshot” taken at time “infirm spouse” enters nursing home (LTC) or hospital or rehab facility if prior to LTC
- Current minimum of \$29,724 (2023; inflation indexed annually)
- Current maximum of \$148,620 (2023; inflation indexed annually)

# Division of Income Benefit for Married Recipients

- Not a test for Medicaid qualification
- A potential benefit once qualified for Medicaid
- The well spouse is entitled to a minimum base income plus potential shelter allowances if residents rented or there are mortgage payments
- Essentially, the well spouse may “take away” income of the infirm spouse necessary to bring the well spouse’s income up to such amount
- \$2,465 per month minimum or \$3,715.50 per month maximum with shelter expenses

# “Disqualification Period” for Gifting

- Disqualified on a “per day” basis based on amount of transfer related to an average cost of LTC in applicable state
- About 1 month for every \$7,500 transfer
- Transfers to spouse excluded because must still meet “division of assets” test
- Under Deficit Reduction Act of 2005
  - 60 month “look back” period for all gifts
  - Disqualification period starts from date transferor would otherwise have qualified for Medicaid except for gift
- Only transfers made for the purpose of qualifying for Medicaid cause disqualification period; however, waivers difficult; in discretion of state

# Accelerating Medicaid Eligibility

- Converting non-exempt resources into exempt resources/Paying debt
- Not a “disqualifying transfer”
  - Purchasing exempt resources
  - Paying off personal debt reduces non-exempt resources such as cash
  - Married couples may not want to convert non-exempt resources into exempt resources until “infirm spouse” enters LTC setting
    - Lowers numerator amount of assets to be divided by two
    - Otherwise, could reduce amount of assets which “well spouse” may keep under “division of assets” test

# Accelerating Medicaid Eligibility (cont'd.)

- Purchase of Medicaid compliant annuities to convert non-exempt assets to income
  - If annuity is actuarially sound under Medicaid rules, purchase not considered transfer
    - Annuity payments considered income and not resource
    - Would want a “term certain” as lifetime annuities for LTC residents; otherwise, would be poor purchase and of no benefit to other family members
    - However, any “term certain” (e.g., a five year period even should annuitant die prior to five years) may not be greater than purchaser’s actuarial life expectancy to meet “actuarially sound” requirement
    - Annuity payments must be equal
    - Annuity must be non-assignable and irrevocable
    - First beneficiary at death must be state up to amounts paid by state for Medicaid recipient’s care
  - Loans can be similarly structured
    - State need not be beneficiary
    - No commissions as with annuity
    - Must specifically state non-cancellable at death or at death of promisee
  - Strategy for Medicaid recipient
    - Reduces disqualification period for gifted assets as an annuity purchased with cash considered income and not a resource
    - Sustains Medicaid recipient through disqualification period
  - Strategy for “well spouse” to reduce non-exempt assets in meeting division of assets test as “well spouse’s” income has no affect on “infirm spouse’s eligibility for Medicaid

# Accelerating Medicaid Eligibility (cont'd.)

- Transfer of assets to descendants and “waiting out” five year disqualification period
  - Best to make transfers in trust for family members and not outright
  - Beneficiaries would be descendants who could voluntarily give trust distributions back for Grantor’s benefit should Medicaid be needed during five year disqualification period
  - Trust should be for lifetime of Grantor/Transferor
  - Grantor trust can be structured to allow Grantor to change trustees (other than to Grantor) and alter disposition of remaining trust assets at Grantor’s death among family members
  - Grantor may also retain actual income for life
  - Causes trust assets to be in taxable estate of Grantor and thus eligible for “step-up” in basis at Grantor’s death
  - Can also be structured as “Grantor Trust” the income of which is taxable to Grantor so as to be taxed at Grantor’s income tax brackets/usually very low

# Estate Planning Documents

- Loans to rectify disqualifying gifts can be similarly structured as annuities, but with no commissions or “pay back” to state beneficiary for Medicaid benefits on any balance owing at recipient’s death
- Property left in trust with discretionary distributions and or Supplemental to Medicaid or governmental resources” Trust for beneficiary by a third party (e.g. spouse or parent) normally not a resource to beneficiary for Medicaid eligibility under Kansas statutory provisions
- With respect to spouses, property left in “Supplemental Needs” Trust for surviving “infirm spouse” must be created “by Will” (literally under federal law) for trust assets not to be resource for surviving spouse
  - Thus, if Revocable Trust primary estate planning instrument, may be advisable to include a “bail out” option authorizing trustee (instead of creating “Supplemental Needs” Trust for surviving spouse) to distribute trust assets to estate of recipient if desirable for Medicaid purposes

# Estate Planning Documents, (cont'd.)

- “Pour over” Will then should have option for executor (instead of distributing assets to Revocable Trust) to create a Testamentary Trust incorporating “Supplemental Needs” Trust of Revocable Trust if desirable for Medicaid Purposes
- Hasn’t been a significant problem for Revocable Trusts to date
- To maximize benefits of married recipient, all assets should be owned by “well spouse”
  - 1/3 of time “well spouse” will predecease “infirm spouse”
  - Don’t want assets coming back to recipient “infirm spouse” to and disqualify recipient for Medicaid or for estate recovery by state upon recipient’s death
- Limitations of foregoing spousal strategy under S.R.S. v. Miller, 275 Kan. 349 (2003)
  - Amount of surviving spouse’s “elective share” spousal survivorship rights under Kansas law from predeceased spouse deemed to be a resource even if left in “supplemental needs” trust by “well spouse”



# Estate Planning Documents, (cont'd.)

- Irrespective of whether surviving spouse consented to plan; even if waived in Premarital Agreement
- Need to authorize transactions deemed desirable by client for Medicaid purposes in Revocable Trust, Will and Durable Power of Attorney
  - Transfers to spouse during recipient's lifetime for division of assets purposes (RT and DPofA)/e.g. transfers to "well spouse"
  - Transfers to other beneficiaries of estate during recipient's lifetime (RT or DPofA) subject to disqualification period
  - Applying for Medicaid (DPofA)
  - Joint Revocable Trusts should be off the table
    - All assets are available resources to both spouses
    - Exempt resource assets not exempt when owned in a trust
    - Joint revocable trusts should correctly be employed when no asset protection desired for surviving spouse
  - Consider employing "reciprocal spousal general powers of appointment"
  - Estate Planning can note ignore Medicaid Planning for their clients and their beneficiaries

# Medicaid Claim

- Federal law mandates states pass estate recovery laws against the probate estates of Medicaid recipients to cover Medicaid benefits paid
- States also authorized to pursue expanded estate recovery claims against other assets passing at death by a single Medicaid recipient or the surviving spouse of a Medicaid recipient under non-probate assets through joint tenancy, beneficiary designation or revocable trust.
- Kansas has not been diligent in tracing surviving spouse upon a later death unless also on Medicaid

# Medicaid Claim (cont'd.)

- State also allowed to impose lien on personal residence during recipient's lifetime or life of surviving spouse.
  - If recipient cannot reasonably be expected to return home
    - If recipient has received Medicaid benefits for six-month period, meets requirement
    - "spotty" usage of this by state
- State also may impose such lien on real property of single recipient or surviving spouse.
- Strategy to avoid": place those asset in a limited liability company (llc), as neither spouse actually owns such real property; llc interests would be owned by spouses

# Medicaid Claim (cont'd.)

- Lien cannot be enforced or “estate recovery” of benefits paid cannot be made
  - Until death of a surviving spouse
  - While any child under age 21, or is blind or permanently or totally disabled (SSI and SSD Test)
  - Upon a personal residence
    - While child of the recipient residing in residence and resided in residence for two years prior to recipient entering LTC and child provided care to recipient delaying need for LTC

# Minimizing Medicaid Claim

## - Planning Strategies

- Use probate avoidance devices (e.g., “TOD,” “POD,” and Revocable Trust for surviving spouse)
  - Easy for state to file claim in probate estate
  - Normally, state must be given notice of potential claim
- Surviving spouse of Medicaid recipient transferring assets to children or others
  - State may be permitted statutorily to set aside transfers to avoid estate recovery by “Medicaid recipient”; surviving spouse not in LTC not a “recipient”
  - Best to transfer assets into irrevocable trust for benefit of family members as noted above to wait out five year period
- As previously noted, questionable how well state will track surviving spouse, particularly if spouse avoids probate ( whereby state would be required to be notified) or surviving spouse resides in another state at death

# Minimizing Medicaid Claim (cont'd.)

- Assets left in properly drafted “Supplemental Needs” Trust by predeceased spouse or by other third party should not be subject to claim at beneficiary’s/Medicaid recipient’s death/not owned by surviving spouse
- Even if assets in estate of single Medicaid recipient or estate of surviving spouse subject to estate recovery, Medicaid qualification still a benefit
  - Medicaid reimbursement rates subject to recovery (less amounts paid by recipient) less than private pay rate
  - Estate recovery limited to Medicaid benefits for LTC only
  - No interest on recovery

# Importance to Farmers and Ranchers

- Farm and ranch property exposed to potential high LTC costs
- Typically have large “cash poor” estates most of which consist of trade or business property which a large number of states consider to be exempt
- Normally have estate plans ill-prepared to maximize Medicaid eligibility
  - Assets held in joint tenancy with spouse or otherwise designed to pass to surviving spouse at death
  - Often have assets in a joint revocable trust/**the worst possible plan!**

# Importance to Farmers and Ranchers and Others

## - Most advantageous estate plan

- Separate revocable trusts leaving assets at death is “supplemental needs” discretionary trust for benefit of surviving spouse
- Employing “reciprocal powers of appointment” of RT’s a consideration
- Comprehensive financial powers of attorney authorizing transfers for Medicaid eligibility purposes
- The potential “five-year disqualification period” trust
- See schematic for normal planning; also has application to attaining other important estate planning goals
- Additional reference: “Medicaid and Long-Term Care Planning” discussion in Foulston Siefkin Estate Planning section on our website ([www.foulston.com](http://www.foulston.com))



