

Continuing Legal Education Course Outline:

Long Term Care Planning and Medicaid After The Deficit Reduction Act

Understanding the Choices Available to Elderly Clients

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After enactment of the Deficit Reduction Act (DRA), it seemed like clients had stark and limited choices to obtain eligibility for Medicaid long term care benefits: *Either*

- impoverishment, that would spend down assets to the allowable resource and income limits, leaving clients with only poverty level “non countable” assets, or
- divestment that would transfer a client’s assets to other family members 5 years or more before care is needed.



February 8, 2006 – President Bush signs the DRA. The end of Elder Law and Medicaid Planning?

But, upon careful review, there are many ways to reduce the hardship, and improve the lives of our clients, and their families. As elder law attorneys, we can advise clients on a full spectrum of resources and solutions that are available to provide ways to protect independence, pay for long term care, and preserve assets for spouses and family members.



Medicaid Long Term Care Application for Massachusetts Residents

Maximizing the resources available to a community spouse.

The most flexibility remains with married couples. The Community Spouse Resource Allowance is just the beginning of the list of strategies that can protect a lifetime of work and savings:

Divide the assets of the fragile couple:

Spouse to spouse transfers are still exempt. So, just as Estate Planners divide jointly owned assets into Tenants in Common ownership to save the estate tax exclusion amount for both spouses, the TIC approach can provide flexibility for Elder Law planning. By splitting ownership, either spouse can:

- pass a 1/2 share to other family members upon death
- transfer 1/2 ownership back to community spouse if nursing home admission is needed

Use Testamentary Trusts: Transfer assets to the CS and have the CS execute a will containing a testamentary supplemental needs trust for the IS. "trustee shall not possess any discretionary power that would result in a reduction or loss of governmental benefits." Are discretionary distributions not included in calculating the PPA of the IS? Is the PPA limited to such items as a fixed income flow such as Social Security, pensions, annuities, etc., and does not include discretionary distributions from a testamentary supplemental needs trust?

Annuitize Institutional Spouse IRA. See page 3

Use Spousal Annuities - The Tax Relief and Health Care Act of 2006 amend the Deficit Reduction Act to allow state Medicaid agencies to collect nursing home costs from a community spouse's annuity, if there is money remaining in the annuity upon his/her death.

On September 29, 2007, Medicaid officials in Massachusetts said they have decided not to require that the community spouse name the state as the primary beneficiary of an annuity she / he owns at the time the ill spouse applies for Medicaid.

Alison Kirchgasser, the Director of Federal and National Policy Management in the Massachusetts Office of Medicaid-Executive Office of Health and Human Services said that "if the community spouse is not receiving any MassHealth benefits and the community spouse is the owner and annuitant of the commercial annuity, so that the institutionalized spouse has no interest under the annuity contract, the current policy is not to require the community spouse to complete an ANN-2 or name the Commonwealth as the remainder beneficiary." The ANN-2 is the annuity disclosure form that must be submitted with a Medicaid application.

In a letter to the Massachusetts Chapter of the National Academy of Elder Law Attorneys, the MassHealth official reminds us that the annuity would be countable if it does not conform to the Medicaid life expectancy rules, and if the community spouse ever needs long term care for herself/himself: "If, however, the community spouse were to apply for MassHealth benefits [for herself/himself] or if a review of the contract or other factors indicated that the institutionalized spouse did have an interest under the annuity, the Office of Medicaid could require, as a condition of eligibility, the completion of an [ANN-2](#) and the naming of the Commonwealth as the beneficiary in the proper position."

An annuity for the Community Spouse could be considered for married couples who want to protect money totaling over and above the Community Spouse Resource Allowance, and still qualify for Medicaid long term care coverage for the nursing home spouse.

Maximizing resources available to other family members.

Planning for single individuals is more challenging now. But the challenges make results that are achieved more gratifying and significant for clients.

Transfer assets to a disabled child: Clients who have a special needs child or grandchild should consider an SNT as a way to preserve the assets. Transfer from the ill parent or grandparent to the SNT is an exempt transfer and can be a last resort for crisis planning and can protect the child or grandchild in the future.

Consider pooled trusts: to reduce the monthly nursing home bill and preserve assets. Pooled Trust Accounts may provide benefits similar to an annuity. Reasons to consider:

- funds remain fully available for supplemental needs for the elder's lifetime
- if there are enough funds to have something left over for the family after elder's death, the funds are paid as a lump sum, instead of being stretched out over several years
- fees contribute to purpose of the pooled trust rather than profit for an insurance company

[A memo issued by the Centers for Medicare and Medicaid Services in May, 2008](#) says that pooled trusts can not be funded with the assets of people over age 65. This is being reviewed by elder law attorneys in Massachusetts, and the pooled trusts do continue to accept accounts for beneficiaries over the age of 65.

Create equity interests in siblings: The regulations will protect the interest owned by the non-institutionalized sibling, assuming the interest is created 5 years before Medicaid eligibility is needed. [130 CMR 520.005 \(B\)](#) ¹

Use annuities for single individuals: The Commonwealth must be listed as beneficiary of an Medicaid recipients annuity, to the extent of any Medicaid payments. But qualifying earlier for Medicaid will reduce the monthly care cost to the Medicaid rate, and that may leave some assets for family members. ² Medicaid now

¹ Joint Ownership of Assets, Other Than Bank Accounts. Any asset, other than a joint bank account, jointly owned by two or more individuals, is presumed to be owned in equal shares and counted proportionately unless a different distribution of ownership is verified or unless assets are being assessed in accordance with 130 CMR 520.016. When such a different distribution of ownership is verified, MassHealth attributes the countable value of the assets to the applicant or member or the spouse in proportion to the ownership interest.

520.007(G): Non countable transfer for transfers to siblings who live in the home. Former home countable unless:
(iii) a sibling who has a legal interest in the home and who was living there for a period of at least one year immediately before the applicant's or member's admission to the medical institution; 130 CMR 520.007 G (G) Real Estate(8)(b) (iii). 2 family house? DMA looks at the deed.

² [130 CMR 520.007 \(J\) \(1\)](#) Treatment of Annuities Established Before February 8, 2006:

Payments from an annuity are countable income in accordance with 130 CMR 520.009. If the annuity can be converted to a lump sum, the lump sum, less any penalties or costs of converting to a lump sum, is a countable asset.

Purchase of an annuity is a disqualifying transfer of assets: (a) when the beneficiary is other than the applicant, member, or spouse;
(b) when the beneficiary is the applicant, member, or spouse and when the total present value of projected payments from the annuity is less than the value of the transferred asset (purchase price). Disqualifying transfer amount based on the actuarial value of the annuity compared to the beneficiary's life expectancy using the life-expectancy tables as determined by the MassHealth agency, giving due weight to the life-expectancy tables of institutions in the business of providing annuities;
(c) when the terms of the annuity postpone payment beyond 60 days, the MassHealth agency will treat the

uses Social Security tables to determine actuarial soundness. ³

Annuitize an IRA: Annuities purchased with a qualified plan assets are exempt from the requirement that they be actuarially sound, non-assignable and have uniform payments: [130 CMR 520.007 \(J\)\(2\)](#) ⁴

annuity as a disqualifying transfer of assets until the payment start date; or
(d) when the terms of the annuity provide for unequal payments, the MassHealth agency may treat the annuity as a disqualifying transfer of assets. Commercial annuity payments that vary solely as a result of a variable rate of interest are not considered unequal payments under 130 CMR 520.007(J)(1)(d).

(2) Treatment of Annuities Established On or After February 8, 2006: (a) The purchase of an annuity will be considered a disqualifying transfer of assets when:
(i) someone other than Comm of Mass is named as the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the annuitant;

(ii) someone other than Comm of Mass is named as such a beneficiary in the second position after the community spouse or minor or disabled children; or
(iii) someone other than Comm of Mass is named as such a remainder beneficiary in the first position if the community spouse or the representative of any minor or disabled children in 130 CMR 520.007(J)(2)(a)(ii) disposes of any such remainder for less than fair-market value.

Purchase of an annuity will be considered a disqualifying transfer of assets if the annuity is not irrevocable and nonassignable.

³ Social Security Period Life Table

<http://www.ssa.gov/OACT/STATS/table4c6.html>

⁴ [130 CMR 520.007 \(J\)\(2\)](#) (c) The purchase of an annuity will not be considered a disqualifying transfer of assets if the annuity names the Commonwealth of Massachusetts as a beneficiary as required under 130 CMR 520.007(J)(2)(a) and if the annuity is:
(i) described in subsection (b) or (q) of section 408 of the Internal Revenue Code of 1986;
(ii) purchased with the proceeds from an account or trust described in subsection (a), (c), or (p) of section 408 of the Internal Revenue Code of 1986;
(iii) purchased with the proceeds from a simplified employee pension described in subsection (k) of section 408 of the Internal Revenue Code of 1986; or
(iv) purchased with the proceeds from a Roth IRA described in subsection (A) of section 408 of the Internal Revenue Code of 1986.

Reverse half-a-loaf planning using annuities to gain eligibility sooner.

Rental property as a planning tool: Use rents to pay overhead on Life Estate property that will avoid estate recovery.

Transfer income producing real estate to community spouse after the ill spouse is approved.

Life estates: if a conveyance can be made before the 5 year look back period, consider this option. If the proposed life tenants are both relatively young and healthy, they probably will make the 5 years. Consider LTC insurance to cover risk of older clients. Remember to consider pending changes in the step up in basis rules.⁵

Irrevocable Trusts: Structure trusts to bridge the need for care during 5 year disqualification period, or to provide income and flexibility to grantors who may need care further into the future. Use the Medicaid trust regulations as a guide⁶ along with income tax rules, especially [the principal residence exclusion](#).

[Intentionally Defective, Irrevocable Income Only Trust.](#) This is the concept that serves many aging clients.

- Irrevocable. It has to be a completed gift for Medicaid. Check the Regulations.

⁵ In 2010 the estate tax is abolished. There will be no §1014 (step up basis acquired from a decedent). There will be a \$1.3 million exclusion that can be allocated to anything you own, but the Life Tenant won't own the remainder interest, and the children (remainder owners) will have to pay the capital gains tax on the remainder.

⁶ Review [130 CMR 520.021](#): Treatment of Trusts, 520.022: Trusts or Similar Legal Devices Created before August 11, 1993; 520.023: Trusts or Similar Legal Devices Created on or after August 11, 1993; and 520.024: General Trust Rules

- Defective Grantor trust under [Title 26 §674](#) to preserve the capital gains exclusion (basis adjustment), since the government treats the trust as a non entity, grantor can use the principal residence exclusion (not as important for recently purchased real estate)
- Income Only to Grantor. Grantor can keep the right to live in the property that is in the Trust, or veto the sale of the real estate. If a sale of real estate is advantageous, the proceeds can be used for assisted living or any other living arrangement.

A special power of appointment is reserved by donor to make the trust "defective." You pick a power from the Grantor Trust Rules.⁷ The "secret" is to "flunk" on of the exceptions to the grantor trust liability provisions . . . but pick an exception that will not cause you to "flunk" the Medicaid rules requiring a completed gift.

Reverse Mortgage for homeowners age 62 and over. FHA administers. No income qualifications. Repayment: when you move, sell, or die. Proceeds based on Age, Value of house, current interest rates. Mortgage proceeds pay out options:

- Tenure
- Term - i.e. monthly
- Line of Credit
- Combination of above; change the option anytime

⁷ The Grantor Trust Rules were drafted at a time when the government wanted to defeat tax savings by forcing the Grantor to pick up the income from the trust. In other words, the government wanted to tax the Grantor using an individual income tax schedule that no longer applies. The rules serve little purpose now, other than to help with estate tax and medicaid planning!

"Grantor trust status results in a trust being treated for most purposes as if it did not exist....Income, losses, deductions, credits . . . are attributed to the deemed owner." Casner & Pennell, Income, Taxation of Trusts, Estates, Grantors and Beneficiaries, Estate Planning 6th Ed. at §5.11.9

[AARP Information and Reverse Mortgage Calculator](#). To prevent borrower's remorse, AARP suggests you [have your client consider all housing options](#). These checklist questions are useful to ask when a client is considering any irrevocable choices, including Trusts!

- How much cash you could get by selling your home?
- What it would cost you to buy (and maintain) or rent a new home?
- How much money you could safely earn on any money left over after you buy a new home?
- Have you recently looked into buying a less costly home, renting an apartment, or moving into assisted living or other alternative housing?

Caregiver Agreements:

Caregiver agreements were always a good idea because they recognize and reward the time and effort that each family member puts in to care, provide an organized schedule for care and other services, and prevent arguments and misunderstandings among family members.

Now an additional use for these agreements may be to reduce the size of an elder's estate, and allow earlier eligibility for Medicaid

Caregiver contracts services performed in the past (before the contract was written and signed) will fail!⁸ But court challenges by elders who are using care giver contracts to pay for current services may decide that these agreements are valid. A contract for prospective services is likely to be upheld.

⁸ [Andrews v. Division of Medical Assistance](#) - "services rendered to an elder by a family member are presumed to be gratuitous" HCFA 64. In the *Andrews* case, there was "no evidence at all that the plaintiff intended to pay her daughter and son-in-law for their labor except an inference that might be drawn that they would not have taken leaves of absences from their respective jobs"

During the current 2009 legislative session, the Massachusetts Legislature's Joint Committee on Elder Affairs is considering a law to protect families who use caregiver contracts.

An intra-family transaction must look the same as a 3rd Party transaction. There should be:

- something in writing (contract or agreement)
- the writing should be executed prior to the work being done (as you would with a contractor)
- the contract price needs to be at something that looks like fair market value for the services rather than an arbitrary number
- having cost estimates from other contractors would be useful.

Tax Requirements to Protect the Parties:

- IRS reporting requirement if annual wages of \$1,400 or more are paid
- Social Security and Medicare tax withholding
- FICA withholding
- employer ID number
- how wages and withholdings are listed in the care giver's Form 1040
- requirement that care giver sign an IRS form, showing that they understand taxes are being withheld
- Massachusetts Form filing requirements
- Division of Unemployment Assistance (DUA) Employer Status Report
- maintaining employment records for at least 4 years after a return is due or paid
- providing a Form 1099 at the conclusion of each tax year to the caregiver as well as to the IRS



Medicaid Long Term Care Application for Massachusetts Residents

Conclusion

At the time that it was enacted, the Deficit Reduction Act may have seemed like the end of Elder Law and Medicaid Planning.

But careful attention to the needs of our clients has proven otherwise: it was really just the beginning.

This outline was originally prepared for a Continuing Education Course presented to the National Academy of Elder Law Attorneys at Northampton, Massachusetts on February 27, 2007.

The outline was updated on September 15, 2009 for information and educational purposes only. It is not legal advice or opinion. Legal advice can only be provided to you by a competent professional who understands your unique circumstances.

Medicaid laws and regulations are different in every state. This article provides only general information about laws and regulations in Massachusetts.

Return to Online resources at
MassHealthHELP.com and
[Estate PlansPLUS.com](http://EstatePlansPLUS.com)