MEDICAID AND NURSING HOMES: PLANNING TECHNIQUES
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I. Introduction

Nursing home care is expensive. The costs deplete resources in a hurry. Oftentimes the nursing home resident, motivated to leave something for his loved ones, wishes to transfer his wealth to his family. If married, a nursing home resident, concerned that these costs will impoverish his spouse, may be even more focused on preserving wealth than an unmarried person. Regardless of the motivation, it is prudent for nursing home residents and their families to understand the circumstances under which Medicaid, a governmental program, would pay for nursing home care.

The federal and state governments fund Medicaid and determine eligibility for the program. The rules are complex. This article assumes the reader is familiar with these regulations in the nursing home context. I recommend that you read the companion article, Medicaid and Nursing Homes: An Introduction, on our website[2] if you are not already well versed with Medicaid rules. That article introduces key related topics as well, such as paying for nursing home costs, managing the family dynamics, and understanding the legal instruments that normally apply in these situations.

This article discusses some of the planning techniques we use in our offices in Tipp City and Beavercreek. It is not an exhaustive analysis of Medicaid or even how the program applies in this context. [3] This article attempts to serve families going through this process as well as attorneys and financial advisors. I give citations where technical detail may be helpful. The information base is my twenty-two years as an attorney who has helped hundreds, if not thousands, of families in these circumstances.

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[2] www.lovettlawoffice.com

[3] A more detailed work is Gregory S. French, Ruth R. Longenecker, and Richard T. Tapps, Ohio Elder Law Practice Manual (2008).

In 2011 the Ohio State Bar Association designated me as a specialist in Estate Planning, Trust, and Probate law.

Because not all states run Medicaid the same way, and not all legal instruments function the same throughout the country, this article will be of most benefit for Ohio cases. Even though this article is not intended, and should not be construed, as legal advice for anyone, this is especially true for cases that do not involve Ohio.

My philosophy is to take full advantage of Medicaid benefits when this advances our client's goals.[4] I do not advocate what I consider to be risky or cutting edge strategies. There is not much room for this because the rules tend to make ineligible those who try to take unfair advantage of the program. More importantly, families in these situations already face challenging issues. I try to provide techniques that are conservative, effective, and likely to avoid law suits. If the reader seeks the latest and greatest fad to try to abuse Medicaid, then this article is not for you.

II. Establishing the Foundation

A. *Clarification of Goals*

My first job as an attorney is to identify my client. In nearly all cases, this is the person entering the nursing home and his spouse. Just like one cannot use a map unless one knows the final destination, my initial priority is to understand what the client wants to accomplish. This may be more easily said than done. Frequently, the nursing home resident, his spouse, and the family approach things as a unit and are scared and confused. Identifying my client can be a first step towards providing some clarity.

To determine my client's goals, I must effectively communicate with him. Sometimes the genuine objectives of the client come through immediately. Sometimes,

[4] I address the ethics of this philosophy in the companion article.

especially if family discord or greed is strong, these are not so clear. Occasionally, I insist on a meeting alone with the client to try to filter out influences that compete with my client's goals, but most of the time this is not necessary.

In the vast majority of cases, the client's goal is to preserve wealth in the family, to adequately provide for the spouse who remains at home (Community Spouse), or some combination of these two objectives. Of course, we must discuss an objective that is not necessarily a goal: paying for the cost of the care. This is in the best interest of the nursing home resident even though it is not always necessarily his wish.

B. *Inventory/Establish the Appropriate Legal Instruments*

Once I identify my client and ascertain his goals, I then obtain and review the basic legal documents. These are the Will, Financial Power of Attorney, Health Care Power of Attorney, and Living Will. Trusts, which are more sophisticated instruments, may also be involved. Some or all of these documents may not be in place. Many times my client or a family member wants to just discuss Medicaid, or to get just one, but not all, of the documents, and they do not wish to consider how they will pay for the care, leave a legacy, or provide for the surviving spouse. These are important considerations that should not be ignored.

In this context, we are nearing the end of a life. It is prudent to consider who will make decisions when the nursing home resident is no longer able to do so. A prolonged unconsciousness or imminent death raises legal as well as emotional complexity. Advance planning for these potential crises helps to manage them better. Addressing who gets what when death arrives is appropriate, too. If the proper instruments are not in place, then just focusing on Medicaid can, so to speak, miss the train coming down the

tracks. Just as the Karen Ann Quinlan and Terri Schiavo cases demonstrate, how and whether to end a life can become the most important issue of all. It is best to address all of these subjects, and make certain all of the legal instruments are in place, before moving on to Medicaid planning.

III. Determining Resources, Income, and Expenses

A. *Nailing Down the Numbers*

Once we have clear goals and the appropriate documents, we can then move on to considering what to do with specific assets. We must understand the nature and extent of all of the nursing home resident's resources, as well as his income and expenses, to determine what actions may be appropriate for particular items.

There is danger in not knowing the full parameters of these matters. One must identify current expenses, and how they may change, and ascertain the extent to which the income can meet these expenses, before one can gauge how long the income and total assets may pay for a person's nursing home costs. Moreover, all assets have particular characteristics and tax attributes that impact their suitability for Medicaid planning. For example, a sale or gift of a personal residence, certificate of deposit, savings or checking account, IRA, annuity, life insurance, stocks, and bonds all have different ramifications under Medicaid rules and the tax code. A planner must know exactly what a person owns, and whether he owns it outright or with another person, in order to give good advice.

B. *Income*

The nursing home resident must use virtually all of his income towards his care before Medicaid pays the remaining expenses. Permissible expenses for the nursing home

resident are current and past medical bills, and health insurance premiums for himself, the Community Spouse, and his children younger than 18.

One should determine if taxes are being withheld and whether the person receives Medicare Part A or B benefits. If there are withholdings for taxes, then an analysis should be made to determine whether this is appropriate. Almost always it will no longer be necessary to make withholdings for federal taxes because the deductions available from the nursing home costs will offset the income so that taxes will no longer be owed.[5] Further, the nursing home resident should have both Medicare Parts A and B and not just one or the other. Federal retirees may not have Medicare A and B coverage. Significant health care costs may not be covered if either coverage is absent.

For these reasons, I prefer to see an itemization of the gross income and withholdings of the nursing home resident and his spouse. For social security, this information appears on the 1099 SSA and with the annual notice of the amount of the cost of living increase. For pensions and annuities, this appears on the 1099 R and, quite often, on the stub for monthly checks that come in the mail.

If the nursing home resident is married, then it is important to determine both his income and that of the Community Spouse. Medicaid will not require the Community Spouse to pay any of her income towards the nursing home resident's care. Only the nursing home resident's income must be applied towards these costs. Prior to applying for Medicaid, the applicant should identify and segregate all sources of income to insure that none of the income of the Community Spouse is spent towards the nursing home

[5] Nursing home costs are deductible medical expenses so long as the person is there due to a physical condition and the availability of medical care is a primary reason for the residence. 26 USC §213(d)(1)(C) and 26 USC §7702B(c); 2011 U.S. Master Tax Guide, Paragraph 1016, at 373 (CCH 2010)(2011 US Master Tax Guide).

expenses. Furthermore, the Community Spouse may receive a minimum amount of income each month known as a Monthly Income Allowance. To determine this amount, the Medicaid caseworker must be aware of the income each of the couple receives.

On a related note, health insurance premiums for both spouses are permissible expenses for the nursing home resident. If the Community Spouse provides the Medicare supplemental coverage, then the couple should explore the possibility of the nursing home resident obtaining and paying for it. This could free up income for the Community Spouse. In addition, the Community Spouse should consider how she will secure her own coverage if the nursing home resident dies while supplying it for the couple.

C. *Expenses*

We should give the expenses a thorough consideration, too. This is a moving target. No one spends the same amount each month. If the person is not yet in a nursing home, then they are on the verge of substantial new expenses. Not only would this include the cost of the custodial care, but expenditures for prescription medicines can be significant, too. In one case my client had 15 prescriptions. Because the costs for medicines can vary greatly, these should be determined with some accuracy. To account for expenses incurred just once or twice a year, such as property taxes or insurance for the home or auto, I normally ask the client to account for all traceable expenses for the immediate six month period. Then we anticipate how this will change in the future.

A long term nursing home stay, as a major lifestyle change, affects the established patterns of expense. This does not begin and end with the costs for nursing home care and prescription medicines. Due to the institutionalization, travel plans change. With the focus on nursing home payments, gifts may be curtailed (or greatly increased).

Automobile expenses could dramatically decrease or increase. If unmarried, the nursing home resident usually will not need a car. The family may take the individual to doctor visits or the nursing home could arrange transportation. On the other hand, the Community Spouse may wish to buy a new car or obtain a handicap accessible van. Both of these are exempt assets. Further, a Community Spouse may not wish to stay in the home. Instead, she may wish to sell it and downsize. Careful consideration must be given as to how lives may change so that expenses can be forecast with some accuracy.

D. *The Burn Rate*

Once we determine the monthly expenses of the nursing home resident and Community Spouse, I compare this to the monthly income to calculate what I refer to as the "Burn Rate." This is the rate at which expenses exceed income. For example, if the nursing home resident and Community Spouse have monthly expenses of $8000 and income of $2500, then the Burn Rate is $5500 per month. Because the expenses could change, it may be appropriate to determine more than one Burn Rate.

E. *Assets*

Determining assets, in my experience, usually takes some effort. Let's touch upon the simpler tasks first. Although home appraisals by seniors are infrequent, the county auditor has a current value. As explained later, this particular value is of special relevance in Medicaid planning.[6] Obtaining it is important, but easy. A visit to the appropriate web site or a single phone call can retrieve it. For bank accounts, stocks, bonds, and mutual funds, banks and brokerage houses send monthly or quarterly statements. If we find a recent version, normally this is sufficient.

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[6] See the discussion on the Personal Residence at Pages 34 to 35.

Even the best organized folks, though, may not have what we need. Most persons keep many of the relevant documents, but not all of them. Memories must be probed to see what is missing. Deeper digging through older files and boxes may be necessary. Some assets, like insurance policies and annuities, may only provide an annual statement. Oftentimes the most recent one cannot be located or it is several years old. We may have to contact the company, with a signed release, to gather this data.

While undergoing this process, we must give due consideration to the sensitivities of the persons involved. Many times the older person has lost their powers of recollection, focus, and intellect. It can be embarrassing to admit one has let their financial affairs slide into disarray. We should be respectful and patient, but diligence and thoroughness are important. If we do not know enough about the assets, then the planning will suffer.

The biggest hurdles come from documents that are unorganized or non-existent. Because most parents do not fully share their financial data with their children, we often face the problem of the nursing home resident being forgetful and guarded, thereby complicating the task of ascertaining what they own. Sometimes the home has a collection of years of scattered papers. I have seen children gather full garbage bags of documents from their parents' house about assets that may or may not still exist. It can take weeks or months to go through dozens, if not hundreds, of documents and contact the institutions to learn whether or not the parent owns something with that company. If the parent still filed income tax returns, then this provides clues and makes the chore easier, but a large percentage of senior citizens no longer face this requirement or failed to file for several years. The task can be even more complicated if the Community

Spouse is also forgetful or resents sharing this data with the children. Oftentimes folks forget what they owned and get statements on an irregular basis. Gas and mineral interests, assets held overseas, and partial interests in real estate for which the tax bill goes to someone else, can be especially problematic. Nevertheless, if the client wants the appropriate planning, then someone must soldier through this process.

F. *Long Term Health Care Insurance*

Early in the case, we discuss with our clients whether they have long term health care insurance (LTHC). Unfortunately, few of our clients have it or will consider getting it. The cost is typically $2500 to $7000 annually. Although this is less than the cost of one month of nursing home care, most persons feel they cannot afford it.

If the nursing home resident has this coverage, then it dramatically affects our planning for the better. This provides a source of funds to pay the nursing home costs. It may also pay for assisted living or care at home and delay institutionalization. It is, by far, the best means for addressing the cost of custodial care because it does not force the nursing home resident to deplete his resources to the same extent that he must if the coverage is not in place. If the nursing home resident has this protection, then there may be no need to seek Medicaid coverage. If the LTHC benefits are meager and utilization of Medicaid remains a goal, then we could still utilize any of the planning tools as necessary.

Furthermore, LTHC enables us to keep even more wealth in the family than we could without it. Because it provides funds to pay for the care, it acts as an additional source of income. It reduces the Burn Rate, which causes us to spend assets at a less rapid

pace. This enables us to keep more assets once the person is in a nursing home and receiving Medicaid.

Another advantage of LTHC is that Ohio promotes its use through the The Long Term Care Partnership Program.[7] This encourages persons to obtain LTHC by permitting them to keep more assets than they could otherwise have while receiving Medicaid benefits. Generally, the extra assets the person can retain are equal to the benefits paid under the policy.

If a person does not have LTHC, and if he has the necessary level of mental or physical deterioration to qualify for Medicaid benefits, then he will not be able to obtain LTHC. No insurer would issue such a policy under those conditions.

It is not too late, though, to consider obtaining LTHC for the Community Spouse. This is a good time to explore the possibility. We encourage all of our Community Spouse clients to acquire it in these circumstances. Many insurance agents sell it.

G. *Distilling the Income, Expenses, and Assets*

Once we understand the assets, income, and expenses, we then determine the Burn Rate and how quickly this will dissipate the resources. If there is a monthly Burn Rate of $5000, then planning is much different for a nursing home resident with total assets of $50,000 versus $500,000. Moreover, planning is much different for a nursing home resident who owns a home versus one who rents or lives with family. Likewise, persons with the same level of assets may need different plans due to the tax consequences of sales or gifts. Only when we have a firm understanding about all of the

[7] Ohio Revised Code (ORC) §5111.18 authorizes the program. Ohio Administrative Code (OAC) §3901-4-02 sets forth the program's rules. OAC §5101:1-38-11 specifies how Medicaid disregards some assets owned by the applicant who has a qualified long term care partnership policy.

assets can we prudently put together a plan. The rest of this article covers the Medicaid planning techniques that we most frequently use.

IV. Considerations for Married Couples and Individuals

Once we have a firm grasp of the income, expenses, and assets, and maximizing Medicaid benefits is a client goal, a nursing home resident, and his spouse if he is married, should consider several things. These involve assessing the level of care required; prepaying funerals; acquisition of household goods and personal effects; buying or selling motor vehicles; use of personal service agreements; prioritizing the liquidation of assets; and making gifts. This section looks at all of these subjects in the order listed, except that gifting has its own separate section in VII starting at Page 35.

A. *Determining the Level of Care*

Even though a person may have mental or physical deterioration sufficient to qualify for Medicaid, institutionalization in a nursing home may not be desirable or necessary. Perhaps some extra help at home, or utilization of a day care facility, would provide the level of assistance necessary. Hiring a cleaning service, obtaining Meals on Wheels, or regular visits to a senior center may fit within the existing budget and stave off the need for nursing home care. Even those who are Medicaid eligible may receive in home services through the Passport program and avoid institutionalization.

If independent living, by which I mean remaining at home, is not an option, then assisted living is a less intensive, less expensive step than nursing home care. Assisted living would typically consist of frequent monitoring, and limited assistance with ADLs, without the continuous oversight that one finds in a nursing home. This may or may not consist of board or cleaning services. The monthly cost for assisted living in Western and

Central Ohio in 2011 ranges from $2500 to $4500 per month, depending on the frequency and intensity of services provided. Although this requires relocation to a facility, the resident retains a greater level of independence and privacy than he would in a nursing home. It is also possible for married couples to room together.

Assisted living, or remaining at home with extra help, are less expensive and less radical changes of lifestyle than placement in a nursing home. These alternatives to full custodial care should be fully considered with the appropriate professionals. Obtaining an assessment from nursing home or assisted living staff is normally at no cost or very inexpensive. These professionals are willing to spend some time with a potential resident and family even though they may not receive a placement. If a person has a less restrictive and less expensive alternative, then they will be less likely to remain in a nursing home or assisted living facility for an extended period. Frequent turnover is expensive for institutions and they wish to avoid it. Because the assessment would be of little or no expense, and the professionals have a strong incentive to provide honest and appropriate advice, it makes sense to fully explore the level of care required for the person in question.

B. *Pre-Paying Funerals*

Pre-paying funerals and related expenses is appropriate for five reasons, although timing the purchase can be an important matter.[8] First, it gets out of the way a lot of decision making and painful choices that are difficult in the immediate aftermath of the loss of a loved one. Second, pre-paid funerals, plots, markers, and related items are exempt assets for Medicaid purposes. Third, purchase of the items now locks in the

[8] One may wish to delay the expenditure until after the determination of the Community Spouse Resource Allowance. See the discussion beginning at Page 25.

expenditure at today's rates. This avoids the cost of inflation. Fourth, it ensures that resources are available to take care of the funeral and related expenses. If the resources are not applied towards this cost now, then the money may not be available in the future. The family may then have to bear these costs. Pre-paid funerals are funded by life insurance policies and regulated by the states, so they are a reasonably safe investment. Fifth, payment of this expense reduces a person's assets and leads to Medicaid eligibility.

C. *Household Goods and Personal Effects*

Under the Medicaid rules, household goods and personal effects of a reasonable amount are exempt. Replacing old and worn out items, or acquiring a new gadget, can add a pleasant sparkle to life. One can fill a home or a small nursing home room with new items and make an unpleasant change of life much more bearable. New clothes, a lift chair, shoes, dentures, glasses, hearing devices, a motorized scooter, and similar items can improve the quality of life. A new television, computer, appliances, or furniture can stir attention, make snacks or juices more accessible, and spruce up the surroundings. A shopping spree reduces assets and promotes Medicaid eligibility. It may also be fun!

D. *Automobiles*

The general rule of thumb on motor vehicles is that an unmarried nursing home resident would typically shed this expense, while a Community Spouse should consider upgrading her transportation. A single nursing home resident usually will not be able to take extended trips. Off site visits are infrequent and short, such as consultations with doctors or a special family get-together. The exception would be a nursing home resident who wishes to have a handicap accessible van for these purposes, but this would be rare. Moreover, a caseworker may not accept the vehicle as an exempt asset if the nursing

home supplies transportation. A Community Spouse who still drives should consider buying a new vehicle if the existing transportation is aged. Like buying other exempt assets, this expenditure reduces the resources and may lead to a speedier determination of Medicaid eligibility. Further, the Community Spouse is much more likely to wish to have a handicap accessible van so that the couple could enjoy more fully, or have greater ease with, their off site trips together. Frequently we see couples that own more than one vehicle. Consideration should be given to owning a single, well functioning car to reduce expenses and the flow of documents related to motor vehicles, such as insurance statements and registration notices.

E. *Personal Service Agreements*

I do not recommend that family members take payment for providing services to each other.

In my experience, Medicaid caseworkers are very suspicious of any payments by a Medicaid applicant to a family member. There is a strong presumption that all payments to family members by the Medicaid applicant are gifts. Of course, gifts create a period during which one is ineligible to receive Medicaid.

Some family members spend significant time caring for a parent or other relative. It is not unusual for us to see a son or daughter spend fifty to one hundred hours per month, or more, with the parent or addressing their affairs. Usually they give the care without notice and on weekends and holidays. To hire this type of service from a business could cost several thousand dollars per month.

Since 1915 Ohio has recognized an express agreement to pay for personal services by one family member for another if the arrangement is proven by clear and

convincing evidence.[9] Therefore, if there is a written fee agreement between the caregiver and recipient, then payments for these services, as long as they are reasonable, *should* be enforceable and a Medicaid caseworker *should* not treat them as gifts. Despite this old legal precedent, Medicaid officials, in my experience, rarely view the payments as legitimate transactions if the caregiver is a relative. The extent to which some caseworkers will ignore the law and count the payments as gifts can be extreme.

In one case, we had the elderly Mother sign a written agreement with her son to pay him for caring for her. The son kept logs detailing what he did each day and how long he did it. We had him charge a rate comparable to commercial providers for these services. He did not charge for companionship care. Instead, he billed for cooking, cleaning, laundry, and hands on assistance with bathing, dressing, and toileting. The Mother provided him a 1099 for the amounts she paid him. He recognized these amounts as income on his federal and state returns and paid the appropriate taxes. We supplied all of this evidence to the caseworker. Nevertheless, she ruled these amounts were gifts.

This is why we do not recommend using a personal service agreement with family caregivers. One is likely to experience strong bias against the arrangement. In these circumstances, a family is already stressed. Fighting the Medicaid appeal is normally too much for the family to tolerate. In the end, I do not feel the risk of litigation, legal fees, and stress is worth it. I believe there are better alternatives for trying to keep wealth in the family.

If the family insists on going this route, there are other complications one must consider. From a tax perspective, there is much less paperwork if the caregiver serves as

[9] Merrick v. Ditzler, 91 Ohio St. 256 (1915).

an independent contractor and not as an employee. This eliminates the need to prepare and file payroll tax reports. If the caregiver receives more than $599 in a year, then the payor must issue a 1099. This is a lot less challenging than dealing with payroll tax returns. The recipient must pay regular income taxes, as well as Social Security and Medicare taxes, upon this income. Everyone involved in the transaction must understand the income tax requirements and prepare to meet their obligations.

There are non-tax considerations, too. The caregiver should check his auto insurance policy to make certain that he retains full coverage in the event he causes an accident while performing tasks under the personal services agreement. Technically, an insurer may interpret this as a “hired auto” type of exemption from coverage. A call to the insurance agent for clarification, or to get an endorsement to the policy, would be in order.

In addition, the caregiver should have his own health, disability, and life insurance in case he becomes injured in the line of duty. With a written independent contractor agreement, normally workers’ compensation benefits would be denied. If the caregiver has her own life, health, and disability coverage, then there should be no need to file a claim.

Payment for personal services is not a permitted expenditure for a Medicaid recipient, so use of these agreements would only be applicable (if at all) prior to the nursing home resident’s receipt of Medicaid benefits or to assist the Community Spouse.

Once again, in the long run, I do not believe that a personal services agreement is worth the hassle the family may face. Ohio law recognizes them as a legitimate possibility, but the Medicaid caseworker may not care how much case law, tax returns,

and service logs you show them. Instead, most caseworkers will scrutinize these arrangements until some shortcoming is discovered, then decide the payments are gifts. I believe one should just make gifts, and present them as such, to the caseworker. With careful planning, one can achieve Medicaid eligibility with outright gifts and avoid all of the problems associated with a personal services agreement.

F. *Prioritizing the Liquation of Assets*

Payment of nursing home costs normally requires the sale of investments. Few persons keep enough cash in their checking and savings accounts to cover more than a few months of the expense. Eventually one must decide the order in which assets should be converted to cash to pay for the costs. The main consideration in these circumstances is the income tax consequence.

In all likelihood the nursing home costs will produce large income tax deductions so that the nursing home resident and his spouse will have little, if any, income tax to pay on their normal income.[10] Most nursing home residents and their spouses have pension and other income each year that is less than the nursing home expenses. This would usually eliminate any income tax. In fact, the expenses may be so large that there is an excess that more than offsets the income. This excess should not be forgotten. It may also offset some of the gains realized by the sale of assets that have gone up in value.

Most senior citizens are likely to have real estate, Roth IRAs, traditional IRAs, Series "E" U. S. savings bonds, mutual funds, stocks and bonds, life insurance, annuities, or certificates of deposit (CDs). Before we explore the income tax ramifications of

[10] See footnote 5 at Page 6.

liquidating these items, we should explore the concept of "basis" under the federal income tax code.[11]

By "basis" I mean the value of an item for purposes of determining a profit or loss upon its sale. For example, if a person pays $40 for a stock, then sells it for $100, the basis would be $40. Because the sale price exceeded the basis by $60, the person would have to pay capital gains taxes on $60.

When a person makes a gift during his life, the recipient of the gift receives the donor's basis in the property. To continue the above example, if a person pays $40 for a stock, then gives it to his child, then his son or daughter will have a $40 basis in the stock. Commentators refer to this as a "carry over" in basis.[12]

On the other hand, if a parent dies owning a $40 stock that increased in value, then the son or daughter inheriting it receives a "step-up" in basis to the fair market value at the parent's death.[13] Thus, if the parent paid $40 for a stock that increased in value to $100 at his death, then the son or daughter would have a basis of $100 in that same stock. If the child then sold it for $100, then they would pay no capital gains tax upon the sale. Thus, there is an income tax advantage for the son or daughter to inherit property with a low basis from a parent instead of receiving it as a gift.

The reader should be aware of a few other tax concepts. Nearly all traditional IRAs have a basis of $0.00.[14] This is because a traditional IRA normally consists of funds rolled over from a 401(k) or 403(b) plan at work, or the account holder deducted

[11] For a thorough, well annotated discussion of basis, see Chapter 16 of the 2011 US Master Tax Guide.
[12] If the donee sells the stock at a loss, the basis would be the lower of the donor's basis or the fair market value at the time of the gift.
[13] An exception could arise in cases in which a beneficiary inherited the asset from a decedent who died in 2010 and filed a federal estate tax return.
[14] For a thorough, well annotated discussion of traditional and Roth IRAs, see Paragraphs 2153 through 2156A, Pages 699 to 713, of the 2011 US Master Tax Guide.

the IRA contributions on his income tax return. As a result, no income taxes were paid on this money. Consequently, once the funds are taken out, they will count as taxable income during the year of withdrawal.

Roth IRAs work differently than traditional IRAs. The main attraction of a Roth IRA is that if the funds remain invested for 5 or more years, then the original investor, who has reached age 59 1/2, or his beneficiary upon his death, will pay no income taxes on the withdrawals.

An asset that normally has a low basis is a U. S. Savings Bond, Series "E." These accumulate interest, sometimes for decades, that is finally payable when the owner surrenders the bond.[15] It is not unusual for bonds that originally cost a few hundred dollars to increase in value to several thousand dollars. The owner of the bond must report the accumulated interest as taxable income when the bonds are cashed in. If the purchaser dies owning the bonds, then they must be surrendered at that time.

Based on these tax rules, it is prudent to consider liquidating the traditional IRAs, then U. S. "E" Savings Bonds, before turning to other assets. In most cases the nursing home costs generate significant tax deductions that the children do not have. If the parent realizes the income from the traditional IRA, then nearly always he would pay less federal income tax on the proceeds than a child that receives these funds via a rollover.[16] Further, the "E" Bonds will have to be surrendered no later than the owner's death, thereby causing the decedent to receive this as income. Once again, the owner's nursing

[15] The interest on "E" bonds must be declared and paid each year for accrual basis taxpayers, or it may be deferred by trading them for "H" bonds. It would be rare, though, for a potential Medicaid recipient to be on the accrual rather than the cash basis. See Paragraph 730, Page 268, in the 2011 US Master Tax Guide.
[16] A non-spouse traditional IRA beneficiary may roll over the IRA into an "inherited IRA" and defer the tax in some situations. See Paragraph 2153F, Page 704, 2011 US Master Tax Guide.

home costs should cause significant deductions to offset some, or all of, the interest income.

If the nursing home resident does not have a traditional IRA or "E" Bonds, then their resources may consist of a Roth IRA, real estate, mutual funds, stocks and bonds, annuities, and life insurance. The Roth IRA, if more than five years old, would be one of the last assets to liquidate because of its high basis. For the real estate, mutual funds, and stocks and bonds, one should compare the basis of the asset with its current fair market value. Generally, one should consider selling first those assets for which the basis is lowest and the gain would be the highest. The nursing home resident and spouse usually have sufficient tax deductions to diminish, if not eliminate, capital gains taxes from the sale of most assets. However, one should analyze the facts before a sale. If the gain would be large enough so the parent would pay taxes, then delaying the sale could be the smart choice. It makes sense to avoid paying taxes as long as possible. If the decedent dies shortly after an asset is sold, then it would have been best to sell the asset with the least amount of taxable gain. This would permit the children to inherit assets that receive a step-up in basis to the fair market value, thereby putting the surviving beneficiaries in the best possible income tax situation.

Life insurance, annuities, and CDs have some attributes that merit special attention.

There are two types of life insurance: whole and term. Both types pay benefits when the insured dies. In nearly all cases, death proceeds from life insurance are not subject to income tax. In addition, whole life policies have a cash surrender value that can

be obtained by borrowing against or surrendering the policy during the owner's lifetime.[17] Once the policy is borrowed against or cashed in, the death benefits are reduced or eliminated. Term policies have no cash surrender value.

If the death benefit of a whole life policy is significantly greater than its cash surrender value, then it is advisable to avoid cashing in the policy. Of course, if the policy has significant premiums, then this must be taken into account. Due to the nursing home costs, the nursing home resident may not be able to pay them. One often finds, though, that life insurance policies owned by senior citizens have a cash surrender value that is quite close to the death benefits. In these cases, it may be advantageous to surrender the policy. It would not be prudent to continue making payments on a life insurance policy that will not increase in value.

Normally, if premiums are still payable, then term insurance on older persons is quite expensive. Oftentimes the cost of the coverage in a year or two will exceed the death benefits. If so, then a sober analysis should be made of the life expectancy of the insured versus the cost of the coverage during this time. If the amount invested is not likely to exceed the death benefits, then let the policy lapse. On the other hand, if it appears appropriate to keep the term coverage, then carefully consider the beneficiary designations. As discussed later in this article, it may be prudent to make the Trustee of a trust or the children the beneficiaries of the term policy instead of a spouse.[18]

Because annuities do not receive a step-up in basis when the owner dies, there is no advantage to inheriting an annuity like there can be when one inherits real estate,

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[17] This article assumes the whole life policy is a simple one the nursing home resident or spouse acquired in a non-business setting and the basis meets or exceeds the cash surrender value. If this is not the case, then this analysis may be wholly inappropriate. If the policy basis is significantly lower than the cash surrender value, or if there is any doubt as to the matter, then one should consult with the company agent before taking action with the policy.

[18] See the discussion on recoupment of Medicaid benefits starting at Page 28.

mutual funds, or stocks and bonds. At the annuitant's death, the proceeds are payable to the beneficiaries listed in the agreement. Any earnings in the contract will be taxable income to the recipient regardless of whether they are payable at death or before this time. A percentage of each payment the owner or beneficiary receives is subject to income tax. When determining whether to cash in an annuity to pay for nursing home costs, one should compare the amount of earnings that would be subject to tax from doing this versus selling some other asset. From a tax perspective, there is no general rule as to when annuities are most suitable for paying nursing home costs.

However, annuities, like certificates of deposit, may charge a penalty for a premature surrender. Most annuities charge a surrender penalty of some sort within the first 10 years of purchase. Sometimes these can be as much as 10% of the original price. A typical surrender charge may be 10% within 12 months of purchase, 9% the next year, and so on until it is just 1% in the 10th year after acquisition. If the surrender penalty is substantial enough, then it may be advisable to delay liquidation of an annuity and sell other assets first. Surrender penalties for certificates of deposit, which can be imposed at any time, are usually much less severe than those that apply to annuities that are only a few years old. Some annuities and CDs waive the surrender charges if the owner dies. One must read the agreement to see whether this type of exception applies.

V. Planning for Married Couples

A. *Maximizing Exemptions, Generally*

Married couples have some planning considerations that are different from unmarried persons who face a long term nursing home stay. Chief amongst these are

maximizing the available exemptions and planning for the Community Spouse Resource Allowance (CSRA). I discuss gifts in Section VII starting at Page 35.

If the nursing home resident has a Community Spouse, then providing for her comfort and care is a prime consideration. Fully utilizing the Medicaid exemptions promotes this goal. We have already discussed the virtues of prepaying funerals, acquiring household goods and personal effects, and upgrading the motor vehicle, all of which are exempt assets in these circumstances.[19] The exempt asset that gains the most attention, though, is the personal residence.

B. *The Home Exemption*

As long as the Community Spouse remains at home, then this real estate is exempt, regardless of value, for Medicaid purposes. An obvious strategy is to acquire the most valuable real estate possible. As we discuss later in this article, if passing along a legacy to the children is a goal, then this may not be the best strategy in light of the State's powers of Medicaid recoupment, but it can lock up a lot of family wealth and save it from immediate expenditure on nursing home costs.[20]

Taking advantage of the home exemption can take two forms: the first is to acquire a different residence. The second is to improve the existing premises. Regardless of the approach selected, use of the couple's resources to buy a new home or fix up the old one is permissible. Perhaps a whole new setting is desired. Acquiring a new home could fill this need. Perhaps fixing up the existing residence would be more appropriate. If so, then installing wheelchair ramps, widening doorways and halls, and making bathrooms more user friendly could meet the more immediate needs. Other

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[19] See the discussion earlier in this article starting at Page 13.
[20] The discussion on Medicaid recoupment starts at Page 28.

improvements to the existing home could include new windows, heating and cooling equipment, a roof, water heater, upgrading the electric and plumbing, and replacing a dirt driveway with a concrete or asphalt version.

C. *Community Spouse Resource Allowance*

The Community Spouse Resource Allowance (CSRA) is the amount of non-exempt assets Medicaid will permit the Community Spouse to keep even though the other spouse is a nursing home resident who receives Medicaid. The minimum CSRA is $21,912, while the maximum is $109,560.[21] Medicaid determines the CSRA by looking at all of the couple's assets, excluding those that are exempt, then adding up everything that remains. If the total remainder is less than $43,824 then the Community Spouse may keep $21,912. If the non-exempt assets are greater than $43,824, then the CSRA equals half of the non-exempt resources or $109,560, whichever amount is less.

A unique feature in determining the CSRA is the treatment of debts. Medicaid does not take unsecured debt, like credit cards, into consideration.[22] Secured debts, like a house mortgage or car loan, normally secure an exempt asset, like the personal residence or an automobile, so they are not taken into account in most cases, either.

Even though this treatment of debts defies common sense, it is important to be aware of it and plan accordingly. Medicaid determines the CSRA as of the first month of a continuous period of institutionalization of the nursing home resident. "Continuous period of institutionalization" means the first continuous period of at least 30 days during which the person is in a hospital, a nursing home, or a combination of these two

[21] These amounts are effective as of January 1, 2010.
[22] Medicaid permits the institutionalized spouse to pay medical bills for himself and the family from his income, but this, in a technical sense, is unrelated to the CSRA. For authority that unsecured debts are not taken into consideration, see Gregory S. French, Ruth R. Longenecker, and Richard T. Taps, Ohio Elder Law Practice Manual, at 4-35 (2008).

locations.[23] The couple should avoid making large reductions of debt prior to this time. This reduces the pool of assets and diminishes the size of the CSRA. Some commentators state that to increase the size of the CSRA, the couple could take out a loan, thereby increasing their gross assets, and then pay off this debt once Medicaid determines the CSRA.[24] This is a logical suggestion that I have made to many clients. As a practical matter, I have not yet met a couple in these circumstances that is willing to do this. Acquiring new debt is too contrary to the inclinations of most senior citizens.

If the couple's non-exempt assets are greater than $219,120, then the largest CSRA the Community Spouse may receive is $109,560. The nursing home resident shall not be eligible for Medicaid until they spend down to the $109,560 level. This excess amount must be spent for the sole benefit of the couple, on their legal obligations, or to acquire and maintain exempt assets. Once the CSRA is determined, it would be appropriate, at that time, to pay debts. If the funerals have not already been purchased, then now would be a good time to do so. Buying other exempt assets, such as household goods and furnishings, an automobile, a handicap accessible van, or improving the residence or acquiring a new one all merit consideration. Any purchase that is not a gift is a permissible expense. It would be perfectly legal for the couple to buy frivolous things like lottery tickets. Perhaps the Community Spouse could take a long delayed trip or purchase a nice piece of artwork she has always wanted. Although some acquisitions are more sensible than others, if the couple does not spend the excess on themselves, then they will have to spend it towards nursing home costs in order to reach the CSRA level and obtain Medicaid benefits.

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[23] OAC §5101:1-39-22(D)(2) and §5101:1-39-35(B)(2).
[24] Ohio Elder Law Practice Manual, at 4-44.

Once the caseworker determines the CSRA, the couple has twelve months to place the assets that comprise the CSRA into the sole name of the Community Spouse. Care should be given in the selection of these assets. The same criteria used to determine the prioritization of the liquidation of assets would also be applicable here. For tax reasons, it would be sensible to liquidate assets with no or a low basis, such as traditional IRAs and savings bonds, as needed to pay the nursing home costs and spend down to the CSRA. The CSRA, ideally, should have the remaining assets with a higher tax basis.

D. *Separation or Termination of the Marriage*

Separation, or termination of the marriage, could be a powerful planning tool, but I have never seen it employed. Beginning the month after separation, the assets of the couple are no longer deemed available to each other.[25] If a couple quits living together, or if they keep cohabiting but end the marriage, then Medicaid would only consider the resources of the nursing home resident. I will not bother to analyze the possibilities this presents because, in 22 years of practice, I have never encountered a couple willing to consider this option.

VI. Planning for Unmarried Persons.

A. *Payment of Exempt Assets or Creditors*

The main consideration for unmarried persons who face a long stay in a nursing home is that Medicaid will only permit them to have $1500 of non-exempt assets. Once the appropriate exempt assets have been acquired, such as a pre-paid funeral, household goods and furnishings, and personal effects, the issue then becomes what to do with the remaining assets.

[25] Ohio Administrative Code (OAC) §5101:1-39-34 (H)(1).

Payment of existing debts may or may not be in the best interest of the nursing home resident. If the person has a large debt load and few assets, then it may be in his best interest to pre-pay his funeral and acquire some exempt assets before he pays his other bills. Having new clothes, a hearing aid, dentures, or similar items, would mean a great deal to the nursing home resident, and paying for the funeral would spare the family this expense. Although this may short-change creditors, there may be little downside risk to the permanent nursing home resident. After all, he will not need a good credit rating, so unpaid bills are not of much concern. Further, he would be "judgment proof" in that a creditor would not be likely to seize his assets. The few items he owns would not be worth enough to justify the effort to take them.

B. *Right of Recoupment*

If Medicaid pays the nursing home costs of a person aged 55 or older, or of a "permanently institutionalized" individual, then the State of Ohio has the right, upon that person's demise, to be paid back for the cost of his care.[26] Any assets the nursing home patient owned or controlled at his death are subject to this claim.

There are three types of instances in which this right of recoupment is most likely to arise. The first is when the Community Spouse survives a nursing home resident who received Medicaid. Although the State of Ohio is barred from seeking recovery while the surviving spouse lives, the State has the right to seek recoupment upon the death of the surviving spouse. The second is when the resident is unmarried and his only non-exempt asset is his home. Medicaid will, in most cases, go ahead and place the person on

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[26] A "permanently institutionalized individual" is one who is not reasonably expected to be discharged and return home. ORC §5111.11(A)(4).

Medicaid, but require him to sell his residence and use the proceeds to pay for his care.[27] The third situation is when the nursing home resident on Medicaid owned assets of which no one was aware or he received an inheritance.

Many legal steps can make it impossible or difficult for Ohio to exercise its right of recoupment. One measure that is encouraged is the acquisition of LTHC. The Qualified Long Term Care Partnership (QLTCP) enables persons to purchase LTHC and thereby protect from recoupment assets equal to the amount of benefits paid by the insurance coverage.[28] LTHC that meets QLTCP guidelines bars recovery from an equivalent amount of resources, making it impossible for the state to seek recovery for Medicaid benefits from this amount of assets. The QLTCP guidelines are well known to agents who sell this type of coverage. It is readily available.

Other steps to stymie the right of recoupment involve the conversion of probate assets into non-probate assets. By "probate" assets, I mean items in a decedent's name that are not automatically payable on his death to someone else. "Non-probate" assets are those that a decedent owns that are automatically payable on his death to someone else. Non-probate assets one normally encounters are those owned in a joint and survivorship fashion and transfer on death accounts.

Although Ohio has the right to gain recoupment from non-probate assets, it is very difficult to do so. If a Medicaid recipient dies and someone opens a probate estate for them, then this Executor or Administrator may receive a letter from the Ohio Attorney General notifying them of the recoupment claim. Although I have never confirmed this, I assume the initiation of a probate case in Ohio triggers a monitoring mechanism that the

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[27] The exception to this rule is when the exempt home is worth more than $500,000. In that case, the person will not be eligible for Medicaid.

[28] See, generally, ORC §3923.41 through §3923.48 and OAC §3901-4-01 through §3901-4-02.

Ohio Attorney General has in place specifically for this purpose. As a result, whenever a probate estate is opened in Ohio, the Ohio Attorney General checks this with a database of recipients who have received Medicaid. Further, an Executor or Administrator opening an estate has the duty to inquire as to whether the decedent ever had Medicaid benefits.[29] If so, then the Executor or Administrator must send a notice to the State of Ohio informing them of this fact. This provides the State an opportunity to file its claim and seek payment.

However, a different set of circumstances arises with non-probate property. Oftentimes there are no probate proceedings when there are only non-probate assets. Thus, the State of Ohio may not know of the decedent's death. Further, the beneficiary of the non-probate property does not have a duty to notify the State that the decedent received Medicaid benefits. Accordingly, it is much more difficult for the State of Ohio to gain recoupment when a decedent's assets are owned in a non-probate form.

A legal and effective technique to confound the right of recoupment is for the unmarried person to own his or her assets in a non-probate fashion. If the single person wishes to increase the chances that he will pass his assets to his children, or other beneficiaries, instead of having them paid to satisfy the State's recoupment claim, then placing his assets in a non-probate form increases his chances of realizing his goal.

Irrevocable trusts are the most effective, most frequently used type of non-probate format in our practice. I discuss them in detail in Section VII, Gifting, at Page 42. Irrevocable trusts are suitable for most assets.

Sometimes an irrevocable trust is not the right option. This could arise because there are not enough assets to justify the cost of establishing a trust; the nursing home

[29] Ohio Revised Code (ORC) §2117.061.

patient has a small bank account with less than $1500; or a community spouse has few assets and wishes to keep things as simple as possible. For these cases in which a trust is not the right fit, joint and survivor or transfer on death mechanisms can turn probate into non-probate property. This works well with bank accounts, automobiles, stocks, bonds, and mutual funds.[30] A short visit to the bank or broker for this purpose can usually switch over the account to the non-probate form. For automobile titles, if the vehicle does not have a loan outstanding, then signing over the old title in front of a notary, then taking it to the motor vehicle title office to obtain the new title, is all that will be required.[31]

Of course, as one may expect, the assistance of an attorney may be necessary to use these non-probate techniques. Further, they do not guarantee that Ohio cannot gain recovery, so some prudence is in order.

Although Ohio transfer on death (TOD) deeds[32] transfer real estate without probate, using this format is virtually certain to trigger a recoupment collection. Ohio Revised Code (ORC) §5302.221 requires the transferor of the TOD to complete an affidavit that states whether the deceased owner is subject to the Medicaid estate recovery program. Further, the Medicaid rules restrict the ability of a community spouse to own real estate with a TOD when the other spouse is in a nursing home and receiving Medicaid.[33] Thus, TOD ownership is not a format that works well in these circumstances.

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[30] The same tax complications that can arise by using joint and survivorship deeds to make real estate non-probate property can also arise with non-real estate types of property. See the discussion of basis at Page 19, and the discussion of estate and gift taxes at Pages 52 to 53.

[31] If the car has a loan on it so the lender holds the title, then obtaining a new title could be difficult, if not impossible, until the loan is satisfied.

[32] ORC §5302.22.

[33] Regulations that work in this manner include the following: OAC §5101:1-39-07 (B)(14)(defines "transfer") and §5101:1-39-07(C)(2)(one of the presumptions of improper transfer).

Just because a full probate administration is not occurring does not mean the state of Ohio will not learn about the existence of the non-probate asset. The obtaining of a tax release, recordation of an affidavit to perform the post-death transfer through a transfer on death deed, or the filing of the instruments necessary to release the Ohio estate tax lien upon real estate, require the filing of some documents with the Ohio Attorney General, Probate Court, or the County Auditor. This leaves a paper trail which, in turn, could lead to the asset and the persons who received it. Some practitioners advise clients to take the initiative and contact the Ohio Attorney General's estate recovery section to learn whether the state has a recovery claim. Those who receive the assets should be aware, in the non-probate transfer setting, that Ohio could pursue recovery for years after the decedent's death, and plans should be made to address such an eventuality.[34]

C. *The Personal Residence*

No asset gets as much attention under the Medicaid rules as the personal residence. There are several alternatives for preserving this asset in the family.

Sometimes a son or daughter will move in with an elderly parent. If this child's care keeps the parent out of a nursing home for at least two years immediately before the entry, then the parent may give the residence to the child without causing a Medicaid ineligibility.[35] It is not advisable to just assume this standard is met. Instead, one should review the form Medicaid uses to make this determination. This is the JFS03697 "Level of Care Assessment." If possible, this form should be taken to a doctor who has cared for the parent for at least the last two years to learn his opinion. Although Medicaid will have its own investigator look into the facts, if the treating physician, after reviewing this

[34] For example, unless there is a specific provision to the contrary in a statute of limitation, such laws are not binding against the State of Ohio. Ohio Dept. of Transportation v. Sullivan, 38 Ohio St.3d 137 (1988).
[35] OAC §5101:1-39-07(E)(1)(d).

form, states that the child's care kept the parent out of the nursing home for at least two years, then this is a good indicator that the transfer may be appropriate. In any event, it is prudent not to record such a deed of conveyance until Medicaid issues its ruling. If the caseworker maintains that the care did not meet the appropriate standard, then recording the deed could cause a gift that triggers an ineligibility to receive Medicaid.

Another note of caution is in order. The standard is that the child must reside with the parent. Visiting every day to make certain the parent is fine is not good enough. The child must actually take up residence in the parent's home. Regularly sleeping there, as well as consistently bathing, getting dressed, and eating in the home are important elements that should be met. Mail delivery or listing the address on a driver's license may not be sufficient. In addition, maintaining a separate residence could jeopardize the exemption.[36]

Although this exception arises quite infrequently, the home may be transferred to the nursing home resident's child who is blind, permanently and totally disabled, or under the age of 21.[37] Such a transfer would not count as a gift that could cause Medicaid ineligibility. On a similar note, the home is not a countable resource if the individual's child, age 65 or older, lives there and is financially dependent upon the nursing home resident.[38]

Occasionally we encounter cases in which elderly siblings live together. If a sibling owns an interest in the residence and lived there for at least one year immediately prior to the other sibling's entry into a nursing home, then a transfer of such residence to

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[36] The following Medicaid state hearing decisions discuss these issues: Appeal No. 1032813 (Summit Co. 2001); Appeal No. 1001723 (Butler Co. 2001); Appeal No. 822960 (Trumbull Co. 1998).
[37] OAC §5101:1-39-07(E)(1)(b) and (c).
[38] OAC §5101:1-39-31(C)(2)(c).

this brother or sister is allowed.[39] This equity of the healthier sibling must be a documented, legal interest. It is wise to obtain a copy of the recorded deed to confirm the ownership status. If all parties agree that the healthier sibling helped pay for the home but is not on the deed, then the parties should put such a deed in place. For cases in which the deed would be signed and recorded just prior to or after nursing home placement, it would also be worthwhile to verify the source of the equity. Applicable instruments could include bank deposit slips, loan documents, closing statements, prior deeds, tax returns, property tax bills, or anything else that proves the contribution.

If the home will be sold, then the Medicaid rules permit anyone, including a family member, to buy it for the appraised value shown by the county auditor. In fact, one can do even better. If the owner is a nursing home resident who receives Medicaid while listing his residence for sale, then he may not refuse an offer that is equal to or greater than 90% of the county auditor's value.[40]

This may or may not work in the buyer's favor. For many years it was a safe bet that a county auditor's value was less than fair market value. Since the housing crisis in 2008, though, one cannot be so sure. When considering this option, one should learn the fair market value of the home and compare it with the county auditor's value. This could create a good investment opportunity. A family purchase may also preserve a parent's ability to live there. The family could take additional measures for creditor protection and for sharing ownership amongst the children.[41]

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[39] OAC §5101:1-39-07(E)(1)(e).

[40] OAC §5101:1-39-05(C)(6)(d) and §5101:1-39-31.3(B)(4).

[41] I explain these techniques at Pages 42 to 52.

D. *Gay and Lesbian Couples*

It is ironic that the denial of marriage, which frustrates most gay and lesbian couples, works to their advantage in the context of Medicaid planning for nursing homes.

Planning for gay and lesbian partners is much easier than it is for married couples. The assets of gays and lesbians are not deemed available to each other. Moreover, committed life partners don't have to search for a dependable gift recipient to pay the nursing home during ineligibility. They already have one.

All of the planning techniques for unmarried persons apply to gay and lesbian couples.

VII. Gifting

A. *Risks*

When confronted with the threat of $7000 a month nursing home costs, the nursing home resident and his spouse may consider the option of giving assets to their children to save them from depletion by these expenses. Although it is possible to make gifts and eventually gain Medicaid benefits, it involves risks. Prudent planning can reduce the risks, but they are always present to some degree.

If circumstances are right, with careful planning and good execution, gifts can preserve assets in the family and permit the nursing home resident to receive Medicaid benefits. However, everything must be right in order for it to work.

A successful plan requires trust. Normally gifts involve a parent and child. The parent must trust that the child will use the money to pay the parent's expenses. The child must be worthy of that trust. If either of these elements fails, then gifting can be a disaster.

It is important to review the things that could go wrong. Only if the parent is comfortable with all of the potential problems should they consider gifts.

The nursing home resident must understand that they have no power to get the money back. There are three parts to a gift: Intent to make a gift; delivery of the item; and acceptance of it.[42] Once these three things happen, legal title passes to the recipient, and the donor has no right to compel the return of the item.[43]

If the donor retains any interest in the property, then it may not count as a gift, and Medicaid could declare it available to pay for the costs of his care. This bars Medicaid eligibility. Consequently, to be effective, gifts must be completely unconditional. This means, under no circumstances, could the parent legally force the child to return the assets. Therefore, if the gift is unconditionally made, and the parent has improved health, cannot receive Medicaid, wishes to buy anything, or becomes displeased with the recipient of the gift, then there may be no way for the donor to retrieve the item.

Moreover, circumstances could change in the life of the person who receives the gift. Usually the assumption is if Mom or Dad needs the money, then the child will either return what is needed or use the gift to pay for whatever the parent requires. Since the gift is unconditional, though, the child is not obliged to use it for his parent. The child could simply decide that he wishes to keep the money. There are other risks, too, such as debt problems, filing bankruptcy, ill health, dying and leaving the asset to others, selling the asset, a market crash or bank failure, divorcing, gambling the proceeds away, and so

[42] 52 Ohio Jurisprudence 3d, Gifts, §3 at 10-11 (2007).
[43] "Title passes immediately and irrevocably upon delivery." 52 Ohio Jurisprudence 3d, Gifts, §3 at 11.

on. Just because a child is stable, in a long term marriage, debt free, and in good health for decades is no guarantee of the future.

Another risk is that the laws could change. Sound planning today could be disrupted by legislation tomorrow.

Another risk is the hazard of making unequal gifts. Nothing is more likely to cause contention amongst the children than giving one more than another. Quarreling children can make the parent's last days unpleasant. They can go through the money by suing each other, they may quit seeing the parent, and they may become less inclined to be generous to their Mom or Dad who gave them the money in the first place. If the parent wishes to make unequal gifts, or completely cut a child out of the process, then they are taking a big risk regardless of the circumstances.

Before considering gifts, the potential donor must be aware of all these risks and be comfortable with them. The donor should feel 100% confident that his child will use the money for the parent if necessary. The donor should only proceed if these conditions are met.

B. *The Five Year "Look Back" Period*

There is a 5 year "look back" period for gifts made on and after February 8, 2006.[44] If one applies for Medicaid any time within 5 years after making gifts, then the applicant may face a period of ineligibility to receive benefits. If the applicant made gifts prior to February 8, 2006, then a 3 year look back period applies.[45]

If one makes gifts and applies for Medicaid more than 5 years later, then the caseworker will not consider those gifts, and they will not cause ineligibility. If one

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[44] OAC §5101:1-39-07(B)(9).
[45] OAC §5101:1-39-07(B)(10)(b)(i).

makes gifts and enters a nursing home within 5 years, then those gifts could make the person ineligible. Therefore, it is important to understand how the ineligibility works.

The county Department of Job and Family Services processes the application for benefits. The law requires a face to face interview.[46] At its conclusion, the applicant must sign the application under penalties of perjury.[47]

The caseworker will ask if the applicant made any gifts during the look back period. If gifts occurred, he will add them all together, then divide this total by the State's average cost per month for nursing home care. Currently this is $6023.[48] The result is the number of months during which Medicaid will not pay for the nursing home. For example, if a person gives away $60,230, then the person is ineligible for 10 months.

Once the caseworker calculates the number of months of ineligibility, he then determines when it begins. It starts on the date an individual receives nursing home care and would otherwise be eligible for Medicaid coverage. For an unmarried individual, this is the date he has no more than $1500 in non-exempt resources, is institutionalized, and meets all the other criteria such as citizenship and sufficient deterioration. For a married nursing home resident, this is the date the couple has spent down to the CSRA and all of the other tests are met.

If one submits a Medicaid application less than 5 years after a gift, then ineligibility could stretch past these 5 years. For example, if one applies in the 59th month after a gift, then ineligibility could last for several months or years that would have been avoided if the application would have been delayed by another month. Therefore,

[46] OAC §5101:1-38-01.2(G)(1).
[47] OAC §5101:1-38-01.2(F)(1).
[48] The private pay rate of $6023 per month is effective July 1, 2009, as per Medicaid Eligibility Procedure Letter#36 issued by the Ohio Department of Job & Family Services on June 11, 2009.

depending on the size of the gift, it may be crucial that the application not be made anytime within 5 years after making a gift.

Likewise, if one decides to make gifts, it is important to do it immediately. Indecision and inertia can be costly enemies. Every month of delay in completing the transfers means another month has passed without commencing the 5 year period. The goal is to reach the 61st month as rapidly as possible. Each month of inaction could, at today's rates, cost another $7000 or more in nursing home care that Medicaid may otherwise have covered.

When deciding how much to give, the donor must keep the 5 year period in perspective. If, 5 years after making gifts, the nursing home resident still has more than $1500, or the couple has more than the CSRA, then he would remain ineligible for Medicaid. Some persons may be unwilling to give everything away. This is understandable. Gifting, when one faces huge expenses, defies common sense. However, if the donor gives away too little, and at the end of the 5 years he has more than $1500, then he will be ineligible. Some persons are comfortable with this possibility and take the view that at least they were able to keep some assets in the family. One should consider this possibility immediately. If the donor makes some gifts, then delays giving away the remaining assets, then a lot could be spent on nursing home care that could have been avoided if the donor made all of the gifts at the beginning of the process.

C. *Long Term Health Care Insurance*

A big consideration is who will keep the money and how it could be made available. If an individual receives the gifts, then those assets are subject to all of the risks

we just examined. However, if there is another source of funds to pay for the nursing home, then we would reduce those risks.

This is another reason that long term health care insurance (LTHC) is an ideal planning tool. The insurance company, which is highly regulated and subject to solvency requirements, would supply the funds. If the benefits are large enough, then they could cover the whole nursing home stay. This would remove the risk of depending on a son or daughter to maintain the assets and make them available for the parent's use. Even if the LTHC benefits could not pay all of the costs, then the more of the expense it covers, the more of the risks it removes.

D. *Reducing the Ineligibility*

If one makes gifts and does not enter a nursing home for more than 5 years, then the donor may keep all of the wealth in the family. This raises the question: what do we do if we cannot make it the 5 years?

The answer is that, with careful planning, we can make the gifts anyways and still gain Medicaid eligibility.

We can achieve this result due to the incentives built into Medicaid law that promote the return of gifts. It makes sense to encourage this. If the son or daughter gives money back to Mom or Dad, then the nursing home resident can pay the expenses instead of requiring the taxpayers to pick up the tab.

Medicaid provides two incentives to return gifts. The first is a complete forgiveness of all ineligibility caused by the gifts if everything is returned.[49] If he gets all of the money back, then the parent must spend it on exempt assets or other expenses until

[49] OAC §5101:1-39-07(M)(1).

he has less than $1500. This puts us in no better position than if Mom or Dad had just spent all of the money and not made any gifts. Nevertheless, there is no penalty. Therefore, the parent suffers no harm for violating the rules.

However, there is a second incentive to promote a return of gifts that works to our advantage. If there is a partial return of the gifts, then the caseworker must redetermine eligibility and, if appropriate, modify the ineligibility period.[50] The consequence is that Medicaid reviews the original application, but takes into consideration what happened since that time. If the gift recipient returns some of the money, then Medicaid treats the original gift as being smaller than it really was. This causes the original ineligibility to be smaller, too. The result is that a reapplication several months later could make the parent eligible for Medicaid.

Here is how we turn the rule to our advantage. Let's assume that the parent gives the son or daughter $60,230. When dividing this by the average private pay rate of $6023, it causes a 10 month ineligibility. Let's also assume that the son or daughter gives back $6023 a month to their parent. If Mom or Dad has $1000 a month income from Social Security, then this gives them $7000 a month, which is enough to pay the actual cost of the nursing home. After 5 months, the child has returned $30,115. The son or daughter still has $30,115. If we reapply, then Medicaid will determine ineligibility based on a gift of only $30,115, not $60,230. When we divide the $30,115 gift by the average private pay rate of $6023, the result is 5. This is the number of months of ineligibility. The 5 months begins to run the date of the original application. Because we are now 5 months later, the 5 month ineligibility has expired. The parent is Medicaid eligible, and the child keeps $30,115.

[50] OAC §5101:1-39-07(M)(2) and (4).

This is why gifts, with careful planning and sound execution by a trustworthy person, can preserve wealth. It is never too late to make gifts and successfully carry out a plan. However, the sooner the parent makes gifts, the better the chance the 5 years will run and the family can keep all of the gifts.

Prudent risk management calls for steps to help insulate the gifts from losses. For the plan to succeed, the money must be available to pay the nursing home during the ineligibility. If Mom or Dad gives the money to the son or daughter, then the child could die, divorce, file bankruptcy, or suffer some other calamity. To protect the assets from these risks, it is better to place them inside of a trust instead of giving them directly to the child.

E. *Medicaid Trusts*

A trust preserves the assets inside of it from the claims of third parties. A son or daughter who is the trustee does not own the assets as an individual. Instead, they own them as the trustee of the trust. This is an identity separate from their individual self. If the son or daughter divorces or gets sued, then the angry ex-spouse or creditor has a claim against them as an individual, not against them as the trustee. Thus, the soon to be ex-spouse or creditor cannot gain access to the funds. If the son or daughter dies, then the assets do not go into their estate because the son or daughter as an individual does not own them. Instead, a successor trustee named in the trust takes over management of the assets.

An irrevocable, self settled trust serves as a good instrument for holding the gifts. It helps to reduce the chance that the gifts may be lost to claims of third parties. To understand why it works well, let's look at some of the Medicaid rules on trusts.[51]

Medicaid recognizes 5 types of trusts.[52] Four of these will not help the folks we normally assist in these circumstances.[53] The one trust that can help is a "self-settled trust established on or after August 11, 1993."

This "Category Two" trust has three main characteristics.[54] First, the assets of an individual who applies for or receives Medicaid form all or part of the trust. This means it must be "self-settled." Second, a will does not establish the trust. Third, the nursing home resident, his spouse, authorized agent, or a person acting for the nursing home resident or spouse sets up the trust.

Our clients can use this trust. They want to take their money, set it aside now, and protect it from the claims of outsiders. The Category Two trust permits this to happen.

Additional rules for Category Two trusts encourage irrevocability and elimination of the donor parent as a beneficiary. If we make the trust revocable, then permitting the parent to change it causes the assets to be considered available for their use. In the words of Medicaid, "[t]he corpus of the trust is considered a resource available to the

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[51] These are found in OAC §5101:1-39-27.1.
[52] OAC §5101:1-39-27.1.
[53] Of the four trusts that will not work, the first is a self-settled trust made before August 11, 1993 that is known as a "Medicaid Qualifying Trust." Since we cannot go back and make this type of trust, it has little usefulness for someone who wishes to make gifts now. The second trust, known as an "exempt" trust, involves a person who is blind or disabled, or contains only their income. These trusts will not help a person who needs to be in a nursing home and suffers from dementia or has problems performing two or more of the six ADLs. This eliminates nearly all clients we see in our practice. The third trust is one established with someone else's funds. Once again, this will not help a person who wishes to preserve their own wealth. The fourth type of trust is one established by will for a surviving spouse. This will not help our clients because they wish to preserve funds now.
[54] OAC §5101:1-39-27.1(C)(2)(a).

individual."[55] We also cannot let the parent have the right to any money from it. The rule states "[i]f there are any circumstances under which payment from the trust could be made to, or for the benefit of, the individual, the portion from which payments could be made is considered a resource available to the individual."[56]

These rules drive us towards a self-settled, irrevocable trust over which the parent has no right to demand funds. These are not terms that anyone would want. We all want complete control of our assets. These requirements prevent the parent from maintaining the control they normally have over their money. All their adult lives a parent controlled their money and got it when they wanted it. Medicaid denies this normality. This is a radical lifestyle change.

Nevertheless, a Category Two irrevocable trust, which we call a "Medicaid trust," is the best tool available for holding the gifts. It places the assets outside of the parent's control, and it protects them from the claims of third parties. This promotes eligibility for Medicaid and increases the chances the funds will be available to pay expenses during the ineligibility.

The trust only works if the child is trustworthy. The parent must have complete faith the trustee would make the funds available because the parent has no power to demand the money. This is no worse a position, though, than if the parent gave the assets outright to the child. Whether the parent makes gifts to the child as an individual or to them as trustee of the trust, the result is the same. The parent intended to give the money away, gave it away, and the child accepted it. This completes a gift that transfers title to someone else. The parent would have no power to demand back the funds if he gave it to

[55] OAC §5101:1-39-27.1(C)(2)(b)(1).
[56] OAC §5101:1-39-27.1(C)(2)(c)(i).

his child as an individual. The parent also has no power to demand the money from the child as trustee.

We do not have to strip the parent of all control. To the contrary, we can give Mom or Dad meaningful influence and power. We include in the Medicaid trust the "power to say no." We do this by requiring the trustee to give the parent notice whenever the trustee wishes to mortgage or sell any assets. The parent has the right, for 10 days, to stop the transaction. This does not violate any Medicaid rules that could somehow make the assets "available" for the parent and cause a loss of benefits. This gives the parent some influence over the situation. If the trustee wants to buy penny stocks or something else risky, the parent can say no. If the trustee wants to sell the house, the parent can say no. This power to maintain the status quo can provide some folks with enough comfort that they can proceed with the gifts. For other folks with more trust in their children, it adds assurance to make them feel more secure.

For most Medicaid trusts, the child is the trustee and the parent (or parents) is the settlor. The parent transfers their assets into the trustee's name. Normally the trustee and the other children have the right to income and principal while the parent is alive. If the parent needs money, then the trustee makes a distribution to himself or siblings, then they make it available to the parent. When the parent dies, then the trust terminates and distributes the remaining assets to the beneficiaries the parent chose when they established the trust.

Attorneys who read this may be concerned the trustee has a "power of appointment" that causes the assets in the trust to be includable in the trustee's estate for gift or estate tax purposes. This is rarely a problem. In late 2010 Washington raised the

lifetime gift and estate tax exemption to $5 Million. This level of wealth surpasses that of nearly all of our clients. Moreover, folks in this wealth range generally do not need Medicaid planning. They have enough resources to pay for the nursing home and leave a legacy. If in some rare case this power of appointment issue came into play, we could get around the problem by requiring any distributions to the trustee to require the permission of one of the siblings. This would insert an adverse party that would cure the ill.

Another concern may be that one can only give away $13,000 per person per year without filing a gift tax return. This should not be a problem, either. Very few persons doing a Medicaid plan would give away more than $5 Million. Consequently, we may have to file a return for the parent making the gifts, but no tax would be due. As for the children who receive distributions from the trust and make them available for a parent, this should not pose difficulties. One can spend an unlimited amount on medical expenses, like nursing home costs, without the $13,000 annual limit. Further, if there are multiple beneficiaries, the trustee can take turns making distributions to siblings, who can then use their annual gifting limit.

Many times a Medicaid plan involves only a home and few other assets. For cases in which the trustee makes no distributions, trust management is simple. If there is no income, then there are no taxes to pay or returns to prepare and file.

A trustee of a Medicaid trust that makes distributions would have work to do. The trustee would want a checking account from which to distribute funds. It would need a tax identification number, which we obtain online during or shortly after the parent and child sign the trust. If the trustee distributes more than $100 of income in a year, then because this is a complex trust under IRS rules, he would have to prepare and file a 1041

return. This is the functional equivalent of a 1040 return for a trust. The beneficiaries would have to report the income on their tax returns. Because the trustee would likely have conservative investments in the trust, based on the low interest rate environment we have today, there would be modest income for the beneficiaries.

Some nursing home residents may want a Medicaid trust, but they cannot name a child as trustee. The child may not be good with money. The child may be impaired. Or the parent may not have enough trust to feel comfortable with the child in this position. This is not necessarily a show stopper. An alternative is naming a bank as trustee. It has solvency requirements and consistent monitoring, thereby being less risky than having a person hold the funds. One can expect to pay several thousand dollars a year for this service. If one can afford it, then it can be worth it.

Recently we used a bank trustee for our client, an elderly lady with Parkinson's disease and nearly $800,000. She had a significant risk of a lengthy nursing home stay. Her two daughters were not suitable candidates to hold the funds. One had debt problems. The other had children in college receiving financial aid. Control of the assets could terminate this assistance. We established a Medicaid trust with a bank as the trustee. The trustee had discretion to make distributions to the daughters, who could then utilize the assets, if necessary, to pay for items needed by the Mother. This arrangement permitted the retention of the assets in trust, yet did not place the assets in the hands of the two daughters who were not suitable candidates to serve as trustee.

F. *Use of Non-Probate Ownership Forms*

Once could implement a Medicaid plan without using a Medicaid trust, but it is not a course we recommend. Use of joint and survivor or transfer on death accounts

amongst the children who receive the gifts is a possible technique. It could keep the assets outside of probate in case a child dies before a parent. It could also concentrate the assets and promote their availability. This would avoid splitting up the assets amongst several children, which would increase the risks they would be spent. Everyone could get the account statements and monitor the situation. Keeping the funds together, and knowing one's brothers and sisters see the accounts, promotes savings and provides an incentive to avoid spendthrift ways.

This format has several weaknesses that weigh against its use. Only one Social Security Number could be used. This causes a reporting of all of the income to one person. If significant amounts are involved, then this could be unfair to the recipient. The children could rotate numbers, or make a distribution to pay the resulting taxes, but this could get burdensome. In addition, there would still be record keeping, and someone would have to manage things or else there could be confusion and inefficiency. Furthermore, holding the assets in this way still leaves them vulnerable to claims of divorcing spouses and creditors.

For these reasons, a trust makes a lot more sense. A trust has one person running the affairs. A trust also does not add that much work for the attorney. Drafting it is only part of the time we devote to a Medicaid plan. Our office would charge a family nearly the same fees to assist with a plan without a trust as we would with a trust. I see no true advantage to choosing this format of joint and survivor or transfer on death accounts over a plan with a Medicaid trust.

G. *Limited Liability Companies*

One could use a limited liability company (LLC) for a Medicaid plan. It has some advantages over a Medicaid trust, but the expense in establishing it leaves the Medicaid trust as a better alternative.

Once the children receive the gifts from the parent, they would then establish an LLC in which each of them owns a membership. They would then place the funds into an account owned by the LLC or transfer the real estate into the LLC's name. The LLC would have its own tax identification number. This would enable the interest and dividends, as well as deductions and other tax events, to be reported to the children each year on a K-1, which is a document similar to a 1098 or 1099. This would work the same as it does with a Medicaid trust.

The LLC could also provide more options in the event one of the children predeceases the parent. In the joint and survivor or transfer on death model, the grandchildren or surviving spouse would not inherit the decedent's share. However, the Operating Agreement of the LLC, in the case of real estate, could call on the surviving children to buy out their deceased sibling's share, thereby making the proceeds available to the surviving issue and spouse. Or, the Operating Agreement could provide that the LLC would be liquidated, and all of the proceeds paid to its members, upon the death of the parent.

The downside to use of an LLC is its expense and sophistication. An attorney must draft the Operating Agreement. If a beneficiary lives in a community property state, then the spouse has rights that can be difficult to surmount if they are not a willing participant. An LLC can serve as a flexible vehicle for concentrating the gifts and

controlling their dissipation, but the costs to establish it are significantly greater than those involving a Medicaid trust.

H. *Life Estates/Life Leases*

A life estate or a lifetime lease is an arrangement with real estate that can permit a parent to make a gift of their residence to their children, yet preserve their right to live there. Although this sounds like a workable alternative, it has many drawbacks that limit its effectiveness as a Medicaid planning tool.

A life estate grants a right to live in and use realty for life. At the tenant's death, the real property passes to the beneficiaries specified in the instrument that created it. A person can create a life estate by deed, trust, or will.

A similar arrangement may be accomplished through a lease. In this scenario, the parent gives or sells the real estate to the children, then the children or their LLC enter into a lease with the parent. The terms typically involve the right to live there for the rest of the parent’s life in exchange for the parent paying rent, which should be in an amount no less than the insurance, taxes, and normal maintenance costs. The lease would also terminate after a few months of vacancy. By recording the lease or a memorandum of it, this would protect the parent’s right to live there in the event the child or the LLC encounters problems with creditors.

Life estates have many good characteristics. As a non-probate form of ownership, at death it is not necessary for probate proceedings to pass along title to the new owners. This feature also makes the State’s right of recoupment more difficult to exercise. Another good aspect is if the Community Spouse resides in the home, then the residence

remains an exempt resource.[57] In addition, if the parent dies owning a life estate, then the children would receive a step-up in basis to its fair market value at the parent's death.

If the life estate is non-transferrable, then after 5 years it is no longer a countable resource.[58] If one could be certain that the parent would not enter a nursing home for 5 years, then a life estate could be a very good planning tool. Unfortunately, the potential problems that accompany the life estate militate against its use.

The biggest disadvantage with a life estate is that it is worth money. If the unmarried nursing home resident owns the life estate, then Medicaid assigns it a value. This would be a fraction of the actual fair market value, but in my opinion the value is unrealistically high.[59] The children could purchase the life estate for this reduced amount, but this creates a financial burden for the children at an unwelcome time.

There are several more disadvantages to using life estates. Granting a life estate is a gift. Doing this within the look back period creates all of the same issues as any other type of gift. The Medicaid rules have formulas for valuing the life estate. If the gift is large enough, then it may trigger a duty to file a gift tax return. Further, it could trigger the duty to file an Ohio estate tax return and pay the taxes.[60] Moreover, use of a life estate or life lease may make it difficult, if not impossible, to mortgage or sell the premises while the parent is alive. Further, the IRS imposes some limitations on the ability to recognize losses, or capital gains instead of regular income, when related persons are

[57] OAC §5101:1-39-32(D)(1)(b) and (D)(2)(b).
[58] OAC §5101:1-39-32(D)(2)(d).
[59] As an example, for a 65 year old person owning a life estate, if the property is not mortgaged, then the life estate is worth 30.033% of the County Auditor's appraised value for Medicaid purposes. See OAC §5101:1-39-32(F), CFR §20.2031-7, and IRS Publication 1457.
[60] If all gifts, other than to the decedent's spouse, within three years of death exceed $338,333, then there is a duty to file an Ohio estate tax return and pay the taxes. A remainder from a life estate could count as such a gift. See ORC §§5731.05, 5731.06, and 5731.21.

parties to the same transaction. Consultation with a tax advisor would be advisable before a child depreciates the property, recognizes losses, or pays capital gains on a sale.[61]

Because of all of these problems, we tend to avoid life estates and life leases.

I. *Loss of Basis Step-Up*

As discussed at Pages 19 to 21, a disadvantage to making gifts is a loss of the opportunity for the children to receive a step-up in basis of assets they would have inherited from a parent. If the children inherit the assets, then they would receive a step-up in basis to the fair market value of the item at the parent's death. This can result in a significant savings of capital gains taxes when the item is sold.

One must keep in mind that the loss of basis step-up pales in comparison to the larger issue: if the parent does not give away the assets, then using them to pay nursing home costs is a much larger loss. Even though one loses the basis increase, gifting to preserve wealth secures a bigger advantage.

J. *Gift and Estate Tax Consequences*

When a person gives more than $13,000 in a year to an individual, then he must file a gift tax return.[62] The return is due on or before the normal April 15 deadline of the year after the event took place.

In this context, it would be rare for a gift tax to be payable. This is because the donor may give away during his lifetime up to $5 Million.[63] If the parent in these circumstances made significant gifts during his lifetime, then hopefully he is still

[61] See, generally, 2011 US Master Tax Guide at Paragraph 1717 (Pages 599-600) and Paragraph 1744 (Page 612).
[62] Paragraph 2905, Page 876, 2011 US Master Tax Guide; 26 USC §2503(b).
[63] Actually, one may give away more than $5 Million in a lifetime because gifts in the exclusion amount of $13,000 or less do not count against the $5 Million limit. Paragraph 2910, Page 877, 2011 US Master Tax Guide.

wealthy. If so, then it is unlikely he would need to be concerned about preserving his right to receive Medicaid.

Preparing the gift tax return may present some challenges. Sometimes the information needed for the return is difficult or time consuming to obtain. One must list the donor's basis in the property. Many times the documents necessary to prove the donor's basis are not immediately available. It can prove time intensive to locate them, and sometimes it is just not possible. Once the preparer of the return has the information, and he has the fair market value of the item as of the date of the gift, preparation of the return is not too difficult and should not be expensive.

Except for bequests to a surviving spouse, Ohio imposes an estate tax upon estates exceeding $338,333. Ohio includes, for purposes of ascertaining the taxable estate, all gifts made within three years of death.[64] It also includes all property subject to a life estate whether or not it is transferable. Therefore, gifts in these circumstances may require the family to pay Ohio estate tax even though there are no assets transferred at death. Keep in mind, though, that the estate tax would have been payable if the nursing home resident died owning the assets. Further, the peak Ohio estate tax rate is 7% for amounts exceeding $500,000.[65] Payment of nursing home costs could be viewed as a 100% tax, so in comparison the estate taxes may not be so onerous.

K. *Gift with Annuity or Promissory Note*

Another planning tool is a combination of a gift combined with an annuity or a promissory note. In this scenario, when the person makes a gift, he does so with less than all of his assets. This creates a period of ineligibility to receive Medicaid. If this person,

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[64] See the discussion at Page 51.
[65] ORC §5731.02.

though, is in a nursing home or about to enter one, and he acquires an annuity or a promissory note that gives sufficient monthly income to pay for his care while he is ineligible, then with careful planning the payments under the annuity or promissory note would end at the same time the ineligibility ends. If done right, the nursing home patient would then be eligible for Medicaid, and the gift could be retained by its recipients.

The advantage of this option over gifts with no note or annuity is that the parent has a legal right to compel payment. This is much less risky than hoping that a child will use some of the gifts to pay the nursing home while the parent is ineligible for Medicaid.

If a parent does not have full faith that a child will pay the nursing home while they are ineligible for Medicaid, then the security offered by this format may be enough to encourage the parent to go forward. In my view, though, if a parent has significant doubts about a child's dependability, then they should not make gifts. The most important aspect of all Medicaid planning is that we take care of the parent. If my client expresses doubts about going forward, then I probe the reasons for their hesitancy. If the child's trustworthiness is an issue, then I may be more inclined to recommend having a bank serve as trustee than exploring the note/annuity option. Nevertheless, the note/annuity approach is one worth considering.

VIII. Contacting the Author

I hope that you find this article informative and understandable. If you have questions, then you may contact me at glovett@lovettlawoffice.com or at our Dayton (Tipp City) office at (937) 667-8805, or our Columbus (Dublin) office at (614) 734-8364. There's never a charge for the first few minutes whether by phone or email.