

MEDICAID AND NURSING HOMES: AN INTRODUCTION

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I. Introduction

A long stay in a nursing home requires the resolution of a key issue: how to pay for the care. Medicaid may do so, but it is complicated. Figuring out if one is eligible, and determining what to do to become eligible, is impossible unless one has some familiarity with the subject.

This article introduces you to Medicaid for nursing homes in Ohio.² Before we examine the rules, we look briefly at other ways to pay for these costs, consider the family dynamics, then review the legal instruments that normally arise in this context. My goal is to explain the basics so you can then, in turn, develop a plan to take full advantage of the benefits Medicaid may provide. A separate article, Medicaid and Nursing Homes: Planning Techniques, covers those methods that we use in our practice.

This article attempts to serve families going through this process as well as attorneys and financial advisors. This is not an exhaustive treatment of the subject.³ 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. Our law firm has three attorneys with offices in the Tipp City and Beavercreek areas. In 2011 the Ohio State Bar Association designated me as a specialist in Estate Planning, Trust, and Probate law.

II. Paying for Nursing Home Costs

Nursing homes are expensive. In 2011, the average cost per month in the Western and Central Ohio areas for custodial care is approximately \$7000. This level of expense can wipe out a lifetime of savings quite quickly.

² This article focuses on Medicaid for nursing homes in Ohio and briefly touches on related issues. Not all states implement the federal Medicaid program the way that Ohio does. Further, not all states feature the same types of documents reviewed in IV, Legal Instruments, starting at Page 6. If your situation does not involve Ohio, then the author urges you to consult with a knowledgeable attorney in the appropriate state.

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

Borrowing is not an attractive option to pay these costs. Most senior citizens do not have the income to afford a sizable loan. Moreover, the elderly are often motivated to leave a legacy for their children, not a debt.

Normal health insurance will pay the costs for only a few months at best. Long term health care insurance is coverage that pays for extended residence in a nursing home. I urge you to consider getting it. Unfortunately, most folks I encounter in our practice do not have it. As a result, they must pay for long term care out of their own pockets.

These persons often turn to Medicaid when Medicare benefits end.⁴ Medicaid is a federal and state funded program that provides assistance to impoverished persons. Medicaid will pay for nursing home costs if one meets certain criteria. Some actions can make one eligible to receive Medicaid quicker than if one did nothing. Some actions can make one ineligible to receive Medicaid for a very long time. It is important to understand the rules, and the types of difficulties one may encounter in this process, if one wishes to preserve assets and provide a comfortable setting for the nursing home patient and a spouse who remains at home.

PASSPORT is a Medicaid program that can permit a person to remain at home and receive assistance to pay for limited support care such as adult day care, home medical equipment, nutrition counseling, transportation, housekeeping, social work, and related services.⁵ Generally, an individual on PASSPORT must meet the income and asset eligibility and deterioration tests for Medicaid and have someone with him providing the hands on care. It will not provide 24/7, custodial care like one receives in a nursing home. If one has a dedicated care giver or a network of persons providing a custodial level of attention, then PASSPORT can be an effective supplement. Nearly all of our clients in these circumstances face a protracted or permanent stay in a nursing home. It is for these situations that this article and its advanced

⁴ I compare Medicare and Medicaid starting on Page 9.

⁵ PASSPORT rules appear at Ohio Administrative Code §5101:3-31 and are described at the website for the Ohio Department of Aging, <http://aging.ohio.gov/services/passport/>.

companion, Planning Techniques, place their focus. Therefore, I do not devote attention to PASSPORT in this article or Planning Techniques.

III. Family Dynamics and Ethics

The nursing home resident normally does not face matters alone. A spouse, children, and possibly others may have involvement in his affairs.

These situations can bring out bad behavior. To avoid this problem, the nursing home resident, his family, and the attorney advising them should establish goals, set up a chain of command, communicate clearly, and put in place the proper documents to facilitate these things.

It is important to address these matters first because uncertainty and hurt feelings can result in litigation. Sibling rivalries can lead to outright contention if there is disagreement or a lack of clear communication. If there is any dishonesty or greed, then this makes the mix even more volatile.

If a lawyer is involved, then he must, as an ethical matter, identify his client and serve his or her needs. If the client wants to work with the attorney through a third party, then the lawyer needs to clarify how this will happen. The next step for the lawyer is to ascertain the goals of his client. This is usually the nursing home resident and, if married, his spouse. Only when these steps have been taken should a plan be put together to accomplish the client's goals.

The lawyer may work with a third party, like a spouse, son, or daughter, if his client permits him to do so. Quite often the nursing home resident is not the person coordinating and conducting the decision making. The attorney should identify the person who is playing this role and determine this person's relationship with the nursing home resident and the rest of the family.

In my experience, the best method by which the lawyer can achieve this is through establishing the terms of the fee agreement. This contract must be between the attorney and his client. If the lawyer's client wishes for him to communicate and work with other family members, then this fee agreement should grant permission to the attorney to do so. If someone

else is going to play this role, then he should have a financial power of attorney⁶ that grants him the legal authority to gather and share the appropriate information.

Most importantly, someone should clearly communicate the patient's goals to all of the participants. The process works best if the goals and other key information, such as the nature and extent of assets and the full particulars of any transactions, are fully shared. If the lawyer's client does not want to provide full disclosure, then this can make it more challenging to maintain a civil atmosphere. If immediate relatives feel they are being excluded, then they may suspect dishonesty and take legal action.

If the family cannot work together, then planning may be impossible. Some situations are so dysfunctional that no agreement is achievable. In these cases, if key decisions are not being made and the nursing home resident is incompetent, then it may be necessary for someone to be appointed guardian.⁷

Some argue that it is wrong to consider use of Medicaid unless one is truly needy. From a broad perspective appropriate for governmental policy, spending taxpayer funds for care that a nursing home patient, or his family, could pay for makes little sense. From my perspective as an attorney who has helped many families in these situations, it is unethical for me to fail to discuss this alternative. An attorney has a duty to zealously represent his client within the bounds of the law. Since Medicaid is available to those who meet its criteria, and the needs of society do not determine eligibility, I believe an attorney must at least raise the possibility of Medicaid coverage. Much like an accountant who takes advantage of every loophole to lower the taxes his client must pay, an effective lawyer in these situations should explain how Medicaid could pay the nursing home. A person has a right to pay the lowest taxes possible if he follows the rules.

⁶ This article discusses powers of attorney starting at Page 6.

⁷ An Ohio probate court may appoint a guardian for a person who is "incompetent," which is defined in Ohio Revised Code (ORC) §2111.01(D) as a person "incapable of taking proper care of the person's self or the person's property or fails to provide for the person's family or other persons for whom the person is charged by law to provide..."

The same person may obtain Medicaid benefits for nursing home costs if he follows the rules, too. From a moral or legal perspective, it is hard to distinguish between the two situations.

IV. Legal Instruments

Most families get along well enough to adequately address the circumstances that accompany residence in a nursing home. For everyone's protection, it is important to have key instruments to address the new situation. These include a will, financial power of attorney, living will, and a health care power of attorney. It may also include a trust. A brief review of these instruments indicates why they are important.

A. Will

A will distributes a person's assets at his death that are in the probate estate. Assets not in the probate estate, like life insurance or annuity proceeds, joint and survivor assets, payable on death accounts, and assets inside a trust, are not controlled by a will. Everything else the person owns in his name that is not automatically payable to someone at his death comes into his probate estate, and these items can be disposed of by will. If there is no will, then Ohio law determines the beneficiaries and who settles the estate. Ohio law may not produce the result the person desires. This is why having a will or trust is important. Because of the difference between probate and non-probate assets, when preparing a will or trust an attorney should gain some understanding of what the person owns to determine whether or not the will or trust would dispose of the person's property. A will, though, is only effective at death, and it does not give anyone any authority while the maker of the will is alive. A trust may give someone else control over assets while the maker is alive, depending on how it is drafted.

B. Financial and Health Care Powers of Attorney

To deal with a person's property and medical decisions while they are alive, financial and health care powers of attorney are essential. Without a health care power of attorney, privacy

rules⁸ make it difficult to learn about a person's condition, and a court order is required for making some key decisions.⁹ Without it, a spouse or family member has limited authority to hire or fire doctors, authorize procedures, review medical records, and work with insurance companies. The health care power of attorney permits those persons named in it to take these types of actions. A Guardian may act for the person if they are incompetent, but this is an expensive legal proceeding that limits the ability to plan and fully take advantage of Medicaid benefits. Powers of attorney are relatively inexpensive. They also permit the patient to determine who shall act on his behalf and how much authority they have. Without a financial power of attorney, it is virtually impossible to deal with another person's assets short of obtaining a court order. An attorney can craft a financial power of attorney to permit fairly broad actions a Guardian cannot take, such as gifting and many forms of Medicaid planning.

C. *Living Will*

A living will permits a person, while alive, to declare what type of treatment he wishes to receive if he becomes permanently unconscious or his death is imminent. In almost all cases, the person signing the living will wishes to avoid protracted life support if his condition is hopeless. By signing a living will, the person directs his treating health care workers to remove or limit the use of heroic measures to keep him alive in such circumstances. If one does not have a living will, then it may take a court order to remove a person from life support. This is what happened in the well known cases involving Terri Schiavo in 2005 and Karen Ann Quinlan in the 1970s.

⁸ Title II of HIPAA, an acronym for the federal "Health Insurance Portability and Accountability Act of 1996," the foremost privacy rule in this area, appears at 42 USC §1320d, et seq. and at 45 CFR §160.101, et seq.

⁹ The procedure one must follow to remove nutrition and hydration via a court order if there is no advance directive, such as a living will or health care power of attorney, appears in ORC §2133.09.

D. *Trusts*

Trusts can be effective Medicaid planning tools.¹⁰ We use them extensively in our practice. Most usually our cases involve a revocable, living trust, or an irrevocable trust we refer to as a “Medicaid trust.”

A trust is a custom drafted instrument that controls the assets placed within it. One must read a trust to determine what the trustee can do; one cannot assume a trustee can do anything. If an asset is not placed into a trust, then the trust will not control the asset.

Before I describe Medicaid trusts, which our practice often uses, let’s quickly look at revocable living trusts. These have limited utility in Ohio Medicaid planning. A revocable living trust permits the owner of the assets to revoke the trust at any time; serve as its trustee; and to be a beneficiary. If one can change a trust at any time, receive benefits from it, or serve as its trustee, then the assets in the trust are usually deemed available for the person’s use and bar Medicaid eligibility. For these reasons, revocable living trusts are not effective instruments for Medicaid planning.¹¹

“Medicaid trust” is a term we use to describe a trust that has three main features. First, it is irrevocable. Once we sign it, we cannot amend it. Second, the person who supplies the assets is not a beneficiary. Third, the person establishing it does not serve as trustee. Thus, a Medicaid trust is the complete opposite of a revocable living trust when it comes to these three criteria.

There are two virtues of a Medicaid trust. Once we transfer the nursing home resident’s assets to the trustee, those assets are not deemed available to him. This gets them out of his hands and serves to make him poor enough to qualify for Medicaid. The second good point is that having a trustee own the assets is safer than having an individual own them. If an individual owns the assets, then dies, divorces, files bankruptcy, or suffers some other malady, then those assets

¹⁰ The rules for trusts in relation to Medicaid eligibility appear in Ohio Administrative Code (OAC) §5101:1-39-27.1.

¹¹ Revocable living trusts can be an effective, if not mandatory, device for some situations, such as reducing or eliminating federal estate taxes.

are at risk. However, if the same person owns the assets as trustee of a Medicaid trust, then those assets are not subject to claims of an ex-spouse or creditor. The assets would not pass through his estate if he dies, either. This is because the trustee owns the assets, not the individual. Thus, this is a much safer form of ownership than having an individual own the items.

Transfers into the trust count as gifts. If less than 5 years old, the gifts cause a period of ineligibility to receive Medicaid benefits.¹² If done right, though, this ineligibility period can be overcome despite the gifts and still preserve significant wealth from nursing home costs. I explain how this works in the Planning Techniques article.

As an aside, revocable living trusts and Medicaid trusts can be important planning tools aside from Medicaid planning for nursing homes. A will cannot make a person wait longer than their 21st birthday to receive benefits, but a trust can do this. Also, trusts can bestow benefits for disabled or impaired persons. Further, both revocable living trusts and Medicaid trusts can make assets available for a disabled or impaired person and permit a beneficiary to receive social security income and a Medicaid card, which the beneficiary can use to pay for medical care. We use trusts for many of our clients for these reasons. Moreover, trusts can limit a person's income and promote his eligibility for PASSPORT, a Medicaid program that enables a person to stay at home and receive assistance instead of being placed in a nursing home.

V. Medicaid Basics in the Nursing Home Context

If one meets the requirements, then Medicaid will pay for custodial care in a nursing home. The following passages A. through J. review the primary rules. They are complex, but one must be familiar with them to grasp the planning techniques our practice uses in these cases.

A. Medicaid versus Medicare

Before we examine the basic rules on Medicaid, let's look at the differences between Medicaid and Medicare. Medicare is a federally subsidized health care insurance available to

¹² I discuss gifting in this article beginning at page 17.

persons aged 65 or older.¹³ To be eligible to receive Medicaid, a person must be of limited means. Medicare Part A may pay for part of a person's nursing home costs for the first 100 days of continuous care. To do so, the person must have gone to the nursing home within 30 days after being in a hospital for at least 3 days. Under no circumstances would Medicare Part A pay for any nursing home costs after this first 100 days. Medicare Part B does not pay for any nursing home care. Therefore, if Medicare does pay for any nursing home costs, it would only do so on a temporary basis. Medicaid, on the other hand, is not limited on the length of time it will pay for nursing home costs if a person is eligible to receive the benefits.

B. *Deterioration*

To qualify for Medicaid assistance for nursing home costs, the person must have a significant level of physical or mental deterioration. If the person has a mental health impairment, such as dementia, then he must require the presence of another person on a 24 hour a day basis for the purpose of supervision to prevent harm.¹⁴ For physical impairment, a person must require assistance with two or more of the six Activities of Daily Living (ADLs). These are transferring, toileting, grooming, bathing, dressing, and eating.¹⁵ Medicaid also applies if a person needs assistance with one ADL and cannot take medicine without the help of another person.¹⁶ Of course, one will be Medicaid eligible if his situation is so acute that he needs skilled nursing or rehabilitation services that have been prescribed by a doctor, such as physical or speech therapy.¹⁷

¹³ Medicare is also available to persons who receive social security disability benefits.

¹⁴ OAC §5101:3-3-06(C)(2)(d).

¹⁵ OAC §5101:3-3-06(B)(1) and OAC §5101:3-3-06(C)(2)(a).

¹⁶ OAC §5101:3-3-06(C)(2)(b).

¹⁷ OAC §5101:3-3-06(C)(2)(c).

C. *Citizenship and Residency*

To receive Medicaid benefits, the nursing home resident must be an Ohio resident¹⁸ and a U. S. Citizen¹⁹ or a “qualified alien.”²⁰ “Residency” requires intent to permanently reside in Ohio.²¹ Typically one applies for Medicaid in the county in which he resides in a nursing home.

D. *Income Rules*

Technically, Ohio limits the amount of income a nursing home resident may receive and still be eligible for Medicaid. However, as a general rule, if the person cannot afford to pay the nursing home because their income is insufficient, then they can gain Medicaid eligibility by spending their income towards their nursing home costs.²² The nursing home resident may also spend his income towards his medical insurance premiums or those for his spouse and a child younger than 18; unpaid medical bills for himself and the family; current medical expenses; and an allotment of \$40 per month as a personal needs allowance that must be kept at the nursing home.

E. *Spousal Income*

A spouse of a nursing home resident does not have to spend her income towards the nursing home costs. In fact, the spouse living at home (Community Spouse) is entitled to receive at least \$1750 per month of income.²³ If the Community Spouse’s monthly income is less than \$1750, then she may receive part of the nursing home resident’s income. This supplement the Community Spouse may receive is known as a Monthly Income Allowance.²⁴ The procedures for determining the exact amount change from time to time and are rather complicated.

¹⁸ OAC §5101:1-38-01.8(C)(2).

¹⁹ OAC §5101:1-38-02(A).

²⁰ OAC §5101:1-38-02.3(B)(10). Generally, a “qualified alien” is one who is a lawful permanent resident and holds a “green card” or is otherwise lawfully in this country.

²¹ Gregory S. French, Ruth R. Longenecker, and Richard T. Tapps, Ohio Elder Law Practice Manual, at 4-8 (2008).

²² OAC §5101:1-39-10.

²³ This rate, known as the Minimum Monthly Maintenance Needs Allowance, is effective July 1, 2008, as per Medicaid Eligibility Procedure Letter #28 issued by the Ohio Department of Job and Family Services.

²⁴ OAC §5101:1-39-24(C)(2)(d).

F. *General Rules on Assets*

Except for certain exemptions, Medicaid deems all assets owned by the Community Spouse and nursing home resident as being available to pay for nursing home costs. If the couple separates for reasons other than placement in the nursing home, then Medicaid will only look at the assets of the institutionalized spouse as being available for his or her care.²⁵ If the nursing home resident is unmarried, then he may only have \$1500 of non-exempt assets.²⁶ Exempt assets that do not count towards this \$1500 ceiling include all of the following:²⁷

- a. Household goods and personal effects of a reasonable value. “Household goods” are items customarily found in the home used for an adequate standard of sustenance. “Personal effects” are normally held incidental items intended for personal use. Household goods and personal effects are assumed to be of a reasonable value.²⁸
- b. Automobiles. Exemptions are one car, regardless of value: 1) if necessary for employment; 2) used for medical appointments; 3) handicap equipped; or 4) used by a Community Spouse. If an auto is not exempt for any of these reasons, then a vehicle worth \$4500 or less is exempt. If there is more than one, then the most valuable vehicle is exempt. An auto can be a car, boat, truck, snowmobile, animal drawn vehicle, or animal. Values are the average trade-in as per the NADA guide. Liens are not considered.²⁹
- c. Life Insurance. Term coverage is exempt. A caseworker must consider all other life insurance on the nursing home patient and the Community Spouse. If the combined death benefits of all such policies on one person are \$1500 or less, then the policies are exempt. If all such policies on one person have death benefits

²⁵ OAC §5101:1-39-34(H).

²⁶ OAC §5101:1-39-05(B)(11)(a).

²⁷ Exemptions, generally, are discussed in OAC §5101:1-39-26(C).

²⁸ OAC §5101:1-39-28.

²⁹ OAC §5101:1-39-29.

exceeding \$1500, then none of the cash surrender value is exempt. Policies that may only fund an irrevocable burial contract are exempt.³⁰

d. Home. The principal residence of the nursing home patient is exempt if it is in his or his spouse's name(s), worth less than \$500,000, and any of these persons remain there: 1) The Community Spouse; 2) his children under 21, blind, or disabled; 3) his child 65 or older who is financially dependent on him; or 4) his sibling who has equity in the home and lived there at least one year prior to institutionalization.³¹

i. For homes worth more than \$500,000, the residence is only exempt if it is occupied by: 1) The Community Spouse; or 2) children under 21, blind, or disabled.

ii. If the nursing home resident has been institutionalized for thirteen months or longer, then an unoccupied home is no longer exempt.

iii. Technically, this is not an exemption, but if the individual's adult child resides in the home for at least two years immediately before the resident enters the nursing home, and this child provided care to the individual that permitted him to stay at home, then a transfer of the home to such child is permissible and is not treated as an improper transfer.³²

iv. If the home is no longer exempt, then Medicaid permits 6 months to sell it, and the proceeds are deemed available to pay for care. The seller may not refuse an offer of at least 90% of the County Auditor's value. If the home is not

³⁰ OAC §5101:1-39-30.

³¹ OAC §5101:1-39-31(C).

³² OAC §5101:1-39-07(E)(1)(d). "Improper transfers" are discussed starting at Page 17.

timely sold, then the total *equity* value is deemed available.³³ The exempt home may be sold and replaced by another home within three months of sale.³⁴

- e. Property Essential for Self-support. A governmental license or permit of unlimited value is exempt if it is used to support an individual. Also, equity of up to \$6,000 may be exempt if it produces at least a 6% annual rate of return and it is used to support an individual.³⁵
- f. Burial Plots and Pre-Paid Irrevocable Funerals for the nursing home resident, spouse, or immediate family are exempt assets.³⁶

G. *Special Asset Rules*

Some types of assets have special rules designed to prevent abuse. Some of the more noteworthy ones involve retirement funds (such as a pension, IRA, or 401(k)); annuities; cash and cash equivalents; notes, stocks, and bonds.

- a. Retirement Funds. If possible, these must be converted into cash, and the remainder once penalties are paid is an available resource. If one is eligible, then one must apply for the benefit. The retirement fund is not deemed available if one must quit employment to receive it.³⁷
- b. Annuities. Annuities purchased after February 8, 2006, must protect the right of the state of Ohio to receive reimbursement for Medicaid benefits paid for the nursing home resident. Generally, the annuity must list the state as a beneficiary or else the purchase is considered an improper transfer of benefits.³⁸ Annuities purchased prior to this date are subject to close scrutiny and very complex rules. Their terms will be respected if they are from a bank, insurer, or entity that sells

³³ OAC §5101:1-39-31.3.

³⁴ OAC §5101:1-39-31.4.

³⁵ OAC §5101:1-39-33.

³⁶ OAC §5101:1-39-27.4 and 32.2

³⁷ OAC §5101:1-39-22.7.

³⁸ OAC §5101:1-39-22.8(C)(1).

commercial annuities to the public; name the applicant the owner, annuitant, and payee; and all payments must occur during the annuitant's life as per life expectancy tables of the Ohio Department of Job and Family Services. If they fail to meet these tests, then there is a danger that part or all of the funds used for the purchase during the "look-back period"³⁹ will be deemed an "improper transfer,"⁴⁰ which is a gift that triggers Medicaid ineligibility. Private annuities are presumed to result from improper transfers.

- c. Cash, Checking, Savings, and CDs.⁴¹ If the nursing home resident has an interest in a joint account, then it is an available resource if the applicant has unrestricted access to it and it is presumed that all of the money belongs to him.⁴² If others made contributions to the account, then this must be proved by appropriate documentation.⁴³ If early withdrawal is prohibited, then this may be considered an improper transfer.
- d. Notes, Stocks, and Bonds.⁴⁴ The value of a note is the balance due unless the obligor has a bankruptcy discharge. Payments are considered income. If the asset is not transferable, then it may be considered an improper transfer if purchased during the look back period. Sales for less than value paid are presumed improper transfers for the value lost if made during the look back period. The value of publicly traded stock is the market closing price. An applicant has the burden to prove the value of closely held shares. Bonds are valued at current cash value. The rules for mortgages and land installment contracts are quite similar to these restrictions.

³⁹ I discuss the "look back period" in the *Gift Penalization* section that starts on Page 17.

⁴⁰ I discuss "improper transfers" and gifts in the *Gift Penalization* section that starts on Page 17.

⁴¹ OAC §5101:1-39-27.2.

⁴² OAC §5101:1-39-27.2(B).

⁴³ OAC §5101:1-39-27.2(C)(3).

⁴⁴ OAC §5101:1-39-27.3.

- e. Lump Sum Payments.⁴⁵ These are treated as income if they are made for two or more months, such as gifts, prizes, and awards. However, tax refunds, insurance policy surrenders, and real estate proceeds are resources.
- f. Life Estates.⁴⁶ If the life estate originates during the look back period and it is transferable, then it is an available resource unless it is exempt; if it is not transferable, it is an improper transfer. If a life estate is established prior to the look back period and it is transferable, then it is an available resource unless it is exempt; if it is not transferable, then it is a resource, but its value may be limited. If someone else established it and the applicant can sell it, then it is an available resource.

H. *Community Spouse Resource Allowance*

Medicaid permits the Community Spouse to keep a certain amount of non-exempt assets in addition to those that are exempt. This amount is known as the Community Spouse Resource Allowance (CSRA).⁴⁷ As of January 1, 2010, the minimum CSRA is \$21,912, while the maximum is \$109,560.⁴⁸ If the couple has non-exempt assets of \$43,824 or less, then the Community Spouse is entitled to the minimum CSRA of \$21,912. If the total non-exempt resources of the couple exceed \$43,824, then the CSRA is half of the total non-exempt resources or \$109,560, whichever is less. Therefore, if a couple has non-exempt assets that equal or exceed \$219,120, the largest CSRA they can receive is \$109,560. Amounts that exceed the CSRA must be utilized for the sole benefit of the couple, their legal obligations, or the acquisition and maintenance of exempt resources.⁴⁹ The assets that comprise the CSRA must be placed in the

⁴⁵ OAC §5101:1-39-27.5.

⁴⁶ OAC §5101:1-39-32.

⁴⁷ OAC §5101:1-39-36.

⁴⁸ Medicaid Eligibility Procedure Letter #41 issued by the Ohio Department of Job & Family Services on December 2, 2009.

⁴⁹ OAC §5101:1-39-07(G)(1)

sole name of the Community Spouse within twelve months of its determination.⁵⁰ Medicaid determines the CSRA based upon the assets the couple owned at the beginning of the first continuous period of institutionalization of the nursing home patient.⁵¹

I. *Gift Penalization*

The Medicaid rules discourage gifts. For Medicaid purposes, a gift is a transfer for less than fair market value.⁵² If there were no penalization of gifting, then persons facing a permanent stay in a nursing home would have a strong incentive to give away their assets so that Medicaid would pay for their care. This would be especially so if the nursing home resident is unmarried. After all, a nursing home cannot grant different levels of care to persons based on their method of payment. For unmarried, permanent nursing home residents there would be no benefit gained by keeping the assets.

Here is how Medicaid determines a penalty for gifts. When the Medicaid application is submitted, the caseworker will ask about transactions that occurred prior to this time. This is the “look back” period. The look back period is 36 months for transfers prior to February 8, 2006.⁵³ For transfers after this date, the look back period is 60 months. If the applicant made unusual gifts (normal charitable, birthday, and Christmas gifts don’t count) during the look back period, then the Medicaid official will combine the value of all gifts. Then, the caseworker divides this by the State’s average monthly nursing home cost, which Ohio sets at \$6023.⁵⁴ The result is the number of months during which Medicaid will not pay for the institutionalized person’s care in the nursing home. For example, if a person gives away \$60,230, then the person is ineligible for 10 months.

⁵⁰ OAC §5101:1-39-36.2(A).

⁵¹ OAC §5101:1-39-36(A).

⁵² Medicaid refers to a gift as an “improper transfer.” OAC §5101:1-39-07(B)(5).

⁵³ OAC §5101:1-39-07(B)(10)(b)(i). Subpart (ii) holds that gifts from a trust are subject to a 60 month look back period.

⁵⁴ 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.

Gifts that occur after February 8, 2006, are especially dangerous. On this date, a more stringent rule on ineligibility took effect.⁵⁵ For gifts made after this date, the penalty begins the date an individual receives nursing home care and would otherwise be eligible for Medicaid coverage.⁵⁶ Previously the penalty period began the date the first improper transfer was made. Thus, if a gift is made after February 8, 2006, and the person applies for Medicaid within 5 years of the transfer, then the ineligibility would not begin to run until the person was in a nursing home and would otherwise be eligible for Medicaid. Therefore, for gifts made on or after February 8, 2006, the Medicaid ineligibility period may not start to run for months or even years after the gifts are made. Of course, if 5 years elapse after a gift, then the look back period would not reach far enough to capture the transfer, and the gift would not trigger ineligibility.

Just because gifts less than 5 years old can trigger ineligibility does not mean one should not consider them. The opposite is true. A gifting plan that is carefully developed and executed can end up preserving a significant level of wealth. The key element is that the nursing home resident must have someone he completely trusts to implement the plan.

This point is worth repeating: The nursing home resident must have someone he completely trusts to run the plan. Once he makes gifts, the nursing home resident has no power to get the assets back. While the grantor is Medicaid ineligible, it is crucial that this trustworthy person use some of the assets to pay for his care. After several months of doing so, the nursing home resident should be able to reapply, then gain Medicaid eligibility. We call this process a “Spendedown.” I explain how it works in Planning Techniques. If done correctly, the nursing home resident will have Medicaid pay for his care and there will be a significant level of wealth left. If the gift recipient does not pay the nursing home during the ineligibility, then the grantor

⁵⁵ The more stringent changes occurred in February 2006 due to the Deficit Reduction Act of 2005 found in 42 USC §1396p. Ohio implemented this federal statute via OAC §5101:1-39-07(K)(2), which became effective on October 20, 2006.

⁵⁶ The ineligibility can also begin when the person would have been eligible to receive services under an HCBS waiver program, like PASSPORT. See OAC §5101:1-39-07(K)(2)(b).

may not receive the care he needs. Because of this risk, the integrity of the gift recipient is crucial. We emphasize this point in every case we handle.

Some gifts are permissible and do not cause ineligibility. Transfers of the home are permissible to the spouse (but restrictions on her subsequent transfer apply); a dependent child under 21, a dependent child who is blind or permanently and totally disabled; a sibling with a documented, legal interest in the home who resided there for at least a year before entry into the nursing home (Sibling Resident); and to an adult child who lived in the home two years immediately prior to institutionalization and whose care delayed the nursing home entry (Home Caretaker).⁵⁷ In addition, transfers of other property are permitted to the Community Spouse, a child who is blind or disabled (or a trust to benefit such a child), or to certain trusts to benefit a person under 65 who is blind or permanently and totally disabled.⁵⁸

In our experience, all transfers receive close scrutiny with a bias towards a gift determination. The regulations, which refer to gifts as “improper transfers,” require the grantor, when making the gift, to have the subjective intent of qualifying for Medicaid.⁵⁹ Realistically, though, the same regulations nullify this duty to ascertain the grantor’s intentions. This is due to a legal presumption that practically all transfers are improper.⁶⁰ Anything larger than a \$20 weekly church contribution or a \$50 Christmas, birthday, or wedding gift will raise the caseworker’s eyebrow. The unwritten rule, with few exceptions, is that regardless of the circumstances, all transfers to family members are gifts. All claims for a Sibling Resident or Home Caretaker exclusion are investigated. Such a claim, to succeed, must be well documented by doctor visits and proof of residence in the home. For transfers other than the home, even a well documented pattern of gifts for a significant time, in our experience, will not matter if the gifts are too large:

⁵⁷ OAC §5101:1-39-07(E)(1). Exemptions similar to these permissible gifts were already discussed in this article starting at Page 13.

⁵⁸ OAC §5101:1-39-07(E)(2).

⁵⁹ “An improper transfer means a transfer ... for the purpose of qualifying for [M]edicaid ...” OAC §5101:1-39-07(B)(5).

⁶⁰ OAC §5101:1-39-07(C).

the caseworker will count them as improper transfers. If too much money is involved, the caseworker will not consider the purpose of the gift. Instead, they rely on the legal presumption that nearly all transfers are gifts, which renders the grantor's intent irrelevant.⁶¹ No gifts, or family transactions, are certain to count as exempt transfers. Although one can rebut the gifting presumption by clear and convincing evidence,⁶² in practice it is very difficult to do so.

J. Recoupment

If Medicaid pays the nursing home costs of a person 55 or older, or of a person who is permanently institutionalized, then Ohio has some rights, when that person dies, to be paid back for the cost of their care.⁶³ Ohio may seek this recovery from any assets the nursing home patient owned or controlled at their death.⁶⁴ This right of recoupment applies to probate as well as non-probate assets.⁶⁵ There are exceptions that bar recovery from the surviving spouse, or surviving son or daughter who is under age 21, blind, or disabled.⁶⁶

VI. Moving on to Planning Techniques

I apologize for the complexity of this article, but there are a lot of things to keep in mind if one wishes to plan well for an extended nursing home stay. I discuss planning in a companion article, [Medicaid and Nursing Homes: Planning Techniques](#). You may review this advanced article on our website, www.lovettlawoffice.com, or you may contact our Tipp City office at (937) 667-8805, or our Columbus office at (614) 734-8364, and we will send you a copy.

⁶¹ OAC §5101:1-39-07(C).

⁶² OAC §5101:1-39-07(D).

⁶³ 42 USC §1396p(a) and (b) empower the states to seek recovery for amounts paid for nursing home costs.

⁶⁴ Ohio's rights to recoupment only reach to "the extent permitted by federal law." ORC §5111.11(B). 42 USC §1396p(b) limits recovery to the "individual's estate," which means the individual who received benefits. This leaves open the possibility that recovery may not come from the assets of the community spouse that survives the nursing home patient. As of January 2011, I found no Ohio cases that consider this possible limitation. One case holds the Ohio recoupment rights include the assets of the community spouse, but it does not consider the limitations set forth in ORC §5111.11(B) and 42 USC §1396p(b). This case, *Ohio Dept of Job and Family Services v. Tultz*, 152 Ohio App. 3d 405 (Summit Co. Ct. App. 2003), was decided before the 2006 and 2007 amendments of ORC §5111.11(B) and 42 USC §1396p(b). Thus, *Tultz* is of questionable authority on this point.

⁶⁵ ORC §5111.11(A)(1) and OAC §5101:1-38-10(B)(1). For the distinction between "probate" and "non-probate" assets, see Page 6.

⁶⁶ ORC §5111.11.