

# Medicaid Planning



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**Protecting Those Who Need It Most**

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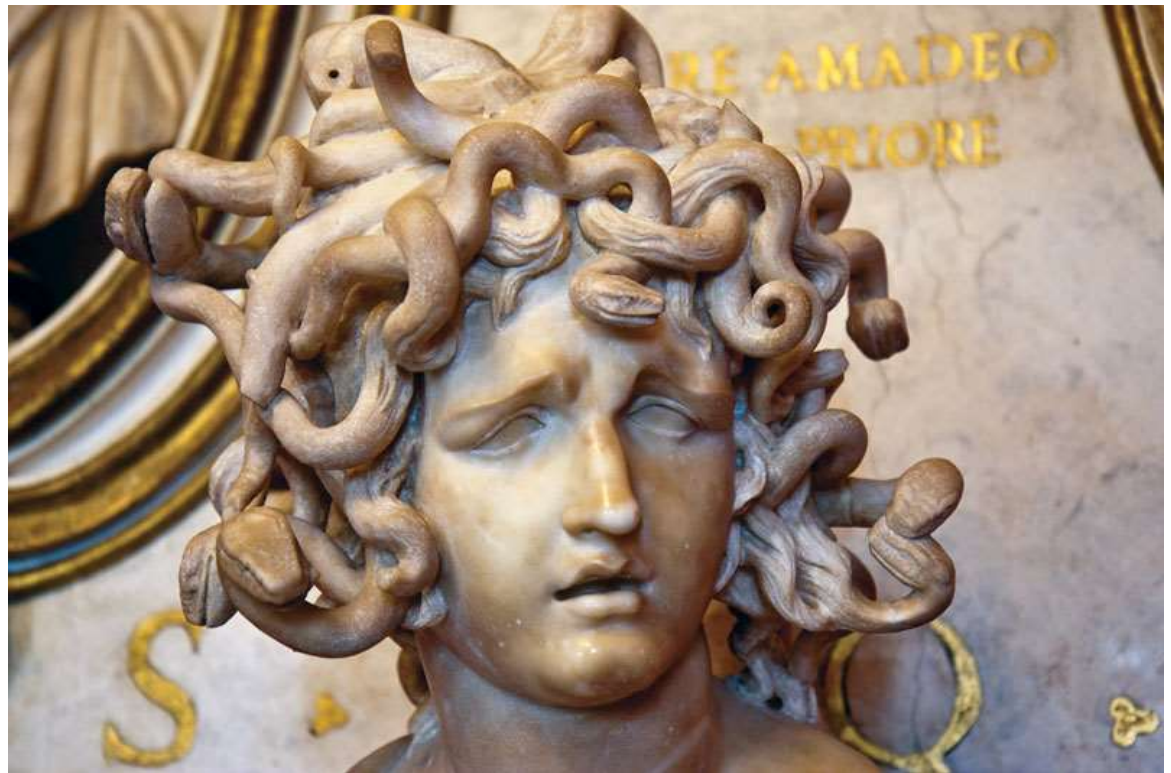
# Welcome to MEDUSA Planning .....



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# Welcome to MEDICAID Planning .....

- Try not to get snake-bit
- If you gaze upon it, you will turn to STONE



# The Medicaid Law is Confusing!

- “One of the most completely impenetrable texts within human experience” and “dense reading of the most tortuous kind”
  - Chief Judge Samuel J. Ervin, III  
(Son of Watergate Prosecutor, Sam Ervin)

Rehabilitation Association of Virginia v. Kozlowski  
42 F.3d 1444, 1450 (4<sup>th</sup> Circuit 1994)

# The Medicaid Law is Confusing!

- "This is a case that does not belong in this court. It involves three governmental agencies federal, state and city and centers about regulations so drawn that they have created a Serbonian bog from which the agencies seemingly are unable to extricate themselves."

- Judge Edward Weinfeld

Feld v. Berger

424 F. Supp. 1356, 1357 (S.D.N.Y. 1976)

# The Medicaid Law is Confusing!

- “As program after program has evolved, there has developed a degree of complexity . . . regulations which makes them almost unintelligible to the uninitiated . . . [a] draftsman who has gotten himself into a position requiring anything like [§ 139a(a)(10)(A)(ii)(VIII)(cc)] should make a fresh start.”

- Judge Henry Friendly  
Friedman v. Berger,  
547 F.2d 724, 727, note 7 (2<sup>nd</sup> Circuit 1976)

# Why Should CPAs Care?

- Since 1995, the number of people age 65 & over filing bankruptcy has tripled
- One of the fastest growing segments of people filing bankruptcy are widows
- One-half of 65 year-olds do not have **ANY** retirement funds
- 10,000 people per day turn 65 years old  
aka **the Silver Tsunami**
- A growing number of people do not have any family or friends to take care of them as they age  
aka **Elder Orphans**

# Why Should CPAs Care?

- Person may only meet 3-4 lawyers during their lifetime - usually during stressful or unpleasant circumstances
- *Please - no Thanos jokes about using the Infinity Stones to snap your fingers and make half the lawyers disappear*
- CPAs are **THE** Trusted Financial Advisor for many people
  - Better understanding of the numbers than **MANY** lawyers
  - Given a glimpse into the checkbook
  - Aware of retirement resources
  - Aware of insurance (health, life, property)



# What is MEDICAID?

- Federal program created in 1965
- MediCAID is **INCOME-BASED**
- MediCARE is **age-based**
- Does not provide services directly
- Does not reimburse individuals for out-of-pocket expenses
- Reimburses providers of medical services

# What is MEDICAID?

- In 2013, .....
  - 55 million people received benefits (17% of US population)
  - \$420 BILLION paid by Fed's and States
- In 2013, SoonerCare enrollment was 790,051 (20.5% of population)
- In July 2019, SoonerCare enrollment was 790,443 (20.0% of population)
  - Two-thirds were children
  - Of the one-third adults, how many Elderly or Disabled?

# What is MEDICAID?

Managed by States

- Federal government defines minimums
- States allowed to EXCEED minimums
- States allowed flexibility in implementation
  
- Oklahoma Unique – General Counsel of OK DHS has professional, cordial relationship with Medicaid Practitioners

# What is MEDICAID?

- This diversity among states makes it very difficult for MEDICAID Planners
- What works in one State may not work in another State
- IF CLIENT has MEDICAID PLAN, and MOVES into or out of OKLAHOMA, they need to call us immediately!
- Existing MEDICAID PLANS should be reviewed every 3 years

# Oklahoma Medicaid Expansion

- November 3, 2020 ballot?
- This measure adds a new Article to the Oklahoma Constitution. The new Article would expand Oklahoma's Medicaid program to include certain low-income adults between the ages of 18 and 65 whose income does not exceed 133% of the federal poverty level, as permitted under the federal Medicaid laws. Shall the proposal be approved?

# Oklahoma Medicaid Expansion

- Every \$1 spent by Oklahoma, Fed's would match with \$9
- 36 States + DC already participate
- Estimates indicate this would bring \$1 BILLION to Oklahoma
- But where would Oklahoma get \$111 MILLION to spend?
- No surprise that OU Medical System and other various Medical and Hospital Associations say it is a "shifting" of \$\$\$ they are already spending

# 4 Types of MEDICAID Plans

1. NO Plan at all – often leads to #4 when needed
2. SELF-DESIGNED PLAN
3. PRE-PLANNING
  - Most flexible
  - Most cost-effective
4. CRISIS PLANNING
  - Most complicated
  - Most expensive

# Self-Designed Plans are a DISASTER

- Banks accounts held in Joint Tenancy
- Comingling of funds a problem
- Real Estate held in Joint Tenancy
- Transfers made for less than Fair Market Value
  
- DENIAL by Medicaid
- Participation is COST-PROHIBITIVE



# Medicaid Pre-Planning - Examples

- Single Person – Recently widowed with paid-off house
- Couple in their Late 60's – Just retired with \$500,000 in savings and IRAs, and paid-off house
- Special Needs/Supplemental Needs person – Parents want to provide for after their death

# Medicaid Crisis Planning - Examples

- Husband is recovering from a stroke  
Prognosis is uncertain  
Most of IRA accounts held in Husband's name
- Applicant makes \$1.75 above the income limit

# Before Medicaid Planning .....

- It helps to have a Medicaid-compatible Estate Plan
- Medicaid Planning is used to solve ADVANCED problems
- A Medicaid-compatible Estate Plan provides a solid foundation to build on

# 4-SQRE Estate Planning©

	Before Death	After Death
Body	<b>S</b> Sick	<b>Q</b> Quick
Property	<b>R</b> Riches	<b>E</b> Estate

# 4-SQRE Estate Planning©: S=Sick

## Body – Before Death

1. Statutory “Living Will”  
aka Oklahoma Advanced Directive for Health Care
2. Medical Durable Power of Attorney  
Supersized “Living Will”
3. HIPAA Authorization

# 4-SQRE Estate Planning©: Q=Quick

## Body – After Death

- Very few legal requirements
- Burial, cremation, other?
- Service or No Service?
- Family-only or Open-to-the-Public

# 4-SQRE Estate Planning©: R=Riches

## Property – Before Death

1. Financial General Durable Power of Attorney  
- May include some health care provisions
2. Guardianship – Monitored by the District Court
3. Revocable Trust

# 4-SQRE Estate Planning©: E=Estate

## Property – After Death

1. Probate – Testate or Intestate
  - Testate (WITH a will) - Strongly Recommend a POUR-OVER WILL
  - Intestate (WITHOUT a will) - Uses the default setting as provided in the Oklahoma Probate Statutes)
2. Revocable Trust



# Main Objective

- Use Medicaid Plan to **COMPLIMENT** Estate Plan
- What are the **S=Sick** GOALS?
  - In-home care? Institutional care?
  - Transition from one level of care to another? How slow/fast?
- What **R=Riches** RESOURCES are available or need to be conserved, or protected?
- Implement Estate Plan triggers, i.e. appoint Health Care Proxy, appoint Attorney-in-Fact, resign from Trust etc.
- Prepare & Implement **Medicaid ACTION Plan**

# Medicaid Action Plan



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# Test #1 – Medical Eligibility

## The NEEDS Assessment for LTC

- 65 years old or Disabled
- Level of Care Requirement – if in Nursing Home, you very likely meet this requirement
  - Skilled
  - Intermediate
  - Custodial care level
- Need assistance with 3 of 6 Activities of Daily Living (ADL)

# Activities of Daily Living (ADL)

Need 3 of 6 from the list:

- Eating
- Walking
- Bathing
- Dressing
- Toileting
- Transferring (i.e. bed to chair)

OK DHS has final decision on ADL

# Disability for Medicaid Purposes

- The physical or mental incapacity to perform any gainful employment, which condition is expected to last for at least one year.
- Same definition as Social Security Administration
- Someone receiving SSDI (Social Security Disability Income) or SSI (Supplemental Security Income) is disabled for Medicaid purposes
- NO SSA determination, then Medicaid decides

**Once determined you NEED Medicaid LTC, then .....**

## Test #2 – Resources (Net Worth)

- Cannot exceed \$2,000 for individual
- Cannot exceed \$3,000 for couples
- Of “**COUNTABLE**” assets – Term of art
- Not adjusted for inflation since 1989
- Inflation adjusted to 2019 = \$4,170 and \$6,255

# Non-Countable or Exempt Assets

- Home the person lives in – Equity >\$560,000???
- Home person moved out of but “**INTENDS**” to return to within 12 months – Joe Dewey’s Opinion
- Funds from sale of home if reinvested within 90 days
- Household goods
- Furniture & Appliances
- Clothing & Personal Effects
- Automobile
- Prepaid burial policies purchased 30+ days
- Other property essential to means of self-support i.e. tools & machinery
- LOTS MORE .....

# Countable Assets

- Cash
- Checking accounts
- Savings accounts
- Certificates of Deposit
- Money market accounts
- Stock and Bonds
- Retirement accounts i.e. 401(k), IRAs, 403(b)
- House in REVOCABLE TRUST
- Annuities\* (Very cool & complex!)
- Accrued CASH of life insurance policies
- Vacation properties
- Other real property
- Life estates in property
- Boats, RVs, motorcycles & other vehicles
- LOTS MORE .....



# “Spend-Down” of Assets

- Purchase of **EXEMPT** assets
  - Furniture & Appliances
- Pay-off debts
  - Mortgage
  - Automobiles
  - Credit Cards
- Household Repairs or Remodeling
- Beware of GIFTS - Don't help with Spend-Down

# Practice Tip

- Trusts are treated differently by Medicaid
- Trusts funded by OPM (Other People's Money) are NOT INCLUDED as a Resource
- Rarely recommend a Joint Trust for Spouses
  - Husband & Wife Family Revocable Living Trust
- Instead, create a separate trust for each spouse
  - Husband Family Revocable Living Trust
  - Wife Family Revocable Living Trust

## Practice Tip (continued)

- Why?
- Include SUPPLEMENTAL NEEDS PROVISION in each Trust
- At death of first spouse, determine if Medicaid-funded LTC a possible need of Surviving Spouse
- If YES, then keep ASSETS in the TRUST so won't be included as a RESOURCE!!!
- Even better if the ASSETS earn \$\$\$
- Allows family to shelter lots of \$\$\$ of otherwise countable resources AND income



# Survey Question

## How Many People Have a Joint Trust?

- **A: YES**
- **B: NO**
- **C: DON'T KNOW**
- **D: DON'T HAVE A TRUST**

# Test #3 – Monthly Income

- ..... “That gross gain or gross recurrent benefit which is derived from labor, business, property, retirement and other benefits, and any other form which can be counted on as currently available for use on a regular basis.”
- **EVERYTHING** unless specifically excluded .....

# Test #3 – Monthly Income - Included

- Interest
- Dividends
- Rents
- Salary
- Royalties
- Inheritances
- Alimony
- Annuity Installments
- VA Benefits
- Trust Stipends
- Life Insurance Proceeds
- Pensions & Retirement Benefits
- Social Security Benefits – Add back Part B!
- LOTS MORE .....

# Test #3 – Monthly Income - Excluded

- Loan Proceeds
- Indian Payments distributed by the Secretary of the Interior (BIA) or by the Tribe
- Low Income Heating and Energy Assistance Programs (LIHEAP) payments for Energy Assistance

# Test #3 – Monthly Income - Excluded

- Supplemental Nutrition Assistance Benefits (SNAP i.e. food stamps; now a debit card)
- Benefits from State and Community Programs on Aging
  - Nutrition programs i.e. Meals-on-Wheels, Sr. Center Group Meals
  - Case Management
  - Health promotion and disease prevention
  - In-home services
  - Transportation



## Test #3 – Monthly Income

- No more than \$2,313.00/month – Single
- No more than \$4,626.00/month – Couple
- 1 penny more than “income cap” – **YOU LOSE!**
- **Anyway out of the trap?**

# Kansas Solution

- “Medically Needy” or “Spend-Down” approach
- Allow client to “Spend-Down” the income until reach State’s income standard for eligibility is reached
- **GREAT SOLUTION** for clients with high medical expenses
- Waa! I want one!!!

# Qualified Income Trust (QIT)

- Aka (d)(4)(B) Trust, or “Miller” Trust  
Miller v. Ibarra, 746 F.Supp. 19 (Colo. 1990)
- For applicants with income between \$2,313 and \$4,585
- The Trust is **IRREVOCABLE**
- Open a CHECKING account – **ALL** income is deposited
  - \$\$\$ paid to nursing home, personal needs allowance, spouse, and approved medical insurance
  - Remaining trust assets are payable to Oklahoma @ death
- No need to accumulate \$\$\$ in Trust – Just Spend It!

# (d)(4)(A) Trusts

- Also known as .....
  - First-Party Special Needs Trust
  - Medicaid Disability Trust
  - Medicaid Payback Trust
  - Self-Settled Trust
- Funded only from beneficiary's assets
  - Disabled person inherits money
  - Disabled person receives a court settlement
- Allows beneficiary to immediately **QUALIFY** for Medicaid

## (d)(4)(A) Trusts (continued)

- Meet SSA definition of “disabled”
- Solely benefit a disabled person that was >65 years old when trust ESTABLISHED and FUNDED
- Established by disabled beneficiary, or beneficiary’s parent, grandparent, guardian, or a court
- Only contain beneficiary’s money
- **IRREVOCABLE !!!**
- After beneficiary’s death, MEDICAID is paid back for funds expended after trust established

# Pooled Trusts

- No individual trustees
- Pooled trust run by a non-profit trustee
- Trustee manages the \$\$\$ of many beneficiaries
  
- No Pooled Trusts headquartered in Oklahoma
  - ARCare (Kansas)
  - Midwest Special Needs Trust (Missouri)

# ABLE Act

- Established in 2014 – Section 529**A**
- Contributions similar to Section 529 College Plans
- Eligible person must be severely disabled prior to age 26
- Blind, or
- Medically determined physical or mental impairment which can
  - Result in death
  - Expected to last for continuous period of not less than 12
- Very complex - need separate presentation

# Community Spouse Resource Allowance (CSRA)

- Community Spouse (CS) = Non-institutionalized spouse of Medicaid applicant
- For 2019,
  - Minimum CSRA = \$25,284
  - Maximum CSRA = \$126,420
- Examples
  - \$25,000 – CS gets all the marital assets
  - \$500,000 – CS gets \$126,420; Spend down of remaining \$373,580



# Community Spouse Resource Allowance (CSRA)

Possible to receive more than *MAXIMUM*, if .....

- Court order of support requires a greater **RESOURCE** limit
- CSRA is inadequate to generate sufficient income to meet Minimum Monthly Maintenance **INCOME** Allowance (MMMIA)
  - Revised upwards after a fair hearing
  - Caseworker cannot make
  - In other words, **RESOURCES** have a **LOW RATE OF RETURN**

# Minimum Monthly Maintenance NEEDS Allowance (MMMNA)

- Spousal impoverishment rules establish the MMMNA
- Community Spouse allowed to keep all of his/her income!
- If CS's gross income is less than \$2,113.75, then CS may keep portion of the Medicaid Applicant's income
- The amount is updated each July 1<sup>st</sup>

# CS Monthly Housing Allowance

- Aka Shelter Allowance
- Aka Excess Shelter Allowance
- As of July 1, 2019, the Shelter Allowance is \$634.13
  - Includes Rent, Mortgage, Property Taxes, & Insurance
- If ACTUAL Shelter Costs > than Shelter Allowance, then MMMNA is increased
- Standard Utility Allowance added to the Monthly Housing Allowance (\$355 for Oklahoma in 2019)

**BUT .....**

# Maximum Monthly Maintenance Needs Allowance

## TOTAL of .....

- MMMNA = \$2,641.25
- Monthly Housing Allowance = \$634.13
- Standard Utility Allowance = \$355.00

(Total so far = \$3,630.38)

- Actual amount of Shelter Costs

**CANNOT** exceed \$3,160.50

The **Maximum** Monthly Maintenance Needs Allowance

# Test #4 – Transfer Eligibility

- In 2006, the lookback period lengthened from 36-months to 60-months
- Applicant **MUST** provide
  - Bank statements
  - Credit card statements
  - Brokerage statements
  - Other real estate and financial information

# Lookback Gotchas

- Joint Tenancy of Assets aka Comingling of Funds
  - Bank Accounts
  - Real Estate
- Using Mom's credit card to buy groceries at Sam's
- Transfers for less than Fair Market Value (FMV)  
i.e. Gifts made within 60-month look back period
- Be VERY CAREFUL with TIMING of application

# Lookback Gotchas

- Parent lived with Child for 10+ years
- Child wrote a check on joint bank account to pay for remodeling expense (i.e. widen doors for wheelchair)
- Child would alternate between Child's credit card & Parent's credit card when bought groceries
- Child wrote personal check for electric; Child wrote check on joint bank account to pay for water and gas
- Medicaid want Child to REIMBURSE Parent before Medicaid eligible

# Gifts – Transfers for less than FMV

- Two gifts of \$250,000 (\$500,000 total) made to each child on January 1, 2015
- Nursing Home files application on December 1, 2019 (the 59<sup>th</sup> month)
- Total amount of gifts (\$500,000) divided by Divestment Penalty Divisor - \$159.74 per day
- Disqualified for 3,130 days or until \$500,000 paid back!

■ **BIG OOPS!!!**



# Don't Make the NAUGHTY List!!!



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# Estate Recovery Rules

- Federal law **MANDATES** that States seek recovery against the **ESTATES** of certain Title XIX members who received medical care and were 55 years of age or older
- You have an **ESTATE** that a Creditor can file a claim against when you file a **PROBATE** petition
- Keep it in a trust!  
But **EVERYTHING** in a trust is a **COUNTABLE** asset
- Includes real and personal property, tangible and intangible, and, at the State's option, LTC benefits

# Estate Recovery Rule

Recovery can be sought for .....

- Nursing facility services
- Home and community-based services
- Related hospital services
- Prescription drug services
- Physician services
- Transportation services

# Estate Recovery Rules

The Government must prove .....

- Government paid expenses covered by Medicaid lien law
- Circumstances are such that a lien attaches as a matter of law
- No superior claims or liens on the property
- Amount of the lien claimed

If meet burden, then **PROBATE COURT** orders the Personal Representative to pay the Government from available assets

# Estate Recovery Rules

Oklahoma is PROHIBITED from making Estate Recoveries

- During the lifetime of surviving spouse (regardless of where live)
- Surviving child under age 21, blind or disabled
- Sibling with equity interest lived in the home for at least 1 year prior to Medicaid recipient was institutionalized
- Adult child lived in the home for at least 2 years immediately before Medicaid recipient was institutionalized and prove assistance delayed admission

# Estate Recovery Rules - Strategies

- Plan ahead!!!
- Plan ahead!!!
- Plan ahead!!!
- **Caregiver Agreement** – helps to establish a claim that is often times superior to Medicaid
- Use **IRREVOCABLE** trusts
  
- **AVOID** Probate

# BONUS ROUND

## QDRO without a Divorce

- Qualified Domestic Relations Order
  - Division of retirement accounts between divorcing couple
  - The division is considered a “non-taxable” transfer
- QDRO statute only requires a “petition” to be filed
  - No requirement that it be a “divorce” petition
- Division of assets only needs to be **EQUITABLE** not **EQUAL**



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