CHRISTIAN LEGAL SOCIETY
2023 NATIONAL CONFERENCE

Medicaid Planning
Opportunities, Challenges and Pitfalls

Presented and Materials Prepared by

John E. Laboe, Esq. [1]

Laboe & Tasker, PLLC

October 7, 2023

LABOE & TASKER PLLC
Office: (603) 224-8700 / Fax: (603) 225-5223
6 Loudon Road, Suite 502 Concord,
New Hampshire 03301
www.laboelaw.com

[1] Attorney Ann N. Butenhof contributed significantly to these materials.

I. Introduction to Medicaid.

A. Creation of the Program. In 1965, Congress passed amendments to the Social Security Act to establish Medicaid, a federal/state health insurance program that provides medical assistance for low-income people. [2] The program is administered in New Hampshire by the New Hampshire Department of Health and Human Services (DHHS), under the regulatory supervision of the U.S. Department of Health and Human Services by the Centers for Medicare and Medicaid Services (CMS). The applicable statutes and regulations for the Medicaid Program are Title XIX of the Social Security Act, 42 U.S.C.§1396, et seq. and 42 C.F.R. pts. 430 – 457. **This is the only governmental program that pays for long-term custodial nursing home care.**

B. Find the Law at the State Level. One of the most important sources of the law in Medicaid practice is the administrative rules developed by each of the States. Each State is tasked with complying with and implementing the federal law and regulations. They do so by developing their own regulations to that end. So, for example, in New Hampshire, the relevant administrative rules are found at N.H. Administrative Rules He-W §§600 , et seq., 800 , et seq., and are available at the New Hampshire State Library, the Office of Legislative Services, and on the New Hampshire State website (www.state.nh.us.). The financial eligibility polices which will be of chief concern to the estate planner, are located in the Medical Assistance Manual (M.A.M.), which is one of DHHS' official policy manuals. The M.A.M. is available at each of the twelve local district offices of the Division of Human Services as well as over the internet.[3]

[2] Content of this presentation is based on the author's experience in the State of NH only, so applicability to other States may vary.

[3] Http://www.dhhs.state.nh.us/AAM_HTM/NEWAAM.HTM

This presentation does not address the eligibility rules for most Medicaid programs, but focuses solely on Medicaid eligibility for long-term nursing home care.

II. Eligibility Criteria for Medicaid

To be eligible for Medicaid's long-term nursing facility coverage, an individual must be both medically and financially eligible. To be medically eligible, the individual must meet the required medical standard of need for a nursing home. More specifically, the individual must require 24-hour/day care for one or more of the following purposes, as determined by a registered nurse or DHHS designee:

(1) Medical monitoring and nursing care which requires the skills of a licensed medical professional;

(2) Restorative nursing or rehabilitative care with patient-specific goals;

(3) Medication administration; or

(4) Assistance with 2 or more activities of daily living.

In short, for an individual to qualify for Medicaid long-term nursing home coverage, that individual must medically need to receive nursing facility level care. If the individual is under the age of 65 and in a nursing facility setting the individual also must meet the medical eligibility criteria of the Aid to the Permanently and Totally Disabled Program (APTD), as defined by N.H. RSA §167:6, VI, or another Medical categorical group. Nursing facility services are a **mandatory benefit** for all Medicaid categorical groups, not just those eligible under Old Age Assistance (OAA) or APTD.

Financial eligibility looks at both an individual's monthly income as well as countable resources. Therefore, a practitioner must examine what money the individual receives on a monthly basis, plus assets belonging to that individual and their spouse.

A. Income Eligibility. In New Hampshire, an individual in a nursing home will be *income eligible* for Medicaid if the individual's gross income is lower than the Medicaid reimbursement rate for the particular nursing home in which the

individual resides. Importantly, the income of the Medicaid applicant's community spouse is not considered when determining the applicant's income eligibility. Given the scope of this presentation, the finer points of the income eligibility will not be further addressed.

B. Resource Eligibility. In order to be *resource eligible* for Medicaid nursing home coverage, an unmarried person can have no more than $2,500 in "countable resources." A single Medicaid applicant whose resources exceed this $2,500 limit will not be eligible, and is required to apply or re-apply once the resources have been "spent down."

Note that an otherwise eligible recipient can lose coverage if the recipient's assets increase in value above the $2,500 limit for 30 or more days. For example, if a person receives an inheritance, his/her assets may increase substantially. Excess resources must be spent down in order to re-qualify for services. Often a recipient's monthly income (i.e. Social Security and/or pension payments), or accrued interest will bring the recipient's account balances to an amount over $2,500 for a short period of time. Monthly income is not considered a "resource" however, during the same month in which it is received. Therefore, having account balances over $2,500 due to monthly income deposits will not disqualify a recipient if they are spent down to below $2,500 within 30 days.

Without trying to be exhaustive in the listing here, there are categories of assets the State will not count when determining Medicaid eligibility, for example:

(1) Real estate not occupied by the applicant or the applicant's spouse that is producing sufficient income to meet the property's expenses (a/k/a "income producing property");

(2) Real estate necessary as a residence for the applicant's spouse, or blind, disabled or minor child;

(3) Jointly owned real estate when the co-owner refuses to sell;

(4) Inaccessible resources – real or personal property whose value is legally unobtainable, such as real or personal property jointly owned by the

applicant with one or more persons, if the terms of ownership preclude unilateral sale;

(5) Items necessary for everyday living including (without limitation) furnishings, appliances, jewelry and the like;

(6) One motor vehicle;

(7) Tools, equipment, farm machinery, livestock.

C. A Few Notes on the Treatment of Real Estate. Seemingly unique to the State of New Hampshire, any real property, including the principal residence, is a countable resource if title is held by a revocable trust created after August 10, 1993. (Different rules apply to irrevocable trusts). In order for the residence in the Trust, occupied by spouse to be sheltered, record title must be transferred out of the trust and into the name of the spouse, individually, in order to become non-countable. After the applicant's eligibility is established, the residence can go back into the trust.

Outside of the context of married couples where one of the marital partners is still occupying the property, a single applicant that would be otherwise eligible for Medicaid, but for owning real property, will be granted Medicaid immediately, but will be required to dispose of the property within six (6) months. This six-month grace period can be extended if the applicant demonstrates a good faith effort to sell. Once the property is sold, the net proceeds are a countable resource which may render the recipient ineligible for Medicaid until the proceeds are spent down..

III. Resource Allocation between Spouses

Although many elderly couples have countable resources in excess of the $2,500 ceiling, very few have enough monthly income to absorb an average nursing home bill. These clients need advice about how to qualify the applicant spouse for Medicaid, without destroying the financial security of the at-home spouse. The U.S. Congress has on several occasions legislated to better protect married couples,

including those provisions created with the enactment of the Deficit Reduction Act of 2005.

The current rules on resource allocation between spouses foreclose the sheltering of assets through transfers between spouses or marital agreements by counting all non-exempt assets belonging to the spouses, regardless of the identity of the owner, or the form of ownership, or the presence of pre- or post -marital agreements. Therefore, a non-applicant spouse's separate assets are deemed available to the unhealthy spouse, without regard to the length of time the assets have been segregated and without regard to the presence of an otherwise valid pre- or post-marital agreement to the contrary. The law does not allow any exception for spouses who have separated, or for spouses in second marriages with separate assets accumulated prior to the current marriage. Thus, prenuptial agreements (or their equivalent) do not protect a spouse from having his or her assets counted (and potentially consumed for care costs) if the new spouse falls ill and seeks Medicaid coverage.

Currently, New Hampshire permits the non-applicant (or "community") spouse to retain one-half of the countable assets, up to $148,620, but no less than $29,724.

Both the minimum and the maximum are scheduled to increase each January in accordance with increases in the federal consumer price index (CPI). For couples with countable assets above $297,240, the law seems to require (but only at first blush) all but $148,620 of the assets, plus $2,500 (the institutionalized spouse's permitted resource limit), be spent before the institutionalized spouse can obtain Medicaid coverage for nursing home care. Fortunately, when the law is read in its totality, there is quite a bit that can be done, readily available and encouraged by the law itself.

A. "Spending Down" Resources. DHHS's seeming demand that the couple spend down a substantial portion of their joint marital assets, the choices

on how to achieve the spend down include some that allow the at home spouse to retain most of the targeted spend down for his/her financial security. In short, there are many appropriate options for meeting the Medicaid spend down requirement other than simply privately paying the nursing home $12,000, or so, per month until the excess resources have been depleted.

The transfer-of-assets rules are not violated when excess resources are spent down by purchasing, remodeling or repairing a home for the community spouse, acquiring a new vehicle, paying off a mortgage; purchasing new furniture or appliances for the home or the nursing home, buying new clothes; or setting up a prepaid irrevocable funeral plan.

Big ticket items that are permitted include purchasing an immediate annuity (a so-called "Medicaid Qualified Annuity") that will generate income for the at-home spouse, although the annuity's payout period may not exceed the expected life expectancy of the annuitant. Also, the at-home spouse can acquire income producing real estate. There is no dollar limit imposed on either the annuity or the income-producing real estate.

The "Medicaid Qualified" Annuity has a number of features including (for example):

1. Payout must be "actuarially sound";
2. The stream of payment must be "even" without a large balloon payment at the end;
3. The payout period cannot be for longer than the projected longevity of the community spouse, determined by reference to the applicable Social Security Administration life expectancy table; life expectancy is conceptual in this application and has nothing to do with the individual's unique medical conditions, if any.
4. Should the community spouse die before the final payment has been made, there will be a death benefit, a remainder value, in the annuity

policy which must be payable to the State up to the total amount of medical assistance paid on behalf of the institutionalized spouse. To the extent that there is remainder value that exceeds what is owed to the State, it goes to the designated beneficiary chosen by the community spouse.[4]

B. The Importance of a "Resource Assessment." The law provides that either spouse may request an "assessment" or inventory of the assets at the beginning of either spouse's "first continuous period of institutionalization."[5] The resource assessment calculates the total value of the couple's assets and each spouse's share. It is a crucially important planning device for the couple and their counsel, because the couple may expend more assets than necessary, or protect less of their resources than the law allows. After this "snapshot" of the assets is taken, the excess assets, if any, must be reduced before Medicaid eligibility is established. The community spouse's protected share of the resources is commonly known as a "spousal resource allowance."

The community spouse's resource allowance and the spend down amount ought to be calculated, ideally, before the couple begins to deplete their assets by paying nursing home bills thereby protecting a more significant portion of the couple's original assets. As a caveat, however, if an influx of additional assets is anticipated, the resource assessment should be delayed. If the couple's countable assets increase between the time of the resource assessment and the Medicaid application, the community spouse's protected share will not be re-calculated, and the additional excess resources also will have to be spent down.

Once the institutionalized spouse establishes eligibility for Medicaid, there can be no further consideration of the community spouse's resources. Post-eligibility changes in the community spouse's financial status are irrelevant to the applicant's on-going entitlement to Medicaid benefits. Specifically, post-

[4] 42 U.S.C.§1396p(c)(1)(F).
[5] 42 U.S.C. §1396r-5(c)(1)(B); A.A.M. . §. §417, 419.

eligibility increase in the assets of a community spouse through inheritance, the sale of property, stock market increases, etc., will not jeopardize the Medicaid eligibility of the institutionalized spouse, and the community spouse will be able to retain these new assets. Should the community spouse, him/herself later become institutionalized, all he/she has at that time is exposed to possible consumption for the private pay of her nursing home costs. That would include any Medicaid Qualified Annuity that is still in the payout period.

In its simplest conception, the importance of the resource assessment is that it gives us the "spend down." From there the community spouse and her planners examine what options are available.

IV. **Transfer of Asset Rules – the 5-Year Look Back**

The Deficit Reduction Act of 2005 (the "DRA") mandates a 60-month "look back" period for all transfers of assets by the applicant or spouse. The "look-back" period applies to transfers that took place within the 60-month period immediately prior to filing the Medicaid application.[6]

The disqualification period will not start to run until the applicant is "spent down", is otherwise financially and medically eligible and has filed an application for Medicaid. The penalty period does not start running from the time of the gift transfer (as was the case in the earlier law).

While an applicant must report all transfers made within the "look-back" period, not all such transfers are disqualifying and the length of any disqualification period depends on the value of the asset that was transferred. The actual penalty period for any disqualifying transfer for less than market value is calculated by dividing the total uncompensated value of the asset by the average monthly "private pay" nursing home rate in the state.[7] The average

[6] 42 U.S.C. . §1396p(c)(1)(B)(ii).
[7] 42 U.S.C. . §1396p(c)(1)(E)(i)(1).

monthly private pay rate for nursing home care in New Hampshire is currently $11,277.91.(As of January 2023). Medical Assistance Manual, Appendix A.

By way of illustration, a gift of $100,000 in value, if made within 5 years of applying for Medicaid, will result in a penalty "disqualification" of 8.9 months. The penalty will not be invoked if the applicant can demonstrate "the assets were transferred exclusively for a purpose other than to qualify for medical assistance." 42 U.S.C. § 1396p(c)(2)(C)(ii). The Medicaid laws presume that transfer made for less than adequate consideration were made for the purpose of qualifying for Medicaid, and thus are disqualifying. This presumption may be rebutted, although as a practical matter, it may be difficult to do so and there is no way to predict how the State will interpret the evidence.

Collaterally, the New Hampshire legislature has created a statutory liability of the recipient of the gift and has made the donee personally liable for the repayment. NH RSA 151-E:19. The nursing home caring for the applicant as its resident has standing to bring the action. The donee's ignorance of the implications of the gift, alone, will not be any kind of defense. The donee's practical innocence of any knowing wrong-doing is not to be found in the statute as a basis for exoneration.

V. Sample Text in Revocable Trust Instruments and Financial Durable Powers of Attorney for Medicaid Planning

1. Simplest Form of Trustee Empowerment to Do Medicaid Planning.

> The Trustee is further empowered to effect the amendment of this Trust to disentitle either or both Grantors from receiving part or any benefit from the Trust property for the specific purpose of making a Grantor eligible for Medicaid or any other public assistance program. To this end, the Trustee is specifically authorized to make gifts to any of the potential beneficiaries referenced in Section 3.3 below for the specific purpose of achieving such eligibility.

2. More Complex and Articulated Version Trustee Empowerment

Medicaid Related Planning Options. The Trustee is further empowered to effect the amendment of this Trust to disentitle either or both Grantors from receiving part or any benefit from the Trust property for the specific purpose of making a Grantor eligible for Medicaid or any other public assistance program. To this end, the Trustee is specifically authorized:

a) to disentitle an institutionalized Grantor from having any beneficial interest in the trust corpus or income and shifting assets to the other Grantor that continues to live independently by means of a Medicaid Qualified Annuity, for the specific purpose of accelerating the date upon which the institutionalized Grantor's Medicaid eligibility can be achieved;

b) to retain a reserve of sufficient assets (taking into account projected income and long term care policy proceeds available) for the Grantors in order to cover 5 years worth of long term care costs and to presently make the gifts of the balance of the trust corpus to the beneficiaries and in the manner specified in Article III in accordance with the terms set forth in a certain Estate Distribution Agreement dated July 30, 2014, for the specific purpose of accelerating the date upon which the Grantor(s)' Medicaid eligibility can be achieved; or

c) to make gifts to any of the potential beneficiaries referenced in Article III, below for the specific purpose of achieving such eligibility. This power shall include, but not be limited to, the commencement or continuation of a gifting program on behalf of a Grantor, whether or not the amount of the gift to any person is limited under the then current exemption under Internal Revenue Code §2503(b). In the event any income or principal is paid or applied to any person other than the Grantors during the life of either Grantor, the Grantors acknowledge that such amount shall be deemed to have been paid first to the Grantors and subsequently paid by the Grantors to such person even though for administrative convenience such payment is made directly from the Trust.

Nothing herein shall be deemed to limit the Trustee's use of any other available means to shelter assets or income.

SPECIAL PLANNING NOTE: Although not expressly mentioned in this text, the planning lawyer needs to be aware that gifts to Special Needs Trusts are allowed without penalty to the donor and are not

subject to the 5 year look-back rule.

3. **<u>Language in Financial Durable Power of Attorney to Empower Medicaid Planning</u>.**

Power to Make Gifts.

My Attorney-in-fact shall have the power to make gifts of my assets to such persons and institutions as shall appear to my Attorney-in-fact to be consistent with the pattern of giving set forth in the "Husband and Wife Joint Revocable Trust" created June 17, 2023 as it may be amended from time to time, or as shall be appropriate to reduce or eliminate Federal or State estate or inheritance taxes on my estate, or to reduce the exposure of my estate to nursing home expenses, or to gain my eligibility for local, state, or federal public assistance programs such as Medicaid. In making gifts hereunder, my Attorney-in-fact shall be mindful of transfer tax considerations, including, without limiting the generality of the foregoing, the transfer tax exclusions available under Internal Revenue Code Section 2503(b) and Section 2503(e); provided that my Attorney-in-fact may make gifts beyond the exclusion amount if deemed advisable. If my Attorney-in-fact makes gifts to minors, such gifts may be made directly to the minor, to a parent, guardian or next friend of the minor, or under the Uniform Transfers to Minors Act.

Power to Make Gifts to Himself or Herself.

I specifically authorize my Attorney-in-fact to make gifts to himself or herself, directly or indirectly, in accordance with the standards set forth in the preceding paragraph, provided however that prior to making any such transfer, my Attorney-in-fact shall first obtain my prior written consent to the gift. If I am not capable of giving such prior written consent, then my Attorney-in-fact shall instead obtain the prior written consent of a person other than my Attorney-in-fact who would have a substantial interest in the transferred property if I were to die immediately before the gift was made. In the event that I am not capable of giving consent to the transfer and there is no person other than my Attorney-in-fact who would have any such substantial interest in the transferred property, then (and only then) my Attorney-in-fact may make gifts to himself or herself without prior consent of any other persons. **Notwithstanding the foregoing, prior written consent is <u>not</u> required for gifts made to or for the benefit of my spouse, Grantor's Wife.**

SPECIAL ESTATE PLANNING CAVEAT

Historic gifting powers in Power of Attorney instruments were limited (based on now obsolete estate and gift tax law) to an annual restriction of the size of the gift to any single donee, in any single calendar year to the greater of $5,000 or 5% of the trust corpus. Unfortunately, lawyers inexperienced in this area of the law unwittingly continue to recite this limitation in the text of the Power of Attorney's text. This limitation has no purpose anymore and is utterly destructive of the agent's ability to take advantage of many of the Medicaid asset sheltering options and should be deleted from the gifting provisions altogether.