2016

Medicaid Planning in Idaho

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Recommended Citation
52 Idaho L. Rev. 507 (2016)

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FULL CITATION:

John A. Miller & Aaron D. Roepke, *Medicaid Planning in Idaho*, 52 IDAHO L. REV. 507 (2016).

MEDICAID PLANNING IN IDAHO

JOHN A. MILLER* & AARON O. ROEPKE**[1]

TABLE OF CONTENTS

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I. INTRODUCTION AND OVERVIEW: MEDICAID NURSING HOME AND HCBS PROGRAMS

In the United States Medicare provides near universal government sponsored health insurance for the elderly. This system has one very large gap. It does not pay for custodial care.[2] Instead custodial or long term care is regarded as a matter of personal responsibility. Since the costs of such care can easily exceed $8,000 a month, the disabled elderly typically become impoverished over time.[3] It is at this point that another federal program, Medicaid, enters the picture. Medicaid will pay the excess long term care costs of an impoverished disabled person. Medicaid is federally funded but relies on the states to administer the program and the states, thus, serve as the gatekeepers for the Medicaid system. Within the general constraints imposed by federal law, it is the states who determine if a person qualifies for this means tested assistance, and it is the states who disburse the funds to the caregivers, typically nursing homes. There are significant differences in how Medicaid is administered from state to state. In this article we focus on the State of Idaho.

Most of the people who end up on Medicaid do not start out impoverished. Instead it is the cost of care that impoverishes them through a process often referred to as "spend down."[4] Depending on their resources at the beginning of spend down, the process can be quick or slow. But for many of the disabled elderly, paying for long term care is an inexorable journey into poverty. This process of impoverishment is marked by a number of decision points that may go unnoticed by the naïve or ill-informed. However, the well advised have a number of choices to make during their descent into poverty. Through "Medicaid planning" there are many ways to ameliorate the financial disruption to applicants, their spouses, and their families caused by the cost of long-term disability.[5]

In this article, we explain the structure of Idaho's version of Medicaid and illustrate some of the planning opportunities and strategies that are available to disabled seniors and their families.[6] Much of what

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2. Medicare provides nearly universal acute care health insurance for those 65 and older, but it does not cover custodial care such as the care one might receive in a nursing home. For a useful summary of Medicare and its limits see RALPH C. BRASHIER, MASTERING ELDER LAW Ch. 8 (2010).

3. *See Compare Long Term Care Costs Across the United States*, GENWORTH, https://www.genworth.com/corporate/about-genworth/industry-expertise/cost-of-care.html (last updated Dec. 01, 2015).

4. The term "spend down" in conjunction with Medicaid has reached the mainstream. *See, e.g.*, June A. Schroeder, *Managing Your Elderly Parant's Assets to Qualify for Medicaid*, AGINGCARE, https://www.agingcare.com/Articles/Managing-Your-Parent-s-Assets-to-Qualify-for-Medicaid-133289.htm.

5. *See infra* Part VIII.

6. For an excellent broader treatment of disability planning see Ralph J. Moore & Ron M. Landsman, *Planning for Disability*, TAX MGMT. PORTFOLIOS 816 (2000) [hereinafter Moore & Landsman]. Commerce Clearing House publishes a 6 volume loose leaf service called the MEDICARE AND MEDICAID GUIDE (1969 – Present). Another valuable resource is

is found in this article has application in states other than Idaho. Even so, it is important for the reader to keep in mind that every state Medicaid program has its unique features and rules. Idaho is no exception. In any given case, specific reference should be made to the appropriate state's laws, cases and regulations.[7] It is worth noting at the outset that Idaho is especially rigorous in its enforcement of Medicaid's impoverishment rules. We believe it is fair to say that Idaho goes farther than many, probably most, states to limit access to Medicaid and to recover from their "estates" monies expended for the long term care of the disabled elderly. As we will explain, the irony of this approach is that it makes divorce a particularly rational Medicaid planning strategy in Idaho. One of the authors has previously written on Medicaid's structural incentive for divorce and has proposed a solution.[8]

A. Medicaid Planning and the Medicaid Program

Medicaid planning may be defined as the process of effectively accessing government resources to pay for long-term health care of a disabled person in the manner that is least financially disruptive to the wellbeing of the person's spouse and family.[9] The government resources being accessed derive primarily from Medicaid.

Medicaid is a state and federally funded medical assistance program for certain people, including the elderly and disabled, who have income and assets below specified standards.[10] It provides comprehensive medical coverage for persons in the federal welfare categories (Temporary Assistance for Needy Families, and Supplemental Security Income for the Aged, Blind and Disabled) and for various additional classes of persons including those requiring long-term care. This means tested program represents a significant cost to federal and state governments alike and they restrict access to its support. Medicaid planning, consequently, has many twists and turns that require the assis-

John J. Regan, Rebecca Morgan, Michael Gilfix, & David M. English, TAX, ESTATE & FINANCIAL PLANNING FOR THE ELDERLY (LexisNexis Elder Law Editorial bd., ed. 2015) (there is an accompanying forms book).

7. One of the authors has, with co-authors, written previously about Medicaid planning in the states of Washington and California. *See* Sean R. Bleck, Barbara Isenhour & John A. Miller, *Preserving Wealth and Inheritance Through Medicaid Planning for Long Term Care,* 17 MICH ST. U. J. MED. & L. 153 (2013); John A. Miller & Vanessa S. Stroud, *Medicaid Planning for Long Term Care: California Style*, ACTEC L. REV. (forthcoming), SSRN at Abstract ID # 2688243, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2688243.

8. *See* John A. Miller, *Medicaid Spend Down, Estate Recovery and Divorce*, 23 ELDER L.J. 41 (2015).

9. *See* John A. Miller, *Voluntary Impoverishment to Obtain Government Benefits,* 13 CORNELL J. LAW & PUB. POL'Y 81 at 91–92 (2003).

10. Medicaid is a creature of federal law. *See* 42 U.S.C. § 1396 (2006). As discussed in the text, Medicaid is structured to be implemented on a state by state basis. In the State of Idaho, Medicaid is administered by the Idaho Department of Health and Welfare (IDHW). The website for IDHW is http://healthandwelfare.idaho.gov/.

tance of knowledgeable attorneys and others with special expertise in the government benefits field.

In the State of Idaho, Medicaid is administered by the Idaho Department of Health and Welfare (IDHW).[11] At the federal level, Medicaid is administered by the Center for Medicaid and Medicare Services (CMS) which is part of the Department of Health and Human Services (HHS).[12] CMS promulgates program instructions and guidelines to the states in a series of transmittals collectively entitled the "State Medicaid Manual," which can also be found in the Commerce Clearinghouse service Medicaid and Medicare Guide.[13]

For institutionalized persons and other disabled persons, states are generally prohibited from using eligibility criteria more restrictive than those used by the Supplementary Security Income (SSI) program.[14] Because of this, guidance on various Medicaid issues can be found in the federal SSI statute,[15] the federal SSI regulations,[16] and in the federal SSI policy manual entitled the Program Operations Manual System (POMS).[17]

B. The Application Process

In Idaho, applications for Medicaid can be requested online, by mail, by phone, or in person.[18] Applications are processed by the Idaho Department of Health and Welfare.[19] The Department provides a single application for Health Care Assistance, which includes applications for Medicaid and other Health Care Assistance programs.[20]

When an application is submitted for an applicant over the age of 65, the applicant must fill out Appendix C in addition to the application for Health Coverage Assistance.[21] Appendix C requests information re-

11. *See* Idaho Dep't of Health and Welfare, http://healthandwelfare.idaho.gov/Default.aspx?TabId=123. The state Medicaid program is authorized by Idaho Code. *See* IDAHO CODE § 56-202 (2015). The state regulations are found in the Idaho Administrative Code. *See* IDAPA §§ 16.03.05, 16.03.09.

12. *See* 42 U.S.C. § 1396 (2006); 42 C.F.R. § 430.0 (2012).

13. CENTERS FOR MEDICAID & MEDICAL SERVICES, THE STATE MEDICAID MANUAL, https://www.cms.gov/Regulations-and-Guidance/guidance/Manuals/Paper-Based-Manuals-Items/CMS021927.html.

14. 42 U.S.C. § 1396a(a)(10)(C) (2012).

15. 42 U.S.C. §§ 1381–1383 (2012).

16. 20 C.F.R. § 416 (2012).

17. *See SSA's Program Operations Manual System Home*, SOCIAL SECURITY ONLINE, https://secure.ssa.gov/apps10/poms.nsf/aboutpoms (last visited Jan. 19, 2016).

18. *See About Medicaid*, IDAHO DEPT. OF HEALTH AND WELFARE, http://healthandwelfare.idaho.gov/Medical/Medicaid/tabid/123/Default.aspx (last visited Jan. 19, 2016).

19. *Id.*

20. *See* IDAHO DEP'T OF HEALTH & WELFARE, APPLICATION FOR HEALTH COVERAGE ASSISTANCE (Rev. Dec. 17, 2015) http://healthandwelfare.idaho.gov/LinkClick.aspx?fileticket=sUbb8vT4MBQ%3d&tabid=1568&portalid=0&mid=11339 (last visited Jan. 19, 2016).

21. *See id.* at 1.

garding the income, resources, and household expense of the applicant, in addition to any medical services being received by the applicant.[22] The Department determines whether the applicant meets the financial eligibility criteria.[23] In addition the applicant must qualify for long term care.[24] In order to qualify for long-term care an individual must meet certain levels of assistance requirements, which are laid out in a formula in the Department's regulations.[25] Generally, an individual will qualify for long-term care if he or she needs extensive assistance with two or more of the following activities: preparing or eating meals, personal hygiene, mobility, transfer, or supervision.[26]

As discussed in detail below, financial eligibility involves meeting both resource (asset) and income tests. Resources are determined as of the first moment of the first day of the month.[27] Income is what is received after that first moment and before the first moment of the next month.[28]

The level of care determination is made by the Department of Health and Welfare using its "Medicaid Enhanced Plan Benefits" rules.[29] Medicaid coverage begins on the first day of the month that an application is submitted and approved.[30] Regulations require the Department to approve or deny an application within 45 days of receipt of a completed application.[31] Medicaid nursing home and medical assistance coverage can be retroactive for up to 3 months prior to the month of application, provided that all eligibility criteria were met in each of the prior months.[32]

When an application is processed, the Department will send the applicant a notice that advises the applicant whether he or she has been approved for Medicaid benefits and will specify how the applicant's income must be spent each month thereafter.[33]

C. Long-term Care Benefits

For persons eligible for long-term care coverage, Medicaid requires that all income, after the special allocations described below, be paid to

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22. *Id.*
23. *Id.*
24. IDAPA § 16.03.10.04.
25. IDAPA § 16.03.10.322.
26. *Id.*
27. IDAPA § 16.03.05.205.
28. *Id.*
29. IDAPA § 16.03.05.720.
30. IDAPA § 16.03.05.051.02.
31. IDAPA § 16.03.05.070.
32. IDAPA § 16.03.03.051.03.
33. Idaho Dept. of Health and Welfare, *Idaho Health Plan Coverage; A Benefits Guide to Medicaid and CHIP*, 3–4 (2015), http://www.healthandwelfare.idaho.gov/Portals/0/Medical/MedicaidCHIP/Idaho%20Health%20Plan%20English.pdf.

the nursing home.[34] The amount that the Medicaid recipient pays to the nursing home each month is called "share of cost."[35] Medicaid will then pay the nursing home the difference between the recipient's liability and the Medicaid reimbursement rate for the facility.[36]

When a person qualifies for nursing home coverage, Medicaid also provides coverage for most medical expenses, such as prescriptions and physician bills.[37]

D. Home and Community Based Services (HCBS)

HCBS is a Medicaid program designed to help persons avoid institutionalization.[38] It covers long-term care delivered at home, in certified family homes, and in assisted living facilities.[39] It is operated under a waiver from the federal Center for Medicare and Medicaid Services, meaning that limits are placed on the program that are different than those for other Medicaid services.[40]

With a few exceptions, HCBS has the same financial eligibility rules as the Medicaid nursing home program.[41] In addition, applicants must show that: (1) they can be maintained safely and effectively in their own home or in the certified family home or assisted living facility;[42] (2) the cost of HCBS is cost effective;[43] (3) the applicant has received HCBS type services for thirty consecutive days;[44] and (4) the applicant is eligible for either an Aged and Disabled (A&D) Waiver or a Developmentally Disabled (DD) Waiver.[45] However, the Idaho Department of Health and Welfare limits the number of approvals for HCBS each year, which means that an applicant who applies for these services after the annual limit is reached will be denied coverage.[46] Also, HCBS coverage is not retroactive: coverage begins the first day of the month that approved services are received.[47]

HCBS provides coverage for a variety of services. For eligible persons residing in their own home, HCBS will pay for a caregiver to come

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34. IDAPA §§ 16.03.05.722–.725.
35. *Id.*
36. *Id.*
37. Idaho Dept. of Health and Welfare, *Idaho Health Plan Coverage, A Benefits Guide to Medicaid and CHIP*, 17 (2015), http://www.healthandwelfare.idaho.gov/Portals/0/Medical/MedicaidCHIP/Idaho%20Health%20Plan%20English.pdf.
38. Home Care, *Personal Care Services and Home & Community-Based Waivers*, http://www.healthandwelfare.idaho.gov/Medical/Medicaid/HomeCare/tabid/215/Default.aspx (last visited Jan. 19, 2016).
39. *Id.*
40. *See* IDAPA §§ 16.03.05.787–.789.
41. IDAPA §§ 16.03.05.787.01–.02.
42. IDAPA § 16.03.05.787.03.
43. IDAPA § 16.03.05.787.04.
44. IDAPA § 16.03.05.787.05.
45. IDAPA §§ 16.03.05.787–.789.
46. IDAPA § 16.03.05.787.07.
47. IDAPA § 16.03.04.787.06.

into the home to provide assistance in daily living activities and personal care, such as bathing, toileting and dressing, and some household maintenance tasks.[48] In addition, HCBS will pay for home delivered meals, transportation services, specialized medical equipment and supplies, minor housing changes that will help the recipient maintain independence, and supervised day programs that offer social and recreational opportunities.[49]

II. INCOME, PATIENT LIABILITY, AND RESOURCE ELIGIBILITY RULES FOR SINGLE PERSONS

A. Income

Income is defined as anything an individual receives during a month that can be used to meet food or shelter needs, including cash, wages, pensions, in-kind payments, inheritances, gifts, awards, rent, dividends, interest, or royalties.[50] Income that is held for over the month in which it was received is a resource.[51] For a single applicant seeking long-term care benefits, the individual's monthly income limit is three times the Federal SSI benefit for a single person.[52] In 2016, this income limit is $2,199.[53] In order to qualify for this income limit, the applicant must be likely to remain in a long-term care facility for at least thirty consecutive days.[54] For a single applicant seeking HCBS, this same income limit applies.[55] Miller trusts, discussed later in Part V.D, may be a necessary component of planning to comply with the income limit.

B. Patient Liability

Patient liability is the amount of income that an individual must pay toward the cost of long-term care.[56] Patient liability is calculated by netting an individual's total income with certain deductions listed in the regulations.[57] For example, every individual in a nursing home is entitled to a deduction from income for a personal needs supplement of $40

48. Giving You a Choice, Home and Community Based Services for Adults, http://www.healthandwelfare.idaho.gov/Portals/0/Medical/MedicaidCHIP/HCBSBrochure.pdf (last visited Jan. 19, 2016).

49. *Id.*

50. IDAPA §. 16.03.05.300.

51. *Id.*

52. IDAPA § 16.03.05.720.02.

53. 2016 SSI AND SPOUSAL IMPOVERISHMENT STANDARDS (Jan. 1, 2016), https://www.medicaid.gov/medicaid-chip-program-information/by-topics/eligibility/downloads/2016-ssi-and-spousal-impoverishment-standards.pdf. The practical limit is actually $2,219 because of a $20 disregard.

54. IDAPA § 16.03.05.720.02.

55. IDAPA § 16.03.05.787.

56. IDAPA § 16.03.05.722.

57. IDAPA § 16.03.05.723.01 (Deductions are listed in same reg .03.a – o).

per month.[58] The personal needs supplement is netted with the individual's gross income and the individual's remaining income will be the amount of patient liability.[59]

C. Resources

For a single applicant seeking coverage for HCBS and long-term care, the individual cannot have more than $2,000 in non-exempt resources.[60] Exempt resources are defined below.

Resources are defined by the Department as cash, personal property, real property, and notes receivable.[61] The applicant must have the power to convert the resource to cash and have the legal right to use the resource for support and maintenance.[62] Resources are valued by the fair market value of the applicant's equity interest in the resource, minus any debt encumbering the property.[63] With the exception of checking and savings accounts and time deposits, an owner of shared property is deemed to own only his or her proportional share of the property.[64]

Common examples of resources that, if they exceed $2,000, will make a person ineligible include: vacation property; boats; recreational vehicles or additional vehicles; stocks, bonds, and certificates of deposit; the cash surrender value of insurance policies (except life insurance with a face value of less than $1,500); and funds in retirement accounts even if they are subject to early withdrawal taxes and penalties.[65] Amounts held in revocable trusts (which includes most "living trusts") are also counted as a resource.[66]

Resource eligibility is determined at the first moment of the first day of any month for which coverage is sought.[67] Generally, if the applicant's resources exceed $2,000 on the first day of the month, coverage will be denied for that month.[68]

D. Exempt Resources

Some resources are not counted, that is, they are deemed "exempt" resources, when determining whether a single applicant for a Medicaid

58. IDAPA § 16.03.04.726. The personal needs allowance for assisted living is $100. For persons residing at home it is $1,100.
59. IDAPA § 16.03.05.723.03.
60. IDAPA § 16.03.05.720; IDAPA § 16.03.05.787; *see also* APPLY FOR ASSITANCE; WHO IS ELIGIBLE?, http://healthandwelfare.idaho.gov/FoodCashAssistance/ApplyforAssistance/Applyforservices/Whoiseligible/tabid/1556/Default.aspx.
61. IDAPA § 16.03.05.200.
62. *Id.*
63. IDAPA § 16.03.05.207.
64. IDAPA § 16.03.05.208.
65. IDAPA § 16.03.05.279.
66. IDAPA § 16.03.05.278.
67. IDAPA § 16.03.05.215.
68. *See id.*

long-term care facility or HCBS has exceeded the $2,000 resource ceiling.[69] As is discussed later, exempt resources can present significant Medicaid planning opportunities. For now we simply describe the basic parameters for establishing exempt status.

1. Generally, real property is counted as a resource unless otherwise excluded.[70] Real property is defined as land, including buildings or immovable objects attached permanently to the land.[71] However, a home**,** which is defined as an individual's personal residence, is exempt if the applicant or spouse is residing in the home or the applicant (or his representative) states that he or she intends to return home.[72] Department regulations impose a $750,000 limit on the exempt home equity of a Medicaid applicant for applications for long-term care coverage.[73] The home equity limit does not apply if the home is occupied by a spouse or by a disabled child, blind child, or child under twenty-one.[74] In addition, proceeds from the sale of a home are exempt if used within three months of receipt of the proceeds to purchase another home.[75]

Rent from the home is income to the recipient, which generally must be paid toward the cost of care.[76] However, the expenses of obtaining rental income can be used to offset countable rental income.[77]

In addition, an applicant's ownership interest in jointly-owned real property is an excluded resource if sale of the property would cause undue hardship to a co-owner.[78] Undue hardship results if a co-owner uses the property as his principal place of residence, would have to move if the property were sold, and has no other readily available housing.[79]

As explained in the discussion of Medicaid estate recovery below, Medicaid will usually have a lien against the Medicaid recipient's interest in an exempt home at the time of death of the Medicaid recipient for most costs paid by Medicaid after the recipient turned 55.[80]

2. A vehicle is exempt regardless of value.[81] If the applicant owns more than one vehicle the exemption will be applied in the most beneficial way to the applicant.[82] However, the equity value of the additional vehicle will be counted as a resource.[83] We are told that Idaho exempts

69. *See* IDAPA §§ 16.03.05.222–.245.

70. IDAPA § 03.05.237.

71. *Id.*

72. IDAPA § 16.03.05.238.

73. *Id.* Under federal law this number may be adjusted for inflation and the current federal inflation adjustment would bring this cap up to $828,000. *See* 2016 SSI AND SPOUSAL IMPOVERISHMENT STANDARDS, *supra* note 53.

74. IDAPA § 16.03.05.238

75. IDAPA § 16.03.05.239.

76. IDAPA § 16.03.05.300.

77. IDAPA § 16.03.05.330.

78. IDAPA § 16.03.05.241.

79. *Id.*

80. *See* IDAHO CODE § 56-256 (2012); IDAPA § 16.03.09.903.01.

81. IDAPA § 16.03.05.222.

82. *Id.*

83. *Id.*

two vehicles for a married couple but there is no published rule to this effect.

3. Household furnishings and personal effects of any value are exempt if they are held for the maintenance, use, and occupancy of the applicant's home.[84] This includes clothing, appliances, furniture, personal jewelry, and other items typically found in a home.[85]

4. A Burial Plot or Urn space held for the burial of the applicant, or the applicant's spouse, or other member of the applicant's immediate family is an excluded resource regardless of value.[86]

5. A Burial Fund of not more than $1,500 per person is an excludable resource if the fund is set aside for the burial expenses of the applicant or the applicant's spouse.[87] In order to be excluded, the burial funds must be kept separate from assets that are not burial related.[88] If the burial funds are used for another purpose, the exclusion is lost.[89] Under limited circumstances an applicant can designate a life insurance policy as a burial fund and the face value of the policy will be excluded up to $1,500.[90] The Burial Fund Exclusion is effective one month after the funds were set aside for burial related purpose, and the exclusion can be designated retroactively to the first day of the month the participant intended the funds to be set aside.[91] The participant must confirm the designation in writing.[92]

6. A life insurance policy is an excluded resource if its face value totals $1,500 or less.[93] If the face value of the policy exceeds $1,500, the policy will be counted as a resource in the amount of the cash surrender value.[94]

7. The principal balance of a real estate contract is an excluded resource of a participant if the Department determines that it is in the Department's best interest to exclude the contract.[95]

8. An applicant who has received, or who is entitled to receive, benefits under a Qualified Long-Term Care Partnership policy issued in Idaho after November 1, 2006, will have the total dollar amount of the insurance benefits paid out for the policy holder disregarded in calculat-

84. IDAPA § 16.03.05.232.
85. *Id.*
86. IDAPA § 16.03.05.224.
87. IDAPA § 16.03.05.223.
88. IDAPA § 16.03.05.223.
89. *Id.*
90. *Id.* The interplay between burial funds and life insurance under the rules is less than clear. If all policies owned by an applicant have face values totaling in excess of $1,500, then the cash value of the policies is counted; if not, then the cash values are not counted. But to the extent that any life insurance cash value is excluded, the $1,500 burial fund exclusion is reduced by that policy's face value. A life insurance policy's cash value may be designated as a burial fund only to the extent the cash value does not exceed $1,500.
91. *Id.*
92. *Id.*
93. IDAPA § 16.03.05.281.
94. *Id.*
95. IDAPA § 16.03.05.276.

ing the value of the participant's resources.[96] The disregarded amount is determined on the date of approval of an initial application approval.[97] Also, the disregarded amount will be deducted from the assets of the applicant's estate for purposes of estate recovery.[98] Thus, if one purchases a $100,000 Long-Term Care Partnership policy, and the policy pays $100,000 for actual long-term care expenses for the policy holder, $100,000 in otherwise non-exempt assets will be deemed exempt for both eligibility and estate recovery purposes.

9. An applicant that is ineligible due to excess non-liquid resources can receive Medicaid coverage if the participant agrees, in writing, to sell excess non-liquid resources at their fair market value, within three months, and the applicant makes reasonable efforts to sell the property at its fair market value.[99] However, this exemption is limited by the amount of liquid resources that an individual owns as of the date that the Department conducts a resource assessment.[100]

III. INCOME AND RESOURCE ELIGIBILITY RULES FOR MARRIED COUPLES

A. Overview of Couple Eligibility Rules

Medicaid has a number of rules that are designed to protect the income and assets of one spouse, often called the "community spouse," when the other spouse goes into a nursing home or begins to receive HCBS benefits.[101] These rules are designed to avoid the impoverishment of the community spouse. By middle class standards, they are not generous.

In Idaho, there are three methods by which Medicaid eligibility is determined for a married person.[102] The three different methods are the SSI Method, the Community Property (CP) Method, and the Federal Spousal Impoverishment (FSI) Method.[103] Each of these Methods uses different guidelines to determine the way that income and resources will be counted, and also the amount of patient liability that the couple will be required to contribute toward the cost of care.[104] Tables are provided in the Department's regulations that are used to determine the couple's resource counting method, the couple's income counting method, and the couple's patient liability method.[105]

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96. IDAPA § 16.03.05.721.
97. *Id.*
98. *Id.*
99. IDAPA § 16.03.05.283.
100. *See id.*
101. *See* IDAPA § 16.03.05.735.02.
102. *See* IDAPA § 16.03.03.731.
103. *Id.*
104. IDAPA §§ 16.03.05.732, .733, .734.
105. *Id.*

Typically, only one spouse will be applying for long-term care benefits. In this situation, the Department's regulations require that the FSI method be used to determine income and resources of the married long-term care applicant.[106] The regulations call the spouse applying for Medicaid the "long-term care spouse."[107] The long-term care spouse is defined as the spouse that has been placed in a medical institution or nursing facility, or is receiving HCBS benefits, for thirty consecutive days, or is likely to need either of these services for thirty consecutive days.[108] The community spouse is the spouse who is not in long-term care and is not receiving HCBS benefits and is married to the long-term care spouse.[109] The discussion below will focus on the FSI Method for both income and resource eligibility because this method addresses the typical scenario for married couples applying for Medicaid. However, the SSI and CP methods will also be discussed briefly.

B. Income Eligibility

The income limit for the long-term care spouse is three times the Federal SSI benefit for a single person, which is currently $2,219[110] There is not an income limit for the community spouse.[111] However, the community spouse is entitled to an allowance if he or she does not receive a certain level of income per month.[112] In this situation, the community spouse can receive a community spouse allowance (CSA), which will be deducted from the long-term care spouse's gross income.[113]

Under the FSI Method, the couple's income is counted as follows.[114] First, except for income paid from a trust, income paid solely in the name of one spouse is treated as the separate income of that spouse.[115] Second, income paid in the names of both the long-term care spouse and the community spouse is divided equally between each spouse.[116] Third, income paid in the names of the long-term care spouse, the community spouse, and a third-person is counted as available to each spouse in proportion to that spouse's ownership, if ownership is specified.[117] Other-

106. IDAPA § 16.03.05.735.

107. IDAPA §§ 16.03.05.735.01–.02.

108. IDAPA § 16.03.05.735.01.

109. IDAPA § 16.03.05.735.02.

110. 2016 SSI AND SPOUSAL IMPOVERISHMENT STANDARDS, *supra* note 53; IDAPA § 16.03.05.720.02.

111. *See* IDAPA § 16.03.05.72.02.

112. IDAPA § 16.03.05.725.08.

113. *Id.* The CSA is not deducted from the applicant's income when determining eligibility; that is, it is not deducted when determining whether the applicant spouse is within the $2,219 income limit. The CSA is only deducted post-eligibility, when determining the applicant's share of cost (patient liability).

114. *See* IDAPA § 16.03.05.724.

115. IDAPA § 16.03.05.724.01.

116. IDAPA § 16.03.05.724.02.

117. IDAPA § 16.03.05.724.03.

wise, if ownership is not specified, half of such available income belongs to each spouse.[118]

C. Resource Eligibility

For a long-term care spouse seeking coverage for HCBS and long-term care, the individual cannot have more than $2,000 in non-exempt resources.[119] If both spouses are applying for HCBS or long-term care benefits, the couple can choose the SSI Method, and, as long as both spouses live together in the same room at the nursing home for a period of six months, the couple's resource limit is $3,000.[120] As mentioned earlier, the FSI Method must be used to compute the resources of a married individual with a community spouse.[121]

When counting a married couple's resources, the Department will do a one-time assessment to determine the value of the couple's resources.[122] The Department will count the couple's total combined resources as of the date of the assessment and assign each spouse a one-half share of the total combined resources.[123] In order to qualify for Medicaid benefits, the long-term care spouse's share cannot exceed $2,000.[124] The community spouse's share of their countable assets is also subject to a limit known as the Community spouse Resource Allowance (CSRA).[125] Countable assets in excess of the limits must be spent down.[126]

In theory the community spouse resource allowance is designed to protect the community spouse from impoverishment.[127] The community spouse resource allowance is deducted from the couple's total combined resources, and the community spouse gets to keep these resources for his or her use.[128] The minimum community spouse resource allowance for 2016 is $23,844, and the maximum community spouse resource allowance for 2016 is $119,220.[129]

118. *Id.*

119. IDAPA § 16.03.05.720.

120. *Id.* If a married couple lives separately, each has a $2,000 resource limit.

121. IDAPA § 16.03.05.735.

122. IDAPA § 16.03.05.736.

123. IDAPA § 16.03.05.738. *See also* IDAPA § 16.03.05.736 (noting that the determination of the value of the couple's community and separate resources are made without applying Idaho's community property statutes).

124. IDAPA § 16.03.05.735.01.

125. 42 U.S.C. §1396r-5(f) (2012).

126. *See* Begley & Jeffreys, Representing the Elderly Client: Law and Practice § 7.05F[4][d] (1999).

127. *See* IDAPA § 16.02.05.742.

128. IDAPA § 16.02.05.742.

129. 2016 SSI AND SPOUSAL IMPOVERISHMENT STANDARDS, *supra* note 53. Idaho's CRSA is determined by subtracting the greater of 1) the minimum resource allowance ($23,844.00) or 2) the spousal share of total combined resources (each spouse is assigned a ½ share of total resources under the FSI method) from the couple's total combined resources on first day of application month. The CRSA cannot exceed the maximum resource allowance $119,220.00 in 2015. IDAPA 16.03.05.742. It is worth noting that income is determined prior

If the community spouse's share of resources is less than the minimum community spouse resource allowance, then the long-term spouse can transfer resources to the community spouse in an amount equal to the difference between the community spouse's spousal share and the minimum community spouse resource allowance.[130] The regulations call this transfer a resource transfer allowance (RTA) and such a transfer is not subject to the asset transfer penalty, which will be discussed below.[131]

If a couple is not required to use the FSI Method, they may choose between either the SSI Method or the CP Method.[132] Under the SSI Method, income and resources of the individual applying for Medicaid are generally counted as mutually available to each spouse.[133] Under the CP Method, each spouse is given a one-half share of the couple's community income and resources and each spouse is given all of their own separate income and resources.[134] The couple's income and resources are presumed to be community property if they were acquired during the marriage.[135] However, this presumption is rebuttable.[136]

IV. TRANSFER OF ASSET RULES

A. How Transfers of Assets May Affect Eligibility

Medicaid's transfer of asset rules *delay* eligibility for long-term care coverage or HCBS for a period of time. This is called the transfer penalty.[137] The purpose of the penalty is to deter transferors from voluntarily impoverishing themselves in order to qualify for Medicaid coverage for their long term care costs. The typical example of such a transfer is a large gift of cash or property to the transferor's child. In the case of a married couple a transfer by either spouse is subject to the transfer of asset rules.[138] Transfers of exempt property other than the home are not subject to the asset transfer rules.[139] A transfer may result in a transfer penalty if the transfer is for less than fair market value[140] and the

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to resources, and if the community spouse has less income than the minimum CSNS – Community Spouse Needs Standard ($1,966.25), the CSRA can be increased by the amount of resources needed to raise the community spouse's income to the minimum CSNS. IDAPA 16.03.04.744–745.

130. IDAPA § 16.03.05.746.
131. *Id.*
132. IDAPA § 16.03.05.761.
133. IDAPA § 16.03.05.762.
134. IDAPA § 16.03.05.764.
135. *Id.*
136. *Id.*
137. IDAPA § 16.03.05.831.
138. Id.
139. *Id.* Transfer of the home to the community spouse will not trigger a transfer penalty.
140. *Id.*

transfer is made during the "look-back" period.[141] In Idaho, a transfer for less than fair market value made during the look-back period is presumed to be made for the purpose of qualifying for Medicaid.[142] However, this presumption is rebuttable, and if an applicant can establish that the transfer was for a purpose other than Medicaid qualification, the transfer will not trigger the penalty.[143] If an asset transfer penalty is imposed upon an individual, Medicaid coverage will be restricted until the individual recovers the transferred asset, receives fair market value for the transferred asset, or the penalty period comes to an end.[144] There are many kinds of transfers that will not cause a transfer penalty – these will be described below.

B. The Look-back Period

Only transfers within a certain period of time before application is made, called the "look-back period," are subject to the transfer penalty.[145] For outright gifts made before February 8, 2006, the look-back period is the thirty-six month period before the month in which an application is made, and sixty months for transfers to irrevocable trusts.[146] The look-back period is sixty months for all transfers made on or after February 8, 2006.[147] Transfers not within the look-back period have no effect on Medicaid eligibility.[148] Thus, for example, if a person gives away $1 million six years before applying for Medicaid, that gift will not be considered in determining eligibility.

C. Calculating the Transfer Penalty

The methodology for calculating the effect of uncompensated transfers in Idaho has changed over the years. Here we describe the rules for gifts on or after February 8, 2006.

1. Transfer of Asset Rules for Transfers On or After February 8, 2006

a. Calculation Methodology

For transfers made after February 8, 2006 and within five years of applying for Medicaid, the total amount of all the transfers will be divided by the statewide average cost of nursing facility services to private patients.[149] In 2015 the average private pay rate in Idaho is $7,396 per

141. IDAPA § 16.03.05.833.
142. IDAPA § 16.03.05.831.01.
143. IDAPA § 16.03.05.841.10.
144. IDAPA § 16.03.05.835.
145. *Id.*
146. IDAPA § 16.03.05.833.01.
147. IDAPA § 16.03.05.833.02.
148. *See* IDAPA § 16.03.05.833.
149. IDAPA § 16.03.05.835.

month and $244 per day.[150] The result of this division will result in the number of days and months of ineligibility caused by the transfer during the look-back period.[151]

b. The Period of Ineligibility BEGINS When the Applicant "Would Have Been Eligible"

Idaho's regulations provide that the period of ineligibility begins on "the first day of the month after the month the transfer took place . . . or the date the individual would have been eligible for long-term care services, if not for the transfer, whichever date is later in time."[152] This means that, in order for the transfer penalty time to begin running, an individual who is not on Medicaid must submit an application and be determined eligible in all respects except for the imposition of the transfer penalty. Medicaid eligibility is on a calendar month basis, and all penalties start to run as of the first day of the month that eligibility otherwise exists. It should be noted that the transfer penalty is not a full disqualification from Medicaid eligibility, but rather causes "restricted coverage," which means during the penalty period the individual has Medicaid coverage for all covered services other than long-term care; this is true for all long-term care recipients.

Ineligibility Period Examples

Example 1: Jodi applies for Medicaid on August 1, 2015. She would have been eligible for long-term care services except that she quit claim deeded her home to her son on May 1, 2015. The home was worth $100,000.[153]

To calculate the length of the penalty period, divide $100,000 by the private nursing home rate of $7,396; $100,000/$7,396 = 13.52 months.[154] To calculate the number of days she is not eligible, multiply the remainder by 30 days; 30 x .52 = 15 days. Jodi would not be eligible for Medicaid for 13 months, 15 days.[155]

The penalty period begins running August 1, 2015, which is the date Jodi would have been eligible for Medicaid.[156]

Example 2: Jim gave $4,000 as a gift to his son on May 15, 2015. He applied for Medicaid on June 23, 2015 and would have been eligible as of that date except for the asset transfer. The daily private pay rate

150. *See* Federal Poverty Guidelines — January 2015 (on file with author).
151. *Id.*
152. IDAPA § 16.03.05.835.02.
153. This example is modified from the examples in the Idaho AABD Handbook. ASSISTANCE FOR THE AGED, BLIND, AND DISABLED (AABD) HANDBOOK at 220 (2011) (on file with authors).
154. *Id.*
155. *Id.*
156. *Id.*

in Idaho is $244 per day. Therefore, $4,000/ $244 = 16 days of ineligibility. The penalty period for Jim begins June 1, 2015. Thus, his application for Medicaid can be approved beginning on June 16, 2015.[157]

Example 3: Janie applies for Medicaid on June 20, 2015. It has been determined that she transferred a CD worth $50,000 to her daughter on December 15, 2014. She also transferred another CD worth $25,000 to her son on March 31, 2015. Regarding the first transfer; $50,000/ $7,396 = 6.76 months; 30 days x .76 = 22 days. The 6 month, 22 day penalty period for this asset transfer begins June 1, 2015, the date she should have been eligible for Medicaid. Regarding the second transfer; $25,000/ $7,396 = 3.38 months; 30 days x .38 = 11 days. The 3 month, 11 day penalty will begin as soon as the 6 month, 22 day penalty ends.[158]

In this last example it is worth noting that though separate gifts trigger separate penalty periods, those penalty periods run serially rather than concurrently.

D. Transfers Which Cause No Penalty

There are a number of transfers that are express exceptions to the Medicaid asset transfer rules and do not cause the imposition of a period of ineligibility.[159] Some of these exceptions present planning opportunities that will be discussed later. For now we simply describe the exceptions:

1. Gifts not in the "look-back period," that is, gifts made more than 60 months before applying.[160]
2. Transfer of the home to a child of the applicant who has lived in the home and provided care to the applicant (which was necessary for the applicant to remain independent) for the two year period immediately prior to institutionalization or HCBS eligibility.[161]
3. Transfer of the home to a sibling of the applicant who has an equity interest in the home and who has lived in the home for the one year period immediately prior to institutionalization or HCBS eligibility.[162]
4. Transfer of the home to a child under age 21 or to a child who is blind or totally disabled.[163]
5. Transfer of the home to a spouse.[164]
6. Transfers to a spouse or trust for the sole benefit of a spouse.[165]

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157. *Id.* at 221.
158. *Id.*
159. IDAPA § 16.03.05.841.
160. IDAPA § 16.03.05.833.
161. IDAPA § 16.03.05.841.04.
162. IDAPA § 16.03.05.841.03.
163. IDAPA § 16.03.05.841.02.
164. IDAPA § 16.03.05.841.01.
165. IDAPA § 16.03.05.841.05.

7. Transfers to a blind or disabled child or to a trust for the sole benefit of a blind or disabled child.[166]

8. Transfers made with intent to dispose of the assets at fair market value or for other adequate consideration.[167]

9. When all gifts that have been made are returned to the Medicaid applicant.[168]

10. Transfers not made for the purpose of qualifying for Medicaid long-term care coverage.[169]

11. Transfers of excluded resources, other than the home and associated property.[170]

12. The transfer occurred as a result of fraud, misrepresentation, or coercion.[171]

E. Waiver of Penalty

The Department must waive the application of the transfer penalty where it will create undue hardship.[172] Undue hardship occurs if the applicant cannot pay for long-term care services by any other means, the applicant has made reasonable efforts to recover the transferred asset, the applicant did not knowingly transfer the asset, or the applicant faces loss of shelter, food, clothing, or health care without assistance from the Department.[173]

F. Certain Purchases Treated As Transfers

The Department treats purchases of certain interests as uncompensated transfers subject to the transfer penalty described above.[174] The underlying logic for this treatment is a concern that the purchase will convert an available asset into something that is not available to pay the purchaser's long-term costs during life.[175] For example, the purchase of a life estate is deemed an uncompensated transfer.[176] The purchase of an annuity for the benefit of the applicant or the applicant's spouse will be treated as a gift unless it is irrevocable, non-assignable, pays out in equal periodic payments, and its term is equal to or less than the life expectancy of the annuitant.[177] Annuity purchases will also

166. IDAPA § 16.03.05.841.07.
167. IDAPA § 16.03.05.841.08.
168. IDAPA § 16.03.05.841.09.
169. IDAPA § 16.03.05.841.10.
170. IDAPA § 16.03.05.831.
171. IDAPA § 16.03.05.841.14.
172. IDAPA § 16.03.05.841.11.
173. IDAPA § 16.03.05.841.11.a–.d.
174. *See* IDAPA § 16.03.05.837 & 838.
175. *See* IDAPA § 16.03.05.837 & 838.
176. *See* IDAPA § 16.03.05.837.02.
177. *See* IDAPA § 16.03.05.838.02.a. The department has recently been arguing that qualified annuities under 16.03.05.838.02 must also produce interest at the treasury rate in

be treated as a gift unless the state is named as the beneficiary after the death of the purchaser, the purchaser's spouse, or the purchaser's minor or disabled child.[178]

V. TRUST RULES

It is essential to recall that transfers to trust are subject to the 60 month look back rules. Thus, a transfer into an irrevocable trust for the benefit of third parties such as the settlor's children within the look back period will trigger a transfer penalty.[179] For trusts created and funded by a Medicaid applicant or spouse (often called self-settled or "Grantor Trusts") where the applicant or spouse is also a beneficiary of the trust**,** Medicaid rules generally deem some or all of the trust estate to be an available resource of the Medicaid applicant even if the trust was created outside of the look back period.[180] But, if a third party sets up a trust for a Medicaid applicant or spouse, and the trust is funded solely with the property of the third party, these rules generally do not apply.[181] Distributions directly to a Medicaid recipient from a trust established by a third party will usually be deemed income to the Medicaid recipient -- and reduce Medicaid coverage on a dollar for dollar basis -- but the corpus of such a trust should not be deemed an available resource to the recipient unless the recipient has the right to demand a distribution.[182] Our general recommendation concerning the creation of a third party trust for the benefit of a Medicaid applicant or recipient is that it be established as a special needs trust (described below) and the remainder interest be left to someone other than the Medicaid beneficiary. The Medicaid trust rules also do not apply to trusts created by Will, including the Will of the spouse of a Medicaid recipient.[183] These limitations create some planning opportunities we will discuss later when we address special needs trusts more fully.

What follows is a discussion of the rules applicable to trusts established after August 10, 1993, and which are set forth in the Departments' regulations.[184]

A. Definition of Grantor Trust for Medicaid Purposes

The Medicaid trust rules apply to any trust established by a Medicaid applicant or to any trust created with the applicant's assets.[185] In

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order to qualify. There are currently not any annuities that produce interest at the treasury rate. *See* email from David Wilson to author (on file with author).

178. IDAPA § 16.03.05.838.03.

179. *See* IDAPA § 16.03.05.871.

180. *See id.*

181. *See id.*

182. *Cf.* IDAPA § 16.03.05.873, *and* IDAPA § 16.03.05.871 (This point is not addressed directly by the Idaho regulations. We think it is reasonably inferred.).

183. IDAPA § 16.03.05.871.

184. *See* IDAPA § 16.03.05.871–.873.

contrast, the trust rules do not apply to the extent the trust includes income or resources of someone other than the applicant, which would include a testamentary trust.[186]

B. Revocable Trusts

For revocable grantor trusts, unless the trust is a revocable burial trust, the entire corpus is deemed to be an available resource of the applicant.[187] Any payment from the trust to or for the applicant is counted as income in the month of receipt.[188] Distributions to third parties are treated as gifts that are subject to the asset transfer penalty.[189] Also, if a personal residence is placed into a revocable trust, the residence will become a countable resource for eligibility purposes unless the applicant or the applicant's spouse is named as the sole beneficiary of the trust.[190] The residence will regain its status as an exempt resource if it is removed from the trust.[191]

C. Deemed Availability of Irrevocable Self Settled Trust

For irrevocable self-settled trusts, the body of the trust is considered a resource to the applicant if any part of such body could be distributed as principal or paid as income to the applicant.[192] Any payment from an irrevocable trust is income to the applicant, and any payment from the trust to any other person is considered to be a gift that triggers the asset transfer penalty.[193] An irrevocable burial trust is not subject to these rules.[194]

D. The Miller Trust

An applicant who is over the income limit can place excess income into a so called Miller Trust and such trust will be treated as an exempt trust.[195] In order for the Miller Trust to maintain its status as an exempt trust, the trust must: (1) be irrevocable;[196] (2) be established for the sole benefit of an applicant who would qualify for long-term care benefits or HCBS except for income in excess of the income limit;[197] and (3) any income that is placed into the trust must be paid to the long-

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185. IDAPA § 16.03.05.871.
186. *Id.*
187. IDAPA § 16.03.05.871.01.a.
188. IDAPA § 16.03.05.871.01.b.
189. IDAPA § 16.03.05.871.01.c.
190. IDAPA § 16.03.05.871.01.d.
191. *Id.*
192. IDAPA § 16.03.05.871.02.a.
193. IDAPA § 16.03.05.871.02.b–d.
194. IDAPA § 16.03.05.871.02.g.
195. *See* IDAPA § 16.03.05.872.02.
196. *Id.* at c.
197. *Id.* at a.

term care or HCBS provider as patient liability.[198] If income placed into the trust is not paid as patient liability, such income will be subject to the asset transfer penalty.[199]

E. Special Needs Trusts

In general, special needs trusts are trusts that are designed to benefit a person without necessarily disqualifying that person from receiving government benefits.[200] Special needs trusts can be broken into two categories, first party and third party.[201] First party trusts are those funded with assets owned by the life tenant.[202] Third party special needs trusts are those funded with assets owned by someone other than the life tenant.[203]

1. First Party Special Needs Trusts

A specific exception from the trust rules (and the transfer of asset rules) is made for trusts for persons who are under 65 and disabled under the Social Security Act standard for Social Security disability benefits or Supplemental Security Income.[204] To qualify for the exemption the trust must: (1) be irrevocable;[205] (2) be established by a parent, grandparent, legal guardian of the disabled person or court (not by the disabled person directly);[206] and (3) must provide that any amount that Medicaid paid on behalf of the disabled person and not distributed from the trust must be paid to the state of Idaho upon the disabled person's death.[207] Once the disabled person reaches the age of 65, the trust loses its status as an exempt trust.[208]

In addition to a special needs trust, an irrevocable trust that is managed by a non-profit association on behalf of a disabled person is also an exempt trust under the Department's regulations.[209] This type of trust can be established by a non-profit association and can be used on behalf of multiple beneficiaries.[210] A disabled person's parent, grandparent, or a court, can establish an account with the trust, and the non-profit will maintain a separate account for each beneficiary of the trust.[211] Assets within each account can be pooled by the trust.[212] In

198. *Id.* at d.
199. *Id.*
200. *See* BEGLEY & JEFFREYS, *supra* note 126, at § 12.01.
201. *Id.*
202. *Id.*
203. *Id.*
204. *See* IDAPA § 16.03.05.872.01.a–.b.
205. *Id.* at d.
206. *Id.* at c.
207. *Id.* at f.
208. *Id.* at e.
209. IDAPA § 16.03.05.872.03.
210. *See id.* at c.
211. *Id.*

order to be exempt, the trust must; (1) be irrevocable;[213] (2) be established and managed by a non-profit association (instead of a parent, grandparent, or court);[214] (3) contain the assets of a person who is blind or totally disabled under Social Security or SSI;[215] (4) have accounts that are established only for the benefit of disabled persons;[216] and (5) any amount paid on behalf of a disabled person and not distributed must be paid to the state of Idaho upon the disabled person's death.[217]

These exceptions for special needs trusts are particularly important when dealing with inheritances and personal injury settlements. While the Medicaid recipient may be ineligible in the month the proceeds are received, eligibility can be regained in all succeeding months if the proceeds are transferred to a trust meeting these specific requirements.[218] Note that similar treatment cannot be obtained for a Medicaid recipient who is 65 or older, because funding the trust will result in a transfer penalty.[219]

2. Third Party Special Needs Trusts and 529 ABLE Accounts

A third party special needs trust, as the name implies, is funded by a person other than the life beneficiary.[220] It takes advantage of the non-application of the look back rules to third party trusts while providing limited support to the Medicaid applicant.[221] It must be designed to limit the life tenant's access to both income and principal in order to avoid being deemed countable income or a countable resource of the Medicaid applicant and to avoid estate recovery.[222] This is achieved by giving the trustee absolute discretion to withhold funds from the applicant during life and by depriving the applicant's estate of any interest in the trust remainder.[223] Idaho's trust regulations do not address Medicaid's treatment of third party special needs trusts.[224] This leaves some room for

212. *Id.*
213. *Id.* at d.
214. *Id.* at a.
215. IDAPA § 16.03.05.872.03.b.
216. *Id.* at c.
217. *Id.* at e.
218. IDAPA § 16.03.05.205.
219. IDAPA § 16.03.05.872.01.e
220. BEGLEY & JEFFREYS, *supra* note 126, at §§ 12.01 & 12B.01.
221. *Id.* at § 12B.01[A].
222. *Id.* at § 12A.03[D].
223. For more on special needs trusts, see John J. Campbell, Preserving Public Benefits in Physical Injury Settlements: Special Needs Trusts & Beyond, 2 NAT'L ACAD. ELDER L. ATT'YS J. 367 (2006); Jeffrey N. Pennell, Special Needs Trusts: Reflections on Common Boilerplate Provisions, 6 NAT'L ACAD. ELDER L. ATT'YS J. 89 (2010); *see also* KEVIN URBATSCH, ADMINISTERING THE CALIFORNIA SPECIAL NEEDS TRUSTS (2011); KEVIN URBATSCH, SPECIAL NEEDS TRUSTS: PROTECTING YOUR CHILD'S FINANCIAL FUTURE (Nolo Press, 5th ed. 2013).
224. Idaho's Medicaid Trust rules are found in IDAPA § 16.03.05.871, 872 and 873. All three sections address trusts funded with the participant's own assets. Any money directly distributed to the Medicaid recipient even from an exempt trust will be income to the recipient in the month received. IDAPA § 16.03.05.873.01.

uncertainty as to their legal treatment. However, since the applicant did not own the assets (at least during the lookback period) and has no right of withdrawal, it seems reasonably certain that estate recovery should not apply to the trust corpus. We will have more to say about this trust in the planning section of this article.

Another approach to disability planning that should come on line soon is the 529 ABLE account established in 2014 by section 529A of the Internal Revenue Code.[225] This is a tax exempt account similar to the familiar 529 account used to save for a child's education.[226] However, the ABLE account is intended to allow saving for a disabled person in a manner that will not disqualify the person from government benefits.[227] As of this writing Idaho has not yet established an ABLE program.[228]

VII. POST-ELIGIBILITY TREATMENT OF INCOME AND RESOURCES

A. Allocation of Institutionalized Person's Income

Generally, a person in a long-term care facility who has been determined eligible for Medicaid must pay virtually all of his or her income to the facility for the cost of his or her care.[229] Payment to the long-term care facility is accomplished through the mechanism of "patient liability."[230] However, a long-term care facility resident can have income deducted for certain expenses from the amount he or she must pay toward patient liability.[231] Any income that is left over after these deductions have been subtracted from the resident's monthly income must be paid to the long-term care facility or to the provider of HCBS services.[232] The most common deductions are as follows:

1. Each long-term care resident is allowed a monthly Personal Needs Allowance of $40.[233] This Allowance is deducted from the resident's monthly income.[234] Additionally, a resident of a residential care or assisted living facility (RALF) is allowed a basic monthly allowance of $100,[235] and a HCBS participant is allowed $1,100.[236]

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225. *See* 26 U.S.C.A. § 529A (West 2014).
226. *See id.*; 26 U.S.C.A. § 529 (West 2014).
227. *See* Begley & Jeffreys, *supra* note 126, at § 18.17.
228. *See* ABLE ACT EXPLAINED, http://www.idahocdhd.org/LatestNews/tabid/171/post/able-act/Default.aspx (Sep. 18, 2015).
229. *See* IDAPA § 16.03.05.722.
230. *Id.*
231. *See* IDAPA § 16.03.05.723 & .725.
232. *Id.*
233. *See* IDAPA § 16.03.05.723.03.f; IDAPA § 16.03.05.725.06.
234. *See id.*
235. IDAPA § 16.03.05.513. These numbers are adjusted for inflation.
236. *Id.*

2. A long-term care spouse can deduct income for a Community Spouse Allowance (CSA), to be used for the community spouse, which is explained below.[237]

3. A long-term care spouse can deduct income for a Family Member Allowance (FMA), to be used for a family member who could be claimed as a dependent on the Federal income tax return of the either the long-term care spouse or the community spouse.[238]

4. Each resident can deduct income to pay for health care premiums for the nursing home resident, including Medicare premiums and premiums for long-term care insurance or supplemental "Medigap" policies.[239]

6. An unmarried resident can deduct income for up to 6 months to be allocated to cover actual home maintenance costs if a physician certifies that the recipient is likely to return home within that period.[240]

7. Any resident can deduct income to pay for any mandatory income taxes that such resident is required to pay.[241]

8. Any resident can deduct income to pay for attorney's and guardian's costs and fees related to the establishment and maintenance of a guardianship to the extent a court order requires these to be paid from the recipient's income.[242]

9. Any resident can deduct income to pay for trust fees and child support obligations.[243]

10. Any veteran resident or a resident who is the surviving spouse of a veteran can deduct any Aid and Attendance allowance and Unusual Medical Expense Allowance that the veteran or surviving spouse receives from the VA.[244] A veteran or the surviving spouse of a veteran can also deduct the first $90 of a VA pension for personal needs.[245] However, the $90 VA pension personal needs is a substitute for the general $40 Personal Needs Allowance.[246]

B. Income Allocation to Community Spouse

The community spouse can keep all checks paid in his or her name, regardless of amount and regardless of whether the income may be characterized as community income.[247] Income includes wages, pensions, social security, VA or military payments, interest or dividends,

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237. IDAPA § 16.03.05.725.08.
238. IDAPA § 16.03.05.725.09; IDAPA § 16.03.05.723.03.i.
239. IDAPA § 16.03.05.725.12; IDAPA § 16.03.05.723.03.j.
240. IDAPA § 16.03.05.723.03.h. For deductibility of other medical costs see IDAPA § 16.03.05.723.03.p.
241. IDAPA § 16.03.05.725.13; IDAPA § 16.03.05.723.03.k.
242. IDAPA § 16.03.05.725.14; IDAPA § 16.03.05.723.l.
243. IDAPA § 16.03.05.725.15 & 17; IDAPA § 16.03.05.723.03.k & .o.
244. IDAPA § 16.03.05.725.02; IDAPA § 16.03.05.723.03.b.
245. IDAPA § 16.03.05.725.05; IDAPA § 16.03.05.723.03.e.
246. IDAPA § 16.03.05.725.05; IDAPA § 16.03.05.723.03.e.
247. *See* IDAPA § 16.03.05.720.02 & 03.

and annuity payments.[248] If the income in the name of the community spouse is less than minimum Community Spouse Needs Standard (CSNS), which in 2016 is $1,991.25,[249] the community spouse can keep enough of the long-term care spouse's income to bring the community spouse's income up to $1,991.25.[250] This is referred to as the Community Spouse Allowance (CSA).[251] This amount is not a cap on how much the community spouse can keep since the community spouse can always keep all income paid in his/her name.[252]

In addition, if the community spouse has shelter expenses in excess of the Community Spouse Shelter Standard, which in 2016 is $597.38,[253] the Community Spouse Allowance (CSA) may be increased up to a maximum of $2,980.50;[254] i.e. the community spouse may keep enough of the long-term care spouse's income to bring the community spouse's monthly income up to a maximum of $2,980.50.[255] Qualifying shelter expenses are rent, mortgage payments, home related taxes and insurance, condominium or cooperative maintenance charges, plus a fixed Food Stamp Program Standard Utility Allowance .[256]

If the total income of both spouses is insufficient to bring the community spouse's income up to the applicable CSA amount, the community spouse is allowed to keep additional resources in an amount that brings the community spouse up to the CSA.[257] Finally, note that the Department allows either spouse to seek a fair hearing on the determination of the CSA, and the Department may adjust the CSA if unusual circumstances or significant financial hardship requires such an adjustment.[258]

C. Post-eligibility Treatment of Resources

Once an applicant has qualified for Medicaid, any money or property that is received by a Medicaid long-term care resident or HCBS recipient will be treated as income in the month of its receipt.[259] In order to remain eligible for Medicaid, any income received by the resident in excess of the income limit must be placed into an exempt income trust (Miller Trust).[260] However, the excess income placed into the Miller Trust must be paid to the long-term care facility or HCBS provider as

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248. *See generally* IDAPA § 16.03.05.300.
249. 2016 SSI AND SPOUSAL IMPOVERISHMENT STANDARDS, *supra* note 53.
250. *See* IDAPA § 16.03.05.725.08; *see also* 2016 SSI AND SPOUSAL IMPOVERISHMENT STANDARDS, *supra* note 53.
251. *Id.*
252. *See* IDAPA § 16.03.05.720.02 &.03.
253. 2016 SSI AND SPOUSAL IMPOVERISHMENT STANDARDS, *supra* note 53.
254. *Id.*
255. *See* IDAPA § 16.03.05.725.08.
256. IDAPA § 16.03.05.725.08.
257. IDAPA § 16.03.05.745.
258. IDAPA § 16.03.05.727.
259. IDAPA § 16.03.05.303.
260. *See supra* Part V.A.; IDAPA § 16.03.05.871.

patient liability.[261] If the resident keeps the income for longer than the month in which the income was received, the money or property will be treated as a resource.[262] In order to remain eligible for Medicaid, resources in excess of the $2,000 resource limit must be spent down.[263]

Cash received from the sale or exchange of any resource besides the home is not income in the month received, but is a countable resource.[264] When a home is sold, the proceeds from the sale of a home remain exempt provided they are reinvested in another home within three months of receipt.[265] Cash or in-kind payments received by the resident for the replacement or repair of an excluded resource, are counted as an excluded resource for nine months from the date of their receipt.[266]

Regarding the community spouse, there is only a one-time assessment of the community resources: at the time of initial eligibility.[267] Unless the long-term care spouse is deinstitutionalized, or becomes ineligible for Medicaid, increases or changes in the form of wealth of the community spouse, and uncompensated transfers by the community spouse, are disregarded.[268] However, Idaho's treatment of the home is particularly stringent as we will describe in the next section.

VII. MEDICAID ESTATE RECOVERY

A. Basic Estate Recovery Rules

Each state is required to recover from the estate of a Medicaid recipient an amount equal to the total amount of long-term care or HCBS benefits paid on behalf of the recipient after he or she is 55 years of age.[269] States are required to seek recovery of such funds against the probate estate of the Medicaid recipient but also have the option of seeking recovery against the non-probate assets in the Medicaid recipient's estate.[270] States cannot recover from the estate of the Medicaid recipient until the death of the recipient and the death of the recipient's surviving spouse, if any.[271] In addition, recovery cannot be made against the recipient's estate during any time the recipient has a surviving child who is

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261. IDAPA § 16.03.05.871.
262. *Id.*
263. *See* IDAPA § 16.03.05.720.01.
264. IDAPA § 16.03.05.209. If the cash is spent by month's end, it will not affect eligibility but a gratuitous transfer of the cash would.
265. IDAPA § 16.03.05.239.
266. IDAPA § 16.03.05.240.
267. *See* IDAPA § 16.03.05.736.
268. *See* IDAPA § 16.03.05.738.
269. *See* 42 U.S.C. § 1396p(b)(1)(B) (2012).
270. 42 U.S.C. § 1396p(b)(4)(A)–(B) (2012).
271. 42 U.S.C. § 1396p(b)(2)(A) (2012).

under the age or 21 or who is blind or totally disabled under Social Security or SSI.[272]

B. Idaho Specific Estate Recovery Rules

In Idaho, the Department may recover any medical assistance paid on behalf of a Medicaid recipient who was 55 or older when the recipient received assistance.[273] The Idaho statute provides that the recovery can be made from the Medicaid recipient's estate, ***and* from the estate of the Medicaid recipient's spouse.**[274] A state regulation limits its recovery against the community spouse's estate to property in the community spouse's estate that has a community property history or in which the institutional spouse had some other property interest.[275] For estate recovery purposes in Idaho, estate is defined as including all of an individual's probate assets as well as all of the:

> "[A]ssets in which the individual had any legal title or interest at the time of death, to the extent of such interest, including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust or other arrangement."[276]

This broad definition of estate includes both the probate and non-probate assets of an individual's estate.[277] Until recently the validity of the Idaho's effort to recover from the community spouse's estate was in question because some state courts have interpreted the federal enabling law to only permit recovery against property in which the Medicaid recipient spouse had an interest at the time of his or her death.[278] Thus, unless the institutional spouse had a claim against the estate of a predeceasing community spouse no estate recovery against the community spouse's estate would be possible. However, the Idaho Supreme Court has concluded otherwise.[279] This case is *Department of Health and Welfare v. McCormick*.[280]

McCormick involved an estate recovery effort against a home owned by George Perry at the time of his death.[281] The home originally belonged to George's wife, Martha Perry, before she transmuted it into

272. *Id.*
273. IDAHO CODE ANN. § 56-218(1) (2015).
274. *Id.*
275. IDAPA § 16.03.09.905.01.
276. IDAHO CODE ANN. § 56-218(4)(a)–(b) (2015).
277. *See id.*
278. *See, e.g.*, *In re* Estate of Barg, 752 N.W.2d 52, 69 (Minn. 2008).
279. *See* Dep't of Health and Welfare v. McCormick, 283 P.3d 785, 153 Idaho 468 (2012).
280. *Id.*
281. *See id.*

community property.[282] A few years later, Martha executed a durable power of attorney appointing George as her agent and a few months after that, George used the durable power to quit claim Martha's interest in the home to himself.[283] About that same time, Martha qualified for Medicaid assistance.[284] Less than three years later, George predeceased Martha.[285] The only significant asset in George's estate was the home, formerly owned by Martha, now worth about $80,000.[286] Martha then died a little more than a year after George's passing.[287] The Department filed a claim against his estate for more than $100,000 in Medicaid benefits it had bestowed upon Martha.[288] The magistrate judge denied the Department's claim, holding that under federal law and Idaho Code § 56-218 estate recovery was limited to property in which Martha had an interest at the time of her death.[289] The Department appealed.[290]

The policy logic supporting the state's claim is obvious. The home originally belonged to Martha so when George died it seems fair to use the home to help pay for Martha's medical bills.[291] But George's estate consisted of no community property. Thus, under general principles of Idaho law, Martha's creditor, the Idaho Medicaid agency should have had no allowable claim against the home. Still, the Idaho Supreme Court upheld the agency's claim by relying on a somewhat novel interpretation of the applicable federal statutes.[292]

The Idaho Supreme Court focused on two of the federal statutes involved. The first statute defines the scope of estate recovery and the second defines the word "assets" as it is used in Medicaid law. The first federal statute allows estate recovery against the "estate" of the Medicaid recipient and also against:

> [A]ny other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through

282. *Id.* at 786, 153 Idaho at 469.

283. *Id.* We imagine this was done upon advice of counsel. As we discuss infra, it is standard Medicaid planning practice to transfer away a married Medicaid recipient's interest in the family home to the community spouse. In some states this will cause the home to be unavailable for estate recovery.

284. *Id.*

285. Dep't of Health and Welfare v. McCormick, 283 P.3d 785, 786, 153 Idaho 468, 469 (2012).

286. *Id.*

287. *Id.* at 787, 153 Idaho at 470.

288. *Id.* at 786, 153 Idaho at 469.

289. *Id.* at 787, 153 Idaho at 470.

290. *Id.*

291. Medicaid does not seek to levy against the home while the community spouse is living in it even when the home is owned solely by the institutional spouse.

292. The end of the Idaho Supreme Court's analysis was to uphold a state regulation that authorized estate recovery against any asset that had ever been community property even where the institutional spouse had no present interest in the property at the time of her death. *See* Dep't of Health and Welfare v. McCormick, 283 P.3d 785, 153 Idaho 468 (2012).

joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.[293]

The Idaho Supreme Court concluded from this language that federal law permitted the state Medicaid agency to lay claim to assets in which the deceased Medicaid recipient had no interest at death.[294] It arrived at this conclusion by assuming that the language "life estate or living trust" could refer to circumstances in which the decedent had conveyed away all interest in the asset prior to death.[295] This approach does not track the way life estates and living trusts are normally used for estate planning purposes. Normally a living trust involves a retained life estate in the settlor and the transfer of the remainder to his or her loved ones.[296] In this sense, a typical living trust is a will substitute.[297] These devices are widely used for disability planning and for probate avoidance. Thus, only at the grantor's death do such trusts benefit third parties. If the grantors are a married couple, typically the trust continues until the second death and then distributes to the children or other beneficiaries.[298] Thus, in the typical living trust the transfer of beneficial ownership occurs at the death of the grantor just like the other arrangements referred to in the statute. But recall that in *McCormick* there was no trust involved and Martha had no life interest in the home. That brings us to the Idaho Supreme Court's next analytical twist.

The second federal statute that the Court focused on was the definition of "assets" found in 42 U.S.C. § 1396p(h)(1). That definition includes income and resources of both the community spouse as well as those of the "institutional spouse."[299] The federal statute's definition of "assets" overrules state marital property law in both common law and community property states in order to force spend down of the community spouse's separate property to pay for the nursing home costs of the institutional spouse.[300] The Idaho Supreme Court argued that the broad definition of assets to include property of the community spouse sup-

293. 42 U.S.C. § 1396p(b)(4) (2012).

294. McCormick, 283 P.3d at 794, 153 Idaho at 477.

295. *Id.* at 792, 153 Idaho at 475. The Court declined to follow the reasoning of the Minnesota Supreme Court in *In re* Estate of Barg where the court applied the doctrine of ejusdum generis to find that the phrase must refer to conveyances of interests that occur at death. *See In re* Estate of Barg, 752 N.W.2d 52, at 70 (Minn. 2008).

296. *See, e.g.*, RAY D. MADOFF et al., PRACTICAL GUIDE TO ESTATE PLANNING §§ 4.05, 8.07 (Wolters Kluwer 2014). Many of these tools have a significant estate tax planning purpose that is not relevant in the Medicaid context. *See generally*, John A. Miller & Jeffrey A Maine, *Wealth Transfer Tax Planning for 2013 and Beyond*, 2013 BYU. L. REV. 879 (2013).

297. *See, e.g.*, Wayne M. Gazur & Robert M. Phillips, Estate Planning: Principles and Problems, 398–99 (3d ed. 2012); Ray D. Madoff et al., Practical Guide to Estate Planning § 4.05[B][2] (Wolters Kluwer 2014).

298. *See, e.g.*, John R. Price & Samuel A. Donaldson, Price on Contemporary Estate Planning, § 10.07 (Wolters Kluwer 2015).

299. 42 U.S.C. § 1396p(h)(1) (2012). Institutional spouse is the federal synonym for Idaho's term "long-term care spouse."

300. Recall that resources of both spouses are considered for the Medicaid's means testing, subject to the spousal income and resource allowance rules. *See supra* part II.A.4.

ports allowing estate recovery against that spouses' estate even when the institutional spouse has no claim to those assets under state law.[301] This reasoning leads to the state having two bites out of the same apple. That is, the state can force spend down of both spouses' assets during life and then lay claim to at least some of the remaining assets of the community spouse upon his or her death.[302]

The Idaho Supreme Court has extended its reasoning in *McCormick* in two later cases, *In re Estate of Wiggins*[303] and *In re Estate of Peterson*.[304] *Wiggins* involved a marriage settlement agreement in which the spouses transmuted their community property into the separate property of the community spouse.[305] The estate argued that the transmutation prevented the state from employing estate recovery against that property.[306] The court had no difficulty in concluding that its reasoning in *McCormick* was applicable to these facts to achieve the same result.[307] Moreover, the court found that Idaho law permits estate recovery against the community spouse's estate even with respect to property that was always the separate property of the community spouse.[308] In *Peterson* the dispute centered on a residence that Mr. Peterson, a Medicaid recipient, had irrevocably transferred during the look back period to his daughter while retaining a life estate.[309] The state did not seek to void the original gift or apply the penalty period rules to it.[310] Instead, upon the Medicaid recipient's death, the state sought to employ estate recovery against the retained life estate and later against the transferred remainder.[311] The court, applying a "but for" analysis, found that "the entire residential property" was subject to estate recovery.[312]

It is not our purpose to analyze the Court's reasoning but to examine its consequences for Medicaid planning. Clearly the court has foreclosed some planning opportunities that are available in other states with less wide sweeping approaches to estate recovery. From this standpoint, the irony of the Court's decisions in *McCormick* and its progeny is that they make divorce the Medicaid planning tool of choice for those with the brio to employee it. We will explore this point more fully after addressing a few other aspects of the mechanics of estate recovery.

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301. Dep't of Health and Welfare v. McCormick, 283 P.3d 785, 792–93, 153 Idaho 468, 475–76.

302. The Idaho rule does, however limit estate recovery against the community spouse's estate to property that had some community property history. *Id.*

303. *In re* Estate of Wiggins, 306 P.3d 201, 155 Idaho 116 (2013).

304. *In re* Estate of Peterson, 340 P.3d 1143, 157 Idaho 827 (2014).

305. Wiggins, 306 P.3d 201 at 202, 155 Idaho at 117.

306. *Id.* at 203, 155 Idaho at 117.

307. *Id.* at 208, 155 Idaho at 123.

308. *Id.*

309. Peterson, 340 P.3d at 1149, 157 Idaho at 833.

310. Arguably this is what the state should have done. *See* IDAPA § 16.03.05.284.2.

311. *Id.*

312. Peterson, 340 P.3d at 1153, 157 Idaho 837.

C. Medicaid Lien on Real Property

In addition to estate recovery, the Department is able to place a lien on real property owned by a Medicaid recipient while the recipient is still living.[313] The lien can only be recorded after the Department has determined that the Medicaid recipient will be permanently institutionalized.[314] Any lien that is imposed upon the Medicaid recipient's real property will dissolve if the recipient is discharged from the long-term care facility and returns home.[315] Further, the Department cannot place a lien on the Medicaid recipient's home if any one of the following is residing in the recipient's home: (1) recipient's spouse; (2) recipient's child under the age or 21 or blind or totally disabled; or (3) recipient's sibling with an equity interest in the home and who has continuously lived in the home for at least one year immediately prior to the recipient's admission to a long-term care facility.[316]

VIII. PLANNING TECHNIQUES TO OPTIMIZE SPEND DOWN AND MINIMIZE ESTATE RECOVERY

Finally we are at the point where we can focus on planning to use the available financial resources in an optimal fashion and to preserve what resources we can for the care of the applicant, the support of the applicant's spouse and for the benefit of the applicant's other loved ones. In some states this is more easily done than in Idaho. In particular, in other states there are a number of planning opportunities for married couples that are not as useful in Idaho.[317] We should observe at the outset that Medicaid planning is controversial in some quarters.[318] From our perspective it is not much different from tax planning. We approach it from the standpoint of asking what strategies does the law allow that help the client achieve his or her goals? Below are some of our answers.

1. Gifting and Waiting Out the Look-Back Period or the Ineligibility Period

Where Medicaid planning is concerned it is easier to help the relatively well off than it is to help the poor. The obvious planning technique

313. *See* IDAHO CODE § 56-256; IDAPA 16.03.09.903.01.

314. IDAPA § 16.03.09.901.01.

315. *Id.*

316. IDAPA § 16.03.09.903.02.

317. One of the authors has, with co-authors, written previously about Medicaid planning in the states of Washington and California. *See* Sean R. Bleck, Barbara Isenhour & John A. Miller, *Preserving Wealth and Inheritance Through Medicaid Planning for Long Term Care,* 17 MICH. ST. U. J. OF MED. & LAW 153 (2013); John A. Miller & Vanessa S. Stroud, *Medicaid Planning for Long Term Care: California Style, AM. C. TR. EST. COUNS. L. REV.* (forthcoming Spring 2016).

318. *See* Miller, *supra* note 9, at 98–101.

for a higher net worth individual is to gift away assets outside the 60 month look back period. The problem, of course, is to have enough funds to cover living and care costs during those 5 years.[319] In this regard, long term care insurance can be a significant planning tool.[320] The donor also needs to appreciate that this form of voluntary impoverishment will likely leave the donor in difficult circumstances.[321] Medicaid benefits simply permit survival and do not guarantee comfort. For this reason, some lawyers will advise families to consider gifts outside the look back period coupled with a special needs trust. For example, a parent who anticipates needing long term care might give a sum of money to his or her children. The children, in turn, might set up a third party special needs trust for the parent for life with the remainder retained by the children. Some lawyers will advise the children to retain their own counsel for the SNT in order to avoid any implication of a quid pro quo arrangement.

There are some gift giving strategies that can work even though the transfer occurs within the 60 month look back period. In such cases the key is to have access to assets to pay for long term care during any period of Medicaid ineligibility arising from a transfer. For example, a Medicaid recipient might gift countable assets and incur a period of ineligibility and then later sell his or her exempt property to pay for care during the penalty period. This approach makes more sense in Idaho than in some other states because of Idaho's aggressive estate recovery program.

2. Purchasing Exempt Resources

A common Medicaid planning technique is to take cash or other countable assets and convert them to exempt assets.[322] This is sometimes called asset repositioning.[323] For example, the home might be renovated to make it more elder friendly,[324] or otherwise enhanced. The home could be sold and a more expensive home purchased. These sorts of changes are often especially useful if there is a spouse remaining in

319. Another concern is obtaining the right sort of housing. A person who is poor will have greater difficulty getting into the sort of housing she prefers. Thus, gifting away assets has a timing component beyond just the look back period. Gift too soon and you may not get into the facility you prefer. Gift too late and you may trigger transfer penalties. In this balancing act, the well-off have a clear advantage.

320. The challenge, of course, is to qualify for long term care insurance. Typically the insurer will deny coverage to a person who is already approaching incapacity at the time of application.

321. *See* Miller, *supra* note 9, at 88.

322. *See supra* Section II.C, for a list of the exempt resources.

323. *See* Miller, *supra* note 9, at 94.

324. There are many modifications to homes that can make life more comfortable and safe for those approaching old age or incapacity. Some simple examples include lowering cabinets in kitchens, installing grab bars in bath rooms, adding motion sensor lights on stairs, and placing easy open handles on doors and windows.

the home or if the plan is to use long term care in the home.[325] The home mortgage can be paid down or off. Excess resources can also be used to purchase household furnishings, appliances or a new car.[326] Note that these exempt resources may be subject to estate recovery upon the death of the Medicaid recipient and his or her spouse. In other states a transfer of the home to the community spouse might avoid this outcome but, as we discussed earlier, Idaho is tougher in this respect.

3. Consuming Excess Resources

Medicaid applicants can always spend excess resources on themselves or their spouses. Nothing will be accomplished if other countable resources are purchased, but the excess resources can be spent on long-term care as well as vacations, entertainment, additional help around the home, or other services. In the appropriate case the parent who is approaching disability might move in with a family member and agree to pay market rate rent. In some circumstances the purchase of a life estate in the home of a child is a viable strategy for the persons approaching incapacity or for the community spouse of an incapacitated person.[327]

Carefully drawn family caregiver agreements may function as an effective spend down strategy that avoids the transfer penalties.[328] These sorts of quid pro quo arrangements may also reduce some of the conflicts that families sometimes experience when some family members provide more care than others.

4. Transfer the Home to Certain Children or Siblings

It is always important to determine whether a penalty-free transfer of the home may be made, i.e. to a child who has lived in the home and cared for the applicant for the two year period immediately prior to institutionalization or a sibling who has lived in the home for one year and has an equity interest in the home or a disabled child.[329]

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325. *See* Thomas D. Begley & Andrew H. Hook, *Medicaid Planning is More Challenging After Recent Reforms*, 33 EST. PLAN. 3, 7–8 (2006).

326. There is no limitation on the value of the excluded car but only one car can be excluded. IDAPA § 16.03.05.222.

327. Begley & Hook, *supra* note 325, at 8–9; Gilfix, *supra* note 6, at 31. The purchase of a life estate in another's home is treated as a resource in Idaho unless the purchaser resides in the home for at least a year. IDAPA § 16.03.05.247.

328. *See*, e.g., Donna S. Harkness, Life Care Agreements: A Contractual Jekyll and Hyde?, 5 MARQ. ELDER'S ADVISOR 39, 55 (2003); Heather M. Fossen Forrest, Loosening the Wrapper on the Sandwich Generation: Private Compensation for Family Caregivers, 63 LA. L. REV. 381, 383 (2003); Begley & Hook, *supra* note 325, at 9. It is important to note that various tax consequences arise from these arrangements including withholding tax requirements for the payor and reportable income for the payee. Professor Miller has a very good student paper on caregiver agreements on file and will provide copies on request. Ask for Comment by Susie Jensen, Caregiver Contracts and Medicaid Benefits.

329. IDAPA § 16.03.05.292; *see also* Gilfix, *supra* note 6, at 31.

5. Establish Trusts for Disabled Persons Less Than 65 or For a Disabled Child of Any Age

As discussed above in Part V.E.1, there is no penalty for transfers to trusts for the sole benefit of disabled children of the Medicaid applicant or for the sole benefit of any disabled person under 65. These trusts have specific requirements to satisfy. The most important of these is that the assets that remain after the death of the disabled person must be made available to reimburse the state for its expenditures on the disabled person's behalf.

6. Installment Sales

As noted earlier, certain sales contracts are exempt assets but the payments are income as received. Selling the home on an installment basis and thereby converting it to an income stream may be preferable to outright sale and spend down.[330] For example, suppose a nursing home Medicaid recipient recovers sufficiently to move to assisted living. The remaining payments on the installment sale become available for any purpose. In contrast, if the home had been sold for cash and the proceeds spent before applying for Medicaid there would be nothing left at the time the person returned home. On the other hand retaining the home as an exempt asset is advantageous in that the entire value remains available (though not in a liquid form). But estate recovery lingers in the background (especially for single home owners). Installment sales to family members may offer valuation opportunities but are also likely to be subject to close scrutiny.[331] Finally, an installment sale may enhance the income available to the community spouse.

8. Disinheritance or Third Party Special Needs Trusts

As discussed earlier after acquired property of a Medicaid eligible individual has to be spent down. A disclaimer will not avoid the problem. Thus, potential benefactors should be advised to bypass the disabled person or to place any gift in a special needs trust that carries only a life interest.[332] Of course if the gift is large enough it may be desirable to forego Medicaid planning and give broader access to the property than a special needs trust would require in order to enhance the disabled person's overall quality of life.

It is worth noting that many interests can pass outside of probate. Thus, not only should the wills of potential benefactors be examined but also their beneficiary designations, especially those with respect to de-

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330. There may be greater opportunities to use installment sales in states other than Idaho. However, the DRA tightened the rules with respect to purchases of notes, loans or mortgages. *See* 42 U.S.C. §1396p(c)(I). For discussion, *see also* Moore & Landsman, *supra* note 66, at A-89.

331. *See* Miller, *supra* note 9, at 96–97.

332. *See* Sections V and VI.

ferred compensation plans and life insurance policies. In community property states such as Idaho, it is especially important to make sure that changes to beneficiary designations are approved by both spouses.

In Idaho one must be alert to the issues raised by the *McCormick* case discussed earlier. Thus, if the person seeking to disinherit the Medicaid recipient is the community spouse, we must be concerned with whether the assets involved were ever community property or other property that the institutional spouse was deemed to own at some time.[333] We discuss this further in Part VIII.B below.

9. Transfers of Remainder Interests in the Home Outside of Look Back

In other states a far sighted planning technique for avoiding estate recovery is to irrevocably transfer a remainder interest in the home to a loved one outside of the look back period.[334] The retained interest can be a life estate or a term of years but a life estate may not completely avoid estate recovery because of the peculiar rules concerning life estates that many states, including Idaho, have adopted.[335] A typical Qualified Personal Residence Trust might well do the job if the Medicaid recipient survives the term of years.[336] However, it is not clear if this technique will work in Idaho because of its stringent approach to estate recovery. The statute and regulation upheld in the *McCormick* case provide that estate recovery can be had against any property in which the Medicaid claimant had "an interest at the time of death, to the extent of that interest, including such assets conveyed to a survivor, heir, or assign of the deceased individual through, joint tenancy, tenancy in common, survivorship, life estate, living trust or other arrangement."[337] Does this catch remainder transfers outside of the look back period?[338] One might argue that such transfers are like transfers for value, that is, they are by definition outside of the scope of estate recovery.[339]

In our view, a transfer of a remainder interest in the home (to someone other than the spouse) outside of the look back period with a retained interest for a term of years should work in Idaho as long as the retained interest has expired before the date of death of the transferor.[340]

333. IDAPA 16.03.09.905.01.

334. *See* Gilfix, *supra* note 6, at 31–32.

335. *See, e.g.*, State v. Willingham, 136 P.3d 66 (2006).

336. For a discussion of QPRTs see John A. Miller & Jeffrey A. Maine, *The Fundamentals of Wealth Transfer Tax Planning: 2011 and Beyond*, 47 IDAHO L. REV. 385, 438 (2011).

337. IDAHO CODE § 56-218(4)(b).

338. Recall that *Peterson* involved a remainder that was transferred during the look-back period. However, it is not clear that this was crucial to the courts conclusion that the entire asset was subject to estate recovery.

339. IDAPA § 16.03.05.284.

340. One could debate this. There is at least an argument that the retained interest would also have to have expired outside of the look back period. We doubt this argument would succeed. *See* IDAPA § 16.03.05.285.

B. Additional Options For Married Couples

In addition to all of the options described above for single persons, there are other options for married couples.

1. Transfer Exempt Assets from the Institutional spouse to the Community Spouse and Revise his or her Estate Plan

While not required, transferring title to exempt resources solely into the name of the community spouse can avoid ineligibility for the nursing home spouse in the event the resources are sold. In most states this will also protect the assets from Medicaid estate recovery.[341] In Idaho, of course, estate recovery can be had against the estate of the community spouse and the *McCormick* analysis applies. How that analysis applies to inter vivos transfers by the community spouse is not entirely clear. For example, had Mr. Perry gratuitously transferred the home away before his death, would the state have had any claim against the home then? Apparently the answer is that a transfer penalty is triggered and Martha would have lost her Medicaid benefits for a period of time if the state took note of the transfer in a timely fashion.[342]

In any event, the community spouse should consider the option of revising his or her estate plan to take into account the possibility that he or she may die before the long-term care spouse. This is because an inheritance by the long-term care spouse could cause ineligibility or subject the inherited resources to a Medicaid lien. Through a new will the community spouse could leave the estate to a special needs trust for the long-term care spouse or directly to children. In either case, the death of the community spouse would not cause the disqualification of a long-term care spouse. Nor would the remainder interest with no community property history be subject to estate recovery if it is left to a third party. We hasten to add that in Idaho the *McCormick* case casts doubt on the treatment of any trust assets that were once community property.

With respect to the community spouse, there is a one-time only "snapshot" of community resources: at the time of initial eligibility. Unless the nursing home spouse is deinstitutionalized, or becomes ineligible for Medicaid, increases or changes of the form of wealth of the community spouse, are generally disregarded. This would also be true of uncompensated transfers by the community spouse of assets other than the home. Thus, for example, if the community spouse receives an inheritance after the snapshot, the state should have no claim against that

341. *See* Michael J. Millonig, *Post-Eligibility Transfers*, 3 NAELA J. 33 (2007). In Idaho the transfer of the institutional spouse's interest in the home to the community spouse will not trigger a transfer penalty. IDAPA § 16.03.05.292.01.

342. IDAPA § 16.03.05.284.02. Recall also that in *In re Estate of Peterson* the state failed to bring a claim against Peterson's home until after his death even though his remainder transfer occurred during life. *See In re* Estate of Peterson, 340 P.3d 1143 (2014). But the state's claim against the home was still upheld. If the same thing were to happen in the context of a fee simple gift by a community spouse, it is unclear if we would see the same result.

property and the community spouse should be able to dispose of that property at death or during life as she chooses. Again, he or she should be advised to use a special needs trust for any gift to the institutional spouse.

2. Purchase an Annuity for the Community Spouse

Excess resources can be used to purchase an immediate annuity for the community spouse that provides for periodic income payments. The annuity must be irrevocable, non-transferable, have no cash surrender value, and the payout term cannot exceed the life expectancy of the Medicaid applicant or spouse.[343] In addition the state must be named as the remainder beneficiary.[344] Idaho uses its own tables to determine life expectancy, which are set forth in the regulations.[345] If these requirements are complied with, no transfer penalty will be assessed for the purchase of the annuity and the value of the annuity income stream will not be counted toward the resource limit for Medicaid eligibility.[346]

By purchasing such an annuity for the community spouse, any amount of excess non-exempt resources can be reduced to the qualification level for the month after the annuity is purchased.[347] However, the annuity payments will be income to the community spouse and may affect an income allocation from the nursing home spouse.[348] As discussed above, there is no maximum limit on the amount of income of the community spouse.

3. Requesting an Excess Resource Allowance for the Community Spouse

If the community spouse's income cannot be made sufficient to meet his or her minimum monthly needs allowance, excess resources can be added to the CSRA.[349] In order to obtain this increase in the resource level, either spouse may request a hearing.[350]

4. Divorce

When a married couple has significant resources, the asset spend down requirements for Medicaid eligibility are painful to meet. This is especially the case when the community spouse has substantial countable assets that are his or her separate property.[351] Consider, for example

343. IDAPA § 16.03.05.838.
344. IDAPA § 16.03.05.838.03. The state's interest can be subordinated to that of the spouse and of any minor or disabled children of the applicant.
345. IDAPA § 16.03.05.838.02.
346. IDAPA § 16.03.05.841.
347. IDAPA § 16.03.05.838.
348. *Id.*
349. IDAPA § 16.03.05.745.
350. IDAPA § 16.03.05.727.
351. Miller, *supra* note 8.

a late in life inheritance of $500,000 by the community spouse prior to the institutional spouse's entry into a long term care facility. Medicaid's resource rules may require spend down of all or most of that inheritance.[352] In such circumstances divorce can serve as a planning option.[353] "This is because, after a divorce, the assets allocated in the dissolution decree to the non-applying ex-spouse are not countable resources for the Medicaid applicant and are not subject to [any transfer penalty]."[354] Similarly if the married couple owns a home as community property in Idaho, the entire value of that home is subject to estate recovery if either spouse is a Medicaid recipient.[355] But an equal division of the home by way of divorce would insulate the community spouse's half interest in the home from estate recovery.[356]

There are various scenarios where divorce is a rational approach.[357]

> In general we can say that the underlying circumstances for considering divorce include:
>
> 1. The community spouse is reasonably healthy and/or the motivation to provide an inheritance to someone other than the institutional spouse is high;
>
> 2. There is a significant amount of wealth and income legally allocable to the community spouse;
>
> 3. The life expectancy of the institutional spouse is sufficiently great to create the likelihood of large uninsured long-term care costs;
>
> 4. Circumstances foreclose less drastic measures;
>
> 5. And, there are insufficient countervailing circumstances such as adverse pension or Social Security consequences.[358]

As discussed earlier, Idaho's stringent enforcement of federal estate recovery requirements forecloses less drastic Medicaid planning strategies that are available in other states.[359] This is particularly true with

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352. *Id.* at 43.

353. *See id.* (for additional scenarios and a more complete discussion of divorce as a planning option).

354. *Id.* at 70.

355. *Id.* at 58–60.

356. *Id.* at 74–75.

357. *See id.*

358. Miller, *supra* note 8, at 71–72. In our analysis we assume a lawful divorce with a fair allocation of assets between the spouses. We also assume that the decision whether to pursue divorce is made by the client after being properly informed. There are moral concerns associated with this sort of planning, but we leave those for others to debate and for clients to decide. In an earlier article one of the authors considered this dimension of Medicaid planning. *See* Miller, *supra* note 7, at 98–101.

359. Miller, *supra* note 8, at 61.

respect to the family home.[360] In Idaho divorce may be the only way of passing on all or part of the value in the home to the next generation.[361] So divorce as a form of Medicaid planning could become more prevalent in Idaho than in other states. Still, "[m]any couples [in Idaho] may find the idea of using divorce for Medicaid planning too repugnant to consider."[362] That is the client's right and, of course, that choice must be respected.

IX. CONCLUSION

Nearly every older person faces the threat of long term disability and the financial challenges that can flow from disability. For most people, a long stay in a custodial care facility is an impoverishing event that leads to reliance on Medicaid. What many people do not fully appreciate is that there are many choices to be made along that path. A skilled elder law attorney can highlight and explain those choices to the client and help the client build a plan. The decisions taken can have enormous repercussions for the disabled elder, his or her spouse and for the people they love.

Mastering Medicaid is challenging because of its complex interplay between federal and state law. The differences from one state to the next are striking. Idaho's strong approach toward estate recovery enforcement is a good example. In Idaho it is much more difficult than in other states to pass the family home on to the next generation when one spouse becomes a Medicaid recipient.[363] This, in turn, highlights the utility of divorce as a Medicaid planning strategy in Idaho.[364] In other states such as California and Washington other strategies are available. These differences in an ostensibly federal program raise questions about fairness and uniformity.

In this article we have sought to inform the elder law practitioner of the full panoply of Medicaid planning tools available in Idaho to serve the client's needs. Still, we do not doubt that there are other Medicaid planning strategies beyond those we have described. Any form of legal planning is an evolving art form. Moreover, the law is subject to change and law changes drive planning changes. The key for the lawyer is to keep up with those changes and to have the insight to see how the system can be made to serve the needs of the client.

360. *Id.* at 70–71.
361. *Id.*
362. *Id.* at 71.
363. *Id.*
364. *Id.* at 70–71.