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PRESERVING WEALTH AND INHERITANCE THROUGH MEDICAID PLANNING FOR LONG-TERM CARE

Sean R. Bleck,¹ Barbara Isenhour,² and John A. Miller³

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

In old age the passage from life to death often involves a significant period of disability. The financial exposure for long term disability care can easily exceed \$100,000 annually. These costs are not covered by Medicare.⁴ Consequently, the costs of long term health care represent one of the greatest

4. 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).

financial risks of old age.⁵ Indeed, for most people a period of extended disability leads to impoverishment. This impoverishment not only brings hardship to the disabled person, it also can seriously disrupt the financial circumstances of the person's spouse and deeply degrade or even eliminate the prospects for inheritance by the disabled person's family. In some cases it may impose a continuing financial burden on the family of the disabled person. Through "Medicaid planning," there are many ways to ameliorate the financial disruption to spouses and families caused by long term disability. In this article, we explain the structure of Medicaid and, using the law of Washington State, illustrate many of the planning opportunities and strategies that are available to disabled seniors and their families.⁶ Most of what is found in this article has application in states other than Washington. Even so, it is important for the reader to keep in mind that every state Medicaid program has its unique features and rules. Washington is no exception. In any given case specific reference should be made to the appropriate state's laws, cases and regulations.

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.⁷ These government resources 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.⁸ It provides comprehensive medical coverage for

5. See John A. Miller, *Voluntary Impoverishment to Obtain Government Benefits*, 13 CORNELL J.L. & PUB. POL'Y 81, 88 (2003). Long term care insurance is available to those who are healthy and wealthy enough to qualify and pay for it. However, its widespread use seems unlikely. *Id.* at 90 n. 67.

6. For an excellent broader treatment of disability planning see Ralph J. Moore & Ron. M. Landsman, *Planning for Disability*, in TAX MANAGEMENT PORTFOLIOS 816 (2000) [*hereinafter* Moore & Landsman]. Commerce Clearing House publishes a six-volume loose leaf service called the MEDICARE AND MEDICAID GUIDE. See COMMERCE CLEARING HOUSE, MEDICARE AND MEDICAID GUIDE (1969 – Present). Another valuable resource is JOHN J. REGAN, REBECCA MORGAN, MICHAEL GILFIX & DAVID M. ENGLISH, TAX, ESTATE & FINANCIAL PLANNING FOR THE ELDERLY (1999) (there is an accompanying forms book).

7. See Miller, *supra* note 5, at 91-92 and the authorities cited therein.

8. 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 Washington, Medicaid is administered by the Health Care Authority ("HCA") of the Washington State Department of Social and Health Services ("DSHS"). The website for HCA is <http://www.hca.wa.gov> and contains updated information related to eligibility standards. *Health Care Assistance in Washington State*, WASHINGTON STATE HEALTH CARE AUTHORITY, <http://www.hca.wa.gov/medicaid/Pages/index.aspx>.

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

Congressional policy to restrict access is symbolized most recently by the Deficit Reduction Act of 2005⁹ (often referred to as the “DRA”). This legislation made major changes in the rules governing eligibility for Medicaid long-term care coverage. Throughout this article, the key changes related to the DRA are specifically noted.

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”).¹⁰ CMS promulgates program instructions and guidelines to the states in a series of transmittals collectively entitled the “State Medicaid Manual,”¹¹ which can also be found in the *Medicaid and Medicare Guide* published by the Commerce Clearing House.¹²

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 program (“SSI”).¹³ Because of this, guidance on various Medicaid issues can be found in the federal SSI statute,¹⁴ the federal SSI regulations,¹⁵ and in the federal SSI policy manual entitled the *Program Operations Manual System* (“POMS”).¹⁶

9. The Deficit Reduction Act of 2005 was signed into law on February 8, 2006. Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2005). As discussed *infra*, this legislation made major changes in the rules governing eligibility for Medicaid long-term care coverage. As of the date of this writing, the state of Washington has adopted regulations implementing the new transfer of asset rules, home equity rules, and spousal annuity rules set forth in the DRA, but has not implemented various other provisions of the DRA. The DRA’s transfer of asset and home equity rules affect transfers and applications made on or after May 1, 2006. The DRA’s annuity rules affect annuities purchased on or after February 8, 2006.

10. The federal regulations can be found at 42 C.F.R. § 430 (2012).

11. CENTERS FOR MEDICARE & MEDICAID SERVICES, *The State Medicaid Manual*, available at <http://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Paper-Based-Manuals-Items/CMS021927.html>.

12. COMMERCE CLEARING HOUSE, *MEDICARE AND MEDICAID GUIDE*: (1969 – Present).

13. 42 U.S.C. § 1396a(a)(10)(C).

14. 42 U.S.C. §§ 1381-1383 (2006).

15. 20 C.F.R. § 416 (2012).

16. See SOCIAL SECURITY ONLINE, *SSA’s Program Operations Manual System Home*, <https://secure.ssa.gov/apps10/poms.nsf/aboutpoms>.

In Washington State, Medicaid is administered by the Health Care Authority (“HCA”) of the Washington State Department of Social and Health Services (“DSHS”).¹⁷

B. The Application Process

Applications for Medicaid can be requested and submitted online, by mail, or in person.¹⁸ Medicaid long-term care applications are processed through the Home and Community Services Offices of DSHS.¹⁹

When an application is submitted, DSHS makes two determinations: first, whether the applicant meets the financial eligibility criteria and second, whether the applicant needs long-term care.²⁰ The need for long-term care requires one to need substantial assistance with two or more of the following activities of daily living: eating,²¹ bathing,²² toileting,²³ ambulation,²⁴ transfer,²⁵ positioning,²⁶ and medication management.²⁷ Alternatively, an applicant with a significant cognitive impairment can qualify if he or she needs substantial assistance with one of listed activities of daily living.²⁸

As discussed in detail below, financial eligibility involves meeting both resource (asset) and income tests. Resources are determined as of the first

17. See WASHINGTON STATE HEALTH CARE AUTHORITY, *supra* note 8. The state Medicaid program is authorized by the Revised Code of Washington. See WASH. REV. CODE § 74.09.500 (2011). The state regulations are found in the Washington Administrative Code. See WASH. ADMIN. CODE § 182. DSHS also has internal manuals. The old “Manual I” has been replaced by a new manual called “Eligibility A-Z.” Its chapters on Adult Medical Programs and Long-term Care have a significant amount of relevant material. HRSA also maintains a federally required and approved “Medicaid State Plan” which describes what services and persons are covered, and the basic eligibility rules. See *Table of Contents*, DSHS, <http://www.dshs.wa.gov/manuals/caz/> (last updated April 4, 2013).

18. See Aging and Disability Services Administration, *How to Apply for Medicaid*, DSHS, http://www.adsa.dshs.wa.gov/pubinfo/benefits/medicaid_apply.htm (last updated Mar. 20, 2013).

19. *Id.* For example, in King County, Washington, the address to write to for applications is P.O. Box 24847, Seattle, WA 98124-8823. The street address is 1737 Airport Way South, at the intersection of S. Holgate Way and Airport Way South. DSHS, Aging and Disability Services Administration, Resources for King County, <http://www.adsa.dshs.wa.gov/Resources/King/Default.htm> (last updated Mar. 30, 2012)

20. See *Medicaid and Long-Term Care Services for Adults*, DSHS, 1, 5 (2012), <http://www.dshs.wa.gov/pdf/Publications/22-619.pdf>. See also WASHINGTON STATE HEALTH CARE AUTHORITY, *supra* note 8.

21. WASH. ADMIN. CODE § 246-335-015(44)(d) (2012).

22. *Id.* § 246-335-015(44)(b).

23. *Id.* § 246-335-015(44)(h).

24. *Id.* § 246-335-015(44)(a).

25. *Id.* § 246-335-015(44)(i).

26. WASH. ADMIN. CODE § 246-335-015(44)(f).

27. *Id.* § 246-335-015(44)(e).

28. *Id.* § 388-106-0355 (2013).

moment of the first day of the month.²⁹ Income is what is received *after* that first moment and before the first moment of the next month.³⁰

The level of care determination is made by the Health Care Authority using its “Comprehensive Assessment.”³¹ Medicaid *nursing home* coverage can only begin as of the date a DSHS assessment of the institutionalized individual’s need for nursing home care is *requested*, or an application is submitted, whichever is earlier.³²

Regulations require DSHS to approve or deny an application within 45 days of receipt of a completed application, although this requirement is frequently not met.³³ 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 (including the assessment request process) were met in each of the prior months.³⁴

When an application is approved, DSHS will send the applicant a notice called an “award letter.”³⁵ This letter will advise the applicant that he/she has been approved for Medicaid benefits and will specify how the applicant’s income must be spent each month thereafter.³⁶

C. Nursing Home Benefits³⁷

For persons eligible for nursing home coverage, Medicaid requires that all income, after the special allocations described below, be paid to the nursing home.³⁸ The amount that the Medicaid recipient pays to the nursing home each month is called “participation.”³⁹ Medicaid will then pay the nursing home the difference between the recipient’s participation and the Medicaid reimbursement rate for the facility.⁴⁰

The Medicaid reimbursement rate is based on the facility’s costs to provide care and the level of need of the residents and varies with each facility -

29. *Id.* § 182-512-0300(1) (2013).

30. *Id.* § 182-509-0001 (2013).

31. WASH. ADMIN. CODE § 388-105-0005 (2013). *See also id.* § 388-106-0070 (2013).

32. *Id.* § 388-106-0045 (2013).

33. *Id.* § 388-406-0035(2)(b) (2013).

34. *Id.* § 182-504-0015 (2013).

35. *See* WASHINGTON STATE HEALTH CARE AUTHORITY, *Medicaid Provider Guide, Nursing Facilities* 1, A.1 (2010), http://www.hca.wa.gov/medicaid/billing/documents/guides/nursing_facilities_bi.pdf.

36. *Id.* *See also Medicaid and Long-Term Care Services for Adults*, *supra* note 20, at 5.

37. WASH. ADMIN. CODE § 182-513 (2013).

38. *Id.* § 182-515-1509 (2013).

39. *See also Medicaid and Long-Term Care Services for Adults*, *supra* note 20, at 9.

40. 42 C.F.R. § 447.253(b)(1)(iii) (2012). *See also Medicaid and Long-Term Care Services for Adults*, *supra* note 20, at 6.

but is always less than the private pay rate.⁴¹ A typical Medicaid reimbursement rate in King County, Washington is \$5,626 per month.⁴²

When a person qualifies for nursing home coverage, Medicaid also provides coverage for most medical expenses, such as prescriptions and physician bills.⁴³

D. COPEs Benefits

The Community Options Program Entry System (“COPEs”) is a Medicaid program designed to help persons avoid institutionalization.⁴⁴ It covers long-term care delivered at home, in adult family homes, and in assisted living facilities.⁴⁵ It is operated under a waiver from the federal Center for Medicare and Medicaid Services, meaning that limits are placed on the program, which are different than those for other Medicaid services.⁴⁶

With a few exceptions, which are described below, COPEs has the same financial eligibility rules as the Medicaid nursing home program. In addition, applicants must either (1) currently be in a nursing home or (2) establish that they are likely to be institutionalized without COPEs, but can safely reside at home (or in a non-institutional residential facility) with COPEs services.⁴⁷ DSHS makes the assessment as to whether a person’s care needs qualify for COPEs, and this can be done on a “fast track” basis for those who face imminent institutionalization.⁴⁸

For eligible persons residing in their own home, COPEs will pay up to around \$1,600 per month (and sometimes higher amounts under “exceptions to policy”) for someone to come into the home to provide assistance in daily living activities and personal care, such as bathing, toileting and dressing, and some household maintenance tasks.⁴⁹ COPEs may pay up to an additional \$1,200 per month for other services including home delivered meals, home

41. 42 C.F.R. § 447.253

42. See *Long Term Care Income & Resource Standards – Personal Needs Allowance (PNA) Charts*, DSHS, <http://www1.dshs.wa.gov/manuals/eaz/sections/LongTermCare/LTCstandardspna.shtml> (updated Feb. 11, 2013) [hereinafter *Income & Resource Standards*].

43. See *What Low-Income Medical Coverage is available?*, WASHINGTON STATE HEALTH CARE AUTHORITY, <http://www.hca.wa.gov/medicaid/Pages/summaryofservices.aspx>.

44. WASH. ADMIN. CODE § 182-515-1505 (2013). *Id.* § 388-106-0015(2).

45. *Id.* § 388-106-0015(2).

46. WASH. REV. CODE § 74.39A.030 (2012).

47. WASH. ADMIN. CODE § 388-106-0310 (2012).

48. DSHS, Electronic DSHS Forms, Fast Track Service Agreement (Form 13-713), available at http://www.dshs.wa.gov/pdf/ms/forms/13_713.pdf.

49. WASH. ADMIN. CODE § 388-106-0010 (2012). See COLUMBIA LEGAL SERVICES, *Questions and Answers on the COPEs Program*, 1-2 (Apr. 2013), www.washingtonlawhelp.org/files/C9D2EA3F-0350-D9AF-ACAE-BF37E9BC9FFA/attachments/1EBA0CD6-B051-4775-B071-7EDFDC934951/5102en.pdf.

health aides, skilled nursing care, night support, and training.⁵⁰ COPEs can also cover care, at a higher rate, in a licensed Adult Family Home, Congregate Care Facility, Boarding Home or Assisted Living facility.⁵¹ For an assisted living facility, COPEs reimbursement ranges from about \$1,800 to \$5,000 depending on the level of services required and the county where the services are provided.⁵² For Adult Family Homes, the range is from about \$1,400 to \$5,000.⁵³ As with institutional coverage, COPEs recipients get coverage for most medical expenses.⁵⁴

There is no retroactive COPEs coverage: coverage begins only when a plan of care and provider contract are approved by DSHS.⁵⁵

II. INCOME AND RESOURCE ELIGIBILITY RULES FOR SINGLE PERSONS

A. Income⁵⁶

In a nursing home, a single individual's income must be less than the private pay rate in the facility plus the applicant's regularly recurring monthly medical expenses.⁵⁷ If an applicant's income is above the Medicaid rate and below the private pay rate, the applicant will be certified as eligible for Medicaid and will only have to pay the Medicaid rate; in that case, however, the applicant must spend down the excess income over the Medicaid rate on medical costs before he or she will be eligible for Medicaid coverage for other medical expenses.⁵⁸

Generally, a single COPEs recipient's monthly income cannot exceed \$6,298.⁵⁹ Single persons with a monthly income equal or less than \$710 per month are ineligible for COPEs, but these persons may receive in-home services or services in adult family homes and assisted living facilities from the Medicaid Personal Care program, which provides services similar to COPEs.⁶⁰

50. *Id.* § 388-106-0300 (2013).

51. *Id.* § 388-106-0305.

52. See COLUMBIA LEGAL SERVICES, *supra* note 49, at 2.

53. *Id.*

54. See *Consolidating the Home and Community Based (HCB) Medically Needy (MN) Waivers into the COPEs Waiver Effective 4/1/2012*, DSHS, www.dshs.wa.gov/manuals/eaz/sections/LongTermCare/LTCNwaiverMNtoCOPEs.shtml (updated Apr. 4, 2012).

55. WASH. ADMIN. CODE § 388-106-0315; *id.* § 182-515-1505.

56. See *id.* § 182-513; see also *id.* § 182-512 (2012).

57. *Id.* § 182-513-1315 (2013). See also *Income & Resource Standards*, *supra* note 42.

58. *Id.* § 182-519-0110 (2012).

59. *Id.* § 182-515-1508(4) (2013). See COLUMBIA LEGAL SERVICES, *supra* note 49, at 2.

60. WASH. ADMIN. CODE § 388-106-0200 (2012). See also *Income & Resource Standards*, *supra* note 42.

B. Resources⁶¹

An unmarried recipient of either nursing home or COPES coverage cannot have more than \$2,000 in *non-exempt* resources.⁶² The exempt resources are defined below.

Resources are valued according to the fair market value of the applicant's equity interest in the resource.⁶³ Mortgages and liens against resources are deducted when determining value.⁶⁴ Joint bank accounts are presumed owned entirely by the applicant unless the applicant establishes a different ownership distribution.⁶⁵ Assets owned jointly by spouses are presumed to be owned proportionately, unless a different ownership allocation can be established.⁶⁶ Life estates and remainder interests are valued using a Life Estate Table found in Appendix 2 of the Long-term Care Chapter of the Eligibility A-Z Manual.⁶⁷

Common examples of resources which, 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 subject to early withdrawal taxes and penalties.⁶⁸ Amounts held in revocable trusts (which include most "living trusts") are also counted.⁶⁹

Resource eligibility is always determined at the first moment of the first day of any month for which coverage is sought.⁷⁰ Generally, if the value of the applicant's resources exceeds \$2,000 on the first day of the month, coverage will be denied for the entire month.⁷¹ However, if resources are only slightly above \$2,000 on the first day of the month, DSHS will allow resources exceeding the ceiling to be "spent down" during an initial month of eligibility.⁷² For this one-time resource "spend-down," the amount of excess resources plus the recipient's monthly income may not exceed the facility's private pay rate plus the recipient's regularly recurring medical expenses.⁷³ DSHS

61. See WASH. ADMIN. CODE § 182-513 (2013); see also *id.* § 182-512 (2012).

62. See, e.g., *id.* § 388-470 (2012); *id.* § 388-478 (2012); *id.* § 182-519-0050.

63. *Id.* § 182-512-0250(6) (2012) (explaining that the value of a resource is equal to its fair market value minus any encumbrances on the property).

64. *Id.*

65. *Id.* § 182-512-0200(5) (2012).

66. WASH. ADMIN. CODE § 182-512-0200(6) (2012).

67. *Id.* § 182-527-2810; DSHS, *Appendix 2 – Determining the Value of Life Estate*, <http://www.dshs.wa.gov/manuals/eaz/sections/LongTermCare/LTCOappendix2.shtml> (updated Mar. 25, 2011).

68. See *infra* Section II.C.10 (annuitization of retirement accounts converts them to income).

69. WASH. ADMIN. CODE § 388-470-0055(1)(a)(v) (2012).

70. *Id.* § 182-512-0300(1) (2012).

71. *Id.*

72. *Id.* § 388-519-0110 (2012).

73. *Id.*

will then require that the amount of resources over \$2,000 plus the recipient's income be "participated" toward the cost of care.⁷⁴

C. Exempt Resources⁷⁵

Some resources are not counted. That is, they are deemed "exempt" resources, when determining whether a single applicant for Medicaid nursing home coverage or COPES has exceeded the \$2,000 resource ceiling. As discussed in Section IX, exempt resources can present significant Medicaid planning opportunities. For now we simply describe the basic parameters for establishing exempt status.

1. Homes

A home (including a mobile home or a condominium) 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.⁷⁶ Because of the DRA, Washington rules impose a \$500,000 limit on the exempt home equity of a Medicaid applicant for applications for long-term care coverage (nursing home or COPES) made on or after May 1, 2006.⁷⁷ 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.⁷⁸ This limit also does not apply to the value of home equity owned by the spouse of an applicant.⁷⁹ A home includes all contiguous property, even if this includes several lots, legal descriptions or tax parcels, and includes related "out-buildings" on the property.⁸⁰ Proceeds from the sale of a home are exempt if used within three months of receipt of the proceeds to purchase another home.⁸¹

Even if the applicant is not currently living in the home, the property can be treated as exempt if the applicant states his or her intent to return to the home.⁸² A statement of intent to return home does not have to be supported by medical verification and does not require a demonstration that such a return is likely.⁸³

74. WASH. ADMIN. CODE § 388-519-0110 (2012).

75. *See Id.* § 182-513-1350; *see also id.* § 182-512 (2012).

76. *Id.* § 182-512-0350(1)(b) (2012).

77. *Id.* § 182-513-1350(7)(a). There was no value limit on the home for applications prior to this date. Federal law now allows the states to exclude no less than \$500,000 and no more than \$750,000 of equity. *See* Michael Gilfix, *Planning for the Home Under Tougher Medicaid Rules*, 35 EST. PLAN. 27, 29 (2008).

78. WASH. ADMIN. CODE § 182-512-0350(1)(b)(ii), (iv).

79. *See id.* § 182-513-1350.

80. *Id.* § 182-512-0350(1)(b).

81. *Id.* § 182-512-0350(2).

82. *Id.* § 182-512-0350(1)(b)(iii).

83. WASH. ADMIN. CODE § 182-512-0350(1)(b)(iii).

Rent from the home is income to the recipient, which generally must be paid toward the cost of care.⁸⁴ However, certain expenses such as interest (but not principal) on home mortgage debt, taxes, insurance, and maintenance expenses for the home can be offset in calculating countable income from rent.⁸⁵

Up to \$931 (as of January 1, 2013) of a Medicaid nursing home resident's monthly income may be used for up to six months to pay actual home maintenance costs if a physician certifies that it is likely recipient the will return home in that period.⁸⁶

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 55.⁸⁷

2. Vehicles

A vehicle is exempt regardless of value if it is used for the transportation of a recipient or a member of the recipient's household.⁸⁸ A "vehicle" is anything used for transportation and can include a boat, snowmobile or animal-drawn vehicle.⁸⁹

3. Household Furnishings and Personal Effects

Household furnishings and personal effects of any value are exempt. This includes clothing, appliances, furniture, personal jewelry and other items typically found in a home.⁹⁰

4. Burial Plots or Urn Space

A burial plot or urn space is exempt regardless of value.⁹¹

5. Burial Expenses

Amounts to cover burial expenses can be exempt in *one* of two alternative ways:

84. *Id.* § 182-512-0750(4) (2012).

85. *Id.*

86. *Id.* § 182-513-1380(5)(e) (2013). Subject to those conditions, "[u]p to one hundred percent of the one-person federal poverty level per month" may be used to pay home maintenance costs. *Id.* The current federal poverty level is \$931. *Income & Resource Standards, supra* note 42.

87. WASH. REV. CODE § 43.20B.060 (2012).

88. WASH. ADMIN. CODE § 182-512-0400 (2012).

89. *Id.*

90. *Id.* § 182-512-0350(1)(a).

91. *Id.* § 182-512-0500(8) (2012).

a. Burial Funds

A Burial Fund of not more than \$1,500 is exempt if it is established as a separate account in any financial institution.⁹² Also exempt is any interest or appreciation in the \$1,500 burial fund account after it is designated.⁹³ The amount that can be set aside for a burial fund will be reduced by the face value of all life insurance policies if this face value is less than \$1,500.⁹⁴

b. Irrevocable Prepaid Burial Funds

Instead of a \$1,500 Burial Fund, a single person can purchase an irrevocable prepaid burial plan or establish an irrevocable burial trust.⁹⁵ The amount of the plan or trust must be reasonable in light of anticipated burial costs, but substantially more than \$1,500 can often be deemed reasonable.

6. Life Insurance

Life Insurance is exempt if the total face value of all policies is less than \$1,500.⁹⁶ If the face value is greater than \$1,500, the total cash surrender value is a countable non-exempt resource.⁹⁷ The amount that can be set aside for life insurance will be reduced by the amount set aside for burial expenses.⁹⁸

7. Sales Contracts

Sales contracts, including Real Estate Contracts, entered into before December 1, 1993 are considered exempt;⁹⁹ payments received under such contracts (including both income and principal) are counted as income in the month of receipt. Sales contracts entered into after December 1, 1993 are exempt only if the contract was for the sale of the applicant's principal place of residence, the principal amount equals the fair market value of the property sold, the contract carries a market interest rate, and the term of the contract does not exceed 30 years.¹⁰⁰ Beginning with contracts entered into on June 1,

92. *Id.* § 182-512-0500(112) (2012).

93. WASH. ADMIN. CODE § 182-512-0500(3) (2012).

94. *Id.* § 182-512-0500(4)(a)(b) (2012).

95. *Id.* § 182-512-0500(5) (2012).

96. *Id.* § 182-512-0450(3) (2012).

97. *Id.* § 182-512-0450(6) (2012).

98. WASH. ADMIN. CODE at §182-512-0450(4). It would seem that term insurance should not affect eligibility since it has no cash surrender value. But, obviously, paying the premiums could be a problem. If the insured's estate is the beneficiary, the estate recovery rules could also be a problem. An outright transfer or a transfer into trust for the benefit of third parties such as the insured's children (along with the obligation to pay the premiums) may be a workable strategy.

99. *Id.* § 182-512-0350(5) (2012).

100. *Id.* § 182-512-0350(7) (2012).

2004 and thereafter, a sales contract is exempt only if it is compensation for the residence of the client on the date of the client's institutionalization and if the term of the contract does not exceed the actuarial life expectancy of the client.¹⁰¹ Transfer of a contract (other than to a spouse) is subject to the transfer penalties discussed below.¹⁰²

8. Long-Term Care Partnership Insurance

The insured amount under a Long-Term Care Partnership Insurance Policy is exempt after the policy coverage has been exhausted.¹⁰³ 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. As of this writing, no policies have qualified under the Long-Term Care Partnership regulations adopted by the Office of the Insurance Commissioner.¹⁰⁴

9. Non-Convertible Resources

Resources that can't be converted to cash in 20 working days are *disregarded* until sold as long as the applicant is making an ongoing bona fide effort to convert them to cash.¹⁰⁵ The proceeds from the sale of such resources are not exempt and will often make the Medicaid recipient ineligible in the month following the sale unless spent or invested in exempt resources.¹⁰⁶ However, such ineligibility is prospective only; the recipient is not required to pay Medicaid back for coverage provided before the proceeds were received.¹⁰⁷

10. Annuities

An annuity which has no cash surrender value, which is not assignable for value during life is not considered to have any value as a resource if, in the case of an annuity for a single person, the state of Washington is named as the contingent beneficiary of the annuity.¹⁰⁸ The income from the annuity, includ-

101. *Id.*

102. *Id.* § 182-513-1363 (2013).

103. WASH. ADMIN. CODE §182-513-1400 (2013).

104. *Id.* § 182-513-1400 (2013); REVISED CODE OF WASHINGTON § 48.85.010 (2012).

105. *Id.* § 182-512-0250(3) (2012).

106. *Id.* § 182-512-0300(3) (2012).

107. *Id.* §182-512-0700(2) (2012).

108. WASH. ADMIN. CODE § 182-516-0200(4)(d) (2012). The DRA required the state to be named as the contingent beneficiary in the case of annuity for a community spouse if the community spouse dies during the term of the annuity. This requirement was implemented in the state of Washington with respect to annuities acquired on or after April 1, 2009. Also, for annuities purchased on or after April 1, 2009, the term of the annuity for the spouse can be no less than five years, or the life expectancy of the spouse, whichever is less. *See* Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 6012, 120 Stat. 63, 63-64 (2005).

ing both interest and principal, is countable income to the recipient when received – and will generally have to be participated toward the cost of care.¹⁰⁹ If an annuity is purchased which has a payout period longer than the life expectancy of the annuitant, DSHS will deem the purchase, in part, an uncompensated transfer subject to the transfer penalties discussed below.¹¹⁰ The amount of the uncompensated transfer is the value of all payments that will be paid under the contract during the period in excess of life expectancy.¹¹¹

Because all annuity income paid to a single Medicaid recipient must be paid toward the cost of care, and the state must be named as the contingent beneficiary of the annuity, converting excess resources into an annuity will usually not make economic sense for single persons as a method to establish eligibility.

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 COPES benefits (other than COPES recipients whose income exceeds the COPES income cap of \$2,022 per month). These rules are designed to avoid the “impoverishment” of the community spouse. By middle class standards, they are not generous.

The Medicaid eligibility rules for married couples apply only when one spouse is in the nursing home or on COPES.¹¹² If both spouses are in a nursing home (or on COPES), they will be treated as though they were single and the Medicaid income and resource rules for single persons, discussed above, will apply for each.¹¹³

The federal Medicaid statute expressly preempts state community property law for purposes of determining the ownership of income and assets.¹¹⁴ Medicaid determines ownership according to the name in which income is received or the title of an asset.

109. *Id.* § 182-516-0201(4) (2012).

110. The notion is that one is, in effect, gifting a remainder interest for one’s heirs. As we will discuss *infra*, an annuity benefitting a spouse continues to have some planning utility.

111. *Transfer of an Asset, Long Term Care*, DSHS, <http://www.dshs.wa.gov/manuals/ez/sections/longtermcare/LTCJtransfer.shtml>.

112. WASH. ADMIN. CODE § 182-513-1350(1)(4) (2013).

113. *Id.* § 182-513-1350(2), (3). If both spouses are in a nursing home, the resources of either will be deemed to the other if they reside in the same room; otherwise, assets are deemed available to the other spouse only for the initial month of institutionalization.

114. 42 U.S.C. §1396r-5(a)(1) (2008).

B. Income Eligibility¹¹⁵

For one spouse of a married couple to receive Medicaid coverage for nursing home care, the income of that spouse must be less than the facility's private pay rate plus his or her regularly recurring monthly medical expenses.¹¹⁶ The nursing home spouse's income is determined by first seeing what income comes in the name of that spouse.¹¹⁷ If this amount exceeds the eligibility standard, the person under certain circumstances may still be eligible if one-half of the income of *both* spouses is less than the eligibility standard.¹¹⁸ There is *no* income limit for a spouse remaining at home.¹¹⁹ Thus, there is no marriage penalty with respect to the income test for Medicaid eligibility. As will be described in the next part below, the same cannot be said for the resources test for Medicaid eligibility.

For COPES, the monthly income of the spouse receiving COPES assistance cannot exceed \$2,094.¹²⁰ Here again, either (1) the income coming in the name of the COPES spouse, or (2) one-half of the couple's income can be used to determine eligibility.¹²¹ There is no income limit for the spouse not receiving COPES, although this may affect cost participation, as explained below.¹²²

C. Resource Eligibility¹²³

All resources of both spouses are considered in determining eligibility, regardless of which spouse owns what resource or whether the property is considered to be separate or community property.¹²⁴ Prenuptial and Separate Property Agreements are disregarded.¹²⁵ Transfers between spouses before application have no effect on this initial eligibility determination.¹²⁶

Because the resources test for Medicaid eligibility lumps all of the assets of a married couple together, some assets owned solely by the non-disabled spouse (called the "community spouse") may have to be spent down in order for the disabled spouse to qualify.¹²⁷ Where the applying spouse (called the "institutional spouse") enters a nursing home or goes on COPES on or after

115. See *id.* §1396r-5(b), (d). See also WASH. ADMIN. CODE § 182-513-1325-1350; *id.* §182-513-1395 (2013).

116. See WASH. ADMIN. CODE § 182-512-0700 (2012).

117. *Id.* § 182-513-1330(2)(a) (2013). This is aptly called the "Name on the Check" rule.

118. *Id.* § 182-513-1330(4).

119. *Id.* § 182-513-1330(3).

120. *Id.* § 182-515-1508(4) (2013). See also *Income & Resource Standards*, *supra* note 42.

121. WASH. ADMIN. CODE § 182-513-1330.

122. *Id.* § 182-513-1330(2).

123. See 42 U.S.C. §1396r-5(c), (f). See also WASH. ADMIN. CODE § 182-513-1350.

124. WASH. ADMIN. CODE § 182-513-1350(9), (10), (12).

125. *Id.* § 182-513-1330(4).

126. *Id.* § 182-513-1330.

127. *Id.* § 182-519-0110 (2012).

July 1, 2009, the combined non-exempt resources of a married couple must be less than an inflation adjusted specified amount to qualify one of the spouses for Medicaid nursing home coverage or COPES.¹²⁸ In general the community spouse is limited to retaining the lesser of:

1. One half of the couple's combined non-exempt resources,¹²⁹ or
2. \$115,920¹³⁰

Any of the couple's combined non-exempt assets in excess of that amount must be spent down before Medicaid eligibility is obtained for the institutional spouse.¹³¹

The amount of non-exempt resources a couple can retain when one spouse is institutionalized (in a facility licensed as a hospital or nursing home) ranges from is \$50,639 up to a maximum of \$117,920 if one-half of the couple's non-exempt resources exceeds \$50,639.¹³² In order to take maximum advantage of this resource standard, the couple must make a "HCS Community Resource Declaration" to DSHS for the month in which the first spouse is institutionalized, although the Resource Declaration can be submitted at any time up to the time of the actual application for Medicaid.¹³³ If the Resource Declaration is submitted, the resource standard will then be the lesser of one-half of the couple's non-exempt resources as of the date the first spouse is institutionalized, or \$117,920.¹³⁴

The same resource rules and exemptions described above for single persons apply to couples,¹³⁵ with the following additions:

1. The "community spouse" (that is, the non-disabled spouse) is allowed \$48,639 in non-exempt resources (or up to \$115,920 if a Resource Declaration is submitted) in addition to the \$2,000 in non-exempt resources allowed the institutionalized spouse.¹³⁶ The community spouse can be allowed more than \$48,639 (or \$115,920) if additional resources are necessary to bring the community spouse's income up to the minimum spousal income allocation level described below.¹³⁷

128. *Id.* § 182-513-1350(9)(b)(ii). The 2013 minimum spousal resource allowance is \$48,639. *Income & Resource Standards*, *supra* note 42. The institutional spouse is entitled to another \$2,000. *Id.*

129. This number is also subject to a minimum (currently \$50,639). In other words, spend down should not push the community spouse below \$50,369 in resources. *See id.*

130. WASH. ADMIN. CODE § 182-513-1350(10)(a); *Income & Resource Standards*, *supra* note 42.

131. WASH. ADMIN. CODE § 182-519-0110 (2012).

132. *See Income & Resource Standards*, *supra* note 42 (The community spouse is allowed to keep up to \$115,920 if other spouse is in a nursing home in addition to the \$2,000 in non-exempt resources for a total of \$117,920).

133. WASH. ADMIN. CODE § 182-513-1350(10).

134. WASH. REV. CODE § 74.09.575 (2011).

135. WASH. ADMIN. CODE § 182-513-1350.

136. "Resource Standards" are defined in WASH. ADMIN. CODE § 182-513-1350.

137. *Id.* § 182-513-1350(12).

All but \$2,000 in non-exempt resources must be transferred into the name of the community spouse before the first regularly scheduled eligibility review, which is usually 12 months after initial eligibility is determined.¹³⁸ Thereafter, the non-exempt resources of the institutional spouse must always remain below \$2,000.¹³⁹ However, after eligibility for one spouse is established, that eligibility is unaffected if the non-exempt assets of the community spouse later exceeds \$48,639.¹⁴⁰

2. Each spouse is allowed to have a \$1,500 burial fund, subject to the same life insurance/irrevocable burial trust rules explained above for single persons.¹⁴¹

3. The home (regardless of value) is exempt if the community spouse resides in the home.¹⁴² Further, if the home is transferred into the name of the community spouse, it will not be subject to Medicaid estate recovery unless the spouse on Medicaid later regains title to the property.¹⁴³

4. One car per couple is exempt regardless of value.¹⁴⁴

As discussed more fully in Section IX purchasing an annuity for the community spouse with excess resources can immediately establish eligibility of the institutional spouse irrespective of the amount of excess resources.¹⁴⁵ However, the distributions to the community spouse from the annuity often will reduce or eliminate the income allocation the community spouse would otherwise receive from the nursing home spouse.¹⁴⁶

138. This subsequent transfer may require a guardianship where the institutionalized spouse is incompetent and lacks a durable power of attorney.

139. WASH. ADMIN. CODE § 182-513-1350.

140. This is often referred to as the "snapshot" approach to eligibility. *See Id.* § 182-513-1350(12), (13).

141. *Id.* § 182-512-0500 (2012).

142. The DRA and WASH. ADMIN. CODE § 182-513-1350(7)(a) limit the exempt home equity of the applying spouse (but not the community spouse) to \$500,000 for applications made on or after May 1, 2006 if the community spouse is not residing in the home.

143. WASH. ADMIN. CODE § 182-512-0350(1)(b)(2)(ii); *id.* § 388-527. Estate recovery and liability are discussed in further detail in Section IV.

144. New regulations promulgated in October 2006 eliminated the exemption of an additional vehicle. *See id.* § 182-513-1350(7).

145. The DRA requires the state to be named as the contingent beneficiary of such an annuity, and this requirement has been imposed in the state of Washington for annuities purchased on or after April 1, 2009. Under this new requirement, if the community spouse dies before the annuity is fully distributed to the community spouse, the state will receive the balance up to the amount spent by the state for the care of the spouse on Medicaid. The state regulations require the term of such annuity to be not less than five years, or the actuarial life expectancy of the community spouse, whichever is less. *See* Deficit Reduction Act, § 6012.

146. WASH. ADMIN. CODE § 182-513-1380(5).

IV. TRANSFER OF ASSET RULES

A. How Transfers of Assets May Affect Eligibility¹⁴⁷

Medicaid's transfer of asset rules *delay* eligibility for nursing home coverage or COPES for a period of time. This is called the transfer penalty.¹⁴⁸ 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. As discussed in Section IX, the transfer of asset rules do not foreclose all planning opportunities. It is ironic that more planning opportunities remain for persons of substantial means than for those persons of lesser means. This is an irony quite familiar to those who do tax planning.

A transfer may result in a transfer penalty if each of the following conditions is met:

1. The transfer is for less than fair market value.
2. The transfer is to someone other than a spouse or disabled child.
3. The transfer is for the purpose of qualifying for Medicaid.
4. The transfer is made during the "look-back" period.¹⁴⁹

There are many kinds of transfers that will not cause a transfer penalty – these are described below. As we will also discuss, the DRA made substantial changes to these rules, which were implemented in Washington for transfers made on or after May 1, 2006.

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.¹⁵⁰ For outright gifts made before May 1, 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.¹⁵¹ The look-back period is *sixty* months for all transfers made on or after May 1, 2006.¹⁵² Transfers not within the look-back period have no effect on Medicaid eligibility.¹⁵³ Thus, for example, if a person gives away one million dollars six years before applying for Medicaid, that gift will not be considered in determining eligibility.

147. See 42 U.S.C. § 1396p(c) (2010). See also WASH. ADMIN. CODE § 182-513-1363-65.

148. WASH. ADMIN. CODE § 182-513-1363.

149. *Id.*

150. *Id.*

151. *Id.* § 182-513-1365; § 182-513-1363(1).

152. *Id.*

153. WASH. ADMIN. CODE § 182-513-1363.

C. Calculating the Transfer Penalty

The methodology for calculating the effect of uncompensated transfers in Washington has changed many times over the years. Here we describe the rules for gifts on or after May 1, 2006.¹⁵⁴

1. *Transfer of Asset Rules for Transfers On or After May 1, 2006*¹⁵⁵

a. Calculation Methodology

The total amount of gifts made after May 1, 2006 and within five years of applying for Medicaid is divided by 258, which represents the average daily cost of nursing home care in the state of Washington.¹⁵⁶ The result of this division, rounded down to the next whole number, will result in the number of days of ineligibility caused by the gifts in that month.¹⁵⁷

b. Gifts of \$238 Per Month or Less Create No Period of Ineligibility

The regulations disregard gifts in a month if the aggregate amount given away in the month is \$258 or less.¹⁵⁸

c. The Period of Ineligibility BEGINS When the Applicant is “Otherwise Eligible”

Based on the DRA, Washington’s rules provide that the period of ineligibility begins on the date the client would be “otherwise eligible for LTC services based on an approved application . . . or the first day after any previous penalty period has ended.”¹⁵⁹ This means that, for a person not now on Medicaid, an application has to be made in order to start the penalty period, and the applicant has to be determined eligible in all respects except for the imposition of the transfer penalty.¹⁶⁰ Further, the state is now taking the position that “otherwise eligible” also means that the applicant must be in a facility that accepts Medicaid, unless the applicant is seeking in-home assistance under the COPES program.¹⁶¹ After the expiration of the penalty period com-

154. Because the look-back period for gifts prior to May 1, 2006 is 36 months, such gifts will no longer have any effect on current eligibility. *Id.*

155. *Id.*

156. This is the number for applications submitted on or after October 1, 2010, and it will be adjusted each October.

157. WASH. ADMIN. CODE: § 182-513-1363(10)(c).

158. *Id.* § 182-513-1363(2)(a). See also *Income & Resource Standards*, *supra* note 42

159. WASH. ADMIN. CODE: § 182-513-1363(7).

160. Thus, non-exempt resources would have to be reduced to less than \$2,000 as of the first day of the month for which application is made, and the applicant would have to be determined to be in need of long-term care as of the same date.

161. WASH. ADMIN. CODE: § 182-513-1363(7)(a).

puted by the response to the first application, a second application must be made in order to actually qualify for benefits.¹⁶² The use of the phrase “LTC Services” in the regulation seems to mean that this process could be used to commence a period of ineligibility for COPES as well as for nursing home care.

*Ineligibility Period Examples*¹⁶³

Example 1: If a single person gives away \$12,450 in June and is left with less than \$2,000 on July 1, submitting a Medicaid application on July 1 would cause a 50 day penalty period (12,450 divided by 249 equals 50) to begin July 1 and run through August 22. To avoid the 150% penalty described below, the donee would need to use the \$12,450 to cover the donor’s cost of care for July and August.

Example 2: If a single person gifts \$7,474 per month for the five month period from June through November, and is left with less than \$2,000 on December 1, there would be a five month period of ineligibility. If a Medicaid application is submitted on December 1, the five month period of ineligibility would begin December 1 and run through April 30.

Example 3: If a single person gifts \$74,740 in May 2007 and applies in January 2012 after all remaining assets have been reduced to \$2,000, the 10 month period of ineligibility will begin January 1, 2012 and end October 30, 2012.

Under the current rules, gifting prior to application may still be economically advantageous to certain persons whose cost of care does not exceed their monthly income and long-term care insurance coverage by more than \$7,474 per month.

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. Some of these exceptions present planning opportunities that will be discussed in Section IX. 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.¹⁶⁴
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

162. For a person already on Medicaid, the transfer penalty will begin on the first of the month following the transfer, with an application not required to start the period of ineligibility. This situation might arise when a person already on Medicaid disclaims or gives away a subsequent inheritance.

163. In these examples we assume a daily nursing home rate of \$249. The monthly rate based on 30 days would be \$7,474. See *Income & Resource Standards*, *supra* note 42.

164. WASH. ADMIN. CODE § 182-513-1363(1).

the applicant to remain independent) for the two year period immediately prior to institutionalization or COPES eligibility.¹⁶⁵

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 COPES eligibility.¹⁶⁶

4. Transfer of the home to a child under age 21.¹⁶⁷

5. Transfers to a spouse or to a trust for the sole benefit of a spouse or transfers into an annuity for the sole benefit of a spouse.¹⁶⁸

6. Transfers to a disabled child or to a trust for the sole benefit of a disabled child.¹⁶⁹ Such a trust must mandate distribution of the entire corpus to the beneficiary within the beneficiary's actuarial life expectancy.¹⁷⁰

7. Transfers to a trust for the sole benefit of any disabled person under 65 years of age.¹⁷¹ Washington's rules require that such a trust mandate distribution of the entire corpus to the beneficiary within the beneficiary's actuarial life expectancy, unless the trust provides for Medicaid to be repaid upon the death of the beneficiary.¹⁷²

8. Transfers made in exchange for fair market value consideration. With respect to payment to a family member for the provision of services, the compensation must be paid no more than 30 days from the provision of the services and meet various other requirements.¹⁷³

9. When all gifts that have been made are returned to the Medicaid applicant.¹⁷⁴

10. Transfers of exempt resources other than the home or sales contracts.¹⁷⁵

11. Transfer of assets which are exempt due to the purchase of a Long-Term Care Partnership Insurance Policy.¹⁷⁶

12. Transfers not made for the purpose of qualifying for Medicaid long-term care coverage.¹⁷⁷

165. *Id.* § 182-513-1363(2)(d)(ii)(C).

166. *Id.* § 182-513-1363(2)(d)(iii).

167. *Id.* § 182-513-1363(2)(d)(ii)(B).

168. *Id.* § 182-513-1363(2)(f) (i)-(iii); *Id.* § 182-513-1363(3)(b).

169. WASH. ADMIN. CODE: § 182-513-1363(2)(e).

170. *Id.* § 182-513-1363(3)(c).

171. *Id.* § 182-513-1363(2)(f)(iv).

172. *Id.* § 182-513-1363 (3).

173. *Id.* § 182-513-1363(4).

174. WASH. ADMIN. CODE: § 182-513-1363(2)(c)(iii).

175. *Id.* § 182-513-1363(2)(b).

176. *Id.* § 182-513-1400 (2008); WASH. REV. CODE: § 48.85.010 (West 2012).

177. WASH. ADMIN. CODE: § 182-513-1363(2)(c)(ii).

E. Waiver of Penalty

DSHS must waive the application of the transfer penalty where it will create undue hardship.¹⁷⁸ This would typically occur where the property transferred cannot be recovered, and the applicant faces loss of shelter, food, clothing, or health care without DSHS assistance.¹⁷⁹ Note, however, that civil penalties may be asserted against the recipients of the gifts for situations where the penalty is waived,¹⁸⁰ as discussed below.

F. Certain Purchases Treated As Transfers

The DRA treats purchases of certain interests as uncompensated transfers subject to the transfer penalty described above. 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 nursing home costs during life and also is unavailable for estate recovery.¹⁸¹ For example, the purchase of a life estate is deemed an uncompensated transfer unless the purchaser resides in the property for at least one year after the date of the purchase.¹⁸² The purchase of a debt instrument, such as a note or mortgage, will be treated as a gift to the seller unless the repayment term is equal to or less than the purchaser's life expectancy, it requires equal periodic payments with no "balloon" payments, and does not cancel upon the death of the purchaser.¹⁸³ The purchase of an annuity 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.¹⁸⁴ Annuity purchases will also 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.¹⁸⁵ Except for the annuity regulations discussed above, which apply to annuities purchased on or after April 1, 2009, the state of Washington has not, as of the date of these materials, implemented regulations to deem these actions as uncompensated transfers which cause a period of ineligibility.

G. Penalties on Recipients of Gifts

If gifts are made during the look back period by a donor who subsequently requires nursing home care and is unable to pay, the state will bear

178. *Id.* § 182-513-1363(2)(c)(iv).

179. *Id.*

180. WASH. REV. CODE ANN. § 74.39A.160.

181. WASH. ADMIN. CODE § 182-513-1363.

182. 42 U.S.C.A. § 1396p(a)(2)(c) (2010).

183. WASH. ADMIN. CODE § 182-516-0201 (2013). Deficit Reduction Act, § 6016.

184. *Id.*

185. *Id.*

that cost of that care if the gift cannot be recovered from the donees.¹⁸⁶ In Washington, however, state law imposes a civil fine on *recipients* of uncompensated transfers who refuse to return the gifts if, as a result, the state provides coverage during a period of ineligibility under the undue hardship exception.¹⁸⁷ The fine equals 150% of the amount expended by the state during the period of ineligibility.¹⁸⁸ A transfer subject to this civil fine is also deemed a fraudulent conveyance and the state is given the right to petition a court to set aside the transfer and require the return of the assets given away.¹⁸⁹

V. TRUST RULES¹⁹⁰

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.¹⁹¹ 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 do not apply.¹⁹² Distributions 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 will not be deemed an available resource to the recipient unless the recipient has the right to demand a distribution.¹⁹³ The Medicaid trust rules also do not apply to trusts created by Will, including the Will of the spouse of a Medicaid recipient.¹⁹⁴

The prior rules applicable to trusts¹⁹⁵ were repealed by the Omnibus Budget Reconciliation Act of 1993, but those rules still apply to trusts created on or before August 10, 1993.¹⁹⁶ Under those rules, the maximum amount of income or assets that a trustee could distribute to the Medicaid applicant were deemed available to the applicant.¹⁹⁷

186. *Id.* § 182-513-1367.

187. WASH. REV. CODE ANN. § 74.39A.160(1)(c). DSHS will provide coverage despite a transfer penalty where the applicant would otherwise lose all access to care (e.g., will be evicted from the nursing home). *See* WASH. ADMIN. CODE § 182-513-1367.

188. WASH. REV. CODE ANN. § 74.39A.160(2)(a).

189. *Id.* § 74.39A.160(3).

190. WASH. ADMIN. CODE § 182-516-0100 (2013).

191. *Id.* §§ 182-516-0100(5), 182-513-1363(3).

192. *Id.*

193. *Id.* § 182-516-0100(11).

194. *Id.* § 182-516-0100(5).

195. WASH. ADMIN. CODE § 182-516-0100(3).

196. *Id.*

197. *Id.* § 182-516-0100(3).

What follows is a discussion of the rules applicable to trusts established after August 10, 1993, and which are set forth in WASH. ADMIN. CODE 182-516-0100.¹⁹⁸

A. Definition of Grantor Trust for Medicaid Purposes

The Medicaid trust rules apply to any trust established by a Medicaid applicant (or his or her spouse), or a person, court or administrative body acting on behalf of or *at the direction or upon the request* of the applicant or spouse.¹⁹⁹ The rules apply to the extent the trust includes income or resources of the applicant (or his or her spouse), including what the applicant was entitled to receive but didn't because of action by the applicant, spouse or a person, court or administrative body acting on behalf of or at the direction of the applicant or spouse.²⁰⁰

B. Revocable Trusts

For revocable grantor trusts, the entire corpus is deemed an available resource of the applicant or recipient.²⁰¹ Distributions to third parties are deemed gifts subject to the transfer penalties.²⁰² The rules also treat distributions to an applicant or recipient from a revocable trust as income.²⁰³

C. Deemed Availability of Irrevocable Trust

For irrevocable grantor trusts where a distribution from the corpus for the benefit of the applicant is permissible under any circumstance, the rules deem the entire corpus from which such distribution can be made an available resource.²⁰⁴ For irrevocable trusts established after August 1, 2003, trusts funded with assets of the applicant or the spouse of the applicant which permit distributions to the applicant or spouse will be deemed available resources for purposes of determining eligibility.²⁰⁵

198. For a detailed discussion of the use of trusts for Medicaid planning that focuses on federal law, see Moore & Landsman, *supra* note 6, at A-70 - A-78. See also Bradley J. Frigon & W. Eric Kuhn, *Which SNT, When and Why?*, 5 NAELA J. 1 (2009). For an example of a special needs trust with commentary, see Jeffrey N. Pennell, *Special Needs Trusts: Reflections on Common Boilerplate Provisions*, 6 NAELA J. 89 (2010).

199. WASH. ADMIN. CODE § 182-516-0100(4)(a)(iii).

200. *Id.* § 182-516-0100(4).

201. *Id.* § 182-516-0100(3)(c)(i).

202. *Id.* § 182-516-0100(4)(d)(iii).

203. *Id.* § 182-516-0100(4)(d)(ii).

204. WASH. ADMIN. CODE § 182-516-0100(4)(e)(i).

205. *Id.* § 182-516-0100(5)(a)(iii)(A).

D. Irrevocable Trust Where No Distributions to Grantor Permitted

For an irrevocable grantor trust where no distribution to the applicant is permitted, a transfer subject to the transfer penalties is deemed to occur as of the date the trust is established and the applicable look-back period is 60 months.²⁰⁶ Such a trust established outside the look-back period will not be deemed an available resource of the applicant.²⁰⁷

E. Special Needs Trusts for Disabled Persons Under 65²⁰⁸

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.²⁰⁹ To qualify for the exemption the trust must (1) be established by a parent, grandparent, legal guardian of the disabled person or court (but not by the disabled person directly), and (2) must provide that Medicaid will be repaid for its expenditures for the disabled person from the remaining corpus of the trust upon the disabled person's death.²¹⁰ For trusts established after August 1, 2003, the Medicaid payback must be required upon the death of the beneficiary, the cessation of the beneficiary's disability or the termination of the trust, whichever is sooner.²¹¹ There is no transfer penalty imposed for funding such a trust.²¹²

For supplemental needs trusts for SSI recipients established after October 1, 2010, the trust must provide that in the case of any termination prior to the death of the beneficiary, all funds remaining after the payment of taxes due because of the termination, administrative expenses necessary to terminate the trust and the repayment of Medicaid, must be distributed to the special needs beneficiary.²¹³ The trust must not give the special needs beneficiary any authority to terminate the trust.²¹⁴

This exception is 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 specif-

206. *Id.* § 182-516-0100(4)(e). *Id.* § 182-513-1363(1).

207. *Id.* § 182-516-0100(4)(e)(ii).

208. 42 U.S.C. §1396p(d)(4)(A); WASH. ADMIN. CODE § 182-516-0100(7)(a). For a detailed treatment of special needs trusts, see John J. Campbell, *Preserving Public Benefits in Physical Injury Settlements: Special Needs Trusts and Beyond*, 2 NABLA J. 367 (2006).

209. WASH. ADMIN. CODE § 182-516-0100(7).

210. *Id.* § 182-516-0100(7)(a).

211. *Id.*

212. *Id.* § 182-513-1363(2)(f)(iv).

213. *Id.* § 182-513-1000(7)(b)(vi).

214. See *Social Security Administration Program Operations Manual System: SI 01120.199*, SOCIAL SECURITY ADMINISTRATION, <https://secure.ssa.gov/poms.nsf/lnx/0501120199>.

ic requirements.²¹⁵ 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.²¹⁶

F. Pooled Asset Trust

Another exception to the trust rules is for accounts in pooled asset trusts administered by non-profit organizations.²¹⁷ These kinds of trust accounts must be established by a parent, grandparent, guardian or court, but can also be established directly by the beneficiary.²¹⁸ While the beneficiaries of these trusts can be 65 or over, there is no exception to the Medicaid long-term care transfer of assets penalties for transfers of assets to such trust accounts for beneficiaries over age 64.²¹⁹

The “master trust” under which the trust accounts for each beneficiary are held must be created and managed by a nonprofit organization.²²⁰ Upon the death of the beneficiary, funds remaining in that beneficiary’s trust account may be held by the nonprofit for the benefit of other beneficiaries of the master trust, or paid back to Medicaid up to the amount paid by Medicaid for the deceased beneficiary.²²¹

If a trust account for a SSI beneficiary is terminated prior to the death of the beneficiary, Medicaid must first be paid back up to the amount paid by Medicaid for the beneficiary.²²² Anything remaining after the Medicaid pay-back must be paid directly to the beneficiary. No beneficiary can have any right to terminate his or her trust account.²²³

G. Trust for the Sole Benefit of a Community Spouse²²⁴

Until August 1, 2003, an irrevocable trust for the sole benefit of a community spouse was not deemed an available resource of the Medicaid applicant or the community spouse.²²⁵ To avoid a transfer penalty at the time the trust was funded, such trusts had to require that the entire trust be paid out to the beneficiary spouse within his or her life expectancy.²²⁶ However, the assets

215. WASH. ADMIN. CODE § 182-513-1363(2)(f)(iv).

216. *Id.* § 182-516-0100(8).

217. *Id.* § 182-516-0100(6)(b).

218. *Id.*

219. *Id.* § 182-513-1363(3)(d).

220. WASH. ADMIN. CODE § 182-516-0100(6)(b).

221. *Id.* § 182-516-0100(6)(b)(vi).

222. *Id.* § 182-516-0100(6)(b)(vi)(A).

223. *Id.* § 182-516-0100(6)(b)(i).

224. *Id.* § 182-513-1365(1)(e), (4).

225. WASH. ADMIN. CODE § 182-516-0100.

226. *Id.* § 182-516-0100(4)(e)(i).

in such a trust established after August 1, 2003 are deemed an available resource for purposes of determining eligibility.²²⁷

VI. POST-ELIGIBILITY TREATMENT OF INCOME AND RESOURCES

A. Allocation of Institutionalized Person's Income²²⁸

Generally, a person in a nursing facility who has been determined eligible for Medicaid must pay virtually all of his/her income to the facility for the cost of his or her care. However, income may be allocated for various other purposes. The most common allocations are as follows:

1. The monthly Personal Needs Allowance of a Medicaid recipient in a nursing home, which for most nursing home residents is currently \$57.28.²²⁹
2. The Spousal Maintenance Allowance for the Community Spouse,²³⁰ which is explained below.
3. An allowance for dependent family members residing with the community spouse, which is one-third of the amount by which \$1,891 exceeds that dependent family member's income.²³¹
4. Amounts for prior incurred medical expenses for which the recipient is liable -- even if incurred when the recipient was ineligible for Medicaid.²³²
5. Health care premiums for the nursing home resident, including Medicare premiums and premiums for long-term care insurance or supplemental "Medigap" policies.²³³
6. Up to \$931 per month for up to 6 months may be allocated to cover actual home maintenance costs if a physician certifies that the recipient is likely to return home within that period.²³⁴
7. 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 and DSHS has approved an Exception To Policy authorizing their payment.²³⁵ DSHS promulgated regulations effective June 1, 1998, which limit the amount of this allocation to \$175 per month in most situations.²³⁶

227. *Id.* § 182-516-0100(5)(e)(i).

228. 42 U.S.C. § 1396r-5(d); WASH. ADMIN. CODE § 182-513-1380.

229. WASH. ADMIN. CODE § 182-513-1380(4)(a)(v).

230. *Id.* § 182-513-1380(5)(b).

231. *Id.* § 182-513-1380(5)(c). See also *Income & Resource Standards*, *supra* note 42.

232. WASH. ADMIN. CODE § 182-513-1380(5)(d).

233. *Id.* § 182-513-1350(7)(d)(i).

234. *Id.* § 182-513-1380(5)(e); *Income & Resource Standards*, *supra* note 42.

235. WASH. ADMIN. CODE § 388-79-030.

236. *Id.* § 388-79-030(1).

Costs related to establishing a guardianship are limited to \$700,²³⁷ and periodic review costs are limited to \$600 during any three year period.²³⁸ There is a procedure for obtaining exceptions to these amounts. The regulations may be found at Wash. Admin. Code 388-79-010 (2008) et. seq.

Any income remaining after these allocations must be paid to the nursing facility as participation toward the cost of care.²³⁹

At least once a year, and more frequently if requested by a client or spouse, DSHS will review the income of spouses, taking into account any increases or decreases in income that will change either the spousal allowance or the nursing home spouse's participation to the nursing home.²⁴⁰ Documentation of income payments received or earned must be submitted as part of this re-determination.²⁴¹ The community spouse has the right to request a hearing if she/he disagrees with DSHS' determination of the spousal allowance or participation amount.²⁴²

B. Income Allocation to Community Spouse²⁴³

The community spouse can keep all checks paid in his/her name, regardless of amount and regardless of whether the income may be characterized as community income.²⁴⁴ Income includes wages, pensions, social security, VA or military payments, interest or dividends, and annuity payments.²⁴⁵

If the income in the name of the community spouse is less than \$1,891 the community spouse can keep enough of the nursing home spouse's income to bring the community spouse's income up to \$1,891.²⁴⁶ This is referred to as the spousal monthly maintenance allowance. This amount is not a cap on how much the community spouse can keep because the community spouse can always keep all income paid in his/her name.²⁴⁷ Community spouses who are considering converting excess resources into an annuity or a sales contract with a monthly income stream may not realize any improvement in their income if they are otherwise eligible for the spousal monthly needs allowance.²⁴⁸

237. *Id.* § 388-79-030(2).

238. *Id.* § 388-79-030(3).

239. *Id.* § 388-79-010.

240. WASH. ADMIN. CODE § 388-434-0005, available at <http://www.dshs.wa.gov/manuals/wac/388-434-0005.shtml#388-434-0005>.

241. *Id.* § 388-434-0005(2).

242. 42 U.S.C. § 1396r-5(e).

243. 42 U.S.C. § 1396r-5(d); WASH. ADMIN. CODE § 182-513-1380.

244. WASH. ADMIN. CODE §§ 182-513-1330(3), 182-513-1350(13). See generally US DEPARTMENT OF HEALTH AND HUMAN RESOURCES, *Spouses of Medicaid Long Term Care Recipients* (Apr. 2005), available at <http://aspe.hhs.gov/daltcp/reports/spouses.htm>.

245. WASH. ADMIN. CODE § 182-512-0600.

246. *Id.* § 182-513-1380(5)(b). See also *Income & Resource Standards*, *supra* note 42.

247. WASH. ADMIN. CODE §§ 182-513-1330(3), § 182-513-1350(13).

248. *Id.* § 182-513-1380(4), (5).

The annuity or contract income will only reduce on a dollar for dollar basis income that they would otherwise receive from his or her spouse.²⁴⁹

If the community spouse has shelter expenses in excess of \$567, the spousal monthly needs allowance may be increased up to a maximum of \$2,898; i.e., the community spouse may keep enough of the nursing home spouse's income to bring the community spouse's monthly income up to a maximum of \$2,898.²⁵⁰ Qualifying shelter expenses are rent, mortgage payments, home related taxes and insurance, condominium or cooperative maintenance charges, plus a fixed utility allowance of \$394.²⁵¹

If the total income of both spouses is insufficient to bring the community spouse's income up to the applicable spousal monthly needs allowance amount, the state will not provide any additional funds for the community spouse.²⁵² In this case, however, the nursing home spouse will not have to pay anything to the nursing facility because all of the nursing home spouse's income, after covering the personal needs allowance, will go to the community spouse. Also in this case, the community spouse is allowed to keep additional resources above the \$48,639 level at the initial Medicaid eligibility determination as necessary to maximize the income of the community spouse up to the applicable spousal monthly maintenance allowance amount.²⁵³

Finally, note that DSHS will respect court orders that provide for a higher level of spousal support than would otherwise be available under the spousal monthly needs allowance described above.²⁵⁴

C. Income Allocation Rules for Community Options Program Entry System (COPEs)²⁵⁵

For a single person living at home, COPEs allows the first \$931 of income to be retained for living expenses, with all remaining income allocated in the same order as for nursing home residents.²⁵⁶ For a single person residing in an assisted living facility, congregate care facility or an adult family home, COPEs allows the first \$62.79 (as of July 1, 2008) to be retained for personal needs, with all remaining income allocated in the same order as for nursing home residents.²⁵⁷

For couples at home, COPEs has the same income allocation rules as are used by Medicaid for nursing homes, except that the spouse receiving

249. *Id.*

250. *See Income & Resource Standards, supra* note 42.

251. WASH. ADMIN. CODE § 182-513-1380(6)(b). *See also Income & Resource Standards, supra* note 42.

252. WASH. ADMIN. CODE § 182-513-1380(5)(b).

253. *Id.* § 182-513-1350(9)(b)(ii). *See also Income & Resource Standards, supra* note 42.

254. WASH. ADMIN. CODE § 182-513-1380(7).

255. *Id.* § 182-515-1505.

256. *Id.* § 182-515-1509(1). *See also Income & Resource Standards, supra* note 42.

257. WASH. ADMIN. CODE § 182-515-1509(3)(a).

COPES is entitled to an initial allocation \$710 instead of the \$62.79 allowed nursing home residents.²⁵⁸ Because the spouse of a COPES recipient is entitled to a minimum monthly maintenance allowance of \$1,891, there is no cost participation required of a couple where one spouse is on COPES in the home unless their combined income exceeds \$2,601 (\$710, the medically needy income level, plus \$1,891, the basic community spouse allocation, which is 150% of the two person federal poverty level).²⁵⁹ If excess shelter costs, calculated in the way explained above for nursing homes, bring the spousal maintenance allowance up to \$2,898, there is no cost participation required unless the couple's combined income exceeds \$3,608 (\$710, the medically needy income level, plus \$2,898, the maximum community spouse allowance).²⁶⁰ If the spouse not receiving COPES receives income in his/her name exceeding the spousal maintenance allowance amount, this excess is not required to be participated toward the cost of COPES care - although in this case all of the income of the spouse on COPES in excess of \$710 must be used for COPES cost participation (unless another income allocation is applicable).²⁶¹

Where a married COPES recipient is residing in an adult residential care facility, adult family home or assisted living facility, the COPES spouse is allowed \$62.79 as a personal needs allowance, but must pay the excess over \$62.79 toward their cost of care.²⁶² If this leaves the community spouse with less than the minimum monthly maintenance allowance, an exception to policy can be requested.²⁶³

If both spouses are on COPES in the home, each is only entitled to an initial allocation of \$931.²⁶⁴

D. Post-Eligibility Treatment of Resources

Except for unanticipated lump sum payments, money or property received by a Medicaid nursing home resident, married or single, will be deemed income in the month received.²⁶⁵ It will cause ineligibility if the amount received, combined with the other income of the resident, exceeds the private pay rate in the nursing home plus the resident's regularly recurring medical

258. *Id.* § 182-515-1509(2). *See also Income & Resource Standards, supra* note 42.

259. WASH. ADMIN. CODE § 182-515-1509(2), (4) (which references WASH. ADMIN. CODE § 182-513-1380(5)(b)).

260. *Id.* § 182-515-1509(4)(d)(ii)(A).

261. *Id.* § 182-515-1509(2).

262. *Id.* § 182-515-1509(4).

263. *Id.* § 182-515-1509 (4)(d)(ii)(B)(iii).

264. WASH. ADMIN. CODE §§ 182-513-1315(13), 182-515-1509(1). *See also Participation, Long Term Care*, DSHS, (Dec. 19, 2012), www.dshs.wa.gov/manuals/eaz/sections/LongTermCare/LTCKparticipation.shtml; *See also* WASH. ADMIN. CODE § 182-505-0100(2).

265. WASH. ADMIN. CODE § 182-512-0250(2).

expenses.²⁶⁶ And, to the extent the income is not spent and causes the resident's non-exempt resources to exceed \$2,000 as of the first moment of the next month, the excess resources may cause ineligibility (or require a resource spend-down).²⁶⁷ This outcome cannot be avoided by disclaimer.²⁶⁸

Cash received from the sale of an exempt or non-exempt resource other than the home is not income in the month received, but is a countable resource if it is held as of the first of the next month.²⁶⁹ The proceeds from the sale of a home remain exempt provided they are reinvested in another home within three months of receipt.²⁷⁰ The proceeds from the sale of other exempt resources are counted as available resources unless reinvested in another exempt resource within one month.²⁷¹ While not required, transferring title of 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, as well as protect the assets from Medicaid estate recovery.²⁷²

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, and uncompensated transfers by the community spouse, are disregarded.²⁷³

The community spouse should consider the option of revising his/her estate plan to take into account the possibility that he/she may die before the spouse on Medicaid because an inheritance by the nursing home spouse could cause ineligibility or subject the inherited resources to the Medicaid lien. Through a new will the community spouse could leave the estate to a special needs trust for the institutional spouse or directly to children. In either case, the death of the community spouse would not cause the disqualification of an institutional spouse and the assets would not be subject to Medicaid estate recovery upon the death of the institutional spouse. Note that a special needs trust created by a revocable living trust would be subject to the grantor trust rules at Wash. Admin. Code 182-516-0100 (2013) and thus would result in the disqualification of the institutional spouse.²⁷⁴

If there is a concern that the estate of the community spouse will be subject to state or federal estate taxes, the community spouse's will could fund the special needs trust for the institutional spouse with the amount that would normally be used to fund a credit shelter trust. Any excess could then be left

266. *Id.* § 182-513-1395(5), (6).

267. *Id.* § 388-519-0110.

268. *See* Lawrence A. Frolik & Alison McChrystal Barnes, *ELDER LAW: CASES AND MATERIALS*, 263 317-21 (4th Ed. 2007).

269. WASH. ADMIN. CODE: § 182-512-0300(3).

270. *Id.* § 182-512-0350(2).

271. *Id.* § 182-512-0300(3).

272. *Id.* § 182-513-1330(5).

273. *Id.* § 182-513-1350(11)(13).

274. WASH. ADMIN. CODE: § 182-516-0100.

to a marital deduction trust that paid income to the institutional spouse but makes the distribution of principal subject to special needs trust standards.

DSHS at one time took the position that a disinherited Medicaid spouse was required to petition for an award in lieu of homestead. However, DSHS does not pursue this position where there has been a mutual revision of wills and a mutual waiver of homestead rights.

As mentioned above, DSHS will examine the resources of the nursing home spouse after one year to see if all of the nursing home spouse's resources in excess of \$2,000 have been transferred to the community spouse.²⁷⁵ If there is not a Power of Attorney, a guardianship may be necessary to accomplish the transfers in cases where the nursing home spouse is gravely disabled or incapacitated. DSHS must extend the one year deadline if it is not practicable to transfer ownership sooner.²⁷⁶ There are often adverse tax consequences from transferring IRA or KEOGH accounts or investments with an early withdrawal penalty, but Medicaid will still require these assets to be transferred within the one year time period.²⁷⁷ It is often better to incur and prepay any taxes and penalties before application, because these obligations are often not considered when valuing resources.

VII. MEDICAID ESTATE RECOVERY²⁷⁸

A. Basic Rule

DSHS has a right to recover from the estate of a Medicaid recipient when Medicaid benefits were paid on behalf of the decedent after he or she turned 55.²⁷⁹ This right of recovery normally arises at death against any property in which the Medicaid recipient had an interest at the moment preceding death.²⁸⁰ This includes the actuarial value of a life estate determined on the date of death disregarding the fact of death.²⁸¹ The Office of Financial Recovery of DSHS pursues the enforcement of the Department's recovery rights. DSHS is required to be notified as a creditor in virtually all probate and non-probate proceedings.²⁸²

275. *Id.* § 182-513-1350(14); § 182-519-0050.

276. *Id.* § 182-513-1350(14)(c). *See also id.* §§ 388-434-0005, 182-513-1367.

277. *Id.*

278. 42 U.S.C. § 1396p(a) (2010); WASH. REV. CODE 43.20B; *Id.* § 43.20B.080; WASH. ADMIN. CODE § 182; *Id.* § 388-527-2700.

279. WASH. REV. CODE ANN. § 43.20B.080(1), (3).

280. *Id.* § 43.20B.080.

281. *Id.* § 43.20B.080(7).

282. The address this notice should be sent to is:

DSHS
Office of Financial Recovery
Post Office Box 9501
Olympia, Washington 98507-9501

B. Specific Estate Recovery Rules

1. Usually, Medicaid's right to file a lien only arises at the death of the Medicaid recipient. However under state legislation passed in 2005,²⁸³ the state can file a lien against the property of a Medicaid recipient who is in a nursing home if DSHS "determines, after notice and opportunity for a hearing, that the [recipient] cannot reasonably be expected to be discharged . . . and return home[.]"²⁸⁴ The determination that the recipient cannot reasonably be expected to return home may be contested in an administrative hearing.²⁸⁵ Even after the lien is filed, it must be removed if the recipient, in fact, returns home.²⁸⁶ If the property is sold, Medicaid will be entitled to a share of the proceeds, even if the Medicaid recipient is still living.

2. Also, under legislation adopted in 2005, DSHS can cause to be recorded in the chain of title of any real property interest held by a Medicaid recipient, "a request for notice of transfer or encumbrance" of the real property interest.²⁸⁷ Title companies are required to list this notice in any title report and a Medicaid recipient attempting to transfer or encumber such property is required to notify DSHS.²⁸⁸ This recording does not establish a lien.²⁸⁹

3. Beginning on June 1, 2004, expenditures for *any* Medicaid service are subject to recovery, except for certain payments to assist with Medicare cost-sharing requirements.²⁹⁰ For services provided between July 1, 1995 and May 31, 2004, the state only recovers for Medicaid benefits under the COPEs or nursing home programs, and related hospital and prescription drug services for recipients of those programs.²⁹¹ Effective July 1, 1995, the Medicaid estate recovery rules are applied to the state funded Chore, Adult Family Home and Congregate Care programs and the Medicaid Personal Care Program.²⁹² Prior to July 1, 1994, the Medicaid estate recovery rules applied to all Medicaid programs.²⁹³

4. The state only recovers for Medicaid or COPEs benefits paid for recipients age 55 or older.²⁹⁴ For benefits paid prior to July 1, 1994, the recovery rules would only apply to expenditures on behalf of the recipient after he or she turned 65.²⁹⁵ There is no age restriction for the recovery rules applied

283. WASH. REV. CODE: § 43.20B.080(8).

284. WASH. ADMIN. CODE: § 182-527-2820(1)(b).

285. *Id.* § 182-527-2820(1)(b).

286. *Id.* § 182-527-2820(2).

287. *Id.* § 182-527-2830(1).

288. *Id.* § 182-527-2830(8), (9).

289. WASH. ADMIN. CODE: § 182-527-2830(3).

290. *Id.* § 182-527-2742(1)(d), (e).

291. *Id.* § 182-527-2742(1)(c).

292. *Id.* § 182-527-2742(1)(b).

293. *Id.* § 182-527-2742(1)(a).

294. WASH. ADMIN. CODE: § 182-527-2740(1)(c).

295. *Id.* § 182-527-2740(1)(a).

to the state funded long-term care programs (Chore, Adult Family Homes, Congregate Care).²⁹⁶

5. Medicaid estate recovery only applies to the “estate” owned by the Medicaid recipient at death.²⁹⁷ Effective July 1, 1995, the definition of “estate” was amended to include probate assets and non-probate assets, as defined in RCW 11.02.005,²⁹⁸ except for property transferring by community property agreements.²⁹⁹ In 1997, legislation was passed which now allows estate recovery for assets that pass to the surviving spouse pursuant to a community property agreement.³⁰⁰

As noted above, 2005 Legislation mandated recovery against life estate and joint tenancy interests, but only to the extent that the property right vested on or after July 1, 2005.³⁰¹ Life estate interests are valued as of the moment “immediately prior to death.”³⁰² Joint tenancy interests are valued as if the Medicaid recipient held the property as a tenant in common.³⁰³

Life insurance owned by the Medicaid recipient is not considered part of the recipient’s “estate” unless the recipient’s estate is named as the beneficiary.³⁰⁴

6. Medicaid estate recovery is limited to the actual amount of Medicaid benefits paid.³⁰⁵

7. For people who died on or after July 1, 1994, there is the potential of Medicaid estate recovery even if the recipient died with a surviving spouse, minor child or a disabled child. However, estate recovery will be deferred until the death of the community spouse and when there are no surviving minor or disabled children.³⁰⁶ Further, the state will release the lien if the surviving spouse wishes to sell the property because the state cannot recover anything prior to the death of the surviving spouse.³⁰⁷ The right to recover does not apply to the property in the name of the community spouse, or the portion of the property owned by the community spouse if the property is jointly owned.³⁰⁸ If the couple leaves any assets in the name of the nursing home spouse, including title to the home, there could be a Medicaid lien against the nursing home spouse’s share of the property.³⁰⁹

296. *Id.* § 182-527-2740(2).

297. WASH. REV. CODE § 43.20B.080; WASH. ADMIN. CODE § 182-527-2740(2).

298. WASH. REV. CODE § 11.02.005(10) (LexisNexis 2012).

299. WASH. ADMIN. CODE § 182-527-2730 (defining “estate”).

300. *Id.*

301. WASH. REV. CODE § 43.20B.080(7).

302. WASH. ADMIN. CODE § 182-527-2810(1)(a).

303. *Id.* § 182-527-2810(1)(b).

304. WASH. REV. CODE § 11.02.005(10); *id.* § 43.20B.080(3).

305. WASH. ADMIN. CODE § 182-527-2790(1).

306. *Id.* § 182-527-2737.

307. *Id.* § 182-527-2737(1)(a).

308. *Id.* §§ 182-527-2810(1)(b), 2742 (explaining that it is the client’s estate that is liable).

309. WASH. REV. CODE § 43.20B.080(6), (7).

If the Medicaid recipient transfers all of his/her property to a spouse or a disabled child before death, there is no estate at death to which the lien can attach.³¹⁰ It is very important for couples to consider whether they want to avoid any potential Medicaid lien by transferring title to all property, including the family home, to the community spouse. The same would be true for single persons on Medicaid who own a home and have a disabled child. In addition, the community spouse should consider revising estate planning documents so as not to leave assets outright to the Medicaid recipient.³¹¹

8. Medicaid recovery may be waived where it will cause an “undue hardship.”³¹² If a Medicaid recipient is survived by a registered domestic partner, the Department “shall recognize an undue hardship” and defer recovery as it would in the case where a spouse survived the Medicaid recipient.³¹³

VIII. THE CLASS ACT

The health care reform legislation that was enacted March 23, 2010, included a novel public insurance model to cover some of the costs of long-term care for qualified participants and was slated to begin in 2013. The program was called The Community Living Assistance Services and Supports Act, but was universally referred to as the “CLASS Act.”³¹⁴ Both widely heralded and savagely maligned, this program would have created a trust fund from voluntary payroll deductions.³¹⁵ However, in October of 2011 the Obama administration announced that it would not seek to implement the Class Act because of funding concerns.³¹⁶ The essential challenge to the viability of the Class Act was getting enough healthy people to participate in order to keep premiums affordable. This is the challenge of long term care insurance, in general. Apparently the President and his advisors decided that not enough healthy people were likely to enroll.

310. There is no transfer penalty for transferring property to a spouse or a disabled child.

311. The use of a “special needs trust” for the Medicaid spouse’s benefit, in the community spouse’s will, may be a particularly attractive option.

312. WASH. ADMIN. CODE § 182-527-2750(1) (defining “undue hardship” as existing if any one of three circumstances is met).

313. WASH. REV. CODE § 43.20B.080(5)(a).

314. The provisions of the CLASS Act can be found at Sections 8001 and 8002 of The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §§ 8001, 8002.

315. 42 U.S.C.A §30011-5 (2011).

316. Patrick Brennan, *Looking Back at the CLASS Act*, NAT’L. REV., Oct. 14, 2011, <http://www.nationalreview.com/corner/280222/looking-back-class-act-patrick-brennan>.

IX. PLANNING TECHNIQUES TO REDUCE EXCESS RESOURCES AND TO AVOID ESTATE RECOVERY

Based on the foregoing analysis we can now set out various planning options to reduce excess resources in the most advantageous manner possible. We begin by looking at the options available to single persons and then consider the additional options available to married persons.

A. Options for Single Persons

Gifts and Waiting Out the Look-Back Period or the Ineligibility Period

For a person with a substantial amount of excess assets who is concerned about Medicaid long-term care coverage, it may be advantageous to transfer assets as quickly as possible to start the clock running on the 60 month look-back period. There is no limit on the amount that can be given away if the gift is not within the look-back period at the time of application -- though applying before the end of the look-back period can have disastrous consequences. For this approach to work, in light of the transfer penalty on gift recipients which is discussed above, it is critical to maintain enough funds to fully cover long term care during the 60 month look-back period. Term limited long term care insurance can be a significant planning tool in this regard.³¹⁷ It is also important to remember that this form of voluntary impoverishment may leave the donor in difficult circumstances.³¹⁸ Medicaid benefits simply permit survival and do not guarantee comfort.

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 sell her exempt property and then give away part of the sale proceeds while retaining some sale proceeds to cover any transfer penalty. This example and some others are illustrated below.

Example 1: Effective Gifting within Look Back Period where Donor has Substantial Income

If a single person has a monthly income of \$5,500 per month, and her cost of care in a nursing home is \$7,500 per month, her monthly cash flow deficit is \$2,000 per month. If this person gifts \$72,000 in May 2012, and is left with less than \$2,000 in June 1, 2012, there will be a 10 month period of ineligibility, running from June 1, 2012 through March 30, 2013 as long as an initial application for COPES

317. 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.

318. See Miller, *supra* note 5, at 88.

or nursing home coverage is made for June 1, 2012.³¹⁹ It will cost \$20,000 to cover her monthly cash flow deficit for these 10 months. So \$52,000 of the \$72,000 gift will not have been spent when the person qualifies for Medicaid coverage on April 1, 2013. In other words, the donee would receive a net gift of \$52,000.³²⁰

Example 2: Effective Gifting through Sale of the Home

Gifting during look back can be advantageous if a person can qualify for Medicaid while still holding an exempt resource such as the home that can then be used to pay for care during a period of ineligibility. However, the gifted funds will have to be used to cover care during the entire period of ineligibility if the funds generated from the exempt resource turn out to be insufficient. Otherwise, the recipients of the gift face the 150% penalty described in Section IV.G above.³²¹

Single Person has \$186,850 in cash and a house worth \$186,850 and currently needs long-term care. Single person then gifts \$186,850 in cash and applies for Medicaid. As long as the single person has no assets other than the house worth more than \$2,000 and needs long-term care, a 25 month period of ineligibility will be established. If the house is then sold and used to pay for care for the 25 month period of ineligibility, the single person can qualify after the 25 month ineligibility period when the house sales proceeds have been spent down to \$2,000. If the house proceeds turn out to be sufficient to fully cover the cost of care for the 25 month period, the “net gift” would be the \$186,850 in cash initially gifted.

Example 3: Effective Gifting of a Partial Interest in the Home

Single person already receiving Medicaid LTC services owns an exempt house worth \$373,700. Single person then gifts a 50% interest in the house and reports the gift to DSHS. Medicaid coverage would be terminated for 25 months beginning with the month after the month of the gift. The house is then sold, and the 50% of the sales proceeds to which single person is entitled can then be used to pay for care during the 25 month period of ineligibility.

Example 4: Effective Gifting Using a Special Needs Trust

A single person under 65 has \$373,700. Single person then gifts \$186,850 and puts \$186,850 into a special needs trust meeting the requirements discussed earlier.³²² Upon application after the gift, a 25 month period of ineligibility will be established. The trust can then be

319. \$72,000 divided by \$238 = 303 days of transfer penalty. See *supra* Section IV.A.

320. See Thomas D. Begley & Andrew H. Hook, *Medicaid Planning is More Challenging After Recent Reforms*, 33 Est. Plan. 3, 4 (2006). This appears to be a design flaw in the asset transfer rules and will likely be closed down at some point.

321. See *supra* Section IV.G.

322. See *supra* Section V.

used to pay for care for the 25 month period of ineligibility. Here again, the “net gift” would be the \$186,850 cash initially gifted.

Purchasing Exempt Resources

A common Medicaid planning technique is to take cash or other countable assets and convert them to exempt assets.³²³ This is known as asset repositioning.³²⁴ For example, the home can be made elder safe,³²⁵ repaired or remodeled, or the home can be sold and a new, more expensive home or condominium purchased. These sorts of enhancements to the home are especially useful if there is a spouse remaining in the home or if the plan is to use long term care in the home.³²⁶ The home mortgage can be paid down or off. Excess resources can also be used to purchase household furnishings or appliances or a new car. Note that these exempt resources will often be subject to estate recovery upon the death of the single recipient. Thus, as we will describe below, asset repositioning usually offers greater advantages for married couples than singles.

Consuming Excess Resources

Medicaid applicants can always spend excess resources on themselves. 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

DSHS will carefully scrutinize payments made to family members for services to determine whether the payments are really gifts. For these payments not to be deemed gifts, one must comply with various statutory requirements, including a requirement that the agreement on which the payment is based must be in writing.³²⁸ Properly drafted and implemented family care-

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

324. See Miller, *supra* note 5, at 94.

325. 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.

326. See Begley & Hook, *supra* note 323, at 7-8.

327. See Begley & Hook, *supra* note 323, at 8-9; Gilfix, *supra* note 80, at 31. Remember, however, that the purchaser has to live in the home for at least a year. See *supra* Section IV.F

328. WASH. ADMIN. CODE § 182-513-1363(4) (2006) provides:

The department does not establish a period of ineligibility for the transfer of an asset to a family member prior to the current period of long-term care service if:

giver agreements may function as an effective spend down strategy that avoids the transfer penalties.³²⁹ These sorts of quid pro quo arrangements may also reduce some of the conflicts that families sometimes experience when one family member provides more care than the others.

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. For example, 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.³³⁰

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

As discussed above, 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 65.³³¹

Installment Sales

As noted in Section II.C, certain sales contracts are exempt assets but the payments are income as received. Selling the home on an installment basis

- (a) The transfer is in exchange for care services the family member provided the client;
- (b) The client has a documented need for the care services provided by the family member;
- (c) The care services provided by the family member are allowed under the [M]edicaid state plan or the department's waiver services;
- (d) The care services provided by the family member do not duplicate those that another party is being paid to provide;
- (e) The FMV of the asset transferred is comparable to the FMV of the care services provided;
- (f) The time for which care services are claimed is reasonable based on the kind of services provided; and
- (g) Compensation has been paid as the care services were performed or with no more time delay than one month between the provision of the service and payment.

329. See, e.g., Donna S. Harkness, *Life Care Agreements: A Contractual Jeekyll and Hyde?*, 5 MARQ. ELDER'S ADVISOR 39, 55 (2003); Heather M. Fossen Forrest, Comment, *Loosening the Wrapper on the Sandwich Generation: Private Compensation for Family Caregivers*, 63 LA. L. REV. 381, 383 (2003); Begley & Hook, *supra* note 323, 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. Susie Jensen, Comment, *Caregiver Contracts and Medicaid Benefits* (on file with authors).

330. WASH. ADMIN. CODE § 182-513-1365(1)(d). See *supra* Section IV.D. See also Gilfix, *supra* note 80, at 31.

331. See *supra* Section IV.D.

and thereby converting it to an income stream may be preferable to outright sale and spend down.³³² 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.³³³ Finally, an installment sale may enhance the income available to the community spouse.

Disinheritance or Third Party Special Needs Trusts

As discussed above, after acquired property of a Medicaid eligible individual has to be spent down. A disclaimer will not avoid the problem. Thus, potential benefactors might be advised to bypass the disabled person or to place any gift in a special needs trust that carries only a life interest.³³⁴ 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 allow in order to enhance the disabled person's 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 deferred compensation plans and life insurance policies.

Transfers of Remainder Interests in the Home Outside of Look Back

A far sighted planning technique for avoiding estate recovery is to transfer a remainder interest in the home to a loved one outside of the look back period.³³⁵ 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 have adopted.³³⁶ A typical Qualified

332. There may be greater opportunities to use installment sales in states other than Washington. However, DRA tightened the rules with respect to purchases of notes, loans or mortgages. See 42 USC §1396p(c)(1)(G). For further discussion, see Moore & Landsman, *supra* note 6, at A-89.

333. See Miller, *supra* note 5, at 96-97.

334. See Sections V and VI.

335. See Gilfix, *supra* note 80, at 31-32.

336. For an illustration of the problem, see State *ex rel.* Dept. of Human Services v. Willingham, 136 P.3d 66, 69-70 (Or. Ct. App. 2006).

Personal Residence Trust (“QPRT”) might well do the job.³³⁷ Married couples may not need this technique since transfers from one spouse to another are exempt from the transfer penalty rules.³³⁸ Instead, they will likely employ the techniques described below.

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.

Transfer Exempt Assets from the Institutional Spouse to the Community Spouse.

While not required, transferring title of 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, as well as protect the assets from Medicaid estate recovery.³³⁹

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, and uncompensated transfers by the community spouse, are disregarded.

Revise the Community Spouse’s Estate Plan

The community spouse should consider the option of revising his or her estate plan to take into account the possibility the he or she may die before the spouse on Medicaid because an inheritance by the nursing home spouse could cause ineligibility or subject the inherited resources to the Medicaid lien. The community spouse could leave the estate to a special needs trust for the institutional spouse or directly to children through a new will. In either case, the death of the community spouse would not cause the disqualification of an institutional spouse and the assets would not be subject to Medicaid estate recovery upon the death of the institutional spouse.³⁴⁰ Note that a special

337. 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).

338. WASH. ADMIN. CODE § 182-513-1363(2)(d)(i).

339. See Michael J. Millonig, *Post-Eligibility Transfers*, 3 NAEJA J. 33 (2007).

340. See Moore & Landsman, *supra* note 6, at A-91. This may not be true in all states. *Id.* In Idaho, there is a recently decided Supreme Court decision upholding estate recovery against assets from the community spouse’s estate even though the institutional spouse had no interest in those assets at the time of the community spouse’s death. Idaho Dept. of Health & Welfare v. McCormick, 283 P.3d 785, 791 (Idaho 2012). In that case, the institutional spouse had converted her separate property (her home) into community property a few years prior to entering a nursing home. *Id.* at 786. Later, the community spouse exercised a durable power of attorney to quitclaim the institutional spouse’s interest to himself. *Id.* The community spouse predeceased the institutional spouse and that led the state to seek recover Medicaid benefits paid to

needs trust created by a revocable living trust would be subject to the grantor trust rules in § 182-516-0100 of the Washington Administrative Code, and, thus, would result in the disqualification of the institutional spouse.

If there is a concern that the estate of the community spouse will be subject to state or federal estate taxes, the community spouse's will could fund the special needs trust for the institutional spouse with the amount that would normally be used to fund a credit shelter trust. Any excess could then be left to a marital deduction trust that paid income to the institutional spouse, but makes the distribution of principal subject to special needs trust standards.³⁴¹

DSHS at one time took the position that a disinherited Medicaid spouse was required to petition for an award in lieu of homestead. However, DSHS does not pursue this position where there has been a mutual revision of wills and a mutual waiver of homestead rights.

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.³⁴² DSHS uses its own tables to determine life expectancy, which are set forth in Appendix 5 of the Long-term Care Chapter of the Eligibility A-Z Manual.³⁴³ 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.³⁴⁴

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.³⁴⁵ The annuity should be purchased in the month before application is made, and any right to revoke the annuity (often called a "free look" period) must expire prior to the first day of the

the institutional spouse from the estate of the community spouse. *Id.* The Idaho Supreme Court held that federal law did not preempt Idaho state law permitting such a recovery. *Id.* at 795.

341. For a discussion of transfer tax planning using marital deduction and credit shelter trusts. *See* Miller & Maine, *supra* note 340, at 388, 433.

342. WASH. ADMIN. CODE § 182-516-0201(4) (2013).

343. *Appendix 5-Individual Life Expectancy Annuity Tables*, DSHS, <http://www.dshs.wa.gov/manuals/eaz/sections/longtermcare/LTCOAppendix5.shtml> (updated Mar. 25, 2011). Annuities purchased on or after April 1, 2009 have to name the state as the contingent beneficiary of the annuity if the spouse dies during the term of the annuity, and requires that annuities do not have a term shorter than five years, unless the life expectancy of the spouse is less than 5 years. The term of the annuity also cannot exceed the life expectancy of the annuitant. WASH. ADMIN. CODE § 182-516-0201(4)(d) (2012).

344. WASH. ADMIN. CODE § 182-516-0201(5) (2012).

345. WASH. ADMIN. CODE: 182-512-0300(1) (stating that countable resources are assessed at 12 a.m. on the first day of the first month of application).

month of application.³⁴⁶ As long as eligibility is established in the month of application, the fact that the annuity payments later increase the community spouse's assets well above the eligibility level will not affect the ongoing eligibility of a continuously institutionalized spouse.³⁴⁷

The annuity payments will be income to the community spouse and may affect an income allocation from the nursing home spouse. Income from the annuity is deemed received on a monthly basis even if the annuity actually pays out annually or over another period.³⁴⁸ But, as discussed above, there is no maximum limit on the amount of income of the community spouse.

Requesting an Excess Resource Allowance

If the couple's combined income is less than \$2,898, the couple may be entitled to keep excess resources to generate additional income.³⁴⁹ To obtain this increase in the resource level, a court or administrative law judge must make a determination that the excess resources are necessary to generate income for the maintenance of the community spouse.³⁵⁰

Divorce, Legal Separation, or Non-Binding Unions

When a married couple has substantial wealth, the asset spend down requirements for Medicaid eligibility are painful to meet. In such circumstances, divorce can serve as a planning option. 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.³⁵¹ An order allocating assets to a community spouse pursuant to a decree of legal separation appears to be as effective for this purpose as a divorce decree.³⁵² In many divorces, it will be necessary to appoint a guardian ad litem to represent the nursing home spouse and it may not be possible to convince a court to allocate all excess resources to the community spouse. Even an equal division may be beneficial to the community spouse where there is a substantial amount of countable assets. For example, if the couple has \$500,000 in countable assets, an equal division would leave the community spouse with \$250,000 rather than the maximum community spouse resource allowance of \$109,560.

Many couples may find the idea of using divorce for Medicaid planning too repugnant to consider. In such cases other approaches may be beneficial. For example, a married couple with substantial countable assets might up-

346. *Id.* § 182-516-0201(4) (indicating that an annuity is considered an available resource unless it is irrevocable).

347. *See id.* § 182-513-1330(3).

348. *See id.* § 182-516-0200(6).

349. *Id.* § 182-513-1350(12)(b). *See Income & Resource Standards, supra* note 42.

350. WASH. ADMIN. CODE: at § 182-513-1350(11)(b).

351. *See id.* § 182-513-1350(11)(a).

352. *Id.*

grade their home or purchase a new car as discussed in Section IX.A.2 above³⁵³ and then later transfer any interest the institutional spouse might have in the asset to the community spouse in order to avoid estate recovery.

For moderately wealthy couples that form late in life, it might be prudent to skip the marriage ceremony or to marry in a form that does not constitute a legally cognizable union.

X. CONCLUSION

The costs of long term care represent an enormous financial risk for most of our nation's seniors and their families. A lengthy nursing home stay is often an impoverishing event. This can undermine the wellbeing of the healthy spouse and disrupt plans of inheritance. However, there are many ways to ameliorate the financial trauma, especially for married couples where one spouse remains healthy. Medicaid planning for long term care can be likened to high level tax planning. Done properly, it requires a skilled advisor with a proactive outlook. Like family and estate planning, it also requires a sense of family dynamics and diplomacy. The beginning point is to understand the law and how it is being applied by those charged with its administration. The eligibility and estate recovery rules surrounding Medicaid are complex and establish many traps and pitfalls for the unwary and uninformed. This is particularly true because of the mix of state and federal laws and regulations that apply. Most non-experts are at risk of making assumptions about the law that are unfounded. Using Washington State as an example, this article has attempted to provide a road map for practitioners seeking to guide their clients through the long term care planning process. Most of the legal requirements and planning techniques described here have application in other states as well. There are nuances of difference and, of course, the applicable authorities differ from state to state. Still the fundamentals are reasonably universal since Medicaid's basic architecture arises under federal law.

353. The essence of this technique, the reader should recall, is to turn a countable asset into an exempt asset.