

Medicaid Planning and Long-Term Care Options

By Taylre Janak

I. Introduction

With our nation's elderly population continuously growing year after year while simultaneously living longer, the United States is at a precipice regarding the cost of long-term care.¹ The majority of the elderly population depends on Medicaid in order to afford the high cost of long-term care in nursing homes. Therefore, as the U.S. Senate is on the verge of repealing the Affordable Care Act (ACA), Medicaid funding is in a precarious place as Republican Party is adamant about cutting substantial funding to nation's most popular entitlement programs: Medicaid and Medicare.

The U.S. House of Representatives passed the American Health Care Act (AHCA) by a vote of 217 to 213 on May 13, 2017 under the guise of repealing and replacing the ACA, which is colloquially known as Obamacare.² Under the House passed measure, Medicaid would be converted into a block-grant program, which would result in more than \$880 billion being reallocated from the program.³ Therefore, the Republican lead ACA replacement bill would change the Medicaid system from "the federal government's open-ended commitment to pay a significant share of states' Medicaid costs...to giv[ing] the states a choice between a fixed annual sum per recipient or a block grant."⁴ The proposed law would impact more than 17 million low-income seniors who depend on Medicaid for health benefits as well as "long-term services and

¹ See *Long-Term Care Providers and Services Users in the United States: Data from the National Study of Long-Term Care Providers, 2013-2014*, U.S. Dep't of Health and Human Serv. 3, 2016 ("the number of Americans over age 65 is projected to more than double from 40.2 million in 2010 to 88.5 million in 2050").

² See Thomas Kaplan and Robert Pear, *House Passes Measure to Repeal and Replace the Affordable Care Act*, NY Times (May 4, 2017).

³ Michael Hilzik, *All the horrific details of the GOP's new Obamacare repeal bill: A handy guide*, LA Times (May 4, 2017).

⁴ Kate Zernike, Abby Goodnough and Pam Belluck, *In Health Bill's Defeat, Medicaid comes of age*, NY Times (March 27, 2017).

supports.”⁵ Therefore, Medicaid funding for long-term care and services faces an uncertain future as long as the Republican Party continues unified control of the U.S. Congress.

Long-term services and supports (“LTSS”) include a broad range of health and health-related services required by mostly elderly individuals who lack the capacity to care for themselves at home.⁶ Long-term care services include “assistance with activities of daily living [(ADLs) e.g., dressing bathing, and toileting], instrumental activities of daily living [IADLs) e.g., medication management and housework]; and health maintenance tasks.”⁷ Long-term care services are typically provided through nursing homes and assisted living facilities.⁸ The number of elderly individuals using nursing homes is projected to increase to twenty-seven million residents in 2050 from around the fifteen million residents who resided in long-term care facilities in 2000.⁹ As the baby boomers¹⁰ gradually age, they are increasingly faced with a financial quandary concerning how to pay for long-term care services. With the high cost of nursing homes, many elderly Americans are turning to Medicaid services to finance their prolonged stays in a facility. Therefore, the Medicaid program is experiencing significant financial strain as the system attempts to cover many elderly Americans extended long-term care

⁵ David Frank, *8 Ways to Health Care Bill is Hazardous to Your Health*, AARP, May 2, 2017.

⁶ See Kirsten J. Colello, Cong. Research Serv., R43506, *Medicaid Financial Eligibility for Long-Term Services and Supports*, 1 (2017).

⁷ *Long-Term Care Providers and Services Users in the United States: Data from the National Study of Long-Term Care Providers, 2013-2014*, U.S. Dep’t of Health and Human Serv. 2, (2016).

⁸ Kirsten J. Colello, Cong. Research Serv., R43506, *Medicaid Financial Eligibility for Long-Term Services and Supports*, 1 (2017); See also, *Long-Term Care Providers and Services Users in the United States: Data from the National Study of Long-Term Care Providers, 2013-2014*, U.S. Dep’t of Health and Human Serv. 2, (2016)(As of 2014, in the United States, there were an estimated 15,600 nursing homes and 30,200 residential care communities).

⁹ *Long-Term Care Providers and Services Users in the United States: Data from the National Study of Long-Term Care Providers, 2013-2014*, U.S. Dep’t of Health and Human Serv. 3, (2016).

¹⁰ *American Generation Fast Facts*, CNN., Oct. 20, 2016. Baby Boomers are individuals born between 1946 through 1964 after the conclusion of World War II. *Id.* As of 2015, the number of baby boomers ranges from 74.9 million to 82.3 million. *Id.* Comparatively, the Silent Generation, which was the precursor to the Baby Boomers, includes between 22.4 million and 29.8 million Americans as of 2015. *Id.*

stays that it was neither designed to nor anticipated covering when the program was enacted in 1965.

This paper will discuss the ethical dilemma concerning “Medicaid planning” as well as the catch-22 many of America’s elderly are faced with as they plan for their future. Many elderly parents want to leave a financial legacy to their children, but are faced with having to use their life's savings to finance a nursing home stay. This paper considers whether it is ethically wrong for middle-class Americans to avail themselves of techniques in order to make them “poor on paper” in order to qualify for Medicaid. Finally, this paper considers whether elder law attorneys have a duty to protect the Medicaid system, and therefore refrain from advising their clients on how to legally construct their estates so that they qualify for Medicaid’s long-term care benefits without violating the law.

II. The Financial Costs of Long-Term Care Services

More often than not, the costs associated with long-term care services far exceed an individual’s life savings. Many middle-class to upper middle class elderly individuals are unable to afford nursing home expenses for an extended period of time. For example, “in 2016, the annual median cost of nursing home care was just over \$82,000 for a semi-private room and more than \$92,000 for a private room.”¹¹ The financial strain is further exasperated by the fact that an average elderly individual spends approximately 835 days or more than two years in a nursing home.¹²

Affording a nursing home stay without long-term care insurance or qualifying for Medicaid has the ability to quickly bankrupt an elderly individual. For example, “the median

¹¹ See Kirsten J. Colello, Cong. Research Serv., R43506, *Medicaid Financial Eligibility for Long-Term Services and Supports*, 1 (2017). This figure averages out to a daily cost of \$248 a day for a private room at a nursing home. *Id.*

¹² See Emily Mullin, *How to Pay for Nursing Home Costs*, U.S. News, Feb. 26, 2013.

household wealth for those who spend fewer than 30 days in a nursing home is [around] \$108,000. But after 6 months, many nursing home residents are effectively [destitute], with median assets of barely \$5,000.”¹³ Therefore, many of America’s elderly are forced to rely on Medicaid in order to afford a nursing home stay.

Many opponents of Medicaid planning argue that middle-class or wealthy elderly individuals should purchase long-term care insurance instead of depending on their respective state’s Medicaid program to finance their long-term care needs. However, many elderly individuals are effectively priced out of long-term care insurance.

A. Long Term Care Insurance

For many, private long-term-care insurance costs far outweigh the benefit received from the payout by the insurance company. Long-term-care insurance is “privately funded insurance which provides coverage for costs that may result from care provided in a long term care facility such as a nursing home, assisted living facility, adult medical day care, respite care, or for individual services provided in the patient’s home.”¹⁴ For many elderly individuals, the cost of long-term-care insurance is as financially prohibitive as the actual out of pocket cost of nursing home care. For example, “a typical policy taken out by a Maryland couple in their mid-50s can initially run around \$3,100 annually, and premiums can shoot up without warning.”¹⁵ Further, the daily cost of nursing home care typically exceeds the daily benefit paid by the policy, which

¹³ Howard Gleckman, *A nursing home stay can ruin your finances*, Forbes, (Jun 22, 2012), <https://www.forbes.com/sites/howardgleckman/2012/06/22/a-nursing-home-stay-can-ruin-your-finances/#7c85618c74d7>

¹⁴ Jason A. Frank, *The Necessity of Medicaid Planning*, 30 U. Balt. L.F. 29, 32 (1999).

¹⁵ *Understanding Long-Term Care Insurance*, AARP (May 2016), <http://www.aarp.org/health/health-insurance/info-06-2012/understanding-long-term-care-insurance.html>. The premium hikes can range between single digit increases to as high as 40 percent. *Id.*

creates another financial conundrum for elderly individuals.¹⁶ Therefore, long-term-care insurance leaves the possibility of leaving the elderly individual responsible for actual nursing home costs that exceed the daily benefit amount.¹⁷

Essentially, individuals who purchase long-term-care insurance are faced with the prospect of paying substantial out-of-pocket costs that the individuals truly cannot afford, resulting in the afore mentioned catch-22.¹⁸ It is estimated that only ten to twenty percent of household's age sixty-five and older can afford long-term care insurance.¹⁹ So, while many opponents of Medicaid planning argue that long-term care insurance is the answer to limiting the elderly's reliance on Medicaid, many elderly individuals are not financially able to afford the premiums let alone the associated out-of-pocket costs due to the nursing home facility.

B. Medicaid

Medicaid funded long-term care services have previously been described by scholars as both “a promise abandoned by government or as a strategic retreat by government from exposure to institutional long-term care costs.”²⁰ Regardless of how Medicaid services have been described, the entitlement program established in 1965 was not created with the express intention of covering the large swath of baby boomers that would come to depend on the program to fund their long-term care services. In fiscal year 2014, Medicaid's long-term care

¹⁶ See Angelina M. Paragoff, *Estate Planning--A Race to the Poorhouse: Should guardians have a duty to impoverish their wards for asset protection purposes thereby preserving assets for heirs?* 34 W. New Eng. L. Rev. 251, 258-59 (2012).

¹⁷ *A Guide to Long-Term Care Insurance*, AHIP 7, (May 2004), https://longtermcare.genworth.com/comweb/consumer/pdfs/long_term_care/GE805_AHIP_Guide_Crono.pdf.

¹⁸ Enid Kassner, *Private Long-Term Care Insurance: The Medicaid Interaction*, AARP 1 (2004); See also, Jason A. Frank, *The Necessity of Medicaid Planning*, 30 U. Balt. L.F. 29, 32 (1999)(“long term care insurers cannot offer affordable policies since the long term care market, unlike other insurance markets, cannot avoid adverse selection. That is, insurers cannot draw premiums from a large and varied pool of clients, which contain a significant number of beneficiaries who will never require long-term care).

¹⁹ Enid Kassner, *Private Long-Term Care Insurance: The Medicaid Interaction*, AARP 1 (2004).

²⁰ See Alison Barnes, *An Assessment of Medicaid Planning*, 3 Hous. J. Health L. & Pol'y 265, 283 (2003).

services and supports spending was around \$152 billion dollars compared to \$146 billion in fiscal year 2013.²¹ Accordingly, 31% of all total Medicaid spending consists of long-term care expenditures.²² While Medicaid expenditures for long-term-care services represent a significant portion of all Medicaid spending, long-term care users represent only a small portion of the total number of Medicaid enrollees because of the high cost-per-user ratio.²³

Medicaid is the “nation’s major publically-financed health insurance program,” as well as the largest insurer of long-term care services.²⁴ Medicaid was signed into law by President Lyndon B. Johnson in 1965 along with its sister entitlement program, Medicare.²⁵ Medicaid operates as a joint program between the federal government and each of the states in order to provide health-care coverage for those low-income individuals who qualify for it.²⁶ Therefore, each state operates its own Medicaid system subject to federal mandated minimum requirements.²⁷

²¹ Steve Eiken, Kate Sredl, Brian Burwell, Paul Saucier, *Medicaid Expenditures for Long-Term Services and Supports (LTSS) in FY 2014: Managed LTSS Reached 15 percent of LTSS Spending*, Centers for Medicare & Medicaid Services 3 (Apr. 15, 2016)(FY 2014 Medicaid spending on long term care services and supports was a 4.0% increase from the previous fiscal year).

²² *Who Pays for Long-Term Care in the U.S.?*, The SCAN Foundation, http://www.thescanfoundation.org/sites/default/files/who_pays_for_ltc_us_jan_2013_fs.pdf.

²³ See Kirsten J. Colello, Cong. Research Serv., R43506, *Medicaid Financial Eligibility for Long-Term Services and Supports*, 1 (2017); See also, *Medicaid’s Long-Term Care Users: Spending Patterns Across Institutional and Community-based Settings*, The Henry J. Kaiser Family Foundation, (Oct. 2011)(“Medicaid long-term care users accounted for 6 percent of the Medicaid population”).

²⁴ See Erica L. Reaves and MaryBeth Musumeci, *Medicaid and Long-Term Services and Supports: A Primer*, The Henry J Kaiser Family Foundation, (Dec. 15, 2015), <http://kff.org/medicaid/report/medicaid-and-long-term-services-and-supports-a-primer/>.

²⁵ *Program History*, <https://www.medicaid.gov/about-us/program-history/index.html>. See also, *What is the difference between Medicare and Medicaid*, U.S. Department of Health & Human Services (HHS), <https://www.hhs.gov/answers/medicare-and-medicaid/what-is-the-difference-between-medicare-medicaid/index.html>. Medicare is a federal health insurance program for short-term health care services for the elderly and certain disabled Americans where patients pay part of the costs of health care through deductibles. *Id.*

²⁶ *Program History*, <https://www.medicaid.gov/about-us/program-history/index.html>

²⁷ See *Id.*; See also, Erica L. Reaves and MaryBeth Musumeci, *Medicaid and Long-Term Services and Supports: A Primer*, The Henry J Kaiser Family Foundation, (Dec. 15, 2015), <http://kff.org/medicaid/report/medicaid-and-long-term-services-and-supports-a-primer/>.

Since Medicaid is a means-tested program, there are various rules and regulations that restrict an individual's access to its benefits.²⁸ For example, an enrollees "countable resources" must not exceed \$2,000 for an individual or \$3,000 for a married couple.²⁹ Thus, to qualify for Medicaid services, an individual must meet both the federal financial and categorical requirements as well as "state-based functional eligibility criteria" that determine the need for long-term care services.³⁰ Because of the stringent financial eligibility criteria required to qualify for Medicaid services, many elderly individual's resort to Medicaid planning in order to structure their assets to qualify for long-term care assistance.

1. What is Medicaid Planning?

Medicaid planning is defined as a "means by which elderly people divest their income and assets to qualify for Medicaid's coverage sooner than they would if they first had to spend their income and assets on the cost of their care."³¹ Until 1980, an elderly individual was permitted to transfer assets to other family members, individuals, or entities in order to meet Medicaid eligibility requirements without penalty.³² However, states started complaining that elderly individuals were taking advantage of the Medicaid system, and pushed Congress to enact reforms that limited an elderly individual's ability to transfer assets away without a penalty.

i. Look-Back Period

In 1988, Congress first passed legislation aimed at limiting an individual's ability to transfer assets to others for less than fair market value in order to be eligible for Medicaid

²⁸ See generally, 42 U.S.C. §1396

²⁹ *Spotlight on Resources*, Social Security Administration (2017), <https://www.ssa.gov/ssi/spotlights/spot-resources.htm>.

³⁰ See *Medicaid Financial Eligibility for Long-Term Services and Supports*, CRS R 43506 (March 7, 2017)(these qualification include having assets that are equal or below a certain threshold

³¹ Julie Stone-Axelrod, *Medicaid asset transfers and estate planning testimony before the Senate Committee on Finance*, CRS, 2 (June 29, 2005).

³² See Alison Barnes, *An Assessment of Medicaid Planning*, 3 Hous. J. Health L. & Pol'y 265, 283 (2003).

services.³³ In 1994, Congress enacted legislation that provided for a thirty-month look-back period as it pertained to the transfer of assets to another individual.³⁴ A look-back period is defined as a “period to determine whether the individual (or his or her spouse) transferred assets (e.g., cash gifts to children, transferring home ownership, etc.,) to another person or party for less than fair market value.”³⁵ The look-back period has gradually increased as Congress has attempted to reign in Medicaid planning.³⁶

Currently, the “look-back period” applies to gifts occurring five years prior to an individual’s application for Medicaid benefits.³⁷ The five-year look-back period was established during the extensive Deficit Reduction Act of 2005 (DRA) which “tightened Medicaid asset transfer rules, discourage[ed] the use of such ‘Medicaid planning’ techniques and made it more difficult for individuals with the resources to pay for their own long-term care services to inappropriately transfer assets in order to qualify for Medicaid.”³⁸ Further, the DRA established

³³ 42 U.S.C. §1396r-5 (1988). “Notwithstanding any other provision of this title, an individual who would otherwise be eligible for medical assistance under the State plan approved under this title may be denied such assistance if such individual would be eligible for such medical assistance but for the fact that he disposed of resources for less than fair market value.” *Id.*

³⁴ 42 U.S.C. §1396 (1993)(“the period of ineligibility shall begin with the month in which such resources were transferred and the number of months in such period shall be equal to the lesser of—30 months.”). The law increased the periods after a transfer of assets during which the individual will be ineligible for Medicaid. The “look back” period was extended from thirty (30) months to thirty-six (36) months for outright gifts. *See, OBRA '93—Changes in Medicaid Transfer of Asset Rules*,” Spain, Spain & Varnet (July 2001), available at <http://www.ssvlegal.com/wp-content/uploads/2014/07/obra.pdf>.

³⁵ Important Facts for State Policymakers *Deficit Reduction Act*, Centers for Medicaid and Medicare Services, (Jan. 8, 2008), <https://www.cms.gov/regulations-and-guidance/legislation/deficitreductionact/downloads/toabackgrounder.pdf>

³⁶ *See* Alison Barnes, *An Assessment of Medicaid Planning*, 3 Hous. J. Health L. & Pol’y 265, 284 (2003)(the look back period has increased from twenty four months to now five years). .

³⁷ *See* Angelina M. Paragoff, *Estate Planning--A Race to the Poorhouse: Should guardians have a duty to impoverish their wards for asset protection purposes thereby preserving assets for heirs?* 34 W. New Eng. L. Rev. 251, 262 (2012); *See also* Mark Eghrari, *The Medicaid Look Back Period Explained*, Forbes (Aug. 1, 2014), <https://www.forbes.com/sites/markeghrari/2014/08/01/the-medicaid-look-back-period-explained/#5a500e9b1364>.

³⁸ *See* 40 U.S.C. §1396p(c).

a penalty that took effect when an individual transferred assets at less than fair market value.³⁹

The penalty had the effect of delaying the date that an individual could qualify to receive Medicaid long-term-care services.⁴⁰

However, there are limited exceptions to the look-back period. The exceptions include assets “that were transferred to the individual’s spouse or to another for the sole benefit of the individual’s spouse; from the individual’s spouse to another for the sole benefit of the individual’s spouse; assets transferred to a trust established for the benefit of an individual under 65 years of age who is disabled, or to an individual’s child who is under age 21 and is blind or permanently and totally disabled.”⁴¹ Further, an individual can avoid the look-back penalty if the individual transfers their principal residence to:

The individual’s spouse; a child under age 21 who is blind or permanently and totally disabled; a sibling who has an equity interest in the home and who was residing in the home for a period of at least one year prior to the individual becoming institutionalized; and a son or daughter of an individual who was residing in the individual’s home for a period of at least two years immediately before the date the individual becomes institutionalized and who provided care for the individual.⁴²

III. Medicaid Planning Techniques

Because of the complex Medicaid qualification laws, Medicaid planning typically requires the careful assistance and advice of an elder-law attorney. Elder-law attorneys utilize a

³⁹ See *Important Facts for State Policymakers Deficit Reduction Act*, Centers for Medicaid and Medicare Services, (Jan. 8, 2008), <https://www.cms.gov/regulations-and-guidance/legislation/deficitreductionact/downloads/toabackgrounder.pdf>. “The penalty period, for transfers made on or after February 8, 2006, now begins on either the date of the asset transfer, or the date the individual enters a nursing home and is found eligible for coverage of institutional level services that Medicaid would pay for were it not for the imposition of a transfer penalty—whichever is later.” *Id.*

⁴⁰ *Id.*

⁴¹ 42 U.S.C. 1396p(c)(2)(B)(i-iv).

⁴² 42 U.S.C. 1396p(c)(2)(A)(i-iv).

variety of asset divestiture techniques including both restructuring an individual's exempt resources as well as applying various financial strategies concerning a healthy spouse. Elder-law attorneys are particularly concerned about avoiding pesky estate recovery provisions that allow state Medicaid programs to recover payments from an individual's estate for nursing facility services as well as related hospital and prescription drug services.⁴³ Estate recovery provisions allow states to recover costs from an individuals "real estate, personal property, and other assets only if they are included within the deceased person's probate estate."⁴⁴

A. Exempt Resources

Elder-law attorneys help structure their client's finances in order to ensure that the client's countable assets do not exceed the maximum allowed to qualify for Medicaid.⁴⁵ Further, elder-law attorneys use the strategy of converting non-exempt assets into exempt or non-countable assets. For example, attorneys advise their clients to deplete some of their savings by purchasing a new primary residence or improving their current residence.⁴⁶ Further, pre-paying funeral and legal costs as well as upgrading or purchasing a new car also qualify as non-countable assets.⁴⁷ The prepayment of services is particularly beneficial when a client's expenses are almost certain to arise in the future.⁴⁸ Effectively converting non-exempt assets

⁴³ *Estate Recovery and Liens*, Medicaid.gov, <https://www.medicaid.gov/medicaid/eligibility/estate-recovery/index.html>. "States may not recover from the estate of a deceased Medicaid enrollee who is survived by a spouse, a child under 21, or blind or disabled child of any age." *Id.*

⁴⁴ *How Medicaid Recovers the Cost of Long-Term Care from your Estate After you Die*, NOLO, available at, <http://www.nolo.com/legal-encyclopedia/how-medicaid-recovers-the-cost-long-term-care-from-your-estate-after-you-die.html>.

⁴⁵ Julie Stone-Axelrod, Cong. Research Serv., *Medicaid asset transfers and estate planning testimony before the Senate Committee on Finance* 6 (June 29, 2005).

⁴⁶ John A. Miller, *Voluntary Impoverishment to Obtain Government Benefits*, 13 Cornell J. L. & Pub. Pol'y 81, 95 (2003).

⁴⁷ See John A. Miller, *Article: Voluntary Impoverishment to obtain government benefits*, 13 Cornell J. L. & Pub. Pol'y 81, 94 (2003). See also, Angelina M. Pargoff, *Estate Planning-A Race to the Poorhouse: Should Guardians Have a Duty to Impoverish their wards for asset protection purposes thereby preserving assets for heirs?* 34 W. New Eng. L. Rev. 251, 264 (2012).

⁴⁸ See John A. Miller, *Voluntary Impoverishment to Obtain Government Benefits*, 13 Cornell J. L. & Pub. Pol'y 81, 95 (2003).

into exempt assets is one way that elder-law attorneys utilize Medicaid planning for the betterment of their clients.

B. Community Spouse Resource Allowance

Elder-law attorneys utilize key provisions of various aspects of Medicaid reform laws in order to restructure and protect a nursing home resident's assets when the resident has a healthy spouse still residing in the community home. In 1988, Congress enacted Medicaid reform provisions in order to prevent "spousal impoverishment."⁴⁹ Typically, spousal impoverishment occurred when a nursing home resident's spouse, who was still living in the couple's home, was left with little or no income or resources on account of the resident's Medicaid eligibility.⁵⁰ Under Medicaid spousal impoverishment provisions, one spouse can keep half of the amount of the couple's combined resources that were owned by the couple on the date of admission to the nursing home.⁵¹ This is called the Community Spouse Resource Allowance (CRSA).⁵² As of 2017, the protected resource amount is up to \$120,900.⁵³ Thus, if a couple has \$200,000 in various savings accounts, the healthy spouse can keep \$100,000 and is not required to spend-down the protected amount in order for the sick spouse to qualify for long-term care services funded by Medicaid.

IV. Ethical Quandary with Medicaid Planning

While Medicaid planning is legal, it has not been without controversy. Opponents of Medicaid Planning argue that Medicaid benefits are not a right, and therefore individuals with

⁴⁹ See, 2 U.S.C. § 1396p(c); See also, *Spousal Impoverishment*, Medicaid, available at, <https://www.medicaid.gov/medicaid/eligibility/spousal-impoverishment/index.html>.

⁵⁰ See *Id.*

⁵¹ See 2 U.S.C. § 1396p(c); See also *Medicaid's Spousal Impoverishment Allowances of 2017*, Elder and Estate Planning Blog (Oct. 19, 2016), <http://marshallelder.blogspot.com/2016/10/medicaids-spousal-impoverishment.html>.

⁵² *Id.*

⁵³ *SSI and Spousal Impoverishment Standards*, Medicaid, available at, <https://www.medicaid.gov/medicaid/eligibility/downloads/spousal-impoverishment/2017-ssi-and-spousal-impoverishment-standards.pdf>.

the means to afford long-term care expenditures should be fiscally responsible and save for the likely need of the services. However, as elderly individuals live in nursing homes and assisted living facilities longer periods of time, even the most fiscally responsible individual will eventually exhaust their life savings on long-term-care services and be forced to depend on Medicaid benefits.

A. Support for Medicaid Planning Practice

Medicaid planning, like tax planning, is a popular financial strategy deployed by older Americans with the assistance of an elder-law attorney in order to protect individual's hard-earned assets in order to eventually will assets to their children upon their death. In fact, "few would suggest that it is improper for taxpayers to maximize their deductions under our tax laws to preserve income for themselves and their families...even though they are...reducing....money available to the government for its public purposes."⁵⁴ Thus the argument goes, since Medicaid planning is similar to maximizing tax deductions, the use of Medicaid planning is not unethical.

Further, supporters of Medicaid planning argue that the majority of older Americans have paid into Medicaid through their tax dollars throughout their earning years, therefore they are allowed to avail themselves to the benefits of the entitlement program.⁵⁵ This theory is similar to the principles behind Medicare. Medicare was created in order to ensure that older American have continued access to health care services as they age.⁵⁶ Similar to the mission of Medicare,

⁵⁴ See Angelina M. Paragoff, *Estate Planning--A Race to the Poorhouse: Should guardians have a duty to impoverish their wards for asset protection purposes thereby preserving assets for heirs*, 34 W. New Eng. L. Rev. 251, 268-69 (2012); See also, Jason A. Frank, *The Necessity of Medicaid Planning*, 30 U. Balt. F. L. 29, 39 (1999) ("tax planning is a practice that sets out to deprive the federal government of revenue, while Medicaid planning allows individuals to receive much needed long term care at a time when they are most financially vulnerable").

⁵⁵ Michael Shalloway, *Ethical Issues in Medicaid Planning*, Marquette Elder's Advisor 1 (2000).

⁵⁶ See Marilyn Moon, *What Medicare has Meant to Older Americans*, Health Care Finance Rev. 18(2): 49-59 (1996).

Medicaid is essential to ensure that older Americans have uninterrupted access to long-term-care services as they age.

Finally, proponents argue that the disturbingly small amount of assets the federal government allows an individual to retain while qualifying for Medicaid assistance does not allow the elderly individual to live a comfortable life in their final years.⁵⁷ A personal needs allowance varies between states but can be as low as \$30 a month in some states.⁵⁸ Older Americans attempt to protect their assets in order to supplement the various expenditures Medicaid does not cover while institutionalized. For example, Medicaid does not cover clothing or other incidentals necessary to live in a nursing home.⁵⁹ Further, Medicaid does not cover services such as hair cuts, hair color, or perms that are a significant factor in ensuring an elderly individual remains comfortable in his or her final years.⁶⁰ Therefore, elder-law attorneys are increasingly ensuring that older American's Medicaid plan includes assets available for the small parts of life that play a significant role in keeping older American's happy and comfortable.

B. Objections to Medicaid planning practice

Among the many objections to Medicaid planning, the most prevalent is that "Medicaid is for the poor, not for those who voluntarily impoverish themselves to qualify for benefits."⁶¹ Many

⁵⁷ See Angelina M. Paragoff, *Estate Planning--A Race to the Poorhouse: Should guardians have a duty to impoverish their wards for asset protection purposes thereby preserving assets for heirs?* 34 W. New Eng. L. Rev. 251, 268-69 (2012); See also, Joseph L. Matthews, *Medicaid Coverage of Nursing Home Care in 2017*, caring.com (May 9, 2017), available at, <https://www.caring.com/articles/medicaid-nursing-home>. Medicaid programs let nursing home residents keep between \$50 to \$100 per month for personal needs. *Id.*

⁵⁸ *Nursing Homes—A Guide for Medicaid Beneficiaries' Families and Helpers*, Centers for Medicare & Medicaid Services, <https://www.cms.gov/medicare-medicare-coordination/fraud-prevention/medicaid-integrity-education/downloads/nursinghome-beneficiary-booklet.pdf>.

⁵⁹ Jane Gross, *Always Making up the Difference*, NY Times (Sept. 4, 2008). Incidental necessities include clothing, cell phone bills, as well as orthopedic shoes. See *Id.*

⁶⁰ *Id.*

⁶¹ Timothy L. Takacs, David L. McGuffey, *Perspectives on Elder Law: Medicaid Planning: Can it be Justified? Legal and Ethical Implications of Medicaid Planning*, 29 Wm. Mitchell L. Rev. 111, 132 (2002).

believe that “preserving peoples’ inheritances is not a compelling public interest that justifies diversion of resources away from the truly needy.”⁶²

Further, opponents of Medicaid planning are vehemently opposed to middle-class individuals purposefully transferring assets away in order to obtain Medicaid benefits.⁶³ These opponents see Medicaid planning as ethically dishonest because it diverts needed financial resources away from actual impoverished citizens of America.⁶⁴ Further, many critics of Medicaid planning argue that elderly individuals should assume the full financial responsibility for long-term care until they are economically unable to do so before depending on taxpayer dollars to pay for care.⁶⁵

Finally, critics argue that Medicaid planning is another vehicle for the children of older Americans to take advantage of their parents in their old age in order to ensure a substantial inheritance. However, attorneys have a duty to avoid acting “in a manner contrary to the best interests of the disabled person when the disabled person is the client.”⁶⁶

V. Attempted Congressional Reforms to Medicaid Planning

A. Granny’s Attorney Goes to Jail Act

In 1996, Congress attempted to capitalize on the growing concern of Medicaid planning by passing legislation that was colloquially referred to as “Granny’s Lawyer Goes to Jail Act.”⁶⁷ The law prohibited an attorney from “knowingly and willfully counsel[ing] or assist[ing] an individual to dispose of assets (including by any transfer in trust) in order for the individual to

⁶² Joseph S. Karp and Sara I. Gershbein, *October 2005: Poor on Paper: An Overview of the Ethics and Morality of Medicaid Planning*, 79 Fla. Bar. J. 61, 63 (2005).

⁶³ See Alison Barnes, *An Assessment of Medicaid Planning*, 3 Hous. J. Health L. & Pol’y 265, 275 (2003).

⁶⁴ See *Id.*

⁶⁵ Julie Stone-Axelrod, *Medicaid asset transfers and estate planning testimony before the Senate Committee on Finance*, CRS, 2 (June 29, 2005); See also Milan Markovic, *Colloquium: Lawyers and the Secret Welfare State*, 84 Fordham L. Rev. 1845, 1854 (2016) (author argues that ethics rules require lawyers to pursue only their client’s “legitimate interests,” which does not include counseling middle class elderly on how to qualify for Medicaid).

⁶⁶ See John A. Miller, *Medicaid spend down, Estate Recovery and Divorce: Doctrine, Planning, and Policy*, 23 Elder L.J. 41, 78 (2015); See also, Model Rules of Prof’l Conduct R. 1.14 (2017).

⁶⁷ 42 U.S.C. § 1320a-7b.

become eligible for medical assistance under a State plan.”⁶⁸ The law, in effect, made attorneys criminally liable for advising their clients on how to best position their assets in order to ensure Medicaid eligibility. Under the law, attorneys faced a fine up to \$10,000 or imprisonment for up to 1 year.⁶⁹

The law faced fierce backlash from the legal community. On March 11, 1998, then Attorney General, Janet Reno informed Congress that she would not defend the constitutionality of §1320a-7b(a). Attorney General Reno stated at the time “the Department of Justice will not defend [the] constitutionality of [the] Section...because the counseling prohibition in that provision is plainly unconstitutional under the First Amendment.”⁷⁰

Subsequently, in 1998 the law was found unconstitutional in *New York State Bar Association v. Reno*.⁷¹ The New York State Bar Association challenged the law on the grounds that it violated attorneys’ First Amendment freedom of speech rights.⁷² The Federal District Court granted the N.Y. Bar Association’s a preliminary injunction preventing the federal government from enforcing the statute.⁷³ Currently, while the law is still on the books, the injunction still prohibits the Department of Justice from enforcing the criminal provisions of the law.

V. Conclusion

While growing Medicaid expenditures will eventually necessitate a need for Medicaid reform, it is not an attorneys’ responsibility to act as both a public policy fixer as well as an attorney. Criticism will continue as long as entitlement programs are readily available to America’s most vulnerable. That is why the Republican dominated Congress continues to

⁶⁸ *Id.*; See also, Lisa Schreiber Joire, *After New York State Bar Association v. Reno: Ethical Problems in Limiting Medicaid Estate Planning*, 12 Geo. J. Legal Ethics 789 (1999).

⁶⁹ *Id.*

⁷⁰ See Jason A. Frank, *The Necessity of Medicaid Planning*, 30 U. Balt. L.F. 29, 40 (1999).

⁷¹ *New York State Bar Ass’n v. Reno*, 999 F. Supp. 710 (N.D. N.Y. 1998).

⁷² *Id.*

⁷³ *Id.* at 716.

receive backlash to the proposed Medicaid cuts in the AHCA. The politics and disagreements surrounding Medicare and Medicaid have existed for over fifty years, and will continue to be a flashpoint as America's large elderly population continues to grow.

It is important to remember that elder-law attorneys do not have a duty to protect the Medicaid system, and ensure that it remains a viable option for years to come. Elder-law attorneys' duty is to their client, which means they must give most accurate legal advice possible. Further, while there are critics who object to the practice of Medicaid planning, the vast majority of Medicaid planning strategies is both legal and ethical. Medicaid planning allows older Americans to realistically afford long-term-care services as well as leave a piece of their hard-earned money to the next generation.