MEDICAID PLANNING IN LOUISIANA

Joseph R. Gilsoul

Gilsoul & Associates, LLC
Elder Law Attorneys
2950 Fairfield Ave., Ste. 300
Shreveport, LA 71104
318-524-9966
joe@gilsoul-law.com
www.gilsoul-law.com

Introduction

This outline gives only the briefest explanation of Medicaid planning, which is but one part of the larger process of estate planning. It will not replace the assistance of a qualified attorney—it is a summarization, not a blueprint. There are too many pitfalls for you to attempt to plan for Medicaid eligibility on your own, and far too much is at stake. Additionally, the law changes constantly, making it difficult for even the professional to keep up. I have created this outline with the hope that you will gain a certain amount of issue awareness, which may alert you to potential courses of action that could save your family large amounts of precious assets and help assure an enhanced level of care should you ever need to enter a nursing home.

What is Medicaid?

Medicaid is a federal program administered by the states. Not to be confused with Medicare, which covers primarily medical benefits and is not needs based, Medicaid covers medical care and nursing home care for those of limited financial means. Medicare covers only a limited amount of nursing home care, while Medicaid covers long-term nursing home care to those who qualify.

What is Medicaid planning?

Medicaid planning is the arranging of your financial affairs to qualify yourself for Medicaid benefits. This allows your resources to be preserved in order to supplement Medicaid benefits, which often fall far short of a person's needs. Additionally, as a secondary but important goal, Medicaid planning may allow you to leave an inheritance to your children or other intended beneficiaries of your estate. This planning usually involves transferring your assets to your children, directly or in trust, in order to reduce your assets to the point where you qualify for Medicaid. If you are successful in this planning, the state will pay for your nursing home care, and, hopefully, your children will supplement your care when needed.

You should consider only legal tactics and strategies. Medicaid planning is not hiding assets or lying on Medicaid applications. Such acts are crimes properly punishable by fines and prison terms. Ethical Medicaid planning means complying with the law. Nothing less is acceptable.

Is it illegal, immoral, or unethical?

Some people, including some attorneys, argue that it is morally wrong to intentionally impoverish yourself so that Medicaid will pay for your nursing home stay. They find it offensive to arrange to "go on the public dole."

Others believe there is nothing immoral or unethical in Medicaid planning. Medicaid planning for a family of modest means is equivalent to estate planning for a wealthy family. There is no real distinction between the two – tax breaks that benefit the wealthy are no less an entitlement than Medicaid benefits. One is welfare for the poor, the other is welfare for the rich.

Transferring assets to qualify for Medicaid is similar to taking advantage of any income tax benefits, such as deduction interest paid on your home mortgage. It is not immoral to take advantage of this deduction. Similarly, the law does not require that you preserve your assets in case they may be needed for nursing home care.

Congress is well aware of legitimate Medicaid planning—it made the rules. It can change the rules at any time it perceives an abuse, and often does so, each time making planning more difficult and less effective. So long as you stay within the rules, you are a good citizen.

The Supreme Court of Maine upheld the suspension of a lawyer's license to practice law because, among other reasons, the attorney failed to advise his client of proper Medicaid planning. This failure resulted in a substantial loss to the client's family. Attorneys have on occasion been sued by clients for failing to advise them of appropriate Medicaid planning strategies. It is clear that the courts consider Medicaid planning not only legal but also required in some cases.

The New Jersey Supreme Court probably put it best:

> Medicaid planning is legally permissible under federal and state Medicaid law.... By its actions, Congress has set the public policy for this program and although some might choose a different course, the law has not. 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, by their actions, reducing the amount of money available to government for its public purposes.
> *In the Matter of Keri* (N.J., No. A-70-02, Aug. 5, 2004).

A New York court stated:

> [N]o agency of the government has any right to complain about the fact that middle class people confronted with desperate circumstances choose voluntarily to inflict poverty upon themselves when it is the government itself which has established the rule that poverty is a prerequisite to the receipt of government assistance in the defraying of the costs of ruinously expensive, but absolutely essential, medical treatment.
> *In the Matter of Shah*, 694 N.Y.S.2d 82 (App. Div. 1999).

What is required to qualify for Medicaid?

- ***Income test***.

If you have income above $2,250.00 , you cannot, as a general rule, receive Medicaid benefits. However, if you are in a nursing home, Medicaid will pay the entire portion of your bill that your income doesn't cover, up to the Medicaid rate for the particular nursing home. For example, if the nursing home Medicaid rate is $6,000 per month, and your income is $4,000 per month (net of Medicare premiums), Medicaid will pay the shortfall of $2,000, plus allow you to keep $38 as a personal care allowance, meaning Medicaid will pay $1,038 of your monthly bill.

Community property laws are disregarded. Income is attributed to the owner, the person in whose name the income is received (the "name on the check" rule). In other words, for Medicaid purposes, income received by your spouse is not yours, even if one-half of that income would be considered yours under Louisiana's community property laws.

If you qualify for Medicaid while staying in a nursing home, you must turn your income over to the nursing home, except for (i) a personal allowance of $38 per month, (ii) premiums for Medicare and health insurance, (iii) an allowance for your spouse of $3,090.00 per month (less your spouse's own income) and (iv) an allowance of $2,030.00 per month for dependents, less the dependent's own income.

Therefore, in most cases if you are in a nursing home and Medicaid is paying part of the bill, and your spouse makes more than $3,090.00 per month, you will need to pay all but a small portion of your income to the nursing home. If your spouse's income falls below $3,090.00 per month, Medicaid automatically allows you to transfer to your spouse enough to bring him or her up to $3,090.00 per month without jeopardizing your benefits. However, if your spouse also enters a nursing home, this transfer stops.

It is interesting to note that there is no limit on the income your spouse can make if you are the person applying for Medicaid long-term care benefits— only your income counts for this purpose. (Contrast this to the resource test discussed next, in which all of the assets of both you and your spouse are considered.)

- ***Resource test***

Because Medicaid is a needs-based program, the recipient must be poor. You are allowed only $2,000 of assets or "resources." In addition, your spouse is entitled to "countable" resources (in 2018) of $123,600. These additional assets must be in your spouse's name, and you will be allowed a reasonable period of time (typically one year after initial eligibility) to transfer this amount of assets from your name to your spouse's.

Not counted, or exempt from the computation of resources, are:

  - Cash value of life insurance having a face value of up to $10,000.

- Cemetery plot.

- Prepaid funeral costs. Any portion of this contract that represents burial funds reduces the $10,000 life insurance exclusion and the $10,000 maximum burial funds exclusion.

- $10,000 for a burial fund, separate from and in addition to the cemetery plot exclusion. (Computation of the burial fund can actually be somewhat complicated.)

- The family home, up to $572,000 of equity, if you intend to return home or if your spouse or minor, blind, or disabled child lives in the home. (However, this exemption is not as substantial as it appears, as your heirs may lose the home to estate recovery, discussed below.) If your spouse or a dependent relative is living in the home, there is no limit to the value of the home.

- Up to $6,000 of equity in property not excluded as trade or business property if it yields at least a 6% rate of return and is essential to your support. In other words, if the property produces less than a 6% rate of return, then even this small exemption is not available. Obviously, this $6,000 limitation would only involve a small fractional interest in passive rental property. There may be strategies to get around this limitation under certain limited circumstances.

- Business Assets (Property Essential for Self-Support). All property used in a trade or business and all property used by an employee in connection with employment as property essential to self support. Naturally, this must be a valid business. Of course, this exception applies only to the spouse because the nursing home resident will not be working.

- Most household furnishings and appliances.

- Wedding and engagement rings.

- Personal effects such as clothing and hobby items.

- One vehicle per household of any value.

It doesn't matter that your spouse may have inherited assets, those count, unless you get divorced.

According to the federal rules, only "available" resources are to be counted. If you are the owner of an undivided interest in real estate, your share of the total value of the asset is considered available. The Louisiana Medicaid Eligibility Manual states, "The inability to find a buyer for the resource does not affect the determination of countable value." This may be contrary to federal law, which requires the consideration of the owner's reasonable but unsuccessful efforts to sell an interest in real estate.

Giving it away

If your resources or assets are too high for you to qualify for Medicaid, an obvious tactic is to give some of your assets away. Of course, these gifts must be disclosed on the Medicaid application. **Making gifts within five years before applying for Medicaid can be catastrophic. Be careful; get expert advice.**

- ***Penalty period***

The gifts will cause a period of ineligibility or a penalty period equal to the value of the gifts divided by $5,000 (the average monthly private pay rate in Louisiana for nursing homes). Thus, if you give away $20,000, the penalty period is four months, meaning that after you apply for Medicaid, the state won't pay your nursing home bill for four months.

When does the penalty period start? The penalty starts not when you make the donation but when (i) you are in the nursing home, and (ii) your countable resources are down to $2,000 or less and your spouse's are down to $123,600 or less.

For example, if you make gifts to grandchildren of $60,000, this results in a penalty period of 12 months ($60,000 ÷ $5,000 = 12). Two years later you enter the nursing home, at which time you still have $50,000 of cash and a few exempt assets. You must pay your own way until your cash is down to $2,000. <u>Then</u> the penalty period starts. You are broke and can't pay the nursing home, but neither will Medicaid until the 12-month penalty has lapsed. Who pays? Someone has to.

It is extremely important to know the difference between two concepts: the look-back period and the penalty period. They are not the same.

- ***Look-back period***

The “look-back” period is the number of months that the state looks back from the date of a Medicaid application for gifts the applicant made. The look-back period for direct gifts is a maximum of 60 months. It is a statute of limitations beyond which Medicaid cannot penalize gifts.

Warning! If benefits are applied for too early, the penalty period has no maximum and can extend well beyond the five-year look-back period. "Too early" means during the look-back period if you made a large gift. For example, presume you give $500,000 to your children and apply for Medicaid within the look-back period—in the 59th month. Looking back 60 months, the gift is found, and its value is divided by $5,000 to determine a penalty period of 100 months. You won’t qualify for Medicaid for 100 months from the date you are in the nursing home and broke. However, if you wait until the 61st month to apply for Medicaid, the gift is not found in the five-year look-back period, no penalty is assessed, and you qualify for Medicaid.

Good planning may require that you retain at least enough money to carry you through the look-back period. Determining this amount can be complicated, and precision is not possible. For our clients, this is one of the many tasks we assist them with.

- ***Gifts to trusts.***

It is usually not a good idea to make large gifts directly to your children, hoping that they will safeguard the gifted assets and make them available for you when needed. They can dispose of the assets or lose them in a law suit. They can die and leave them to unsympathetic heirs. They can turn on you and become selfish at your time of need. Their spouses can interfere.

A good option in some cases is to establish a trust naming yourself (and your spouse if you have one) as income beneficiary and your children as principal beneficiaries. The trust will prohibit you from gaining access to the principal under any conditions. One or more of the children could serve as trustee (you don’t have to name a bank). In this way, you have preserved the income for yourself. Neither your children nor their creditors or heirs can interfere with your right to income so long as you live. Furthermore, upon your death, all of the advantages of a trust may accrue to your children, if the trust is properly drafted. Hopefully, if and when you run short of money your children will help you out, but the trust nor any side agreement can legally bind them to do so.

Several disadvantages of this "income only" trust are readily apparent:

1. The assets transferred to the trust may not generate any significant income.

2. The income may interfere with qualification for Medicaid under the income test. However, unless the income is in the form of oil and gas royalties or a similar asset, the trustee can solve this problem at the appropriate time by changing the asset mix so that very little income is generated by the trust.

3. Few people are comfortable planning so far ahead—at least 60 months.

4. Costs are associated with the trust, such as attorney fees to draft it, accounting fees for the preparation of its tax returns, etc.; however, these fees are usually quite reasonable considering the benefits derived.

In most cases our clients are so comfortable with their children that they prefer to establish a trust of which the children are the sole beneficiaries—they will receive the income as well as the principal. In this case, you and your spouse will not be beneficiaries. This avoids the income test problem, but not the five-year look-back period. Because you do not retain the right to income, this type of trust is in one sense riskier, as you must rely more on the good faith of the children to help out if necessary. The primary advantage of this trust is that the income will never be lost to nursing home expenses and, for technical reasons, is stronger than an income only trust.

- ***Special problems regarding the home.***

As mentioned above, the home is usually exempt from consideration as a resource, at least so long as the recipient has a reasonable possibility of returning home or the home is occupied by the spouse or a dependent. However, in many cases Louisiana will be required by federal law to recover from the recipient's estate the Medicaid benefits paid to him.

For example, a person may spend 10 years in a nursing home and not lose their home. However, upon their death the home may lose its exemption. At that point, the State of Louisiana may require that the heirs sell the home and repay Louisiana for the Medicaid costs paid on behalf of the home owner. When the home is sold, whether by the estate or the heirs, none of the sales proceeds will go to the heirs until Louisiana is first reimbursed for its Medicaid costs.

Fortunately, the state exempts from recovery the value of the home in an amount equal to one-half the median value in the parish where the house is located ($66,200 in Caddo Parish, $79,200 in Bossier Parish, and $98,500 in Orleans Parish). Also, if an heir who inherits your home or a portion of it has family income of less than three times the official U. S. poverty guideline, the state will not be entitled to reimbursement. For example, in 2018 the federal poverty guideline for a family of three is $20,780, so if the heir has a wife and child and their combined family income is less than $62,340 per year, the home will not be subject to recovery to reimburse the Medicaid benefits. This is true even if several heirs inherit the home, only one of whom falls under this income limit.

Also, if you enter a nursing home and your heirs spend their own money on reasonable and necessary expenses in order to maintain the home, the state may at its discretion allow the heirs to recoup their investment before the state receives any reimbursement. (Keep those receipts, as the state will require hard proof.)

Because the state may recover a large portion of the value of the home after you are gone, it is often a good idea to give the home away while you continue to live in it. However, doing so may cause the loss of the homestead exemption, which will cause the payment of at least $800 of additional property tax each year. Of course, the gift of the home will result in a penalty period, so in most cases this donation should occur at least five years before you anticipate filing for Medicaid.

Trap for the unwary: Donating your home to your children may be a financial blunder. The first $250,000 of gain ($500,000 for a married couple) from the sale of your home may be exempt from tax. However, if you donate the home to your children, and they later sell it, they will be required to pay tax on the profit. If your home has appreciated significantly in value, you need to consider donating it to a specialized type of trust, known as an “intentionally defective irrevocable grantor trust.” When this trust sells the home, you will qualify for the exclusion of the gain if you would have qualified: that is, the trust is ignored for income tax purposes. A complete explanation of this issue is beyond the scope of this paper, and mention of it here is meant only to make you aware of it.

It's complicated. As you can see, planning for the family home owned by someone who may need Medicaid benefits can be quite complicated. This is not something you should do without expert advice.

- ***Planning with annuities.***

Annuities are a complex area in the Medicaid planning context. The basic idea is that a countable asset (cash) is converted to something that is not an asset at all, but a stream of income, a contract by which an insurance company pays you a set amount of cash periodically. In the past states fought Medicaid friendly annuities very hard. However, under current law, it appears that annuities are stronger than ever, at least for a married couple where one enters the nursing home. This topic is discussed in the attached addendum.

- ***Long-term care insurance.***

A very attractive alternative in many cases is the purchase of long-term care insurance. On occasion this is the only recommendation I make to a client if the premiums are reasonable in their particular case. However, this policy can be purchased only if you are healthy, and picking the right policy may be a complex undertaking.

What is the alternative?

Medicaid planning is not pleasant. It means parting with assets before you are probably ready, incurring attorney and accounting fees, and making a lot of tough decisions. Are there alternatives?

Of course, the first alternative is to do nothing. If you are wealthy, Medicaid is of no concern. If you have an income above the income test level, you may not be concerned with qualifying for Medicaid because you do not want to do anything to reduce your income and you would likely not qualify for Medicaid in any event. However, in certain circumstances, by doing nothing you could pay for your nursing home care out of your family's inheritance, leaving them much less than if you planned. More importantly, you could spend all of your money before you die, leaving you with only those benefits that Medicaid provides.

If you or your spouse is a veteran, having served at least 90 days of active duty, with at least one day during time of war, you may qualify for a pension, known as Aid & Attendance, from the Veteran's Administration.

Whom should you look to for help?

Proper planning requires the aid of an attorney with deep experience in this area. It is illegal to practice law without a license, and many of the tasks involved in Medicaid planning involve the practice of law. Furthermore, an advisor who is not an attorney does not have the broad background necessary to consider all of the issues that may come up. Additionally, an attorney has no ulterior motive, such as the sale of an annuity or other product. The attorney's only interest is creating the best feasible Medicaid and estate plan in conformance with your desires. If an annuity will enhance your planning, the attorney will recommend it, but will refer you to someone who is licensed to sell annuities. The attorney will not share in any commissions.

When it comes time to qualify for Medicaid, an attorney with extensive experience in elder law is also the best choice to take you through the application process. If they prepared your plan, they are familiar with your circumstances and can fight for you if your application is denied, even by going to court if necessary. Remember, don't wait until you are already in the nursing home to contact the attorney because some tactics may be lost after entering the home.

Conclusion

Proper Medicaid planning in appropriate cases can provide for your long-term care by stretching your money and in addition save the family a large amount of money. Many family estates have been completely lost to nursing home fees. Usually this was unnecessary and could have been avoided with good planning. If you believe Medicaid planning may be appropriate, act now. Time is of the essence, both because of the look-back period and because of the possibility that future changes in the law will further erode the planning opportunities.

Medicaid planning is but one part of the estate planning process, a process which can be quite complex even for those with small estates. A good overall plan requires expertise not just in qualifying for Medicaid but also in the broad field of estate planning. For this reason, it is highly recommended that you consult with an attorney for your Medicaid planning, one who specializes in estate planning and who also knows the intricacies of Medicaid qualification and potential VA benefits if you or your spouse is a veteran.

Disclaimer

This outline presents general information only. Possession of this outline does not create an attorney-client relationship between the reader and the author or his law firm. Do not use this outline to make decisions without the advice of a qualified attorney.

Addendum
Annuities

Annuities provided a unique opportunity to qualify for Medicaid—a giant loophole sanctioned by Congress. This usually involves situations where a married couple has assets that exceed the resource test. If you are about to enter a nursing home, you may transfer to your spouse an amount of cash at least equal to your excess resources as a couple, the excess amount that is keeping you from qualifying for Medicaid assistance. Your spouse would then purchase an irrevocable “immediate pay” annuity that pays a monthly amount to your spouse, with the monthly payment based on a time period no less than your spouse’s life expectancy. This converts the excess assets into a stream of income to your spouse. (As mentioned above, it makes no difference how much income the noninstitutionalized spouse has, as only the income of the spouse applying for Medicaid counts toward the income test.)

However, there are certain disadvantages to the annuity strategy. First, if your spouse one day ends up in a nursing home also, the annuity income would be paid to the nursing home, which could result in most or all of the annuity being used, leaving the children with little or nothing. Therefore, this planning is appropriate only if one of the spouses is healthy.

Also, if your spouse has relatively little income, the annuity may provide little benefit since it would only supplant income that you may turn over to your spouse while you are in the nursing home. (See the above discussion of the rule allowing the spouse in the nursing home to transfer income to the at-home spouse sufficient to bring his or her income up to $3,090.00 per month.) As a result, the use of annuities should be a Medicaid planning strategy of last resort. However, with the requirement that the penalty period start only after you are in the nursing home and broke, in many cases an annuity is the best alternative.

Federal law requires that the annuity be countable as a resource, however, unless it:

1. Is irrevocable;

2. Pays out principal and interest in equal monthly installments (no balloon payment) to the individual in sufficient amounts that the principal is paid out within the actuarial life expectancy of the annuitant;

3. Names the State as the residual beneficiary of funds remaining in the annuity, not to exceed any Medicaid funds expended on the individual during his lifetime (the spouse, if not also in a nursing home, or a minor or disabled child may be named as beneficiary ahead of the state); and

4. Is issued by an insurance company licensed and approved to do business in the jurisdiction in which the annuity is established (no private, family annuities).

These uses of annuities are beyond the scope of this outline and require great care in implementing. However, in the appropriate case, the use of an annuity can be a powerful and effective Medicaid planning tactic.