Financial & Legal Solutions for Long-Term Care Planning

By, John J. Campbell, CELA, MSCC

My Two Rules of Long-term Care Planning

1. Ensure that the individual will have uninterrupted access to proper care in the proper setting and that there will always be a means of payment available; and
2. Try to preserve as many assets as possible without violating Rule #1

Always plan for the worst and hope for the best.
You can always adjust if needed.

Financial Solutions vs. Legal Solutions

Financial Solutions usually require early planning and medical underwriting
Legal Solutions can be used for both long range and crisis planning
Financial Solutions can delay or even eliminate the need for gov't benefits
Legal Solutions are aimed at eligibility for gov't benefits
Both Financial and Legal Solutions can be incorporated into a long-term care plan

Financial Solutions

Long-Term Care Insurance
Life Insurance with Long-Term Care rider
Annuity with Long-Term Care rider
Life Settlements

Pension Protection Act of 2006

Effective January 1, 2010
Allows use of "1035 Exchange"
- Life Insurance to Life Insurance with LTC Rider
- Annuity to Annuity with LTC Rider
- Life Insurance or Annuity to LTC Policy
- Cannot use "qualified annuity"

Long-Term Care Insurance

Can pay for LTC at home, in assisted living or in nursing home
Premiums cannot be raised except across a class of insureds
May be based upon per diem amount, total lifetime benefit or both
No death benefit
LTC Partnership policies can provide additional exempt resources and estate recovery protection to Medicaid applicants
Payments are exempt income for Medicaid purposes

Life Insurance

"Hybrid" policy

- Life Insurance policy with Long-Term Care rider
- Typically a "single premium" policy
- Using LTC benefits will decrease the death benefit
- LTC coverage will vary from policy to policy
- Premiums are fixed and cannot be increased while policy is in force

Annuities

- Annuity with LTC rider
- Excellent use of "qualified money"
  - Trustee-to-Trustee transfer for IRAs, 401Ks, etc.
- Deferred annuity
  - Early withdrawals each year pay for life insurance with LTC feature
  - Will usually have to wait 2 yrs. or more before using the LTC benefits
  - Works best between age 59 ½ and 65

Life Settlements

- Use existing life insurance to create Long- Term Care Benefit Plan
- Similar to Viatical Settlement but proceeds fund a plan w/ third party administrator
- Excellent if life policy has low cash value or if old "term insurance" policy is about to expire
- "Reverse medical underwriting: requires terminal condition & immediate need for LTC
- If less than 2 years to live, proceeds are tax-free
- Use with Medicaid crisis planning

Legal Solutions

- Medicaid
  - Some Financial Solutions can delay Medicaid eligibility
    - Remember that many assisted living facilities and nursing homes are reluctant to admit "Medicaid pending" or might require 1-3 yrs. private pay before Medicaid
  - Some Financial Solutions work hand-in-hand w/ Medicaid (e.g. LTC Partnership Policies)

Medicaid Long Term Care Benefits

- Nursing home
- Home & Community Based Services (HCBS)
- Program for All-inclusive Care for the Elderly (PACE)

Eligibility

Income Test

Medicaid LTC, HCBS & PACE

$2,199/Month

Only Income of Medicaid Applicant is Counted

Can still be "income eligible" with income over $2,199/mo. up to the Regional NH average using an Income Trust

Colorado Regional Monthly NH Costs for 2015:

Region I	$8,039.00
Region II	$7,286.00
Region III	$6,828.00
Region IV	$6,845.00

Resource Test

Medicaid through Medicaid LTC, HCBS & PACE

$2,000 for Individual/$3,000 for Married Couple

Resources of Both Spouses are Counted

Long Term Care Insurance Partnership Program

May keep additional resources equal to total LTC Insurance payments made

Spousal Impoverishment Protections

The spouse who will receive Medicaid LTC, PACE or HCBS benefits is called the "institutionalized spouse;" and the spouse is called the "community spouse."
CSRA $119,200
MMMNA $1,966
May be increased, but no more than $2,981
MIA

CSRA is determined as of a "snapshot" in time (i.e., the application filing date); not subject to annual reviews

Community spouse can also qualify for HCBS or PACE, but must comply with resource limit (CSRA does not apply here)

Exempt Income

Long Term Care Insurance Payments.

Reverse Mortgage Payments.
VA Aid & Attendance Benefits for Unreimbursed Medical Expenses

Exempt Resources

Primary Residence, if the recipient's equity in the home does not exceed $552,000 or the recipient's spouse or minor, blind or disabled child continues to live there;
Vehicle;
Personal Property;
Life Insurance, if the total face value of all life insurance policies the Medicaid recipient owns does not exceed $1,500 or if "term life;"
Burial Insurance, if value less than $1,500 or if irrevocable;
Annuities. An irrevocable & non-assignable annuity is considered an available resource until it is annuitized. Once annuitized, payments from the annuity are considered income in the month received.

Revocable or assignable annuities are countable resources, whether or not annuitized.

Medicaid Estate Recovery

Medicaid planning is not just for eligibility!
What about preventing a Medicaid Estate Recovery claim?

Medicaid may assert an Estate Recovery claim for up to the amount of benefits provided to an individual who:

Receives Medicaid benefits at age 55 or older
Receives Medicaid benefits in a NH regardless of age

Gifts/Transfers Without Fair Consideration

60-month "look back" – runs back from date of Medicaid application
Penalty period

combined uncompensated value of all asset transfers during look back period; divided by average monthly cost of nursing home care ($7,249 in Colorado in 2015); equals number of months & days of ineligibility
Begins first day of the month following the later of:

The transfer date or
Date beneficiary is receiving services *and* is eligible for Medicaid but for the transfer
Countable resources and income must be down to eligibility levels and individual must pass functional assessment *before* penalty period begins to run!

Important Exempt Transfers to Remember:

Transfers between spouses;

Transfer of the home to the Medicaid recipient's:

Minor, blind or disabled child,

Sibling who has an equity interest in the home and who was residing in the home for at least one year immediately before the date the individual entered the nursing home, or

Child who was residing in the home for at least two years immediately before the date the individual entered the nursing home and who provided care that permitted the individual to reside at home rather than in an institution;

Transfers of any assets directly or to a trust established solely for the benefit of the Medicaid recipient's minor, blind or disabled child or to a trust established solely for the benefit of any disabled individual under 65 years of age;

Transfers to purchase Medicaid friendly annuities;

Transfers to purchase life estate in another person's home if purchaser actually lives in the home for 1 year after the purchase.

Medicaid Friendly Annuities

Annuities purchased on or after February 8, 2006:

Entire purchase price is transfer without fair consideration unless:

The annuity is purchased from a life insurance company or other commercial company that sells annuities as part of its normal course of business;

The annuity is annuitized to the Medicaid recipient or the Community Spouse; AND

Annuities must be irrevocable and non-assignable for payments to be treated as income

Revocable or assignable annuities are treated as an available resource, even if they are annuitized

Medicaid Friendly Annuities

Purchase of assignable or revocable annuity not treated as a transfer without fair consideration

Purchase of irrevocable non-assignable annuities is a transfer without fair consideration, unless:

If the annuity is purchased for a community spouse and HCPF is named as death beneficiary

No other restrictions apply to CS annuities!

CS annuities are a great way to increase CS income as part of "spend down"

Remember: CSRA is a snapshot, so CS can accumulate funds after the CSRA is determined

If the annuity is purchase for an institutionalized spouse and HCPF is named as death beneficiary; AND

The annuity is an IRA annuity under IRC §408(b); OR
The annuity is a deemed IRA under IRC §408(q); OR
The annuity is purchased with proceed from:

An IRA under IRC §408(a);
An employer established account under IRC §408(c);
A simple retirement account under IRC §408(p);
A simplified employee pension plan under IRC §408(k); or
A Roth IRA under IRC §408A; OR

The annuity is actuarially sound based on the life expectancy tables; and
The annuity provides for payments in equal amounts during the term of the annuity with no deferral and no balloon payments made.

Gift Planning With Annuities

Need to determine safe allocation of excess resources to:

Gift Amount
"Hold back" amount to cover the penalty

Hold back amount cannot be in the form of a countable resource, or it will delay the start of the penalty
Can convert from resource to income using a Medicaid friendly annuity
CAUTION! The combined gross income of the applicant at the time of application cannot be greater than the Regional NH average amount or the application will be denied due to excess income.

Determining how much to gift and how much to hold back

Calculate what the gross income of the individual will be at application time
Project the costs of care based upon Regional NH average
Determine what excess resources will be at application time
Use the worksheets in your written materials
Remember, if both spouses are applying, the penalty is divided between them, so use special worksheet for this

May also include the primary residence in a gifting plan to avoid Medicaid Estate Recovery

Can transfer entire interest in fee simple or can use joint tenancy or life estate/remainder
If transferring to more than one co-owner, use life estate/remainder to minimize transfer penalty

Planning With Trusts

Treatment of Self-Settled Trusts

Self-Settled Trust is a trust that is funded wholly or partially with assets of the Medicaid recipient or the recipient's spouse.

Revocable – All assets in trust are available resources.
Irrevocable – All assets that could be distributed to or for the benefit of the recipient *under any circumstances* are available resources. Assets that cannot be used for the recipient are transfers without fair consideration when placed into the trust.

"Under any circumstances" is broadly construed:
Power of substitution
Power to make loans
Early termination
No distributions of principle or income to or for the benefit of grantor

Use for 5-year planning

Treatment of Self-Settled Trusts

Revocable or Irrevocable –

All distributions to or for the benefit of the recipient are treated as income to the recipient.
Any distributions of funds available to the recipient to or for the benefit of anyone but the recipient are transfers without fair consideration when distributed from the trust.

Exceptions under OBRA '93

(A) Disability Trust

Disabled and under age 65
Must be created by parent, grandparent, guardian or court
State pay-back provision required

(B) "Miller Trust" or "Income Trust")

Income above $2,199 but less than Regional Average monthly NH cost
State Pay-back provision required

(C) Pooled Trust

Disabled & any age

Must be created by parent, grandparent, guardian, court or the individual

State pay-back or trust retention provision required

Colorado used to allow pooled trusts for +65 recipients if the trust provides an actuarially sound care plan. Now, Colorado will impose a penalty for a transfer without fair consideration.

Other Exempt Trusts

Third Party Trusts

Created by a third party and not at the direction or request of the beneficiary
"Donee Trusts" when recipients of gifts wish to set funds aside for the applicant's supplemental needs

Wait until 30-45 days after gifts
Include donees and the applicant as beneficiaries
May never receive property belonging to the applicant

Sole Benefit Trusts

Single beneficiary - no other beneficiary can benefit at any time -- distribution after beneficiary's death must be to the beneficiary's estate

Must be "actuarially sound" based upon beneficiary's RLE

Testamentary Special Needs Trusts
The Community Spouse's will should contain TSNT provisions
Medicaid will require outright bequest equal to elective share, exempt property & family allowance
Provide for this mandatory bequest to be satisfied with life estate in primary residence if possible – this will limit or avoid estate recovery later
TSNT can hold the balance
Can also be used to provide for disabled child, sibling, friend, etc.

FOR ALL TRUSTS USED IN MEDICAID PLANNING –

ALWAYS include a provision for trustee, court or trust protector to amend the trust if necessary to comply with changes in Medicaid law or policy!!

Spending Down
Convert Non-Exempt Resources into Exempt Resources
Home Repairs & Improvements
Personal Property
Medical Equipment & Supplies
Vehicle
Irrevocable Burial Plan
Medicaid-Exempt Trusts

Convert Non-Exempt Resources into Income
Medicaid-exempt Annuities, especially for the CS!
Long Term Care Insurance
Remember that an LTCI Partnership policy also increases the amount of exempt resources!
Reverse Mortgage to provide income if care is in the home and preserving the home is not a priority

Transfer Non-Exempt Resources for Fair Market Value
Pay off mortgages, credit cards & other debts
Travel
Hire Care Manager

Fees for Attorneys, Accountants, or other services
Personal Care Contracts

Personal Care Contracts

Must be in writing, signed and notarized
Must spell out services to be provided and monthly payment amount
Can only cover current services. No pre-payments or payments for services rendered prior to the date of the contract
Any agent under *any* POA cannot be beneficiary of the contract
PRACTICE TIP: Use an "independent contractor" agreement to avoid being treated as an employer