

ELDER LAW ATTORNEYS NEED NOT APOLOGIZE FOR MEDICAID PLANNING

By

Calvin C. Curtis¹

1. Introduction. The Scope of the Issue.

Elder law attorneys have been far too timid, and far too quick to apologize to the public at large, for assisting clients with Medicaid planning. And, like bad politicians in a debate, elder law attorneys have let the opponents of Medicaid planning frame the issues and place them on the defensive.

This is not to say that Medicaid planning, including asset transfers, annuities, and impoverishment, is necessarily a good idea. For the individuals involved, such planning can lead to a loss of independence and perhaps inadequate care. Moreover, the federal government can ill afford to pay for everyone's nursing home care. And some no doubt have strong feelings that qualifying for Medicaid assistance is akin to receiving welfare. However, the issue is hardly as black and white as many believe. Medicaid planning is simply not "cheating" or "stealing" from the federal government.

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See also T. Begley and A. Hook, *Legal Ethical Issues in Transferring Assets for Medicaid Planning: Case Studies in Contrast*, Estate Planning, October 2003 at p. 522.

Statistics show that more than half of nursing home residents receive Medicaid assistance.² Since the *majority* of nursing home residents receive Medicaid assistance, how can it be considered unethical or immoral for some of the remaining *minority* of such residents to plan to receive--or to accelerate their eligibility for--such assistance? Moreover, where does such an argument logically begin and end? It is easy to criticize those who impoverish themselves to qualify for Medicaid. But at the same time, should we also criticize those seniors who readily qualify for Medicaid assistance upon entry to a nursing home (without engaging in asset transfers or other planning techniques) for failing to save for nursing home expenses? For failing to buy a long term care policy? Should their family members be forced to step in to pay their nursing home expense?

Many who are quick to criticize Medicaid planning ignore that our country allocates and spends tax dollars through the give and take of the political process. Some statistics suggest that approximately \$42 billion in federal revenue was spent on nursing home

² Thomas A. Scully, Administrator, Centers for Medicare & Medicaid Services, testified before The Senate Finance Committee as follows:

State and federal governments now pay roughly 60 percent of all long-term care costs, while those needing care and their families pay for 30 percent of costs. A variety of sources, including long-term care coverage, account for the remaining 10 percent. Among the larger nursing home companies, Medicare beneficiaries typically account for 10 percent to 15 percent of the home's population, while Medicaid beneficiaries typically account for 65 to 70 percent of nursing home residents.

Testimony of Thomas A. Scully, July 17, 2003.

Medicaid in 2001.³ While this amount is significant, to be sure, the amount attributable to seniors who plan for Medicaid eligibility, through asset transfers or otherwise, is likely but a tiny fraction of that amount.

In contrast, consider the following examples:

- ***Was Our Involvement in Iraq Appropriate?*** Last year, President Bush sought \$87 billion for the Iraqi conflict and reconstruction. Recent news reports suggest he will ask for an additional \$40-\$50 billion more.⁴ Total defense spending is expected to be approximately \$380 billion in 2004.⁵
- ***Do We Need to Explore Outer Space?*** President Bush also recently proposed spending \$12 billion to return to the moon and visit Mars. NASA estimates the eventual cost of the new program to be closer to \$170 billion.⁶
- ***If Medicaid is Welfare, What Are Agricultural Subsidies?*** Do you realize that the federal government plans to spend \$8.2 billion over 5 years to mitigate the cost of crop insurance, attract more farmers into the crop insurance program, and lessen the need for ad hoc farm disaster assistance?⁷ And that it plans to spend an estimated \$7.1 billion in additional emergency financial assistance to farmers?⁸ Will you receive a portion of this assistance?
- ***\$5 Billion for Disaster Relief.*** A study has concluded that federal disaster relief totaled approximately \$5 billion last year. The study further reported that “[p]roperty owners who fail to insure are eligible for a staggering array of government grant and loan programs.”⁹ Can such relief be analogized to failing to obtain long-term care insurance and later qualifying for Medicaid assistance?

³ Centers for Medicare and Medicaid Services, Department of Health and Human Services (\$41.8 billion in calendar year 2001); 2003 CMS Statistics, Table 32 (\$42.8 billion in fiscal year 2001).

⁴ USA Today, January 27, 2004, at p.1.

⁵ Time Almanac 2004, at p.394.

⁶ Time, January 26, 2004, at p.42.

⁷ See CRS Report IB10033 – Federal Crop Insurance Reform Issues in the 106th Congress.

⁸ Id.

⁹ NCPA – Federal Spending and the Budget – Federal Benevolence Kills Flood Insurance.

- ***Social Security Disability.*** Although the test for disability benefits under Social Security is complete inability to engage in any meaningful employment, many know of situations where this test appears not to have been rigorously or literally applied. In fiscal year 2000, the Social Security Administration planned to spend \$1.7 billion on program integrity and anti-fraud initiatives.¹⁰

The purpose of these examples is not to criticize our involvement in Iraq, the space program, or various government aid programs. Rather, the point is that the government provides various forms of assistance that does not benefit all of its citizens, and with which not all citizens will agree. But to criticize Medicaid planning alone, while ignoring the many other assistance programs, is certainly naïve.

2. Estate Planners Cannot Credibly Criticize Elder Lawyers.

While elder lawyers can understand critical comments regarding Medicaid planning from the public at large,¹¹ high-end estate planners cannot credibly attack Medicaid planning.

Consider the following three contrasting hypotheticals.

First, have you noticed that more and more of your clients are interested in asset protection strategies, and are concerned about “losing everything” in the event they are sued? Contrast their thinking with the elderly client concerned about “losing everything” should she need long term nursing home care.

¹⁰ Testimony of William A. Halter, Deputy Commissioner of Social Security, before the House Ways and Means Committee, March 30, 2000.

¹¹ See, e.g., D. Conway, *Cheating Uncle Sam for Mom and Dad*, Newsweek, _____, 2003, at p. ____.

Second, suppose an elderly woman retains you as her lawyer. Her husband, now deceased, taught school for many years, and the couple do not have a large estate. Your client explains that she will soon need long term nursing home care. She wants to proceed with whatever strategies will accelerate Medicaid eligibility because she always wanted to leave an "inheritance" to her children, and because she perceives there to be little difference in the quality of care she is likely to receive in the nursing home. Her assets, some of which are tied up in life insurance policies, total \$31,000.

By month's end, you work with client to cash in her insurance policies, help her purchase a \$7,000 irrevocable funeral plan, pay your fee of \$1,060 (your meeting, travel and other time total 5.8 hours at \$200 per hour) and assist client in making gifts to her children. Several months later you hear that client has been admitted to a nursing home, that her Medicaid application has been approved, and that Medicaid will begin paying approximately \$2,400 toward the cost of client's care. Client is 67 years old, and is in the early stages of Alzheimer's disease, although she is competent and otherwise physically sound. You are not sure whether you are comfortable with your practice in elder law.

Finally, later that same day, you attend an estate planning luncheon where the subject of Medicaid planning is raised. When planning techniques are discussed, you overhear a colleague whisper to another "not Medicaid planning again. Legal, sure, but immoral. It's just welfare to pull money out of the Treasury like that."

As lunch winds down, you hear these same (well-dressed) colleagues discuss the following situation. Wealthy clients A & B, husband and wife, have a \$4 million estate. The name of the client sounds familiar, and you recollect that the husband comes from a relatively prominent family, having inherited virtually all of his wealth.

Both husband and wife have credit shelter trusts, and a family limited partnership. Husband and wife make "annual exclusion" gifts each year to their children through the limited partnership. As the lunch breaks up, you hear further discussion along the lines of (1) "there will be no estate tax for this couple beginning in 2006 (when the applicable credit amount will be \$2,000,000 per person)"; (2) "are you taking discounts on the partnership gifts? If so, what percent?" (3) "have you increased your fee above \$3,000 for an A/B estate plan?" (4) "the estate tax makes no sense anyway. It's voluntary, for the most part, and easily avoidable;" and (5) "how much will it affect your practice when its gone?" Your colleagues appear happy with their estate planning practices, and obviously have no compunction with the pending demise of the estate tax.

In many ways, the possible elimination of the federal estate tax, and many of the techniques used in high-end estate planning to reduce a taxable estate, are the antithesis of Medicaid planning. Yet in other ways, Medicaid planning and high-end estate planning have much more in common than many people (including many estate planners) think.

Opponents of the estate tax contend, among other things, that the estate tax is unfair and results in double taxation. It penalizes wealth. And, of course, Americans are well-versed in the convention of ordering their affairs to pay the minimum amount of tax necessary.¹²

As a result, wealthy taxpayers engage in various techniques crafted by estate planners to transfer wealth to their children and grandchildren, and to reduce the size of their estates. One of the most common techniques, the family limited partnership, with accompanying discounts for minority interests and lack of marketability, has particularly troubled the Internal Revenue Service, which has aggressively attacked such partnerships in litigation.

¹² “Anyone may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one’s taxes.” *Helvering v. Gregory*, 69 F.2d 809, 801 (2d Cir. 1934), *aff’d*, 293 U.S. 465 (1935).

Cf., on Medicaid planning, *In the Matter of John XX*, 226 A.D. 2d 79, 652 N.Y.S. 329 (3d Dept. 1996), wherein the Court approved a guardian’s application to transfer \$640,000 of an incapacitated person’s assets, while retaining \$150,000 to pay for his care during the 36 month Medicaid look-back period:

“[T]here being little question that, barring death, John will require continued nursing home care, the cost of which will exhaust his assets, it cannot be reasonably contended that a competent, reasonable individual in his position would not engage in the estate and Medicaid planning proposed in the petition. * * * Although we agree with the Department’s central contention that the Medicaid program was not designed to provide medical benefits to those who render themselves “needy” through the use of plans such as that proposed here, the simple fact is that the current law rewards prudent ‘Medicaid planning.’”

See also, *In the Matter of Shah*, 257 A.D. 2d 275, 282-283 (1999):

“[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 among 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.”

Why? Because such techniques accelerate the transfer of wealth and threaten the reach of the federal estate tax.

One study prepared by the Center on Budget and Policy Priorities has suggested that the repeal of the estate tax would cost \$294 billion over ten years, 2002 through 2011.¹³ By any measure, this constitutes a significant benefit to the beneficiaries of the approximately two percent of estates subject to the federal estate tax—the wealthiest Americans.

But wait a minute! These wealthy citizens are simply ordering their affairs to reduce taxes—a time honored tradition. An art! The tax laws permit such planning. They want to leave a legacy for their children and grandchildren. They are not asking the public at large to pick up their nursing home expense, they are simply seeking to reduce their tax expense. After all, they *earned* their wealth! (Ignore, for the moment, the fact that much wealth in the country is inherited rather than earned.)

By now, the parallels to Medicaid planning should be obvious. Instead of creatively applying the tax laws, elder lawyers apply the Medicaid rules. Medicaid laws permit planning for Medicaid eligibility. And, while the estates at issue may be much more modest in size, middle Americans (and, sometimes, lower middle Americans) are every much as interested in leaving a legacy to their children as wealthy Americans. They, too, earned their modest estates.

¹³ See I. Lay and J. Friedman, *Estate Tax Repeal: A Costly Windfall for the Wealthiest Americans*, Center on Budget and Policy Priorities, February 6, 2001. The Joint Committee on Taxation estimated the cost of repeal at \$236 billion for the nine year period from 2002-2010.

That leaves the final distinction between reducing the public fisc by minimizing one's tax expense, versus affirmatively reducing the public fisc by utilizing Medicaid. Again, however, before one criticizes Medicaid recipients, one should think long and hard about the many other beneficiaries of the public fisc, whether they receive agriculture subsidies, disaster relief, or some of the billions of additional dollars spent in other government programs. And, one might add, those who stand to benefit from estate tax relief.

3. **Long Term Care Insurance Providers Cannot Credibly Attack Medicaid Planning.**

For many of the same reasons, long term care insurance providers, like estate planners, cannot credibly attack Medicaid planning.

Long term care insurance has not reached its full potential and in many ways remains a product in search of a market. A common criticism of long term care insurance remains the prospect of paying for insurance one may never need. It remains expensive, perhaps understandably so, and is too costly for many of the people who might benefit from it.

Moreover, many long term care insurance providers face a second conflicting dilemma. As set forth above, the principal argument advanced by opponents of Medicaid planning, *i.e.*, that Medicaid planning improperly drains the public treasury, is suspect, or at least a close question of contrasting shades of gray. Yet many long term care salesmen

advance this argument without hesitation, let alone critical analysis, in some cases tainted further by their pursuit of a commission based fee.

4. **Conclusion.**

Elder lawyers may never be popular. We're criticized for applying "loopholes" and viewed with suspicion because Medicaid planning is "immoral" or "unethical" and many of our clients are not wealthy. Divorce lawyers, in contrast, seldom appear to be criticized for their work, even though the social and economic costs of divorce are huge. Corporate "raiders" and takeover specialists are often glamorized for their brusque powerplays, without regard to who gets hurt in the latest mega-merger. We simply write that off as business.

But Medicaid planning is not black and white. Rather, it is the product of our country's inability (again, perhaps understandably so), to come to grips with rising medical costs, universal health insurance and the circumstances of aging and nursing home care. These are complicated and expensive issues. But many of those who choose to criticize and snub Medicaid recipients, and elder lawyers, should first take a closer look at the many ways federal revenues are spent.

Cheating Uncle Sam For Mom and Dad

Why do so many otherwise honest citizens think it's OK to take Medicaid money they don't deserve?

BY DIANA CONWAY

ONCE MY PARENTS REACHED their 80s, I started getting an unwanted education in just how expensive end-of-life care can be. I began to discover, too, that there are clever ways for people with money to avoid paying their fair share of nursing-home costs. Lawyers who specialize in elder law, and who are well versed in Medicaid rules, can show the upper middle class how to become poor on paper, so that the government will pick up their nursing bills. These arrangements are all perfectly legal, but are they ethical?

A few years ago my 85-year-old mother looked at the column of numbers the housing manager of her new assisted-living home showed her and burst into tears. The manager had just figured out that a studio apartment, 14 by 14 feet, would cost her \$2,300 a month. He handed my mother a tissue and turned to me. "So many of our elders react this way," he said. "They've saved all their life for a rainy day, but when I tell them that rainy day has arrived, they can't bear to part with their money."

Today's old folks are survivors of the Great Depression. My mother always delighted in finding a penny on the street. If someone handed her a business card, she'd draw a flower on the reverse side and turn it into a holiday gift tag. Supermarket produce bags, used wrapping paper and plastic cutlery from fast-food restaurants filled one whole closet of her house. When I explained that her bank account would almost certainly take her to the end of her days, she ran her fingers through her silvery spider-web hair and protested, "But I worked so hard to leave something for my grandchildren!"

Nobody wants to hoard savings only to see them hemorrhage away at the rate of thousands of dollars a month. My friends, who were once '60s radicals, are now sixtysomething opportunists in search of legal loopholes. They discuss putting family money in trusts or tax-exempt annuities that could leave the government subsidizing their parents' or their own end-of-life care. Ethics never enters the equation.



PHOTOGRAPH BY RON LEVY FOR NEWSWEEK

NOT PAYING THEIR FAIR SHARE: My friends, once '60s radicals, are now sixtysomething opportunists in search of legal loopholes

My mother was lucky. She died quickly enough to leave her grandchildren some college money, scraped together from her pitiful salary as a secretary and her minuscule Social Security pension.

As a child of divorce, I have another mother, too—my father's second wife, who lives in California and suffers from dementia. When she was hospitalized and it became clear that she would need the kind of round-the-clock care a nursing home could provide, the first question the hospital and HMO social workers asked my father was "Is your wife Medi-Cal eligible?"

Medi-Cal is California's Medicaid program. It picks up the long-term-care ex-

penses of people who can't pay for themselves. When I called a Medi-Cal office on my father's behalf, I found out that to qualify he had to have \$89,280 or less in assets and a monthly income of no more than \$2,232. "If he has more," said the helpful lady on the other end of the line, "he'll need to spend down to that amount and then wait three years before he applies for aid. He might want to see a lawyer."

"You mean about how to hide his assets?" I asked.

She laughed nervously and said that although she couldn't advise me to do such a thing, lots of people give money to their children or otherwise arrange their finances to avoid spending all their savings for long-term care. She told me that my father could even go to court and make a case for a bigger monthly allowance.

Medicaid is designed to help the truly indigent. If we steal from the federal government, or the state of California, we steal from our fellow citizens, whose taxes go up to pay for our care. Medi-Cal currently pays about \$1,000 less a month than the average private patient. That means nursing homes must raise the rates for private patients to compensate.

"When ethics and self-interest seem to be in conflict, we face an ultimate choice," writes ethics professor Peter Singer in "How Are We to Live?" My father expressed his choice this way: "I've never cheated one penny on my taxes, and I'm not going to start hiding money now. If we outlive our savings, I won't feel a bit guilty about accepting Medicaid. But I sure as heck am not going to pretend to be eligible before then."

Every well-to-do senior who hides savings for the gain of his own family and seeks benefits meant for the needy weakens communal bonds. Have we become a nation of Scrooges, counting our own coins with little concern for others?

I'm proud of my father. If my stepmother lives several years in her nursing home, or if he also needs long-term care, their life savings will run out. But he will leave me one thing of great value: an example of ethical behavior in an era when most people are out to grab everything they can for themselves.

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