Chapter Thirteen

How to Use Medi-Cal to Pay for Long-Term Care

While Medi-Cal should be used as a last resort to pay for long-term care, there are cases where this may be the only option for a family to protect assets. However, if the individual who is applying for Medi-Cal and his or her well spouse (if any) have too many countable assets to qualify for Medi-Cal, they will have three options: convert the excess countable assets into exempt assets, spend down the excess assets on goods or services for the ill or well spouse, and in some cases gift away the excess assets, all without penalty. Let's use the some examples to illustrate these options.

THE MARRIED COUPLE

Let's look at the example of a married couple, Mary, age 78, and her husband, Bill, age 82, with countable assets totaling $380,000. In the case of a married couple, the law allows for a division of countable assets to occur at the time that either spouse enters a nursing home. Simply put, the ill spouse, is allowed to keep just $2,000 and the healthy spouse, usually called the well spouse or the community spouse, is able to keep assets up to the community spouse resource allowance, which is currently $120,900. In our example, let's assume that Bill is the ill spouse and will soon need care in a skilled nursing facility (SNF). So, Bill gets to keep $2,000 of countable assets and Mary will get to keep $120,900 for a combined total of $122,900 they will retain from their countable assets. Although they will keep any value of exempt assets, the balance of their countable assets, $257,100 will need to be spent down to zero before Medi-Cal will begin paying.

CONVERTING ASSETS

The first option for Mary and Bill will be to convert countable assets into exempt asserts. Examples of this include using excess funds in an account to buy a new (or more expensive) home; pay off the mortgage on or make improvements to an existing home; buy a new car; purchase a prepaid burial/cremation contract, or purchase a qualifying annuity.

The Omnibus Reconciliation Act of 1993 (OBRA '93) includes provisions that allow for excess funds to be protected if invested in an annuity that complies with certain rules. This annuity, sometimes referred to as an OBRA '93 Medi-Cal compliant annuity, must be irrevocable, non-assignable, non-commutable, non-transferable and actuarially sound. When properly done, converting the excess cash into an OBRA '93 Medi-Cal compliant annuity will allow the healthy spouse (Mary in our example) to retain 100% of the excess countable assets (See Exhibit 13.1).

SPENDING ASSETS

Naturally, Mary and Bill could spend the excess $257,100 in countable assets on good and/or services they need. They could pay for repairs and deferred maintenance needed for their home. Pay off their credit card and other bills. Hire and pay an attorney to advise them about their long-term care planning and pay for a care coordinator/advocate to help them get Bill placed in a good SNF. They could pay for a family vacation for everyone to spend a month in a beach house together. They could pay privately for caregivers to take care of Bill so that he could stay at home longer. They might prepay funeral and burial costs or for services they will use later (provided the contract and their payment under it are irrevocable). A good prepaid services could be contracting with a care coordinator/advocate for services over a set period of time to help ensure that Bill receives the care he needs and deserves from the SNF. Finally, it also may be very helpful for Mary and Bill to plan to use some of the excess countable assets to pay privately for Bill's care in the skilled nursing facility for a while in order to help get him placed in a facility of their choosing.

TRANSFERRING ASSETS

Mary and Bill may also be able to transfer their excess countable assets to their family or into an irrevocable trust for their family without any penalty, if the gifting is done correctly. Gifts of countable assets made during the "lookback period" to anyone other than the well spouse may result in a penalty period during which Medi-Cal will not pay for the individual's care in a SNF. The penalty period imposed due to gifts made during the lookback period is calculated as the number of whole calendar months that the amount gifted would have paid for a SNF in California at the Average Private Pay Rate (APPR) for SNFs in the state at the time the Medi-Cal application is submitted. In other words, **the value of the gift, divided by the applicable APPR, rounded down to the whole number, equals the number of months of the penalty period. The penalty period starts running from the first day of the calendar month in which the gift was made.** In most counties in California, a gift is defined as the value of an asset that is transferred for less than adequate consideration in any one day to any one person from any one source, less any consideration that was received for the asset that was transferred. The APPR is re-determined by DHCS annually and is typically announced by the Director of DHCS each April. The current APPR in California (as of January 2017) is $8,189. The Medi-Cal lookback period is currently thirty (30) months for all gifts other than gifts to or from a trust. For gifts to or from a trust, the lookback period is sixty (60) months.

Let's apply these gifting rules to the excess $257,100 in Mary and Bill's case. It they gift this amount to their children (outright or in trust), the gift will create a penalty period of 31 months during which Medi-Cal will not pay for Bill's care in the SNF. If Bill needs to go into the SNF right away, privately paying during this penalty period would be devastating. However, the penalty period could be reduced by dividing the amount to be gifted into smaller gifts that are stacked. "Stacked" gifts are possible in California based on the following three rules: (1) the penalty period is assessed on each gift separately (i.e. the gifts are not added together), (2) penalty periods will run concurrently (i.e. they are not tacked onto to one another to run consecutively), and (3) a gift is the amount given to any one person (or trust) on any one day from any one source. Caution is recommended as these three rules will change when the regulations implementing

the current state statues (which implement OBRA '93 and DRA rules) become effective. So it is extremely important that the reader consult with a knowledgeable elder law attorney before attempting any gifting as a part of an asset protection plan.

Example

Current Situation

Countable Assets $380,000

Monthly Private Cost of Desired SNF $10,000
Monthly Income $2,000
Monthly Shortfall in Desired SNF . . . . ($8,000)

Due to current countable assets exceeding $2,000 + $120,900 (CSRA) Bill would not be able to apply for Medi-Cal until he and Mary deplete 100% of their excess assets of $257,100 in a little over 2 ½ years

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Stacked Gifting Plan

Goal: eligibility in 3 months

PROPOSED Stacked Gifting PLAN:

KEEP PERSONAL RESERVE. $2,000
KEEP CSRA $120,900
SAVINGS NEEDED TO PAY PRIVATELY FOR 3 MOS $24,000
TOTAL GIFTS $233,100
MAXIMUM STACKED GIFT AMOUNT $32,000*
NUMBER OF MAX STACKED GIFTS 7.3

*Transfer of $32,000 creates a penalty period of 3 months.
(32000/8189=3.9, rounds down to 3 months)
OUTCOME: Medi-Cal eligibility is established in 3 months and $356,000 of assets are protected for family.

COURT ORDERS

If it is not practical or possible to transfer Bill and Mary's excess assets, it MAY be possible for Mary (as the well spouse) to increase the normal CSRA by obtaining a court order under California Probate Code §3101. The petition is based on her financial need to keep more of the savings for her living expenses. She is entitled (see separate legal authority) to keep the amount of resources needed to produce the income she needs to pay for her living expenses. The income produced by her resources is determined based on them being invested conservatively, such as in 6 month CDs.

For example, if Mary's living expenses during the past year, prorated monthly, are $4,300, and her and Bill's monthly income is $3,100, she needs to keep resources to produce the additional $1,200 per month, or $14,400 per year. At the 6 month CD interest rate in the area of 1%/year, she would theoretically need approximately $1.44 million in savings to produce the additional income needed to cover her expenses. However, the total of Mary's and Bill's available assets is only $380,000. So, given these facts, a court order may be obtained increasing the CSRA to $380,000.

THE SINGLE PERSON

The case of a single individual using Medi-Cal as a long-term care planning strategy is more challenging since there is not a community spouse who is entitled to keep any of the countable assets. Therefore, in the case above, if Mary had predeceased Bill, the entire $380,000 of countable assets would have to be reduced to just the $2,000 that Bill is allowed.

Without the need to protect their assets for Mary, it may make sense to consider whether or not the family is concerned about making sure that there are adequate funds to pay for their parent's funeral expenses and other expenses that are not covered by Medi-Cal. Using the gift stacking technique above, an individual could transfer excess assets to members of the family or into an irrevocable trust. Alternatively, they could pay privately for his care in the SNF for a period of time to help get him into a SNF of their choice. They could convert the excess assets by purchasing exempt assets.

HALF A LOAF

Another technique to protect assets is called "Half-a-Loaf," and will protect half of the excess assets by transferring half of them and converting the other half into an OBRA '93 Medi-Cal compliant annuity. This technique is being used in most of the other 49 states, all of which have adopted the OBRA '93 and DRA rules and it should work in California once DHCS adopts the regulations to implement the OBRA '93 and DRA rules here too.

Using the Half-a-Loaf technique, Bill would transfer half of his excess assets, $190,000, to his family or into an irrevocable trust for the family and invest the other half in an OBRA '93 Medi-Cal compliant annuity. He could then enter a SNF of his choosing that accepts Medi-Cal and promptly apply for Medi-Cal to pay for his care after the penalty period resulting from the gift expires. The income generated from the annuity, along with Bill's Social Security and pension income, would pay for the cost of his care in the SNF during the penalty period. By using the annuity and his other income to pay privately for the SNF for so long, Bill is likely to get a warm welcome into the SNF that he desires. At the end of the penalty period, Medi-Cal would begin paying for Bill's long-term care in the SNF. The end result, Bill has now gotten into the SNF of his choice and protected half of his assets, $190,000, for his family.

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