

The Medicaid Planning Guidebook

Fourth Edition

Michael Anthony, JD, CMP™

Table of Contents

Section 1 – Medicaid Planning Primer

Introduction	1
A. Medicaid Public-Private Partnership	2
B. Medicaid Planner's Role	3
C. Medicaid Planning Objective	4

Section 2 – Medicaid Program Overview

A. The Federal-State Partnership	7
B. Governing Law	8
C. Scope of Coverage	9
D. Medicare Confusion	12
E. Nursing Home Medical Qualification	14
F. Medicaid Certified Beds	15
G. Medicaid Discrimination in Admissions	15

Section 3 – Medicaid Eligibility Planning: A Systematic Approach

A. Medicaid Planning Timeline.....	17
1. Client Intake and Initial Assessment.....	17
2. Asset Assessment.....	18
3. Income Assessment.....	18
4. Quick Assessment.....	18
5. Medicaid Plan Development.....	18
6. Medicaid Plan Implementation.....	18
7. Application Filing.....	18
8. Verification Process.....	19
9. Eligibility Determination	19
10. Post-Eligibility Follow-Up.....	19
11. Post-Death Advocacy.....	19
B. Client Intake	19
C. Pre-Planning vs. Crisis Planning.....	20
D. Preliminary Asset and Income Assessment	22
E. Asset Protection Factor	23

Section 4 – General Asset Eligibility Rules

A. Protected Assets	25
---------------------------	----

1. Homestead	25
2. Primary Vehicle	26
3. Personal Items	27
4. Cash Value Life Insurance.....	27
5. Certain Business and Non-Business Property.....	28
6. Some Qualified Retirement Accounts.....	29
7. Single Premium Immediate Annuities (SPIA)	30
8. Funeral/Burial Plans	30
9. Burial Space.....	31
10. Individual Countable Resource Allowance.....	31
B. Unprotected Assets.....	32
1. Cash and Cash Equivalents	33
2. Securities and Other Investments.....	33
3. Qualified Retirement Accounts	33
4. Homestead Owned by Revocable Trust (Some States)	33
5. Excess Homestead Equity and Non-Homestead Real Estate	34
6. Additional Vehicles.....	34
7. Life Insurance	34
8. Deferred Annuities	35
9. Divestments	35
10. Life Care Contracts	35
11. Closely Held Business Ownership.....	36
C. Basic Spenddown Calculation.....	36

Section 5 – Community Spouse Asset Rules

A. Community Spouse Spenddown	37
B. CSRA Calculation.....	38
1. Snapshot Baseline.....	38
2. CSRA Straight Deduction.....	39
3. One-Half Deduction	39
4. Ownership Issues	41
C. Changing the CSRA.....	43
1. Inflating the Countable Resources before the Snapshot Date.....	43
a. Tap Home Equity.....	44
b. Revocable <i>Inter Vivos</i> Trust	44
2. Fair Hearing – Error Correction	45
3. Fair Hearing – CSRA Increase.....	46
a. Conservative Method.....	46
b. Liberal Method.....	46
4. Judicial Order.....	47
5. Assignment of Rights/Refusal.....	48
D. Married with No Community Spouse	48
E. Evolution of Same-Sex Marriage in Medicaid	49
1. Full Legalization (<i>Obergefell</i>)	49
2. Repeal of DOMA (<i>Windsor</i>)	49
3. Pre- <i>Windsor</i> Expansion.....	50

Section 6 – Asset Eligibility Strategies

A. Understanding the Spenddown	51
1. Countable to Non-Countable Conversion	51
2. Secondary Planning Considerations	52
3. Fair Market Value Transactions.....	52
4. Error Margin	53
B. Basic Asset Eligibility Strategies	54
1. Tangible Personal Property	54
2. Homestead Advantages	55
a. Renovate the Home.....	55

b. Buy a New Home	56
3. Upgrade the Primary Vehicle	57
4. Pre-Pay Funeral/Burial	58
5. Long-Term Care Partnership Program	60
C. Advanced Asset-Eligibility Strategies	62
1. Unavailable/Non-Sellable Assets	62
a. Unavailable Assets	62
b. Non-Sellable Assets	64
2. Service Contracts	66
3. Income-Producing Property	68
4. Annuities and Promissory Notes	69
5. Strategic Divestment	71
6. Caring for Disabled Family	72
D. Difficult Strategies	72
1. Single Premium Modified Endowment Life Insurance	73
2. Complex Transfers and Multi-Year Strategies	73
3. Family Limited Partnerships and Closely Held Businesses	74
4. Balloon Annuities and Self-Cancelling Installment Notes	74
E. Executing Strategies	74
1. Who Can Act	75
a. Power of Attorney	75
b. Guardian or Conservator	76
2. Documentation	77
a. Time Deposits	78
b. Securities	78
c. Insurance and Annuity Policies	79
d. Qualified Accounts	80

Section 7 – Divestments

Introduction	83
A. Divestment Transfers and Exceptions	84
1. Transfers/Gifts	84
a. Direct Transfer/Gift	84
b. Overpayment	85
c. Underselling	85
d. Creating Joint Ownership	85
e. Immediate Annuities/Promissory Notes	86
f. Life Estate	87
g. Disclaimer	88
h. Debt Forgiveness	88
i. Purchasing Life Insurance	88
j. Transferring Income	88
k. Inequitable Divorce Settlements	89
2. Exceptions and Cures	89
a. Homestead	89
b. All Other Assets	90
c. Additional Exceptions	92
i. Intent to Dispose	92
ii. Exclusively for Another Purpose	93
iii. Cures	95
iv. Undue Hardship	96
3. Lookback Period	96
4. Penalty Period	97
a. Calculation	97
i. Round Down (Pre-DRA)	98
ii. Pro-Rata	98
iii. Daily Divestment Divisor	98

iv. Division with Remainder.....	99
b. Start Date	99
B. Divestment Eligibility Strategies.....	100
1. Historical Divestment Planning.....	100
a. Divest and Wait.....	100
b. Divest and Insure	102
c. Serial Divestment (Prohibited by DRA).....	103
d. Half-a-Loaf (Prohibited by DRA).....	104
2. Modern Divestment Planning.....	105
a. Reverse Half-a-Loaf (Partial-Cure States Only)	105
b. Modern Half-a-Loaf with an Annuity (or Promissory Note).....	107
c. Collapsing Penalty Period.....	109

Section 8 – Trusts

Introduction	111
A. Revocable Trusts.....	112
1. History and Use	112
2. Funding Revocable Trusts	113
3. Medicaid Interplay.....	113
4. Strategic Uses	114
a. Increase CSRA.....	114
b. Revoke/Defund Trust.....	115
B. Irrevocable Trusts	115
1. Non-Divestment Trusts	116
a. “Solely-for-the-Benefit-of-Spouse” Trust	116
b. “Solely-for-the-Benefit-of” a Blind or Disabled Child.....	117
c. Trust for Sole Benefit of Disabled Person under 65.....	119
d. (d)(4)(A) Supplemental Needs Trust.....	119
e. (d)(4)(C) Pooled Trusts	120
f. Qualified Income Trust (QIT) (a/k/a Miller Trust).....	122
g. Third-Party Trusts	123
h. Testamentary Trust	125
2. Divestment Trusts	126
a. Self-Settled No-Access Trust.....	126
b. Self-Settled Limited-Access Trust	128
c. Third-Party Limited Access Trust	129
C. Practical Trust Issues	131
1. Trust Creation	131
2. Trust Funding	134
3. Trust Management	136
4. Trust Taxation	137
5. Trust Termination	138
a. True Revocation/Defunding.....	138
b. Trust Settlement/Fulfillment	138
c. Trust Busting/Reformation	139

Section 9 – Safe Harbor Annuities and Promissory Notes

Introduction	141
A. Annuities	141
1. Medicaid Annuity Evolution	144
2. Modern Medicaid Safe Harbor Annuity Requirements (Post DRA)	147
3. Modern Medicaid Safe Harbor Annuity Strategies	150
a. Divestment and Annuity	150
b. Convert Countable Assets to Annuity (Married Couple).....	151
c. Annuity as Divestment	153
d. Double Annuity Half-a-Loaf.....	155
e. Medicaid Annuity as Leverage.....	156

f. Qualified Medicaid SPIA.....	158
i. Qualified Account – Single Patient.....	158
ii. Qualified Account – Married Patient with Community Spouse.....	159
iii. Qualified Account – Community Spouse Owner.....	160
iv. Qualified Account – Not DRA Compliant.....	160
v. Qualified Deferred Annuities (Texas).....	161
g. Personal Service Contracts.....	161
4. Special Annuity Concerns.....	161
a. Commissions	162
b. Surrender Fees	164
c. §1035 Exchanges.....	165
d. Qualified Rollovers/Transfers	167
e. Effective Date	169
f. Free-Look Period.....	171
g. Valuation	172
h. Illustrations	172
i. Private Annuities.....	173
j. Actuarial Soundness Discrepancy.....	173
B. Promissory Notes	174
1. Creating Promissory Notes	174
a. Definition	174
b. History of Promissory Note Uses	174
c. Modern Promissory Notes	174
2. Using Promissory Notes	176
a. Community Spouse Excess Asset Conversion.....	177
b. Promissory Note as Leverage.....	177
c. Favorable and Unfavorable Use.....	178

Section 10 – Income Eligibility and Share of Cost

Introduction	179
A. Income Inventory	180
1. Source Type.....	180
a. Earned Income.....	180
b. Unearned Income.....	180
c. Exclusions	181
2. Frequency	181
B. Income Limits	183
1. Spenddown States	183
2. Income-Cap States	183
C. Determining the Share of Cost.....	184
1. Single Patient Monthly Liability.....	184
a. Determining Gross Income.....	184
b. Determine Total Deductions	184
i. Personal-Needs Allowance	185
ii. Health Insurance Premiums	185
iii. Pre-Medicaid Eligibility Medical Expenses (PEMEs)	186
iv. Guardian/Conservator Expense.....	187
v. Limited Housing Maintenance	187
c. Calculating the Share of Cost	188
2. Married Share of Cost Calculation	188
a. Determining the Spousal Allowance	189
i. No MIA.....	190
ii. Partial MIA.....	190
iii. Full MIA	190
b. Calculating the Share of Cost	190
D. Income Conservation Strategies	190
1. Health Insurance Premiums	191

2. Increase Shelter Expense	191
3. Fair Hearing.....	192
4. Court Order.....	193
5. Family Allowance	194
6. Terminate Income Source	194

Section 11 – Special Concerns Homesteads and Family Farms

Introduction	197
A. Valuation.....	197
1. Scope of Property.....	198
2. Intent to Return.....	200
3. Establishing the Value of Property	200
4. Homestead with Excess Equity.....	202
a. Home Equity Loan.....	203
b. Reverse Mortgage.....	204
c. Divest Equity.....	205
d. Sell Equity.....	205
e. Segregate or Lease a Portion.....	206
B. Protection Strategies	207
1. Divest Home (Full or Partial)	208
a. Total Divestment	208
b. Divest Home and Keep Life Estate.....	210
c. Divest Small Fractional Share.....	212
2. Occupant/Family Exclusion	213
a. Community Spouse	213
b. Caregiver Child	213
c. Sibling Joint Owner.....	215
d. Child under 21.....	216
3. Miscellaneous Techniques	216
a. Buy More Equity.....	216
b. Beneficiary Deed	217
c. Compound Strategy.....	217

Section 12 – Other Related Benefits

Introduction	219
A. Prerequisite Benefits	220
1. Social Security	220
2. Veterans' Benefits – VA Improved Pension (VAIP).....	220
a. Basic Eligibility.....	221
b. Wartime Service.....	221
c. Reduction	221
d. Financial Assessment and Net Worth Limit.....	221
e. VA Divestment and the VA Spenddown.....	222
f. Accredited Advisors.....	223
g. Care Contract Harmonization.....	224
h. Countable VA Income When Determining Medicaid Eligibility.....	224
i. Annuity as Divestment and Medicaid Annuity Harmonization	225
j. VA Regional Pension Management Centers	225
k. VA Advocacy	225
i. Commencing an Appeal.....	225
ii. The Board of Veterans' Appeals	226
iii. U.S. Court of Appeals for Veterans' Claims	226
3. Long-Term Care Insurance (LTCI)	226
B. Concurrent Benefits (Medicare Savings Programs)	226
1. Qualified Medicare Beneficiary (QMB).....	226
2. Specified Low-Income Medicare Beneficiary (SLMB)	227
3. Qualifying Individuals (QI)	227
4. Qualified Disabled and Working Individuals (QDWI)	228

C. Alternate Benefits	228
1. Home and Community Based Service Waivers	228
a. Medicaid Home Care Waiver Programs	229
i. Asset Limits.....	229
ii. Income Limits.....	229
iii. Share of Cost	229
iv. Cap on Services	230
v. Self-Directed Care.....	230
vi. Program Waiting Lists.....	230
b. Community Spouse Resource Rules	230
c. How HCBS is Organized	231
d. HCBS Estate Recovery.....	231
e. Penalty Period Start Date	231
2. Assisted Living Waivers	232
3. Program of All-Inclusive Care for the Elderly (PACE).....	233

Section 13 – Applying for Medicaid

Introduction	235
A. Determining the Applicant.....	235
1. Patient.....	235
2. Community Spouse.....	236
3. Legally Appointed Representative.....	236
a. Power of Attorney	236
b. Guardian/Conservator.....	237
4. Authorized Representative	238
B. Timing.....	238
1. Month-Based System.....	238
2. Retroactive Application or Request for Retroactive Coverage	238
a. Section 1115 Waivers to Eliminate Retroactive Medicaid Coverage.....	240
b. Retroactive Coverage is Unavailable if Applicant Dies Before Application Approval.....	241
3. Annual Redetermination	241
4. Medicare Overlap	241
5. Eviction and Medicaid-Pending Status.....	242
6. Promptness of Processing	243
7. Applying Too Early.....	244
C. Completing and Filing the Application	244
1. Full Disclosure	244
2. Filling out the Application.....	245
3. Attaching Exhibits	246
a. Identification and Health Insurance Cards	246
b. Proof of Citizenship.....	246
c. Asset, Income, Expense, and Divestment Verification	247
4. Waiver of Confidentiality.....	248
5. Filing Locations	248
D. Verification Process	248
1. Asset Verification	249
a. Real Property	249
b. Vehicles	249
c. Financial Accounts	249
d. Annuity and Life Insurance Policies	250
e. Commercial Paper	251
f. Trusts	251
2. Income Verification	251
a. Social Security	251
b. Pensions and Pension Annuities	252
c. Immediate Annuities, Promissory Notes, Land Contracts, & Trusts.....	252
d. Earned Income	252

3. Expense Verifications	253
a. Health Insurance Premiums.....	253
b. Shelter Expenses.....	253
i. Rent Expense.....	253
ii. Mortgage Expense.....	253
iii. Homeowners or Renters Insurance.....	253
iv. Property Taxes.....	254
v. Utilities.....	254
4. Transfer and Divestments Verifications	254
a. Significant Fair-Value Transactions	254
i. Source	254
ii. Mode	254
iii. Transaction Receipt.....	254
iv. Resultant Asset	255
b. Divestment Penalty-Causing Transfer.....	255
c. Exempt Transfers	255
5. Timing	256
a. Deadlines	256
b. Best Evidence.....	256
c. Shift the Burden	256
d. Denial for Timeliness.....	257
E. Appealing Adverse Decisions	257
1. Fair Hearing.....	257
2. Representation and Advocacy.....	258
3. Appeals to a State Court	258
4. Bypassing State Court and Filing a Federal Action.....	258

Section 14 – Post-Eligibility Issues

A. Post-Approval.....	259
1. Notification	259
2. Monthly Liability/Income Procedures.....	260
3. Audits	260
4. Annual Redeterminations	261
5. Unreported Income Notifications.....	261
6. Change Notification.....	262
7. After-Acquired Assets	263
8. Fee Anticipation	263
B. Asset Issues	263
1. Retitle CSRA Assets.....	264
2. Update Estate Plans	264
a. Patient's Estate Plan	264
b. Community Spouse's Estate Plan.....	266
i. Elective Share	266
ii. Divorce	267
3. Community Spouse Eligibility Planning.....	268
C. Income Issues	268
1. Changes Impacting Copay	268
2. Boosting Expenses	268
3. Petitioning for Increased Spousal Allowance.....	268
D. Miscellaneous Issues	269
1. Moving	269
a. Intrastate Move	269
b. Interstate Transfer.....	269
2. Bed Holds	270
3. Correspondence and Communication.....	270

Section 15: Estate Recovery

Introduction	271
A. Federal Requirements	272
1. History of Estate Recovery	272
2. Breakdown of 42 U.S.C. §1396p	273
a. Liens (a/k/a TEFRA Liens)	273
b. Allowable Recovery.....	274
c. Mandatory Recovery	274
d. Delay of Recovery	274
e. Undue Hardship.....	275
f. Estate Scope	275
g. Long-Term Care Insurance Partnership Program	276
h. Recovery from the Estate of a Community Spouses	277
i. Annuity Beneficiary Designations	279
B. State-by-State Overview	279
1. Alabama (AL)	279
2. Alaska (AK).....	280
3. Arizona (AZ).....	282
4. Arkansas (AR).....	284
5. California (CA)	285
6. Colorado (CO).....	287
7. Connecticut (CT)	289
8. Delaware (DE).....	291
9. Florida (FL),.....	293
10. Georgia (GA)	294
11. Hawaii (HI).....	295
12. Idaho (ID)	296
13. Illinois (IL).....	298
14. Indiana (IN)	300
15. Iowa (IA)	302
16. Kansas (KS).....	303
17. Kentucky (KY)	304
18. Louisiana (LA)	305
19. Maine (ME).....	306
20. Maryland (MD)	307
21. Massachusetts (MA).....	308
22. Michigan (MI)	309
23. Minnesota (MN)	311
24. Mississippi (MS).....	312
25. Missouri (MO)	314
26. Montana (MT)	315
27. Nebraska (NE).....	316
28. Nevada (NV).....	317
29. New Hampshire (NH)	319
30. New Jersey (NJ).....	321
31. New Mexico (NM).....	323
32. New York (NY).....	324
33. North Carolina (NC)	325
34. North Dakota (ND)	327
35. Ohio (OH).....	328
36. Oklahoma (OK)	331
37. Oregon (OR).....	332
38. Pennsylvania (PA)	333
39. Rhode Island (RI).....	335
40. South Carolina (SC)	336
41. South Dakota (SD)	337
42. Tennessee (TN)	339

43. Texas (TX).....	340
44. Utah (UT).....	342
45. Vermont (VT).....	343
46. Virginia (VA).....	344
47. Washington (WA).....	345
48. West Virginia (WV).....	347
49. Wisconsin (WI).....	348
50. Wyoming (WY).....	350
C. Advocacy	352
1. Probate and Non-Probate Estates	352
2. Estate Administration Guidance	352
3. Claim Negotiation	352
4. Claim/Statute Challenge	352
D. Additional Recovery Avoidance	353
1. Probate Estate Avoidance	353
2. Avoid Expanded Estate Assets.....	353
3. Planning Sooner	353
4. Delay Estate Administration	353
5. Move the Patient (to another state)	354
6. Move the Patient (home)	354
7. Divorce.....	354

Section 16 – Advocacy Opportunities

A. Administrative Advocacy.....	355
1. Fair-Hearing Use	355
a. Increase the CSRA.....	356
b. Correct CSRA Error.....	356
c. Correct Income Errors	356
d. Increase MMMNA.....	356
e. Object to Wrongful Denial	356
f. Hardship Waivers	356
2. Fair Hearing Procedure	357
a. Request	357
b. Hearing.....	357
c. Representation	358
d. Appeal Adverse Ruling.....	358
B. State Court Advocacy	358
1. Appeal Administrative Decisions	358
2. Mandamus Actions	359
3. Increase CSRA.....	359
4. Increase Community Spouse Monthly Income Allowance	360
5. Legally Incapacitated Individuals	360
a. Establishment of Guardian/Conservator.....	360
6. Ratification of Agents Actions	360
7. Ratify Medicaid Plan.....	361
a. Divestments	361
b. Non-penalty Divestments.....	361
c. Conflict of Interest	361
d. Termination of Spousal Rights	361
8. Trust Creation and Modification	362
9. Divorce	362
10. Heir Representation	362
11. Decedent Probate.....	362
C. Federal Court Advocacy	362
1. Reigning in State Law	363
2. §1983 Claims	363
D. Miscellaneous Issues	363

1. Client Identification	363
2. Conflicts of Interest	364
3. Multi-licensed Professionals	364
4. Unauthorized Practice of Law	364
5. Certified Medicaid Planner™ Designation	365
6. Fee Charging	366

Section 17: Practical Application (Examples)

Introduction	367
A. Planning Scenarios	367
1. Example: Robert and Dorothy	367
2. Example: Ruth	370
3. Example: Geraldine	373
4. Example: Thomas	377
5. Example: Edward and Martha	379
6. Example: Dolores	382
7. Example: Ray and Sophie	386
8. Example: Isaac and Agnes	389
9. Example: George and Mary	391
10. Example: Brenda (California Only)	392

Appendix

Appendix A – Federal Governing Law	397
Appendix B – Basic Medicaid Planning Intake Form	413
Appendix C – Individual Countable Resource Allowance (ICRA) by State	425
Appendix D – 2020 Federal Spousal Impoverishment Figures	426
Appendix E – HCFA Transmittal 64	427
Appendix F – Social Security Actuarial Life Table (Period Life Table, 2016)	443
Appendix G – 2019-2020 Divestment Divisors	448
Appendix H – Life Estate and Remainder Table	449
Appendix I – 2020 Trust and Income Tax Tables	451
Appendix J – Sample Medicaid Application (Idaho)	453