Medicaid Planning for Maryland Family Lawyers

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In 2016, the vanguard of the Baby Boom generation will turn 70, causing a spike in demand for long-term care services. The cost of long-term care, particularly in nursing homes, is staggering, and often exceeds $100,000 per year. The aging population has created a new set of challenges for family law practitioners, who must weigh these new considerations when counseling clients.

Most individuals who need long-term care need to consider the possibility of obtaining Medicaid benefits. Medicaid (known in Maryland as Medical Assistance) is a means-tested joint federal-state entitlement program that is the single largest payer of long-term care services in the United States. Many middle-class families have come to rely upon Medicaid as a payer of last resort for long-term care costs. Medicaid benefits are available for nursing home care and for those living in assisted living facilities and elsewhere in the community under the 1915(c) Home and Community-Based Options Waiver. The eligibility rules for the Medicaid program, particularly for married couples, are based on a complex patchwork of federal and state statutes, regulations, and policy.

As clients age and long-term care costs become an increasing concern, family law attorneys will be well-served by obtaining a basic understanding of the Medicaid eligibility rules so they can spot potential issues. Additionally, the new "mutual consent" divorce law that went into effect October 1, 2015, may create new planning opportunities. This article intends to give a brief overview of the Medicaid eligibility rules and planning techniques for family law attorneys and to review the consequences of divorce on Medicaid eligibility and planning.

Overview of Medicaid Eligibility Rules for Family Law Attorneys

To receive benefits, an individual must meet technical, medical, and financial eligibility criteria established under federal and state law.

1. Technical

An individual must be a U.S. citizen (certain categories of aliens also qualify) and a Maryland resident (a Maryland nursing home admission counts as residency). State of Maryland Department of Health and Mental Hygiene, Division of Eligibility Services, Maryland Medical Assistance Policy Manual ("Manual") 500.2, 500.7. Most individuals will also need to qualify as aged (65 or over), blind, or disabled (per the Social Security Administration's definition). Manual 500.8.

2. Medical

For Medicaid coverage of nursing facility services, the applicant must require skilled nursing or rehabilitation services on a daily basis or require "health-related services above room and board," such as hands-on assistance in performing at least two activities of daily living or a high level of direction and supervision. Department of Health & Mental Hygiene Nursing Home Transmittals 213 (July 1, 2008) and 237 (January 1, 2012).

3. Financial

Applicants must meet both income and asset (resource) tests that vary depending on whether the applicant is married or single. Generally, the income and resources attributed to an applicant include what the applicant and his or her spouse actually receive or possess. 42 U.S.C. § 1396p(e)(1); COMAR 10.09.24.08-1A(1). However, resources to which the applicant or spouse has a legal right will still generally be attributed to the applicant. 42 U.S.C. § 1396p(e)(1); COMAR 10.09.24.08-1A(1).

a. Income

In Maryland, an applicant for nursing home benefits can meet the Medicaid income test by being "medically needy," meaning that the applicant's monthly countable income is less than the monthly cost of care. COMAR 10.09.24.10B(3). Only the applicant's income is taken into consideration for this test. COMAR 10.09.24.10-1C(1). If the applicant's spouse lives in the community (a "community spouse"), and his or her monthly expenses exceed certain levels, a portion of the applicant's income (in 2015, up to a maximum of $2,931/month, reduced by the community spouse's income) may be sheltered for the community spouse's use as a "spousal needs allowance." Manual, Schedule MA-8; COMAR10.09.24.10-1C(7). If a court orders the applicant to pay support to the community spouse, then the ordered amount may exceed the maximum. COMAR 10.09.24.10-1C(8). Otherwise, all of the applicant's income, less deductions for health insurance premiums, a small personal needs allowance, and several other very limited expenses, must be paid to the nursing home.

b. Resources

All the applicant's and applicant's spouse's assets ("resources") are generally "countable" unless an exclusion applies, such as an exclusion for the home property. COMAR 10.09.24.08F(1). A non-married individual applicant can have no more than $2,500 in "countable" resources. COMAR 10.09.24.08L, M. For a married couple, the commu-

nity spouse can keep one-half of the couple's combined countable resources (excluding the house and car) as they existed as of the month the applicant entered the nursing home for a stay of 30 days or more, up to a maximum of $119,220 (for 2015). COMAR 10.09.24.10-1D(1), E(2). This amount is the Community Spouse Resource Allowance (CSRA). For a married applicant, Medicaid disregards which spouse actually owns the assets until 90 days after the notice of eligibility, at which point assets titled in the applicant's (the "institutionalized spouse") name alone cannot exceed the $2,500 limit. Manual 1000.1(f).

c. Penalties and Recoveries

The Medicaid program audits the financial information of an applicant and his or her spouse for the five years preceding the date of the application (the "look-back period"). COMAR 10.09.24.08-1B(2). If assets have been transferred to another party for less than fair market value during the look-back period, the Medicaid program will apply a "penalty period" – a number of months during which it will not pay for nursing home care. COMAR 10.09.24.08(K)(3). The penalty is currently one month for every $7,940 transferred. Manual, Schedule MA-6. Transfers between spouses made during the look-back period are generally exempt from penalty. COMAR 10.09.24.08B(8)(a). There is a 90-day period following the notice of eligibility during which assets can be retitled into the community spouse's name alone without penalty. Manual 1000.1(f).

The Maryland Department of Health and Mental Hygiene (DHMH) can place a lien on the real property of an applicant to recover benefits paid on the applicant's behalf. COMAR 10.09.24.15(A-2)(2). However, it cannot place a lien on the real property if there is a spouse or disabled adult child currently living on the property. COMAR 10.09.24.15(A-2)(3). DHMH can file a claim against the estate of a deceased applicant for Medicaid payments made on the applicant's behalf. COMAR 10.09.24.15(A-3).

d. Special Needs Trusts

The Social Security Act authorizes certain special needs trusts to be funded with the applicant's own assets and/or income without causing ineligibility for benefits. 42 U.S.C. § 1396p(d)(4)(A), (C); COMAR 10.09.24.08-2B(6). These

trusts are for the sole benefit of the applicant. COMAR 10.09.24.08-2B(6)(b)(iii), C. Any funds remaining in these trusts at the death of the beneficiary must be used to reimburse the State for Medicaid expenditures made on the beneficiary's behalf. COMAR 10.09.24.08-2B(6)(b)(iv), C(6). Funds in these trusts can be used to pay for items that government benefits do not cover, such as private duty nursing aides and quality-of-life items.

The Impact of Marital Status and Divorce on Medicaid Benefits

As mentioned above, the marital status of an applicant dramatically impacts which financial eligibility rules apply.

1. Planning with the CSRA

Currently, a community spouse is entitled to keep a significant portion of the couple's combined assets (the CSRA). A married couple can "spend down" to the CSRA by purchasing an annuity that converts the couple's excess resources into income for the community spouse. Medicaid views the entire annuity payment as income, not just the interest portion. Manual 700.1(d)(8). The annuity must be irrevocable, be non-assignable, payable on an actuarially-sound basis not to exceed the purchaser's life expectancy, and provide payments in approximately equal

amounts during the annuity term. 42 U.S.C. § 1396p(c)(1)(F), (G); Manual 800.13(a). If the annuitant dies, any funds remaining in the annuity must first be used to reimburse the State of Maryland for Medicaid expenditures paid on the institutionalized spouse's behalf. *Id*. This planning provides a high degree of asset preservation.

2. Alternatives to the CSRA: Spousal Refusal and Divorce

There are two main alternatives to the CSRA for protecting assets for the community spouse: spousal refusal and divorce.

a. Spousal Refusal

A community spouse can simply refuse to allow his or her assets to be made available for use by the institutionalized spouse and refuse to cooperate in the application for Medicaid. In this situation, the institutionalized spouse may still receive benefits if he or she assigns all rights to the State to receive support from the community spouse and agrees to cooperate in a criminal action for spousal non-support against the community spouse under Md. Code Ann., Family Law Article ("FL") § 10-201(a). COMAR 10.09.24.10-1D (3); DHMH Policy Alert 10-04.

If there is no existing award of alimony or court order entered pursuant to FL § 10-202, then it is unclear what, if any, spousal support rights can be assigned. One spouse is not liable for the other's debts by reason of marriage, and absent a court order or agreement, the community spouse has no obligation to pay for the institutionalized spouse's care. FL § 4-301(d); *Wal-Mart Stores, Inc. v. Holmes*, 416 Md. 346, 381 (2009) (the only legal duties to provide support arise from alimony or child support, or if support is ordered following a criminal conviction for willful non-support); *see also* Scott M. Solkoff, *Spousal Refusal: Preserving Family Savings by "Just Saying No" to Long-Term Care Impoverishment*, 2 Marquette Elder's Advisor 25 (Winter 2001). Under the Health- General article, a community spouse is "responsible" for the health care needs of the institutionalized spouse to the extent that the community spouse is able to pay. Md. Code Ann., Health – General § 15-122(a). The community spouse is liable to the State to the extent that Medicaid payments have been made for the institutionalized spouse and, in cases of spousal refusal, the community spouse may also be liable for monetary penalties and enforcement and administrative costs. *Id.* However, federal protections against spousal impoverishment, including the CSRA, supersede this statute at least to the extent there is any conflict. Moreover, this statute appears to be very rarely, if ever, enforced.

FL § 10-201(a) imposes criminal liability for non-support. Under that section, the non-supporting spouse could be convicted of a misdemeanor unless he or she has "just cause" for the refusal to provide support. If a prenuptial agreement waives the right to spousal support and alimony, this would arguably qualify as "just cause." *See Wal-Mart Stores*, 416 Md. at 381-82 (absent a court order, spousal obligation to provide support is contractual in nature). Spousal refusal is infrequently used by applicants and, consequently, the Medicaid policies regarding spousal support rights are infrequently enforced by the State.

b. Divorce

Divorce creates a number of issues in the context of Medicaid planning. Whenever an elderly or disabled individual is involved in a divorce, the attorney should consider the potential impact on Medicaid benefits.

i. Absolute vs. Limited Divorce

The Medicaid rules do not differentiate between absolute and limited divorce. However, it is likely that in Maryland only absolute divorce would constitute a divorce for Medicaid purposes. A limited divorce is a divorce from bed and board only and involves "no severance of the marital bonds." *Ricketts v. Ricketts*, 393 Md. 479 (2006); *Walter v. Walter*, 181 Md. App. 273, 289 (2008) (a limited divorce "does not end the marriage"). Although the court may determine ownership of personal property in a limited divorce proceeding, Medicaid views all property owned by the applicant and his or her spouse together, regardless of the actual title. FL § 8-202; COMAR 10.09.24.06B(3)(a). A court has the authority only to award marital property, including ordering the division of retirement plans and pensions, in an absolute divorce proceeding. FL § 8-205(a); *Walter*, 181 Md. App. at 273, 292.

ii. Property Division

If divorce occurs before the applicant applies for Medicaid benefits, then the applicant would be treated as a single applicant, and assets owned by the former spouse would not be countable. A married couple could simply retitle

their holdings to the community spouse's name alone and then seek an absolute divorce without requesting a court-ordered division of marital property. Following the divorce, the institutionalized spouse could quickly qualify for Medicaid, and the couple's assets would be preserved for the community spouse. Furthermore, in evaluating eligibility, the State can review only assets that were titled in the applicant's name at any time during the previous five years. Manual, 800.17. Accounts that had been titled solely in the divorced spouse's name throughout the entire look-back period would not be subject to audit.

However, there is a risk that DHMH would penalize this type of planning. No regulation or policy expressly addresses this type of divorce action, but DHMH has wide latitude to interpret its enabling statutes. *See Chevron U.S.A. v. NRDC*, 467 U.S. 837, 842-43 (1984). While transfers between spouses are generally exempt from penalty, DHMH might still impose a penalty based on the assets being transferred in anticipation of a divorce and subsequent Medicaid application. *See* 42 U.S.C. § 1396p(c)(1)(A), (c)(2)(C).

A "resource" includes only assets to which the applicant has a legally enforceable right. Manual, 800.2. Therefore, DHMH could penalize an uneven distribution of assets only if the institutionalized spouse receives less than he or she would have been legally entitled to. In an absolute divorce, the parties are entitled to an "equitable distribution" of property, in which the court considers a variety of factors, including the parties' ages, economic circumstances, and mental and physical conditions. FL § 8-205(b).

While no published Maryland decision has discussed how Medicaid eligibility concerns relate to the equitable distribution of property, courts in New Jersey, also an equitable distribution state, have addressed the issue. *See W.T. v. Division of Medical Assistance and Health Services*, 916 A.2d 1066 (N.J. App. 2007). In *W.T.*, the appellant experienced a sudden and debilitating injury rendering him quadriplegic and vent-dependent. *Id.* at 1068. W.T. and his wife owned about $686,000 in combined assets, $450,000 of which were in W.T.'s IRA. *Id.* at 1068-69. On the advice of their attorney, the couple filed for and were granted a divorce. *Id.* at 1069. The divorce incorporated a settlement agreement that granted $250,000 to W.T., which he spent down by privately paying the nursing home, gifting funds to his daughter, and creating a special needs trust. *Id.* When W.T. applied for Medicaid, the State penalized the property division in the divorce on the basis that $250,000 was less than 50 percent of the couple's combined marital property. *Id.* at 1071. The court reversed the state Medicaid agency's decision, reasoning that New Jersey matrimonial law did not require a rigid 50/50 split of marital property. *Id.* at 1076. As long as the distribution did not leave one spouse as a "public charge," the parties were free to divide marital assets as they wished. *Id.* at 1077. W.T. received almost 40 percent of the marital property; his standard of living was fixed (as he would be in the nursing home for the rest of his life); and his wife had a far longer life expectancy and no earning power.. *Id.* 1077-78. The court viewed these factors as rendering the settlement agreement acceptable. *Id.* Importantly the court disagreed with the state Medicaid agency's argument that the purpose of the distribution was to qualify W.T. for Medicaid, even though it acknowledged that the settlement agreement intended to preserve W.T.'s future eligibility for benefits. *Id.* at 1078.

The *W.T.* decision provides useful guidelines for dealing with a situation where a divorcing spouse is facing an immediate need for long-term care. W.T.'s life expectancy, the permanency of his institutionalization, the nature of his assets (tax-deferred), and his wife's lack of income weighed in favor of the unequal distribution. The court did not require that all of W.T.'s share be used to pay for his nursing home care, as a portion of his funds was placed into a special needs trust, and another portion was gifted to his daughter (presumably incurring a penalty). *Id.* at 1070. Parties must accept the fact that courts applying equitable distribution principles are reluctant to approve a settlement or distribution that provides maximum protection for the couple's assets by "impoverishing" the institutionalized spouse. *See Newman v. Newman*, 653 P.2d 728, 735 (Co. 1982) (stating that court will not enforce antenuptial agreement that leaves one spouse a "public charge"); *Lowes v. Lowes*, 650 N.E.2d 1171, 1176 (Ind. Ct. App. 1995) (reversing the trial court's decision to terminate spousal support payments so that the recipient could quickly spend down and

obtain Medicaid eligibility).

A Medicaid applicant who has restructured assets in anticipation of or following a divorce within the five years preceding the application might need to demonstrate that the restructuring was consistent with equitable distribution principles. It would likely be helpful to have the court formally authorize the distribution, either by ordering the division or by incorporating a separation agreement into its judgment of absolute divorce.

Attorneys cannot assume that judges will understand the underlying Medicaid eligibility concerns and so should make efforts to educate them on why an uneven distribution can nonetheless be equitable and even beneficial to both parties. Some general principles to keep in mind include:

> Assets remaining in the institutionalized spouse's name will almost always need to be spent down below $2,500. Otherwise, they will be subject to reimbursement to the State, either via lien or recovery from the institutionalized spouse's estate or special needs trust after the institutionalized spouse's death.

Even with a sizeable medical expense deduction, liquidating assets for Medicaid planning purposes will often incur significant tax liability.

It will often be advantageous to transfer retirement assets to the community spouse via a Qualified Domestic Relations Order (QDRO). Similarly, if the institutionalized spouse receives substantial pension income from a government or ERISA plan, such benefits are often not assignable without a QDRO. (or, for government plans, an analogous order such as an eligible domestic relations order). If the pension is not assignable (and therefore cannot be assigned to a special needs trust for the institutionalized spouse's benefit), then it will often make sense to shift the pension to the community spouse as part of the settlement.

Even assuming that an equitable distribution occurs, DHMH might take the position that any transfers of property after the divorce are subject to penalty, as the couple is no longer married. Accordingly, to the extent possible, assets should be retitled before the issuance of a final divorce decree.

iii. Alimony

An applicant receiving alimony would need to pay it to the nursing home as part of his or her cost-of-care contribution. COMAR 10.09.24.07I. If a court has ordered an institutionalized spouse to pay "support" to the community spouse, the court-ordered amount is deducted from the institutionalized spouse's cost-of-care contribution. COMAR 10.09.24.10-1(E)(3). However, there is no deduction for support payments to a *former* spouse, so alimony that is ordered pursuant to an absolute divorce may not be deductible.

Alimony may be awarded even when no divorce is granted, as long as the claimant can allege that grounds for divorce exist and establish the need for alimony. *See Cruz v. Silva*, 189 Md. App. 196, 222 (2009). The court is required to consider whether the alimony award would cause a spouse who is a resident of a "related institution," as defined under Md. Code Ann., Health-General § 19-301 (which includes nursing homes), to become eligible for Medicaid more quickly. FL § 11-106. The court also cannot award alimony to the spouse of a resident of a related institution if the "separation" required for the divorce is effected by the resident's institutionalization. FL §§ 11-101, 11-102. This restriction does not extend to grounds for divorce that do not require a twelve-month separation (including "mutual consent" divorce).

iv. Pre-nuptial Agreements

A pre-nuptial agreement can help establish "just cause" for a later spousal refusal to make assets available to the institutionalized spouse. The agreement should waive the right to support or alimony. It should further stipulate that each party shall retain his or her own titled property and that nothing acquired in the future will be considered marital property. A pre-nuptial agreement that contains these provisions and waives the right to a court-ordered division of property would also reduce the possibility that a divorce resulting in an unequal distribution of assets would be penalized by DHMH.

3. Use of Mutual Consent Divorce in Medicaid Planning

Anecdotal evidence suggests that not many couples choose to obtain Medicaid eligibility through divorce. Annuity-based planning is an appealing alternative. The 12-month separation period limits the effectiveness of divorce as a planning tool where the separation is due to a traumatic onset of disability resulting in a nursing home admission. The couple would need to pay at least 12

months of the institutionalized spouse's care before even filing for a divorce.

Two recent developments may change the landscape. First, in its 2015 session, the General Assembly passed Senate Bill 472 allowing for "mutual consent" divorce. The law allows couples with no minor children in common to obtain an absolute divorce by mutual consent without requiring a separation period. Second, Congress may drastically alter the treatment of non-IRA annuities by requiring one-half of the annuity payments to be contributed towards the institutionalized spouse's cost of care. *See* H.R. 1771, *available at* https://www.govtrack.us/congress/bills/114/hr1771.

If H.R. 1771 or similar legislation were to pass, it would dramatically reduce the effectiveness of annuity-based planning, as annuities could only preserve approximately one-half of the couple's assets over the CSRA amount. Divorce would be the better option as long as it resulted in the community spouse's receiving more than the CSRA plus one-half of the couple's combined assets over the CSRA amount. Divorce would be particularly advantageous for couples where the community spouse has substantial non-marital property, as DHMH does not distinguish between marital and non-marital property. *See* Thomas D. Begley, Jr. and Jo-Anne Herina Jeffreys, *Medicaid Planning for Married Couples*, NAELA Quarterly 19, 26 (Spring 2004).

Under the mutual consent divorce law, the couple must have no minor children in common and must execute and submit a written settlement agreement that resolves alimony and the distribution of property. FL § 7-103(a)(8)(i), (ii). Additionally, the divorce will only be granted if neither party files a pleading to set aside the settlement agreement prior to the required divorce hearing and both parties appear before the court at the absolute divorce hearing. FL § 7-103(a)(8)(iii), (iv).

The largest obstacle in obtaining a divorce for a spouse with serious health or capacity issues lies in who may act for the spouse with respect to a divorce proceeding. The majority rule is that a legal guardian cannot petition for divorce on behalf of an incapacitated spouse, although a significant number of states do allow it. Michael Farley, Note, *When "I Do" Becomes "I Don't": Eliminating the Divorce Loophole to Medicaid Eligibility*, 9 Elder Law Journal 28, 40-41 (2001). However, nearly all states allow a legal guardian to defend, vacate or settle a divorce suit on behalf of the ward. David E. Rigney, *Power of incompetent spouse's guardian or representative to sue for granting or vacation of divorce or annulment of marriage, or to make compromise or settlement in such suit*, 32 A.L.R. 5th 673 (orig. pub. 1995). There is no published authority on the subject in Maryland, but court practices generally permit the guardian to represent a ward in a divorce proceeding, even if he or she may not file the divorce complaint. An agent appointed under a Maryland statutory form power of attorney likely has the same authority. *See* Md. Code Ann., Estates & Trusts § 17-202 (statutory form power of attorney authorizes agent to oppose or settle litigation for the principal).

However, it is unclear whether a guardian or agent can satisfy the "appearance" requirement of the mutual consent divorce law. The bare language of the law does not require the disabled spouse to actually testify. The authors of this article were advised by one magistrate's office that both parties are required to appear and testify that the agreement is voluntary. It is unclear whether a guardian or fiduciary could testify on behalf of an institutionalized spouse who is incompetent or physically unable to render an appearance. It will take time and experience to determine which classes of fiduciaries may satisfy the "appearance" requirement.

Conclusion

Family law practitioners need to be aware of the unique issues facing older couples or couples where one or both spouses have disabilities that may require institutional care. Decisions made regarding property settlement or alimony can have far-reaching consequences that may jeopardize an individual's ability to qualify for valuable public benefits. Additionally, knowledge of the Medicaid rules can help allocate property and alimony in a way that maximizes protection of a couple's combined assets. With more and more elderly clients potentially contemplating divorce, the ability to identify and address possible Medicaid issues will only grow more valuable.

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