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Very few clients plan ahead for a long-term stay in a nursing home. Though often predictable well in advance, the placement of a family member creates an emergency of a lifetime. The trauma of the separation, the seriousness of the illness, and the stigma of the nursing home hit all at once. The cost of care is enough to impoverish an average family. According to the Michigan Family Independence Agency, the state agency that administers the Medicaid program, the average cost of a nursing home is \$4,518 per month, \$54,216 per year. Program Eligibility Manual (PEM) 405. Family members fan out seeking answers to myriad questions. Some of them consult an attorney with questions on Medicaid.

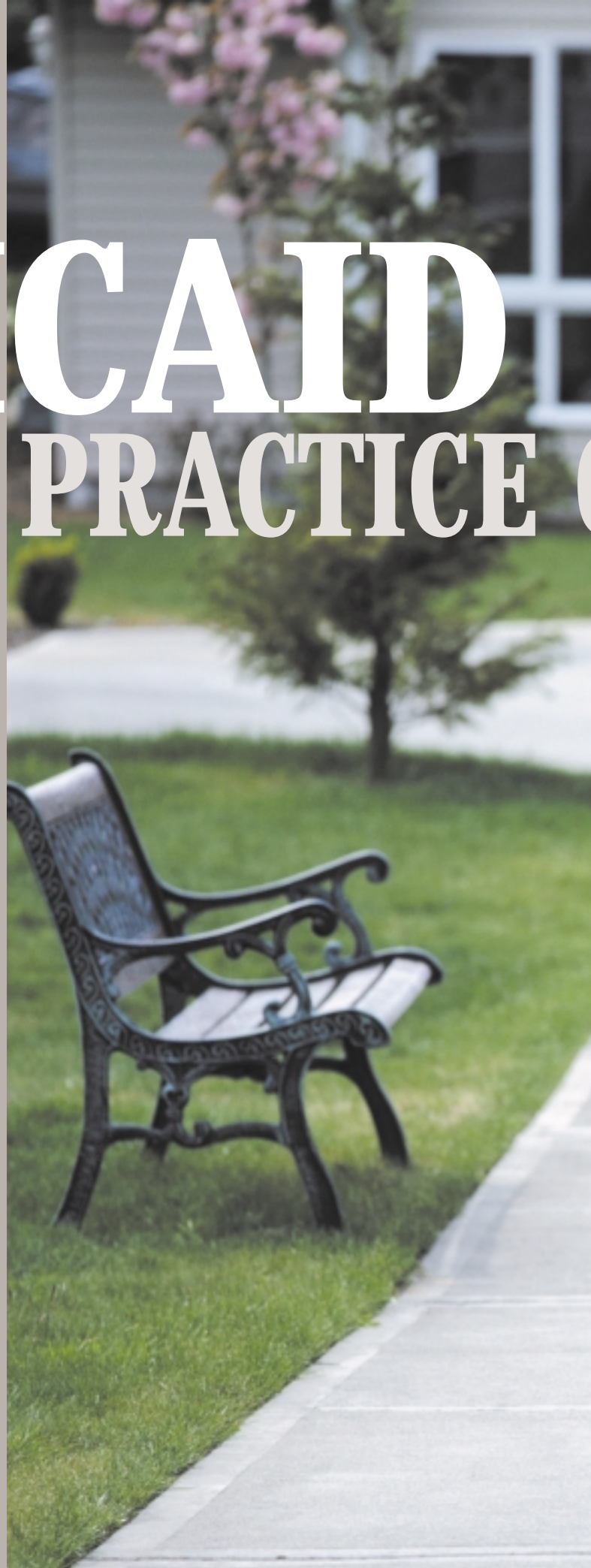
Medicaid

Medicaid is the government program that will pay for long-term care in a nursing home, provided the person qualifies. The law is Title XIX of the Social Security Act. It is codified at 42 USC 1396. While the cost of long-term care is an issue, resorting to Medicaid to pay for the nursing home bill is not always the first issue to be resolved.

Ethical Issues

Though most families come together, common conflicts arise. Often a child contacts the attorney and makes the appointment to discuss the needs of the parent in a nursing home or, if the spouse is surviving, he or she may focus on caring for the patient and call a lawyer for help. This is one area of law where the question, "Who is the client?" is one of the first presented. The attorney must be alert to conflicts of interest and be ready to protect the client and the confidentiality of the attorney-client relationship. Michigan Rule Professional Conduct (MRPC) 1.6.

Children almost always expect to be present at appointments. They view themselves as assisting their parent, but not infrequently have their own interests. They may be advocating that the parent "give it all away" rather than pay the nursing home, a rarely necessary choice. They may have abused their access to joint accounts or exceeded their authority as attorney in fact.





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*Understanding
Medicaid can
help lawyers
assist their
clients in
making
difficult
decisions
about long-
term care.*

But children are not the only persons with potential conflicts. There may be conflicts between spouses. The nursing home spouse may not wish to stay in the nursing home, and the couple may have sufficient assets for in-home care. The marriage may be a second marriage and the assets subject to an antenuptial agreement. The at-home spouse of a long-“dead” marriage may wish to effect an informal legal separation and get “all the property.” When dealing with parties of advanced age, with disabilities, and people with fiduciary relationships to disabled people, it may not be safe for the attorney to attempt to represent all parties. MRPC 1.8.

When the client is the patient, the attorney must be vigilant against aiding abuse of the client. The nursing home resident is dependent on others and vulnerable to undue influence and coercion. The resident often meets the standard for the appointment of a guardian under the Estate and Protected Individuals Code. MCLA 700.1105(a), 700.5306. The attorney may need to visit the nursing home resident and ascertain his¹ capacity and his wishes. The community spouse is rarely less vulnerable, being overwhelmed by the crisis of a spouse in a nursing home and completely dependent upon the assistance of children and friends.

The lawyer must determine whether there are conflicts and whom he will represent. Failure to do so at the onset may preclude the lawyer from representing any party. MRPC 1.9.

Is Medicaid Desirable?

Some clients think they want to apply for Medicaid but change their minds upon reviewing their circumstances and receiving counsel about the alternatives and consequences of becoming eligible. For some clients, the expense and difficulty in making Medicaid eligibility may not be worthwhile. Some nursing home patients have short life expectancies and are candidates for hospice. Others might be candidates for adult foster care after a period of rehabilitation.

Even when the nursing home stay is expected to be long-term, a client may not wish to have immediate Medicaid coverage. The resident may have to move when he becomes eligible for Medicaid since some nursing homes do not participate in the program. Other homes elect partial Medicaid certification and certified beds may not be available. In either case, an applicant will be discharged to a new nursing home. When the discharge is from a partial participation home, the client must first be considered for a Medicaid-certified bed when one becomes available. However, the family and patient may not want to go through the trauma of adjusting to a new nursing home. They may prefer to apply when a certified bed becomes available. In cases such as the above, the client may rather reposition investments to produce more income. For example, \$200,000 in equi-

FAST FACTS

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ties may not produce much income but invested at six percent interest would provide an extra \$1,000 a month of income.

Determining Medicaid Eligibility

The Applicant

When the client wishes to apply for Medicaid, the attorney must review the client’s financial situation both currently and for the last 60 months. The scope of review includes assets and actions taken with assets by the applicant, spouse, and all joint owners.

Divestment—Transfers of Assets

Before assets may be counted, the attorney must inquire whether the client, spouse, or any joint owner has transferred or “divested” any assets within the past 36–60 months in which the client has had assets in trust. This is the “lookback period.” Transfers of assets for less than fair market value within the lookback period requires a penalty calculation. 42 USC 1396p(c)(1)(A), (B). The lawyer should not only inquire into whether money was gifted out of bank accounts and such, but whether children were added to brokerage accounts, stocks, and real estate. An asset held in a joint tenancy, tenancy in common, or similar arrangement, will be considered to be transferred when any action is taken that reduces or eliminates the applicant’s or spouse’s ownership or control of the asset. 42 USC 1396p(c)(3).

Exceptions

Transfer penalties do not apply to:

1. Transfer of home to spouse, dependent, or disabled child, co-owner siblings who lived in the house at least a year, and caretaker children who lived in the home for two years. 42 USC 1396p(c)(2)(A).

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2. Transfers to a spouse or to another for the sole benefit of the spouse; transfers from the spouse for the sole benefit of the spouse; transfer to a trust solely for the benefit of the individual's blind or disabled child, and transfers to a trust solely for the benefit of a disabled individual under age 65. 42 USC 1396p(c)(2)(B).
3. Transfers where a) the individual intended to dispose of the assets for fair market value, b) the assets were transferred exclusively for a purpose other than to qualify for Medicaid, or c) the transferred assets were returned to the individual. 42 USC 1396p(c)(2)(C).

Penalty Period

The length of a penalty period is measured in months. The amount transferred in the appropriate lookback period is divided by average monthly private long term care cost. PEM 405. For persons who made their first application in 2001, the monthly figure is \$4,518. Fractions are dropped. For example, gifts of \$10,000 to three children results in a penalty period of six months. The period begins in the month of the gift. If periods would overlap, then the later period begins when the earlier ends. If the client is in a penalty period, assets may need to be returned.

Asset Determination

What are assets? The Michigan program recognizes five categories: exempt, unavailable, non-salable, excludable, and countable. PEM 400. Exempt assets include the home and adjacent land, household goods, personal effects, a vehicle, the value of any burial space or agreement for the purpose of providing a place for the burial of the individual, his spouse, or any other member of his immediate family. See also 42 USC 1382b(a). An unavailable asset is one the client does not have control of and cannot reduce to cash. Non-salable assets are those without current market value, such as vacant land that has been for sale for 30 days without an offer, or a promissory note by a child. Excluded assets, such as loan proceeds and rental property, are not counted. Countable assets are all other assets. PEM 400.

Eligibility is determined on countable assets. If the applicant is single, these must be "spent down" to \$2,000. If the applicant is married and the spouse is not living in a nursing home, the applicant must spend down to the Community Spouse Resource Allowance (CSRA) plus \$2,000. If a spouse is in the nursing home, the couple's assets must be determined for the "snap shot," that is the first day of a 30-day or longer stay in a hospital or nursing home that took place after September 30, 1989. The "initial assessment" of countable assets determines the CSRA. This equals one

half of the assets from a minimum, in 2001, of \$17,400 to a maximum of \$87,000.

It is not unusual for the attorney's office to have to reconstruct asset histories. Clients can forget what assets they had on the snapshot date. The result can be a very time-consuming process of calling, writing, and faxing asset holders such as banks, insurance companies, and pension plans to get proof for claims of value. Often the community spouse is of little assistance.

The Spend Down

Once the countable assets are identified, the lawyer knows how much the client will have to spend down before the applicant is eligible. It is at this point that the month of Medicaid eligibility may be identified.

In advising the client on spend down, the lawyer will help the client get the maximum value from often scarce dollars. The spending should be completed according to priorities. The first order should be to pay bills already incurred. This would include nursing home bills that will not be paid by Medicaid, mortgages, and auto loans. The next category of expenditure will be for needed items such as home repairs or a newer car, if necessary. A pre-paid funeral should be considered.

After necessary expenditures are completed, the client may pursue other options. If he is under 65, he may have a court, guardian, or parent set up a trust under 42 USC 1396p(d)(4)(a). Funds transferred will not be considered available assets and will not be considered divested. Any funds remaining in the trust after the recipient's death are subject to being paid back to the state upon death for the cost of Medicaid. When there is a spouse, the client may wish to fund an annuity to provide income for the lifetime of the spouse. The Michigan program also allows a "sole benefit trust" that reaches the same result but with much greater flexibility in funding. Transfers, including transfers in trust, for a disabled child are not divestment. PEM 260, 405.

The client may wish to transfer the homestead to a caregiver child or a sibling co-owner, as identified above, as transfers that are not divestment. Gifts to children may be considered after all other options, unless the applicant is single, then the money to the children may be consideration for handling the applicant's affairs, both financial and medical, for her lifetime. These are not all the options available to the client and family. The range of options can assure that the client will meet his goals.

Spousal Income

Income is not usually a factor in eligibility. It may matter in the Medicaid application since the community spouse may need additional funds for her own needs. For example, she may need to pay aides or she may live in an assisted living apartment. The lawyer may seek additional income allowance from the nursing home spouse by fair hearing or through probate court order. Community spouses of nursing home recipients are entitled to a minimum monthly maintenance needs allowance with excess shelter adjustment 42 USC 1396r-5(d)(3), (4). In 2001, this range was from \$1,452 to \$2,175.

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The amount can be increased through a fair hearing or by court order. 42 USC 1396r-5(d)(5), (e)(2)(B).

The Medicaid Practice

The lawyer's role in assisting clients with Medicaid is to advise them on available options and assist them with the often overwhelming process of preparing the application and supporting documentation. The lawyer should be familiar with nursing homes, know the Medicaid statutes, and Michigan rules. In addition, the lawyer will need the clerical staff to handle the non-legal components of the application, such as organizing bank statements and utility bills.

A lawyer may be tempted to advise a family on the Medicaid law and not handle the application. This typically backfires. The Medicaid application process can be a very difficult one for those who have not been through it before. The application must be fully documented. Applicants must present copies of the applicant's and spouse's social security cards, drivers license, Medicare card, health insurance card, health insurance premium statement, social security benefit letter, bank statements, automobile titles, insurance policies, annuity contracts, prepaid funeral documents, and burial plot docu-

ments. Many families, even those with experience in file preparation, cannot submit the required documentation to the Family Independence Agency office in a timely manner. They get frustrated and miss deadlines. What may have seemed so simple after consultation with the lawyer now seems impossible. The lawyer may hear "we did what you told us and it did not work." It is preferable for the lawyer to hire the clerical staff necessary to handle the application.

To work in this area, a lawyer should be ready to help the family through the crisis; emotions are often just below the surface. The unsuccessful attorney will be the scapegoat for the family's umbrage with cruel fate. The successful attorney receives much appreciation from the family and satisfaction from helping clients in need. ◆

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Footnote

1. For purposes of convenience, the nursing home resident will be referred to in the male gender and the community spouse in the female.