

MEDICAID PLANNING FOR FARMERS

Land for Good

Farm Succession Advisors Training

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Presenters

- **Donald H. Sienkiewicz** focuses his legal practice on estate planning, asset protection, and elder law. He is the principal attorney at the Estate Preservation & Planning Law Office in Milford, New Hampshire. Attorney Sienkiewicz previously practiced with the firms of Rath, Young, & Pignatelli , P.C., in Concord, New Hampshire and Goodwin Procter LLP, in Boston, Massachusetts. His practice includes advising clients on tax efficient wealth management, business succession planning, and long-term care planning through the use of revocable and irrevocable trusts, limited liability companies, and other legal arrangements. He earned his Juris Doctor degree in 2002 from Northeastern University School of Law in Boston, Massachusetts, where he was a fellow in the Jerome Lyle Rappaport Honors Program in Law and Public Service. He earned bachelor's degrees from Boston University in Economics and Environmental Policy, both magna cum laude. Before attending law school, Attorney Sienkiewicz spent four years leading expeditions for troubled teenagers in Utah, Arizona, Oregon, and California as a wilderness guide. He enjoys skiing, hiking, and fishing; lives with his wife, Katja, and their four children in the beautiful Monadnock region of southern New Hampshire.

Presenters

- **Paul O. Dillon** is a Sole Practitioner who is licensed in Maine and has been an Attorney and Counselor at Law for thirty-four years. He limits his practice to business, estate, elder law, and charitable planning. His office is located in Corinth, Maine where he works with individuals, families, business owners, farmers and woodlot owners throughout the State of Maine. Paul received his B.S. in Zoology from Montana State University, Bozeman, Montana and his J.D. from the University of Tulsa College of Law, Tulsa, Oklahoma.

The issue: How to save the farm from estate recovery

- General Rule:
 - Income-producing property is not a countable resource
- The Situation:
 - Estate Recovery: sale of the Family Farm after death

Medicaid Overview

- Medicaid is based on federal law
- States interpret and administer the federal law
- It is crucial to know the federal law first , then see how your state interprets it

Medicaid Overview

- Medicaid provides long-term care benefits in three settings:
 - Home and Community Based Services waiver pays for nursing home level services provided in the home
 - Residential Care benefits cover room and board and medical care in a residential care facility, often one which provides memory care.
 - Medicaid contributes to the payment of most nursing home beds in a state.

Medicaid Overview

An applicant must be eligible for Medicaid both financially and medically.

- Financial eligibility is determined by DHHS. An applicant is financially eligible for Medicaid if he or she meets the income and asset limits, and there is no disqualifying transfer penalty.
- Medical eligibility is determined by Change Healthcare, formerly Goold Health Systems.

Medicaid Overview

- Need to be aware of your State's estate recovery laws.
- For Example: Maine has a broad estate recovery statute.
- Exposed in Maine: Any real and personal property in which the decedent had “any legal interest at the time of death, to the extent of that interest, including assets conveyed to [another after death] through tenancy in common, survivorship, life estate, living trust, joint tenancy in personal property, or other arrangement but not including joint tenancy in real property”. 22 M.R.S. §14(2-1).

Medicaid Overview

- Currently, the claim is pursued in the probate process with a Claim Against Estate.
- DHHS does not impose a lien on property during the Medicaid recipient's lifetime.
- There is no estate recovery when the Medicaid recipient is survived by a child with disabilities or by a spouse.
- In Maine, there is no “delayed” estate recovery if CS survived IS and then CS dies.

Proactive Long-Term Care Planning Strategies

1. Financial powers of attorney
2. Long-term care insurance Partnership program
3. Estate Planning for Asset Protection
4. Considerations in transferring the primary residence
5. Medicaid Asset Protection Trust
6. Limited Liability Company
7. Contract with family member for personal care
8. Treatment of Annuities

Financial Powers of Attorney

- Granting Power to an Agent on behalf of the Principal
- Need to be sure that it survives disability and is considered durable
- Include power to do Medicaid planning

Long Term Care Insurance

- Some clients have it
- It is important to review and understand any existing policy
- Consider Partnership Program “dollar for dollar” exclusion
- Consider including LTCI as one part of an asset protection plan

Income

- Maine is not an income cap state.
- Few applicants are ineligible based on income. Is the applicant's income less than the private pay rate in the facility?
- According to Genworth, the national median cost per month in an assisted living facility is \$3,628 and in a semi-private room in a nursing home is \$6,844.
- Compare those to the Maine monthly median costs of \$4,991 for assisted living and \$8,365 for a semi-private nursing home room.

Income

- When an individual's application for MaineCare is approved DHHS will calculate the individual's cost of care by considering the individual's gross income reduced by medical insurance premiums, a personal needs allowance (\$40 for nursing home; \$70 for residential care), and any allocation for the community spouse.
- There is no spousal allocation when the IS is covered by the HCBS waiver (yet) or by MaineCare residential care benefits.
- For allocations of the IS income to the CS in the nursing home setting, consult Appendix F in the MaineCare Eligibility Manual.

Asset Rules—The Basics

- \$8,000 “savings” exclusion means that the countable asset limit is effectively \$10,000. “Savings” is defined as an account which earns interest or dividends except that a checking account does not need to earn interest/dividends and includes, savings or checking account including those in a credit union, IRA, Keough, available CSV in an annuity or life insurance policy, stocks, bonds, and mutual funds.
- The Community Spouse Resource Allowance in the nursing home setting is \$119,720. There is no CSRA with HCBS waiver (at present)P and in the residential care setting.
- An available asset is defined as “An asset that has a value which is legally obtainable by the individual. If there is a penalty for early or late withdrawal to get the asset, the available asset I the amount after t he penalty is taken”

Asset Rules – The Basics

- Fair market value is defined as the “[a]mount that can be expected to be received for selling a similar article on the open market in the geographic area involved. The individual may refute the fair market value determined by the Department by providing statements from two credible sources.”
- An asset exempt during lifetime would typically be exposed to Maine’s broad estate recovery rules after death.

Asset Rules – Income-Producing Property

- Income-producing property may be exempt but not if it is owned in a revocable living trust.
- This includes any property and equipment used in the production of income, e.g. real property, boats, trucks, machinery, livestock, garden plots, wood lots, liquid assets used as part of a business or trade.
- After three years of operation, the property must produce countable income that equals or exceeds .22% of its value annually.

Estate Planning for Asset Protection

- Testamentary supplemental needs trust for benefit of the surviving spouse
- Always when one spouse has a current long-term care need
- Sometimes when neither spouse has a long-term care need

Estate Planning for Asset Protection

- Caution: Surviving spouse is expected to pursue the spousal elective share: “For transfer purposes, an asset includes all income and resources of the individual and the individual’s spouse. This includes any income or resources which the individual or the individual’s spouse is entitled to but does not receive because of action or lack of action by the individual as defined above, including but not limited to renouncing an inheritance or failing to exercise a spousal share in a challenge to a will.” MaineCare Eligibility Manual Part 15, Section 1.3
- Caution: Statutory exemptions and allowances for surviving spouse totaling \$29,000
- Use half-a-loaf strategy to protect a portion

Asset Rules – Motor Vehicles

- One motor vehicle of unlimited value is exempt, and a second vehicle will be exempt if needed for employment or access to medical care, if it is a vehicle modified for accessibility, and if it is a vehicle necessary for the area, e.g. 4-wheel drive for winter or a second vehicle kept on mainland for an island dweller.

Spend Down

- There is no limit on spend down for goods and services for the applicant and the community spouse.
- There is no limit on making home improvements and renovations.
- Client could pay down debt, pay legal fees, and purchase a motor vehicle, personal belongings, household furnishings, jewelry, burial plots, mortuary trust, etc.

Other Asset Rules and Opportunities for Asset Protection

- Assets which are in the process of being converted are exempt during the period they are unavailable (e.g. insurance policies which have been sent to the insurance company, property which is being probated, and stocks which have been submitted for redemption).
- A life estate is a countable asset and is defined as “ownership of real property...limited to the term of life, usually that of the owner of the life estate, and may have other conditions attached such as occupancy.”
- A life lease is defined as “a contract arrangement to live in a certain place, usually for the term of life.” it is not ownership and therefore is not a countable asset.”

Preliminary Transfer Questions

- From the MaineCare Eligibility Manual at Part 15, Section 1.3:

To determine the effect that the transfer has on eligibility, several questions must be answered:

- I. What was transferred?
- II. Who was the transfer made to?
- III. When was the transfer made?
- IV. What did the individual or couple receive in exchange?
- V. Why was the transfer made?

Transfer Penalty

- The look back period is 60 months. The applicant for MaineCare long-term care benefits must disclose any transfers made in the preceding five years for which he or she (or the spouse) received less than FMV in return.
- At a minimum, DHHS requires one full year of the applicant's and the applicant's spouse's income and asset statements, then a "snapshot" statement for each prior year. Depending on the history of transfers, DHHS may then require copies of all statements for all five years.
- DHHS will generally require copies of any checks written for over a certain amount. We see that minimum being a range from \$100 to \$1000, depending which DHHS office is processing the application

Transfer Penalty

- The penalty period divisor is currently \$8,476 for all regions of Maine. This divisor is used whether the application is for residential care or for nursing home care or HCBS.
- The transfer penalty begins in the month the applicant is otherwise medically and financially eligible.
- There is not limit on the length of a transfer penalty.
- There is a separate transfer penalty for residential care than for HCBS and nursing home. There is a “double jeopardy.” A new penalty will be imposed if the same individual moves from one level of care to the other.

Transfer Penalty

- Any transfer is presumed to have been made for the purpose of getting MaineCare. The presumption can be rebutted with clear and convincing proof that the transfer was made exclusively for a purpose other than to qualify for Medicaid either at the time of the transfer or at some future date.
- Not penalized: Assets which the owner intended to dispose of at fair market value or for other valuable consideration but, without being at fault, the owner did not obtain full fair market value.
- Not penalized: Irregular or infrequent gifts provided the cumulative amount of the gifts do not exceed \$500 per calendar quarter. Each gift is analyzed separately. This provision does not mean that the first \$500 per quarter is excluded when the cumulative amount of those gifts is more than \$500.

Transfer Penalty

- Partial cures are allowed. The following will not result in a transfer penalty: “Assets transferred for less than fair market value once all the assets have been returned to the individual. There is no penalty as of the month in which all the assets are returned to the individual. When only part of an asset or its equivalent value is returned, a penalty period can be modified but not eliminated. A penalty remains in effect for the past time period during which the asset had been transferred.” Part 15, section 1.4 (VI).

Exempt Transfers

- Transfer of any asset to the spouse.
- Transfer of any asset to a child for whom total and permanent disability or blindness has been confirmed by the SSA.
- Transfer of any asset to a trust for the benefit of anyone under age 65 who does or would meet the SSA criteria for total and permanent disability.
- Transfer of the home to a child under age 21.
- Transfer of the home to a sibling with an equity interest who resided in the home for at least one year.

Exempt Transfers

- Transfer of the home to a child who was residing in the home for at least two years and who provided care which enabled the applicant to live at home rather than in a facility.
- When the applicant is young enough, possibly consider a transfer to a self-settled special needs trust with payback provisions.

Other Asset Rules and Opportunities for Asset Protection

- An irrevocable mortuary trust with up to \$12,000 per person is a non-countable asset. Of the three available contracts, choose credit for services and identify an individual, not “my estate,” as the beneficiary of excess assets.
- New savings bonds have no cash value for six months from the date of issue.
- Jointly owned real estate where the joint owner refuses to sell.

Asset Rules – Primary Residence

- The primary residence and any contiguous real estate will be excluded as a countable asset during the lifetime of the applicant if there is either a subjective intent to return home or the spouse or a dependent child is residing there.
- For applicants for long-term care, the value of the primary residence must be less than \$828,000 in 2016.
- The primary residence will not be exempt if it is owned in a revocable living trust.

Asset Rules – Valuing Real Estate

- Maine's DHHS considers the fair market value of real estate to be equal to its tax-assessed value as set by the municipality as adjusted to 100% valuation rate.
- This may be rebutted by statements from two real estate appraisers (although opinions of value from real estate professionals like brokers are usually accepted).
- Proceeds from the sale of the primary residence will be excluded for up to three months from the date of receipt.

Considerations in Outright Transfers of the Home and Farm

- Loss of ownership and control
- Loss of the stepped up basis for the next generation
- Loss of the personal residence exclusion from capital gains tax
- Loss of certain exemptions from real estate taxes including the homestead exemption and certain veterans' exemptions
- Loss of the opportunity for a reverse mortgage
- Exposure to the children's liabilities, e.g. divorce, lawsuits, bankruptcy, etc.

Medicaid Asset Protection Trust®

- To start the “five year” clock ticking
- Design informed by Maine’s broad estate recovery statute
- Personal preference for very conservative drafting
- Need to check its effectiveness in your State

Medicaid Asset Protection Trust®

- To Start 5 Year Lookback You Need To Give Property Away
 - Give It To Children
 - Easy To Do
 - Subject To Their Lives
 - Or
 - Give It To Medicaid Asset Protection Trust®
 - Irrevocable Trust
 - Protects Assets From Children's Issues

Medicaid Asset Protection Trust®

- Issues With Giving Assets To Children
 - If given during lifetime your original tax basis goes with the property resulting in large capital gain tax
 - If left at death then the asset gets a “Step Up in Basis” to the value at the date of death
 - In order to obtain “Step Up in Basis” must wait until death
 - Between now and death you could end up in a nursing home and expose assets to MaineCare Estate Recovery
 - Assets transferred to Children are subject to their death and “Creditors, Predators, and Unhappy Spouses” meaning a loss of control

Medicaid Asset Protection Trust®

- Using A Medicaid Asset Protection Trust®
 - A unique Irrevocable Trust
 - Drafted as a Grantor Trust which allows “Step Up in Basis” at death of Trustmaker
 - Assets transferred to MAPT are protected from Children’s issues and their “Creditors, Predators, and Unhappy Spouses” meaning keeping control
 - Funded in order to start the 5 year lookback the assets can be protected from Medicaid Estate Recovery

Medicaid Asset Protection Trust®

- Medicaid Asset Protection Trust®
- Trustmaker
- Trustee other than Trustmaker
- Beneficiaries
 - Beneficiaries during Lifetime
 - Common Fund
 - Beneficiaries after death of Trustmaker
 - Unique terms for each Beneficiary
 - Allows for caring for Beneficiaries with Special Needs
 - Written Tenancy Agreement instead of Life Estate
 - Protects Assets in MAPT from Estate Recovery

Use of Limited Liability Companies

- Prevent Partition Sales
- Maintain or diversify control
- Appoint a Farm Manager
 - Family Member
 - Tenant
 - Other
- Transfer LLC interests to a MAPT

Helpful LLC Design Features

- Unanimous or Supermajority Vote Required to:
 - Transfer LLC interest
 - Sell Land
 - Admit Substitute Member
 - Amend Operating/LLC Agreement

Helpful LLC Design Features

- Define “Permissible Transferees”: your clients define the “Circle of Trust”: who is “in” and who is “out”.
- Maintain/Diversify Control:
 - Children vs Grandchildren
 - Favored vs Excluded Descendants
- Appointment of a Farm Manager:
 - Farmer, Child, or Children appoint
 - Preference of Selection
 - Method of Election

Techniques to Get Income Back to the Grantor

- Reserve Income in the Medicaid Asset Protection Trust®
 - Pro: Grantor Control
 - Con: Payable to Nursing Home
 - Con: Show's on Applicant's Tax Return
 - Con: Regulatory Risk

Techniques to Get Income Back to the Grantor

- If Grantor is Operator:
 - Crop Income
 - Grantor control may be provided by the Operating/LLC Agreement

Techniques to Get Income Back to the Grantor

- If Grantor is Not Operator:
 - Grantor as Manager
 - Farm Management Agreement
 - Document the Management Decisions
 - Grantor control may be provided by the Operating/LLC Agreement

Techniques to Get Income Back to the Grantor

- Trust Beneficiaries can:
 - Gift to Grantor as needed
 - Purchase Goods/Services for Grantor
 - Pay Grantor's Bills
 - No Grantor Control

Planning with the Mortgaged Farm

- Use of a Medicaid Asset Protection Trust®
- Takes the assets of the senior generation out of the picture
- Does the Lender trust the trust beneficiaries?

Planning with the Mortgaged Farm

- Land must consistently cash flow sufficiently to pay mortgage
- Or trust has other assets
- Or beneficiaries have the ability to pay mortgage, if necessary, by loaning money to the trust
- Lender's agreement to assumption of debt by trustees
- Lender signs "due-on-sale" clause waiver

Planning with the Mortgaged Farm

- Need all players on the same page
- Best not to have written agreement supporting consideration for Grantor's promise to convey land in exchange for assumption of indebtedness
- "Consideration" may result in imputed sale and could trigger capital gain unless to a grantor trust
- Do not release Grantors/original obligors—debt forgiveness equals imputed income unless debtor is insolvent
- Make sure Lender will not give a 1099 to Grantor!
- Trustees agree to assume Grantor's debt (simple assumption agreement is okay)

Crisis Planning Strategies for a Single Applicant

- Gifting plus partial return, known as “reverse half-a-loaf” in Maine.
- Gifting plus annuity to pay for care during the resulting transfer penalty

Crisis Planning: Married Applicant

When the application is for Medicaid nursing home benefits and the applicant is married:

- Spend down
- Purchase income-producing property
- Purchase a Medicaid-compliant annuity, generally to run for no less than 12 months.
- After the initial application, MaineCare only considers assets owned by the IS.
- Currently in Maine, post-eligibility transfers by the CS do not affect continued eligibility of the IS.

Crisis Planning: Married Applicant

- Transfer assets out of applicant's name and into spouse's name in almost all cases.
 - There is no transfer penalty for transfers between spouses.
 - The community spouse's assets are only relevant on an application for MaineCare nursing home benefits, not HCBS waiver or residential care.
 - Update the CS's estate plan.

Crisis Planning Married Applicant

- Post-eligibility transfers
- Once eligibility is established, Community Spouse's resources are not deemed available to Institutional Spouse
 - Cite 42 U.S.C. § 1396r-5(c)(4)

Personal Services Agreements

- Payment to a family member for personal care will be treated as a gift and subject to a transfer penalty unless:
- The services were performed after a written agreement has been executed between the applicant and provider. The agreement must show the type, frequency, and duration of the services being provided to the applicant and the amount of consideration (money or property) being received by the provider/relative.
- At the time of the receipt of the services, the applicant was not residing in a nursing facility or a residential care facility.

Personal Services Agreements (cont.)

- At the time of the receipt of the services, the services had been recommended in writing and signed by the applicant's physician, as necessary to prevent the transfer of the applicant to residential care or nursing facility care. Such services may not include the mere providing of companionship.
- The amount paid for the services must be equal to or less than the fair market value of the services at the time the services were delivered. FMV may be determined by consultation with an area business which provides services.

Treatment of Annuities

- Treatment of Pre and Post-DRA Annuities
- Annuity Established Pre-DRA:

If the annuity was annuitized prior to the DRA, it should be treated as just an income stream.

- Note: If the annuity was purchased prior to the DRA but annuitized after the DRA, the amount annuitized will be treated as an uncompensated transfer.

- Annuity Established Post-DRA:

If the annuity was established after the implementation of the DRA, it will be treated as an uncompensated transfer and/or as a countable asset.

Medicaid Compliant Annuities

- DRA requires that an immediate annuity must:
- (1) Be irrevocable and non-assignable
- (2) Provide for payments in equal amounts with no deferral or balloon payments
- (3) Be guaranteed to return at least the individual's premium investment within the individual's Medicaid life expectancy – actuarially sound
- (4) Designate the state Medicaid agency as a remainder beneficiary

Where to Look

- 42 USC 1396p and 1396r-5
- Your State's Medicaid Manual
- Administrative Code sections from your State
- Fair Hearing decisions from your State

Federal Medicaid Cites

- 1396p(a)-(b)—Estate Recovery provisions and exceptions
- 1396p(c)—Asset transfers and calculating the penalty period
- 1396p(c)(f)—Annuity Provisions
- 1396p(c)(2)—Exceptions to the transfer penalty rules
- 1396p(d)—Treatment of Trusts
- 1396p(f)—Home Equity Limits
- 1396p(g)—Definitions
- 1396r-5—Treatment of income and resources for certain institutionalized spouses

Thank you

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