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Money in, money out

A plan for maintaining a client's Medi-Cal eligibility after receipt of a substantial settlement

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The dilemma

Your client is over the age of 65, needs 24/7 skilled long-term care due to the subject injury, is receiving a substantial seven-figure settlement, and does not want to spend a substantial portion of their settlement on long-term care.

Medicare does not cover long-term care. Medi-Cal will cover long-term care but the money your client is receiving would financially disqualify him/her from Medi-Cal. What do you do?

Client introduction

The client, a 73-year-old widower, had been living a healthy, vibrant, and independent life at home until he suffered a small hemorrhagic stroke. He immediately went to the emergency room at the first sign of symptoms. The emergency room sent him for imaging, diagnosed a small stable bleed, and told him he would make a complete recovery.

Due to a botched communication between a tele-consult neurologist and on-site nurse, the nurse administered TPA – a powerful blood thinner. Though TPA is a miracle drug for ischemic strokes, it is a nightmare if given to a bleeder. Thin the blood of a bleeder, and they bleed more. The client's small 9cc bleed mushroomed to a 43cc bleed. The client's 75 percent chance of full recovery vanished, leaving the client with severe and permanent physical disabilities necessitating 24/7 skilled long-term care for the remainder of his shortened life-expectancy.

After being transferred to a Skilled Nursing Facility (SNF), the client's Medicare coverage for Long-Term Care was quickly exhausted. The out of pocket cost for an SNF can easily exceed $13,000/month, or $156,000/year. 24/7 in-home care is even more expensive (approximately $25,000/month or $300,000/year). Either of those price tags would quickly erode your client's settlement funds; which begs the question: How will your client pay for his skilled long-term care?

The traditional options

You consult a special-needs/public-benefit preservation expert. They present several options:

- Client returns home and pays $25,000/month *out of pocket* for in-home care.
- Client stays in the SNF and pays $13,000/month *out of pocket* for the SNF care.
- Client stays in the SNF and transfers his settlement money into a d4C Pooled Trust. Though this avoids financial disqualification for Medi-Cal, the client loses control of the funds, and the client's estate would be responsible to pay Medi-Cal back upon your client's death. This results in essentially an interest-free loan from Medi-Cal to your client during his lifetime for the cost of the SNF care.[1]

You discuss these options with your client. None are attractive. You return to the special-needs expert and ask if there is a way to utilize public assistance to meet your client's needs while avoiding the repayment requirement at the end of your client's life. The answer is no, that's not possible.

Most stop there. You shouldn't. There is another better and legitimate option that most special-needs attorneys will flatly discount as non-viable, but is a common practice among California's elder law attorneys.

The fix – obtain Long-Term Care Medi-Cal with no repayment obligation

To qualify for Long-Term Care Medi-Cal, a program designed to provide financial assistance to those in SNFs, an unmarried applicant must show that he has less than $2,000.00 in countable assets.[2]

Countable assets include checking and savings accounts, stocks, bonds, life insurance surrender values, and various other assets.[3] Exempt assets, which are not counted against the countable asset limit, most importantly include a residence and retirement accounts making minimum distributions.[4]

Having just received seven-figure money, how in the world, you might ask, will your client meet the 'less than $2,000' in assets eligibility requirement? The answer: by following the gifting strategy outlined below.

The strategy – gift the settlement proceeds to a trusted third party

After receipt of the settlement funds, the client gifts the settlement money to trusted family members or friends (in this case the client's daughter and granddaughter). The daughter and granddaughter subsequently, under their own volition, create and fund a third-party Special Needs Trust (SNT) for the benefit of the client. By gifting the settlement monies away, the client satisfies the 'less than $2,000' in assets eligibility requirement for Medi-Cal and ensures that Medi-Cal will not be repaid upon the client's passing. Several issues demand careful attention in this process.

Legal authority to make gifts

In this case, the client had the necessary capacity to make a well-informed and

calculated decision about gifting. Further, he had the ability to personally execute the gifts himself. But even clients who clearly have legal capacity to make decisions may be unduly influenced. Legal counsel must take extra care to ensure proper ethical boundaries are created and respected.

In many cases, the person who requires SNF care does not have the mental capacity to manage legal and/or financial affairs and a doctor's letter has stated as much. If an incapacitated adult is residing in an SNF and a family member expresses interest in Medi-Cal asset preservation, a thorough review of the incapacitated person's estate plan must be conducted. This review should specifically identify the authority that successor trustees and agents have under any trusts and Durable Power of Attorney, respectively.

Many actions beneficial to Medi-Cal asset preservation, such as gifting assets or revoking a trust, *may not* be conducted by someone other than the creator of those documents unless express language is contained in the estate plan.[5] In cases where such authorities are not provided, some asset preservation strategies are simply not possible without utilizing a conservatorship or some other court-approved and time-consuming process.

Medi-Cal gifting rules

Any discussion of Medi-Cal gifting rules should begin with some context. The federal government pays for 50 percent of Medi-Cal expenditures.[6] Therefore, the more citizens that utilize Medi-Cal benefits, the more federal funds flow into the state. If one "follows the money," then the 50 percent federal subsidy may explain why California's favorable Medi-Cal gifting rules, detailed in a set of draft regulations promulgated in 1990,[7] have not been updated or changed.

The federal government, aware that California and many other states maintained "loose" eligibility and gifting requirements, made an effort to "tighten up" the Medi-Cal program with the passage of the Deficit Reduction Act of 2006 (DRA). The DRA contained rules that drastically limited the ability for persons to gift assets without triggering Medi-Cal eligibility penalties. In response, California has been "working on" regulations to implement the DRA for the last 12 years. While California may change the gifting rules *at any time in the future*, the current set of rules governing gifting and Medi-Cal eligibility will continue to be generously interpreted under the 1990 Draft Regulations.[8]

Avoiding penalties for gifting through well-designed gifting strategy

When applying for Medi-Cal, the client's receipt and gifting of the settlement funds to trusted third parties must be documented and disclosed as part of the application for benefits. Depending on how the gifts were made, Medi-Cal may impose an eligibility penalty. A careful gifting strategy is paramount to minimize the eligibility penalty. Though our client gifted away seven figures in compensation, the specifically tailored gifting strategy described below limited his Medi-Cal eligibility penalty to two months.

Medi-Cal eligibility penalties for gifting are based on the following calculation:

• Gift Amount / APPR (the 'Average Private Pay Rate') = Month(s) of ineligibility

The California APPR is based on the average monthly cost of an SNF and is typically updated in April of each year. The APPR in 2017, the year that our client made his gifts, was $8,515.00.[9] Applying the penalty calculation formula, a gift of $100,000 would create 11 months of ineligibility:

• $100,000 / $8,515 = 11.74 = 11 months of ineligibility[10]

Similarly, gifts of $8,500, $17,000, and $25,000 would respectively create only zero, one, and two months of ineligibility:

• $8,500 / $8,515 = 0.98 = 0 months ineligibility
• $17,000 / $8,515 = 1.99 = 1 month ineligibility
• $25,500 / $8,515 = 2.99 = 2 months ineligibility

So long as more than one gift to an individual is not made on the same day from the same account, eligibility penalties from different gifts *are not* cumulative. Accordingly, the client can gift $25,500 per day to multiple people for as many days in a row as the client wishes, and the total ineligibility penalty remains only two months.[11]

Our client executed a strategy to gift his settlement proceeds to his adult daughter and granddaughter. When the net settlement check was deposited in our client's checking account, he immediately initiated the following gifting strategy:

During September, our client gifted a total of $765,000 by gifting no more than $25,500/day to both his daughter and granddaughter. Pursuant to the penalty calculation formula, this produced a two-month ineligibility penalty applied in September and October.

During October, our client gifted a total of $680,000 by gifting no more than $17,000/day to both his daughter and his granddaughter. This produced a one-month ineligibility penalty applied in October.

During November, our client gifted $8,500/day to both his daughter and his granddaughter until his remaining settlement funds were less than $2,000. This produced no additional ineligibility penalty and the client was eligible for Medi-Cal benefits beginning in November.

Documentation of the gifting process (bank statements along with copies of the gift checks and the daughter's and granddaughter's deposit receipts) were submitted to Medi-Cal as part of the client's application. Medi-Cal approved his application and imposed only a two-month eligibility penalty applied during September and October.

Once the client's settlement money was gifted to his daughter and granddaughter and his Medi-Cal eligibility was

established, daughter and granddaughter could either: (i) take no further action and keep the gifted funds, or (ii) create a third-party Special Needs Trust (SNT) and fund it with some or all of the gifted funds. Notably, creating a third-party SNT *does not* require that the State of California be repaid upon the passing of a Medi-Cal beneficiary and would allow the daughter to act as trustee – two important issues to the client.

Conclusion

California's citizens currently benefit from a very generous interpretation of Medi-Cal gifting regulations. These rules, however, may change at any time. Until then, gifting assets will remain a powerful and effective strategy for those wishing to accelerate Medi-Cal eligibility.


Emison

Theo Emison is a partner in the San Francisco trial firm Emison Hullverson LLP. *Theo litigates and tries catastrophic personal injury and wrongful death cases exclusively on behalf of injured persons. Since graduating magna cum laude from USF School of Law, Theo has successfully obtained jury verdicts or arbitration awards in medical malpractice, wrongful death, and personal injury cases, including the third largest arbitration award against Kaiser in California in 2008. Theo represented the 'client' from this article in his medical malpractice claim.*


O'Toole

Brian O'Toole is an estate planning attorney with a focus on elder law and special needs planning. He advises families struggling to manage the frequently exorbitant costs of providing medical care for loved ones in need. Using the depth of his knowledge of governmental assistance program eligibility requirements, Brian is frequently able to preserve your client's settlement funds while using public assistance programs to meet their care needs. Brian brainstormed and implemented the "client's" gifting strategy discussed in this article.

Endnotes:

[1] Note: A self-settled d4A Special Needs Trust was not an option because the client, aged 73, exceeded the 65-year-old age limit for such trusts.

[2] See California Code of Regulations Title 22, Division 3, Health Care Services.

[3] *Id*.

[4] *Id*.

[5] See CA Probate Code §§ 4264 and 15401.

[6] Henry J. Kaiser Foundation: https://www.kff.org/medicaid/state-indicator/federal-matching-rate-and-multiplier/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D.

[7] See California Department of Health Services All County Welfare Director Letters 90-01 and 90-02.

[8] *Id*.

[9] Department of Health Care Services All County Welfare Director Letter 17-14.

[10] Medi-Cal's gifting calculation drops the decimal and rounds down the penalty to the nearest whole number. See Department of Health Care Services Form MC 176 PI (05/07).

[11] See Department of Health Care Services Form MC 176 PI (05/07).


Plaintiff


Plaintiff


Plaintiff