

Mark's ATop Ten@List of MediCal Facts for the Estate Planner:

#10. MediCal is a means-tested welfare program.

As such, the program involves three key components -

Eligibility - can you obtain benefits?

Share of Cost - how much will you pay toward your care?

Recovery - state will have right to recover from your estate for benefits paid (at your death or your spouse's death).

MediCal should be thought of as a last resort, not a first choice.

MediCal benefits are still effectively available and of use when the individual is in a skilled nursing facility, not at home or in residential care facility for the elderly.

#9. MediCal looks at eligibility primarily through asset classifications.

Exempt - won't count against you; residence, 1 vehicle, burial arrangements, term and group life insurance, tangible personal property

Unavailable - example - property for sale, property owned and controlled by another person and not willing to sell.

Nonexempt - everything else, counts toward applicable property allowance.

Note - special rules apply to retirement accounts such as IRAs and 401ks

#8. Spousal Impoverishment Rules still apply.

ACommunity Spouse@- spouse in at home (not in an SNF)

AInstitutionalized Spouse@- spouse in SNF

CSRA - \$95,100

ISRA - \$2,000 (Institutionalized Spouse's Resource Allowance)

CSRA is one-time, Asnapshot@, assets considered include all community property assets, as well as all separate property assets of either spouse.

MMMNA - \$2,378 - this is the MINIMUM amount of monthly income which the Community Spouse may have; no limit on income, only how much can be paid from the institutionalized spouse to the community spouse.

CSRA can still be increased via court order or administrative hearing - to amount of property needed to produce the income up to MMMNA

7. Advance Planning Still Preferable.

Some court proceedings can be eliminated or simplified

Trust? vs. Wills w/comprehensive financial power of attorney

Comprehensive financial power of attorney is key -

- express gifting authority

- gifting not limited to the annual exclusion amount

- agent able to self-deal

- ability to amend or revoke trust and to remove assets from trust to implement gifts

- include real property legal descriptions and parcel numbers

- public benefits language - see ' 4.46A in CEB Durable Powers of Attorney Book

- appointment of special agent to make gifts

6. Treatment of Income.

Name on check rule - allocates income to the person receiving the check

After deductions for Medicare and other health insurance premiums and for a Personal Needs Allowance of \$35/month, all of a person's income will be payable to SNF as a Share of Cost@

(Keep in mind - higher the share of cost, the less the state is paying and the less the recovery claim will be)

Where married, name on check rule applied, then IS income may be paid to CS in order to bring up to MMMNA of \$2,378

5. Transfer of Family Residence.

Residence exempt based on subjective intent to return home

Residence can still be transferred to anyone at any time w/o penalty (for now)

Problems - gift tax liability; carry over of cost basis to donee

Contrast transfer w/ retention - if retained, it gets step up in basis at death; appreciation continues? plus - net rental income can increase share of cost and reduce recovery

Likely to be changing with new regulations

4. Transfers of Nonexempt Property.

Can be done; not prohibited and not criminalized

If transfers made within look back period of 30 months (soon to be increasing to 36 months) - a period of ineligibility is calculated

Amount transferred is divided by APPR - \$4,812.00

Resulting number, rounded down to the nearest whole number, is the number of months the donor won't qualify for benefits.

Transfers will be severely curtailed under the expected new regulations from DHS

If gifting to be done, must consider method -

By donor personally? Must have capacity

If no capacity, then by 1) authorized agent under power of attorney or 2) by Court order, e.g., Conservatorship and Substituted Judgment

3. Annuities.

Annuities are insurance products which can be used in the MediCal context to convert an otherwise countable or nonexempt asset to a stream of income.

If done properly, and payments are to be made for no more than the life expectancy of the annuitant, then the underlying value won't count, but, of course, the income will go to share of cost.

Can still be valuable to obtain the primary benefit of MediCal, that is, to reduce the cost from the retail rate of private pay, to the wholesale rate of MediCal reimbursement rate.

Latest development re annuities is that DHS will be seeking recovery against payments remaining at death of the MediCal recipient

2. If Eligibility Doesn't Get You, Recovery Will.

Too much emphasis can be placed on obtaining benefits, on eligibility and w/o thinking of consequences of recovery.

DHS recovery program will attempt to recover benefits paid from estate of recipient.

Certain exclusions apply - surviving disabled child (complete bar to recovery), surviving spouse (claim deferred until death of surviving spouse and recovery limited to assets received from MC recipient through distribution or survival).

DHS recovery involves an after death claim, not predeath liens.

Hardship waivers also permitted, but historically difficult to obtain.

State is serious about recovery and likely to increase its efforts.

Department is seeking to recover against such devices as joint tenancy property and life estates and, in latter situation, against value of the retained interest at the time of transfer, not at time of death.

1. Don't Try this at home; consult with an expert.

CELA - designation for Certified Elder Law Attorney

Certified by National Elder Law Foundation; accredited by ABA and recognized as a specialty by State Bar of California; see www.nelf.org

MediCal eligibility and planning is not for dabbling. Rules and regulations are very complicated and difficult to find and keep current.

NAELA - National Academy of Elder Law Attorneys www.naela.org; also CANHR - California Advocates for Nursing Home Reform www.canhr.org