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**TRANSFER OF ASSETS IN THE MEDICAID PROGRAM  
A CASE STUDY IN WASHINGTON STATE**

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**RICHARD P. KUSSEROW  
INSPECTOR GENERAL**

## **EXECUTIVE SUMMARY**

### **PURPOSE**

This study examined whether asset shelters, including property transfers, play a significant role in qualifying people for Medicaid long-term care benefits in the State of Washington.

### **BACKGROUND**

The Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) placed very strict limits on the transfer of assets within 2 years of application for the purpose of qualifying for Medicaid. Nearly all States have adopted these restrictions and enforce them with varying degrees of intensity. The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) further strengthened limitations on the use of trusts to shelter assets and income. The Medicare Catastrophic Coverage Act of 1988 (MCCA) made transfer of assets restrictions mandatory.

Aggregate data indicate that more than half of the nation's nursing home costs are paid privately "out-of-pocket." Most observers assume that asset shelters do not play an important role in long-term care funding, that "Medicaid requires impoverishment" and that the availability of Medicaid nursing home benefits does not impede the development of other options to finance long-term care.

In contrast, a recent Office of Inspector General study, Medicaid Estate Recoveries, found that (1) Medicaid eligibility staff throughout the country report widespread asset sheltering by applicants and their attorneys, (2) many legal shelters are available in the law, regulations and policy and (3) Medicaid nursing home recipients frequently die with significant estates that pass unencumbered to noncontributing heirs. The Office of Inspector General will conduct a national inspection of Medicaid asset shelters to determine their impact on States other than Washington.

### **MAJOR FINDINGS**

The elderly and their families transfer or shelter large amounts of money and property to qualify for Medicaid in Washington State.

Fifty-eight percent of the Washington Medicaid nursing home cases that were initially denied assistance because they exceeded the resource eligibility threshold became eligible within a few months by transferring or sheltering their assets.

**Advice on how to qualify for Medicaid nursing home benefits is widely available; abuse is common.**

The experts who counsel Medicaid applicants to shelter assets include private attorneys, legal services lawyers, social service agencies, the Medicaid agency staff, some nursing homes staff and private counselors. We found anecdotal evidence of concealment, fraud and financial abuse of the elderly for the purpose of qualifying for Medicaid long-term care benefits.

**RECOMMENDATIONS**

- The Washington State Department of Social and Health Services should (1) document exempt as well as nonexempt asset values and (2) verify and record asset dispositions.
- Because this case study empirically corroborates our earlier, more anecdotal, findings in Medicaid Estate Recoveries, we repeat the recommendations from that report here. (See "Recommendations" for the detailed proposals.)
  - (1) Change Medicaid rules to permit families to retain and manage property while their elders receive long-term care.
  - (2) Strengthen the transfer of assets rules so that people cannot give away property to qualify for Medicaid.
  - (3) Require a legal instrument as a condition of Medicaid eligibility to secure property owned by applicants and recipients for later recovery.
  - (4) Increase estate recoveries as a nontax revenue source for the Medicaid program while steadfastly protecting the personal and property rights of recipients and their families.

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## INTRODUCTION

The objective of this study was to document the extent to which private resources are consumed, transferred or otherwise sheltered to qualify for Medicaid nursing home benefits in the State of Washington. We selected Washington because of a State law--the Deccio Amendment--which permits unlimited transfer of assets between spouses for the purpose of qualifying for Medicaid.<sup>1</sup>

Stories alleging that people with large incomes and assets are able to qualify for Medicaid long-term care benefits by "gaming the system" have been common for years. In 1985, for example, Business Week wrote: "The same people who rely on tax planning and make use of every loophole in the tax laws to build up their assets...can use the same techniques to keep them--and still qualify for Medicaid." (Business Week, p.123) Generally, however, information about transfer of assets and other shelters has been anecdotal.

To determine the actual extent to which Washington State residents can legally preserve income and assets and still qualify for Medicaid long-term care benefits, we examined a random sample of nursing home beneficiaries over the age of 65 who were initially denied eligibility for assistance, but were later approved. Appendix A describes our methodology.

The background, legislative history and programmatic significance of the Medicaid "transfer of assets" rules were examined in the Office of Inspector General's (OIG) June 1988 national program inspection entitled Medicaid Estate Recoveries. Since publication of that report, the Medicare Catastrophic Coverage Act of 1988 (MCCA) became law (PL 100-360). The MCCA tightened Medicaid eligibility criteria in some respects and loosened them in others. For example, transfer of asset restrictions were extended from 2 years to 30 months, but the treatment of income and resources was liberalized substantially to protect community spouses. We completed this study before MCCA became law. Nevertheless, our findings and

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1 Title 74 of the Revised Code of the State of Washington provides at 74.09.532, "A person is ineligible for medical assistance...if the person knowingly and wilfully assigns or transfers cash or other resources at less than fair market value...for the purpose of qualifying or continuing to qualify for such medical care within 2 years preceding the date of application for such care: Provided, that for the purpose of qualifying for such care...this section shall not prohibit the voluntary transfer or assignment between spouses." (Emphasis added.) According to the conference committee report (synopsis as of April 9, 1981): "This bill is needed to tighten up the law to prevent people from defrauding the Medicaid program by transferring large assets immediately prior to applying for assistance." An earlier version of the bill limited interspousal transfers to \$175,000 for the principal residence and \$15,000 cash. The final version of the law did not contain these limits.

recommendations are not materially affected by the new law, but rather point to further enhancements along the lines begun in MCCA.

As a result of this inspection case study of Washington State, the Office of Inspector General will conduct a national inspection of Medicaid asset shelters to determine (1) their fiscal impact in other States, (2) the availability and distribution of information on legal asset shelters and (3) the extent of concealment, fraud and financial abuse of the elderly to qualify for Medicaid.

## FINDINGS

### CASE REVIEW: The elderly and their families transfer or shelter large amounts of money and property to qualify for Medicaid in Washington State.

We originally selected a sample of 360 cases; however, only 198 met our study criteria. All 198 were initially denied eligibility--114 or 57.6 percent were approved for Medicaid nursing home benefits within a few months. Most of these (73 percent) were denied initially because of excess or improperly transferred assets, but quickly reapplied and qualified having successfully resolved the resource problem. The box insert below highlights a few examples. Appendix B provides more examples and further details.

#### SAMPLE CASES

Case #12: Transferred \$153,500 to adult children using an irrevocable trust.

Case #41: Used \$50,000 to pay off a note on the family home which is exempt.

Case #114: Removed applicant's name from bank accounts and certificates of deposit (totaling \$206,363) and from the family residence (\$40,000).

Case #245: Transferred property with an assessed value of \$433,000 to the well spouse "to qualify the incompetent for medical assistance benefits..." according to the court order.

Of the 114 subsequently approved cases, 88 or 77.2 percent reported that they possessed liquid assets at or before the time of their initial denial totaling \$1,690,160 and averaging \$19,206 per case. Thirty-six cases or 31.6 percent had home equity totaling \$1,522,837 and averaging \$34,610. Eighteen cases or 15.8 percent had other real property totaling \$751,822 and averaging \$41,768. Finally, 45 cases or 39.5 percent had other assets totaling \$269,436 and averaging \$5,987 per case. In total, we found that 100 cases or 87.7 percent possessed 1 or more of these assets totaling \$4,234,255 and averaging \$42,343 per case.

How could these people have qualified for public assistance so quickly? Clearly, much of what they owned, such as homes, automobiles and life insurance policies, were at least partially exempt from Medicaid eligibility resource limits. A large portion of their assets must have been disqualifying, however, because all of the cases were initially denied eligibility.

In all four categories of assets, interspousal transfers account for the protection of more assets than any other known form of disposition.<sup>2</sup> Interspousal transfers explain 68.1 percent of liquid assets disposed, 46.0 percent of disposed residence value, 73.4 percent of other real property and 35.1 percent of other assets. This finding is not surprising given the "Deccio" exemption of such transfers in Washington State. Other types of disposition are much less significant and account for too little of the total assets to be analyzed confidently by type of asset. Appendix C contains the raw findings by type of asset.

Some interesting observations emerge when we examine total assets by type of disposition (Table 1). Interspousal transfers account for 59.0 percent of total assets, but only 15.8 percent of the cases. It appears that a few people are saving most of the money under this eligibility exclusion.

**TABLE 1. ANALYSIS OF TOTAL ASSETS BY TYPE OF DISPOSITION**

<u>Type Of Disposition</u>	<u>Cases</u>		<u>Disposed Amounts</u>	
	<u>No.</u>	<u>Percent</u>	<u>Amount</u>	<u>Percent</u>
<b>SHELTERED ASSETS</b>				
Transferred to Spouse	18	15.8%	\$2,498,246	59.0%
Transferred to Adult Children	9	7.9	460,078	10.9
Retained as Exempt	70	61.4	454,246	10.7
Subtotal	85*	74.6*	3,412,570	80.6
<b>CONSUMED FOR NURSING</b>				
HOME CARE	46	40.4	329,332	7.8
OTHER	5	4.4	112,054	2.6
UNKNOWN	23	20.2	380,299	9.0
NO ASSETS TO DISPOSE	14	12.3		
TOTAL	114*	100.0*	\$4,234,255	100.0

\*These columns are not additive. Each case could dispose of each type of asset by different methods which creates a duplicate count. The "total" of 114 represents all unduplicated approved cases. The dollar figures are not affected by duplication, because they accrue to the disposition categories regardless of case source.

The category "consumed for nursing home care" means the assets were used to pay for care in the manner commonly referred to as spend down of resources. Although spend down accounted for only a small percentage of total dollar dispositions, it touched over 40 percent of the people in the sample. This finding agrees with an observation in our earlier work on Medicaid estate recoveries. People with large assets who are accustomed to consulting attorneys and accountants can preserve their holdings by obtaining good professional advice, whereas people with modest

2 Case record documentation for the sample was frequently incomplete. We often were unable to determine the disposition of an asset. The type of asset disposition was shown as unknown whenever this occurred.



savings often lose what little they have to nursing home costs before they learn the ins and outs of Medicaid eligibility.

Monthly income of Medicaid nursing home recipients is important because most of it must be contributed toward their cost of care.<sup>3</sup> Data for May 1988 indicate that the average recipient in Washington State costs \$1692 per month to maintain in a nursing home. Recipient income contributes \$438 or 25.9 percent. Table 2 shows the sources and amounts of income in the 114 approved cases which were initially denied. These cases contained 151 sources of income at \$440 per source. None had investment income. All investment grade assets apparently were sheltered or consumed to qualify for assistance. Average income per case was \$583 per month, but incomes ranged from \$256 per month for 15 private pensions to \$477 per month for 107 Social Security beneficiaries.

**TABLE 2. INCOME SOURCES FOR APPROVED CASES**

Income Source	Cases		Monthly Amount	
	No.	Percent	Total	Average
Social Security	107	93.9%	\$50,999	\$477
Veterans Benefits	15	13.2	6,671	445
Railroad Retirement	6	5.3	1,563	260
Other Government Benefits	8	7.0	3,432	429
Private Pensions	15	13.2	3,834	256
<b>Total Income Sources</b>	<b>151</b>	<b>*</b>	<b>66,499</b>	<b>440</b>
<b>Total Cases</b>	<b>114</b>	<b>100.0%</b>	<b>\$66,499</b>	<b>\$583</b>

\*Because cases may have more than one income source, their percentages do not add to 100 percent, and the average total per case exceeds any component average.

Our findings on recipient income in Washington further disagree with general beliefs concerning spend down. National data on nursing home costs for 1986 indicate that 50.9 percent or \$19.4 billion was paid by private individuals without the help of insurance. This high out-of-pocket cost is cited frequently as evidence that the public is spending down their life savings in private pay nursing home status before becoming impoverished and qualifying for Medicaid. The out-of-pocket figure is derived, however, by adding all known payment sources (e.g., Medicaid, Medicare, private insurance, etc.) and subtracting the total from total nursing home costs nationally. The remainder is presumed to represent direct costs to private individuals. In Washington State, however, a considerable portion of this "out-of-pocket" cost is really the contribution of personal income to the cost of care of Medicaid recipients. This is money that recipients would have spent for normal living expenses even if nursing home care were unnecessary. It does not represent spend down of an estate.

3 Some exclusions exist, however, such as a \$25 per month personal needs allowance, a spousal allowance in some cases, money spent for third party insurance coverage, etc.

Because comparable data State-by-State are not available, we cannot say what proportion of Washington's out-of-pocket costs can be explained in this manner. We do know, however, that patient contributions to cost of care in Washington for May 1988 were 34.9 percent of the amount contributed by Medicaid. The comparable figure for an 8-month period in neighboring Oregon State was 31.2 percent. If such figures are representative of the typical situation nationally, then a large proportion of out-of-pocket costs can be explained in this manner.

### **PROJECTIONS**

Our 16.8 percent sample yielded \$4,234,255 in total assets among 114 originally denied, but subsequently approved, Medicaid nursing home cases. Projected to the universe of our sampled population, the full year figure in Washington is \$27,495,162. This is 14.3 percent of total Medicaid nursing home benefits in the State for 1986. This figure does not take into account assets sheltered by (1) the majority of Medicaid recipients who were already on assistance when we conducted the study, (2) individuals in the nonapproved category who may end up on assistance while still sheltering assets or (3) people who have not applied yet.

### **INTERVIEW RESULTS: Advice on how to qualify for Medicaid nursing home benefits is widely available; abuse is common.**

We interviewed 32 persons who give professional advice on Medicaid long-term care eligibility. We asked them about the people who seek their advice, the information they provide, the sources of their funding and the techniques used to shelter or divest assets. Our interviews involved five categories of respondents: private attorneys, legal services attorneys, social workers, Medicaid representatives and others.

### **ELDER LAW IS GROWING**

Elder law deals with all aspects of laws that affect older people. Estate planning, which traditionally emphasized what happens to property after death, focuses increasingly on planning for incapacity during life. One of the most important objectives of elder law is to help the elderly and their families take full advantage of available public long-term care funding sources. Medicaid is by far the biggest such source.<sup>4</sup> Thus, according to the November 26, 1987, New York Times: "A new breed of legal specialist is advising elderly people how to protect their financial

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<sup>4</sup> Medicaid paid 41.5 percent of total nursing home costs in 1986 compared to 6.1 percent from Medicare and all other public sources.

assets, maximize eligibility for Medicaid and avoid being impoverished by the high cost of health care, especially nursing homes."

The Washington State Bar Association has sponsored continuing education seminars on elder law. Training materials for one course advised that:

...there is no dollar limit on how much can be transferred. Nor are there any time limits or requirements. An ill spouse can transfer all of his/her interest in property to the well spouse on one day and the next day make application for Medicaid. Millions of dollars in resources can be transferred or hundreds of dollars. (Thompson and Wechsler, pps. 4-5)

A staff director of the American Bar Association's Commission on Legal Problems for the Elderly said that seminars on elder law have now been offered in every State in the country. Five years ago, these courses were available in only a few States.

We interviewed seven attorneys who actively practice health, disability or elder law. They counsel an average of eight elderly people per month on how to qualify for Medicaid long-term care benefits while preserving assets and income. Their Medicaid clients own an average of \$140,000 in assets of which \$55,000 is home equity. Although rare, some cases involve sums up to \$1 million. With certain qualifications, the attorneys said that 95 to 100 percent of these assets can be preserved while qualifying for Medicaid. Clients were referred to these attorneys by many sources, including hospital discharge planners, social workers, welfare caseworkers, medical doctors, other attorneys and clients or as a result of public speaking engagements with retiree groups.

When we asked how elder law attorneys help their clients qualify for Medicaid, we received a wide range of answers. But one response encompassed everything we were told:

#### SAMPLE MEDICAID ELIGIBILITY PLAN BY AN ELDER LAW ATTORNEY

I do everything from the beginning including all of the paperwork. For a fee of \$950, I guarantee eligibility within 30 days. Income makes no difference. I have never seen a case with too much income to qualify, because the couple's income is split in half to qualify. Washington is a spend down of income State. I change the ownership of all property including life insurance policies, car titles, mobile homes, residences and other real property, bank accounts, certificates of deposit, stocks, government or private bonds, and anything else. Property transfers go from the ill to the well spouse. If the client is competent, I do a Power of Attorney to establish authority for the transfers; otherwise, I do a guardianship and we get the court to order the transfers. If a contract or deed of trust is involved, I do an assignment so that the income becomes separate to the well spouse. I help them buy burial plots and other exempt property. I search the Code of Federal Regulations for all possible "set-asides." I help the family obtain the necessary documentation, verifications, and signatures from banks, the Social Security Administration, other private and government pension plans, etc. I even go to the nursing home for the patient's signature if necessary. Finally, I fill out the Medicaid application and go to the eligibility interview with the family. I have been doing this for 2 and 1/2 years and it is 90 percent of my practice. I fell into it by accident taking referrals from the local legal services agency which does the same thing I do, but for free, under a Federal grant.

Several attorneys said they provide free informational hand-outs on Medicaid eligibility and on how to qualify while preserving income and assets. They also refer clients who are unable or unwilling to pay their fees to the legal services agency. Some observed that qualifying for Medicaid is so easy that people do not always need professional help.

### *The Legal Arsenal Is Diverse*

We asked about specific techniques to qualify people for Medicaid nursing home benefits while preserving assets and/or income. By far the most common procedure, recommended without exception by each of the respondents, was interspousal transfers as permitted under the Deccio amendment. Statutory exclusions such as the home exemption are universally known and used. Other techniques mentioned include:

- (1) trusts, including revocable, irrevocable, craven, two pot and other variations;
- (2) purchase of exempt assets such as homes, home furnishings, color televisions and other personal property;
- (3) life estates, wherein permanent ownership is sold or given away while the right to use the property is retained;
- (4) joint tenancy with right of survivorship;
- (5) divorce;
- (6) relocation from other States to take advantage of Washington's lenient eligibility and transfer of assets rules;
- (7) intent to return;
- (8) gifts, gift plans and estate planning;
- (9) durable power of attorney and guardianships which allow others to dispose of a sick elder's assets; and
- (10) miscellaneous techniques such as care contracts or nonsupport suits.

One respondent said, "There are probably another 10 sheltering techniques; everything has been tried at one time or another." Some respondents expressed concern about the new limits on asset transfers in the MCCA. One volunteered, however, that "people will just find more creative solutions for hiding or disposing assets in a legal way."

### *Legal Services Attorneys Offer Advice*

Elderly people and their families, who need legal advice to protect assets and qualify for Medicaid, do not have to rely only on attorneys in commercial practice. We spoke to representatives of three organizations which provide free guidance.

- Evergreen Legal Services spends \$60,000 per year to assist people to qualify for Medicaid of which 90 percent is federally-funded from the Senior Citizens' Act.

- Gonzaga University Legal Assistance runs a Senior Citizens Law Project which uses law students to counsel the elderly on Medicaid eligibility and transfer of assets. Funding, which is part Federal, comes from the Area Agency on Aging, the law school and the Legal Services Corporation.
- Senior Rights counsels 20 or 30 people per month on transfer of assets to qualify for Medicaid. United Way provides the funding.

Legal services attorneys recommended the same asset sheltering techniques enumerated by their colleagues in private practice. Two of them also have private Medicaid practices helping an average of six people per month preserve a home and \$100,000. Their publicly-funded clients usually have fewer assets (e.g., a home and \$10,000 or less).

### *Social Service Agencies Provide Referrals*

Social service agencies are one step removed from the legal exercise of structuring assets to qualify people for Medicaid. Although they provide simple advice on sheltering resources, their main function in this arena is to refer anyone with property to a private or legal services attorney.

We interviewed eight representatives from a variety of agencies including the Red Cross Aid to Aging Program, the Foundation for the Handicapped, Harborview Hospital, the King County Prosecutor's Office and the King County Division of Aging (the local Area Agency on Aging).

These agencies counsel 895 clients per month on senior issues including Medicaid eligibility and legal referrals. They reported the average assets of clients seeking Medicaid eligibility at \$34,000, not counting homes. The agencies are well publicized and often refer families to each other. A few of their services are highlighted:

- The Foundation for the Handicapped manages elderly clients' assets. They purchase room furnishings, clothing, television sets, stereos, chairs, etc., with a client's assets to assure his comfort in the nursing home while simultaneously qualifying him for Medicaid benefits.
- Harborview Hospital staff counsel 5,000 elderly patients per year. They complete and submit Medicaid applications for everyone they think is eligible.
- The King County Division of Aging annually spends approximately \$2 million dollars (half Federal) to assist 2,200 elderly people. Medicaid eligibility counseling is an important part of the service, including referrals to legal services.

Although referrals are their main contribution, some Medicaid counseling is quite sophisticated. For example: "We do suggest to the elderly that if they have brothers or sisters to whom they want to leave estates, they should direct the estate into a trust instead of leaving it directly through a will. Otherwise, the sibling might lose Medicaid eligibility."

### *Washington's Medicaid Agency Helps People Shelter Assets*

We interviewed five representatives of the Department of Social and Health Services (DSHS)--Washington's single State Medicaid agency. They included experts on eligibility policy, eligibility determination, trusts and adult protective services.

Medicaid staff routinely advise applicants with excess assets to exhaust their resources or consult an attorney. Individual eligibility workers may suggest specific asset protection techniques--"it's okay to transfer resources to a spouse" or "intent to return is so liberal, DSHS does not even question it." The box insert below highlights some examples from cases in our sample. A private attorney told us the help an applicant receives depends entirely on the "luck of the draw" among caseworkers. One kind of eligibility worker "believes his job is to help qualify people for assistance...the other kind says 'go away and stop ripping off the system.'"

Supervisors and workers are very aware of asset shelters. They cited the same techniques listed by private and public attorneys. A financial services specialist, who monitors cases handled by eligibility workers, said that 98 percent of married applicants have transferred at least a bank account. "Most retired couples coming on for the first time have at least \$10,000. Some have so much we don't know how much they have." One case had four single-spaced typed pages listing transferred assets. Another respondent told us 20 percent of applications begin with excess resources ranging up to \$100,000. A third said, "The idea to spend it on a spouse's long-term care costs never arises." In fact, some of the largest asset shelters are done to qualify for Washington's home and community-based care program (COPES)--not because care is needed, but to obtain the peripheral benefit of drug reimbursement.

Approximately 2 or 3 percent of Washington's Medicaid nursing home caseload involves trusts. A staff attorney told us she reviews one trust case per month averaging \$100,000 to \$200,000. She also does personal injury settlements which, although they do not usually affect the elderly, do involve Medicaid long-term care. These settlements are much higher, involving lump sums and annuities of \$1.5 to \$3.0 million. Although people have these assets, "They still want Medicaid to pay all

medical costs." The trusts have very precise language. They quote the Federal laws and regulations, including the Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1985<sup>5</sup> which was supposed to make trusts much less effective as Medicaid shelters. The language in the trusts is "virtually identical. There is no doubt the private attorneys are sharing notes." Sample trusts are passed out at lawyers' seminars. Although the Attorney General's office tries to attack the trusts, they have had little success. Administrative law judges reportedly are reluctant to challenge trusts set up through Superior Court, and the Health Care Financing Administration (HCFA) has not provided the necessary guidance on interpreting the COBRA Medicaid Qualifying Trust Law.

### *Nursing Home Representatives Concur*

We talked to several nursing home administrators and private long-term care counselors. Representatives of the nursing home industry confirmed the widespread use of interspousal and other transfers. They said trusts, intent to return, commingling of assets<sup>6</sup> and gifts, such as deeding over the house or vacation property to the children, are common. Each said that Medicaid eligibility staff and other social workers counsel people on how to transfer assets while qualifying for Medicaid.

### *Fraud and Financial Abuse Were Common Themes*

Nearly everyone we interviewed knew of people who either misrepresented their financial situation to qualify for Medicaid or were expropriated by others and forced onto public assistance. For example, one attorney told us that clients ask: "Will I get caught? Do they [i.e., Medicaid staff] check and verify what I tell them? Do they prosecute?" A nursing home administrator said, "10 percent of the people we see involve a little bit of dirty wash." Often, however, the perpetrator is not a Medicaid applicant or recipient, but rather a friend, relative or unrelated third party with a pecuniary interest in the infirm elder's estate.

Financial abuse of the elderly, according to study respondents, is "commonplace," "bigger than anyone thinks," "rife." We heard many stories about people forced onto Medicaid when their income or resources were taken. For example:

- A dean of admissions and his CPA son "took grandma's Cadillac and rental houses."

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5 42 U.S.C. 1396a(k)

6 Commingling of assets is the practice of mixing the income or assets of a nursing home patient (especially Social Security income) with those of the personal representative so that money is lost which should pay the costs of care.

- Children became payees for their parents' income and then refused to pay the nursing home.
- The son of an Alzheimer's patient neglected to report \$65,000 because his mother "intended him to have the money."
- A contractor fraudulently sold \$40,000 of remodeling to a frail old woman, went bankrupt, and was allowed by the Bankruptcy Court to pay back 5 cents on the dollar.

Although government assumes the cost of care in such cases, detection, enforcement and recovery are very difficult. Usually, there is no hard proof. Often the victim is incompetent or will not testify against a loved one.



## RECOMMENDATIONS

### RECOMMENDATION # 1--DOCUMENTATION OF LEGAL SHELTERS

**FINDING:** During 1 year, 57.6 percent of Medicaid nursing home applications denied in Washington State were on assistance within a few months. Of these cases, 87.7 percent originally possessed liquid assets, homes, other real property, and other assets totaling \$27.5 million or 14.3 percent of the State's annual Medicaid nursing home budget. To qualify themselves for public assistance, 15.8 percent of these cases transferred 59.0 percent of the assets to spouses. Conversely, only 7.8 percent of the originally available assets were spent down for care by 40.4 percent of the cases.

**RECOMMENDATION:** The Washington State Medicaid agency should:

- improve case record documentation to assure that asset values and dispositions are recorded in all cases and
- implement an information storage and retrieval system to measure the impact of interspousal transfers, trusts, purchase of exempt assets and other shelters on the availability of Medicaid resources for poor people.

**IMPACT:** These improvements will enable State and Federal officials to determine the full extent and impact of shelters.

The following findings and recommendations are repeated from Medicaid Estate Recoveries, with minor alterations to reflect changes in the Medicare Catastrophic Coverage Act.

### RECOMMENDATION #2--ELIGIBILITY AND TREATMENT OF RESOURCES

**FINDING:** Some HCFA, SSI and State Medicaid policies promote retention of assets during Medicaid eligibility while others encourage precipitous liquidation of property with concomitant losses in value. Assets retained by recipients, in the absence of estate recovery programs, pass unencumbered to heirs at the expense of the taxpayers. Assets liquidated, sheltered or concealed to obtain eligibility are lost as a long-term care funding resource also. Incapacitated elderly people are sometimes financially abused by people who want to take their property, while at the same time, qualifying them for Medicaid nursing home benefits.

**RECOMMENDATION:** Change Medicaid rules to permit families to retain and manage property while their elders receive long-term care. Specifically:

- Eliminate SSI "intent to return" rules as they apply to Medicaid long-term care recipients.

- Reinststate and broaden the "bona fide effort to sell" exemption.
- Allow Medicaid recipients to retain more income-producing property such as "contracts of deeds" or rental homes.
- Require agreement to liens and estate recoveries as a condition of Medicaid eligibility for people with property.
- Encourage State Medicaid programs to protect recipients and their property from financial exploitation through conservatorships, legal representation and property management when necessary.

**IMPACT:** This policy would ease the financial impact of catastrophic long-term care costs on the elderly and their families, giving them time to cope with the problem. Total Medicaid costs would decline as estate recoveries increase.

### **RECOMMENDATION #3--TRANSFER OF ASSETS**

**FINDING:** Despite (1) almost universal State implementation of the TEFRA authority to restrict transfers of assets for the purpose of obtaining Medicaid eligibility and (2) mandatory transfer of assets restrictions required by MCCA, people are still able to give away, or otherwise shelter, property to qualify for assistance. This may be done by using the legal "loopholes" recommended in law journal articles or by deceit and concealment.

**RECOMMENDATION:** Strengthen the transfer of assets rules so that people cannot divest themselves of property to qualify for Medicaid. Specifically:

- Improve State verification of property and transfers.
- Clarify that the "transfer of assets" restrictions apply to all property including that which is, or would be, exempt from eligibility determination.
- Expressly prohibit the transfer of property to spouses and other dependents which is permitted under current law.
- Extend the current 30-month "look-back" period to 5 or more years.
- Have HCFA publish regulations on transfer of assets.

**IMPACT:** More property will be retained by recipients to reimburse Medicaid for their cost of care after they and their dependents are no longer in need.

#### **RECOMMENDATION #4--LIENS**

**FINDING:** State Medicaid programs need to track property owned by recipients and ensure that it is not transferred or otherwise disposed before recovery of Medicaid benefits can be accomplished. Liens achieve these objectives most efficiently. While permitting liens, TEFRA placed so many qualifications on their use that only two States have employed liens to secure property for recovery of benefits correctly paid.

**RECOMMENDATION:** Require a legal instrument as a condition of Medicaid eligibility to secure property owned by applicants and recipients for later recovery. Specifically:

- Make liens, or some other form of encumbrance, a condition of eligibility so that the recipient's interest in any property solely or jointly owned will inure, up to the cost of care paid by Medicaid, to the Medicaid program when neither the recipient nor dependents need the property further.
- Promote home equity conversion by using liens, "voluntary mortgages," "open-ended mortgages" and accounts receivable to let people extract their equities gradually while they receive assistance.

**IMPACT:** Mandatory liens would secure the State and Federal Government's investment and permit Medicaid recipients to retain needed property while receiving highly expensive, but essential, care.

#### **RECOMMENDATION #5--ESTATE RECOVERIES**

**FINDING:** Less than half of the States pursue Medicaid estate recoveries for benefits correctly paid. Of those which do, a few are very effective, but most are not. The HCFA and State Medicaid managements place little emphasis on retention of recipient property or estate recoveries. The TEFRA authority for estate recoveries, as for liens, is only voluntary. Many State staff believe that TEFRA limitations hobble estate recoveries without safeguarding legitimate recipient interests.

**RECOMMENDATION:** Increase estate recoveries as a nontax revenue source for the Medicaid program while steadfastly protecting the property rights of recipients and their dependents. Specifically:

- Make estate recovery programs mandatory like other forms of third party liability.
- Provide technical assistance on estate recoveries, so that States can implement them quickly and easily to generate an immediate cash flow for the Medicaid program.
- Promote awareness of the importance of real property ownership and estate recoveries for Medicaid funding.

- Allow estate recovery of benefits received before age 65.
- Permit estate recovery in cases of joint tenancy with right of survivorship.
- Require spousal and dependent recoveries upon death or seniority (of a minor child).

**IMPACT:** Based on Oregon's experience--even under current restrictive laws, regulations and policies--estate recoveries can recoup 5.2 percent of Medicaid nursing home costs, 5.0 percent of Medicaid payments to people over age 65 and 1.7 percent of total Medicaid vendor payments. With enhanced legal authorities and greater programmatic emphasis, the contribution of estate recoveries to Medicaid's program resources could be truly staggering.

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## METHODOLOGY

Background

We focused the study sample on cases at the point of application for Medicaid assistance and determination of eligibility. We reasoned that cases initially denied, but later approved for assistance, would yield the most transferred or sheltered assets. We sampled only for such cases.

This method overlooked all assets sheltered by everyone already on Medicaid. For example, assets sheltered by people who successfully availed themselves of the counseling and advice discussed in the "Interview Results" section of this report were not measured. Such people qualified immediately for Medicaid and, therefore, could not have fallen into our sample of denied and subsequently approved cases. The total amount of assets transferred and sheltered by the Medicaid nursing home population in Washington State is left to the reader's inference and to future study.

Sample Selection

Washington's Medicaid agency provided a valid random sample of recipients over the age of 65 who were initially denied eligibility for nursing home assistance, but were later approved. Based on data provided earlier, we originally estimated the universe of annual denied cases at 3000. We anticipated that 75 to 85 percent of these cases would have reapplied and qualified for Medicaid by the time of our case record reviews. Based on preinspection research, we expected approximately half of the subsequently approved cases to have divested or otherwise sheltered personal and/or real property to achieve eligibility. Given these parameters, a sample of 358 cases would have yielded a confidence level of 90 percent and precision of 10 percent. We actually selected a sample of 360 cases. Unfortunately, only 198 cases met the study criteria because the State was unable to provide a "clean" sample. A total of 162 cases had to be dropped for a variety of reasons including "deceased," "nonnursing home," "under age 65," etc. Adjusting for a sampling period of 11 months instead of a year (July 1987 through May 1988) and for a factor of 45 percent dropped cases, the actual universe from which we sampled was reduced to 1182 cases.

Our 16.8 percent sample yielded \$4,234,255 in total assets among 114 originally denied, but subsequently approved, Medicaid nursing home cases. Projected to the universe of our sampling population, the comparable figure in the Washington State Medicaid nursing home caseload would be \$25,203,898. This, however, is an 11-month figure. If we add a month to estimate an annual total, we get \$27,495,162. Thus, projecting from our sample, approximately \$27.5 million in assets were sheltered or consumed to qualify.

### Methodological Caveats

(1) Because our review followed the sampling period by only a few weeks, other cases within the sample probably have been or will be approved after our review. Since they are not reflected, our findings are conservatively low.

(2) Sixteen of the 36 homes owned by sample recipients had no values reported in the case record. Because homes are usually exempt, their values often are not recorded. To estimate the total value of home equity in the sample, we assigned the average value of the 20 homes with values recorded to the 16 without values recorded. Total values in the text, charts and tables reflect this extrapolation.

(3) Other real property values were extrapolated by the same methodology used for home values. Sixteen of the 18 other properties had values recorded in the case record.



## SAMPLE CASES

Case #12: Transferred \$153,500 to sons with an irrevocable trust on November 25, 1986. Denied assistance October 5, 1987. Case reconsidered, approved briefly and then closed. This case illustrates the State's efforts to defeat trust shelters.

Case #41: Denied August 17, 1987. Applicant and spouse separately held liquid assets of \$235,000. The applicant used \$50,000 of his \$80,000 to pay off a note on the couple's home. Some of his remaining \$30,000 was evidently used to pay for care, but the case record is unclear. Insurance in the amount of \$8000 was transferred to the wife. The case was approved September 14, 1987.

Case #114: Denied December 18, 1987. Disqualifying bank accounts and certificates of deposit were in the applicant's and spouse's names. The applicant's name was removed from the bank accounts and certificates of deposit (totaling \$206,363) and the family residence (\$40,000) as of December 1987. The case was approved for nursing home care on February 1, 1988.

Case #193: Denied August 18, 1987. A home valued at \$84,900 was transferred to the spouse by quitclaim deed on July 2, 1987. Personal effects of \$15,000; automobiles worth \$5,775, and liquid assets of \$222,865 were transferred to the spouse with a Durable Power of Attorney dated April 14, 1986. The assignment of assets document cites the "Deccio Amendment" (RCW 74.09.532) by saying that it "expressly allows the transfer of property from one spouse to the other for the purposes of qualifying for medical assistance from the state to pay for full time residential care and services in a medically supervised residential care facility." The case was approved on October 20, 1987 with an effective date of July 1, 1987.

Case #245: Denied September 17, 1987; reapplied and approved on October 1, 1987. Property with an assessed value of \$433,000 was transferred to the spouse on June 26, 1987 by court order. The purpose of the court order was "to cause all but \$2,000 of the incompetent's assets to be transferred to the incompetent's husband, [spouse], to qualify the incompetent for medical assistance benefits under RCW 74.09.532 [Deccio Amendment]." The applicant also owned and transferred property in another county for which we do not have an assessed value. In addition, the applicant had 9 bank accounts, including two in banks outside the United States. We were able to find the value of only one of these accounts which was \$12,952. The guardian for this case was given the following advice by the eligibility worker: "Our state office in Olympia has recently changed the way we look at resources of husband and wife. Now, even if there has been a court approved gift of all property and the bank account still has both names on it, we will count one-half as being available to our client. For this reason you may want to remove [applicant's] name from all bank accounts, deeds, trust accounts, stocks, etc. and reapply."

Case #263: Denied February 16, 1988, but approved March 1, 1988. A half interest in a home worth \$33,100 and \$149,000 in liquid assets were transferred to the spouse. The quitclaim deed for the residence explained: "The Grantor [name of Medicaid applicant]; for and in consideration of love and affection; conveys and quit claims to [name of spouse] all interest in the following described real estate." The case record also contained a letter from Metropolitan Savings and Loan which said: "This letter is to inform you that as of today, February 18, 1988, the [Medicaid applicant] has no legal claim to any funds held with Metropolitan Savings and Loan. The account number [X] has been closed. The funds in the aforementioned account have been transferred to account number [Y] in the name of [the spouse] as an individual account with sole ownership of said funds."

### TRUST CASES

In addition to our sample of nursing home cases, we originally intended to analyze examples of trust cases. We expected, based on preinspection findings, to be able to obtain such examples by requesting them when we visited the local community service offices to conduct our case record reviews. Unfortunately, the Medicaid agency does not have a systematic way to identify trust cases. We had to rely on the memory of eligibility workers. Most of the cases identified were not Medicaid cases, or the trust document did not have a list of assets attached. Therefore, we dropped the analysis of specific trust cases from this report. Narrative analysis and anecdotes of trust issues are found in the "Interview Results" section of this report. This analysis is based on our interview with the trust specialist in the Department of Social and Health Services's Office of Attorney General.

ASSET DISPOSITIONS BY TYPE OF ASSET

Tables C-1 through C-4 indicate the disposition of the four categories of resources reviewed. The reader's attention is directed to the fact that the detailed breakdowns of residential and other real property disposition are extrapolated to reflect estimated values for properties the value of which were unreported.

**TABLE C-1: DISPOSITION OF LIQUID ASSETS IN APPROVED CASES**

Type of Disposition	Cases		Disposed Amounts		Average per Case
	No.	Percent	Amount	Percent	
Transferred to Spouse	15	13.2%	\$1,151,521	68.1%	\$76,768
Transferred to Adult Children	2	1.8	201,500	11.9	100,750
Consumed for Nursing Home Care	38	33.3	148,503	8.8	3,908
Retained as Exempt	16	14.0	22,621	1.3	1,414
Unknown	17	14.9	166,015	9.8	9,766
No Liquid Assets to Dispose	26	22.8	-----	---	-----
Total	114	100.0%	\$1,690,160	100.0%	\$14,826
Cases with Liquid Assets	88	77.2%	\$1,690,160	100.0%	\$19,206

**TABLE C-2: DISPOSITION OF RESIDENCES IN APPROVED CASES\***

Type of Disposition	Cases		Disposed Amounts		Average per Case
	No.	Percent	Amount*	Percent	
Transferred to Spouse	11	9.7%	\$700,704	46.0%	\$63,700
Retained as Exempt	8	7.0	267,487	17.6	33,436
Unknown	5	4.4	198,256	13.0	39,651
Transferred to Adult Children	4	3.5	147,408	9.7	36,852
Consumed for Nursing Home Care	5	4.4	112,728	7.4	22,546
Other	3	2.6	96,254	6.3	32,085
No Residence to Dispose	78	68.4	-----	----	-----
Total	114	100.0%	\$1,522,837	100.0%	\$13,358
Cases with Residences	36	31.6%	\$1,522,837	100.0%	\$42,301

\* This table includes actual values of residences when available and average values for homes which had no value recorded in the case record.

**TABLE C-3: DISPOSITION OF OTHER REAL PROPERTY  
IN APPROVED CASES\***

<u>Type of Disposition</u>	<u>Cases</u>		<u>Disposed Amounts</u>		<u>Average per Case</u>
	<u>No.</u>	<u>Percent</u>	<u>Amount</u>	<u>Percent</u>	
Transferred to Spouse	5	4.4%	\$551,436	73.4	\$110,287
Transferred to Adult Children	2	1.8	89,770	11.9	44,885
Consumed for Nursing Home Care	7	6.1	62,366	8.3	8,909
Retained as Exempt	2	1.8	25,285	3.4	12,643
Other	1	.9	15,000	2.0	15,000
Unknown	1	.9	7,965	1.1	7,965
No Other Real Property to Dispose	96	84.2	-----	----	-----
<b>Total</b>	<b>114</b>	<b>100.0%</b>	<b>\$751,822</b>	<b>100.0%</b>	<b>\$6,595</b>
Cases with Other Real Property to Dispose	18	15.8%	\$751,822	100.0%	\$41,768

\* This table includes actual values for other real property when available and average values if no property value was recorded in the case record.

**TABLE C-4: DISPOSITION OF OTHER ASSETS IN APPROVED CASES**

<u>Type of Disposition</u>	<u>Cases</u>		<u>Disposed Amounts</u>		<u>Average per Case</u>
	<u>No.</u>	<u>Percent</u>	<u>Amount</u>	<u>Percent</u>	
Retained as Exempt	58	50.9	\$138,853	51.5	\$2,394
Transferred to Spouse	5	4.4	94,585	35.1	18,917
Transferred to Adult Children	2	1.8	21,400	7.9	10,700
Consumed for Nursing Home Care	2	1.8	5,735	2.1	2,868
Unknown	1	.9	8,063	3.0	8,063
Other*	1	.9	800	.3	800
No Other Assets to Dispose	45	39.5	-----	----	-----
<b>Total</b>	<b>114</b>	<b>100.0%</b>	<b>\$269,436</b>	<b>100.0%</b>	<b>\$2,363</b>
Cases with Other Assets	69	60.5%	\$269,436	100.0%	\$3,904

\* In this case, the assets were transferred to nonrelatives.