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Billions leak through loopholes in state law

KINGSTON, N.Y. -- "No way around it, nursing homes are a huge expense," estate-planning lawyer Phillip Tribble told about a dozen people sitting in a nondescript Holiday Inn meeting room just off a Thruway exit in this small Hudson Valley city one recent afternoon.

"One of the ways to pay for it is out of your own pocket," he told the group, most around retirement age. "But there are other options.''

It's the "other options" that the people wanted to know about at this seminar, one of a regular series Tribble's law firm and scores of others hold across the state.

Tribble is an "elder-law attorney," someone well versed in the details of the state's Medicaid law. What he was selling that day, as thousands of other lawyers are every day in the state, are legal ways for people to hold onto their assets, while still meeting the legal definition of poor, which they have to do to qualify to have taxpayers pay for their nursing-home care.

The financial stakes are huge, for the individuals and for taxpayers.

But relatively few people -- less than 15 percent of the 110,000 nursing-home residents in the state -- pay for it themselves. For more than three-quarters of the residents, taxpayers pay the bill through the Medicaid program.

That translates into a whopping $7.4 billion this year.

"By default, Medicaid has become the main insurer of long-term care in this country," said Carol Raphael, president of the Visiting Nurse Service of New York, the largest provider of home care in the country. "That was not the intention when it was created in 1965."

To qualify, a nursing-home resident on Medicaid can have only $3,950 in assets and $50 a month in income. The resident's spouse who is still living in the community can have $2,319 in monthly income and between $74,820 and $92,760 in assets, plus a house and a car.

But there are legal ways around those limits.

For instance, there is a technique called "spousal refusal," where someone headed to a nursing home can transfer all of his or her assets to a spouse -- who can then refuse to pay for the wife or husband's care, making him or her "poor" under the Medicaid definition.

"You just sign a piece of paper. Even if they have a million dollars," Audrey Toussaint, another elder-law attorney, said on a radio show.

Or here's another tip that Tribble gave to his audience. Say you gave your son $800,000 35 months ago. If you applied for Medicaid today, you would have to disclose that gift, because the law requires you to report all financial transactions within the past 36 months. That would make you ineligible for Medicaid for more than the next five years.

But if you wait just two more months, it would be beyond the so-called "look-back period," and you wouldn't have to disclose it. You would be eligible for taxpayer support immediately.

"They never see the $800,000 gift," Tribble said.

Some see moves like this as a taxpayer ripoff.

"It's absurd. It's taxpayer subsidy of private inheritance," said Carl Young, president of the New York Association of Homes and Services for the Aging. Many of the group's members are nursing-home owners strapped because the Medicaid payments they get fall short of meeting the cost of care.

Young himself is facing a potential problem trying to arrange care for his mother.

"We could have her deed over to me and my brother her house, and then she'd be eligible for Medicaid sooner," he said.

But then he added, "I do that, I'm the biggest hypocrite in Albany, and that's saying something."

Working the system

A group looking at the Medicaid system last year for Gov. George Pataki found a couple of instances of rich people using loopholes to transfer the cost of care of their spouses to taxpayers.

In Nassau County, according to a report issued by the group, a man wanted to donate $1 million to a university to have a bench named in his memory. He refused to pay for the care of his wife in a nursing home so he would have the cash to make the donation.

In another case cited in the report, the wife of a New Jersey man who was injured while on a business trip in Suffolk County had his assets transferred to her. She then refused to pay for his care, most of which was provided in Rockland County. New York got stuck for the $800,000 his care cost. If he had been hospitalized in his home state, his wife's assets, under New Jersey law, would have been counted in determining whether he was eligible for Medicaid.

Pataki has proposed closing the loopholes that allow for such situations. If they are closed, "people with financial means will not be eligible for Medicaid, except under very limited exceptions authorized under federal law," the Medicaid-study group said.

But there's another way to look at it.

"Take money away from the woman who's left (at) home? I think that's unbelievable," said Michael Burgess, executive director of the New York Statewide Senior Action Council. He said that impoverishing the spouse outside the nursing home would just make two people dependent on taxpayers instead of one.

'Can't sustain a system'

There are no recent figures on how many nursing-home residents shelter assets or how much money is involved. Young said studies in other states show that the numbers are probably substantial.

But Howard Krooks, chairman-elect of the Elder Law section of the state Bar Association, which opposes tightening the eligibility rules, pointed to a 1993 study done by the federal General Accounting Office that estimated only one in 10 nursing-home residents transferred assets.

He also defended the rule that allows spouses to keep their assets while Medicaid pays for the care of an ailing partner.

"It prevents the healthy spouse from being pauperized," he said. "If they had to spend all of their assets (on the ailing spouse), then most likely they would become a public charge."

Although some wealthy people do manage to keep hundreds of thousands of dollars for themselves or their heirs, most trying to shelter some of their assets are of far more modest means, said Krooks, who is based in White Plains.

"This really is a middle-class issue," he said. "Most of my clients have two-hundred, three-hundred thousand dollars in assets."

All sides agree with the Pataki task force's idea that steps need to be taken to encourage people to buy long-term-care insurance. The state Long Term Care Partnership offers policies that protect assets, but so far has sold only about 40,000 policies, too few to have much of an impact. Tax breaks or other incentives are needed, advocates say.

"If we don't change, there aren't going to be enough taxpayers to keep the system viable," Young said. "You can't sustain a system that gets 70 percent of its money from government. That's a train wreck."

Meanwhile, people continue to consult lawyers on how to take advantage of the current system. Those at Tribble's seminar learned that his firm will prepare a Medicaid application for them for $4,700, and set up an asset-protection trust for an additional $3,100.