The Nuts and Bolts of a Medicaid Crisis Plan

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Planning for Care at Home

- No look back period/no transfer penalty
- Coordinate planning for eventual nursing home needs
- Consider exempt transfers and/or purchases
- Determine whether waivered services are needed
- Use Pooled Trust for excess income/income spend down
- Choose your program carefully (Lombardi vs. home care vs. CDPAP)
- Medicaid application without Schedule A

Planning for Care at Home (con't.)

- Consider consequences of planning for care at home on future chronic care/nursing home eligibility
  - While there is no look back period for home and community based Medicaid (and, as a result, no transfer penalty/penalty period), if chronic care Medicaid is needed within 5 years of any transfers made as part of the HCBM planning and application process, those transfers will impact eligibility for chronic care Medicaid

No Homestead – Buying a Life Estate

- Deficit Reduction Act of 2005 stated that a purchase of a life estate by an A/R will be a transfer for less than full value (a gift) unless A/R resided in home for 1 year after purchase
- Even though value of life estate is disregarded when calculating value of assets of A/R, the life estate still does have a value
- 96 ADM 08, Attachment V provided the life estate valuation figures

No Homestead – Buying a Life Estate (con't.)

- For example, 80 year old using this chart could acquire a life estate for 0.43659 of the value of the property
- However, radical change in 2011
- As part of the now-abandoned Expanded Estate Recovery (thank you David Goldfarb, Amy O'Connor and all our Legislative Committee!), life estates were now to be valued using IRS Table S, which took into account the applicable federal midterm rate for the month of transfer

No Homestead – Buying a Life Estate (con't.)

- 11 OHIP/ADM 8 provides that life estates are now to be valued by determining the IRC § 7520 rate, looking at Table S, and then applying the appropriate factor
- So, in September 2012, that same 80 year old could acquire a life estate for 0.07902 of the fair market value of the property
  - September 2012 had as its 7520 rate 1.00%

No Homestead – Buying a Life Estate (con't.)

- Old way:
  - $500,000 home x 0.43659 = $218,295
- New way:
  - $500,000 home x 0.07902 = $39,510
- As a result, this is now a less attractive option for planning simply because the amount permitted to be transferred is significantly smaller
- But, it remains a mid-range planning tool

The True "Crisis" Plan: Promissory Note/Gift Planning

- Because the Deficit Reduction Act of 2006 changed the date on which the Penalty Period for any transfer begins, the traditional "half-a-loaf" planning that was done pre-February 2006 is no longer possible
- "Half-a-loaf" had an applicant gifting away approximately ½ of his/her assets, immediately triggering the penalty period, retaining the balance to pay for care during the running of the penalty period
  - At the end of the penalty period, retained assets would have run out and Medicaid would start paying for care

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Promissory Notes (con't.)

- If traditional Half-A-Loaf is done, the applicant would spend down the retained half (arriving at the $14,250 of permissible retained assets), ***then*** the penalty period would run
- So, the post-DRA modification to the Half-A-Loaf plan is to gift away some, loan away the other

Promissory Notes (con't.)

- Remember, penalty period runs on the LATER of the date when the A/R:
  1. is resource eligible;
  2. is income eligible;
  3. requires nursing home level of care;
  4. has filed a Medicaid application; and
  5. has no other ineligibility period outstanding

Promissory Notes (con't.)

- A promissory note is "an unconditional promise, signed by the maker, to pay absolutely and in any event a certain sum of money either to, or to the order of, the bearer or designated person."
- To implement a gift-note plan, the attorney must draft a DRA compliant promissory note to evidence the loan made by the A/R, which will be repaid with interest over a specified period of time.

Promissory Notes (con't.)

- DRA modified the rules governing the purchase of promissory notes, loans and mortgages. The DRA amends Social Security Act Section 1917(c)(1) by adding new rules governing the purchase of these investments (see Section 6016(c) of the DRA). New York adopted these rules (see 06 OMM/ADM-5)

Promissory Notes – Critical Information Needed

1. Medicare Cut Off Date
2. Assets
3. Prior Transactions Review
4. Income
5. Cost of Care
6. Outstanding Liabilities
7. Need for Retained Assets
8. Liquidity of Assets
9. Penalty Period Divisor

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Promissory Notes – Critical Information Needed

- Medicare Cut Off Date: eligibility for Medicaid cannot occur until medical expenses exceed income; if A/R is having care at nursing home paid for through Medicare, then A/R does not have medical expenses that exceed income
- Prepare A/R and family for the uncertainty of this – when it happens on the 2d day of a 31 day month, a nursing home liability will accrue for the remainder of the month

Promissory Notes – Critical Information Needed

- Assets: *Everything that is not exempt is counted*. Everything.
  - Security deposits at the nursing home
  - Life insurance cash values if owned by A/R
  - Stock (even the 16 shares someone owns as a result of life insurance companies going public years ago)
- Be prepared to prove exclusions/exceptions should apply (i.e., bank account held jointly with another is considered the A/R unless it can be proven A/R did not contribute)

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Promissory Notes – Critical Information Needed

- Review of Prior Transactions. Someone who gifted away $50,000 during the last 5 years is going to have a very different Promissory Note/Gift Plan than someone who has not made any gifts
- Be familiar with your LCDSS practices ($2,000 level of asset review? Review of deposits and withdrawals or just withdrawals?)

Promissory Notes – Critical Information Needed

- Income. Get proof of income (don't take their word for it). Evaluate what is the gross income and what are the offsets
  - Income tax withholdings are not permitted – get them to stop
  - Health Insurance premiums are permissible, but identify true cost
  - Watch for 13th pension payments
  - Consider Long Term Care Insurance payments
  - RMDs and other distributions from retirement

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Promissory Notes – Critical Information Needed

- True Cost of Care. Prove it. Is the rate the A/R or family tells you the private room rate? The semi-private room rate? Does it matter? Does the price quoted include the 7% assessment or is that additional? Will additional medical expenses be incurred (*i.e.*, what health insurance does the A/R to have cover prescription costs)?

Promissory Notes – Critical Information Needed

- Assess Outstanding Liabilities. Satisfying outstanding liabilities is permissible spend down if those liabilities belong to A/R. Include in your evaluation of "liabilities" permissible expenditures (home repairs, etc. if there is a Community Spouse), your legal fees and preneed funeral arrangements, if needed. Get those spent.
- Outstanding medical bills can be used to offset excess assets.

Promissory Notes – Critical Information Needed

- Gauge A/R and Family's need for level of retained assets. Just because A/R is allowed to keep $14,250 doesn't mean the plan will work out that way.
  - In addition, prepare the family for the fact that the $14,250 (or a large part of it) may be illiquid resources that will then need to be liquidated.
  - Third Quarter plan may mean less assets needed (income tax refund and/or NH Assessment credit may mean influx of cash within 6 months)

Promissory Notes – Critical Information Needed

- Assess Liquidity of Assets. Depending on how your pot of excess assets are comprised, your planning options may be limited.
  - How fast can you liquidate stock? Cash in life insurance or take a loan against it?
  - Can you annuitize an annuity? Is IRA in payout?
  - If your entire pot of excess resources are illiquid, does borrower (child) have sufficient cash to repay note?

Promissory Notes – Critical Information Needed

- Remember Your Penalty Period Divisor. Just because it's a Suffolk County resident, doesn't mean we're using Suffolk County divisor.
  - GIS 12 MA/003 and 96 ADM 8, page 15 tell us that the regional rate for the region in which the facility is located will be used to calculate penalty periods
- Therefore, if an application is going into Suffolk County based upon residency but for care in Albany, use $8,540 **and not** $11,849

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Get To Work!

- Draft your Note (partially)
- Calculate your Gift
- Calculate your Penalty
- Calculate your Loan
- Finalize your Note
- Direct A/R and Family on transfers
- Verify transfers
- Complete Medicaid Application
- Supervise repayment

Drafting the DRA Compliant Promissory Note

- DRA rule: Funds used to purchase a promissory note, loan or mortgage are considered to be a transfer of assets unless all of the following criteria are met:
  - The repayment term is actuarially sound (see the actuarial standards offered by the Office of the Chief Actuary of the Social Security Administration);
  - The payments are made in equal amounts during the term of the loan, with no deferral of payments and no balloon payments; and
  - The promissory note, loan or mortgage prohibits the cancellation of the balance upon the death of the lender.

Drafting the DRA Compliant Promissory Note (con't.)

- A promissory note complying with the DRA criteria will be considered a bona fide transaction, and the purchase of such an asset will not be classified as a transfer of assets.
- Given the clear language of the DRA, the drafting attorney will want to ensure that these criteria are met on the face of the note

Drafting the DRA Compliant Promissory Note (con't.)

- Additional drafting tips:
  - Include language stating that the note is non-negotiable, non-assignable and otherwise non-transferable by the Promisee
  - This defeats the argument that the note could be considered a negotiable instrument (see Medicaid Reference Guide at page 296), and thus an available resource to the A/R, by means of potential resale of the investment to a third party.

Drafting the DRA Compliant Promissory Note (con't.)

- Additional drafting tips:
  - Exclude otherwise standard note terms:
    - acceleration language in the event of default;
    - increase in interest rate upon default;
    - authorizing the collection of attorneys fees in the event of default;
    - other terms that would make the note attractive to a third party.
    - Include language expressly prohibiting pre-payment of the loan.

Our Client

- On October 1, Daughter and Agent under Power of Attorney that you drafted a year ago comes in to talk about your client, Mom
- Mom is eighty-two (82) years of age, widowed
- Mom is currently in a skilled nursing facility in Albany after residing in an assisted living facility in the area where she moved to several years ago from Long Island
- Daughter tells you Mom has $285,000 in the bank

Our Client (con't.)

- Daughter tells you Mom receives $1,805 of Social Security and $500 of pension payments each month
- Daughter tells you that it will cost $385 per day
  - You know that this facility charges $385 PLUS the 7%; remember – the nursing home assessment is part of the applicant's overall monthly medical expenses and can be claimed on the individual's personal income tax return for the year (see New York State Department of Taxation Form IT-258)

Our Client (con't.)

- You review old notes and inquire as to whether the 529 Plan that Mom set up for grandchild has been transferred; Daughter "forgot" about it and calls you later to confirm it is valued at $11,259
- You also inquire as to Mom's life insurance policy, and later learn it has CSV of $14,545
- You also ascertain that Daughter just paid the October nursing home bill before seeing you

The Well-Prepared Daughter

- Because you met with Daughter several months ago, she has been gathering financial records for you
- Daughter leaves what she believes is 60 months of records with you and you and your team begin reviewing
- Daughter also says she has an invoice due for Mom's physical therapy for $3,500

Initial Marching Orders to Daughter

- You instruct Daughter to:

1. Spend $2,500 on legal fees for your Medicaid Application and your Promissory Note/Gift Plan
2. Spend an additional $2,500 on a preneed funeral arrangement
3. Spend $3,500 on physical therapy bill

Discoveries

- Your review reveals $13,000 of prior transfers that Daughter cannot explain
- Your review also shows that the $285,000 Daughter thought Mom includes a $125,000 IRA

$285,000 - $125,000 = $160,000
nonqualified funds

Discoveries

- Your review also reveals that Mom's pension pays a 13th monthly payment, bringing Mom's actual monthly pension to $541.67

$500 x 13 = $6,500 ÷ 12 = $541.67 per month

- Mom takes RMDs out of her IRA equaling $7,310 per year each December

$7,310 ÷ 12 = $609.17 per month income from IRA

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Discoveries

- Your review also reveals $597 of health insurance premiums paid each quarter

$597 ÷ 3 = $199 per month

Mom's Countable Income

$1,805.00		Social Security
$541.67		Pension
$609.17		IRA
($199.00)		Health Insurance Premium
$2,756.84		

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Mom's Assets

$ 160,000.00	Cash in the bank
$ 11,259.00	value of 529 plan
$ 14,545.00	Life Insurance cash value
$ 185,804.00	Mom's Assets

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Mom's Liabilities

$ 3,500.00	physical therapy bill
$ 2,500.00	Legal fees due
$ 2,500.00	Preneed funeral
$ 8,500.00	

- ** Other ways to handle the physical therapy bill?
- ** What about the penalty for withdrawing 529?

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Mom's Liabilities (con't.)

- Physical therapy bill **may be** needed to offset excess of life insurance if we are unable to liquidate the life insurance in enough time
  - *Unlikely in this plan, because October nursing home bill is paid up*
- We may choose to use entire value of life insurance as portion of gift (particularly if death benefit exceeds cash surrender value by a significant amount)
- In the end, the physical therapy bill has to get paid, so use it wisely

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Mom's Liabilities (con't.)

- 529 Plans are considered assets of the owner (Mom) and the value is the current value minus any charges or deductions imposed to liquidate (10% in most cases); see MRG page 315
- However, we may elect to transfer entire value of plan as part of the gift
  - Depending upon your county, they may count the entire $11,259 as gift or may only count 90% of it as part of the gift

Mom's Countable Assets

$185,804.00		Mom's Assets
$13,000.00		Prior Gifts
($8,500.00)		Expenses to be paid
$190,304.00		Funds with which to begin our plan

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Prior Gifts

- The prior gift of $13,000 must be added back into the plan; this is often confusing for the client to understand. However, if we pretend that the gift was returned and is now cash in the bank, we would then have that $13,000 to plan with

Otherwise Eligible Date

- The gift-note plan will be put in place in October, but the "otherwise eligible" determination date of November 1, 2012.
- In our case, we know we'll be private pay through November 1 due to month of October already being paid; however, other times we are "guessing" when Medicare will cut off

How Much Can Our Note Pay?

- Figure out the maximum Note payment that can occur…*Because eligibility occurs when medical expenses exceed income, Mom's total combined income, including Note payment, cannot exceed cost of care*
- November has 30 days, so the total cost of care for November will be $12,358.50

$385 per day plus 7% ($26.95) = $411.95 per day

$411.95 per day x 30 days = $12,358.50

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Maximum Note Payment

- $12,358.50 cost of care minus $2,756.84 of other income = $9,601.66
- Therefore, the MAXIMUM that the Note can pay out is $9,601.66 per month
- NOTE: if your Note were to start on 31-day month, you would have to ensure your total income (Other Income plus Note) did not total more than $411.95 x 31
- February causes big problems…consider waiting until March

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Promissory Notes (con't.)

- Knowing the maximum payout our Note can have, let's play with some figures
- Gift away $85,400.00, results in 10 month penalty period

$85,400÷ 8,540 = 10 months

- Loan away $94,500
  - Payable for 10 months at 3.25% interest
  - Generates monthly payment of $9,591.34

The Loan

	Enter Values
Loan Amount	$94,500.00
Annual Interest Rate	3.25%
Loan Period in Years	0.83
Start Date of Loan	11/28/2012

Monthly Payment	$9,591.34
Number of Payments	10
Total Interest	$1,413.37
Total Cost of Loan	$95,913.37

No.	Payment Date	Beginning Balance	Payment	Principal	Interest	Ending Balance
1	11/28/2012	$ 94,500.00	$ 9,591.34	$ 9,335.40	$ 255.94	$ 85,164.60
2	12/28/2012	85,164.60	9,591.34	9,360.68	230.65	75,803.92
3	1/28/2013	75,803.92	9,591.34	9,386.03	205.30	66,417.88
4	2/28/2013	66,417.88	9,591.34	9,411.45	179.88	57,006.43
5	3/28/2013	57,006.43	9,591.34	9,436.94	154.39	47,569.48
6	4/28/2013	47,569.48	9,591.34	9,462.50	128.83	38,106.98
7	5/28/2013	38,106.98	9,591.34	9,488.13	103.21	28,618.85
8	6/28/2013	28,618.85	9,591.34	9,513.83	77.51	19,105.02
9	7/28/2013	19,105.02	9,591.34	9,539.59	51.74	9,565.43
10	8/28/2013	9,565.43	9,591.34	9,565.43	25.91	0.00

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Promissory Notes (con't.)

$190,304.00		Assets to begin plan
($85,400.00)		Gift
($94,500.00)		Loan
$10,404.00		Assets remaining in Mom's name

Summary

Month/Year	# of Days	Daily Rate	Total Cost of NH	Other Available Income	Promissory Note Payment	Deficit
November 28, 2012	30	$411.95	$12,358.50	($2,756.84)	($9,591.34)	$10.32
December 28, 2012	31	$411.95	$12,770.45	($2,756.84)	($9,591.34)	$422.27
January 28, 2013	31	$411.95	$12,770.45	($2,756.84)	($9,591.34)	$422.27
February 28, 2013	28	$411.95	$11,534.60	($2,756.84)	($9,591.34)	($813.58)
March 28, 2013	31	$411.95	$12,770.45	($2,756.84)	($9,591.34)	$422.27
April 28, 2013	30	$411.95	$12,358.50	($2,756.84)	($9,591.34)	$10.32
May 28, 2013	31	$411.95	$12,770.45	($2,756.84)	($9,591.34)	$422.27
June 28, 2013	30	$411.95	$12,358.50	($2,756.84)	($9,591.34)	$10.32
July 28, 2013	31	$411.95	$12,770.45	($2,756.84)	($9,591.34)	$422.27
August 28, 2013	31	$411.95	$12,770.45	($2,756.84)	($9,591.34)	$422.27
						$1,740.68

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Mom's Assets

$10,404.00		Assets in Mom's name
($1,740.68)		Deficit over 10 month plan
$8,663.32		Assets remaining in Mom's name

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What to Gift?

- The gift IS NOT $85,400
- Remember, we added $13,000 back in to account for prior gifts
- Therefore, direct the client to gift away ONLY $72,400 in additional funds

$85,400 total gift – $13,000 already gifted = $72,400 additional gift to be made now

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What to Gift? (con't.)

$72,400.00	total current gift
($11,259.00)	gift 529 plan
($14,545.00)	gift life insurance
$46,596.00	additional cash to be gifted

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Promissory Notes Discussion Points

- What is the appropriate rate of interest? Test your county…we use 3.25% because we were successful with that when we started years ago; other practitioners use the short or mid-term rate; others demonstrate what a comparable CD rate for a similar duration might pay

Promissory Notes Discussion Points

- When does the loan start repaying? We'd like to be able to wait a full month before paying, because if you took a loan from a bank, you wouldn't have to make a payment in the first month; however, clients and nursing homes aren't really interested in waiting to be paid!

Promissory Notes Discussion Points

- What happens if a gift results in a partial month penalty period? Not all gifts are neat and clean
  - In the month in which the partial month penalty is due, client will have to contribute toward the cost of care, in addition to regular income
  - For example, if the partial month penalty is .37, the contribution will be $8,540 x .37 = $3,159.80

Promissory Notes Discussion Points

- What level of retained funds?
  - Some plans work out where A/R has "mid-range" retained funds (as in this example); however, others have A/R retaining very small and others have A/R bumping up against $14,250
  - Mom can apply for income tax refund if she incurred income tax and has medical expenses to offset
  - Mom will apply for partial credit of nursing home assessment

We Have Achieved "Otherwise Eligible" Status

- This plan works because in November 2012, the A/R is "otherwise eligible" and the penalty period will begin to run for the $85,400 gift that was made.
- February really can throw a wrench in the plan – for good or for bad…be careful that the surplus does not push the A/R over the $14,250 level; watch that refunds and other influxes do not do the same

Summary

- Total Gift to Daughter of $85,400 will need to be reduced by the interest charged on the loan ($1,413.37)

  $85,400.00 - $1,413.37 = $83,986.63

- Retained funds of $10,404 will be reduced by deficit of $1,740.68

  $10,404 .00 –$1,740.68 = $8,663.32

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Assets Remaining

- Assets Remaining =

$85,400.00	gifted funds
($1,413.37)	interest paid from gift
$10,404.00	countable assets in Mom's name
($1,740.68)	deficit over course of 10 month
$92,649.95	

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Twist

- Assume the same facts, but with a December 1, 2012 start date
- Looks different; result is nearly the same
- Maximum Note payment is now $10,013.60

  $411.95 x 31 = $12,770.45 - $2,756.84 = $10,013.60
- Make a gift of $85,400.00 resulting in 10 month penalty period
- Loan $98,500.00 over 10 months, paying $9,997.32 per month

Twist (con't.)

	Enter Values
Loan Amount	$98,500.00
Annual Interest Rate	3.25%
Loan Period in Years	0.83
Start Date of Loan	10/15/2012

Monthly Payment	$9,997.32
Number of Payments	10
Total Interest	$1,473.19
Total Cost of Loan	$99,973.19

No.	Payment Date	Beginning Balance	Payment	Principal	Interest	Ending Balance
1	10/15/2012	$ 98,500.00	$ 9,997.32	$ 9,730.55	$ 266.77	$ 88,769.45
2	11/15/2012	88,769.45	9,997.32	9,756.90	240.42	79,012.55
3	12/15/2012	79,012.55	9,997.32	9,783.33	213.99	69,229.22
4	1/15/2013	69,229.22	9,997.32	9,809.82	187.50	59,419.40
5	2/15/2013	59,419.40	9,997.32	9,836.39	160.93	49,583.01
6	3/15/2013	49,583.01	9,997.32	9,863.03	134.29	39,719.98
7	4/15/2013	39,719.98	9,997.32	9,889.74	107.57	29,830.23
8	5/15/2013	29,830.23	9,997.32	9,916.53	80.79	19,913.70
9	6/15/2013	19,913.70	9,997.32	9,943.39	53.93	9,970.32
10	7/15/2013	9,970.32	9,997.32	9,970.32	27.00	0.00

Twist (con't.)

$190,304.00		Assets to begin plan
($85,400.00)		Gift
($98,500.00)		Loan
$6,404.00		Assets remaining in Mom's name

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Summary

Month/Year	# of Days	Daily Rate	Total Cost of NH	Other Available Income	Promissory Note Payment	Deficit
December 28, 2012	31	$411.95	$12,770.45	($2,756.84)	($9,997.32)	$16.29
January 28, 2013	31	$411.95	$12,770.45	($2,756.84)	($9,997.32)	$16.29
February 28, 2013	28	$411.95	$11,534.60	($2,756.84)	($9,997.32)	($1,219.56)
March 28, 2013	31	$411.95	$12,770.45	($2,756.84)	($9,997.32)	$16.29
April 28, 2013	30	$411.95	$12,358.50	($2,756.84)	($9,997.32)	($395.66)
May 28, 2013	31	$411.95	$12,770.45	($2,756.84)	($9,997.32)	$16.29
June 28, 2013	30	$411.95	$12,358.50	($2,756.84)	($9,997.32)	($395.66)
July 28, 2013	31	$411.95	$12,770.45	($2,756.84)	($9,997.32)	$16.29
August 28, 2013	31	$411.95	$12,770.45	($2,756.84)	($9,997.32)	$16.29
September 28, 2013	30	$411.95	$12,358.50	($2,756.84)	($9,997.32)	($395.66)
						($1,913.14)

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Summary

- This works because, as of December 1st, the income is less than the medical expenses and the penalty period begins to run
- Mom accumulates income over the course of the note due to the "deficit" actually being a "surplus"

Summary

- Total Gift to Daughter = the $85,400 will need to be reduced by the interest on the loan ($1,473.19)

  $85,400.00 - $1,473.19 interest = $83,926.81

- Retained Funds of $6,404.00 will grow by surplus of $1,913.14

$	6,404.00	retained assets
+	1,913.14	surplus
$	8,317.14	

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Assets Remaining

- Assets Remaining:

$	85,400.00	gift
-	1,473.19	interest
+	6,404.00	Mom's assets
+	1,913.14	surplus from loan
$	92,243.95	

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Compare

- Assets Remaining in November 1 plan: $92,649.95
- Assets Remaining in December 1 plan: $92,243.95
- *Consider*: is there a RISK by having a surplus over the life of the loan? If end result is almost the same, is it worth having a surplus?

Conclusion

- Preparation is key
- Managing client's expectations is necessary
- Give yourself a "cushion" in case client calls you and discovers other things
- Give yourself a "cushion" in case DSS finds other transfers

Conclusion

- Income tax refund; deficit/surplus; and Nursing Home Assessment credit/refund will impact figures
- Remember, retained funds or gifted funds can be used after eligibility for other items (beyond what the $50 Personal Needs Allowance might allow)

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Thank You!

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