Medicaid Planning and Personal Service Contracts

The Tax Man Cometh

One of the more common devices used today in Medicaid planning is the Personal Service Contract. As a result of the 2005 enactment of the Deficit Reduction Act [DRA], facetiously known as the “Nursing Home Bankruptcy Act”, personal service contracts will become even more popular as a tool to assist elderly and disabled taxpayers in their daily care, as well as a planning technique to qualify elderly clients for Medicaid. However, if your client intends to spend-down his or her assets through compensating relatives for care taking services, then the contract must be set forth in writing. Indeed CMS’s manual provides:

[W]hile relatives and family members legitimately can be paid for care they provide to the individual, [the agency] presumes that services provided for free at the time were intended to be provided without compensation...However, an individual can rebut this presumption with tangible evidence...[such as] a payback arrangement [that] had been agreed to in writing at the time services were provided.[[1]](#footnote-1)

All fifty states and the District of Columbia have some form of assisted living regulations.[[2]](#footnote-2) In fact, many state statutes are written in vague terms allowing assisted living facilities and elderly clients to negotiate a contract defining the standard of care.[[3]](#footnote-3) While assisted living facilities, continuing care retirement communities, and adult day care centers exist, most long term care is still provided by family members and close friends.[[4]](#footnote-4) One study suggests that family care giving to the eldery grew from 7 million households in 1987 to more than 21 million in 1997, and with a projection of more than 39 million by 2007.[[5]](#footnote-5) Actually, the true figure is closer to 50 million today.[[6]](#footnote-6)

Some families believe that inter-generational caregiving contracts are abhorrent and contrary to cultural morals. Indeed, many states have enacted filial responsibility statutes requiring adult children to provide support to their indigent parents. However, if properly planned, elderly clients may realize tax benefits from the formation of personal service contracts.

In Medicaid planning, it is extremely important that the practitioner be in a position to recognize the tax consequences of whatever planning techniques the practitioner recommends to the client. This certainly is important with respect to personal service contracts. The tax issues are almost always a factor in a decision. They do not necessarily control the decision, but the client must be fully advised of the tax ramifications.[[7]](#footnote-7)

This paper assumes that the practitioner has a basic understanding of the use of personal service contracts in the elder law arena and focuses primarily on the tax issues arising from the use of these contracts.

Income Tax Issues

In utilizing personal service contracts it is important to determine the following:

* Is a caretaker a household employee or an independent contractor?
* Can I hire a non U.S. citizen?
* What taxes if any need to be withheld?
* What happens if the caretaker wants only cash and doesn’t want any withholding?
* Is the caretaker subject to the minimum wage law?
* Does the elderly or disabled taxpayer get a tax deduction for payments to the caretaker?
* What are the tax consequences of payments to the caretakers?
* Do taxpayers get a tax credit for payments made to their elderly or disabled dependent’s caretaker?

Is a Caretaker an Employee or an Independent Contractor?

Generally, if your client or their agent hires someone to perform household work, including caretaker services, that person is deemed to be an employee.[[8]](#footnote-8) The relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which the result is accomplished. In essence, an employee is subject to the will and control of the employer not only as to what shall be done, but as to how it should be done.

It is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing the right is the employer. Other factors include how the person is paid, the furnishing of tools and of a place to work, and whether there is real risk as a result whether the worker will realize a profit or suffer a loss.[[9]](#footnote-9) If the worker is an employee, it does not matter whether the work is full time or part time, whether the disabled taxpayer hired the worker through an agency or a list provided by an agency, or whether the worker is paid hourly, daily, weekly or by the job.[[10]](#footnote-10)

Indeed, the IRS asserts in Pub. 926 that cleaning people, health aides, private nurses, caretakers, and similar domestic workers are employees. Based on the factors set forth above, the IRS is probably correct as to the classification as employees of all the above workers, with the exception of perhaps private nurses and those hired from agencies where the agency is paid for the worker’s services.

With respect to private nurses, if the worker is State-licensed and only checks on the patient sporadically or even once a day just to render medical assistance, then that individual may be deemed an independent contractor. On the other hand, if that private nurse is rendering care on an on-going basis, daily, and for many hours a day, then that individual is more likely to be deemed an employee.

If the workers, including private nurses, are hired through an agency, and the agency is paid for the services, then the agency will be deemed an employer. However, if all the agency receives is a commission, then, your client may very well be deemed the employer. However, if the agency establishes the scope of the work, when the caretaker will be paid and the caretaker rate, then the agency may will likely be deemed the employer; however, this should be discussed with the agency ahead of time to assure that your client is not the one responsible for taxes.

In addition, effective January 1988, every employer is required to report information on all newly hired workers within a specified period (generally two weeks), or incur a penalty.[[11]](#footnote-11) Each State has its own designated agency that is responsible for collecting such information.

Can Your Client Engage the Services of a Non- U.S. Citizen?

It is unlawful for your client to hire or continue to employ an alien who cannot legally work in the United States. You should advise your client to have a newly hired worker fill out and complete the U.S. Citizenship and Immigration Services (USCIS) Form I-9. This should be done on the first day of work. The client is responsible for reviewing original documents that demonstrate an employee’s identity and eligibility to work in the United States. Social Security cards may bear special annotations that restrict their use.

If there is a restriction, such as for temporary employment, the client should make sure that the card is still valid by looking at the expiration date. An employer must retain the I-9, either for three years after the date of hire or for one year after the employment is terminated, whichever is later. There are a number of forms that can establish identity, and if in doubt, the client or attorney should review the latest instructions on Form I-9. However, in general, a social security card is required along with another form of identification such as a passport, a voter’s registration care, a military card, an Alien Registration Receipt Card or Permanent Resident Card, a birth certificate or an identification card issued by federal, state or local government agencies or entities.

If the worker doesn’t have a social security number, he or she should file Form W-7 to request an Individual Taxpayer Identification Number. This number will be used on all tax reports and returns.

Withholding Requirements

If your client hires a caretaker in 2010 and pays wages of $1500 or more to that individual, the client may need to withhold and pay social security and Medicare taxes, as well as pay federal unemployment tax (FUTA) and certain state employment taxes. For 2010, the social security taxes amount to 15.3% of the wages and the client is responsible for paying one-half (½) of such taxes and the employee, the other half, providing the client withholds the caretaker’s portion. If the client doesn’t withhold, the client is responsible for paying the full amount of the tax; however, the taxes the client pays to cover the caretaker’s portion must be included in the caretaker’s wages for income tax purposes.

The caretaker’s share of social security and Medicare taxes are not counted as social security and Medicare wages or as FUTA wages. In addition, the client will also be responsible for paying a FUTA tax equal to 0.8% of the first $7000 of wages for each employee. Finally, each state will differ as to its taxes and the attorney should become knowledgeable with respect to his or her state withholding requirements.

For Medicare purposes, social security taxes and FUTA, the client should not count any wages paid to his or her spouse, a child under 12, or a parent. If the caretaker is under the age of 18, and his principal occupation is providing household services, then he or she isn’t required to pay any Medicare or social security tax, but the client is still responsible for paying the client’s share (7.65% of the wage base). Note that if the caretaker is under 18 and he or she is a student, then providing household services is not considered to be his or her principal occupation.

A client is not required to withhold federal income tax from wages he or she pays to a caretaker. However, if the caretaker requests that the client withhold tax, the client is only required to do so if the client agrees. If the client does agree, then the client should give the caretaker a Form W-4 Employee’s Withholding Allowance Certificate to fill out. If the client doesn’t agree, then there is no obligation on the client’s part to do so, but the client should notify the caretaker in writing of such non-agreement.

The client doesn’t have to include in income the following items:

* Meals provided to the caretaker at the home for the client’s convenience.
* Lodging provided to the caretaker at the client’s home for the client’s convenience and as a condition of employment.
* Up to $105 for transit passes the client gives an employee for transportation on a bus or train.
* Up to $205 a month for parking, provided the caretaker substantiates the expense.

Although food and lodging do not constitute taxable wages, the value of the same can be deemed to be part of wages for purposes of complying with the minimum wage laws.

The client is required to file a W-2 for any caretaker whose social security and Medicare wages were $1500 or more for the 2010 calendar year. In addition, if both the client and caretaker agreed to withhold income tax, then a W-2 would be required even if $1500 in wages were not paid. The client can either pay the payroll taxes quarterly or all at once on April 15 of the year subsequent to the time the wages were paid. The client is required to report the wages on Schedule H with his or her return and if no return is due, then Schedule H can be filed separately.

What Happens if the Client Pays the Caretaker Cash

and Doesn’t Report It?

If your client pays cash under the table, he or she could still be personally liable for the payroll taxes, often referred to as the “Nanny Tax”. This could be problematic if a person holding a power of attorney is the individual paying the caretaker his or her salary, as he or she could be deemed personally liable for such taxes under Internal Revenue Code (“IRC”) Section 6672.

In addition, if the executor or the trustee knows of the situation and later closes the estate, the estate could be held liable for the taxes. Although there may be no duty to amend a tax return that hasn’t been filed (and this rule may be changing), there certainly is a duty to file tax returns that have not been filed. If the executor or trustee is aware of such returns then he or she should consider filing amended tax returns. Certainly, if the attorney is advised of the problem, then, under IRS Circular 230, Section 10.23, the attorney has a duty to advise the client of the need to file the returns and the potential penalties for not doing so.

Finally, if the caretaker is ever terminated, he or she may go to the state’s local employment office and then the client could find himself or herself liable for the unpaid payroll taxes, first at the State level and then at the Federal level as the IRS and most States now have an agreement to share information.

Is a Caretaker Entitled to Minimum Pay?

Caretakers must in general be paid the minimum wage, which is the greater of the amount set forth by the Fair Labor Standards Act (FLSA) or the State or local government in which the caretaker lives. Live-in employees must be paid for every hour of work, but they are not automatically entitled to the overtime rate of one and one-half times the normal hourly rate if they are employed through a 3rd party service,[[12]](#footnote-12) providing State law doesn’t does not impose a different set of rules.[[13]](#footnote-13) However, if those services are provided at an assisted living facility, the overtime rules may very well be applicable.[[14]](#footnote-14)

In 1974, Congress amended the Fair Labor Standards Act to include many domestic service employees not previously subject to its minimum wage and maximum hour requirements. Congress simultaneously created an exemption that excluded from coverage under the Fair Labor Standards Act certain employees employed in domestic service employment, including companionship workers. The Department of Labor promulgated a set of regulations defining the terms “domestic service employment” and “companionship workers.” Under one of the regulations, “services of a household nature performed by an employee in or about a private home . . . of the person by whom he or she is employed . . . such as nurses [and] caretakers employed on other than a casual basis” are exempt from FSLA coverage.[[15]](#footnote-15) Furthermore, exempt “companionship workers” include those “who are employed by an employer or agency other than the family or household using their services….”[[16]](#footnote-16) The Supreme Court has held that both regulations are valid and binding.[[17]](#footnote-17) However, each State may have its own set of Labor Laws that the taxpayer must adhere to in terms of determining whether overtime must be paid.

What are the Tax Consequences to the disabled taxpayer

with Respect to the Payment for a Caretaker Contract?

Assuming that the disabled taxpayer files his or her own tax return, and doesn’t qualify as another’s dependent, the client may be entitled to deduct some of the payment as a medical expense under IRC Section 213. However, the disabled taxpayer must show that the expenditure qualifies as a medical expense. In the case of payments for caretakers, this should not present a problem as payments for “qualified long-term cares services” are within the definition of medical expenses, as are various capital improvements to the family home to accommodate the disabled taxpayer.

Deductible long term expenses are, generally, the same for both chronically ill and non-chronically ill individuals. However, unlike other deductible types of medical expenses, the long term care deduction only encompasses “services.” In this context, “services” will likely include the use or transfer of medical supplies. But, “maintenance or personal care services” should include ancillary medical supplies furnished as a necessary part of the services.[[18]](#footnote-18)

Long term care services are defined as those services which are “necessary diagnostic, preventive, therapeutic, curing, treating, mitigating, and rehabilitative services, and maintenance or personal care services.”[[19]](#footnote-19) However, as “maintenance or personal care services” are not deductible by non-chronically ill taxpayers, to fully deduct long term expenses the services must be provided to a chronically ill individual.[[20]](#footnote-20)

The term “chronically ill” means any individual who has been certified by a licensed health care practitioner as:

(i) being unable to perform (without substantial assistance from another individual) at least 2 activities of daily living for a period of at least 90 days due to a loss of functional capacity...or

(iii) requiring substantial supervision to protect such individual from threats to health and safety due to severe cognitive impairment.[[21]](#footnote-21)

It should be fairly easy for most disabled taxpayers to come within the ambit of the statute and thus be deemed to be “chronically ill.” First, the elderly client must not be able to perform at least 2 activities of daily living, which would include dressing, bathing, cooking, eating, normal bathroom functions, or even just getting up from a chair.[[22]](#footnote-22) Secondly, this deficit must be documented by a licensed health care practitioner such as a doctor, nurse, or social worker, and this must be done annually. Assuming these requirements are met then the expenditures for such services should be a deductible medical expense, under IRC Section 2l3.

Although there is, as of yet, no exhaustive or definitive listing of deductible services, such services would include meal preparation, household cleaning, and other similar services that a chronically ill person is not able to perform. Thus, a medical deduction for a proportionate cost of meals and lodging provided to live-in caretakers will be allowed.

Generally, if a disabled taxpayer resides in a retirement home, he or she will not be able to deduct the cost of his or her care, except where, and to the extent that, an independent contractor is utilized to provide medical care on an ad hoc basis. Thus, for example, only those expenses that are unequivocally medically related are deductible in a retirement home; food, transportation, and general lodging and ancillary expenses will be deductible expenses.

However, by way of contrast, if a resident in an assisted living, or skilled nursing, facility, the elderly client ought to be able to deduct the majority of care costs. This is, axiomatically, because clients who unfortunately can no longer care for themselves but need the expert medical and general care only obtainable in an assisted living, or skilled nursing, facility necessarily require constant medical services. Further, the provision of medical and related supplies is, as will normally of course be the case with residents of specialized care facilities, inextricably intertwined with the medical services themselves. Thus, as may be reasonably inferred from recent Tax Court decisions, the entire cost of caring for the elderly resident ought to be fully deductible.[[23]](#footnote-23)

It is also important to note that there is an important exception in the IRC which disallows any payments to family members or other “relative” for caregiver services as a medical deduction.[[24]](#footnote-24) A relative is defined as any spouse, lineal descendant, brother or sister (includes half-brother or half-sister), and various entities, including corporations, trusts or partnerships in which any of the above individuals own more than a 50% interest. In essence, if the elderly client pays his or her child or brother to take care of him or her, then that client is not entitled to a medical deduction. The only exception is where the family caregiver is a “licensed professional with respect to such service,”[[25]](#footnote-25) in which case a payment will be allowed.

Even assuming that the payment is deductible under the above tests, there are two additional limitations. First, the deduction is commonly referred to by tax practitioners as a “below the line deduction” which means it is deductible from AGI,[[26]](#footnote-26) or is classified as an itemized deduction. Consequently, this deduction is only available to taxpayers who itemize their deductions as opposed to taking the standard deduction, which in 2005 was $5,000 for singles, $7,300 for a head of household and $10,000 for married couples. An additional $1250 is allowed to any taxpayer who is at least 65 by December 31. However, as a practical matter, fully one-half of all taxpayers over 65 don’t even have a tax liability, making this deduction, at best, superfluous.[[27]](#footnote-27)

Assuming that the client does indeed have a tax liability and itemizes as opposed to taking the standard deduction, there is still another limitation on the medical deduction. Medical expenses are only allowed to the extent that they exceed 7.5% of AGI. Accordingly, if Mary has AGI of $40,000, then Mary can only deduct those medical expenses that exceed $3,000. Finally, the taxpayer can only deduct those medical expenses that are not covered by insurance, including Medicare.

Taxpayers may take medical expense deductions for all payments for care in assisted living or dementia facilities. Further, nearly all the deductible fees that are paid to assisted living or dementia facilities are also likely to qualify for long term care services.

From the tax perspective of an elderly client, payments made to a caretaker will most likely result in no tax benefit at all. Payments to family members are not deductible, unless made to a family member who is a “licensed professional” with respect to the services are performed. Even if the payments were deductible, the elderly client would have to be a taxpayer with an income tax liability and who itemizes his or her deductions and then would still be subject to the 7.5% deduction from AGI as well as not be entitled to reimbursement by insurance, including Medicare. As a result, unless the payments are substantial in nature, and not made to a family member (unless he or she is a licensed professional), then, in all likelihood, the payments will not be deductible for tax purposes.

Tax Consequences to Caretakers

Individuals are taxed on the compensation they receive for services whether that compensation is received in the form of cash, cash equivalents, property or options to acquire property.[[28]](#footnote-28) As a result the recipient of the income will be subject to the following tax consequences:

* Federal and State income taxes.
* Social security tax of 12.4% on the first $106,800 of earnings.
* Medicaid tax of 2.9% on all earnings.
* Local taxes such as in New York City.
* Query whether the city is allowed to charge a business tax since in essence the caretaker is conducting a business in the location in which the services are performed.

On the other hand, if the payments made were deemed gifts, then there would be no tax consequences at all.[[29]](#footnote-29) However, if Medicaid planning is the goal, then gifting is probably no longer a reasonable alternative in light of the new law, the DRA, effective February 8, 2006. Under the new law, the penalty period starts not from the date of the gift (as under the old law) but at the time the person is in a nursing home and first qualifies for Medicaid. Consequently, the old gifting techniques, such as staggered gifting or half-a-loaf approach will no longer be a viable method of qualifying for Medicaid.[[30]](#footnote-30)

A number of practitioners have suggested utilizing an annuity agreement along with a caretaker agreement as a Medicaid planning technique. In essence the elderly client would enter into a caretaker agreement with a family member. The elderly client would then purchase an annuity contract and secure payment for the caretaker agreement with the annuity contract. The caretaker would be paid from the annuity contract as long as he or she took care of the elderly client. The gist of the argument is that the transference of the annuity contract as security for the caretaker contract is for valid and sufficient consideration, and hence there should be no period of ineligibility.

A further argument could be made that, in the event the elderly client dies prior to the full payment of the annuity, the annuity could still be paid to the caretaker if the caretaker contract were properly crafted to provide that full payment of the annuity is necessary to induce the caretaker to give up his or her other means of employment to take care of the elderly client. Furthermore, the new law should have no effect on the annuity, as the annuity isn’t available since it is security for the performance of contractual services to be provided, and hence doesn’t have to comply with the new Medicaid rules under the DRA.

The author believes that practitioners should carefully examine the new law prior to implementing this strategy. First, most state agencies will, in all likelihood, attack this type of planning, contending that in almost all commercial transactions, securing a caretaker contract with an annuity is unheard of and thus isn’t for fair and adequate consideration. Secondly, giving the caretaker the balance of the annuity if the elderly client dies within a couple months after purchasing it isn’t fair and adequate consideration either, and hence the state is entitled to reimbursement. Finally, what happens if the caretaker dies first? Is another family member named as a successor to the contract? Does the caretaker’s family get the annuity anyway even if the caretaker hasn’t fulfilled his or her obligations?

1. CMS State Medicaid Manual § 3258.1 (2004); see also Richard L. Kaplan, *Federal Tax Policy and Family Provided Care for Older Adults*, 25 VA. Tax Rev. 509 (2005). [↑](#footnote-ref-1)
2. Jennifer Rae Fleming, *The Blurred Line Between Nursing Homes & Assisted Living Facilities: How Limited Medicaid Funding of Assisted Living Facilities Can Save Tax Dollars While Improving the Quality of Life of the Elderly*, 15 U. Miami Bus. L. Rev. 245, 253 (2007). [↑](#footnote-ref-2)
3. *Id.* [↑](#footnote-ref-3)
4. Richard L. Kaplan, *Federal Tax Policy and Family-Provided Care for Older Adults*, 25 Va. Tax Rev. 509, 510 (2005). [↑](#footnote-ref-4)
5. Donna L. Wagner, Nat'l Alliance for Caregiving, Comparative Analysis of Caregiver Data for Caregivers to the Elderly: 1987 and 1997, at 1 (1997), available at http://www.caregiving.org/data/analysis.pdf. [↑](#footnote-ref-5)
6. National Family Caregivers Association (Summer 2000) (Presentation). [↑](#footnote-ref-6)
7. Because you must advise your client of the tax ramifications, it is very important to identify the client. Once you have identified the client, it is equally important to advise the others involved in the matter that you do not represent them. It is best to do this in writing. Then there is no confusion concerning to whom you owe your ethical and fiduciary duties as an attorney. [↑](#footnote-ref-7)
8. *See* IRS Pub. 926 (2010); Rev. Rul. 80-365, 1980-2 C.B. 300. [↑](#footnote-ref-8)
9. For a number of years the IRS took the position that there were 20 factors to apply to classify a worker, albeit some of the tests were more important than others. *See* Rev. Rul. 87-41, 1987-1 C.B. 296. As of October 30, 1996, the IRS has acknowledged that the 20 common law factors listed in revenue ruling 87-41 are not the only ones that may be important. The IRS Training Manual provides that the most important test is control, and the agents are to look at three areas: (1) behavioral control; (2) financial control; and (3) relationship of the parties. *See* Employment Tax Handbook 104.6 § 5.8.1 (Apr. 21, 1999). However, the Supreme Court has noted that the common law test contains no shorthand formula or magic phrase that can be applied to determine whether a caretaker is an employee or independent contractor, and therefore all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324 (1992). [↑](#footnote-ref-9)
10. IRS Pub. 926 (2010). [↑](#footnote-ref-10)
11. *See* Personal Responsibility and Work Opportunity Act of 1996, Pub.L.No. 104-193, 110 Stat. 2105. This section was enacted under the auspices of enforcing child support orders. [↑](#footnote-ref-11)
12. *See* Fair Labor Standards Act of 1938, 29 U.S.C. § 213(a)(15). [↑](#footnote-ref-12)
13. See *Joy Cash, v. Iola Winn*, et. Al., 205 Cal.App. 4th 1285; 140 Cal Rptr. 3d 367 (August 15, 2012). In the *Cash* case, the Plaintiff Trustee hired a caretaker to assist an elderly client in the client’s home. The caretaker help the client with preparing meals, household chores, dressing, taking medicine and checking the elderly client’s blood sugar. If the worker is a personal attendant, who is employed to dress, supervise and feed the client, he or she is exempt from overtime pay requirements pursuant to Cal. Code Regs., tit 8, § 11150. However, if the employed person is a registered nurse, with some exceptions, they are in fact not exempt from overtime pay. See § 11150, subd. 1(A)(3)(f), (g). The court held that even if the “personal attendant” spends more than 20 percent of the time) engaging “in a single ‘health care’ task (such as taking a temperature or pulse” or assisting with over-the-counter blood sugar test, there is no right to overtime. 205 Cal. App 4th at 1299. [↑](#footnote-ref-13)
14. *See* FN 12, *supra.* [↑](#footnote-ref-14)
15. 29 C.F.R. § 552.3 (1975). [↑](#footnote-ref-15)
16. 29 C.F.R. § 552.109(a) (1975). [↑](#footnote-ref-16)
17. *Long Island Care at Home, Ltd. V. Coke*, 551 U.S. 158, 162 (2007). [↑](#footnote-ref-17)
18. See for a thorough and helpful analysis: Vorris J. Blankenship, *Tax Issues Complicate the Costs of Chronic Illness and Long-Term Care Insurance*, 106 J. Tax’n No. 4 (2007). [↑](#footnote-ref-18)
19. IRC §§ 213(d)(1)(c) & 7702B(c)(1)-(3). [↑](#footnote-ref-19)
20. IRC § 7702B(c)(3). [↑](#footnote-ref-20)
21. IRC § 7702B(c)(2)(A). [↑](#footnote-ref-21)
22. IRC § 7702(B)(c)(2)(B). [↑](#footnote-ref-22)
23. *See*, *e.g.,* *Hospital Corporation of America*, 107 T.C. 116 (1996) *aff’d*. 348 F.3d 136 (6th Cir. 2003); *Osteopathic Medical Oncology & Hematology, P.C*., 113 T.C. 376 (1999). Providers’ costs are deductible, and, while there are no cases directly on point, the elderly taxpayer, as advocated herein by analogy, ought, him or herself, to be able to deduct these costs. [↑](#footnote-ref-23)
24. IRC § 213(d)(11)(A). [↑](#footnote-ref-24)
25. *Id.* [↑](#footnote-ref-25)
26. IRC § 62(a). [↑](#footnote-ref-26)
27. Kaplan, *supra* note 1, at 544. [↑](#footnote-ref-27)
28. IRC § 61. [↑](#footnote-ref-28)
29. IRC § 102(a). [↑](#footnote-ref-29)
30. There will be considerable debate whether gifting through the use of annuities and “half-a-loaf” gifting approach will work under the new law. Some commentators believe that “half-a-loaf” gifting is still possible, by having the elder care client make the gift just before he or she enters the nursing home and then have the donees give back enough money to cover the proposed penalty period. Other commentators believe that a gift can be made with enough money held back to purchase an annuity that would cover the period of ineligibility. Because the annuity is an exempt asset, the elderly person would still qualify for Medicaid. [↑](#footnote-ref-30)