

Medicaid Recipient Issues When the Community Spouse Dies First: Protections, Rules, and Key Planning Strategies

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Today's faculty features:

Kelly R. Gusmano, Attorney, **Woods Oviatt Gilman**, New York

Dale M. Krause, J.D., LL.M., President and CEO, **Krause Financial Services**, De Pere, Wis.

Melissa Negrin-Wiener, Senior Partner, **Cona Elder Law**, New York

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**WHEN THE COMMUNITY
SPOUSE DIES FIRST:
MEDICAID PROTECTIONS, RULES,
AND KEY PLANNING STRATEGIES**

Kelly R. Gusmano, Esq.

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TODAY'S GOALS

Provide

an overview of Medicaid's community spouse protections.

Highlight

the Community Spouse Resource Allowance.

Explore

preemptive measures and revising the estate plan.

Illustrate

how to maintain Medicaid eligibility in case the community spouse dies first.

LONG-TERM CARE AND MEDICAID PLANNING

WHAT IS LONG-TERM CARE PLANNING?

- Long-term care planning is the **financial planning surrounding a long-term care event**.
- Goals of long-term care planning include:
 - **Avoiding or mitigating financial stress** associated with long-term care
 - **Preserving assets** for a healthy spouse or the next generation

WHY IS IT IMPORTANT?

- It's estimated that 70% of seniors will require long-term care at some point and **35% of seniors will specifically require nursing home care.**
- The average cost of a nursing home stay is nearly \$95,000 per year.
- More and more clients will need care, but **few can afford the exorbitant cost.**



How much does a nursing home cost?

\$7,908/month

\$94,896/year

HOW DOES THIS IMPACT YOUR CLIENTS?

The average stay in a nursing home is 2.3 years.

50% of couples will exhaust their life savings within one year.

75% of single people will exhaust their life savings within one year.

Bottom line: The cost of long-term care has a detrimental effect on your client's estate planning goals.

THE SOLUTION: MEDICAID PLANNING

- The unfortunate reality is many seniors who require long-term care **did not plan ahead** and are therefore unprepared for the high costs.
- As seniors and their families realize the cost of long-term care and the limited options to pay for it, they need a **qualified legal professional** on their side.
- Medicaid planning allows you to help these seniors **protect their hard-earned assets and accelerate their eligibility for benefits**.

WHAT IS MEDICAID PLANNING?

- Crisis Medicaid planning is the **legal rearranging of one's assets** to fit within the parameters of the Medicaid program.
- It is designed to help those currently in a nursing home or about to enter one **accelerate their Medicaid eligibility**.
- Once eligible, Medicaid will pay for **the majority of their care costs**, minus a small co-pay.
- In short, Medicaid planning helps people qualify for Medicaid **without depleting their assets** first!

WHAT IS YOUR ROLE AS THE ATTORNEY?

- With Medicaid planning, attorneys like you can help clients:
 - Navigate complex Medicaid rules
 - Learn about asset protection strategies
 - Accelerate eligibility for benefits
 - Stop the financial bleeding of the nursing home
- Moreover, clients **are happy to pay** for these services because of the value, savings, and peace of mind they provide.

THE MEDICAID PROGRAM

WHAT IS MEDICAID?

- Medicaid is a **joint federal and state** health insurance program that pays for a person's custodial care in a nursing home, including room and board, pharmacy, and incidentals.
- **Each state** has its own unique Medicaid restrictions and regulations.
- Applicants must meet both **financial and non-financial** criteria in order to qualify.

MEDICAID ELIGIBILITY REQUIREMENTS

- **Non-Financial Requirements**
 - Must be a U.S. citizen or qualified alien
 - Must be age 65 or older, or disabled
 - Must reside in a Medicaid approved facility
- **Income Requirements**
 - *Institutionalized Spouse*: must be less than the private pay rate of the facility in most states
 - *Community Spouse*: no income limit
- **Asset Requirements**
 - *Institutionalized Spouse*: \$2,000 of countable assets in most states
 - *Community Spouse*: up to \$137,400 of countable assets in most states

EXEMPT VS. COUNTABLE ASSETS

EXEMPT ASSETS

Do not count toward the resource allowance

- Primary residence
- One vehicle
- Personal property
- Small whole life insurance policy
- Funeral Expense Trust (below a state-specific limit)

COUNTABLE ASSETS

Do count toward the resource allowance

- Cash, checking, savings, and other bank accounts
- Stocks, bonds, and mutual funds
- Deferred annuities
- Additional property and vehicles, including boats and RVs
- IRAs and retirement accounts (in most states)

SPOUSAL IMPOVERISHMENT STANDARDS

- In order to prevent the community spouse from being left destitute, the Medicaid program employs certain spousal impoverishment standards.
- **Community Spouse Resource Allowance (CSRA)**
 - The amount of countable assets the community spouse can retain while qualifying the institutionalized spouse for Medicaid
- **Monthly Maintenance Needs Allowance (MMNA)**
 - The amount of monthly income the community spouse is entitled to
 - If their income is below this amount, they are entitled to an income shift from the institutionalized spouse, dollar-for-dollar, until the allowance is met.

COMMUNITY SPOUSE RESOURCE ALLOWANCE

- Some states apply a **standard CSRA**, which is currently \$137,400 in most states.
 - Any assets exceeding this amount must be eliminated before the institutionalized spouse can qualify for benefits.
- Other states use a **minimum and maximum CSRA**, currently \$27,480 and \$137,400 in most states.
 - The community spouse is entitled to retain one-half of the couple's total countable assets as of the snapshot date. If the amount is more than the maximum, they can keep the maximum CSRA. If it's less than the minimum, they can keep the minimum CSRA. If it's somewhere in the middle, they can keep that amount.

THE SNAPSHOT DATE

- This is the date the institutionalized spouse **first entered care on a continuous basis** (at least 30 days).
 - *Ex) Jan was admitted to the hospital on June 3. She was transferred to a skilled nursing facility four days later, where she still remains. On August 15, her husband, Hank, talks to an attorney and pursues Medicaid eligibility. The couple's snapshot date is June 3.*
- The state Medicaid agency will **take a “snapshot” of the couple's finances** on that date to determine the CSRA.
 - The community spouse can keep one-half of the couple's assets as of this date, not to fall below the minimum and not to exceed the maximum.
 - *Ex) On June 3, Hank and Jan had \$300,000 in the bank. Since half of this amount, \$150,000, is more than the maximum CSRA, Hank is allowed to retain the maximum allowance of \$137,400.*

MONTHLY MAINTENANCE NEEDS ALLOWANCE

- Like the CSRA, some states apply a **standard MMNA**, which is currently \$3,435 in most states.
- Other states use a **minimum and maximum MMNA**, which are currently \$2,288.75 and \$3,435 in most states.
 - The community spouse is always entitled to at least the minimum MMNA, but they may be entitled to a larger amount, not to exceed the maximum, depending on their shelter expenses.

DIVESTING ASSETS

- Applicants **can't give away assets** in order to accelerate their eligibility.
- This is commonly referred to as a **divestment** and includes:
 - Giving away assets for no compensation
 - Selling assets for less than fair market value
- At the time of application, the state Medicaid agency will **look back over the previous five years**, known as the lookback period, to see if the applicant or their spouse made any divestments.
- If divestments have been made, the applicant is **subject to a period of Medicaid ineligibility**, known as the penalty period.

SPEND-DOWN STRATEGIES

SPENDING DOWN ASSETS FOR MEDICAID

- Since applicants cannot simply give away their assets to achieve Medicaid eligibility, they must **spend down** their excess countable assets with the help of an attorney.
- Typical spend-down methods include:
 - Purchasing or improving **exempt assets**
 - Paying off **mortgage, credit card debt, or other liabilities**
 - Purchasing a **Medicaid Compliant Annuity**
 - Purchasing a **promissory note**



WHAT IS A MEDICAID COMPLIANT ANNUITY?

- A **Medicaid Compliant Annuity (MCA)** is a single premium immediate annuity (SPIA) with added restrictions to meet the requirements of the Deficit Reduction Act of 2005.
- An MCA **converts excess countable assets into an income stream** with zero cash value.

HOW DOES AN MCA WORK?

- For Medicaid purposes, an MCA **eliminates excess assets** and **accelerates eligibility** for benefits.
- Strategies and best practices for using MCAs vary depending on the case facts.
- In order to be Medicaid compliant, an annuity must meet **five main requirements**.

REQUIREMENTS OF AN MCA

- **IRREVOCABLE**
The contract cannot be revoked or altered.
- **NON-ASSIGNABLE**
The contract cannot be assigned or sold to another party.
- **ACTUARIALLY SOUND**
The term of the annuity cannot exceed the owner's Medicaid life expectancy.
- **EQUAL PAYMENTS**
The contract must provide equal monthly payments with no deferral or balloon payments.
- **STATE AS BENEFICIARY**
The state Medicaid agency typically must be named primary beneficiary to the extent of benefits paid on behalf of the institutionalized individual, though exceptions exist.

HOW IS AN MCA FUNDED?



Non-Qualified Funds

- A check typically accompanies the MCA application.
- **Quick turnaround time** – about 5 business days



Tax-Qualified Funds

- Two funding options: **Trustee-to-Trustee Transfer** or **60-Day Rollover**
- Allows the client to fund an MCA with their IRA and avoid immediate tax consequences.

AN MCA STRATEGY FOR MARRIED COUPLES

- The most common MCA strategy for a married couple is the **Community Spouse Plan**.
- Any countable assets exceeding the Individual Resource Allowance and Community Spouse Resource Allowance are **funded into an MCA for the community spouse**.
- After purchasing the MCA, the couple's assets are eliminated for Medicaid purposes, and the **institutionalized spouse can immediately apply and qualify** for benefits.
- The MCA payments then go to the community spouse, who has no income limitations, and they can **use the funds to continue their lifestyle at home**.

ADDITIONAL MCA STRATEGIES FOR MARRIED COUPLES

- **Institutionalized Spouse Plan**

- If the couple has a low enough income to qualify for an income shift under the MMNA rules, they may opt to fund an MCA owned by the institutionalized spouse.
- With this strategy, a portion or all of the MCA income will shift to the community spouse.

- **Name on the Check Rule**

- If the institutionalized spouse owns a countable IRA, the couple may try the Name on the Check Rule strategy, which involves a tax-qualified IRA owned by the institutionalized spouse but made payable to the community spouse.
- This strategy is only viable in some states.

PREEMPTIVE STRATEGIES

WHAT HAPPENS IF THE COMMUNITY SPOUSE DIES FIRST?

- Most spouses leave assets to each other, so the institutionalized spouse may now own all of the couple's assets. Even without a will, the law often provides for the surviving spouse to receive a portion of the estate.
- The institutionalized spouse's continuing eligibility for Medicaid is in jeopardy, as he or she no longer has the benefit of the spousal impoverishment protections that allowed for additional assets to be protected!

WHAT COULD HAPPEN IF THE ESTATE PLAN IS NOT REVISED?

- If the institutionalized spouse is in a nursing facility, it is likely that all needs are being met by the facility. Additional assets will cause the institutionalized spouse to lose Medicaid benefits, but do nothing to increase quality of care or quality of life.
- If the institutionalized spouse then passes away, the inherited assets may also become subject to Medicaid estate recovery.

SHOULD THE COMMUNITY
SPOUSE JUST LEAVE ASSETS TO
OTHER BENEFICIARIES?

THE ELECTIVE SHARE

- One spouse cannot completely disinherit the other spouse. In most states, the elective share is one-third to one-half of the total estate and generally applies to probate assets AND testamentary substitutes. In New York, the elective share is \$50,000 or one-third of the total estate, whichever is greater. NY Estates, Powers and Trusts Law (EPTL) section 5-1.1-A.
- Because of this legal right to the funds, if the institutionalized spouse does not exercise this right to the elective share, the institutionalized spouse is treated as if he or she made a **GIFT**.
- There may be no funds to pay during the penalty and no way to claw back funds from other beneficiaries!

CONSIDER THESE THREE STRATEGIES

- ☑ Completely **disinherit** the institutionalized spouse anyway.
- ☑ Leave assets (or just the amount of the elective share) to the institutionalized spouse in a testamentary **supplemental needs trust**.
- ☑ Satisfy the elective share with **exempt assets**.

CAN THE RIGHT OF ELECTION BE PREEMPTIVELY WAIVED?

Likely no. Even if a waiver is signed more than five years before the death of the community spouse, the local Department of Social Services is likely to consider the waiver to be effective upon the death of the community spouse. A penalty could then be issued for the amount waived.

CAN THE INSTITUTIONALIZED SPOUSE DISCLAIM HIS OR HER INTEREST IN THE ESTATE?

No. If the institutionalized spouse disclaims an interest to which he or she is legally entitled, the disclaimer is deemed to be a gift.

DISINHERIT

PROS:

- If the institutionalized spouse dies before exercising his or her right of election, there is no impact to the Medicaid.
- If assets can be returned for the elective share, he or she may be able to engage in planning strategies to protect at least half.

CONS:

- If the other beneficiaries received testamentary substitutes via beneficiary designation, they may be unwilling to make funds available for the elective share, especially if they inherit something like an IRA or retirement account.
- If the funds are not made available, the local Department of Social Services could issue a penalty. The institutionalized spouse will likely be unable to pay during the penalty.

LEAVE ASSETS TO AN SNT

PROS:

- The assets in the SNT are not countable for Medicaid purposes.
- The assets in trust can be used for the benefit of the institutionalized spouse.
- If the local Department of Social Services is determined to impose a penalty, the trustee can make funds available without clawing them back from beneficiaries.

CONS:

- The SNT may not satisfy the elective share! The institutionalized spouse may be entitled to the assets outright and free of trust.
- The community spouse must be careful to revise beneficiary designations to ensure that the SNT is adequately funded.

LEAVE EXEMPT ASSETS

PROS:

- In states where an IRA or retirement account is considered an exempt asset, the IRA or retirement account will satisfy the elective share without impacting Medicaid eligibility.

CONS:

- The institutionalized spouse's NAMI will increase due to the additional income from the IRA or retirement account (especially if the local Department of Social Services requires the institutionalized spouse to take more than the required minimum distribution).
- If the institutionalized spouse lives long enough, the entire account could be depleted.

EXAMPLE

John and Helen (age 85) live in New York. Helen was just approved for Medicaid. John used a spousal refusal to allow him to protect assets above the community spouse resource allowance.

John now wants to revise his estate plan to ensure that he and Helen can pass as much of their assets as possible to their children rather than to the nursing home.

WHAT SHOULD JOHN
DO?

John's Assets

\$200,000 Cash

\$100,000 IRA

\$300,000 Total

- *Should John's estate plan completely disinherit Helen?*
- *Should John leave \$100,000 to Helen in a testamentary SNT?*
- *Should John leave his IRA to Helen?*

EXAMPLE—DISINHERIT

John decided to disinherit Helen entirely. Unfortunately, John passes away shortly thereafter. Helen reports the death of her spouse to the local Department of Social Services.

RESULT: the local Department of Social Services is determined to impose a penalty. Helen is able to claw \$100,000 back from the beneficiaries and engages in planning to protect about half of the \$100,000 through the use of a gift and loan plan.

EXAMPLE—SUPPLEMENTAL NEEDS TRUST

John decided to execute a new will that leaves \$100,000 in cash to an SNT for Helen. Unfortunately, John passes away shortly thereafter. Helen reports her interest in the trust to the local Department of Social Services.

- **POSSIBLE RESULT #1:** The local Department of Social Services accepts the SNT. No change to Helen's Medicaid eligibility. Any money remaining at Helen's death passes to the remainder beneficiaries.
- **POSSIBLE RESULT #2:** The local Department of Social Services recognizes that the SNT does not satisfy the elective share and threatens to impose a penalty for the \$100,000 that Helen is entitled to outright. If this happens, Helen can engage in planning to protect about half of the \$100,000 through the use of a gift and loan plan.

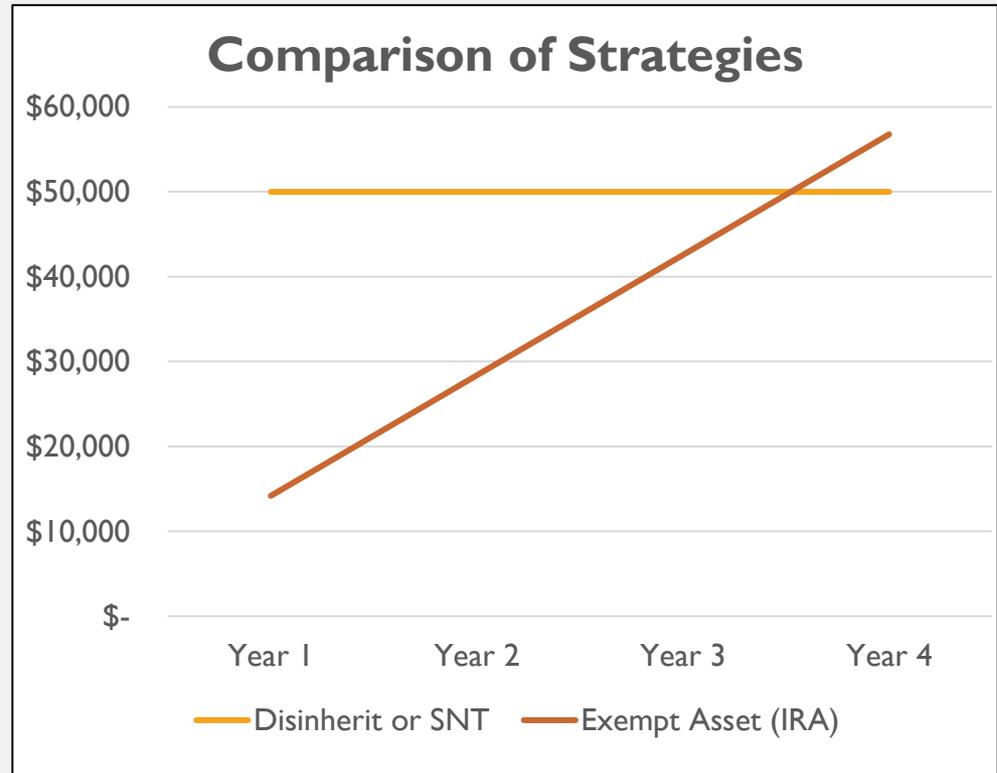
EXAMPLE—EXEMPT ASSETS

John decided to leave his whole IRA to Helen. Unfortunately, John passes away shortly thereafter. Helen reports the additional income to the local Department of Social Services.

RESULT: Helen continues to be eligible for Medicaid. The case will be re-budgeted so that the additional income becomes part of her NAMI. At 85, Helen's life expectancy (according to the NY Medicaid 2022 Life Expectancy Tables) is 7.05 years. Helen will have to draw \$1,182 per month from the IRA, which will increase her NAMI accordingly.

COMPARISON OVER TIME

- **Disinherit:** Additional planning could be done to save half if the spouse has to take the elective share.
- **SNT:** Either everything is saved or, if needed, additional planning could be done to save half.
- **Exempt Asset (IRA):** The principal of the IRA is protected, but \$1,182 is lost from the account each month.



Applicant Recipient Spouse (“A/R Spouse”) – The spouse in the nursing facility applying for or receiving Medicaid benefits.

Well Spouse – The spouse in the community.

Community Spouse Resource Allowance (“CSRA”)– the amount of resources the Well Spouse is permitted to have when the A/R Spouse is in a nursing home receiving Medicaid benefits. In NY, the 2022 CSRA is \$74,820 with a maximum of \$137,400.

Monthly Maintenance Needs Allowance (“MMNA”)– the Well Spouse’s maximum permissible amount of monthly income. In NY, the 2022 MMNA is \$3,435.

Spousal Refusal

The concept of Spousal Refusal came out of the passing of the Medicare Catastrophic Coverage Act (“MCCA”) of 1988. Spousal Refusal essentially permits the Well Spouse to avoid the income and resource allowance limitations by signing a document stating that he/she will not make their excess income and/or resources available to pay for the A/R Spouse’s care.

Note: 42 U.S.C. § 1396r-5(c)(3) requires that the State be permitted to seek recovery of the cost of medical assistance from the well spouse.

Florida and New York are at the forefront of acknowledging spousal refusal.

Bowden v. Delaware Department of Health and Social Services

Rossetti v. Waldman

May v. Azar

Protecting Funds Received by the A/R Spouse

Promissory Note

- Once the funds are received by the A/R Spouse, he/she will no longer be eligible for Medicaid benefits.
- Discontinue Medicaid coverage and protect a portion of these assets via a Promissory Note Plan or other partial asset protection plan that may be available in your state.

Protecting Funds Received by the A/R Spouse

The Family Home

- In New York you can qualify for Medicaid with a home in your name as long as your equity value does not exceed \$955,000.

(GIS 93 MA/024, 06 OMM/ADM-5(II)(B) and 21 MA/25)

- If the Well Spouse and the A/R Spouse are both on the deed and the Well Spouse dies first, the A/R Spouse will more than likely become the owner of the entire home.
- This will not affect Medicaid eligibility (unless the total equity exceeds \$955,000). However, the A/R Spouse will have to sign an Intent to Return Home and Medicaid will likely place a lien on the property so they will have a claim against the A/R Spouse's estate when they pass away.

Protecting Funds Received by the A/R Spouse

Life Insurance and all other Non-Retirement Accounts

The Well Spouse's life insurance policies and non-retirement accounts name the A/R Spouse as the beneficiary...

- Any of the assets received under a beneficiary designation by the A/R Spouse will have to be treated just like assets received under the Will (Elective Share) or Law of Intestacy.
- The A/R Spouse will not longer be eligible for Medicaid benefits and said benefits will need to be discontinued. Thereafter, the A/R Spouse can engage in Promissory Note planning or other partial asset protection planning depending on the State.
- In NY, if the A/R Spouse's assets only increase minimally, they can set up an Irrevocable Pre-Plan and remain on Medicaid benefits.

Protecting Funds Received by the A/R Spouse

What if the A/R Spouse is incapacitated?

- Advance Directives – Proper planning will allow the agent under the Power of Attorney to handle any assets received by the A/R Spouse if the Well Spouse predeceases.
- Guardianship – If there is no Power of Attorney or if the Power of Attorney document is missing language or lacking certain powers, it may be necessary for the family to bring a proceeding in Supreme Court to become the legal guardian of the A/R Spouse in order to effectuate these asset protection plans.

Thank You

Kelly R. Gusmano

kgusmano@woodsoviatt.com

Dale M. Krause, J.D., LL.M.

dalekrause@medicaidannuity.com

Melissa Negrin-Wiener

mnegrin@conalaw.com