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Medicaid Asset Rules and Pitfalls to Avoid: Transfers, Conversions, Asset Limits, Level of Care, Exempt Assets

Look Back Periods, Transfers and Gifts of Assets, Purchase of Exempt Assets, Conversion of Assets into Noncountable Assets

THURSDAY, JULY 15, 2021

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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Medicaid Eligibility and Related Rules

Presented by:
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Dispelling Myths

Facing Reality

- Elder Law Attorney Plays Vital Role
  - Framing Relevant Issues and Identifying Pitfalls
  - Providing Accurate, Relevant Information
  - Advising Clients to Seek Additional Professional Input

Long Term Care Options

- Home
- Assisted Living Facility
- Nursing Home
- Continuing Care Retirement Community

Planning and Paying for Long-Term Care

- Private Pay/ Long-Term Care Insurance
- Medicare
  - Includes: Part A, B, C, D, Medigap
- Medicaid

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Medicaid

- Medicaid is based on Federal Law
- States interpret and administer the federal law
- Each state differs in interpretation of federal law

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Medicaid Programs for Today's Presentation

- Nursing Home Medicaid
- Programs for persons aged 65 or older or disabled which have the same financial eligibility requirements but may have different gifting and penalty rules (these vary by state)
  - Waiver Programs: Home and Community Based Care, Medically Needy

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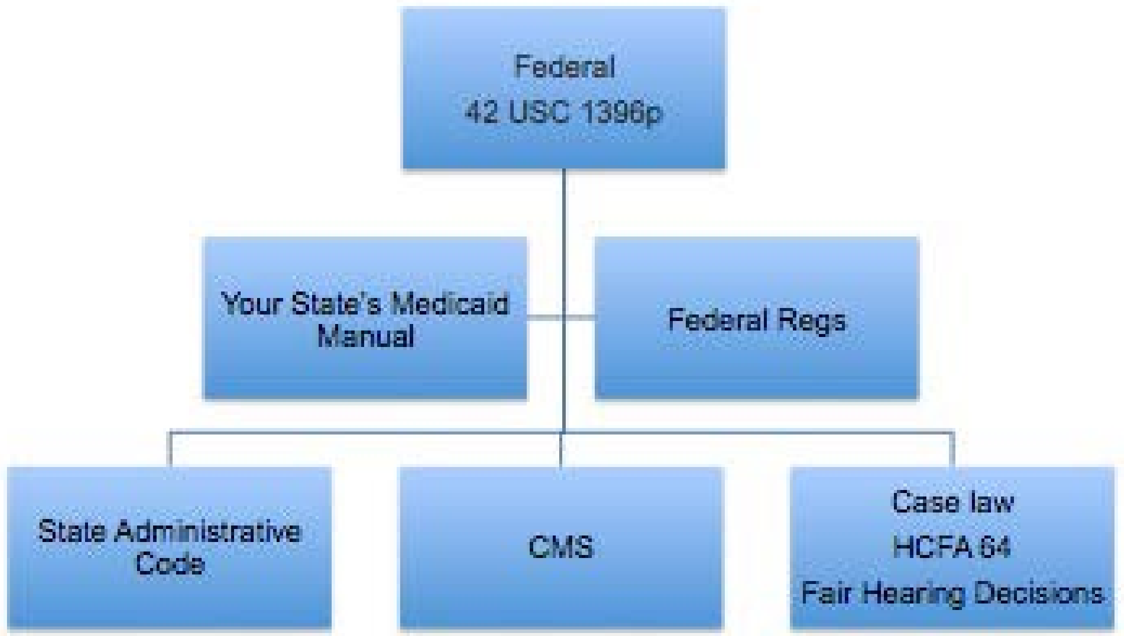
Medicaid



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Medicaid Rules

- 42 USC § § 1396p and 1396r-5
- Your state’s Medicaid Manual
- Your state’s Administrative Code sections
- Your state’s Fair Hearing decisions

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Additional Sources

- CMS website – www.cms.hhs.gov
- HCFA Transmittal 64
  - Interprets OBRA '93 (codified at 42 USC § 1396). Establishes rules on how transfer penalties are calculated, requires annuities to be actuarily sound, and establishes a life expectancy table
- Program Operations Manual (POMS)
  - Policies and procedures followed by SSA for its programs including SSI

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Pertinent Code Sections

42 USC § 1396p

- 1396p(a) – (b) – estate recovery provisions and exceptions
- 1396p(c) – asset transfers and calculating the penalty period
- 1396p(c)(1)(F) – annuity provisions
- 1396p(c)(2) – exceptions to the transfer penalty rules
- 1396p(d) – treatment of trusts
- 1396p(f) – home equity limits
- 1396p(h) - definitions

Pertinent Code Sections

- 42 USC § 1396r-5:
  - Treatment of income & resources for certain institutionalized spouses

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Eligibility – Non-Financial

- U.S. Citizen
- Qualified Alien
  - Permanent Resident
  - Refugee
  - See more qualified aliens at CMS State Medicaid Manual at Section 3211.1

  (https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/P45_03.ZIP)
- Age 65 or older or disabled and in need of long-term care
- Meet the definition of disabled if determined so by the SSA (or Medicaid's own determination of disability if no application for disability submitted to SSA)

Eligibility - Financial

- Must meet income and asset limits set by the state
- Income varies by state but capped at $2,382 / month in 2021
- Assets for a single person – generally $2,000 but varies by state
- Community Spouse allowed assets between $26,076 and $130,380

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INCOME

Income
42 USC § 1382a

- Earned Income: wages or self-employment income
- Unearned Income: all other income
  - Support and maintenance, annuity payments, retirement, pension, veterans’ compensation and pensions, disability benefits, social security income, social security disability income, prizes and awards, etc.

- Name on Check Rule – income attributed to person whose name is on the check
  - If two names are on the check, then income will be allocated equally

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Income Cap vs Spend Down State

- Spend Down State
  - Allows applicant/recipient to incur medical expenses and spend down their excess income on the medical expenses before Medicaid will pay
  - Example: Client has income of $1,000. Medicaid eligibility requires income of no more than $600. Client must incur $400 in allowable expenses before Medicaid will pay for client's care

- Income Cap State
  - Imposes a limit on a Medicaid applicant's income, capped at $2,382 (for 2021) in gross income
  - Income over the cap must go into a Qualified Income Trust (a/k/a Miller Trust)

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Miller Trust

(Qualified Income Trust)

- An irrevocable, income only trust which holds the Medicaid applicant’s excess income to allow the applicant to qualify for Medicaid
- The excess income must be spent on the applicant’s care or needs
- Any funds left in the trust account at the applicant’s death must be paid back to the State (up to the amount paid out for the care)
- Deposits must be made into the trust every month

Income for Married People

- 42 USC § 1396r-5 (Spousal Impoverishment)
  - These rules were put into place to ensure that the community spouse does not become impoverished
- Minimum Monthly Maintenance Needs Allowance (MMMNA)
  - Minimum amount of income a community spouse is entitled to
  - Some states require excess income be contributed to the Medicaid recipient spouse's care
  - 2021 MMMNA figures:
    - $2,155.00 (minimum)
    - $3,259.50 (maximum)

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MMMNA Example

- Bill and Jane are married. Bill is going into a nursing home in a state with a $3,259.50 MMMNA.
- Bill has income of $3,000. Jane has income of $1,259.50. Jane is short $2,000.
- The state will divert $2,000 of Bill's income to Jane which leaves $1,000 of Bill's income to be paid to the nursing home.

ASSETS / RESOURCES

Assets – Countable Resources

- 42 USC § § 1396p(g) and 1382b
- All income and resources of the individual and individual's spouse, including any income or resources which the individual or spouse is entitled to but does not receive because of action:
  - (A) by the individual or spouse,
  - (B) by a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or spouse, or
  - (C) by any person, including any court or administrative body, acting at the direction or upon the request of the individual or spouse.
- Simply put – EVERYTHING COUNTS

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Countable Resources

- Checking Accounts
- Investment/Brokerage Accounts
- CDs
- Cash
- Real property (other than primary residence)
- Boats, ATVs, RVs
- Art
- Collections
- And More

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Joint Assets

- If titled jointly, Medicaid generally presumes that the asset belongs to the Medicaid applicant/recipient.
  - This is a rebuttable presumption
  - Example: Dad has a joint savings account with his one worth $25,000. Unless it can be proven that the account was funded with the son's money, the entire account will be considered Dad's asset.

IRAs and Other Qualified Retirement Accounts

- There is nothing in the federal rules that protect IRAs
- Some states do not count IRAs if the applicant/recipient (or spouse) receives their RMDs
  - RMD payments are considered income

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Annuities

- The purchase of an annuity will be penalized unless:
  - State is named as first beneficiary (If there is a spouse or disabled child, then State is 2nd)
  - State only gets up to the amount paid out on behalf of the Medicaid recipient
  - Irrevocable and non-assignable
  - Actuarially sound
  - Equal payments with no balloon payment; or
  - Purchased with proceeds from a retirement account or an annuity within an IRA
- Annuities purchased prior to the DRA 05 are evaluated under the prior rules

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Excluded/Exempt Assets

- 42 USC § 1382b
  - (a)(1) Home (Equity limit of $603,000 or $906,000 depending on the state)
    - If in a nursing home the applicant/recipient must have the subjective intent to return home
  - (a)(2)(a) An automobile (most states allow any value)
  - (a)(2)(a) Household goods and personal effects
  - (a)(2)(b) Prepaid burial and/or service for Medicaid applicant, spouse, or any other immediate family member
  - (a)(3) other property which is so essential to the means of self-support of such individual (and spouse) as to warrant its exclusion, including tools and machinery used in a business (a/k/a income producing property)
  - Life insurance policies with a cash value of $1,500 or less

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EXAMPLE

Stephanie is not married and has the following assets:

- 2020 Volvo worth $40,000
- Home worth $500,000 (no liens on the home)
- Checking account with a balance of $15,000
- CD worth $10,000
- Life Insurance policy with a $1,500 cash value

If attempting to qualify for Medicaid the following would apply:

- 2020 Volvo (non-countable)
- Home (non-countable if an intent to return home is filed)
- Checking account (countable)
- CD (countable)
- Life Insurance (non-countable)
- Assuming $2,000 asset limit, then Stephanie would be over resourced by $23,000

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EXAMPLE

Joel is not married and has the following assets

- Home with a fair market value of $600,000 and mortgage of $250,000
- Truck worth $12,000
- Boat worth $25,000
- IRA with a balance of $100,000
- Joint savings account with brother valued at $18,000

The following would apply to Joel's situation

- Home (non-countable if an intent to return home is filed)
- Truck (non-countable)
- Boat (countable)
- IRA (countable , unless state allows him to take his RMDs, then only the income is countable)
- Life insurance (countable)
- Total countable resources: $43,000 or $143,000 if IRA is countable

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Community Spouse Assets

- Community Spouse Resource Allowance (CSRA)
  - The minimum/maximum amount of resources a community spouse is allowed to keep when the applicant/recipient spouse applies for Medicaid
  - Varies by state
    - $26,076 (minimum)
    - $130,380 (maximum)
  - Some states allow the maximum, while others take the total countable assets and divide it equally between spouses

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“Snapshot Date”

- This is the date Medicaid uses to determine the Community Spouse Resource Allowance
- Varies by state:
  - 42 USC § 1396r-5(c)(1) – the first day of continuous institutionalization over 30 days; or
  - Date of Medicaid application; or
  - Other – varies by state

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GIFTING, LOOKBACK AND PENALTY PERIODS

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Gifting and Lookback

- 42 USC 1396p(c)
  - A gift is a transfer of assets for less than fair market value (a/k/a an uncompensated transfer)
- Lookback period
  - States that have not adopted the DRA
    - 36 months for outright gifts
    - 60 months for gifts to/from a trust
  - States that have adopted the DRA
    - 60 months for all transfers

Lookback Period

- Starts with the date of the Medicaid Application, or
- The pick-up date if seeking retroactive benefits

Penalty Period

- A gift made during the lookback period will result in a penalty period
  - This is the number of months that the applicant is ineligible for Medicaid benefits because of a gift (uncompensated transfer) made during the lookback period
- Calculating the Penalty Period

  Total amount gifted during the lookback period

  Divided by

  <u>Penalty Divisor for the particular state</u>

  = Penalty Period
- Penalty Period starts when the applicant is determined to be "otherwise eligible" for Medicaid but for the penalty period (42 USC 1396p(c)(D))
  - Financially Eligible and Medically Eligible

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“Otherwise Eligible”

- Need not actually be residing in a nursing home
  - Community Care is not provided in the nursing home setting
- Would otherwise be receiving institutional level of care but for the penalty period

Exempt Transfer of the Home

- 42 USC 1396p(c)(2)
  - Transfer home to the applicant's
    - Spouse
    - Child under age 21 or is blind or permanently disabled
    - Sibling of applicant who has an equity interest in the home <u>and</u> has resided in the home for at least one year prior to applicant becoming institutionalized
    - Caretaker child who has resided in the home for at least two years prior to the applicant becoming institutionalized <u>and</u> provided care which permitted the individual to reside at home rather than in an institution or facility

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Avoiding the Penalty Period

- Only transfers made in contemplation of Medicaid are to be penalized
  - Presumption that all transfers are made in contemplation of Medicaid
  - Argue that transfer was not made in contemplation of Medicaid eligibility
    - Burden is on the applicant
  - Undue Hardship
  - Return transferred funds to the applicant/spouse can cure the penalty
    - This will likely make the applicant ineligible for Medicaid by being over resourced

Exempt Transfers

- All other assets may be transferred:
  - To the applicant's spouse or a third-party for the sole benefit of the spouse (i.e. use a Sole Benefit Trust)
  - From the spouse to a third-party for the sole benefit of the spouse (Sole Benefit Trust)
  - To a disabled child, or trust established for the sole benefit of a disabled child
  - To a trust solely for the benefit of a disabled person under age 65

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EXEMPT TRUSTS

Self-Settled First-Party Special Needs Trust

- 42 USC 1396p(d)(4)(a)
  - Established for the benefit of a disabled person under age 65
  - Uses the disabled person’s money
  - Must contain a payback provision

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EXEMPT TRUSTS

Miller Trust

- 42 USC 1396p(d)(4)(b)
  - Made up entirely of grantor’s income
  - Must contain payback provision

Pooled Trust

- 42 USC 1396(d0(4)(c)
  - Contains assets of a disabled person
  - Established and managed by a non-profit organization
  - Separate accounts, but the non-profit can pool all of the funds together
  - Payback provision (may pay to the non-profit, state, or combination of the two)

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Planning and Converting Assets to Exempt Assets

Gift and Note/Annuity Planning

- Gifting combined with Promissory Note or DRA Compliant Annuity
- Gift to outright or to a trust which creates a penalty period
- Purchase Promissory Note or DRA Compliant Annuity to pay back set amount of income during the penalty period allowing the applicant to private pay for his/her care during the penalty period

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Planning and Converting Assets to Exempt Assets

Caregiver Agreement

- Protect assets by paying a lump sum to a caregiver
- Prohibited in some states
- Must be for fair market value
- Payment should be made contemporaneously with services provided
- Is taxable income to the caregiver
- May be considered applicant’s employee
- May require proof of services provided

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Planning and Converting Assets to Exempt Assets

Purchase Life Estate in Another's Home

- Purchasing the right to live in someone's home
- Must live in the property for 1 year or it will be treated as a gift

Transfer Home While Reserving a Life Estate Interest

- If sold during the individual's lifetime, they are required to receive his/her remainder interest based upon the actuarial table
- Is considered a gift, except for the remainder interest

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Planning and Converting Assets to Exempt Assets

Enhanced Life Estate Deeds ("Ladybird Deeds")

- Life estate holder reserves the right to sell, mortgage, convey, etc. without the consent of the remainder persons
- No current transfer has been made, and thus no penalty period
- Depending on the state this could be subject to estate recovery

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Planning and Converting Assets to Exempt Assets

Purchase Income Producing Property

- 42 USC 1382b(a)(3)
  - Other property which is so essential to the means of self-support of such individual (and spouse) as to warrant its exclusion, including tools and machinery used in a business
  - Can be "income producing property" (i.e. purchase interest in rental property)

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Converting Assets to Exempt Assets

Medicaid Asset Protection Trusts (proactive planning)

- Transfer assets and not apply for Medicaid until the penalty period for such transfer has expired
- Reserve the right to receive income from the trust
- Protects the principal from Medicaid
- Preserves the step-up in basis
- Preserves the IRC § 121 capital gains exclusion
- Preserves real property tax exemptions

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QUESTIONS?

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