



"GRANNY GOES TO JAIL": How to Avoid Medicaid Elder Care Liability in the USA

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MEDICAID AND LTC




- Established as Title IX of the 1965 Amendment to the Social Security Act
- Health insurance program for:
 - low-income families with children; aged, blind, or disabled people on SSI; low-income pregnant women and children; and people with high medical bills ("MEDICALLY-NEEDY")
- Funded & administered through state-federal partnership with States establishing eligibility standards, benefits and setting payment rates ("COMITY"). **The feds pay but the states control the purse.**

MEDICAID AND LTC: COVERAGE, FUNDING & DEMOGRAPHICS

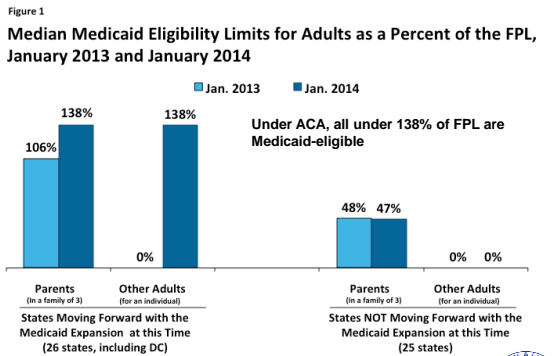


- Must cover **skilled nursing and home health services**. **MEDICARE ONLY COVERS 100 DAYS OF LTC**
- Federal govt. - 57% of Medicaid funding; states 43% varies with per capita income in each state (Miss. 83%, Conn. 50%)
- 60 million (20% of US population) receive Medicaid support. 7% of the Medicaid population (4 million people) receive LTC
 - 1 million nursing home patients
 - 3 million home or community-based LTC
 - 4 million LTC BENEFICIARIES - account for 19% of all Medicaid spending (LTC is expensive)
- Medicaid Beneficiary must require skilled nursing care to qualify for LTC
 - Freq. VS, catheters, ventilation, drsg. changes, IV, ostomy, med monitoring, injections, diabetic care
 - May be less stringent for home or CLTC

MEDICAID AND LTC: INCOME & ASSET TESTS




- Income qualifying levels are tied to the **SUPPLEMENTAL SECURITY INCOME (SSI)** program (Title XVI), but limits can be higher in more liberal states. Generally \$2000/\$3000 Assets, \$2163.00 monthly income (2014)
- In **29 states**, "Medically Needy" having large medical or LTC bills, may deduct these costs to reach the required eligibility income level. Criteria are stringent as needy income level at or below SSI levels.
- Deduction may be **direct or indirect** by potential beneficiary paying a "co-pay" for income above qualifying level for their share of services.
- In **some states**, "300 percent rule" applies. There, individuals with income up to 300% of SSI (\$2,163 per month in 2014), qualify for LTC
- 21 states are strict "income cap states."**



SOURCE: Eligibility data for January 2013 based on the results of a national survey conducted by the Kaiser Commission on Medicaid and the Uninsured and the Georgetown University Center for Children and Families, 2013. Status of Medicaid expansion decisions and 2014 eligibility levels based on data from the Centers for Medicare and Medicaid Services, available at: <http://www.medicare.gov/About-the-Center-for-Medicaid-and-Medicare-Inquiry/2014-Medicaid-and-CHIP-Eligibility-Levels/medicaid-eligibility-levels>. Data have been updated to reflect more recent activity.



MEDICAID AND LTC: MILLER TRUSTS



- STATES MUST ALLOW PATIENTS TO QUALIFY IF EXCESS INCOME PLACED IN A "QUALIFYING INCOME OR 'MILLER' TRUST." **STATES ARE ABLE TO RECOVER FUNDS IN THE TRUST AFTER THE PERSON'S DEATH.**
- THE MEDICALLY NEEDY OR 300 PERCENTERS MUST APPLY ALL BUT **\$30 TO \$90 PER MONTH** TOWARD THE COST OF CARE, REDUCING MEDICAID'S LIABILITY. **MORE ALLOWED FOR CLTC OR HOME CARE.**
- TRUST MONIES CAN COVER **CLOTHING, BOOKS, TOILETRIES, BIRTHDAY FLOWERS, CABLE TV OR TELEPHONE SERVICE.** **ADDITIONAL ALLOWANCE FOR PAYMENT OF MEDICARE, SUPPLEMENT OR ADVANTAGE PLAN PREMIUMS.**

Medicaid and LTC: COMMUNITY SPOUSE



- **NH resident with community spouse** is allowed to keep a greater proportion of income for spousal support (between \$1,938.75 (majority) and \$2,931 per month in 2014. **Individual or couple needing Medicaid LTC must have assets less than \$2,000 or \$3,000, respectively.**
- Community spouse can receive another allowance if **medical expenses exceed a state-designated maximum. Waivers may be requested.**
- **Medicaid fair hearing** can result in more income for the community spouse if argument supports need.

Medicaid and LTC: COMMUNITY SPOUSES and resource analysis



- "Snapshot" asset analysis of **"combined resources"** used if one spouse requires LTC and leaves a community spouse
 - **Resources = anything that can be converted to pay for LTC**
 - **50% states – comm. spouse keeps half of resources not over \$117,240 (2014).**
 - **100% states – comm. spouse can keep up to \$117,240.00 (2014)**
 - **If the combined resources are less than \$23,448.00 (2014) the healthy spouse keeps it all (statutory minimum). Certain combined resources are excluded**
 - **All require LTC spouse spend down to \$2000. Spend down need not be for LTC if Medicaid not yet applied for. After Medicaid application, substantial portion goes to LTC expense – need "intelligent gifting".**

ASSETS NOT COUNTING TOWARDS THE \$2,000 ASSET LIMIT



- **Personal possessions** - clothing, furniture, and jewelry
- **One vehicle** excluded, regardless of value - must be used for transportation of LTC spouse or household member. Value of additional vehicle can be excluded if needed for health or self-support (business) reasons. (state rules)
- **Principal residence** – must be in the same state in which LTC patient applying for coverage
- **Prepaid burial plans** and small amount of **life insurance**
- **"Inaccessible" Assets** (trust monies, etc.)
- **Income producing property**, or if used in trade or business

INCOME TEST EXCLUDES:



- Nutritional assistance such as food stamps
 - Housing assistance provided by the federal government
 - Home energy assistance
 - Some earnings if CLIENT HAS earned income from work
- ALL OTHER PASSIVE AND ACTIVE INCOME INCLUDING veterans' BENEFITS, DIVIDENDS, interest, PENSIONS, social security and most wages apply as income**

ELDERCARE LIABILITY AND PERSONAL HOMES



- State may require a **single** Medicaid LTC beneficiary **not residing** in a home without anticipation of return to sell it to pay for Medicaid costs.
- Other states allow the home to be vacant in anticipation of returning whether the patient is capable or not. An **"Intent to Return Home" document must be executed to avoid the home's sale** or its being an asset for the Resource Test.
- For states fully implementing the **Deficit Reduction Act of 2005**, home equity exceeding **\$543,000 (\$814,000 in some states)** must be counted as an asset to qualify under the asset test. This rule does not apply if a comm. spouse lives in the home

"GRANNY (OR HER LAWYER?) GOES TO JAIL"



- **HIPAA 1996** - criminal penalties (one year) and/or fine of \$10,000.00 for person "knowingly and willfully disposing of assets" for the purpose of becoming Medicaid eligible
- repealed shortly after its enactment, by Sec. 4734 of the **Balanced Budget Act of 1997**, which freed Granny from the threat of jail.
- **SLOGAN WAS USED TO PEDDLE LTC POLICIES EVEN INTO THE 2000'S**
- "persons who for a fee assist others in disposing of assets" to qualify for Medicaid, became known as the **"Granny's Lawyer Goes to Jail" law**. Penalties for Granny's advisors - fine not to exceed \$10,000 or imprisonment for not more than a year, or both. (BBA 1997)

"GRANNY'S LAWYER GOES TO JAIL!"



- ATTORNEY GENERAL JANET RENO OPINED THAT WAS **VIOLATIVE OF THE FIRST AMENDMENT** IN COMMUNICATION TO SPEAKER GINGRICH
- **NEW YORK STATE BAR V. RENO**, 999 F. SUPP. 710 (1998), HELD THAT THE LAW PUT ADVISORS IN A QUANDARY WHERE THEY HAD A **DUTY TO OBEY THE LAW BUT ALSO AN ETHICAL OBLIGATION TO PROVIDE CLIENTS WITH COMPLETE REPRESENTATION.**
- APPLIED EVEN THOUGH **IT WAS NOT ILLEGAL TO DISPOSE OF ASSETS** FOR PURPOSES OF QUALIFICATION FOR MEDICAID AT THAT TIME
- FEDERAL COURT GRANTED **PRELIMINARY INJUNCTION** PROHIBITING ENFORCEMENT

THE DEFICIT REDUCTION ACT OF 2005 (DRA)



- **Saves \$40 billion** over five years by slowing Medicare and Medicaid spending, changing student loan formulas and other provisions.
- **"Lookback Period" for asset transfers increased from three to five years**
- Changes start of penalty period for transferred assets from **transfer date** to the date when the **transferor enters a nursing home** and would otherwise be eligible for Medicaid coverage.
- **"The Nursing Home Bankruptcy Act of 2005."** Penalty period only initiates after LTC patient is out of money. Nursing Home eats the loss.

The Deficit Reduction Act of 2005 (DRA)



- In states with "filial responsibility laws," **nursing homes may seek reimbursement from residents' children.**
- The state is required to be the **remainder beneficiary as to all annuities.**
- Continuing Care Retirement Communities (CCRCs) may require residents to **spend down resources before applying for medical assistance in the LTC (skilled nursing) area.**
- Sets rules under which individual's CCRC **entrance fee** is considered an available resource.

The Deficit Reduction Act of 2005 (DRA)



- Requires states to apply the **"income-first" rule (maximum allowable as to LTC spouse income)** to community spouses appealing for increased resource allowance based on need for more funds invested to meet their minimum income requirements.
- See *Blumer v. Dep't of Health & Family Svcs*, 237 Wis. 2d 810, 2000 Wis. App. 150, 615 N.W.2d 647 (Ct. App. 2000) pet. rev. denied, 239 Wis. 2d 309, 619 N.W.2d 92 (2000), rev.'d, 534 U.S. 473, 122 S.Ct. 962.
- Authorizes states to include **home and community-based services as an optional Medicaid benefit.** (Previously, states had to obtain a waiver to provide such services.)

DRA: CLOSURE OF ASSET TRANSFER LOOPHOLES



- **LIFE ESTATE IS AN ASSET** UNLESS GRANTEE RESIDES IN HOME FOR AT LEAST A YEAR AFTER ORIGATION.
- FUNDS TO PURCHASE NOTE, LOAN OR MORTGAGE COUNTED AS ASSET UNLESS **REPAYMENT TERMS ARE ACTUARILLY SOUND, INVOLVE EQUAL PAYMENTS AND PROHIBIT CANCELLATION AT DEATH OF LENDER.**
- STATES **CANNOT "ROUND DOWN" FRACTIONAL PERIODS OF INELIGIBILITY** IN DETERMINING INELIGIBILITY PERIODS DUE TO ASSET TRANSFERS.
- **MULTIPLE TRANSFERS CAN BE TREATED AS SINGLE** WITH PENALTY PERIOD BEGINNING ON THE EARLIEST TRANSFER DATE

DRA: ADDITIONAL CONSTRAINTS ON WAIVERS



- States **not required** to offer spousal poverty protections to home and CLTC waiver program participants
- **19 states fail to offer** the spouses of waiver participants the full level of income and/or asset protection afforded the spouses of nursing home residents by the feds.
- **13 states protect neither income nor assets** of spouses of waiver participants
- **6 states protect assets but not incomes** of the community spouses of waiver participants.

ASSET TRANSFER PENALTIES



Penalty calculated by dividing the transferred amount by the state's average monthly Medicaid nursing home cost. States publish their monthly average cost at least yearly. **QUOTIENT PROVIDES THE NUMBER OF MONTHS THE PATIENT MUST PAY HIS OR HER OWN LTC COSTS**

Four years prior to LTC need, Bill alienates \$500,000.00 to his children (home sale, irrevocable trust, sale of real property, jewelry, art collection). Avg. State Monthly NH Expense - \$5000.00

Bill must pay 100 months (over 8 years) of his own LTC expense prior to qualifying for Medicaid coverage.

After look back lapses, Medicaid cannot assess a penalty.

Bill would do better to pay for himself for one year

TRANSFER OF HOME WITHOUT DRA PENALTY



- transfer to applicant's spouse or child **under 21** or who is **blind or disabled**
- transfer into trust for the **sole benefit** of **disabled person under age 65** (even if trust is for the benefit of applicant, under certain circumstances)
- transfer to **sibling living in the home during the year preceding** the applicant's institutionalization and already **holding an equity interest** in the home
- transferred to **"caretaker child,"** a child of applicant living in the house for at least two years prior to NH and who provided care allowing applicant to avoid a NH stay.

CAVEATS



- **SINGLE ELDERLY LIKELY TO NEED LTC** – CONSIDER **CARETAKER CHILD OR SIBLING** – ALSO SPEND DOWN TO MEDICALLY-NEEDY LEVEL IF POSSIBLE
- MOVE INTO **MORE MODEST HOME** EARLIER IN LIFE
- GIFT **ASSETS TO CHILDREN** AS EARLY IN LIFE AS POSSIBLE
- CONSIDER A **LONG-TERM CARE INSURANCE POLICY**
- KEEP YOUR **SPOUSE HEALTHY**
- CONSIDER A **TRUST FOR BENEFIT OF LTC RECIPIENT** AND FORM EARLY
- MOVE TO A **STATE WITH HIGHER WAIVER VALUES**
- INVESTIGATE A **MILLER TRUST** (PAYS FOR CABLE, FLOWERS, PERSONAL CARE)
- SOMETIMES ITS BEST TO **WAIT A WHILE** TO APPLY FOR MEDICAID

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