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Medicaid Promissory Notes: Gift and DRA Compliant Transactions, Shielding Assets, Safe Harbors, Spousal Refusals

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Medicaid Promissory Notes: Gift and DRA Compliant Transactions, Shielding Assets, Safe Harbors, Spousal Refusals

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Introduction:

Basic Medicaid Eligibility

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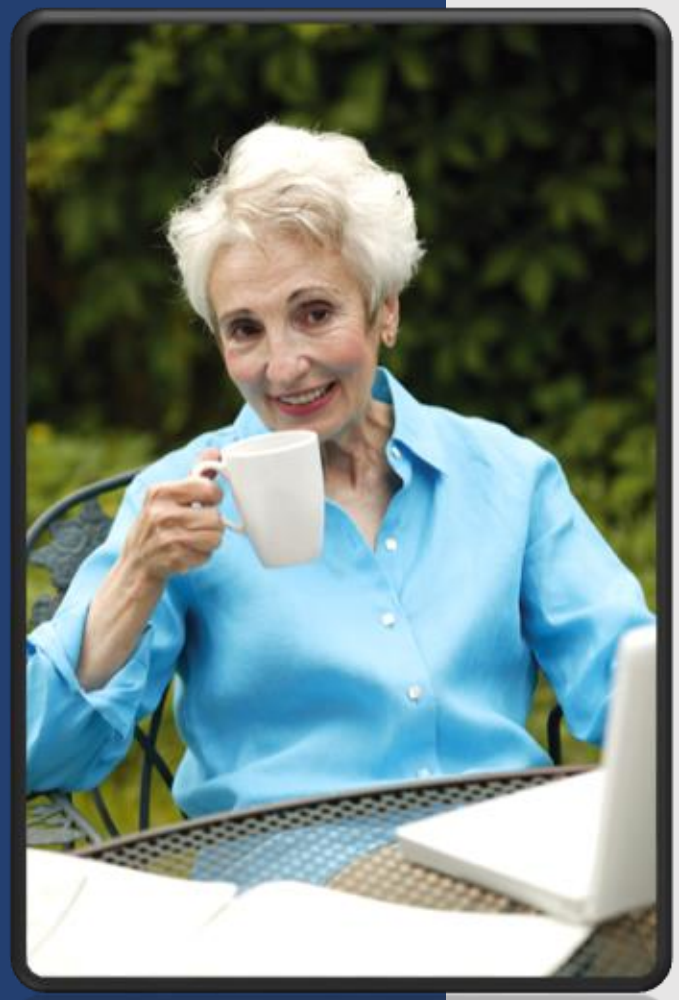

Long-Term Scare

70% Odds That You Will Need Skilled Nursing Care If You Live Over Age 70

Medicare Not For Long-Term Care

Not For Chronic Needs

Only for Rehabilitation up to 100 Days

Subject to Strict Limitations

Non-Financial Eligibility Criteria in Illinois

To be eligible for Illinois Medicaid, an applicant must be:

- a U.S. citizen or legal resident;
- resident of the state where benefits are sought;
- medically necessary (there must be "medical eligibility") and be over age 65;
- if the applicant is under age 65, the applicant must prove disability as defined by the Social Security Administration.

Basic Financial Require-ments

1. Income limit or engage in monthly income spend down
2. Resource spend down
3. 60-month review of resources – known as the five-year lookback

Income Discussion

Monthly Income Limit

- $2,901.00 in 2025 for the applicant
  - If above the limit, monthly income spenddown applies
- $3,948.00 for the applicant's spouse if living at home (Community Spouse)
  - If above the limit, then responsible relative contribution may apply

Sample Monthly Income Calculation

Gross Income	
Social Security Benefits	$2,000.00
- Pension	$1,000.00
Total Gross Income	$3,000.00
Health Care Premiums	
Medicare Part B	$ 185.00
+ Medicare Part G (Supplemental)	$ 260.00
+ Medicare Part D (Prescription)	$ 70.00
Total Allowed Premiums	$ 515.00

SAMPLE Total Monthly Income Spend Down for SINGLE client

Total Gross Income	$3,000.00
- Total Allowed Premiums	$ 515.00
- Disregard (LTC)	$ 60.00
Total Due to Facility EVERY month	$2,425.00

Community Spouse Maintenance Needs Allowance

Currently = $3,948.00

- monthly income allowance for spouse to prevent spousal impoverishment
- Applicant spouse can transfer income to the Community Spouse if his or her income is under $3,948.00

Resources

Common Exempt Resources of ***Applicant*** – Single or Married

- $17,500 of resource disregard
- Homestead only if not in trust and applicant expresses intent to return home (or if qualified person lives in the homestead)
- IRAs (as long as taking monthly distributions), GA, but not IL
- Personal effects
- Life Insurance, with limits
- One Auto of any value
- Burial space
- Pre-Paid Funeral

Common Exempt Resources of Community Spouse

- $139,648.00 in Illinois
- $159,920.00 in Georgia
    - of resource disregard (Community Spouse Resource Allowance – CSRA)
- Homestead equity value at no more than $730,000.00
- Personal Effects
- Car of any value
- Life Insurance
- Burial space
- Pre-Paid Funeral

Resources Available to Pay for Care

- Any resource that is not exempt or is over the resource disregard is considered available to pay for care.
- An available resource is one which can liquidated or is controlled by the applicant or the community spouse

Spend down of Resources

- Medicaid requires the spend down of resources over the resource limits to pay for care.
- The applicant will be "approved" for Medicaid with a spend down.
- The spend down is LIMITED to medical needs, such as paying the facility.

Five-year look back

Medicaid audits every resource for the past five years immediately prior to the requested eligibility date.

Purpose of the five-year look back

(1) Verify all transactions were allowed during that time frame and

(2) the applicant or the community spouse received fair market

value for all transactions.

Presumption At Law

The presumption at law is that if the applicant or the community spouse (if applicable) transferred resources within five years of applying for Medicaid it was to qualify for Medicaid.

Fair Market Value

- Fair Market Value is receiving the going rate for a particular good or service, which must be verified.
  - Bank statements, inclusive of canceled checks and deposit documentation
  - Invoices or bills
  - Bills of sale
  - Appraisals
  - Contracts or Leases

Non-Allowed Transfers

- Gifts.
- Transfers for which neither the applicant or the community spouse can produce verification of receipt of Fair Market Value.

Consequences of Gifts or lack of verification of FMV

Medicaid imposes a Penalty Period on the value of the transaction(s)

Penalty Period

Such period is the length of time (measured in months) that Medicaid will not pay for care even if the applicant is "approved."

The penalty period begins at eligibility if there is no spend down of resources.

If there is a spend down of resources the penalty begins to run AFTER the spend down – because you can have both a spend down and a penalty on a case.

Charities are not exempt from the transfer penalty rules.

Calculation of Penalty

Aggregate Value of Non-Allowed Transfers / $10,965

Aggregate Value of Non-Allowed Transfer Amounts / Monthly private pay of facility in Illinois

Monthly Private Pay (IL)

Facility Daily Rate X 30 days = Monthly Private Pay

Private pay DOES NOT include extras to the monthly bill.

IL Example of Applicant with an Expected Penalty

Unverified Cash Withdrawals	$ 5,000.00
Gift to Grandchild For College	$20,000.00
Total Non-Allowed Transfer Amount	$25,000.00
Facility Daily Rate	$ 340.00
X	30 days
Monthly Private Pay	$10,200.00

Example Final Calculation

$25,000/10,200 = 2.45 months of penalty

Medicaid will not pay for care for 2 months as of the eligibility date (or upon completion of imposed spenddown) and .45 of the third month.

Brief Overview of Medicaid Crisis Planning

Crisis Planning

- Goal: convert resources otherwise subject to spenddown to exempt income or resource
- Cure transfers within the Lookback Period
- No planning in advance of need
- Gift & DRA Complaint Transactions do not save all resources

Crisis Planning:

The last resort to shield assets from spend down

Types of Crisis Planning

- Allowed Transfers
- DRA Compliant Transactions
- Spousal Refusal

Allowed Transfers

List of Allowed Transfers and/or purchases BEFORE filing application

- All transfers between spouses
- All transfers for which the applicant or CS received FMV
- Homestead to one of the following:
  - Spouse
  - Caretaker child
  - Disabled child
  - Child under 21
  - Sibling on title and sibling lived in homestead for 1 year prior to applying
- Purchases of Exempt Assets
  - Car purchase
  - Burial Plot Purchase
  - Prepaid Funeral Purchase
- Payments to Caregivers

Allowed Transfers

- Transfer of assets to a Disabled Child or Supplemental Needs Trust for the Child
- Transfer to Supplemental Needs Trust if applicant is under 65
- Medicaid Complaint Annuity Purchase
- Loan on a Medicaid Complaint Promissory Note

Transfers to Spouse

- Not penalized
- If transfer creates over-resourcing, then planning is required

FMV Purchases in preparation for application

- Remodel home for the community spouse's comfort
- Pay off all loans – personal or mortgage(s)
- Pay off all credit cards
- Pay homeowners or car insurance for a year
- Pre-pay real estate taxes for a year
- Buy everything needed for the applicant or spouse
- Anything else the applicant or spouse may need

Transfers to Supplemental Needs Trust

- An applicant can transfer unlimited resources to a disabled child directly or to a supplemental needs trust for his or her sole benefit.
    - The child must meet the Social Security definition of disability.
- If the applicant is under age 65, then he or she can transfer all resources over the limit to a first part supplemental needs trust for the applicant's self benefit

Lump-Sum Payments to Caregivers

- Lump-Sum Payments in Workers' Compensation:
  - Allowed when in the best interest of the claimant or dependents.
  - Prevents undue hardship on the employer or insurance carrier.
  - Must not prejudice the claimant or dependents.
  - Determined by the South Carolina Workers' Compensation Commission.
- Factors Considered:
  - Hardship to employer or carrier.
  - Best interests of the claimant and family.

S.C. Code Ann. § 42-9-301

Homestead Transfers

Spouse

Caretaker child

Disabled or blind child

Child under 21

Sibling on title

Transfer of Homestead to Spouse

- Applicant can transfer Homestead to the Community Spouse
- Community Spouse will then create an Estate Plan under which he or she leaves all assets to the applicant spouse in a testamentary supplemental needs trust

Transfer of Homestead to Disabled Child

An applicant parent may transfer the parent's interest in the homestead as an allowed transfer.

The intent of the disabled child exception is to ensure that a disabled child is provided for by a parent in need of Medicaid.

Transfer to Caretaker Child

A parent may transfer the parent's interest in the homestead to a "caretaker child" as an allowed transfers

A "caretaker child" is

1. a child who provided care for the parent (either nursing or support) and
2. lived in homestead for at least two years immediately before the applicant parent entered a facility or otherwise applied for Medicaid.

Evidence to Support Exemption

Doctor's note that applicant parent would have otherwise needed institutional level of care;

Proof the child resided with for the applicant the two years immediately prior to the applicant needing to go into a long-term care facility, a two year old license showing the applicant's address as the child's address is sufficient; and

An affidavit signed by the child that he or she provided care that prevented the applicant from having to enter a long-term care facility sooner.

Transfer to Child under 21

The applicant parent is allowed to transfer his or her homestead to a child under 21.

The transfer must be directly to the child. If the child is under 18, then there must be a minor's guardianship opened.

Transfer to Sibling

- The transfer is exempt if:
  - The sibling is already on title and
  - Has lived there for a year immediately before applicant's application for long-term care Medicaid benefits

Structuring Gift and DRA Compliant Transaction

Mechanics

- Exhaust all allowed transfers
- Reserve allowed resource amounts
- Calculate the income due to the facility
- Gift to Medicaid Trust or trusted person to create a penalty
- Increase income via annuity or promissory note purchase to cover nursing home cost
    - During the penalty, the income increases to just short of the cost of the facility

Gift and Note Strategy

- Partial Gift and DRA Compliant Transaction
  - Promissory notes
  - Annuities

Gift to a Medicaid Trusts

- The trust terms must be unamendable;
- Neither the applicant/community spouse can revoke;
- Assets/resources cannot distribute to applicant (and/or Community Spouse);
- No Control by applicant (and/or Community Spouse).

Medicaid Compliant Annuities

Beneficiary Requirement

- After the single applicant's death the beneficiary must be State of Illinois up to the amounts it paid for Medicaid for the applicant.
- If the applicant is married or has a disabled or minor child, then the spouse or child can be the beneficiary with the State the secondary beneficiary up to the amounts it paid for Medicaid for the applicant.

Structural Requirements

- Actuarily sound.
- It is irrevocable and unassignable.
- No cash value (this is what makes it unavailable).
- Equal payments and no balloon payment at the end.

Single Applicant

- The goal is to gift a portion of the over-resourced value and create a penalty.
- After the penalty period ends, the gifted portion is not subject to spend down

Married Applicant

- transfer asset over resource limit to the community spouse
- Purchase annuity with assets of the resource limit
- The annuity creates an income stream to the community spouse

Promissory Note Problem?

What if annuity payments cause Spouse's income to exceed $3,948 in Illinois?

Answer:

- responsible relative contributions toward the applicant's cost of care
- Contributions are a fraction in contrast to a resource spend down

Medicaid Compliant Promissory Notes

Promissory Notes under Medicaid

- Medicaid provides that the purchase of a promissory note is an uncompensated transfer of assets unless the note meets specific criteria.

- Criteria specified in SC Medicaid Manual § 302.12 and 42 U.S.C. § 1396p

Structural Criteria

- Contract and loan must be contemporaneous
- Equal payments with no lump sum or balloon payment
- Actuarily sound and cannot be canceled at death
- Remaining installments must be paid to the state if the applicant dies up to the amount paid by Medicaid for medical payments

Promissory Note Example

- Ed Jones is single, 75 years old, and is residing in a nursing home.
- The private cost of the nursing home is $8,100.00 and the Medicaid monthly divisor is $10,965.00.
- He has total countable assets of $225,000.00 and fixed monthly income of $2,000.00.

Promissory Note Example

- Gift $136,271.95
  - Medicaid transfer penalty of 16 months
- Promissory Note $88,228.05
  - Monthly Payments: $5,671.79
  - Term: 16 months
  - Interest Rate: 4.0%

Promissory Note Problem?

What if note payments cause applicant's income to exceed $2,901.00 in Georgia?

Answer:

Establish a qualified income trust.

SC Medicaid Manual § 304.19

Promissory Note Problem?

What if note payments cause Spouse's income to exceed $3,948 in Illinois?

Answer:

- responsible relative contributions toward the applicant's cost of care
- Contributions are a fraction ofa resource spend down

Gift and Note Strategy

- Gift and DRA Compliant Transaction
  - Gift will be protected
  - Purchase of a promissory note or annuity to pay for long term care through the penalty period
- Benefits
  - Protects a portion of the applicant's assets
  - Secures income stream to pay the nursing home
  - Utilize vehicles sanctioned by DRA

Spousal Refusal

Assignment of Support Rights to State

The applicant assigns the State of Illinois the right to seek support payments from the community spouse in a written statement.

89 Ill.Admin.Code 120.379(i)

Spousal Refusal triggers Responsible Relative Liability

Illinois can seek payments from the community spouse from both income and resources.

- 89 Ill.Admin.Code 120.379(j)

A Discount Strategy

- The state pays a discounted reimbursement rate to facilities
- Spousal refusal produces a responsible relative liability up to the amount the state paid

Verifications

- Even if engaging in Spousal Refusal, the Community Spouse MUST provide all required verifications.
- If the Community Spouse does not, then the application can be denied.

Conclusion

QUESTIONS

Q&A

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