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Medicaid Resource and Income Allowances and Transfer of Asset Rules 2018

MEDICAID ELIGIBILITY GENERALLY

The rules for Medicaid eligibility vary tremendously depending upon your age and/or whether you are disabled. The information in this material discusses, generally, people over the age of 65 or those who are disabled.

Be careful, though: Medicaid rules are highly complex, and even slight variations in fact may affect the results. Single people/widows are treated differently than married couples. Married couples living together in their own home are treated differently than couples where one spouse is in a nursing home and the other remains at home. There are different rules depending upon whether you are over or under 21, or 55, or 65. Results are different if your assets consist mostly of retirement accounts vs. non-retirement accounts.

> ***Note**: We cannot stress enough that Medicaid eligibility often hinges upon knowing the exceptions to the rules. So, use the information below as a guide, but it is not offered as advice. Advice is tailored to individual client situations. There are no short-cuts towards achieving Medicaid eligibility.*

RESOURCE ELIGIBILITY RULES

To be eligible for Medicaid, you may generally have no more than the following amounts which are called "exempt" resources. All figures are as of January 1, 2018:

Single:	If the applicant is a single or widowed individual:	$15,150.00
Couple:	If the applicants are a married couple:	$22,200.00

Community Spouse: If only one spouse requires Medicaid, then under certain circumstances the spouse who does not need Medicaid benefits, if he or she lives outside of a nursing home (called the “community spouse”) , may be able to keep up to $123,600.00 as his or her exempt resources, rather than just the lower figures shown above. This higher amount is called the Community Spouse Resource Allowance (CSRA).

Additional “exempt” assets. You may also keep the following:

1. Homestead. Your primary residence will not be counted as an asset if you live there, or if your spouse, minor child or disabled adult child lives there. But, the equity cannot be more than $858,000.00. If your equity exceeds this, you will have to reduce it—either by taking out a loan (mortgage) or by transferring part ownership to someone else. (Caution: transfer may cause ineligibility.)

2. Burial Funds. You may deposit into a pre-needs irrevocable funeral trust with a funeral home of your choice to cover your funeral and burial costs. There is no cap so long as the amount deposited is “reasonable.” In addition, you may have a separate burial fund of $1500 for certain other burial costs.

3. Retirement accounts. The Medicaid applicant’s IRA, 401(k) and other retirement accounts are exempt *provided* that they are in “payment status” meaning that the applicant is making annual withdrawals of the required minimum distribution (RMD) [Note: calculation is different for unmarried individuals in Nassau, Suffolk, Westchester and most upstate Counties]. However, RMD is counted as *income* (see later).

INCOME ELIGIBILITY RULES

Income rules differ depending upon whether the Medicaid applicant is single or married, living at home or not, and whether one or both spouses apply for Medicaid benefits. In most cases only one spouse at a time will need benefits, so the general rules are as follows:

Unmarried individual living at home may keep $842.00 per month of income plus $20.00 cash while still qualifying for Medicaid payments for home care.

Unmarried individual residing in a nursing home gets to keep $50.00 per month. All other income will go to reduce medical costs.

If one spouse is institutionalized and the other continues to live at home, the community spouse may keep $3090.00 of income each month. (Counted income includes Social Security, pension, interest and dividends, rental income, etc.) If the community spouse does not receive this much, he or she is given an allowance from the institutionalized spouse’s income to make up for the shortfall.

Assisted Living Program Facilities: Individuals living in an assisted living facility are entitled to $1,444.00 of monthly income. Married couples are allowed to keep $2,888.00. Note: most

assisted living facility are privately funded and do not accept Medicaid. Only assisted living program facilities (i.e. those that accept Medicaid for room, board and health service) use these income numbers.

Special income producers. There are two asset types requiring further consideration: retirement accounts and annuities. In both cases, the amount of income to be counted is based upon the life expectancy of the owner of those assets (usually the Medicaid applicant) and will have to be withdrawn according to published life expectancy tables. Different life expectancy/withdrawal tables are published for annuities and retirement accounts.

Income exemptions: Not all income is counted. Some of the most common types of non-countable income are Holocaust war reparations and Japanese-American interment payments, loans and in some cases, lump sum payments when received.

Note: "Income" refers to what comes in during a particular calendar month. If income is not spent during that month (or in some cases in the months following), the income becomes a "resource" and may be counted towards the $15,150.00 resource level.

TRANSFER OF ASSETS RULES

1. Spending excess resources. Resources exceeding allowable amounts may be spent prior to applying for Medicaid benefits. You are not limited to medical bills. Any legitimate expenditure counts so long as it is not a "gift by another name" to others.

   a. Examples of expenditures which are not considered to be transfers:

      i. Paying someone to care for you or your spouse. This includes a family member (but extra care is required in such a case).
      ii. Making home repairs or improvements.
      iii. Buying a new automobile.
      iv. Taking a trip.
      v. Eating meals at a restaurant every day of the week.

   b. Examples of expenditures which may result in a determination of ineligibility:

      i. Paying for a grandchild's tuition.
      ii. Making repairs or improvements to someone else's home unless you live there.
      iii. Buying a new automobile for a family member.
      iv. Paying for the vacation of a family member.

   c. For exceptions, see section "3.f." below.

2. Transferring exempt resources. (If you or your spouse transfers exempt resources, there is no Medicaid penalty. If you or your spouse transfer non-exempt resources to an exempt *recipient*, there is also no penalty.)

   a. Exempt recipients: Generally: spouse, minor children, disabled adult children. A Medicaid applicant may transfer *any* assets to these individuals.

   b. Additional exemptions: In addition to the above recipients, a Medicaid applicant may transfer an exempt homestead to a sibling who has an equity interest in the house and has been living there for at least a year, or to a child who has been living with the applicant for at least two years in order to keep him/her out of a medical institution (i.e. nursing home).

3. Transferring non-exempt resources. If you transfer non-exempt resources, there is a Medicaid penalty unless you transfer them to an exempt individual.

   a. Penalty applies to institutionalization only: The penalty applies in cases where the Medicaid applicant is in a nursing home or if he/she enters one within the "look-back" period established by law (see below).

   b. Penalty does not apply to home care: If the Medicaid applicant needs home care, there is generally no disqualification period. However: if the applicant enters a nursing home later, the penalty rules may again apply.

   c. Penalty periods. The penalty period begins on the first day of the month following the month in which the Medicaid applicant is institutionalized and would be eligible for Medicaid but for the transfer. This is a circular way of saying that the penalty period may not even *begin* for months or years after the transfer. In addition, the penalty applies to any non-exempt transfer made within 60 months of applying for Medicaid benefits. See the examples below.

   d. Calculation of penalty. The penalty is based upon a formula that is supposed to represent the average cost of a month's stay in a nursing home within a specific State region. The State Medicaid agency divides the amount of the transfer by the regional divisor number to arrive at the ineligibility period.

      Example: Say that on January 10, 2018 you gave away $100,000 in a region of New York State that penalizes this transfer by denying nursing home Medicaid benefits for one month for each $10,000 transferred. The ineligibility period would be ten months ($100,000 / $10,000 = 10). If you entered a nursing home in January 2021—three years later—the ten-month penalty would run from February 2021, not February 2018.

   e. Gifts for tax purposes distinguished. A common question is whether the Medicaid law exempts a gift of the annual amount permitted under the Internal Revenue Code

(currently $15,000 per year per recipient). It does not. In other words, if you give a gift of $15,000, no gift tax will be due, but Medicaid will still apply the penalty rules discussed in the above example.

f. Overcoming the presumption that a transfer was made for Medicaid purposes. Medicaid regulations permit the Department of Social Services to presume that any gifts to or expenditures made for the benefit of family members (see examples in section "1.b." above) were made with the specific intention of reducing your assets in order to qualify for Medicaid benefits. However, this presumption is rebuttable by evidence tending to prove that this was not your intention.

Examples where the presumption may be rebutted by proper evidence:

1. A significant cash gift on the occasion of a wedding, bar mitzvah, etc.

2. A clear pattern of giving similar gifts for many years, e.g. a grandparent who has paid a grandchild's private school tuition for the past several years, and not for the first time just prior to applying for Medicaid.

3. A documentable emergency by the recipient, usually a close family relative.

SPOUSAL RESPONSIBILITY ("SPOUSAL REFUSAL")

The general New York law is that one spouse is liable for the support of the other, including for medical bills. This law, however, is subject to certain modifications under Medicaid regulations.

Spousal Refusal. When one spouse refuses to contribute income or resources towards the support of the spouse applying for Medicaid, and the applicant himself or herself meets the resource eligibility threshold (i.e. $15,150), Medicaid must be awarded. The theory behind this is that "no" means no—that Medicaid cannot simply presume that the non-applying spouse will pay for care if he or she has said that he/she would not. The Department of Social Services may request an "assignment of support" from the applicant and may sue the refusing spouse for appropriate support.

Even if the agency sues the community spouse—and some, but not all, do—the community spouse will have an opportunity to negotiate a monthly payment and settle with the Medicaid agency. In short, there is nothing to fear from refusing to support a spouse.

One of the major concerns in planning for a husband and wife is how (and whether) to transfer assets out of both names to children or others. Unfortunately, there is no easy answer here and very careful planning is required. For example, while one spouse may transfer assets to another spouse, that recipient cannot re-transfer assets to others before the institutionalized spouse is receiving Medicaid. In short, there are techniques available to transfer assets from a

couple to their children (or to others), but such planning is not a proper topic for this general information handout because each case must be handled personally and very carefully between your attorney and you.

LIENS AND RECOVERIES

There are several circumstances under which Medicaid may recover for benefits paid to a recipient. For example, if the recipient received benefits that he or she was not entitled to, payments may be recovered. This often occurs when assets were not disclosed but were later discovered by Medicaid.

Medicaid may also place a lien on your home in limited circumstances, generally, if you are temporarily absent –usually because you are being treated in a medical facility but claim that you intend to return once treatment is completed.

Finally, in some cases, Medicaid may recover payment from the estate of a deceased Medicaid recipient if the recipient was over the age of 55 at the time the benefits were paid. This is a highly complex area and, with the proper planning, liens and recoveries may be avoided. Because there are so many factors that may affect your rights, it is best to discuss this on a case-by-case basis.

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- Probate of wills and administration of estates.
- Advising the elderly and their families on how to avoid impoverishment due to catastrophic medical costs and nursing home placement. Assist families in obtaining nursing home benefits and planning home care options, Medicaid planning, spousal refusal planning and other asset-protection techniques.
- Drafting durable powers of attorney, living wills & health care proxies to avoid expensive court guardianship proceeding.
- Drafting revocable trusts to avoid probate and irrevocable trusts to prevent the loss of life savings.
- Estate plans for people with special needs: ill spouses; elderly parents; disabled or "spendthrift" children.
- Represent clients in will contest litigation—both defending wills and contesting them.