

## MEDICAID OUTLINE

### Types of Medicaid Coverage

#### **Community Medicaid**

- Clinical or out-patient basis
- Includes physicians, dentists, pharmaceutical, nursery

#### **Home Care**

- Includes personal care, nursing, physical therapy, occupational therapy, home health care and home health aid services

#### **Institutional**

- Hospitals, medical facilities, nursing homes and home health care through **Lombardi Program**

### Medicaid Eligibility

#### **Authorized Recipients**

- (1) Medically needy
- (2) Categorically needy
- (3) Legal US resident

#### **NY Eligibility**

- (1) Legal US resident (no duration or citizenship requirements)
- (2) Applicant must be resident of county their application is made and must “intend to remain”
  - If age 21 – 65: residency based on intent to remain OR person unable to state intent
  - < 21 or > 65:
    - (a) Disabled: physical or mental incapacity prevents employment for > 1 year,
    - (b) Eligible for Public Assistance: income and assets very low, OR
    - (c) Recipient of SSI: automatically qualifies for Medicaid

### “Means Testing”: Income

- First \$20 is *exempt* from being counted
- Single Individuals:
  - **Homecare - \$767 per month** (plus \$20)
  - **Nursing Home** – ALL of recipient’s monthly income (except exempt income) in excess of \$50 must be paid to nursing home as an offset to Medicaid payments
- Income Levels for a Couple receiving Home Care: \$1,117 per month + \$20
- Income Level for a Couple receiving Institutional Care: **Minimum Monthly Maintenance Needs Allowance** [“MMMNA”] → **\$2,739 / month**
  - Income can be *deemed* (only for spouses, parents or children < 21) or attributed to another, even if not actually paid
  - ALL income available to institutionalized spouse must be attributed to community spouse bf granting the latter an increase of “**Community Spouse Resource Allowance**” [“CSRA”]

## “Means Testing”: Resources

- **“Available Resources”:** cash, securities
  - Includes spouse’s resources
  - If applicant or spouse is entitled to resources but does not collect (renunciation of bequests, right of election, waiving pension income, tort settlements, etc.) State can enforce the right
- **IRAs, KEOGH’s, 401(k)s**
  - If retirement account is in *payout* (RMD, SEPP) income is included in means testing by principal is NOT included
  - ROTH IRAs → BAD for Medicaid purposes: account owner MUST begin payouts from Roth
- **Annuities**
  - Income will be included in means testing calculation
  - Requirements:
    - (1) Annuity payout must be “actuarially sound” based on life expectancy to avoid period of ineligibility
    - (2) Irrevocable
    - (3) Non-Assignable
    - (4) No deferral of payments permitted
    - (5) No balloon payments permitted
    - (6) Payments must be in equal amounts during annuitization
    - (7) State must be named first beneficiary unless there is a community spouse, blind or disabled child (in which case state is #2 beneficiary)
- **Exempt Resources**
  - (1) **Homestead**
    - Primary residence occupied by applicant, spouse or minor, blind or disable child
    - One, two or three family home, condo, co-op or mobile home
    - If part of homestead is income producing: home is exempt but income is included
    - Cap on equity of \$750,000 if not spouse or minor, blind or disable child
      - Can take a reverse mortgage or HELOC to decrease equity
    - **Hardship Exemption** on equity cap if:
      - (1) a legal impediment prevents accessing equity AND
      - (2) denial of Medicaid would deprive applicant of healthcare, life, food, clothing, shelter or other life necessities
    - If applicant is institutionalized and expresses intent to return home → house is still an exempt asset BUT Medicaid may place a lien on the homestead
      - Home may lose exempt status if applicant is declared “*permanently absent status*”
  - (2) **Burial Allowance - \$1,500:** must be in a separate account
  - (3) **Irrevocable Burial Trust**
    - In addition to “burial allowance”; burial space, grave, crypt, , headstone, casket
    - Must be prepaid to funeral home director
    - Any money not utilized goes to Medicaid (don’t over-fund too much)
  - (4) **Personal Property:** all personal property and furnishings are exempt

- (5) “Luxury Fund” = \$13,800 cash assets (2009)
- (6) Supplemental Needs Trusts
- (7) Irrevocable Income Only Trusts – “Medicaid Qualifying Trusts”
  - Allows the assets held in Trust to avoid being included (if application to Medicaid takes place 5 years later)
  - General Strategies
    - 5 year ineligibility begins upon funding
      - Keep 5 years of liquid assets available outside of the Trust
      - If a Medicaid application is made during look back period a penalty period is imposed on the Trust
    - Can be created by the individual, spouse, 3<sup>rd</sup> party acting on individual’s behalf or courts and administrative bodies
    - Neither the Grantor nor the Grantor’s spouse should be Trustee
    - As a last resort, can collapse Trust under EPTL §7-1.9
      - This undoes the planning
      - Not available if ANYONE beneficially interested in the Trust is unable to consent to the revocation of the Trust
  - Income v. Principal
    - Income: Payable to the Grantor and the Grantor’s spouse
    - Principal: Cannot be accessible to the Grantor or Grantor’s spouse under ANY circumstances, nor can it be paid to 3<sup>rd</sup> parties providing services to them
  - If Real Estate is held by the Trust, the Grantor MUST retain a lifetime right of exclusive use and occupancy (equivalent of a legal life estate)
  - Trust Terms:
    - MUST be Irrevocable and cannot be amended
    - MUST contain a prohibition against court-ordered invasion of principal under EPTL §7-1.6(a)
    - MUST state that Unitrust provisions under EPTL §11-2.4 do NOT apply (could result in principal to the Grantor)
    - MUST state it will be administered according to its terms even if it conflicts with EPTL §11-2.3(b)(5)(A) (the “power to adjust”)
    - SHOULD provide how remaining Trust principal will be distributed at the death of the Grantor (to avoid Probate)
    - MAY want to give the Trustee discretion to pay principal to the Grantor’s beneficiaries during the Grantor’s lifetime
  - Taxation
    - Best to have the Grantor considered the owner of income tax purposes
      - §674 – grantor retains a lifetime special power of appointment over the Trust principal (*best to avoid this power*)
        - BUT, the gift will be incomplete for gift tax purposes, so can avoid using Lifetime Exemption
      - §675(4)(b) – power to reacquire trust corpus by substituting property of an equivalent value
      - Also, §121 residence appreciation exclusion applies for primary residence

- For estate tax purposes, Grantor's right to income invokes §2036, thus allowing a step-up in basis

## Transfer Rules

1. In NY, jointly owned assets are considered the applicant's in full, but can be rebutted with evidence
  2. TIC assets are deemed "transferred" when applicant's ownership % is reduced
  3. Placing another's name on assets does not in itself constitute a transfer
  4. "Life Estates" are NOT countable resources for purposes of Medicaid eligibility (not counted)
- **"Look Back Period" → 60 months after outright transfer of assets**
    - ANY transfer that is not "exempt" in the last 60 months will be calculated for a "penalty period"
    - Multiple transfers made during Look Back Period are aggregated into one total amount to determine the Penalty Period
  - **"Penalty Period" → commences on the first of the month following the date of transfer**
    - NO Penalty Period is imposed for transfers by applicant requesting Community Care
    - Penalty period does not commence on the transfer until applicant is otherwise Medicaid eligible
    - Commences on the LATER of:
      - (1) the first day of the month after assets have been transferred, OR
      - (2) the date on which an individual is both receiving institutional care AND whose application for Medicaid would be approved but for the Penalty Period
      - *Ex: Penalty Period for non-exempt transfer made within 60 month Look Back Period commences when (1) applicant has \$13,800, (2) is receiving institutional care, (3) had applied for Medicaid, and (4) application would be approved but for Penalty Period*
    - A number of months: Value of transfer divided by average monthly cost of nursing homes in the applicant's Medicaid district: **\$9,439 in Westchester** (for 2009)
      - *Ex: \$100,000 transfer → divided by \$9,439 → 10,59 months*

### Transactions NOT considered "Transfers" (a/k/a "Exempt Transfers")

- (1) Purchase of Life Estate: can purchase life estate on a person's home (b/c consideration)
  - Purchaser must remain in home for at least one year
  - Seller to applicant will have to pay capital gains taxes on gain
- (2) Personal Service Contract: one party agrees to provide services; applicant agrees to pay them
  - Services include: cooking, cleaning, assisting in ADLs, caregiving
  - Can be both (1) personal care component, and (2) managerial component
  - Payment options: (1) lump sum, or (2) ongoing (can use escrow account for either)
    - Real estate can be used as consideration for services
    - Payments are income taxable
  - Consult a geriatric care manager to ascertain geographic value of care services, especially where a family member is caregiver
- (3) Annuities → *See above for terms*
  - If there is community spouse, blind or disabled child → State must be named as a remainderman in the second position
  - If there is none of the above or annuity is actuarially unsound → State is in first position
- (4) Transfers Made for Purposes OTHER than qualifying for Medicaid

- Happens when an unexpected, catastrophic illness occurs after transfer
- (5) Promissory Notes: funds are considered a transfer UNLESS:
  - (a) repayment term is actuarially sound
  - (b) payments are in equal amounts during the term of the loan, with no deferral or balloon
  - (c) prohibits cancellation of the balance upon the death of the recipient
  - → NO requirement that state be named as remainder beneficiary, either in first or second position
- (6) Transfer of Non-Homestead Real Property
  - Transfer is exempt (NO period of ineligibility) ONLY if transfer is:
    - (a) to applicant's spouse, or to another for the sole benefit of spouse
    - (b) from applicant's spouse to another for sole benefit of the spouse
    - (c) to a disabled child
    - (d) to a trust established for the benefit of an individual under 65 who is disabled
- (7) Transfer of the Homestead
  - Transfer is exempt (NO period of ineligibility) ONLY if transfer is:
    - (a) to the applicant's spouse
    - (b) a child of the applicant under age 21
    - (c) a child of the applicant who is blind or disabled (regardless of age)
    - (d) **“Residing Sibling Co-Owner” Exemption**: the applicant's sibling who has (1) an equity interest in the home, and (2) who has resided in home, and (3) is using it as their primary residence for at least one year prior to applicant's admission to a LTC facility
    - (e) **“Caretaker Exempt Transfer”**: a child of applicant who has resided in home as his / her residence for 2 years immediately prior to applicant's admission to LTC facility AND who has provided care to applicant
- (8) Transfers Made by Community Spouse
  - If after institutionalized spouse has resided in nursing home for 30 days & is receiving Medicaid:
    - Any non-exempt transfers by healthy spouse only effects his or her Medicaid eligibility (NOT institutionalized spouse)
- (9) Imposition of Penalty Period Creates an Undue Hardship
  - (a) applicant is otherwise Medicaid eligible, and
  - (b) applicant and / or spouse is unable to have transferred assets returned, and
  - (c) denial of care would endanger applicant's health or life
- (10) Assets Comprising the Non-Exempt Transfer are Returned to Applicant
  - Only applies if received before Medicaid makes a decision as to eligibility and ALL assets comprising the non-exempt transfer are returned
    - Any amount NOT returned are calculated for penalty period

### Preserving Real Property (With 60 Month Planning)

- **Outright Transfer of Residence Without Reservation of Life Estate**
  - LEAST desirable
    - Gift Tax and house has applicant's cost basis for Capital Gains Tax

- Starts 60 month look back & large value of sale ensures long penalty period (which only begins when applicant is in nursing home and otherwise Medicaid eligible)
  - FMV appraisal is required
- **Retention of Life Estate and Transfer of Remainder of House**
  - Some good, some bad
    - Step-up in basis at applicant's death b/c of §2036
    - If house is sold during look back period or institutional stay the applicant (and Medicaid) is entitled to a portion of the sale base on life estate's value
  - If (for gift tax purposes) it is prudent to make an "incomplete transfer":
    - Use a limited power of appointment in Trust
    - §2702 does not credit any value for a transfer of remainder interest to a family member
      - Retention of a life estate is an exception to this rule
      - The gift is completed if it is transferred to a non-family member
    - ***Remember:*** a gift of a future interest does NOT allow for annual exclusion usage
  - Use current §7520 rate to figure out value of the life estate portion
- **Transfer to Irrevocable Income-Only Trust (I.e. "Medicaid Qualifying Trust")**
  - MOST desirable currently
    - Allows for use of §121 personal residence exemption if house is sold during life
      - MUST include §675(4) ability for Grantor to substitute like-valued property
    - Can be structured to allow transferee to receive step-up in basis at transferor's death
      - MUST include reservation of life income interest (I.e. life estate) to Grantor
  - This IS a taxable gift, and no annual exclusion is available
    - Can be avoided if limited power of appointment is retained
      - House will be included in gross estate, BUT no gift tax due and step up at death

### Retirement Accounts

- **Countable Resource**
  - If applicant is able to withdraw from a retirement account is considered an "available" resource
    - Any taxes due to the withdrawal ARE ALSO considered available
  - Withdrawals or Separate and Equal Periodic Payments ["SEPP"] MUST be applied for if owner is under 59 ½ → Use Attachment VIII to '06 OMM/ADM 05
    - BUT if applicant is under 59 ½ and has 401(k) (or other plan he cannot receive benefits from while working) that is NOT an available assets (b/c he has to terminate employment)
  - Once client over 59 ½ he "MAY" (not definitely) use only RMDs → Use Social Services Tables
- **SEPPs**
  - If "maximized" only income (NOT principal) is counted as available
    - Community Spouses: Surplus income may be put into self-settled or pooled SNT
  - Roth IRAs may also be put in SEPP status (since they are IRAs)
- **Community Spouse**
  - If CS has funds that exceed CSRA but income below MMMNA:
    - (1) consider requesting an increase in the CSRA, or

- (2) take benefits from retirement accounts (& pay taxes) and invest in exempt assets or an annuity on Community Spouse's life expectancy (or sooner)
- CS is NOT required to perform SEPP maximization on her retirement accounts
  - No good reason for CS to take distributions to avoid spousal recovery or support claims



## Community Spouse Rules

### **Income Levels for Community Spouses → “MMMNA” = \$2,739 / month (for 2009)**

- **Community Spouse is entitled to Minimum Monthly Maintenance Needs Allowance [“MMMNA”]**
  - If spouse is below MMMNA they are permitted to receive total income up to MMMNA by deducting income of the institutionalized spouse
    - BUT the income MUST be made available for the community spouse’s benefit
- **“Income First”**: the institutionalized spouse’s income must be transferred to the community spouse BEFORE resources are transferred to them (avoids hoarding of income)
- **\*\* Community spouses with less income than MMMNA is NOT allowed resources in excess of CSRA to generate income that could be provided by institutionalized spouse’s Social Security**
  - Institutionalized spouse’s SS are NOT included in determining community spouse’s income UNLESS he / she intended to make this income available to community spouse
    - Federal law states that SS benefits are NOT alienable
    - If there was no intent, community spouse can ask for increased CSRA ONLY by having a **Fair Hearing** or Court Order
  - If institutionalized spouse’s income is insufficient to bring community spouse’s income to MMMNA and increased CSRA may be established
- **“Enhanced Income” for Community Spouses**: Determined using **“Exceptional Circumstances Test”**
  - **“Reasonable, ordinary expenses”**: housing, utilities, food, Medicare, automobile
- **Process for Increasing MMMNA using Resources**
  - (1) Determine MMMNA for community spouse
  - (2) Determine community spouse’s gross monthly income (including investment income)
  - (3) Subtract community spouse’s income from MMMNA (any deficit is the “shortfall”)
  - (4) Determine institutionalized spouse’s gross monthly income; deduct personal needs allowance; allocate remaining income to community spouse’s shortfall
  - (5) If shortfall remains: determine amount of resources needed to generate income to overcome shortfall using a “reasonable method” (such as single premium annuity)

### **Resource Levels for Community Spouses → “CSRA” = \$74,820 - \$109,560 (for 2009)**

- **How to Determine CSRA**
  - Where the institutionalized spouse’s share exceeds \$74,820 the community spouse may retain resources in an amount equal to the spousal share (NOT to exceed \$109,560)
    - *Ex: If spouses have \$50,000 → CS keeps \$50,000*
    - *Ex: If spouses have \$80,000 → CS keeps \$74,820*
    - *Ex: If spouses have \$200,000 → CS keeps \$100,000*
    - *Ex: If spouses have \$300,000 → CS keeps \$109,560*
  - Determined at the beginning of the most recent **“Continuous Period”** of institutionalization
    - At least 30 consecutive days of institutional care in an institution or nursing facility
- **“Fair Hearing” can increase community spouse’s CSRA**
  - FIRST Social Services determines if couple’s countable resources exceed \$149,640 (2x CSRA)

- If this can't be determined, community spouse only entitled to \$74,820

### Spousal Refusal

1. Other options are preferable when spouse's assets and income are slightly more than MMMNA & CSRA
2. Allows nursing home spouse to be Medicaid eligible immediately w/out a spend down & penalty period
3. Can be used for nursing home, home care and community care (like the Lombardi Program)

- **Requirements for Non-Institutionalized Spouse Getting SR**

- "Spousal Refusal Letter": signed by the community spouse, stating he / she refuses to make his/her resources for institutionalized spouse
- "Assignment of Support": signed by institutionalized spouse (if unable to sign, a statement explaining the medical reason must be provided)
  - Authorizes Dept. of Social Services ["DDS"] to commence an action for support against refusing spouse (DDS claim may be made once spouse is approved for Medicaid services)

- **How to Retain Assets & Income in Excess of MMMNA & CSRA (w/out a "Fair Hearing")**

- As to Resources
  - (1) institutionalized spouse assigns the state any right of support
  - (2) state may commence assignment if institutionalized spouse is unable
  - (3) the state finds that denying eligibility would "work an undue hardship"
- As to Income
  - During any month the spouse is institutionalized (with some exception) the community spouse's income shall be deemed available to the institutionalized spouse

- **Impact of SR**

- Medicaid may only consider the income and resources of applicant spouse
- Community spouse must disclose ALL income and resources, and any information that must be included as part of the Medicaid application
- Refusing spouse does not have to sign Medicaid application for institutionalized spouse

- **Recovery Against Either Spouse's Estate**

- 10 year SOL after either spouse's death for Medicaid to place lien on either estate
- NY only recovers against institutionalized spouse's assets paying by Probate / Intestate estate
  - ***NO recovery from Operation of Law assets***
  - Claims against institutionalized spouse's estate are not permitted if survived by refuser
    - At refusing spouse's death Medicaid can place a lien against his/her estate
    - NO valid Medicaid claim if refusing spouse survives institutionalized spouse by more than 10 years & the latter received benefits at age 55 or older
- If refusing spouse pre-deceases institutionalized spouse, Medicaid can place a lien against refuser's estate if Medicaid proves he/she had "sufficient ability" to pay for care
  - Being above MMMNA or CSRA is often ample proof

- **"Spousal Right of Election" against Institutionalized Spouse**

- General background:
  - A pecuniary (not fractional) share of 1/3 of the institutionalized spouse's estate
  - Includes Probate & Intestacy assets & Testamentary Substitutes
    - Includes General POAs, Rev Trusts, Totten Trusts, joint bank accounts, retirement accounts, transfers made w/in 1 year of death)

- Who can exercise the right? The spouse, a guardian / guardian ad litem, conservator of incompetent spouse, but NOT a fiduciary of an estate
- How to Exercise Right of Election
  - Must be made w/in 6 months of issuance of Letters, but NO LATER than 2 years after deceased spouse's death
  - Original must be filed w/ proof of services in Surrogate's Court issuing letters
  - Written notice must be served on estate fiduciary or persons named in the Will
  - Waiver of Right can be made by renouncing spouse any time during the marriage
  - Waiver MUST be in writing and subscribed by the maker and acknowledged
- Medicaid Transfer of Asset Rules
  - Waiving Right for an institutionalized spouse results in a transfer and penalty period for Medicaid eligibility
  - The date of transfer is "the last date the institutionalized individual could have pursued his elective share"
  - Penalty will not begin until one has applied for Medicaid and is otherwise eligible

### Creating a Medicaid "Crisis Plan"

#### **Take the Following Steps in this Order**

1. Keep "luxury fund" of \$13,800 in separate account and fund irrevocable burial agreement
2. Gift 40 – 45% of applicant's funds to desired recipient
  - a. Triggers ineligibility period for Medicaid nursing home care
  - b. "Penalty Period" is determined by monthly amount in applicable county
    - i. *Ex: \$100,000 gift → \$9,439 → 10,59 months of penalty*
3. Applicant lends remaining resources to a family member as a Promissory Note to be repaid monthly
  - a. Repayments to applicant pays for nursing home care during period of ineligibility
4. Applicant files Medicaid application w/ local Department of Social Services (DDS)
  - a. Applicant will be denied, but serves as notice that penalty period was created
5. Promissory note payments & Social Security & and other income pays for nursing home during Medicaid ineligibility period
6. When penalty period expires a second Medicaid application or recertification is filed w/ DDS, which should be approved