

MEDICAID FOR ESTATE PLANNING ATTORNEYS

November 10, 2020

By Liz Wallace

AGILE Elder Law
308 W. 1st, Ste 205
Spokane, WA 99201

1030 N. Center Parkway, Ste 121
Kennewick, WA 99336

(509)530-2380
liz@agilelawfirmeast.com

TABLE OF CONTENTS

MEDICAID LONGTERM CARE ELIGIBILITY AND PLANNING STRATEGIES

- I. OVERVIEW: MEDICAID LONGTERM CARE
- II. FINANCIAL ELIGIBILITY FOR SINGLE PERSONS
- III. FINANCIAL ELIGIBILITY RULES FOR MARRIED COUPLES
- IV. ESTATE PLANNING

I. OVERVIEW OF MEDICAID LONGTERM CARE BENEFITS

A. THE MEDICAID PROGRAM

Medicaid is a state- and federally-funded medical assistance program for certain people, including the elderly and disabled, who have income and assets below certain levels. It provides medical coverage for those persons, including long-term care.

At the state level, Medicaid is administered by the Washington State Health Care Authority (HCA) and the Washington Department of Social and Health Services (DSHS), Home and Community Services (HCS) department. The state regulations governing long-term care are primarily found in Chapter 182-500 *et seq* in the Washington Administrative Code (WAC).

B. THE APPLICATION AND ELIGIBILITY DETERMINATION

DSHS makes two separate determinations: whether the applicant meets the financial eligibility criteria and whether the applicant meets the physical eligibility criteria.

A person is physically eligible for long-term care benefits if he or she requires substantial assistance with two or more of the following activities of daily living: eating, bathing, toileting, ambulating, transferring, positioning, and medication management. However, an applicant with a significant cognitive impairment can qualify if he or she needs substantial assistance with only one of these activities of daily living.

A person is financially eligible if he or she meets both income and resource standards. Income is computed on a monthly basis and consists of what is received during that month by the person who is applying for or receiving care (not the whole household). Assets are determined on the first moment of the first day of each month and consist of property received before the first moment of the current month and that remain in the possession of the applicant. Thus, income in one month can become an asset in the following month.

When an application is approved, DSHS will send a letter awarding benefits. This letter will advise the applicant that he/she has been approved for Medicaid benefits and will specify how the applicant's income must be spent toward the cost of care in each month thereafter. A Medicaid recipient must participate a portion of their income toward their care each month.

C. SKILLED NURSING BENEFITS

For persons eligible for nursing home coverage, Medicaid requires that all monthly income, after deductions for personal needs and some and some other deductions, be paid to the nursing home. The amount that the Medicaid recipient pays to the nursing home each month is called "participation." Medicaid will then pay the nursing home the

difference between the recipient's participation and the Medicaid reimbursement rate for the resident at that facility.

When a person qualifies for nursing home coverage, Medicaid also provides coverage for most medical expenses, such as prescriptions and physician bills.

D. IN-HOME, ADULT FAMILY HOME, and ASSISTED LIVING BENEFITS

COPES is a Medicaid program that pays for care outside of skilled nursing facilities. It covers long-term care delivered at home, in adult family homes, and in assisted living facilities.

For eligible persons residing in their own home, COPES will pay for someone to come into the home to provide assistance with daily living activities and personal care. COPES will also cover care in an Adult Family Home or Assisted Living Facility. COPES recipients also get coverage for most medical expenses.

II. INCOME AND RESOURCE ELIGIBILITY RULES FOR A SINGLE PERSON

A. INCOME

In a nursing home, a single individual's income must be less than the private pay rate in the facility plus the applicant's regularly recurring monthly medical expenses. If an applicant's income is above the Medicaid rate and below the private pay rate, the applicant will be certified as eligible for Medicaid and will only have to pay the Medicaid rate.

B. RESOURCES

A single applicant cannot have more than \$2,000 in non-exempt resources. Exempt or non-countable resources are defined below. Resource eligibility is always determined at the first moment of the first day of any month for which coverage is sought.

Resources are valued according to the fair market value of the applicant's equity interest in the resource. Mortgages and liens against resources are deducted when determining their value. Joint bank accounts are treated as if they are owned entirely by the applicant unless the applicant can show a different ownership structure.

Funds in retirement accounts are counted as assets if they are available to the applicant, even if subject to early withdrawal taxes and penalties.

Assets held in revocable living trusts are also counted as if they were owned by the applicant outright.

C. EXEMPT RESOURCES

The following resources are not counted when determining whether a single applicant for Medicaid has more than \$2,000.

1. HOME. A home is exempt if the applicant is residing in the home or the applicant states that he/she intends to return home (the applicant does not have to show that he or she is able to return home, just that he or she intends to do so). A home includes all contiguous property, and includes out-buildings on the property. Proceeds from the sale of a home are also exempt if used within three months of the receipt of the proceeds to purchase another home.

A portion of a Medicaid nursing home resident's monthly income may be used for up to 6 months to pay actual home maintenance costs if a physician certifies that it is likely recipient will return home in that period.

2. VEHICLE. A vehicle is exempt if it is used for the transportation of a recipient or a member of the recipient's household.

3. PERSONAL PROPERTY. Household furnishings and personal effects are exempt. This includes clothing, appliances, furniture, personal jewelry, and other items typically found in a home.

4. BURIAL PLOT. A burial plot or urn space is exempt.

5. LIFE INSURANCE/BURIAL FUNDS. A burial fund or life insurance policy of not more than \$1,500 in face value is exempt. The \$1,500 limit is an aggregate.

6. PREPAID BURIAL PLAN. A prepaid burial plan is exempt if it is irrevocable.

7. PARTNERSHIP POLICIES. A Long-Term Care Partnership insurance policy can increase the amount of exempt resources that can be protected at the time of application and protected from Medicaid estate recovery.

8. ITEMS LISTED FOR SALE. Resources that can't be converted to cash in 20 working days are disregarded until they are sold, as long as the applicant is making an ongoing bona fide effort to convert them to cash. The proceeds from the sale of such resources are not exempt and will make the Medicaid recipient ineligible in the month following the sale unless spent in the month in which they are received.

9. SINGLE PREMIUM IMMEDIATE ANNUITY. An irrevocable annuity which has no cash surrender value, is not assignable, and which pays out in equal installments over five

years (or the life expectancy of the annuitant) is not considered to have any value as a resource if the state of Washington is named as the contingent beneficiary of the annuity. The income from the annuity is countable income to the recipient when received – and will generally have to be participated toward the cost of care.

10. JOINTLY-OWNED RESOURCES. A resource jointly-owned with another person is not counted as a resource when the joint-owner refuses to agree to sell that resource.

III. INCOME AND RESOURCE ELIGIBILITY RULES FOR MARRIED COUPLES

A. OVERVIEW OF COUPLE ELIGIBILITY RULES

Medicaid has a number of rules that are designed to protect the income and assets of a spouse who does not need long-term care, who we often call the “community spouse.” These rules are designed to avoid impoverishment of the community spouse.

These Medicaid eligibility rules for a married couple apply only when one spouse is receiving Medicaid. If both spouses are applying for Medicaid, they will each be treated as though they were single and the Medicaid income and resource rules for single persons, discussed above, will apply for each.

The federal Medicaid statute expressly preempts state community property law for purposes of determining the ownership of income and assets.

B. INCOME ELIGIBILITY

For one spouse of a married couple to receive Medicaid coverage, the income of that spouse must be less than the facility's private pay rate plus his/her regularly recurring monthly medical expenses. The nursing home spouse's income is determined by first seeing what income comes in the name of that spouse. If this amount exceeds the eligibility standard, the person under certain circumstances may still be eligible if one-half of the income of both spouses is less than the eligibility standard.

C. RESOURCE ELIGIBILITY

All resources of both spouses are considered in determining eligibility, regardless of which spouse owns what resource or whether the property is separate or community property. Prenuptial and Separate Property Agreements are irrelevant to this determination.

When only spouse is applying, the combined non-exempt resources of a married couple must be less than \$60,075 to qualify one of the spouses for Medicaid nursing home coverage or COPES.

The resource standard for a couple when one spouse is receiving skilled nursing care can be increased from \$60,075 to up to a maximum of \$130,640, if one-half of the couple's non-exempt resources exceeds \$60,075 at the time one of them entered skilled nursing. In order to take advantage of this enhanced resource standard, the couple must submit a HCS Community Resource Declaration, which will list the assets of the couple at the time the applicant spouse entered the hospital or skilled nursing facility. If the Resource Declaration is submitted, the resource standard will then be increased to one-half of the couple's non-exempt resources as of the date the first spouse is institutionalized, up to a maximum of \$130,640.

The same resource rules and exemptions described above for single persons apply to couples, with the following additions:

1. The community spouse is allowed \$58,075 in non-exempt resources (or up to \$128,640 if other spouse is in a skilled nursing facility) in addition to the \$2,000 in non-exempt resources allowed for the applicant spouse. The community spouse can be allowed more than this if additional resources are necessary to bring the community spouse's income up to the minimum spousal income allocation level described below.

All but \$2,000 in non-exempt resources must be transferred into the name of the community spouse before the first regularly scheduled eligibility review, which is usually 12 months after initial eligibility is determined. After this first year, non-exempt resources of the Medicaid spouse must always remain below \$2,000. However, after eligibility for one spouse is established, that eligibility is unaffected if the non-exempt assets of the community spouse later exceed resource limits.

2. Each spouse is allowed to have a burial fund or an irrevocable prepaid burial plan subject to the same rules explained above for single persons.

3. The home is exempt if the community spouse resides in the home, regardless of its value. Further, if the home is transferred into the name of the community spouse, it will not be subject to Medicaid estate recovery.

4. One automobile per couple is exempt regardless of value or use.

IV. ESTATE RECOVERY

DSHS has a right to recover from the estate of a Medicaid recipient if services were paid after age 55. This right of recovery normally begins at death. The Office of Financial Recovery of DSHS pursues the enforcement of the Department's recovery rights.

A. MEDICAID LIEN

Medicaid's right to file a lien exists at the death of the Medicaid recipient. In some cases, the state can file a lien against the home of a Medicaid recipient while he or she is alive. The is applicable when the recipient is receiving skilled nursing care and DSHS determines the recipient cannot reasonably be expected to be discharged and return home. The determination can be appealed. The lien must be removed if the recipient returns home.

B. ESTATE

Medicaid estate recovery only applies to the "estate" owned by the Medicaid recipient at death. This includes all probate assets and non-probate assets, but does not include the assets of the surviving spouse.

Life estate interests are valued as of the moment immediately prior to death. Joint tenancy interests are valued as if the Medicaid recipient held the property as a tenant in common.

V. WHAT DOES THIS MEAN FOR ESTATE PLANNING?

A. SUPPLEMENTAL NEEDS TRUSTS ARE ESSENTIAL

Supplemental Needs Trusts where the Trustee has discretion for all distributions can protect these assets from Medicaid. If the Trust is properly drafted, those assets do not count for Medicaid purposes and the State cannot lien on them for estate recovery purposes. These trusts are the most important thing an estate planning attorney can do to protect their clients from Medicaid costs when planning.

Supplemental Needs Trusts are a tool to preserve assets. These Trusts are meant to supplement the benefits available to the beneficiary from other sources, such as Medicaid. This allows the Trust to pay for the things that Medicaid will not, such as hearing aids, dental work, motorized wheelchairs, new clothes, etc.

B. MARRIED COUPLES MUST USE A WILL TO ACCOMPLISH THIS

The Medicaid WACs and trust WACs combine to create a situation where a trust created by the Will of a deceased spouse is a third-party trust. Assets in a third-party trust are non-countable as far as Medicaid is concerned, as long as the beneficiary cannot direct the distribution of the assets.

The WACs are very clear that this trust must be created by a Will. It cannot be created by a living trust. Assets in a Supplemental Needs Trust created by the living trust of two

spouses will be countable for Medicaid purposes and lienable for estate recovery purposes.

C. (ALMOST) EVERYONE'S WILL SHOULD HAVE A SUPPLEMENTAL NEEDS TRUST

When planning for the future for our clients, it's important to plan for as many contingencies as is reasonable. If you have a couple and that couple does not have a federally taxable estate, including at least a contingent Supplemental Needs Trust is important. If you wait until one spouse needs care to change the estate plan, it may be too late for capacity purposes.

If you have a single person, you should include a contingent Supplemental Needs Trust to protect their heirs, in case those heirs should become disabled.

D. POWERS OF ATTORNEY

Wills aren't the only important component of an estate plan when Medicaid is a consideration. Many clients who need care require the assistance of an Attorney-in-Fact when doing Medicaid planning. For this reason, all Powers of Attorney should include some important powers for the Attorney-in-Fact.

They should include the authority to gift assets on behalf of the principal, including to the Attorney-in-Fact him/herself. Many strategies we perform for single persons require gifting in order to preserve some assets to supplement Medicaid benefits. It's important that the Attorney-in-Fact be allowed to do this gifting on behalf of the principal.

They should include language allowing gifting to preserve assets and avoid estate recovery for a person who will receive Medicaid benefits. The RCWs allow gifting on behalf of a principal in order to qualify that person for benefits, but not to preserve assets or avoid estate recovery. This difference is subtle but can significantly affect the ability to do Medicaid planning, so this language should be included in the Power of Attorney.

They should be immediately effect, if the client is okay with that. Making Powers of Attorney effective immediately saves a lot of time in the planning process.

E. ASK A MEDICAID ATTORNEY TO REVIEW YOUR DOCUMENTS

If you have questions about how to draft a Supplemental Needs Trust that will protect assets or a Power of Attorney that will be useful for Medicaid planning, ask a Medicaid or elder law attorney to take a look at your documents or help you with your language. They will likely be very willing to help you.