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**Medicaid Eligibility  
for  
Long Term Care in Colorado After  
The Deficit Reduction Act of 2005**

## **INTRODUCTION**

For all practical purposes, in the United States the only "insurance" plan for long-term institutional care is Medicaid. Medicare only pays for approximately 7 percent of skilled nursing care in the United States. Private insurance pays for even less. The result is that most people pay out of their own pockets for long-term care until they become eligible for Medicaid. While *Medicare* is an entitlement program, *Medicaid* is a form of welfare -- or at least that is how it began. So to be eligible, you must become "impoverished" under the program's guidelines.

Despite the costs, paying privately for nursing home care may be advantageous. By paying privately, an individual is more likely to gain entrance to a better quality facility. The obvious disadvantage is the expense; in Colorado, state nursing home fees average \$5,546 a month and Denver Metro fees are at least \$5,995 per month. These are official Colorado figures. In fact, the costs could be as much as 10% more. Without proper planning, nursing home residents can lose the bulk of their savings.

For most individuals, the object of long-term care planning is to protect savings while also qualifying for nursing home Medicaid benefits. This can be done within the following rules of Medicaid eligibility.

In Colorado, the Health Care Policy and Financing Authority administers Medicaid through local Departments of Human Services. The State publishes regulations in the Colorado Code of Regulations which it modifies frequently to carry out federal and state changes to the law. However, to qualify for federal reimbursement, the state program must comply with applicable federal statutes and regulations. So the following explanation includes references to both state and federal law.

This newsletter reviews the significant highlights of Medicaid in Colorado. Of course, it is simplified and some lesser known aspects are reviewed. The discussion which follows incorporates the portions of The Deficit Reduction Act of 2005 (DRA) that affect Colorado Medicaid. The new rules concerning how penalties are assessed for gifts, the increase of the look-back period to five years and impacts on annuity planning are discussed.

If the reader is contemplating taking actions that could result in Medicaid impacts, then the reader should consult with an elder law attorney.

## THE ASSET RULES

The basic rule of nursing home Medicaid eligibility is that an applicant may have no more than \$2,000 in "countable" assets in his or her name. In addition, for couples, the "at home" spouse is entitled to an allowance from countable assets of \$104,400 in 2008. "Countable" assets generally include all assets *except* the following: (1) the principal residence in Colorado, if the equity in it does not exceed \$500,000, (2) an automobile, whatever its value, if it is used for transportation of the applicant or a member of the applicant's household; (3) household and personal possessions, such as clothing, furniture, jewelry, etc., but not personal effects acquired for investment, for example, coin collections, gems, jewelry without family significance (4) a qualifying burial plan or burial trust (5) the cash value of a whole life insurance policy, or policies, owned by either spouse *if* the *face* amount of the policy, or total policies, is \$1,500.00 or less and (6) certain other assets that apply in special situations.

If the nursing home resident applies for Medicaid and signs an official form that he or she intends to return to his home, then the applicant's home will not be considered a countable asset. The home is not countable even if it does not appear likely that the nursing home resident can return home. Therefore, the home will not be counted against the asset limits for Medicaid eligibility.

If the home is titled in the name of a trust, a corporation, partnership, etc., then the home will be counted. Title to the home may be conveyed to the applicant or the applicant's spouse solely or them both jointly. Then, the home will no longer be counted.

## THE TRANSFER PENALTY

The Deficit Reduction Act of 2005 imposes new rules concerning gifting that are dramatically different from the prior rules. These new rules apply to gifts, transfers without fair consideration, on or after the enactment date, February 8, 2006. Because these rules are only applied prospectively, there are "old rules" and "new rules."

Medicaid regulations create a penalty for transferring assets. Prior to February 8, 2006, the applicant would be ineligible for Medicaid for a period beginning on the first day of the month in which the transfer was made by an applicant or the applicant's spouse. Dividing the amount transferred by \$5,546<sup>1</sup> determines the actual number of months of ineligibility. For instance, if an applicant made a gift of \$16,638 on February 1, 2006, then he or she would be ineligible for Medicaid for three months<sup>2</sup>. The last day of the ineligibility period is May 1, 2006. Another way to look at this is that for every \$5,546 transferred an applicant will be ineligible for nursing home Medicaid benefits for one month following the gift.

Prior to February 8, 2006, the Department of Human Services (DHS) may only consider transfers made during the 36-month period before a person applies for Medicaid: the "look-back" period. (A

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<sup>1</sup> This amount is increased annually.

<sup>2</sup>  $\$16,638 / 5,546 = 3$

longer period affects transfers from a trust.). Consequently, for transfers of \$199,656 or more by an applicant, the period of disqualification may be limited to thirty-six months.<sup>3</sup>

Based on the laws in effect on April 1, 2006, for example, an individual made a gift of \$199,656 on February 1, 2006, and you are applying for Medicaid in 2008, then the look-back period is 36 months and the ineligibility expires on February 1, 2009. So, a gift before the enactment of the new gifting law could produce a period of ineligibility even *after* the new law. If the person applied for Medicaid, for instance, on April 1, 2008, the application would be denied because the ineligibility period that followed the gift had not expired.

As of the enactment date of The Deficit Reduction Act of 2005, *the "look-back" period* for gifts from a Medicaid applicant or his or her spouse *is five years or sixty (60) months*. That means that gifts on or after February 8, 2006, under the new rules, could be discovered by the Department of Human Services up to five years after the gift.

A “Medicaid Trap for the Unwary” has been created by the new gifting rules. The ineligibility period for a gift is *deferred until the person applies for Medicaid*. This creates a “ticking time bomb” for individuals who are not familiar with the new rules. While in good health and not contemplating long term care, a person could make a gift. The next year they have a stroke and need long term care at a facility. Then the person could meet the financial tests for Medicaid and apply for medical assistance from Medicaid. To say it another way, the person who applies is indigent. Although the applicant would qualify for Medicaid without a gift, *Medicaid will not pay the facility until the ineligibility period is over!* For example, if the person made a gift of \$16,638, the ineligibility period would be three months. Medicaid would not pay for the applicant's care until three months after the person applied!

The effect of the new rules may be that nursing homes will be wary of taking patients who apply for Medicaid. The facilities will be worried that they will admit a patient who has made a gift after the enactment date but the patient or the patient’s representative does not know it. The facility may not discharge a patient who is “Medicaid pending” and yet have only the patient’s income less the personal needs allowance for payment each month.

While the patient may apply for Medicaid alleging undue hardship as defined by the regulations, hardship is difficult to prove and is rarely approved by the Department of Human Services. An appeal from the denial by the Department may have to be undertaken without any guarantee of success.

## **EXCEPTIONS TO THE TRANSFER PENALTY**

Transferring assets to certain recipients will not trigger a period of Medicaid ineligibility. Medicaid authorities recognize the following exempt recipients:

- (1) a spouse<sup>4</sup>

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<sup>3</sup> Transfers of the home to a revocable trust may cause the home to lose its exempt status. Transfers *to third parties from* a revocable trust are subject to a “look back” period of up to *five years*. The use of trusts can be a trap for the unwary; see an elder law attorney for further advice. The Department takes the position that a transfer *to* an irrevocable trust is subject to the five-year look back period.

<sup>4</sup> Or anyone else for the spouse’s benefit.

- (2) a blind or disabled child
- (3) the trustee of a trust for the benefit of a blind or disabled child
- (4) the trustee of a trust for the benefit of a disabled individual under age 65<sup>5</sup>

Special rules apply with respect to the transfer of a home. Besides being able to make the transfers without a penalty to the persons named above, the applicant may freely transfer his or her home to:

- (1) a child under age 21
- (2) a sibling who has lived in the home during the year preceding the applicant's institutionalization and who already holds an equity interest in the home
- (3) a "caretaker child"<sup>6</sup>

A very important "escape hatch" is available concerning the transfer penalty. Returning a transferred asset to the applicant for Medicaid can "cure" the penalty for a transfer. After that, the transfer is treated as if it had never been made.

## **ESTATE RECOVERY**

### **Lien**

While a Medicaid recipient is in a qualified facility, the State may file a lien on the recipient's home in limited circumstances. Only if a doctor determines that there is no reasonable likelihood that the recipient will return to the home and after notice is given to the recipient may the State assert its lien. If the community spouse or certain other persons reside in the home, then the State may not file its lien.

### **Recovery from the Decedent's Estate**

Colorado has the right to recover whatever benefits it paid for the care of the Medicaid recipient from his or her probate estate. Given the rules for Medicaid eligibility, the only property of substantial value that a Medicaid recipient is likely to own at death is his or her home. Under current law, Colorado may make a claim against the decedent's home only if it is in his or her probate estate. The State may not recover, however, if a spouse survives the deceased Medicaid recipient or if there is a child of the recipient who is under age 21 or a blind or disabled dependent of the recipient. Also, the State may not recover its medical expenditures from the sale of the home if a qualifying sibling or child meets certain criteria. For instance, no recovery may be made if a surviving child is a "caretaker child". In the State's discretion, the State may waive, compromise or settle its claims for "good cause."<sup>7</sup>

A probate estate does not include property that is jointly owned, held as a life estate or in a trust, or held in an annuity, and thus these assets escape estate recovery. Congress has given the states the

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<sup>5</sup> Even for the benefit of the applicant in certain circumstances.

<sup>6</sup>The regulations define a child of the applicant as one who lived in the house for at least two years before the applicant's institutionalization and who during that period provided such care that the applicant did not need to move to a nursing home. There are other requirements. See an elder law attorney if you think that you or a child may be a caretaker child.

<sup>7</sup> 10 CCR 2505-10, § 8.063

right to seek estate recovery against such nonprobate property. So far, Colorado has not passed laws or regulations to allow such recovery.

## TREATMENT OF INCOME

Unlike assets, a couple's income is not pooled for the Medicaid application. Each spouse's income is treated separately: "his is his" and "hers is hers." Income from joint investments is split equally between the spouses. An applicant in the Denver Metro Area may have no more than \$5,995<sup>8</sup> per month in income to qualify for Medicaid. If the applicant's income is more than \$1,911 per month but less than the maximum<sup>9</sup>, however, then Colorado law permits a trust to be used to achieve Medicaid eligibility. In this way, an applicant can avoid the dilemma of having both more income than the maximum permitted by Medicaid rules but not having enough money to pay privately for nursing home care.

Payments received by the applicant from a reverse mortgage or long term care insurance are *not* counted as income.

When a nursing home resident becomes eligible for Medicaid, all of his or her income, less certain deductions, must be paid to the nursing home. The deductions include a monthly personal needs allowance of \$50 or \$90, if a Veteran, a deduction for any uncovered medical costs,<sup>10</sup> and, for a married applicant, an allowance paid to the spouse who does not receive Medicaid benefits.

## SPOUSAL PROTECTIONS

### Assets

Medicaid law provides for special protections for the spouse of a nursing home resident, known in the law as the "community" spouse. Under the rule for Colorado, the spouse of a married applicant is permitted to keep up to \$104,400<sup>11</sup> of the couple's combined assets at the time of the Medicaid application.

So, for example, if a couple owns \$156,400 in *countable assets*, the spouse in need of care would not become eligible until their savings were reduced by \$50,000 to \$106,400: \$2,000 for the nursing home spouse plus a maximum of \$104,400 for the community spouse.

The determination of the level of the couple's assets is made as of the date of institutionalization of the nursing home spouse. That date is the day on which he or she enters either a hospital or a long-term care facility in which he or she then stays for at least 30 days.

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<sup>8</sup> This amount is increased annually and varies by region.

<sup>9</sup> The "Gap" or "Utah Gap"

<sup>10</sup> Including medical insurance premiums.

<sup>11</sup> This amount is increased annually.

## **Income**

In all circumstances, the income of the community spouse will continue undisturbed. The community spouse will *not have to use his or her income to support the nursing home spouse* receiving Medicaid benefits. Sometimes, the community spouse is also entitled to share in all or part of the monthly income of the nursing home spouse. The community spouse may receive income from their spouse to raise their income to a calculated maximum. This maximum takes into account the community spouse's income. The total can range from a low of \$1,711.00 to a high of \$2,610.00<sup>12</sup> a month. If the community spouse's own income exceeds this maximum, then he or she would not share in their spouse's income.

### **Increasing the Community Spouse's Financial Security: The Medicaid Annuity**

If the income from the nursing home spouse is not enough to raise the total income of the community spouse to the minimum level (MMMNA), then, according to the "old rules," the community spouse could purchase a *qualifying* commercial annuity sufficient to raise the income of the community spouse to the minimum: the MMMNA. Such an *annuity is not counted as a resource*, but the income from it is counted instead. If it is "actuarially sound," then no transfer without fair consideration would occur by purchasing the annuity. If the income from the annuity raises the income of the community spouse above the MMMNA, however, then a gift may result in a period of ineligibility for Medicaid for both spouses.<sup>13</sup>

Individual Retirement Annuities are permitted under DRA. These permit a person to purchase a qualifying irrevocable single premium immediate annuity with IRA, 401K, Roth IRA, etc., assets. These annuities must comply with IRC 408. The rules stated above for cash annuities regarding the income as it impacts the MMMNA do not apply to these retirement annuities. No gift can result from their purchase. Upon purchase, the IRA is no longer counted as an asset. Without this treatment an IRA would be valued at 80% of its stated value.

Under the Deficit Reduction Act of 2005, the rules about qualifying annuities are the same. However, the Act has new rules concerning the beneficiary of the annuity. If the applicant is the owner and annuitant of a policy in his or her name, then Colorado's Health Care Policy and Financing Authority must be named as a primary beneficiary of the annuity to the extent of any unsatisfied claim for estate recovery. If, however, the applicant has a spouse or a disabled or minor child, then either of them may be named as the primary beneficiary at the applicant's death and the Health Care Policy and Financing Authority named as secondary beneficiary. A qualifying annuity for the spouse does not have this restriction on beneficiaries.

### **The Medicaid Application**

Applying for Medicaid is cumbersome and tedious. Every fact asserted in the application must be verified by documentation. The application process can drag on for several months as the local Department of Human Services demands verification regarding such issues as the amount of assets and dates of transfers. If the applicant does not comply with these requests and deadlines promptly,

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<sup>12</sup> These amounts are increased annually.

<sup>13</sup> Beware: the regulations in this area are complex and the annuities are *irrevocable*.

Human Services will deny the application. We often see the children of parents who are applicants for Medicaid struggle to obtain financial information since their parents kept poor records and were secretive regarding their assets. If the documents are not timely provided to the Department, then the application could be dismissed for “lack of cooperation.”

### **Changes in the Law and Use of Information**

Medicaid laws and regulations change frequently as with The Deficit Reduction Act of 2005. The values showed for levels of benefits and for other calculations increase once a year. Some change in the middle of the year and others at the beginning of the year. The values used in this discussion are accurate through the revision date indicated. Please check these figures with an attorney or Medicaid eligibility technician when applying for Medicaid.

This article is not intended as legal advice but is intended for educational use. The reader should not rely on the information contained in it to make decisions concerning Medicaid. Instead, the reader should consult with a qualified elder law attorney who specializes in Medicaid before taking action concerning a Medicaid matter.

### **About the Author**

The National Elder Law Foundation has certified Mr. Mitchell as an Elder Law Attorney. Colorado, however, does not certify specialists in any field. Mr. Mitchell is past co-chair of the Colorado Bar Association’s Elder Law Forum Committee and has been a member of the National Academy of Elder Law Attorneys, Inc. since 1991. He has lectured to attorneys on Medicaid topics. Since 1980, Mr. Mitchell has practiced in the fields of guardianship, probate and estate planning as well.