

Planning and Skills for Chronic Care Medicaid:

Part I

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Long-Term Care Planning in 2018



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Medicaid Overview

- At its core, Medicaid provides health coverage to millions of Americans, including eligible low-income adults, children, pregnant women, elderly adults and people with disabilities
- It is a joint program of the federal government and the states
- It is administered by the states according to federal requirements, and is funded jointly by the states and federal government

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Medicaid Overview

- Medicaid provides the primary source for long-term care services in New York State
- Medicaid can provide benefits for care in the community and in skilled nursing facilities
- Eligibility rules for these programs have significant differences

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Medicaid in New York State in 2018

- Go to:
http://www.health.ny.gov/health_care/medicaid/publications/
- Administrative Directives (ADM)
- General Information System Messages (GIS)
- Informational Letters (INF)
- Local Commissioners Memorandum (LCM)

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Medicaid in New York State in 2018

- SEE GIS 17 MA/020: 2018 Medicaid Levels and Other Updates

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Medicaid in New York State in 2018

- Single Individual
 - Resource allowance = \$15,150
 - Chronic Care or Community Based Medicaid
 - Monthly income
 - Chronic Care Medicaid - \$50/month
 - Community Based Medicaid - \$842/month + \$20/month disregard

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Medicaid in New York State in 2018

- Married Couple – “Medically-needy Spouse” (or “A/R Spouse”) and “Community Spouse”
 - Resource allowance
 - **Chronic Care Medicaid**
 - A/R Spouse - \$15,150
 - Community Spouse - \$74,820 - \$123,600*
 - *Spousal share = ½ of married couple’s resources up to \$123,600



Medicaid in New York State in 2018

- Married Couple – “Medically-needy Spouse” (or “A/R Spouse”) and “Community Spouse”
 - Resource allowance
 - **Community Based Medicaid**
 - Normally, couple can only keep \$22,200 in resources
 - BUT, consider Spousal Impoverishment variations, including certain waivers, MLTC, and Immediate Need



Medicaid in New York State in 2018

- Married Couple (cont’d)
 - Monthly Income
 - **Chronic Care Medicaid**
 - A/R Spouse - \$50/month
 - Community Spouse - \$3,090/month (MMMNA) + portion in excess*
 - *Typically, contribution will be 25% of excess
 - Consider Chronic Care Spousal Budgeting



Medicaid in New York State in 2018

- Married Couple (cont'd)
 - Monthly Income
 - **Community Based Medicaid**
 - Normally, couple can only keep \$1,233/month + \$20/month disregard
 - BUT, consider Spousal Budgeting variations (including Spousal Impoverishment income budgeting)



Medicaid in New York State in 2018

- Married Couple – Both Spouses are “Medically-needy”(or “A/Rs”)
 - **Chronic Care Medicaid**
 - Resource allowance
 - Each Spouse - \$15,150, so \$30,300
 - Monthly income
 - Each Spouse - \$50/month, so \$100



Medicaid in New York State in 2018

- SEE GIS 15 MA/023: Policy Change for Determining the Appropriate Medicaid Regional Rate for Calculating a Transfer Penalty Period and the Regional Rates for 2016
 - Chronic Care Medicaid ONLY – REMEMBER, NO Penalty Period for Community Based Medicaid
 - *PLANNING POINT* - For Community Based clients, consider impact of transfers to facilitate Medicaid eligibility should Chronic Care Medicaid be needed during the next 5 years



Medicaid in New York State in 2018

- GIS 15 MA/023 (cont'd)
 - Penalty Period - # of months equal to the uncompensated value of transferred assets divided by the regional rate
 - Districts MUST use regional rate in effect on the date the institutionalized individual applies or requests an increase in coverage
 - Application in February 2018 for coverage retroactive to November 2017. Use the 2018 regional rate based on application date.
 - Previous Department policy to use the regional rate in effect on requested starting date of coverage



Medicaid in New York State in 2018

- SEE GIS 17 MA/019 – Medicaid Regional Rates for Calculating Transfer Penalty Periods for 2018
 - Rates – Use the rate in the region *where facility is located*
 - Central - \$9,722
 - Northeastern - \$10,719
 - Northern Metro - \$12,428
 - NYC - \$12,319
 - Long Island - \$13,053
 - Western - \$10,239
 - Rochester – \$11,692



Chronic Care Medicaid First Step: Medical Eligibility

- Medicaid only pays for nursing home care that is medically necessary
- PRI/SCREEN (Patient Review Instrument/SCREEN)
 - PRI is an assessment tool developed by the NYSDOH to assess selected physical, medical, and cognitive characteristics of nursing home residents, as well as to document selected services they may receive
 - Administrative Data
 - Medical Conditions and Treatments
 - Activities of Daily Living
 - Selected Behaviors
 - Specialized Services
 - Diagnosis
 - Screen – determine patient’s ability to return to community or qualify for long-term placement



Chronic Care Medicaid
Second Step: Income Eligibility

- There is a difference between “eligibility” and “post-eligibility Medicaid budgeting”
- During the eligibility review, it is critical that an Applicant’s **income** does not exceed his/her medical expenses (cost of care)
 - Look at the Applicant’s gross income
 - Deduct “permissible disregards,” such as health insurance costs
 - If the cost of care exceeds income, Applicant is income eligible



Chronic Care Medicaid
Third Step: Resource Eligibility – Single Applicant

- Assets: \$15,150
- Assets in excess of \$15,150 will result in denial of benefits until threshold is reached
 - Applicant may “spend-down” excess resources, implement a Gift/Note plan, or engage in some other strategic planning
- Exempt Assets: pre-paid irrevocable burial fund; personal property; some limited life insurance (face value not exceeding \$1,500)



Chronic Care Medicaid
Third Step: Resource Eligibility – Married Applicant

- Assets: \$15,150 for Applicant, with Community Spouse Resource Allowance (CSRA) = \$74,820 for Community Spouse (“CS”) = (\$89,970 total)
 - In limited situations, Community Spouse may keep more (1/2 up to \$123,600)
- If Community Spouse is over the resource threshold; consider Spousal Refusal, Gift/Note Planning, Spousal Share Declaration, or Spend-Down
- Exempt Assets Community Spouse May Keep: Home (up to \$858,000 in equity); Automobile; personal property; pre-paid irrevocable burial fund; some limited life insurance



Chronic Care Medicaid
Fourth Step: Transfer of Asset
Review

- Eligibility for Medicaid benefits for nursing home care is also dependent upon a review of financial records for a specified period of time (60 months)
- Transfers (gifts or sales at less than fair market value) by A/R or spouse will result in a period of ineligibility during which the A/R cannot receive Medicaid benefits



Chronic Care Medicaid
Fourth Step: Transfer of Asset
Review

- When the A/R has resources below the threshold (\$15,150 or \$89,970), DSS then engages in the “look-back” and may impose a “penalty period” of ineligibility if it discovers transfers or gifts within the look-back period



Chronic Care Medicaid Fourth
Step: Penalty Period

- If DSS finds that transfers were made for less than fair market value (gifts), a penalty period will be imposed
- Penalty period is the period of time during which you are ineligible for Medicaid benefits
- Calculated by dividing the value of the gift/transfer by the regional rate of care



Fourth Step: Regional Rates

- Use the regional rate of the region in which the nursing home is located, NOT the rate from the region in which applying (i.e., resident of Albany being placed in Buffalo nursing home; application to Albany County, regional rate is Western New York)
- Regional Rate for Western New York for 2018 = \$10,239



Chronic Care Medicaid
Fourth Step: Example for
Calculating Penalty Period

- Applicant has gifted \$105,000 during last 5 years
- Penalty Period determined as follows:
$$\frac{\$105,000}{\$10,239}$$
- Penalty Period = 10.25 months



Chronic Care Medicaid
Fourth Step: Commencement of
Penalty Period

- Penalty Period begins to run on the ***LATER*** of: (1) the date when (a) the Medicaid applicant: (i) is resource eligible; (ii) is income eligible; (iii) requires nursing home level care; and (iv) has filed a Medicaid application and (b) no other period of Medicaid ineligibility is outstanding; ***or*** (2) the first day of the month after which assets have been transferred



Chronic Care Medicaid
Fourth Step: Implications

- If an Applicant satisfies all of the requirements, DSS will deny Medicaid benefits as a result of the transfer and impose the applicable penalty period.
- Applicant now has \$15,150 (or \$89,970 for a couple), is in a nursing home, and has to wait out the penalty period
- Nursing homes have significant concerns about a resident being ineligible for Medicaid benefits but without sufficient resources to pay



Illustration

- A/R is deemed medically needy (Step One)
- A/R's cost of care exceeds Applicant's income (Step Two)
- A/R and Spouse are under resource level (\$89,970 with exempt assets) (Step Three)
- Penalty period of 10.25 months imposed (Step Four)
- A/R enters Nursing Home July 1 and applies for Medicaid asking to start July 1
- A/R doesn't have Medicaid until May 1 of following year
- During that time, A/R and Spouse must private pay (contract with NH requires it)



Chronic Care Medicaid
Eligibility Secured: Next Steps

- These determinations are critical for planning prior to implementation
- Budgeting computed for when Medicaid starts paying (in above example, at end of penalty period)



Chronic Care Medicaid
Income Budgeting - Single
Applicant

- For a single person, use countable Medicaid income, deduct \$50, and arrive at “spend-down” (income contribution required to be paid toward cost of care)



Chronic Care Medicaid
Income Budgeting- Married
Applicant

- Community Spouse (“CS”) is permitted to retain \$3,090 of income per month – this is the Minimum Monthly Maintenance Needs Allowance (MMMNA)
 - Health insurance costs are permitted disregards
- If CS has income of his/her own that exceeds \$3,090 he/she will be asked to contribute 25% of excess toward care of A/R



Chronic Care Medicaid
Income Budgeting: CS Excess
Income

- Example: A/R (Wife) has income totaling \$1,500. CS (Husband) has income totaling \$3,775

\$1,500	Wife's Income	\$3,775	Husband's Income
<u>(\$50)</u>		<u>(\$3,090)</u>	
\$1,450	Wife's Contribution to Care	\$685	Husband's Excess Income

- Husband will be asked to contribute 25% of excess, or \$171.25 per month
- Total family contribution = \$1,621.25



**Chronic Care Medicaid
Income Budgeting : CS Under
Threshold**

- In situations where the CS does not have sufficient income to bring her up to the \$3,090 level
- Example: Husband (Applicant) has \$3,775 of income; Wife (CS) has \$1,500
 - Wife is allowed to keep up to \$3,090; her \$1,500 is \$1,590 under the threshold
 - Wife is deemed \$1,590 of Husband's income
 - Husband contributes \$2,135 to the cost of his care (\$3,775 less \$1,590 less \$50)



Exempt vs. Countable Assets

New York State Medicaid Reference Guide

- Defines resources as property of all kinds, including real, personal, tangible, and intangible
- All resources of an SSI-related applicant/recipient (A/R) are reviewed to determine availability and value as of the first day of the month for which the A/R is applying for or receiving Medicaid.



Exempt vs. Countable Assets

- Available assets as well as assets which the applicant or spouse is entitled to, but does not obtain because of action/inaction
 - Renunciation of inheritance
 - Waiver of right of election
- Certain assets may be considered resources, unless certain elections are made, such as for individual retirement accounts not in "pay-out status"



Exempt vs. Countable Assets

- Exempt resources in Medicaid determination
 - Irrevocable pre-paid funeral and burial arrangements
 - Tangible personal property
 - Limited life insurance (face value not exceeding \$1,500 designated for a burial allowance)
 - Community Spouse
 - Residence (equity cap of \$858,000)
 - Automobile



Specifically Exempt Transfers

Transfer of homestead (principal residence) exempt if transferred to:

- The spouse;
- Child of A/R who is under 21;
- A blind or disabled child;
- Sibling of A/R with equity interest in the home, and who has resided in home, and is using it as his/her primary residence for at least one year prior to A/R's admission to SNF
- Child of A/R who has resided in the home as his/her residence for at least 2 years immediately prior to A/R's admission to SNF and has provided care to the A/R



Specifically Exempt Transfers

Transfer other than homestead exempt if transferred to:

- A/R's spouse or to another for the sole benefit of the A/R's spouse
- From the A/R's spouse to another for the sole benefit of the A/R's spouse;
- Disabled child;
- To a trust for the sole benefit of an individual under sixty-five (65) years of age who is disabled



Specifically Exempt Transfers

Other:

- Post-eligibility transfers by the Community Spouse will be considered exempt as to the A/R's continued eligibility, but will impact CS' personal eligibility
- Transfers made for purposes other than qualifying for Medicaid (fact-specific)
- Undue Hardship



Treatment of Retirement Accounts

- Pay-out status
 - Taking required minimum distributions
 - Based on IRS tables
 - However, maximization for A/R – local county practice
 - Is each retirement account in payout status?



Treatment of Annuities

- DRA Guidelines – 06 OMM/ADM-5
 - A/R to disclose the description of any interest the A/R or spouse has in an annuity
 - If purchased after February 8, 2006, NYS named as remainder beneficiary in first position or purchase deemed transfer of assets



Treatment of Annuities

- Annuity purchased by or on behalf of A/R, purchase treated as transfer unless:
 - Annuity in subsection (b) or (q) of Section 408 of IRC;
 - Annuity is purchased with proceeds from an account described in (a), (c), (p) of Section 408 of the Code; a simplified employee pension (within the meaning of 408(k) of the Code); or a Roth IRA described in 408A of the Code; or
 - Annuity is:
 - Irrevocable and non-assignable;
 - Is actuarially sound (as determined in accordance with actuarial publications of Office of Chief Actuary of SSA); and
 - Provides for periodic payments in equal amounts with no deferral and no balloon payments



Treatment of Annuities

- Criteria applies to transactions on or after February 8, 2006, with transactions including:
 - Any action to change the course of payment or that changes the treatment of the income or principal;
 - Additions of principal;
 - Elective withdrawals;
 - Requests to change the distribution of the annuity;
 - Elections made to annuitize the contract.



Community Medicaid – Transfer Implications

- Nature of the asset being transferred
- Timing of the transfer as it relates to Medicaid eligibility
- Manner in which the transfer is accomplished
 - Outright
 - Tax and financial ramifications
 - Transfer to a qualifying Trust
 - Tax and financial ramifications
 - Income-implications to A/R
- Future impact on transition to Chronic Care Medicaid
 - If CC Medicaid is needed, was the planning facilitated in a manner in which the transfer can be reversed, if necessary?



Chronic Care Medicaid – Transfer Implications

- Nature of the asset being transferred
- Timing of the transfer as it relates to Medicaid eligibility
- Manner in which the transfer is accomplished
 - Outright
 - Tax and financial ramifications
 - Creation of joint tenancy
 - Financial institution accounts
 - Stock/brokerage accounts



Chronic Care Medicaid – Transfer Implications

- Real property transferred with retained life estate interest
 - Value of the transfer – remainder interest established utilizing IRC Table S (age of transferor), taking into account the 7520 rate as of the month of transfer
 - Sale of property – proceeds allocated utilizing IRC Table S (age of transferor), taking into account the 7520 rate as of the month of sale
- Transfer to a qualifying Trust
 - Tax and financial ramifications
 - Income-implications to A/R
 - Life use and occupancy of real property
 - Married couple – joint trust vs. two trusts



Planning Options

- The 5 Year Plan
 - Accounting for resources, income, and expenses
 - Retain enough to pay or calculated fall short
 - Married couple – planning underway for both spouses
 - For longer plans, avoids the technicalities of Gift/Note plan



Planning Options

- The 5 Year Plan (cont'd)
 - Consider
 - Income is high
 - Cost of care is low
 - Assets are sizeable
 - Issues in past transactional history
 - Combination of factors



Planning Options

- The calculated spend-down
 - Especially for a married couple
 - New vehicle
 - Home improvements
 - Pre-paid funeral plans for both



Planning Options

- Spousal Refusal
 - Otherwise responsible spouse refuses to contribute assets or income to A/R spouse
 - May retain assets and income beyond threshold levels
 - Deferral of payment option, since DSS will often pursue repayment at Medicaid rate (less than private pay) – local DSS practice



Crisis Planning with Promissory Notes

- To implement a gift-note plan, the attorney must draft a DRA compliant promissory note to evidence the loan made by the A/R, which will be repaid with interest over a specified period of time.
 - New York adopted DRA rules (see 06 OMM/ADM-5)



9 Pieces of Information Needed to Do Crisis Plan

1. Medicare Cut-Off Date
2. Assets
3. Prior Transactions Review
4. Income
5. Cost of Care
6. Outstanding Liabilities
7. Need for Retained Assets
8. Liquidity of Assets
9. Penalty Period Divisor



Promissory Note Planning

- #1 - Medicare Cut-Off Date: eligibility for Medicaid cannot occur until medical expenses exceed income; if A/R is having care at nursing home paid for through Medicare, then A/R does not have medical expenses that exceed income
- Prepare A/R and family for the uncertainty of this - when it happens on the 2nd day of a 31 day month, a nursing home liability will accrue for the remainder of the month



Promissory Note Planning

- #2 - Assets: **Everything that is not exempt is counted.**
 - Security deposits at the nursing home
 - Life insurance cash value
 - Stock (even the nominal shares someone owns as a result of life insurance companies going public years ago)
 - UTMAs vs. 529s
 - Be prepared to prove exclusions/exceptions should apply (*i.e.*, joint bank account; legal impediment; sibling with equity interest, etc.)



Promissory Note Planning

- #3 - Review of Prior Transactions. Someone who gifted away \$50,000 during the last 5 years is going to have a very different Promissory Note/Gift Plan than someone who has not made any gifts
- Be familiar with your DSS practices (\$2,000 level of asset review? Review of deposits and withdrawals or just withdrawals?)



Promissory Note Planning

- #4 - Income. Get proof of income. Evaluate what is the gross income and what are the offsets.
 - Income tax withholdings are not exempt
 - Health Insurance premiums are permissible offsets
 - Watch for 13th pension payments
 - Consider LTC Insurance payments (paying for LTC is permissible health insurance expense; payments from LTC insurance are budgeted as income)
 - RMDs and other distributions from retirement
 - When does the income “hit” the account?



Promissory Note Planning

- # 5 - True Cost of Care. Prove it. Does the price quoted include the assessment or is that additional? Will additional medical expenses be incurred (*i.e.*, what health insurance does the A/R have to cover prescription costs)?



Promissory Note Planning

- # 6 - Assess Outstanding Liabilities. Satisfying outstanding liabilities is permissible spend-down if those liabilities belong to A/R. Include in your evaluation of “liabilities” permissible expenditures (home repairs, etc., if there is a Community Spouse), your legal fees and pre-paid funeral arrangements.
 - Outstanding medical bills can be used to offset excess assets.



Promissory Note Planning

- # 7 - Gauge A/R and Family’s need for level of retained assets.
 - Any advantage to being “under-resourced” (reduction of ineligibility period)?
 - Prepare the family for the fact that a significant portion of the \$15,150 may be illiquid resources that will then need to be liquidated.



Promissory Note Planning

- # 8 - Assess Liquidity of Assets. Depending on how excess assets are comprised, your planning options may be limited.
 - How fast can you liquidate stock? Cash in life insurance or take a loan against it?
 - Can you annuitize an annuity? Is IRA in payout?
 - If your entire pot of excess resources are illiquid, does borrower have sufficient cash to repay Note?
 - Note payments **MUST** be made evenly every month.



Promissory Note Planning

- # 9 - Remember Your Penalty Period Divisor. Just because it's an Erie County resident, doesn't mean we're using an Erie County divisor.



Get To Work !!!

- Calculate your Gift
- Calculate your Penalty
- Calculate your Loan
- Finalize your Note
- Direct A/R and Family on transfers
- Verify transfers
- Complete Medicaid Application
- Supervise repayment



Drafting the Promissory Note

- Follow the DRA rules - Note must be:
 - Actuarially sound
 - See GIS 18 MA/008 - 2018 Update to the Actuarial Life Expectancy Table
 - Equal monthly payments, with no provisions for deferral or balloon payments
 - Not cancelled upon death.



Drafting the Promissory Note

- A promissory note complying with the DRA criteria will be considered a bona fide transaction, and the purchase of such an asset will not be classified as a transfer of assets.
- Given the clear language of the DRA, the drafting attorney will want to ensure that these criteria are met on the face of the note
- Include non-negotiable, non-assignable and non-transferable by Promisee (defeats the argument that note could be considered a negotiable instrument, and available resource to A/R, by means of potential resale to 3rd party.



Weiss Case and Return of Gifts

- Pre-Weiss
 - FH Decision #5075217L – Onondaga Co. (2009)
 - Assets were transferred to a child.
 - Child paid Applicant’s assisted living room and board
 - Decision – Agency was directed to recalculate penalty period to account for amounts paid to assisted living facility as a return of a portion of gifted assets



Weiss Case and Return of Gifts

- Pre-Weiss
 - FH Decision #5563403R – Suffolk (2010)
 - Applicant made transfers to Irrevocable Trust
 - Applicant’s daughter paid money towards expenses incurred by Applicant at an assisted living facility
 - Decision: Agency was correct in its disallowance of “give-backs” – not paid by Trust nor used for nursing home expenses



Weiss Case and Return of Gifts

- Weiss vs. Suffolk Co DSS
 - Application approved with 6.84 month penalty period for transfer of \$78,236.74 to daughter
 - Daughter used \$41,600 of the gift to pay an assisted living facility for Applicant’s care
 - No “give-backs” approved by DSS
 - Fair Hearing – Affirmation of DSS determination
 - Not entitled to reduction – not returned in cash or other liquid asset



Weiss Case and Return of Gifts

- Matter of Weiss v. Suffolk Cty Dep’t of Soc. Svcs., et al. 121 A.D.3d 703, App. Div. 2d Dep’t, Oct. 1, 2014.
 - Department of Health determination is supported by substantial evidence
 - Returned assets were not used to pay for applicant’s skilled nursing facility care per the Dept. of Health ADM
 - Plain language of the ADM defines return of assets ONLY as return to applicant of “an equivalent amount of cash or other liquid assets” or use by transferee to pay the applicant’s “nursing facility services.”



Weiss Case and Return of Gifts

- SEE 96 ADM-8
 - “For purposes of these [Medicaid] rules, transferred assets shall be considered returned if the person to whom they were transferred: uses them to pay for nursing facility services for the MA applicant/recipient; or provides the MA applicant/recipient with an equivalent amount of cash or other liquid assets.”



Weiss Case and Return of Gifts

- Impact of return of transfers when Irrevocable Trust is used
 - See technical provisions of EPTL §7-1.9
 - Including “all persons beneficially interested”
 - Issues with beneficiaries returning assets



The End



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