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*Introduction
Medicaid*




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Learning Objectives

- ◆ Brief overview of Medicaid eligibility in home care and institutional settings.
- ◆ Review classic Medicaid application techniques used by elder law practitioners.
- ◆ Explain the more complex obstacles encountered during the Medicaid eligibility and application process.
- ◆ Analyze the sophisticated techniques used to overcome the more difficult Medicaid eligibility challenges.




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The History of Medicaid

- ◆ The Social Security Amendments of 1965 created Medicaid by adding Title XIX to the Social Security Act, 42 U.S.C., Section 1396 et seq.
- ◆ States are not required to participate.
- ◆ Any state that does participate must comply with federal Medicaid laws.
- ◆ Each state administers its own Medicaid program, establishes eligibility standards, determines the scope and types of services it will cover, and sets the rate of payment.




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Types of Care

Community Medicaid/Home Care – Covers the cost of a home health aide (for a certain number of hours) for those who require assistance with their activities of daily living (ADLs).



Institutional Medicaid/Chronic Care – Covers the cost of nursing home care for those with few assets who require skilled nursing care.

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**Financial Eligibility
Community Medicaid**



RESOURCE ALLOWANCE
Single - \$14,850
Couple -\$21,750

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Asset Transfer

Individuals can divest themselves of all assets and be eligible the first day of the following month for Medicaid Home Care benefits.

Note: Medicaid will only begin to pay benefits on the first day of a given month. Therefore, transfers should be made by the end of the prior month.

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Asset Transfers


Transfers can be made to ANYONE in order to qualify for Medicaid Home Care benefits.

However, if an individual goes into a nursing home within 5 years of the transfers and said transfers were not made to a spouse, minor or disabled child, the individual will be subject to a Medicaid penalty.

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Financial Eligibility



INCOME ALLOWANCE
Single - \$825
Couple - \$1,209

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Community Based Care Excess Income

- ◆ If an individual has income in excess of the allowable amount, they must spend down their excess income on the cost of their care which means that a single individual will be forced to live on \$825 per month.
- ◆ Excess income will be used to pay for the individual's care first. Once that money has been expended each month, Medicaid will pay for all of their care needs, including prescription drugs, medical equipment and home health aide costs.

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**Medicaid Home Care
Excess Income**

An alternative to spending down excess income each month is to deposit the excess income into a Pooled Income Trust.

Pursuant to New York Social Services Law Section 366(2)(b)(2)(III), ... "In the case of an applicant or recipient who is disabled, as such term is defined in section 1614(a)(3) of the federal social security act, the department must not consider available income or resources the corpus or income of the following trusts... (B) ...a trust containing the assets of such a disabled individual established and managed by a non-profit association which maintains separate accounts for the benefit of disabled individuals..."


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**Medicaid Home Care
Excess Income**

Pooled Income Trusts

- ◆ A Pooled Income Trust meets the criteria set forth in Section 366(2)(b)(2)(iii) of the Social Services Law.
- ◆ Elderly and disabled participants contribute their excess income to the Pooled Income Trust to be managed along with other participant's funds



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Financial Eligibility

Pooled Income Trust

The money in the participant's trust account can be used for the participant's living expenses, including mortgage payments, rent, food, utilities, recreational activities, clothing, etc.


Note: Disbursements from the trust must be paid directly to the provider of the service. Upon the death of the participant, any money remaining in the trust will go to the not-for-profit or charitable organization to further its charitable purpose.

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**Medicaid Home
Approval of**

**Once financial eligibility is established, the
Medicaid applicant must prove medical necessity**



An assessment is done to determine how many hours the Medicaid program will cover for each applicant. This assessment is task-based with regards to the individuals activities of daily living (ADLs).

Activities of Daily Living


- Toileting
- Ambulating
- Transferring
- Feeding
- Dressing
- Grooming
- Turning/Positioning

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**Medicaid Home
Approval of**

- ◆ The minimum number of hours approved is 4 hours per day
- ◆ 24-hour live-in care is available if the applicant qualifies. However, the home health aide must be able to get 5 hours of uninterrupted sleep.
- ◆ 24-hour split shift care is available if the applicant qualifies. This means 2/12 hour shifts with a home health aide awake at all times.



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**Medicaid Home
Approval of**

**Pursuant to GIS 12 MA/026, when determining whether a person requires
24-hour split-shift care or live-in care, the following must be
considered:**

- The existence of a medical condition that directly causes the person to need frequent assistance with personal care services tasks during the night;
- The specific task or tasks with which the person requires frequent assistance during the night;
- The frequency at which the person requires assistance with these tasks during the night;
- Whether the person requires similar assistance with these tasks during the daylight hours and, if not, why not;
- The informal supports or formal services that are willing, able and available to provide assistance with the person's nighttime tasks;
- The person's ability to use adaptive or specialized equipment or supplies to meet his or her documented medical need for assistance with nighttime tasks; and whether the person's physician has documented that, due to the person's medical condition, he or she could not safely use the equipment or supplies; and
- Whether a live-in aide would likely be able to obtain an uninterrupted five hours of sleep were live-in services to be authorized.

◆ Note: GIS 12 MA/026 clarifies the proper interpretation and application of 18 NYCRR 505.14

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Financial Eligibility Institutional Medicaid






RESOURCE ALLOWANCE
 Applicant - \$14,850
 Community Spouse - \$120,900

INCOME ALLOWANCE
 Applicant - \$50
 Community Spouse - \$3,022.50

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Institutional Medicaid

The majority of obstacles faced when applying for Institutional Medicaid benefits, have to do with the resource allowance, asset transfer penalties and the 5 year look-back.

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Institutional Medicaid



Look Back Period ≠ Penalty Period!


- ◆ The Look Back Period is 5 years.
- ◆ The Penalty Period begins when the person is in a nursing home and has less than \$14,850 in total assets.
- ◆ The length of penalty period depends on the regional rate.
- ◆ The regional rates must be used when calculating a transfer of assets penalty period for coverage of nursing facility services.

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Penalty Period Case Study

- ◆ She is not eligible for Medicaid institutional benefits until February 2017.
- ◆ She has to come up with the money to cover this private pay period.



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Institutional Medicaid Penalty Period

Transfers made during the 5 year look-back period, will be considered a gift subject to a penalty period unless the transfer is made to an exempt party under 18 NYCRR 360-4.4 (i.e., spouse, caretaker child, disabled child, minor child)

There are additional regulations which, if properly applied, can overcome the presumption that a transfer is not exempt and therefore subject to a penalty.

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Institutional Medicaid - Gifts Not In Contemplation of Death

Social Services Law Section 366 (5)(d)(3)(iii) provides that, "an individual will not be ineligible for Medicaid as a result of a transfer if a satisfactory showing is made that the asset was transferred exclusively for a purpose other than to qualify for Medicaid."

The key here is to prove that the transfers were not made in an attempt to protect the funds for Medicaid purposes.

- ◆ Pattern of Gifting
- ◆ Health of the Medicaid applicant at the time of the transfers
- ◆ Remaining assets in the name of the Medicaid applicant at the time of the transfers
- ◆ Was there an attempt to have the gift returned?
- ◆ What was the purpose of the gift?


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**Institutional Medicaid
Undue Hardship**

Pursuant to 06 ADM-5,

"An individual who is unable to demonstrate that a transfer was made exclusively for a purpose other than to qualify for nursing facility services, may have coverage authorized for these services if the individual meets undue hardship."



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**Institutional Medicaid
Undue Hardship**

Pursuant to 06 ADM-5,

"...undue hardship exists when:

1. The individual applying for the nursing facility services is otherwise eligible for Medicaid; and
2. Despite his/her best efforts, as determined by the social services district, the individual or the individual's spouse is unable to have the transferred asset(s) returned or to receive fair market value for the asset or to void a trust; and
3. Either: the individual is unable to obtain appropriate medical care such that the individual's health or life would be endangered without the provision of Medicaid for nursing facility services; or the transfer of assets penalty would deprive the individual of food, clothing, shelter or other necessities of life."

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**Institutional Medicaid
Undue Hardship**

Pursuant to 18 NYCRR 360-4.10,

Undue Hardship means a situation where:

"(i) a community spouse fails or refuses to cooperate in providing necessary information about his/her resources;

(ii) the institutionalized spouse is otherwise eligible for MA;

(iii) the institutionalized spouse is unable to obtain appropriate medical care without the provision of MA; and

(iv) (a) the community spouse's whereabouts are unknown; or

(b) the community spouse is incapable of providing the required information due to illness or mental incapacity; or

(c) the community spouse lived apart from the institutionalized spouse immediately prior to institutionalization; or

(d) due to the action or inaction of the community spouse, other than the failure or refusal to cooperate in providing necessary information about his/her resources, the institutionalized spouse will be in need of protection from actual or threatened harm, neglect, or hazardous conditions if discharged from an appropriate medical setting."

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**Institutional Medicaid
and Cause**

18 NYCRR 351.26 provides that,

"[A]n applicant for or recipient of public assistance is exempt from complying with any requirement concerning eligibility for public assistance if the applicant or recipient establishes that good cause exists for failing to comply with the requirement. Except where otherwise specifically set forth in the Regulations, good cause exists when the applicant or recipient has a physical or mental condition which prevents compliance...or which prevents the applicant or recipient from being reasonably expected to comply with an eligibility requirement..."

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**Institutional Medicaid
and Cause**

Fair Hearing #5032106J

the ALJ held that, while the Agency's determination was correct when made, based upon the applicant's mental condition, the applicant's failure to comply with the eligibility process was excused pursuant to 18 NYCRR 351.26, and therefore the Agency was directed to, *inter alia*, immediately restore benefits to the applicant therein. There, where the applicant reportedly suffered from depression, anxiety and panic attacks, was briefly hospitalized, and reported feeling "overwhelmed" and confused upon receipt of the Medicaid "Notice(s)," which led her to place them in a drawer and leave them there, the ALJ found that the applicant's representative's argument that the Appellant should be excused from appearing for the [Validation Review] appointment in question, **due to her psychiatric incapacity,** was "credible, consistent and persuasive" (*emphasis added*).

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**Medicaid Case
Planning**

All Is Not Lost!



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**Institutional Medicaid
Crisis Planning**

- ◆ Approximately one-half of a Medicaid applicant's assets can still be protected with a Promissory Note.
- ◆ Approximately one-half of the Medicaid applicant's assets must be transferred to their intended beneficiaries.
- ◆ The Medicaid applicant will loan the other one-half to a beneficiary, who signs a Promissory Note.

...I, the undersigned, promise to pay to or for the order of the payee named in this promissory note the sum of \$10,000.00 as the principal amount of the loan. I agree to pay the interest on this loan at the rate of 10% per annum.

PROMISSORY NOTE

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**Promissory
Note Planning**

In order to enter into a Promissory Note, the individual must be in a nursing facility and must transfer all of their assets down to the Medicaid resource allowance (currently \$14,850).

Approximately one-half of these transferred assets will be a gift and the other half will be a loan pursuant to an executed promissory note.

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**Institutional Medicaid
Crisis Planning**

Pursuant to 06 ADM-5,

"When transferring assets pursuant to a Promissory Note, "the funds used are to be treated as a transfer for less than fair market value unless the note.... :

- ◆ has a repayment term that is actuarially sound;
- ◆ provides for payments to be made in equal amounts during the term of the loan, with no deferral and no balloon payments made; and
- ◆ prohibits the cancellation of the balance upon the death of the lender."

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**Promissory
Note Planning**

- ♦ Look Back = 5 years
- ♦ Penalty period on any gifts made in that 5 year period begins when your loved one is in a nursing home and below the resource limit (currently \$14,850).
- ♦ Length of the penalty period depends on the amount gifted divided by the average cost of care (on Long Island: \$12,811/month).

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**Institutional Medicaid
Crisis Planning**

- ♦ After giving away one-half of the Medicaid applicant's assets and loaning the other half, the Medicaid applicant will have less than \$14,850 in assets.
- ♦ Penalty period begins to run on the gifted assets.
- ♦ Use the monthly repayments pursuant to the Promissory Note to pay the nursing home during the penalty period.
- ♦ The loan repayments are timed to end when the penalty period ends.

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**Promissory Note
Planning Case**

Mrs. Jones has total assets of \$230,000


- ♦ Her income from Social Security and her deceased husband's pension totals \$2,000 per month.
- ♦ She is in a nursing home and her Medicare coverage ended on October 31, 2013.
- ♦ The nursing home costs \$13,500 per month.

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Promissory Note Planning

On October 26, 2013, Mrs. Jones transferred a total of \$220,000 to her daughter.
 \$110,000 is a gift and the other \$110,000 is a loan for which Mrs. Jones' daughter signs a Promissory Note.




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Promissory Note Planning

- ♦ Mrs. Jones only has \$10,000 of assets now and is in the nursing home so the penalty period can start on the gift.
- ♦ Using \$11,000 as the average regional rate for a nursing home, the \$110,000 gift results in a 10 month penalty period.




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Institutional Medicaid Crisis Planning

- ♦ The loan of \$110,000 is repaid over 10 months at a rate of \$11,000 per month.
- ♦ Remember the nursing home costs \$13,500 per month.
- ♦ The loan repayments will be \$2,500 short each month.
- ♦ \$2,000 of the shortfall will come from Mrs. Jones' income.
- ♦ Shortfall = \$500 per month




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**Promissory Note
Planning**

- ◆ This shortfall is necessary in order for Medicaid to accept the Promissory Note transaction.
- ◆ Must have medical expenses that you are unable to pay in order for Medicaid to engage.




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**Promissory Note
Planning**

At the end of the 10 months, Mrs. Jones goes on Medicaid and her daughter keeps the \$110,000 gift.



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**Promissory Note
Planning**

- ◆ One-half of assets were saved.
- ◆ One-half had to be spent down on the cost of care.
- ◆ All was not lost.
- ◆ Better plan: Preserve all assets by planning ahead and using an Asset Protection Trust.

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