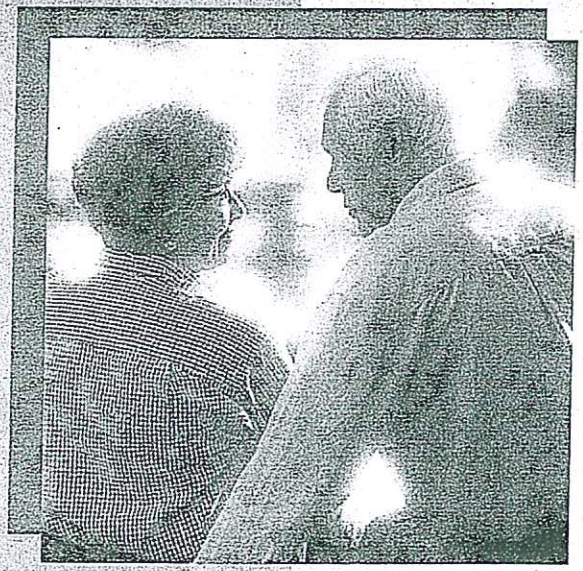
Do You Qualify for Financial Assistance for Nursing Home Care?



The Consumer's Guide to Medicaid Transfer Planning and Protection of Assets

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"Let our advance worrying
become our advanced thinking
and planning."
WINSTON CHURCHILL

OUR MISSION STATEMENT

Helping your loved ones get the nursing home care they deserve while legally protecting your family's assets.

Introduction

The decision to move a family member or loved one into a nursing home is one of the most difficult decisions you can make.

Perhaps the move is being made because the family member can no longer care for himself or herself...or has a progressive disease like Parkinson's or Alzheimer's...or has had a stroke or heart attack.

No matter the reason, those involved are almost always under great stress.

At times like these, it's important that you pause, take a deep breath and understand that there are things you can do. Good information is available and you can make the right choices for you and your loved one.

The Consumer's Guide to Medicaid Transfer Planning and Protection of Assets is designed to help provide you with information and answers to some of the questions you will encounter. These are questions, which we, as Elder Law attorneys deal with on a daily basis.

Our clients have found this guide to be a valuable resource, and we hope you will find it useful too.

This guide is brought to you as a service of:

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Americans are living longer than ever before. At the turn of the 20th century, the average life expectancy was about 47 years. As we enter the 21st century, life expectancy has almost doubled. As a result, we face more challenges and transitions in our lives than those who came before us.

One of the most difficult transitions people face is the change from independent living in their own home or apartment to living in a long term care facility or "nursing home." There are many reasons why this transition is so difficult. One is the loss of home...a home where the person lived for many years with a lifetime of memories. Another is the loss of independence. Still another is the loss of the level of privacy we enjoy at home, since nursing home living is often shared with a roommate.

Most people who make the decision to move to a nursing home do so during a time of great stress. Some have been hospitalized after a stroke, some have fallen and broken a hip, still others have progressive dementia, like Alzheimer's Disease or Parkinson's Disease, and can no longer be cared for in their own homes.

Whatever the reason, the spouse or relative who helps a person transition into a nursing home during a time of stress faces the immediate dilemma of how to find the right nursing home. The task is no small one, and a huge sigh of relief can be heard when the right home is found and the loved one is moved into the nursing home. For many, the most difficult task is just beginning: *How to cope with nursing home bills that may average $5,500.00 per month or more!?*

How to Pay for Nursing Home Care

One of the things that concerns people most about nursing home care is how to pay for that care. There are basically four ways that you can pay the cost of nursing home care:

1. Long Term Care Insurance - If you are fortunate enough to have this type of coverage, it may go a long way toward paying the cost of the

nursing home. Unfortunately, long term care insurance has only started to become popular in the last few years and most people facing a nursing home stay do not have this coverage.

2. Pay with Your Own Funds - This is the method many people are required to use at first. Quite simply, it means paying for the cost of a nursing home out of your own pocket. Unfortunately, with nursing home bills averaging $5,500.00 or more per month in our area, few people can afford a long term stay in a nursing home.

3. Medicare - This is the national health insurance program primarily for people 65 years of age and older, certain younger disabled people, and people with kidney failure. Medicare provides short term assistance with nursing home costs, but only if you meet the strict qualification rules.

4. Medicaid - This is a federal and state funded and state administered medical benefit program which can pay for the cost of the nursing home if certain asset and income tests are met.

Since the first two methods of private pay (i.e. using your own funds) and long term care insurance are self-explanatory, our discussion will concentrate on Medicare and Medicaid.

What About Medicare?

There is a great deal of confusion about Medicare and Medicaid.

Medicare is the federally funded and state administered health insurance program primarily designed for older individuals (i.e. those over age 65). There are some limited long term care benefits that can be available under Medicare. In general, if you are enrolled in the traditional Medicare plan, and you've had a hospital stay of at least three days, and then you are admitted into a skilled nursing facility (often for rehabilitation or skilled nursing care), Medicare may pay for a while. (If you are a Medicare Managed Care Plan beneficiary, a three day hospital stay may not be required to qualify.)

If you qualify, traditional Medicare may pay the full cost of the nursing home stay for the first 20 days and can continue to pay the cost of the nursing home stay for the next 80 days, but with a deductible that's nearly $194.50 per day. Some Medicare supplement insurance policies will pay the cost of that deductible. For Medicare Managed Care Plan enrollees, there is no deductible for days 21 through 100, as long as the strict qualifying rules continue to be met. So, in the best case scenario, the traditional Medicare or the Medicare Managed Care Plan may pay up to 100 days for each "spell of illness." In order to qualify for this 100 days of coverage, however, the nursing home resident must be receiving daily "skilled care" and generally must continue to "improve." (Note: Once the Medicare and Managed Care beneficiary has not received a Medicare covered level of care for 60 consecutive days, the beneficiary may again be eligible for the 100 days of skilled nursing coverage for the next spell of illness.)

While it's never possible to predict at the outset how long Medicare will cover the rehabilitation, from our experience, it usually falls far short of the 100 day maximum. Even if Medicare does cover the 100 day period, what then? What happens after the 100 days of coverage have been used?

At that point, in either case you're back to one of the other alternatives: long term care insurance, paying the bills with your own assets, or qualifying for Medicaid.

What is Medicaid?

Medicaid is a benefits program which is primarily funded by the federal government and administered by each state. Sometimes the rules can vary from state to state.

One primary benefit of Medicaid is that, unlike Medicare, the Medicaid program will pay for long term care in a nursing home once you've qualified. Medicare does not pay for treatment for all diseases or conditions. For example, a long term stay in a nursing home may be

caused by Alzheimer's or Parkinson's disease, and even though the patient receives medical care, the treatment will not be paid for by Medicare. These stays are called custodial nursing stays. Medicare does not pay for custodial nursing home stays. In that instance, you'll either have to pay privately (i.e. use long term care insurance or your own funds), or you'll have to qualify for Medicaid.

Why Seek Advice for Medicaid?

As life expectancies and long term care costs continue to rise, the challenge quickly becomes how to pay for these services. Many people cannot afford to pay $5,500.00 per month or more for the cost of a nursing home, and those who can pay for a while may find their life's savings wiped out in a matter of months.

Fortunately, the Medicaid Program is there to help. In fact, in our lifetime, Medicaid has become the long term care insurance of the middle class. But the eligibility to receive Medicaid benefits requires that you pass certain tests on the amount of income and assets that you have. The reason for Medicaid planning is simple. First, you need to provide enough assets for the security of your loved ones -- they too may have a similar crisis. Second, the rules are extremely complicated and confusing. The result is that without planning and advice, many people spend more than they should and their family security is jeopardized.

Exempt Assets and Countable Assets: What Must Be Spent?

To qualify for Medicaid, applicants must pass some fairly strict tests on the amount of assets they can keep. To understand how Medicaid works, we first need to review what are known as *exempt* and *non-exempt* (or countable) *assets*. Exempt assets are those which Medicaid will not take into account (at least for the time being). In general, the following are the primary exempt assets:

- Home, so long as its fair market value does not exceed $636,000.00. The home must be the principal place of residence. The nursing home resident may be required to show some "intent to return home" even if this never actually takes place.
- Personal belongings and household goods.
- One car or truck.
- Burial spaces and certain related items for applicant and spouse
- Irrevocable prepaid funeral contract.
- Value of life insurance if face value is $1,500.00 or less. If it does exceed $1,500.00 in total face amount, then the cash value in these policies is countable.

All other assets are generally non-exempt, and are countable. Basically, all money and property, and any item that can be valued and turned into cash, is a countable asset unless it is one of those assets listed above as exempt. This includes:

- Cash, savings, and checking accounts, credit union share and draft accounts.
- Certificates of deposit
- U.S. Savings Bonds
- Individual Retirement Accounts (IRA), Keogh plans (401K, 403B). An IRA may be exempt if it is making distributions to the owner who is in the nursing home and is 72 or over (but the required minimum distributions will be treated as income of that person who is in the nursing home).
- Prepaid funeral contracts which can be canceled
- Trusts (depending on the terms of the trust).
- Real estate (other than the residence).
- Additional vehicles
- Boats or recreational vehicles.
- Stocks, bonds, or mutual funds.
- Notes Receivable
- Cash Surrender Value of Life Insurance

While the Medicaid rules are very complicated and tricky, it's safe to say that a single person will qualify for Medicaid as long as he has only

exempt assets plus a small amount of cash and/or money in the bank (not over $2,000.00).

Some Common Questions

I've added my kids' names to our bank account. Is this a countable asset?

Yes. The entire amount is counted unless you can prove some or all of the money was contributed by the other person who is on the account. This rule applies to cash assets such as:

- Savings and checking accounts
- Credit union share and draft accounts
- Certificates of deposit
- U.S. Savings Bonds

Can't I Just Give My Assets Away?

Although the Federal Gift Tax laws allow you to give away up to $16,000.00 per year per person without gift tax consequences, those gifts will likely result in a period of ineligibility for numerous months. Under the Deficit Reduction Act that became law in February 2006, severe restrictions on assets transfers were implemented. This legislation extends the "lookback" (or "penalty") period for all transfers from three to five years. It also changes the *start of the penalty period for transferred assets from the date of the transfer to the date Medicaid would have been available except for the transfer.*

Though some families do spend virtually all of their savings on nursing home care, Medicaid often does not require it. There are a number of strategies which are perfectly legal that can be used to protect family financial security.

Division of Assets: Medicaid Planning for Married Couples

Division of Assets is the name commonly used for the Spousal Impoverishment provisions of the Medicare Catastrophic Act of 1988.

It applies only to couples. The intent of the law was to change the eligibility requirements for Medicaid where one spouse needs nursing home care while the other spouse remains in the community, i.e., at home. The law, in effect, recognizes that it makes little sense to impoverish both spouses when only one needs to qualify for Medicaid assistance for nursing home care.

As a result of this recognition, "division of assets" was born. Basically, in a division of assets, the couple gathers all their countable assets together in a review. Exempt assets, discussed above, are not counted.

The countable assets are then divided in two, with the at-home or "community spouse" allowed to keep one half of all countable assets to a maximum of $137,400.00. The other half of the countable assets must be "spent down" until less than $2,000.00. The amount of the countable assets which the "at-home spouse" gets to keep is called the Community Spouse Resource Allowance (CSRA).

Each state also establishes a monthly income floor for the at-home spouse. This is called the Minimum Monthly Maintenance Needs Allowance. This permits the community spouse to keep a minimum monthly income of up to $3,435.00.

If the "community spouse" (the at-home spouse) does not have at least $3,435.00 in income, then he or she is allowed to take the income of the nursing home spouse in an amount large enough to reach the Minimum Monthly Maintenance Needs Allowance (i.e., up to at least $3,435.00). The "nursing home spouse's" remaining income goes to the nursing home. This avoids the necessity (hopefully) for the at-home spouse to dip into savings each month, which would result in gradual impoverishment.

To illustrate, assume the community (at-home) spouse receives $1500.00 per month in Social Security. Also assume that the nursing home spouse receives $2,200.00 per month in Social Security.

The community spouse would be entitled to receive $3,435.00 - $1,500.00 = $1,935.00 of the nursing home spouse's income.

The balance of the nursing home spouse's income ($265.00) less a small monthly allowance of $60.00 will then go to pay for the cost of his care.

This does not mean, however, that there are no planning alternatives that the couple can pursue. Consider the following case studies:

Case Study: Medicaid Planning for Married People

Ralph and Alice were high school sweethearts who lived in Wichita Falls, Texas, their entire adult lives. Two weeks ago, Ralph and Alice celebrated their 51st anniversary. Yesterday, Ralph, who has Alzheimer's, wandered away from home. The police found him, hours later, sitting on a street curb, talking incoherently. They took him to a hospital. Now the family doctor has told Alice that she needs to place Ralph in a nursing home. Ralph and Alice grew up during the depression. They always tried to save something each month. Their assets totaling $120,000.00, not including their house, are as follows:

Savings account	$35,000.00
CDs	$65,000.00
Money Market account	$17,000.00
Checking account	$3,000.00
Residence (no mortgage)	$150,000.00

Ralph gets Social Security and Pension check for $1500.00 each month; Alice's check is $800.00. Her eyes fill with tears as he says, "At $5,500.00 to the nursing home every month, our entire life savings will be gone in less than two years!" What's more, she's afraid she won't be able to pay her monthly nursing home bills, because a neighbor told her that the nursing home will be entitled to all of Ralph's Social Security check.

There is good news for Alice. It's possible she will get to keep everything… all of their assets and all of the income… and still have the state Medicaid program pay Ralph's nursing home costs. While the process may take a little while, the end result will be worth it.
To apply for Medicaid, he will have to go through the Texas Health and Human Services Commission (HHSC). If she does things strictly according to the way HHSC tells her, she will only be able to keep about half of her assets plus she will be entitled to a minimum monthly income to pay her expenses. But the results can actually be much better than that. Texas law allows her to seek an increase in her income allowance. Based

on a 3% rate of interest, their entire savings, plus their Social Security, will not generate enough income to bring her up to the current allowable minimum monthly income of $3,435.00. However, she must proceed properly, and if so, Alice *may be entitled to keep their entire savings,* and Medicaid will pay for Ralph's nursing home.

The challenge is that this cannot be accomplished without proper planning. She will have to get advice from someone who knows how to navigate the system. But with the proper advice, she'll be able to avoid the spend-down and keep everything she and Ralph have worked so hard for.

This is possible because the law does not intend to impoverish one spouse because the other spouse needs care in a nursing home. This is certainly an example where knowledge of the rules, and how to apply them, can be used to solve Alice's dilemma.

Case Study: Medicaid Planning for single People

John, a widower with three children, has Parkinson's disease and recently moved into a nursing home in Wichita Falls, Texas. He has a home valued at $100,000.00, a car valued at $25,000.00 and a savings account worth $100,000.00. His monthly income from Social Security and retirement is $1,500.00. The cost of care is $5,500.00 per month. John has no long term care insurance. He is worried sick because he was told by his neighbor that, because he had not done anything at least 5 years ago, it is too late to protect any of his "nest egg" he worked so hard to build.

So what can John do? He can retain a lawyer who knows the "ins and outs" of Medicaid law and, based on the foregoing fact situation, legally protect about 64% ($64,000.00 of the nest egg) as well as the car and homestead!! However appropriate steps must be taken to protect the home from the Medicaid Estate Recovery Program.

Case Study: A Trust for a Disabled Child

Margaret and Sam have always taken care of their daughter, Elizabeth. She is 45, has never worked, and has never left home. She is "developmentally disabled" and receives SSI (Supplemental Security Income). They have always worried about who would take care of her after they die. Some years ago, Sam was diagnosed with dementia. His health has deteriorated to the point that Margaret can no longer take care of him. Now she has placed Sam in a nursing home and is paying $5,500.00 per month out of savings. Margaret is even more worried that there will not be any money left for the care of Elizabeth.

Margaret is satisfied with the nursing home Sam is in. The facility has a Medicaid bed available that Sam could have if he were eligible. Medicaid would pay his bill. However, according to the information she got from the social worker, Sam is $48,000.00 away from Medicaid eligibility. Margaret wishes there was a way to save the $48,000.00 for Elizabeth after she and Sam are gone. There is.

Margaret can consult an Elder Law attorney to set up a *"special needs trust"* with the $48,000.00 to provide for Elizabeth. As soon as she does, Sam will be eligible for Medicaid. Elizabeth won't lose her benefits, and her security is assured.

Of course, all trusts must be reviewed for compliance with Medicaid rules. Also, failure to report assets is fraud, and when discovered, will cause loss of eligibility and repayment of benefits. Still, some people question making gifts before entering a nursing home.

I Heard I Can Give Away $16,000.00 Per Year. Can I?

As discussed earlier, many people have heard of the Federal Gift Tax provision that allows them to give away $16,000.00 per year without paying any gift taxes. What they do not know is that this refers to a Gift Tax exemption. It is not an absolute right under Medicaid regulations.

Having heard of the exemption, they wonder, **"Can't I give my assets away?"** The answer is, maybe, but only if it's done within the strict provisions of the Medicaid law.

So even though the Federal Gift Tax law allows you to give away up to $16,000.00 per person, per year without incurring gift tax liability, those gifts could very well result in a period of Medicaid ineligibility for many months.

Will I Lose My Home?

Many people who apply for Medicaid assistance benefits to pay for nursing home care ask this question. For many, the home constitutes much or most of their life's savings. Often, it's the only asset that a person has to pass on to his or her children.

Under the Medicaid regulations, the home is an exempt asset (so long as equity is less than $636,000.00). This means that it is not taken into account when calculating eligibility for Medicaid. But in 1993, Congress passed a little-debated law that affects hundreds of thousands of families with a spouse or elderly parent in a nursing home. That law requires states to try to recover the value of Medicaid payments made to nursing home residents. This law is known as "estate recovery" and became the law in Texas as of March of 2005.

Estate recovery does not take place until the recipient of the benefits dies. Then, federal law requires that states attempt to recover the benefits paid from the recipient's **probate estate**. Generally, the probate estate consists of assets that the deceased owned in his or her name alone without beneficiary designation. Some believe the federal law permits states to go even further and recover non-probate assets, including assets owned jointly or payable to a beneficiary.

The asset most frequently caught in the "Estate Recovery web" is the home of the Medicaid recipient. A nursing home resident can often own

a home and receive Medicaid benefits without having to sell the home. But upon death, if the home is part of the probate estate, the state may seek to force the sale of the home in order to reimburse the state for the payments that Medicaid made. At the present time there are ways to legally protect the homestead from estate recovery. But since Medicaid rules are constantly changing, you will need assistance from someone knowledgeable about these rules.

The Importance of Having the Right Estate Planning Documents in Place

In order to be able to protect assets it is critically important that the Medicaid resident and his/her spouse (if applicable) have in place the following:

1. **Financial (sometimes called 'business" or statutory") durable power of attorney** that authorizes Medicaid transfer planning. [Quite often a Power of Attorney will have "gifting" language but limits the gifting powers to the "annual gift tax exclusion amount' (which is $16,000.00 per person, per year at present.) This type of language can create a major problem!!! Most lawyers are not familiar with Medicaid and the need for the RIGHT type of financial durable power of attorney.]

2. **Medical power of attorney**. To make medical treatment decisions (including life support decisions).

3. **Will**. Where one spouse is on Medicaid (or may be a candidate for long term care in the future) it is highly desirable to have the "well spouse" have a Will in place which establishes a "spousal care protection trust" for the spouse in poor health in order to preserve Medicaid eligibility for that spouse and thereby protects assets.

4. **Directive to Physicians**. Also called a "living will", this document allows you to give specific directions about life support if you

become terminally ill.

5. **HIPAA Release.** The Health Insurance Portability and Accountability Act is a federal law which requires medical professionals to not communicate to anyone about your physical or mental health unless you have executed a written HIPAA Release. (Thus your spouse or other family member would not likely be able to communicate with your physicians for example, without you having sign this release).

The Single Most Important Thing to Remember!!

Based on our experience in working with literally hundreds of folks in protecting assets in a Medicaid context, the single most important thing to remember is this:

It is our experience that in 9 out of 10 cases, significant things can legally be done to protect significant assets.

(It is important to keep in mind that most people you will talk to know nothing about Medicaid and all of the options that are available –or they know just enough to be dangerous!! Do not listen to anyone who is not experienced in this very complex area of law.)

Legal Assistance

Aging persons and their family members face many unique legal issues. As you can tell from our discussion of the Medicaid program, the legal, financial, and care planning issues facing the prospective nursing home resident and family can be particularly complex. If you or a family member needs nursing home care, it is clear that you need legal help. Where can you turn for that help? It is difficult for the consumer to be able to identify lawyers who have the training and experience required to provide guidance during this most difficult time.

Generally, nursing home planning and Medicaid planning is an aspect

of the services provided by Elder Law attorneys. Consumers must be cautious in choosing a lawyer and carefully investigate the lawyer's credentials.

How do you find a law office that has the knowledge and experience you need? You may want to start with recommendations from friends who have received professional help with nursing home issues. Who did they use? Were they satisfied with the services they received? Hospital social workers, hospital discharge planners, Alzheimer's Parkinson's and other support groups, accountants, financial planners, and other financial professionals can also be good sources of recommendations.
In general, a lawyer who devotes a substantial part of his or her practice to nursing home planning should have more knowledge and experience to address the issues properly. Don't hesitate to ask the lawyer what percentage of his or her practice involves nursing home planning. Or you may want to ask how many new nursing home planning cases the law office handles each month. There is no correct answer. But there is a good chance that a law office that assists with two nursing home placements a week is likely to be more up-to-date and knowledgeable than an office that helps with two placements a year. Ask whether the lawyer is a member of any Elder Law planning organizations such as NAELA Is the lawyer involved with committees or local or state bar organizations that have to do with nursing home planning? Does the lawyer lecture on nursing home planning? If the lawyer lectures to the public, you might try to attend one of the seminars. This should help you decide if this is the lawyer for you. The leading national organization of Elder Law attorneys is the National Academy of Elder Law Attorneys (NAELA), 1577 Spring Hill Road Suite 220, Vienna, VA. 22182.
While mere membership in the Academy is open to any lawyer and is no sure sign that the attorney is an experienced Elder Law practitioner, membership does at least show that the lawyer has some interest in the field. In addition, the Academy runs three-day educational sessions twice each year to help lawyers stay current on the latest aspects of elder law and nursing home planning. Attending these sessions takes time and commitment on the part of the lawyer and is a good sign that the lawyer is attempting to stay up to date on nursing home issues. You may want

to look for an attorney who is a member of NAELA and has recently attended one or more of its educational sessions.

In the end, follow your instincts and choose an attorney who knows this area of the law, who is committed to helping others, and who will listen to you and the unique wants and needs of you and your family.

This booklet was published and distributed by C. Dan Campbell, P.C. as a public service. It is not intended to advise anyone on a specific problem because different facts may change the application of the law in a particular matter. Before taking any action involving asset protection planning you should consult with an attorney who is experienced and trained in this highly specialized area of law. If you would like additional copies of this booklet, at no charge, please contact:

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