Medicaid Planning for Married Couples

Solutions to Paying for Nursing Home Care

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MEDICAID PLANNING FOR MARRIED COUPLES: SOLUTIONS TO PAYING FOR NURSING HOME CARE

The decision to move a spouse or a parent into a nursing home is never easy. In fact, it is a choice that many families dread having to make.

Every family reaches this point under different circumstances. Maybe Dad has Alzheimer's...perhaps Mom had a stroke...or maybe your husband or wife simply can't care for himself or herself any longer.

While every family's circumstances are unique, almost all families share one thing in common: everyone involved in making this difficult decision is under a great deal of stress. There's the physical and emotional exhaustion, the worry, and almost always there is financial pressure.

While thinking about nursing home care—and the bills that accompany it—can seem overwhelming, it is important to remember that you have options. With help and advice from an experienced elder law attorney, you can make wise choices for your loved one and for your family.

The purpose of this guide is to give you some good, basic information about paying for nursing home care. In particular, it focuses on Medicaid planning and answers some of the questions you may have about this often misunderstood program. It explains the basic Medicaid rules, dispels a few myths you might have heard, and gives you a brief introduction to Medicaid planning for married couples. Our clients tell us that they have found this guide to be a valuable resource, and we hope that it will be useful to you as well.

Making the transition from living at home to living in a nursing home is never easy. In fact, it is one of the most difficult decisions any of us will ever face.

For the person going into the nursing home, the move means leaving home...the place he or she lived for many years. A place of comfort and familiarity that holds a lifetime of memories. The move also means giving up all the independence and privacy he or she enjoyed at home, and going to an unfamiliar place which, while it may be pleasant, has new sights, sounds, smells, and routines.

For spouse and family, the weeks and months leading up to the move can be a time of turmoil. The choice to move a loved one into a nursing home can be incredibly difficult. Then there is the task of finding the right nursing home. Once these tough decisions are made, the family often breathes a quick sigh of relief, only to be faced with another sobering task: figuring out how to pay the monthly nursing home bill.

HOW WILL YOU PAY FOR NURSING HOME CARE?

Many people worry that they will go broke paying for nursing home care, and with good reason: the nationwide average cost of a private nursing home room is more than $8,365 per month.[1] There are four basic options for paying for nursing home care:

1. *Long-Term Care Insurance*: Long-term care insurance is gaining popularity as a means of paying for nursing home care. And if you have a long-term care policy, it may cover a great deal of your nursing home care. The problem is, in order to qualify for long-term care coverage, you have to be healthy. And even if you plan far in advance and purchase a policy while you are relatively young, premiums can be expensive. This may be why there are still relatively few people who have long-term care insurance.
2. *Self-Pay:* This is the way many people fund their nursing home care, at least at first. They pay out-of-pocket until their savings are depleted, then they apply for Medicaid.
3. *Medicare*: Many people assume that Medicare will pay for nursing home care. The truth is, Medicare provides very limited coverage for skilled nursing care. It is available only if you meet certain very strict requirements, and it only covers costs for a short period of time.
4. *Medicaid:* With the cost of nursing home care too high for most people to fund on their own, Medicaid has become the default long-term care insurance plan for the middle class. The Medicaid program provides healthcare coverage for certain groups of people (including those over age 65) who have restricted incomes and resources. The federal government provides partial funding for the program and it sets the overall Medicaid guidelines. Each state interprets and applies the guidelines for its own residents, meaning that the exact criteria you must meet to qualify for Medicaid can vary from one state to the next.

DON'T COUNT ON MEDICARE TO COVER YOUR NURSING HOME EXPENSES

Medicare is federally-funded health insurance designed for people 65 and older. It is also available for younger people who have certain disabilities.

The program does provide some long-term care benefits, but these benefits are limited. The exact benefits available depend on which specific Medicare plan you are enrolled in. However, in general, Medicare may cover up to 100 days of care in a skilled nursing facility for each "spell of illness" you experience.

This is not much comfort for a dementia patient facing the need for many months or years in a nursing home.

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[1] https://www.genworth.com/aging-and-you/finances/cost-of-care.html (2018)

MEDICAID

What is It?

Medicaid is another government program designed to assist with healthcare costs. The federal government helps to fund the program, and it establishes the program's guidelines. Each state receives varying amounts of matching funds and grants from the federal government, and each state is allowed by federal law to interpret and enforce the Medicaid eligibility guidelines.

With each state empowered to enforce Medicaid guidelines according to its own interpretation, the actual rules for qualifying for Medicaid can vary significantly from state to state.

Who Needs It?

The goal of the Medicaid program is to provide health care coverage for people with limited income and assets. The program is aimed at providing coverage to low-income senior citizens, children, and people with disabilities.

Because Medicaid offers more comprehensive long-term care coverage than the Medicare program, and because long-term care costs are so high, many middle class seniors rely on Medicaid to pay for their care.

A common misconception about Medicaid is that you have to impoverish yourself and your family completely before you can qualify for nursing home coverage. This is simply not true. Medicaid guidelines allow you to keep certain assets and they allow your spouse who does not need nursing home care to retain at least a portion of his or her income. Also built into the Medicaid guidelines are "safe harbor" provisions that allow you to plan ahead so that you can protect at least a portion of your assets and still qualify for long-term care coverage through Medicaid.

HOW DO THE MEDICAID RULES WORK?

Medicaid has a reputation for being complicated and difficult to qualify for. There are a few reasons for this. First, because each state decides how it will apply and enforce federal Medicaid eligibility guidelines, the details of eligibility vary from state to state. Second, Medicaid guidelines tend to change frequently. Third, each person's circumstances are different. The way the Medicaid guidelines applied to your co-worker's situation or your sister-in-law's situation may not be true for your situation. This is why estate planning and elder law attorneys do not recommend a do-it-yourself approach to Medicaid planning.

The best way to use this guide is to get an overall picture of how the Medicaid program works, and then talk to an estate planning and elder law attorney who has experience with Medicaid

planning. He or she can let you know how **[Member: please insert the name of your state]** rules apply to you, and can help you design a plan that will allow you to retain as many of your assets as possible while applying for long-term care coverage.

The Two Types of Assets

When you apply for Medicaid, you must pass a strict test, called a *means test*, on the amount of assets you are permitted to keep. The first step in understanding how the means test works is to understand that the Medicaid rules do not view all property as equal.

For Medicaid purposes, your assets are divided into two categories: *countable* and *exempt.*

Exempt assets include:

- Your home, up to certain equity limits
- Personal belongings such as clothing and jewelry, as well as furniture and other household items
- One motor vehicle, as long as it is used as transportation for you or a member of your household for medical care
- A designated funeral fund for you with a value of up to $1,500 or a prepaid funeral plan of a reasonable amount, typically up to **$10,000**[2]
- A life insurance policy with a face value of $1,500 or less
- Certain assets that are considered "inaccessible"
- If you are married and your spouse's total income does not reach the statutory minimum, certain other assets may be deemed exempt in order to raise your spouse's total income up to the minimum.

These assets are not counted toward your eligibility limits; they are ignored for purposes of the means test.

Your *countable assets*, on the other hand, are valued and totaled. Countable assets generally include:

- Cash
- Checking and savings accounts
- Stocks and bonds
- Mutual funds
- Certain trusts

[2] Member: This is the typical amount. Please insert your state-specific information

- Certain real estate
- Certificates of deposit
- Motor vehicles (other than your primary car or truck) and boats
- Most other assets

The total value of countable assets you are allowed to have varies from state to state, and it changes each year based on inflation and other factors.

Currently, to qualify for Medicaid in some states, a nursing home resident is permitted to have no more than **[$2,000]**[3] in countable assets. If a nursing home resident is married, his or her spouse who does not live in a nursing home (called a "community spouse" under Medicaid guidelines) can typically keep half of the couple's joint countable assets up to a maximum of **[$126,420].**[4]

THE LOOK-BACK PERIOD

To keep Medicaid applicants from giving away assets in order to qualify for benefits, the federal government has enacted what is known as a *look-back period.* When you apply for Medicaid, your financial records for the previous five years will be examined, and asset transfers that violate the rules will trigger a penalty. The penalty is a delay in Medicaid benefits for a certain period of time. The period, calculated in months, is determined by dividing the value of the transfer by your state's average monthly cost of nursing home care.

For example:

Jack gives $70,000 to his daughter, Margie. Two years later, Jack has a severe heart attack and needs to enter a nursing home. When he applies for Medicaid, the $70,000 transfer is divided by $10,000 (the average cost of nursing home care in his state).

$70,000 divided by $10,000 equals seven, so Jack's benefits will be delayed by seven months; he will have to pay his nursing home bills out-of-pocket for this length of time.

There are certain exceptions to the look-back rule. For example, you can make penalty-free transfers to:

- Your spouse
- Your child who is blind or disabled (or a trust for the benefit of your blind or disabled child)

[3] Member: This number is the current default DRA figure. If the figure for your state differs, please insert it.
[4] Member: This number is the current default DRA figure. If the figure for your state differs, please insert it.

- A trust that is solely for the benefit of a disabled person under age 65

Can't You Give Away $15,000 Per Year?
A common myth about Medicaid eligibility is that people can give away up to $15,000 per year in order to qualify for coverage.

This myth stems from confusion between tax law and Medicaid law. Under federal gift tax law, you are permitted to give away up to $15,000 annually, per recipient, to an unlimited number of recipients without the need to file a gift tax return.

While gifting certain assets can be part of Medicaid pre-planning, gift tax rules do not apply to the Medicaid program. In other words, Medicaid applicants do not enjoy an absolute, penalty-free right to give away any amount of property, no matter how small.

DIVISION OF ASSETS: MEDICAID RULES FOR MARRIED COUPLES

What happens if your spouse needs a nursing home but you are healthy? Does Medicaid require you to live in poverty while your spouse is in the nursing home?

Medicaid law has special provisions for married couples, commonly called *Division of Assets.* These provisions were first enacted as part of the Medicare Catastrophic Act of 1988.

The intent of the division of assets provisions is to provide a common-sense approach to Medicaid eligibility when one spouse needs nursing home care and the other spouse is healthy enough to continue living at home. Medicaid calls this "remaining in the community" and designates the at-home spouse the *community spouse.*

It does not make much sense for both spouses to be impoverished when only one spouse needs Medicaid benefits for nursing home care. Therefore, the Division of Assets provisions attempt to strike a balance.

The provisions are structured so that the spouse who needs nursing home care must qualify for benefits, while the community spouse may keep enough income and assets to continue a comfortable life outside the nursing home.

Here is how Division of Assets works:

1. The Division of Assets process is essentially a review of a couple's countable assets. Therefore, the couple gathers together all of their countable assets, including bank statements and other relevant financial documents so that the values of the couple's countable assets can be ascertained.

- *The exempt assets discussed above are not taken into account during this review.*

2. The couple's countable assets are valued, totaled, and divided in half.
3. The community spouse is allowed to keep half of the countable assets, up to a maximum of **[$126,420].**[5] This is called the Community Spouse Resource Allowance, or CSRA.
4. The nursing home spouse is allowed to keep up to **$2,000**[6] of the other half of the couple's countable assets. Any excess must be "spent down" before he or she can qualify for Medicaid assistance for nursing home care.

INCOME[7]

Medicaid applies income limits to nursing home residents and their spouses. Currently, you as a nursing home resident, in most states, are permitted to keep up to **$60** per month[8] in income. If your income exceeds the maximum, the excess is paid to the nursing home as a contribution toward the cost of your care.

The community spouse is not required to pay any income toward the nursing home spouse's care. This means that, as a rule, the community spouse keeps his or her income each month. But what if the nursing home spouse was the primary breadwinner and the community spouse is left with a low income?

Each state establishes an income floor – called the Minimum Monthly Maintenance Needs Allowance – for the community spouse. The minimum ranges from $2,057 to $3,160.

If the community spouse's income is below the Minimum Monthly Maintenance Needs Allowance, he or she may keep enough of the nursing home spouse's income to bring him or her up to the established minimum. After the community spouse's income meets the minimum, the rest of the nursing home spouse's income is paid to the nursing home.

The purpose of the Minimum Monthly Maintenance Needs Allowance is to prevent the need for the community spouse to make ends meet by dipping into savings, leading to gradual impoverishment.

For example:

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[5] Member: This number is the current default DRA figure. If the figure for your state differs, please insert it.
[6] Member: This number is the current default DRA figure. If the figure for your state differs, please insert it.
[7] Member: If your state is an income cap state, modify this section to discuss your state's rules, *Miller* Trust, etc.
[8] Member: This number varies by state. Please insert the figure in your state.

John and Anna are a married couple. John receives $2,500 in pension payments each month, and another $1,500 in social security benefits. Anna receives $1,000 in social security benefits. When John needs to enter a nursing home, he applies for Medicaid benefits. It is determined that Anna's Minimum Monthly Maintenance Needs Allowance is $1,900. This is what happens to John's income each month:

$ 4,000.00	Total Income
- 60.00	To John
- 900.00	To Mary (to raise her income to $1,900)
$ 3,040.00	Paid to Nursing Home

MEDICAID PLANNING

What happens if the time comes for nursing home care, and you don't meet the Medicaid income and asset tests? For too many people, the answer is to enter the nursing home and pay for care out of pocket each month until they have spent enough assets that they qualify for coverage.

With monthly nursing home bills averaging just over $8,365[9] nationwide, many residents go through their life savings in a matter of months, rather than years. There are a couple of problems with this approach.

First, spending your assets in this manner leaves your loved ones with no financial cushion. Wouldn't it be a shame to let a lifetime of hard work and disciplined savings go to waste, leaving your family without a safety net in the event they are faced with their own crisis in the future?

Second, there is often no need to spend all, or even most, of your assets on nursing home care before you can qualify for Medicaid coverage. The Medicaid guidelines have provisions that allow you to plan ahead and protect your assets.

However, because the rules are complicated, many people who do not seek expert help end up making one of two mistakes: they either spend more than they should, or they run afoul of the rules and subject themselves to harsh penalties.

An experienced estate planning and elder law attorney can assess your family's financial situation, listen to your goals, and let you know how the Medicaid guidelines apply to your circumstances. Then, he or she can recommend strategies for working within the guidelines to best meet your family's needs.

[9] https://www.genworth.com/aging-and-you/finances/cost-of-care.html (2018)

Consider the following case studies:

CASE STUDY: TRUST FOR CHILD WITH DISABILITIES

Marian and Ron have been married for more than 40 years. During much of their marriage, their focus has been on providing the best possible life for their daughter, Kelly. Kelly is 30 years old, and she has cerebral palsy. Because of her condition, she lives with her mom and dad and she receives Supplemental Security Income (SSI).

Several years ago, Marian had a series of small strokes. Since then, Ron has cared for her at home. Recently, however, she had a bad fall. This caused her condition to worsen to the point that she needs nursing home care.

Ron has found a nice facility near their home with an excellent reputation, but it will cost more than $7,000 per month. Although the couple has always saved diligently, Ron worries that their savings will be used up on nursing home bills, and he'll have nothing left for Kelly's care.

When Ron checks into assistance for Marian, he learns that there is a Medicaid bed available in the nursing home, but that Marian has too many assets to qualify for benefits. According to the social worker at the facility, Marian is over the Medicaid asset limit by $86,000. Ron is discouraged, because he thinks he must spend the $86,000 on Marian's nursing home bills before she will be eligible for Medicaid assistance.

Ron could benefit from a consultation with an estate planning and elder law attorney. If he took this step, he would learn that there is a way for Marian to become Medicaid eligible *and* save the $86,000 for Kelly rather than pay it to Marian's nursing home. The solution is a Special Needs Trust.

As soon as Ron establishes a Special Needs Trust for Kelly and transfers the $86,000 into it, Marian will become eligible for Medicaid benefits. Provided the trust is established and administered according to strict government guidelines, the money will be preserved for Kelly's care even after Ron and Marian are gone.

Ron and Marian found themselves in an emergency situation with little time to make arrangements. But what about those who have time to plan ahead?

CASE STUDY: INCOME ONLY TRUST

Grace and Allen have been married for many years. They have two children, Anna and Mark, both in their thirties.

Grace and Allen are concerned about the history of Alzheimer's disease in Allen's family. Allen has not yet experienced any Alzheimer's symptoms. However, just to be safe, they make an appointment with their estate planning and elder law attorney.

She talks to the couple about their financial situation and discovers that if Allen were to need nursing home care, they would be roughly $250,000 over the limit to qualify for Medicaid assistance.

Gifting

She explains the Medicaid rules, including the five-year look-back period and the penalty provisions. She tells them that sometimes couples in their situation who don't seek advice from an experienced attorney, choose to give their excess money to one of their children, with the understanding that the child will use the money to support the parents. This is done in hopes that both spouses remain healthy until after the five-year look-back period expires, so that the couple can avoid paying a penalty. However, the approach has a few drawbacks:

- *Loss of Control:* As soon as the transfer is made, the money belongs to the child and not to the parents. The child has no obligation to spend the money on the parents; worst case scenario, Anna or Mark could spend the money on cars or vacations and leave their parents without a nest egg. What is far more likely, though, is for Anna or Mark's creditors to gain access to the money. A job loss, a lawsuit, and under some circumstances a divorce, could leave a child's finances – including money gifted by a parent – vulnerable.
- *The Medicaid Penalty:* What if Allen becomes ill and needs a nursing home before the five-year look-back period expires? Having made a $250,000 direct transfer during the look-back period, he will be assessed a penalty on this entire amount. In Grace and Allen's state, the average monthly private pay rate for a nursing home is $10,000. $250,000 divided by $10,000 is 25 months; therefore, Grace and Allen will have to pay his nursing home bills out-of-pocket for just over two years before Allen's Medicaid benefits will begin.
- *Taxes:* Transferring this sum of money directly to one of their children can cause tax consequences Grace and Allen might not want. For instance, the IRS will view the transfer as a gift and will require Grace and Allen to file a gift tax return. Depending on their gifting history, the couple could also be required to pay tax on the gift.

Benefits of an Income-Only Trust

Then, Grace and Allen's estate planning and elder law attorney lets them know about a planning strategy that might work for them. It is called an income-only trust. Grace and Allen would establish an *Irrevocable Trust* – one they can't terminate or directly control – and transfer the $250,000 into the trust. The purpose of the trust is to transform the $250,000 from a countable asset into an exempt asset for Medicaid purposes. To accomplish this, they would have to follow a number of strict rules.

For example, Grace and Allen could have access to the trust income, but not the trust principal. Since they are concerned about Allen's health, they would structure the trust so that Grace

received the trust income. As the community spouse, she would not be obligated to pay this income to the nursing home.

Neither Grace nor Allen could serve as trustee of the trust; however, they could designate one of their children to act in this capacity. They could also retain the power to appoint a replacement trustee.

The couple could name one (or both) of their children as beneficiaries of the trust, and they could reserve the power to add or replace beneficiaries. Under this arrangement, the funds in the trust would be protected from their children's creditors, lawsuits, and divorcing spouses.

In addition, their attorney explained that, should Allen need nursing home care within five years, the transfer would fall within the look-back period and it would trigger a penalty. However, because of the way trusts are valued under Medicaid calculations, the entire $250,000 would not be counted. The result would be a much shorter penalty period.

Grace and Allen asked about taxes, and their attorney told them that the IRS does not consider the transfer to the trust a gift; therefore, there would be no need to file a gift tax return or pay gift taxes. She also explained that the arrangement carried with it certain income tax advantages for the family – the money would continue to be taxed at the couple's lower income tax rate and any appreciable assets (like real estate or stocks) transferred into the trust rather than gifted directly to their children could ultimately result in lower capital gains taxes for the kids.

ESTATE RECOVERY

One of the most common concerns of people who apply for Medicaid benefits is whether they'll lose their home. After all, your home is likely your most valuable asset. In many families, it is the one asset that parents dream of passing on to their children.

During your lifetime, you do not need to worry about losing your home to qualify for Medicaid. Your home, up to certain equity limits, is an exempt asset under Medicaid regulations. Therefore, it does not even enter the calculations when Medicaid eligibility is being determined.

However, after your death, the rules change. Federal Medicaid regulations require the state Medicaid agency to attempt to recover whatever benefits it paid for your care. This recovery is made from your estate. Often, a Medicaid recipient's only recoverable asset is his or her home.
It is important to note that the state cannot try to recover any benefits if you leave behind any of the following:

- a living spouse
- a blind or disabled child

- a child under the age of 21

However, after your spouse dies, and assuming you do not leave behind a blind or disabled child or a child under the age of 21, the state Medicaid agency begins its recovery efforts.

Your estate planning and elder law attorney can let you know what options are available for protecting your home and other assets from Medicaid estate recovery. For example, a home that has been transferred into a properly established income-only trust is safe from estate recovery. Instead of going to the state Medicaid agency when you die, it goes to those you have designated as beneficiaries of the trust.

GETTING HELP

Entering a nursing home brings with it countless decisions. Some of them, like figuring out how to pay for nursing home care, can be complex – even confusing. If you, your spouse, or a loved one is facing the need for nursing home care, you need expert legal guidance.

The problem is, sometimes choosing the right lawyer can be its own tough decision. Open your phone book or do a quick online search, and you'll see that there are countless attorneys competing for your business. How do you know which ones have the training and experience required to give you and your family the help you need during this difficult time in your lives? There are a few steps you can take to narrow your search:

First, know what kind of lawyer you are looking for. Generally speaking, Medicaid planning and nursing home planning are provided by estate planning and elder law attorneys. These attorneys help their clients in a wide range of ways, from assisting with estate planning needs to counseling clients on tax concerns and social security issues, to addressing the many issues that surround nursing homes and other types of long-term care.

Second, make sure you work with a knowledgeable and experienced estate planning and elder law attorney. Start your search by asking family, friends, and colleagues if they have worked with an attorney they'd recommend. You might also check with your doctor, your financial advisor, or local hospital social workers or Alzheimer's support groups. All of these professionals work closely with estate planning and elder law attorneys and can serve as reliable sources of recommendations.

Before you commit to working with an attorney, sit down and talk to him or her. Find out what percentage of the attorney's practice is devoted to Medicaid planning; the more time an attorney spends on a particular type of matter, the more experience he or she is likely to have.
Also find out whether the attorney is a member of any elder law planning organizations. What are the requirements for membership? Some organizations require their members to take continuing education classes that go above and beyond state licensing requirements – and they

require that those classes be focused on estate planning and elder law topics. This benefits you because it helps to ensure that the attorney stays up-to-date on the latest legal developments, as well as the latest planning strategies.

What about writing endeavors and speaking engagements? Has the attorney published any articles or books on the subject of elder law or given any speeches or presentations on the topic? While not a guarantee of expertise, these are signs that an attorney has a deep interest in the subject and may be an authority.

While you are interviewing the attorney, don’t simply pay attention to what he or she tells you. Pay attention to how you feel as you talk to the attorney and as you interact with the receptionist and the other staff members in the office. Remember, you’ll be working closely with these people, and you’ll be talking about some very personal matters. You want to choose an attorney – and a law firm – with whom you feel comfortable.

Whether you are just beginning to think about nursing home care, or whether your loved one has already entered a nursing home, it pays to have a talk with an experienced estate planning and elder law attorney. He or she can help you sort through the rules and regulations and apply them to your family’s situation, often revealing solutions you did not realize were available.