

PACE UNIVERSITY
SCHOOL OF LAW

ELDER LAW: NOT FOR
DUMMIES

A Practical Interactive Experience

APRIL 2013

THE FLINTSTONES: A HYPOTHETICAL FACT PATTERN



THE FLINTSTONE QUESTIONNAIRE



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THE FLINTSTONES: A HYPOTHETICAL FACT PATTERN?

- REAL CASE – Names changed to protect the innocent...and attorney client privilege.
- What are the FIRST DECISIONS to be made...and who makes them?

1. Who is/are the client(s)?
2. What type of Medicaid services will be sought?
 - Home Care – Services delivered in the home; or
 - Institutional – Nursing Home (Rock Pile NH)
3. Why does it make a difference?
4. Is there any type of “pre-Medicaid” coverage available (except private pay/LTC insurance)?

TYPES OF MEDICARE COVERAGE

- PART A: HOSPITALIZATION -- No "premium," but deductible & co-pay after 60 days
- PART B: DOCTORS -- \$104.90 per mo. plus surcharge is income over \$85K
- PART C - MEDICARE ADVANTAGE (HMO) - Cost varies
- PART D - DRUG COVERAGE - Cost Varies
- "REHABILITATIVE" COVERAGE

MEDICARE “REHABILITATIVE” COVERAGE

- IS NOT LONG TERM
- STRICT QUALIFICATIONS/LIMITATIONS
 - 3 Day Hospital Stay Within 30 Days of Nursing Home Admission
 - Maximum Coverage – 100 Days per “Spell of Illness” (begins when hospitalized; ends 60 days after discharge).

MEDICARE “REHABILITATIVE” COVERAGE (cont.)

- First 20 Days Covered in Full
- Days 21 - 100: Co-Pay - \$148 per day (2013)
- Coverage Only Applies While “Skilled Care” Required
- “Improvement Standard” – Recent policy change: Skilled nursing and therapy services necessary to maintain a person's condition can be covered by Medicare (*Jimmo v. Sebili* No. 11-cv-17 (D.VT)(2013))

MEDICAID ELIGIBILITY

SCOPE OF COVERAGE

INCOME & RESOURCE
LIMITATIONS AND ALLOWANCES

ASSET TRANSFERS

□ LOOK BACK □ & PENALTY PERIODS

by

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Sources of Law

42 U.S.C. Section 1396 et seq.

42 CFR §430 et seq.

New York Social Services Law §363 et seq.

Title 18 of the New York Code of Rules and Regulations [18 NYCRR §§360.1 et seq.].

Administrative Documents*

Administrative Directives (ADMs)

General Information System (GIS) Messages

Informational Letters (INF's)

Medicaid Reference Guide (MRG)

*All can be found at the New York State Department of Health website:

http://www.health.state.ny.us/health_care/medicaid

Types of Services

- ▣ **Community Medicaid** – doctors, pharmaceuticals, medical supplies, dentists, etc. delivered in the community
- ▣ **Home Care Services** – delivered either through the community Medicaid program or through various waiver programs or managed long term care
- ▣ **Institutional Services** – nursing home and hospital care.

Eligibility

- ▣ United States Citizen , Permanent Resident or individual here legally under color of law (PRUCOL) see 04 ADM 7 for extensive discussion of PRUCOL.
- ▣ **Residency** in New York State and county
 - For nursing home residents county prior to admission
- ▣ Physical presence plus intent to remain=residency.
- ▣ Presence alone may be sufficient. **Matter of Shah, 95 NY2d 148 (2000)**

Categorical Eligibility

- ▣ **Minor** (under age of 21)
- ▣ **Aged** (over age 65)
- ▣ If between ages 21 and 65:
 - **Blind** – certified by NYS Commission for Blind/VI
 - **Disabled** – physical or mental incapacity which prevents gainful employment and is expected to last at least one year. Certified by Social Security Adm. or NYS Department of Labor.
 - **Receiving public assistance or SSI**

Financial Eligibility

- ▣ **Means tested** – must be poor
- ▣ **Resource and Income thresholds** for singles, married couples with additional allowances for minor and disabled family members.

MARRIAGE: CURSE...?



- SPOUSES ARE CONSIDERED “LEGALLY RESPONSIBLE RELATIVES” WITH OBLIGATION OF SUPPORT
 - Since 2008, this includes same sex couples married in states recognizing them.
(GIS O8 MA/023)
- UNLESS OTHERWISE EXEMPT, ALL RESOURCES & INCOME OF EACH SPOUSE ARE “DEEMED” AVAILABLE TO THE OTHER

OPTION: SPOUSAL REFUSAL

- What is it?
 - Document that requires Medicaid to determine eligibility of applying spouse (“MA”) without regard to excess resources or income of the CS.
 - States that non-applying spouse refuses to make their resources and/or income available for the cost of necessary medical care and services for their spouse.
 - Can be used with applications for both **institutional** and **community** Medicaid benefits.



Spousal Refusal Not a “Free Ride”

- Coupled with requirement that M/A execute assignment of right of support by spouse.



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- Gives Medicaid (DSS) right to bring lawsuit against refusing spouse for benefits paid
- Although Medicaid can't “count” resources/income of refusing spouse in determining eligibility of M/A, failure of spouse to **disclose all** resources/income can result in denial of the application.

Advantages of Spousal Refusal

- Allows for eligibility of M/A
- Any recovery against refusing spouse is for benefits paid at Medicaid rate
- Recovery against refusing spouse excess income is generally at 25%
- Allows for post-eligibility planning for refusing spouse

2013 MEDICAID RESOURCE LIMITS

- ▣ \$14,440 for an INDIVIDUAL
- ▣ \$21,150 for a MARRIED COUPLE (both applying for COMMUNITY Medicaid)
- ▣ EXCESS COUNTABLE RESOURCES DISQUALIFY THE INDIVIDUAL FOR MEDICAID UNLESS THEY ARE OFFSET BY OUTSTANDING MEDICAL EXPENSES

MARRIAGE: ...OR BLESSING?

PROTECTION FOR THE COMMUNITY SPOUSE - CSRA



- ▣ COMMUNITY SPOUSE RESOURCE ALLOWANCE (CSRA)(2013)
 - MINIMUM OF \$74,820
 - MAXIMUM OF \$115,920

- ▣ How calculated?
 - 1/2 of couple's aggregate non-exempt resources (subject to \$74,820 minimum \$115,920 maximum)

Example #1: If countable resources are \$149,640 or less, CSRA is \$74,820
($\$149,640 \div 2 = \$74,820$)

Example #2: If countable resources are \$231,840 or above, CSRA is \$115,920
($\$231,840 \div 2 = \$115,920$)

Example #3: If countable resources are between \$149,640 and \$231,840, the actual CSRA formula must be applied.

If countable resources are \$180,000, then the CSRA is \$90,000 ($\$180,000 \div 2 = \$90,000$)

HOMESTEAD TREATMENT



- ▣ PRIMARY RESIDENCE IS EXEMPT
IF EQUITY VALUE IS LESS THAN \$802,000
(2013)
- ▣ BUT, MEDICAID CAN PLACE A LIEN ON
THE HOME IF OWNER IS IN A SKILLED
NURSING FACILITY AND HOME IS NOT
OCCUPIED BY A SPOUSE, MINOR OR
DISABLED CHILD

Other Exempt Resources

- ▣ **Burial Allowance** – up to \$1,500 in face value of life insurance or separate account designated for funeral
- ▣ **Irrevocable Pre-Paid funeral contract** of any amount

May be established for applicant and immediate family members.

- ▣ **Burial space items** – grave, crypt, mausoleum
- ▣ **Personal property** – unlimited amount
- ▣ **One automobile** regardless of value
- ▣ **Unavailable assets**



MEDICAID TREATMENT OF RETIREMENT ACCOUNTS



- ▣ ACCOUNT IN “*PERIODIC PAYMENT STATUS*” (a/k/a “payout status”) IS AN EXEMPT RESOURCE – IRA’s, 401(k)’s, 403(b)’s

- ▣ COUNTIES DIFFER:
 - SOME ACCEPT RMD AMOUNT (WESTCHESTER AND NYC)
 - OTHERS REQUIRE USE OF DSS LIFE EXPECTANCY TABLES. (NASSAU AND SUFFOLK)

ANNUITIES CAN WREAK HAVOC ON MEDICAID PLANNING

- ▣ NON-QUALIFIED ANNUITIES WILL BE TREATED AS FULLY AVAILABLE, UNLESS THEY ARE:
- ▣ IRREVOCABLE
- ▣ NON-ASSIGNABLE
- ▣ PAY OUT IN EQUAL INSTALLMENTS OVER THE ACTUARIAL LIFE EXPECTANCY OF THE ANNUITANT (USING DSS TABLES)
- ▣ NAME DSS AS REMAINDER BENEFICIARY TO FULL EXTENT OF MEDICAID PROVIDED (UNLESS THERE IS A SPOUSE)

SURPRISE: JOINT ACCOUNTS MAY BE FULLY AVAILABLE

- ▣ JOINT BANK ACCOUNTS ARE FULLY AVAILABLE TO THE MEDICAID APPLICANT UNLESS JOINT OWNER CAN PROVE CONTRIBUTION
- ▣ JOINT FINANCIAL INSTITUTION ACCOUNTS ARE AVAILABLE TO OWNERS PER-CAPITA



2013 MEDICAID INCOME LIMITS

COMMUNITY BUDGETING:

- \$800 for an INDIVIDUAL
- \$1,175 for a MARRIED COUPLE

INSTITUTIONAL/SKILLED NURSING FACILITY BUDGETING:

- Net Available Monthly Income (“NAMI”) (e.g. Soc. Sec., Pension and “RMD”) less \$50.00 per month “personal allowance.”

Income in excess of these thresholds must be “spent down” on Medical care.

MARRIAGE: ...OR BLESSING ?



PROTECTION FOR THE COMMUNITY SPOUSE - MMMNA

- ▣ MINIMUM MONTHLY MAINTENANCE INCOME NEEDS ALLOWANCE (“MMMNA”): \$2,898 (2013)
- ▣ Spouse can request **fair hearing** or bring action in **family court** to obtain enhanced CSRA or MMMNA.
- ▣ Standard for enhanced allowance: “exceptional circumstances which result in significant financial distress.” **Gombrecht** Court of Appeals (1995)

BUDGETING OF INCOME

- ▣ **Unearned Income** is fully counted. (i.e. retirement income, Veteran's benefits, disability payments, unemployment compensation, support payments, gifts, interest, dividends)
- ▣ **Earned income**--\$65 disregard and $\frac{1}{2}$ of the rest is counted
- ▣ \$20 per month unearned or earned income **disregard**
- ▣ **In-kind maintenance and support is not counted as income.**

INCOME DISREGARDS

- ▣ German and Austrian Reparations
- ▣ Nazi Persecution funds
- ▣ Agent Orange Settlement Funds
- ▣ State Crime Victim Assistance Funds
- ▣ Native American assistance payments
- ▣ ***Reverse Mortgage proceeds spent in the month received***

- ▣ Exempt payments should be segregated from other funds to retain their exempt status

Deductions from Income

- ▣ **Medical Expenses:**
 - Medicare premiums (B, C and/or D)
 - Health insurance premiums (“Medigap”)
 - Expenses of Maintaining Rental Property
 - Expenses incurred in a trade or business

TRANSFER OF ASSET PENALTY



- ▣ Applies only to Medicaid applications for institutional care
- ▣ Applies to gifts made within “look back period” of 60 months prior to application
- ▣ Penalty only begins to run when individual is BOTH
 - Institutionalized
 - Assets are below resource threshold

EXEMPT TRANSFERS TO SPOUSE

- ▣ Transfers directly to a spouse, or to a trust for the sole benefit of a spouse, are exempt BUT REMEMBER:
 - Transfers to a spouse resulting in non-exempt resources or income in excess of the CSRA or MMMNA – and therefore requiring use of a “spousal refusal” -- gives Medicaid (DSS) the right to bring a lawsuit against the refusing spouse for benefits paid.

OTHER EXEMPT TRANSFERS

- ▣ Certain transfers of the “Homestead”
- ▣ Transfers to or for the sole benefit of **A BLIND OR DISABLED CHILD** (but this may effect public benefits eligibility of disabled child)
- ▣ Transfers to a Supplemental Needs Trust (“SNT”) for **any individual under age 65 who is disabled.**

APPLYING WHAT YOU'VE LEARNED TO OUR HYPOTHETICAL

THE FLINTSTONE QUESTIONNAIRE



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PRE-PLANNING FINANCIALS



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INSTITUTIONAL MEDICAID TRANSFER PLANNING



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POST-PLANNING FINANCIALS



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INSTITUTIONAL MEDICAID APPLICATION SUBMISSION COVER LETTER



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