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A FAMILY GUIDE ON MEDICAID PLANNING

*What it is, How it Works,
and Why You Need a Plan*



AMERICAN ACADEMY
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A FAMILY GUIDE ON MEDICAID PLANNING: WHAT IT IS, HOW IT WORKS, AND WHY YOU NEED A PLAN

What is your greatest fear? Projections estimate that over two-thirds of individuals who reach age 65 will need long-term care services during their lifetime,¹ and for many this statistic brings about immense fright.

One of the problems with our fears is that so many of us choose to ignore them. Ignoring the possible need for nursing home care means that you miss out on the valuable chance to plan ahead. Not only does planning ahead let you shape what your nursing home experience might look like, it also allows you to think carefully about how you'll pay for nursing home care. Perhaps more accurately, it gives you time to find alternatives for paying for care, so you can preserve your hard-earned assets.

One of the most-used alternatives is Medicaid.

WHAT IS MEDICAID?

Medicaid is a joint federal-state program that pays certain healthcare costs. The program is needs-based, meaning that it is available to those who meet certain financial criteria, including income and asset limits. 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 within reason.

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. People tend to confuse Medicare and Medicaid, but the two programs are not the same.

MEDICARE

Medicare is federally funded health insurance designed for people 65 and older or on Social Security Disability for over 2 years. The coverage available through the program is divided into four categories, called "parts":

- *Part A* is hospital coverage. It helps pay for the cost of inpatient care in a hospital or skilled nursing facility with a limit of 100 days. It also provides some coverage for home health care, as well as hospice care.
- *Part B* is medical coverage. It helps pay for medical services other than hospital stays, such as doctor's visits, outpatient care, certain types of medical equipment, and home health care.

¹ <http://www.educationviews.org/Americas-aging-opportunity/> (2016)

- *Part C* is also known as Medicare Advantage. Under Medicare Advantage, recipients of Medicare can choose to take their Medicare benefits through private health insurance plans, rather than through Medicare Parts A and B.
- *Part D* is prescription drug coverage. It helps to defray the cost of prescription medications.

While Medicare covers many healthcare expenses, it does not provide complete coverage. For instance, many people are surprised to discover that the program's coverage for long-term care is extremely limited.

WHO NEEDS MEDICAID?

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 long-term care 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.

This guide will give you a basic overview of Medicaid guidelines and help you understand some of your planning options. Remember, it is never too late to qualify for Medicaid. However, the earlier you begin to plan, the easier it is to make the most of the safe harbor provisions... and the more likely you'll be to keep all or most of your assets, rather than making unnecessary nursing home payments.

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 are applied to your neighbor's, or your brother-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.

Use this guide 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 New York Medicaid rules apply to you. They can also help you design a plan that will allow you to retain as much of your assets as possible while applying for long-term care coverage.

INCOME AND ASSETS

When it comes to Medicaid planning for long-term care, eligibility depends on a handful of factors. After you have demonstrated that you need nursing home care, two things matter: your income and your assets.

Countable Assets vs. Exempt Assets

Viewed through the lens of Medicaid requirements, each of your assets falls into one of two categories: either *countable* or *exempt*.

Countable assets are those whose values are tallied, and the total value is compared to Medicaid asset limits for purposes of determining eligibility. Exempt assets are those whose values are not looked at for purposes of determining Medicaid eligibility.

Because the list of exempt assets is short, the best definition of a countable asset is an asset that is not on the list of exempt assets.

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
- 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
- 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

Asset Limits

With very few exceptions, everything you own that is not identified as an exempt asset is included when your assets are totaled for purposes of determining your (or your spouse's) Medicaid eligibility. This includes:

- Cash
- Checking and savings accounts
- Stocks and bonds
- Mutual funds
- Certain trusts
- Certain real estate
- Certificates of deposit
- Motor vehicles (other than your primary vehicle) and boats
- Most other assets

The total value of countable assets you are permitted to have as a Medicaid nursing home recipient varies from state to state, and it changes each year based on inflation and other factors.

Currently, to qualify for Medicaid, you as a nursing home resident are allowed to have no more than \$15,150 in countable assets. If you are married, your spouse who does not live in a nursing home (called a "community spouse" under Medicaid guidelines) can typically keep half of your joint countable assets up to a maximum of \$123,600.

Income Limits

Medicaid also applies income limits to nursing home residents and their spouses. Currently, nursing home residents are permitted to have up to \$50 per month in income each. If your income exceeds the maximum, the excess is paid to the nursing home as a contribution toward the cost of your care.

If you are married, your spouse is allowed to keep his or her income. If you are the main breadwinner, and your spouse does not have enough income to live on, he or she is entitled to a *Minimum Monthly Maintenance Needs Allowance (MMMNA)*. The MMMNA is calculated using a complicated formula, and currently is \$3,090. If your spouse's income does not reach the MMMNA, then instead of being paid to the nursing home, your excess income goes to your spouse in the amount required to boost his or her income to the monthly minimum.

For Example:

Mary and Joe are a married couple. Joe is in a nursing home, and Mary is the at-home spouse. Mary's MMMNA has been set at \$3,090, but she only receives \$1,000 per month in Social Security. Here is what happens to Joe's \$1,200 in Social Security and his \$3,000 pension income under the Medicaid rules:

\$1,200.00	Joe's Social Security Income
3,000.00	Joe's pension income
50.00	To Joe
<u>2,090.00</u>	<u>To Mary (to allow her to reach MMMNA)</u>
\$2,160.00	Paid to Nursing Home

WHY IS MEDICAID PLANNING IMPORTANT?

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 to qualify for coverage.

With monthly nursing home bills averaging just over \$7,200ⁱ nationwide, and over \$15,000 in New York City, 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 built-in "safe harbor" provisions that allow you to plan ahead and protect your assets.

However, because the rules are complicated, many people do not seek expert help and 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.

WHY NOT JUST GIVE AWAY YOUR ASSETS? THE LOOK-BACK PERIOD

Some people mistakenly believe that they can simply give some or all of their assets to their children or other relatives in order to qualify for Medicaid. The truth is, part of Medicaid planning may involve giving away some of your assets. However, this has to be done with extreme caution and should only be done with the advice of an experienced attorney. If you give away your assets at the wrong time, or use the wrong method, you can face tough penalties.

In 2006, the federal government passed a law called the Deficit Reduction Act (DRA). As a result of this law, it is harder to qualify for Medicaid. One of the tough provisions of the DRA is the five-year "look-back period."

This provision imposes a penalty, tied to your state's average cost of nursing home care, to certain transfers made within the five years before you apply for Medicaid coverage.

In general, every \$12,428 worth of assets that you give away 60 months prior to applying for Medicaid (the "look-back period") will make you ineligible for benefits for one month. Even worse, the ineligibility period does not begin until you have already spent down your other assets and you are ready for a nursing home.

There are some important exceptions to the look-back period. Because the rules are strict and the penalties are harsh, it is critical that you seek the advice of an experienced estate planning and elder law attorney before you attempt to give away any assets.

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 (discussed below), 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.

WHEN SHOULD YOU PLAN?

It is never too late to get help with Medicaid planning, even if you or your loved one is already in a nursing home. However, the sooner you begin to plan, the better. Estate planning and elder law attorneys divide Medicaid planning into two categories based on how far in advance it is started. These categories are *crisis planning* and *pre-need planning*.

CRISIS MEDICAID PLANNING

Crisis planning is for people who are facing an imminent need for long-term care. Sometimes, this is because they have experienced a health crisis and, while they are in the hospital or a rehabilitation center, their doctor has told them that they will not be able to return home. Sometimes, they are already in a long-term residential facility, such as a nursing home, or they are paying for in-home care.

Whatever the reason, many people find themselves suddenly facing the possibility of using their life savings to pay for care. With America's nursing home costs averaging \$87,235ⁱⁱ annually, and New York City's averaging over \$180,000 annually, a lifetime's worth of savings could disappear in a few short years, if not a matter of months.

Often, people in this type of crisis situation find themselves unable to qualify for Medicaid because their assets exceed the qualification limits – they own too much. The biggest mistake many people make is to assume that it's too late to seek help and engage in Medicaid planning. They think their only option is to pay out of pocket for care until they've depleted their assets enough to qualify for coverage.

The truth is, even if you or your spouse is in a nursing home, you can still get help from an experienced estate planning and elder law attorney and put together a crisis plan. Remember our discussion of *countable* and *exempt* assets? One type of crisis planning focuses on shifting assets from the countable column to the exempt column. For instance, your attorney might advise you to:

- Replace your car (or purchase one, if you do not already own one)
- Buy a prepaid funeral plan
- Make certain improvements to your home
- Prepay estimated income or capital gains taxes
- Buy furniture for your home

Depending on your circumstances, your attorney might also advise you to take other steps, such as pay off certain debts, buy a “Medicaid-qualified” annuity, or enter into a life care contract under which you pay one of your children for providing you with care giving services.

All of these strategies serve a common purpose: they protect your savings and preserve it so that it benefits you and your loved ones. At the same time, these strategies allow you to play by Medicaid rules to change the way the Medicaid program views your financial situation, allowing you to qualify for coverage without depleting all of your assets.

DISADVANTAGES OF CRISIS MEDICAID PLANNING

Crisis planning can be an incredible help to those facing an immediate need for Medicaid benefits, however, it has its disadvantages. Because of the intensive nature of legal work involved, this type of planning tends to be more expensive than pre-need planning. It also tends to be more stressful for you and your family, because it takes place during a time in your lives that is already marked by illness and difficult transitions. Finally, because crisis planning prevents you from taking advantage of the five-year look-back period, it may limit the amount of assets you are able to preserve.

COMMUNITY MEDICAID IN NEW YORK STATE

In New York, the Community Based Medicaid program will pay for the cost of home health aides, enabling a person to stay in their home and receive care rather than having to go into a nursing home or long term care facility. When applying, the local Department of Social Services considers the applicant's income and assets and whether the Medicaid applicant requires assistance with the activities of daily living.

Because most people are not aware of the eligibility requirements for Community Based Medicaid in New York they think they would not qualify. This is unfortunate because many individuals who could be eligible are spending their life savings on the cost of home health aides. Whether an individual requires an aide 24 hours a day or just 4 hours, whether it is for the first time (perhaps they are leaving a rehab facility) or they have had an aide with them and are paying privately, many can be eligible for Community Medicaid benefits with the proper planning. It is best to seek the advice of an experienced Elder Law attorney.

PRE-NEED MEDICAID PLANNING

The best way to plan for long-term care is to do so well before the need arises. Estate planning and elder law attorneys call this pre-need Medicaid planning, and it gives you the most options for preserving your assets.

In fact, some people who engage in pre-need planning find that they can buy long-term care insurance and limit, or even avoid, their need for Medicaid coverage. However, long-term care insurance is not an option for everyone. Some people have medical conditions that prevent them from qualifying for coverage. Others find that the premiums are too expensive.

Pre-need Medicaid planning that begins early enough allows you to take advantage of the five-year look-back period. This means that, in addition to the crisis planning strategies detailed above, you may be able to gift property or establish an Irrevocable Medicaid Trust. These additional strategies not only allow you to preserve your assets and avoid using them to pay for nursing home care in the short-term, they can also protect your property from Medicaid liens and from recovery.

GIFTS

Generally speaking, gifts to people other than your spouse trigger a transfer penalty if they occur within the five years before you apply for Medicaid. Planning more than five years in advance

eliminates the worry about transfer penalties, so under some circumstances, it makes sense to give certain assets to your children or other loved ones as part of a Medicaid plan.

The problem with gifting assets in this way is that once you give away your property, it is gone. You have no way to control what happens to your assets, and even under the best of circumstances, your loved one can lose them.

For example, imagine you are currently healthy, but you have a family history of Alzheimer's disease. Anticipating the need for nursing home care in the future, you decide to plan in advance and give a large portion of your savings to your adult son, who has a stable job and has always been very responsible. After all, you want him to have this money eventually.

The problem with this approach is that even if your son is very cautious, the money is not as safe as it could be. What would happen if he lost his job and lost the ability to pay his debts or was sued through no fault of his own? His creditors could sue him and gain access to the money you gave him.

Often, estate planning and elder law attorneys recommend a more secure solution: a Medicaid Income Only Irrevocable Trust.

TRUST PLANNING

Trusts can be an effective Medicaid planning tool; however, in order to be effective for Medicaid purposes, a Trust must conform to strict rules.

For example, only an *Irrevocable Trust* – one that you cannot change after it is created – meets Medicaid guidelines. This means that a Revocable Living Trust (the kind many people use for probate avoidance purposes) is not an effective Medicaid planning strategy.

Further, not all Irrevocable Trusts work as Medicaid planning tools. For example, if you establish an Irrevocable Trust that allows payments of Trust principal to you or your spouse, then the assets in that Trust are treated as countable assets under Medicaid rules.

The best way to make sure a Trust is effective as a Medicaid planning tool is to work closely with an experienced estate planning and elder law attorney.

Like gifts, many assets transferred to an Irrevocable Medicaid Trust are subject to the five-year look-back rule. Therefore, this planning strategy is generally best for people who can plan as far in advance as possible.

For those who are in a position to take advantage of an Irrevocable Medicaid Trust, the arrangement offers a number of benefits:

- Helps to reduce your countable assets, allowing you to qualify for Medicaid benefits when the time comes.
- Allows you to ensure your assets are protected and preserved for your chosen beneficiaries.
- Allows you and your spouse to use the Trust income to supplement your living expenses, if necessary.

ESTATE RECOVERY

Another advantage of an Irrevocable Medicaid Trust is that it can help protect your home from a state and federal policy known as *estate recovery*.

Under federal law, after a Medicaid recipient dies, the state is required to recover whatever benefits it paid for that person's care from the recipient's estate. However, the state cannot try to recover any benefits if the recipient leaves behind any of the following:

- a living spouse
- a blind or disabled child
- a child under the age of 21

Because of the way Medicaid eligibility rules work, most recipients die leaving their home as their most valuable asset. Therefore, most estate recovery efforts focus on recipients' homes.

When you transfer your home into an appropriately drafted Irrevocable Medicaid Trust, the property belongs to the Trust and not to you. Even if the Trust sells the house, the proceeds of the sale are a Trust asset. Since the home is not part of your estate, it is protected from Medicaid's estate recovery policy.

WHERE CAN YOU GO FOR HELP?

As you can see, the legal and financial issues that surround Medicaid eligibility and planning can be particularly complex and difficult to untangle. Many people find it obvious that they need help navigating all the guidelines, rules, and exceptions to the rules.

How do you know where to go for help? Medicaid planning falls under estate and elder law planning. Attorneys who focus their practice in these areas help their clients with a variety of issues including estate and tax planning, disability planning, and finding and paying for quality long-term care.

Before you settle on an attorney, it is important that you do some legwork. Be careful to investigate the attorney's background and credentials, and make sure you choose a lawyer with

plenty of experience – not just in the general practice of law, but with Medicaid planning in particular.

Start by checking with friends, family members, and colleagues. Have they used a Medicaid planning attorney? Were they pleased with the services they received?

You can also talk to your doctor, your financial advisor or accountant, or a social worker at your local hospital. These professionals can often recommend experienced and knowledgeable attorneys.

When the time comes to meet with an attorney, don't be afraid to ask lots of questions. Find out how long the attorney has practiced law. Ask what percentage of the firm's practice involves Medicaid planning. Ask questions that will give you an idea of the lawyer's experience.

For example:

- Is he or she a member of any elder law organizations?
- What about bar organization committees that focus on elder law or Medicaid issues? If so, does he or she hold a leadership position on the committee?
- Does the attorney give presentations on elder law, estate planning, or Medicaid planning to other lawyers or to the public?
- Has he or she written articles on the topic?

While an attorney can be knowledgeable about Medicaid planning without engaging in any of these activities, participation in such activities is a clue that the attorney is focused on Medicaid planning and may be considered knowledgeable by others in the field.

A final tip: While you are interviewing an attorney, don't just pay attention to the answers he or she gives you; pay attention to *how* he or she answers your questions. Does the attorney listen carefully and courteously, and give you complete answers in language you can understand? Or does he or she cut you off, talk over you, or talk in legalese?

Remember, this is someone you'll be trusting to guide you through some pretty complex areas of law – you should be comfortable talking to each other.

WHEN WILL YOU BEGIN YOUR PLAN?

There's no way to know what tomorrow will bring. That's why, when it comes to Medicaid planning, there's no time like the present.

The first step is simple: Find a trusted attorney to guide you – one with proven experience in estate planning and elder law. From there, he or she can help you navigate the rules and make sure you have the best possible plan in place.

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ⁱ http://www.alz.org/downloads/Facts_Figures_2012.pdf

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ABOUT THE ACADEMY

This report reflects the opinion of the American Academy of Estate Planning Attorneys. It is based on our understanding of national trends and procedures, and is intended only as a simple overview of the basic estate planning issues. We recommend you do not base your own estate planning on the contents of this Academy Report alone. Review your estate planning goals with a qualified estate planning attorney.

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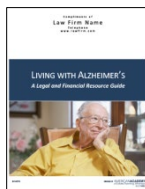
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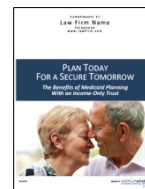
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7 Things You Need to Know Before You Choose a Nursing Home



Living With Alzheimer's: A Legal and Financial Resource Guide



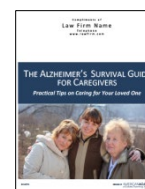
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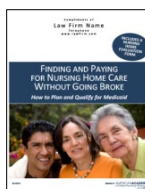
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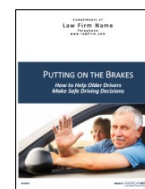
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Living With ALS: A Legal and Financial Resource Guide



Finding and Paying for Nursing Home Care Without Going Broke: How to Plan and Qualify for Medicaid



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