

PRESENTED AT

24th Annual Estate Planning, Guardianship and Elder Law Conference

August 4-5, 2022
Galveston, TX & Live Webcast

Medicaid Update

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INTRODUCTION

This is the authors' third "Medicaid Update" in three years. Last year's "Medicaid Update" covered primarily the same topics as the previous year's, merely highlighting the relatively small number of changes. We thought that degree of repetition justified by the high importance of the two topics that received most of our attention: (1) Lady Bird Deeds and Transfer on Death Deeds and (2) exclusion of some retirement accounts from resources counted by Medicaid. Although those two topics continue to be extremely important, we have not seen much change in them in the past year so have decided to move on to other topics this year. For our comments on those topics, which we believe are still up to date except as discussed below, see the "Medicaid Update" paper for this conference last year or a slightly revised version published by the State Bar of Texas for its Advanced Elder Law Course in November 2021.

Another reason we are not expanding on our discussion of Lady Bird Deeds and Transfer on Death Deeds is that Julie Ezell-Perez has done that beautifully in her PowerPoint presentation *Do a Good Deed*. She has given us permission to publish that as an "extra paper" for this "Medicaid Update" presentation.

Likewise, a major problem area in handling Medicaid cases these days is that HHS is experiencing difficulty keeping them moving, apparently due to difficulty retaining staff in this time of low unemployment. Because the focus will be on annual reviews in the 14 months after the end of the public health emergency, we are providing some suggestions on handling annual reviews. In addition, Benecia Flores has allowed us to publish her popular and authoritative paper *Pesky Problems in Medicaid Cases* as another "extra paper."

I. PRE-ELIGIBILITY MEDICAL EXPENSES NOW DEDUCTIBLE

Most beneficiaries of nursing home Medicaid must pay most of their income as a Medicaid copayment. However, in calculating copayment, they can deduct from their income \$60 per month for personal needs and also deduct their "incurred medical expenses."¹ The Center for Medicare and Medicaid Services interprets the federal law to include in incurred medical expenses all medical expenses incurred during the three calendar months before the first date of Medicaid eligibility (the "medical effective date"), and that interpretation has been upheld in federal court.² However, Texas and a few other states allow that

¹ Medicaid for the Elderly and People With Disabilities Handbook [H-2100](#).

² *Maryland Department of Health and Mental Hygiene v. Centers for Medicare and Medicaid Services*, 542 F.3d 424 (4th Cir. 2008), interpreting [42 U.S.C. § 1396a\(r\)\(1\)\(A\)](#).

deduction only for such expenses incurred on or after the medical effective date.³ In a recent Policy Bulletin, Texas HHS announced it now follows the CMS interpretation of the law:⁴

Expenses for necessary medical care not covered or reimbursed by a third party are allowable deductions when calculating a recipient's monthly copayment amount if the medical services are received not more than three months prior to the month of application, regardless of the recipient's medical effective date (MED). Expenses for services received more than three months prior to the month of application are not allowable as IME deductions.

The big news in that is that under the case cited above, the medical expenses that can be reimbursed include *nursing home* expenses. That would include the unpaid nursing home expenses of an unmarried Medicaid applicant who had spent down most of their money when they were admitted to the nursing home but still had more than \$2,000 at the end of every calendar month before they received the denial on that basis. Likewise, a client who failed to establish a required Qualified Income Trust because they failed to disclose all their income to their attorney gets another bite at the apple.

The Policy Bulletin cited above helpfully explains how those pre-eligibility incurred medical expenses can be paid even after eligibility is established. Essentially, instead of paying copayment to Medicaid for the first few months of eligibility, the client will pay all their income to the nursing home (if nursing home expenses are the only incurred medical expenses) until that debt is paid. Assume, for example, that incurred medical expenses of \$10,000 consist entirely of nursing home expenses owed to the facility in which the client resides and the copayment not including that deduction would be \$2,000 per month. For the first five months of eligibility, the \$2,000 per month copayment goes entirely to the facility to be credited against the client's debt there instead of being paid to the Medicaid program. After the five months, the copayment is paid to Medicaid as usual.

That Policy Bulletin provides it is effective June 1, 2022. We assume that means it applies to agency actions on or after that date.

A Texas NAELA member who pioneered this procedure recommends implementing this deduction from copayment as follows:⁵

³ Medicaid for the Elderly and People With Disabilities Handbook [H-2150](#).

⁴ [Policy Bulletin 22-07](#) (May 2, 2022).

⁵ Nathan Peters, whose practice is in Denton, Texas.

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First appeared as part of the conference materials for the
24th Annual Estate Planning, Guardianship and Elder Law Conference session
"Medicaid Update"