

Medicaid Planning in Guardianships
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I. INTRODUCTION

This paper examines how government benefits planning can be accomplished in the context of guardianships and community administrations. Specifically, the paper focuses on the long-term care Medicaid benefit, describing and demonstrating how the practitioner can use Texas Estates Code and Family Code provisions to accomplish Medicaid eligibility and protection from Medicaid estate recovery for clients while navigating ethical issues that may be presented.

II. LONG-TERM CARE MEDICAID

When enacted in 1965 along with Medicare, Medicaid was associated with welfare. Throughout the intervening decades, Medicaid evolved and has been expanded to cover more people in need of medical services, including long-term care services such as those provided in a nursing home. One of the most sweeping and important changes in the law dates to 1989 and relates to a married person who will apply for Medicaid but whose spouse will stay in the home.¹

Long-term care Medicaid for the elderly and people with disabilities (nursing home Medicaid), is a program that provides institutional care to recipients whose medical condition regularly requires the skills of licensed nurses. Long-term skilled nursing care is also provided to eligible individuals at home under the Star+Plus Waiver program. All such Medicaid applicants must meet financial and non-financial categorical requirements to qualify for services. This paper begins with a brief outline of Medicaid eligibility requirements.

A. Non-Financial Eligibility Criteria

Non-financial requirements include the following: The applicant must have a medical necessity for nursing home care;² be over age 65,³ blind,⁴ or disabled;⁵ be a U.S. citizen or approved alien status,⁶ and have Texas residency.⁷ All of these requirements apply to both single and married applicants for long-term care Medicaid.

B. Financial Eligibility Criteria

Income. The long-term care Medicaid program's gross monthly income limit in 2024 is \$2,829. This limit is adjusted every year on January 1 commensurate with the cost-of-living

¹ 42 U.S.C.A. § 1396r-5.

² 26 T.A.C. § 554.2401.

³ 1 T.A.C. § 358.211(a)(1).

⁴ 1 T.A.C. § 358.211(a)(2).

⁵ 1 T.A.C. § 358.211(a)(3).

⁶ 1 T.A.C. § 358.203.

⁷ 1 T.A.C. § 358.207.

increase in Social Security. The limit is the same for single and married applicants. Even if the applicant is over the income cap, they can still be eligible with a properly drafted and administered Qualified Income Trust.⁸ The Texas Estates Code expressly allows a guardian of the person to establish and direct the ward's income to a Qualified Income Trust.⁹ "[I]ncome is anything a person receives in cash or in kind that can be used to meet the person's needs for food and shelter. It is the receipt of any property or service a person can apply, either directly or by sale or conversion, to meet basic needs for food and shelter. The receipt of a payment – in the form of cash, property, or service – is income in the month of receipt and a resource as of 12:01 a.m. on the first day of the month after receipt."¹⁰

Income copayment rules differ for single and married applicants and depend on (1) whether one spouse or both spouses are applying and (2) the incomes of both spouses. An unmarried Medicaid recipient in a nursing home will have to pay all of their income, minus allowable deductions such as for personal needs and health insurance premiums, to the nursing home as a copayment (formerly referred to as applied income). A married Medicaid recipient in a nursing home may or may not have to pay any of their income as a copayment, because they may be able to divert some or all of their net income to their spouse. The spouse at home who is not applying for Medicaid (referred to as the "community spouse") keeps their income. Income is attributed to the spouse whose name is on the check.¹¹

Resources. Long-term care Medicaid, like most Medicaid programs, has a resource limit. "Resources are cash, other liquid assets, or any real or personal property or other non-liquid assets owned by a client, his spouse, or parent, that could be converted to cash."¹² The general rule is that the person cannot have countable resources in excess of \$2,000. This is the policy for single applicants and married applicants using the spousal impoverishment rules.¹³ The simple rule belies the complexities when a married person applies for Medicaid. In situations in which one spouse enters the nursing facility while the other remains at home, the amount of income available to support the community spouse is considered when calculating the Protected Resource Amount ("PRA"), an amount allowed by law to help avoid impoverishment of the community spouse. The community spouse generally can protect one-half of the total family countable resources, up to \$154,140 (in 2024). For example, a couple with \$200,000 in countable resources can protect \$100,000. In some cases, substantially more resources can be protected.¹⁴ Several types of resources are excluded from the resource limits used to determine Medicaid eligibility. The value

⁸ 42 U.S.C.A. § 1396p(d)(4)(B); MEPD Handbook § F-6800.

⁹ Tex. Est. Code § 1151.051(c)(5).

¹⁰ MEPD Handbook § E-1200.

¹¹ 42 U.S.C.A. § 1396r-5(b)(1); MEPD Handbook §§J-2110 J-2100.

¹² MEPD Handbook § F-1000.

¹³ MEPD Handbook § F-1300.

¹⁴ See e.g., MEPD Handbook § J-1000, *et seq.* This paper only scratches the surface of the intricacies of Medicaid eligibility requirements. For an excellent paper discussing Medicaid policies specifically for married applicants, see Coulter, Jennifer, "Medicaid Couples Planning," presented at the Texas NAELA Summer Conference sponsored by The University of Texas School of Law and Texas Chapter of the National Academy of Elder Law Attorneys, August 9, 2023.

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