

**MEDICAID
QUALIFICATION
AND
SPOUSAL SUPPORT
2021**

**A Guide for Nevada's Married Seniors
and Their Families**

(Protecting the non-disabled spouse from
impoverishment)

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John has been practicing law since 1977, primarily in the area of Elder Law since 2007. His practice focuses on Guardianships, Medicaid qualification, Durable Powers of Attorney, Estate Planning, Special Needs Trusts, all with an emphasis on a new area of law called “**LIFE CARE PLANNING**”. He is a member of the Life Care Planning Law Firms Association (LCPLFA), the Academy of Special Needs Planners (ASNP), and the National Academy of Elder Law Attorneys (NAELA).

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Krista has been practicing law in Reno for 20 years, after graduating, cum laude from Gonzaga University. She has been compelled by public interest, working in both public and private sectors. In 2021 she joined John in a new area of law called “**LIFE CARE PLANNING**”. She is a member of the Life Care Planning Law Firms Association (LCPLFA), the Academy of Special Needs Planners (ASNP), and the National Academy of Elder Law Attorneys (NAELA), and active in community service projects.

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Amy has been a legal assistant since 1994, and began specializing in guardianship, Medicaid, and long term care planning in 1996. Amy obtained her certificate of completion in Elder Care Coordination from Stockton University Center on Successful Aging.

I. INTRODUCTION:

Nursing home care is usually paid for by private funds, nursing home (long term care) insurance or “Institutional” Medicaid. If you don't have long term care insurance, Medicaid may pay for your spouse's care.

If you are married and it is necessary to place your spouse in a nursing home, you do not have to become impoverished. You have the legal right to keep a reasonable amount of your marital income and savings for your ongoing support.

This booklet is intended to explain to married persons with spouses living in nursing homes, how Medicare and Medicaid pay for long term care and your rights to spousal support, while living in the community.

II. THE BASICS:

A. Medicaid is a medical assistance program funded by the federal and state governments to pay for basic health care for persons who meet certain "categorical"

requirements such as age (over 65) and/or disability.

B. Nevada seniors and persons with physical or cognitive disabilities, who receive services as a patient in a skilled nursing facility, intermediate care facility, or hospital for 30 consecutive days or longer, **and** are determined by Medicaid to need this care, may qualify for institutional Medicaid benefits if they meet the income and resource qualifications.

C. Medicaid will analyze and categorize resources held in the name of both spouses, individually and jointly, into two different categories, exempt and non-exempt, in order to determine eligibility. Medicaid analyzes both spouses' incomes, and it will be necessary to provide verification of both net and gross income for both spouses. You will also be asked if any gifts of assets have been made within the last five (5) years. Any gift may adversely effect Medicaid eligibility.

D. It can take several weeks to several months to receive a Medicaid decision after the application is submitted. If the decision is not favorable, it could result in substantial debt being owed to the facility for months of ineligibility, resulting in a significant reduction of the savings the at-home spouse thought they could depend on for their own future needs in the community. For these reasons, it is crucial that you obtain competent and accurate advice before filing an application for benefits.

E. The information contained herein is not a substitute for legal advice in a specific situation. The rules set forth herein are subject to revision. This brochure is for informational purposes only and does not create an attorney-client relationship.

III. AN OVERVIEW OF MEDICARE AND MEDICAID AND LONG-TERM CARE

A. Medicare is a two-part health insurance program for Social Security and Railroad Retirement recipients administered by the Social

Security Administration. It is designed to help meet the hospital and medical costs of Social Security and Railroad Retirement Beneficiaries (age 65 or older) and some persons with disabilities that are under age 65, **regardless of income and resource levels**. Medicare benefits to pay for nursing home care are limited to persons needing skilled care. Medicare will pay for 100% of the first 20 days of skilled nursing care and all but \$185.50 for days 21 through 100. After day 100 the costs of care must be paid for privately if the person who is institutionalized is not receiving some form of government assistance, or private long-term care insurance. Many persons don't need skilled care, but may need full time custodial care. Medicare does not pay for custodial care.

B. Some Medicare supplemental insurance policies pay the co-payment for Medicare (currently \$185.50 per day) for the 21st through 100th day of skilled care.

C. If Medicare or Medicaid will not pay for your spouse's nursing home care, then some

private insurance for long term care will cover custodial nursing home care. Typically, if Medicare will not pay, neither will most Medicare supplemental insurance policies.

IV. EXEMPT ASSETS

Certain items that you own are not counted in determining your spouse's eligibility for Institutional Medicaid benefits. Among these are your residence (that you have lived in for at least one month), one vehicle, certain burial funds, your household goods and a family business.

A. For the spouse in the care facility, a **\$2,000.00** resource limit applies. This means the spouse in the nursing home can have this much money in savings.

B. As stated above, certain resources do not count against the resource reserve limit. Nevada Medicaid specifically excludes resources such as:

- The family home, as long as the individual **intends to return home**, or

as long as a spouse or dependent relative is living in the home (subject to certain limitations pertaining to equity interest);

- One motor vehicle **regardless of value**;
- A burial policy or funds set aside for burial up to \$1,500.00 in value. The funds set aside for burial can be a life insurance policy or other asset like a special bank account. Applicants for Medicaid **should be sure to indicate on the application form** if their life insurance, bank account, etc. is an asset that they have set aside for burial.
- Interest earned on money set aside for burial is also excluded. Once Medicaid eligibility is established, the burial fund will be **excluded even if the added interest exceeds \$1,500.00**. Money should not be withdrawn from the burial account (except to pay for the burial

costs of the person for whom the account is established).

- A family business is generally exempt and is not counted in determining your spouse's eligibility for Medicaid. This is particularly important for ranching families.

V. NON-EXEMPT ASSETS

Non-Exempt Assets are assessed by the Medicaid caseworker to determine if their total net value will exceed the spousal resource allowance amount set by the federal government. These can include the following items owned by either spouse, or both spouses: Checking, savings, credit union accounts, retirement accounts, life insurance, vehicles in addition to the exempt vehicle, recreational vehicles, savings bonds, stocks and investment accounts, etc..

VI. SPOUSAL IMPOVERISHMENT RULES

Spousal Resource Allowance: There are specific rules that protect the spouse at-home if the other spouse is in a rehabilitation or nursing home (or some other limited care settings that accept Medicaid) for 30 consecutive days or longer. These rules are called The Spousal Impoverishment Rules, which may make it unnecessary to "spend down" your resources. The spouse at home is allowed to keep at least one-half of the Non-Exempt Assets owned by either member of the couple as of the date the spouse with a disability entered a nursing facility. The spouse at-home is now allowed to keep a **maximum** (y2021) of **\$130,380.00** in savings, even if that is more than half of the assets.

Spousal Income Allowance: The at-home spouse is allowed to keep a **minimum** (y2021) of \$2,155.00 of the marital income for support. If this minimum income allowance is

insufficient to meet the monthly needs of the at-home spouse, a court can award the at-home spouse part of the income of the spouse who is institutionalized to provide the federal maximum monthly maintenance needs allowance of \$3,259.50.

VII. INCOME ELIGIBILITY OF THE SPOUSE WHO IS INSTITUTIONALIZED

Generally, the spouse who is institutionalized cannot have countable gross income that exceeds **\$2,382.00 per month** or it will affect his or her eligibility for institutional Medicaid benefits, unless further analysis is made.

Exception: If the spouse who is institutionalized has Social Security, pension or other countable income exceeds \$2,382.00 gross monthly, he or she would be over the individual income limit and would not be eligible for Nevada Medicaid. However, if the spouse in the institution has income and the

at-home spouse's income added together **does not exceed \$4,764.00 per month**, the institutional spouse will qualify from an income perspective because the income can be divided into two (2) equal shares *for eligibility calculations*.

Legal Remedy if Income Exceeds Nevada's Income Cap: If the spouse who is institutionalized has income that exceeds the income cap, a Qualified Income Trust, or "Miller Trust" as it is sometimes referred to, can be implemented for that spouse. If the person who is institutionalized has capacity to execute a trust he or she can do so by appointing someone else as Trustee to manage it for him or her in order to obtain eligibility. If he or she do not have capacity to execute a trust, the agent of a properly formed and executed power of attorney may be able to implement it on his or her behalf. If neither of these options are available, it may be

necessary to obtain guardianship for this purpose.

If the Qualified Income Trust is properly implemented, the income of the spouse who is institutionalized would be distributed according to the Medicaid rules to allow him or her to obtain Medicaid eligibility.

VIII. TRANSFER OF ASSETS

A. If your spouse should need nursing home or other long-term care, a “transfer of assets” rule may be applied by the Medicaid Program in determining eligibility. The rule presumes that any transfer of assets which occurs within sixty (60) months prior to submitting the Medicaid application, is done to obtain Medicaid eligibility. This means your application for Medicaid will be denied and you might remain ineligible for a lengthy period of time (up to 5 years) after a Medicaid application is filed and a penalty denial period is assessed because of the gifts. The gifting rules are very complex and a detailed discussion is beyond the scope of this

pamphlet. **However, special rules apply to transfers of the family home which are summarized in paragraph C below.**

B. Transfers of assets for reasons other than to qualify for Medicaid will not result in a penalty. However, the ***person applying for benefits must prove*** that the transfer or gift was not made for the purpose of obtaining Medicaid eligibility and the person applying is required to provide proof or else the penalty will likely be assessed.

C. Transfers of a family home are subject to special Medicaid rules. Transfers of homes will no longer be permitted without the transfer of assets penalty, except as provided below.

Home transfers are allowed when the transfer is made to:

- The patient's spouse; or
- A child of any age who is blind and/or disabled; or
- A minor child or minor children; or

- A sibling with an equity interest who lived in the home for one year prior to the patient's admission to a medical or nursing facility; or

- A child who resided in the home for two years prior to the patient's admission and who provided care to the patient, which permitted him or her to reside at home.

A spouse at home who receives the title to the family home from the spouse with a disability who is institutionalized, is not allowed to transfer the asset to anyone else except a child who has a disability or is a dependent. The rule provides that if the spouse at home transfers property received from the spouse with a disability, the penalty for the transfer of assets will be applied to the person with a disability that is institutionalized. The spouse at home should not give away any property.

IX. MEDICAID ESTATE RECOVERY

A. After a Medicaid recipient passes away, the Medicaid program has a right to file a claim against the estate of any Medicaid recipient who was 55 years of age or older at the time Medicaid was received. The Medicaid Program will not be able to enforce such a claim during the life of a surviving spouse, a dependent child or a child of any age who has a disability. There is a hardship exemption which will allow the Medicaid Program to waive recovery against the estate in some cases.

B. Currently, the Medicaid Program cannot recover its costs of care of a spouse who is institutionalized from the estate of the at-home spouse who survives the spouse in the care facility that received Medicaid benefits. Remember, Medicaid can only recover from an institutionalized married person's estate after that person's spouse is also deceased. Hence, Medicaid cannot and will not seek to force a surviving spouse from his or her home because the other spouse received Medicaid benefits. The estate recovery is not made upon the

at-home spouse's share of the estate. Medicaid may file a lien on the deceased Medicaid beneficiary's share, if any, of the family residence.

X. IMPORTANCE OF OBTAINING CONCISE AND COMPETENT ADVICE BEFORE SUBMITTING AN APPLICATION FOR ASSISTANCE.

A. If you are the at-home spouse and your spouse is going into a nursing home, an elder law attorney can analyze your situation to determine what approach you should take to protect your income and assets for your ongoing support. It can be particularly important to have a spousal income and resource analysis completed by an attorney to verify how your income and assets will be categorized (exempt and non-exempt) by the Medicaid program to avoid any period of ineligibility. Any savings not set aside for the at-home spouse's support, can be used to pay off debts, including the mortgage on the residence, or the debt on the exempt vehicle, or can be used to catch up on

deferred maintenance or repairs to the home. Any other savings should be used for the care for the spouse who has a disability, including any assistive technology to enhance his or her quality of life.

B. Some of the rules set forth herein also apply to determine eligibility for a spouse who has a disability and still remains at home, who desires to receive services in the home or in a group home, pursuant to the community home based initiative program or other waiver programs. These programs are run by the State Department of Aging and Disability Services.

C. The best solution for long term care planning is to obtain legal advice as soon as the potentially disabling condition is diagnosed to optimize options, to enhance the quality of life and maintain placement in the least restrictive environment as long as possible. Persons trying to pre-plan before there is a disability should obtain legal advice, consider long term care insurance and create a comprehensive plan that will allow more successful aging.

D. Nursing home costs are tax deductible if the principal reason the individual resides in the nursing home is because the person is “chronically ill” and services are necessary for diagnostic, preventative, therapeutic, treating, mitigating, rehabilitative, maintenance and personal care services.

E. Citizen Alert. Annuities generally are treated as resources by Medicaid except in limited circumstances. You should not buy an annuity because someone tells you it will protect your assets without first obtaining competent legal advice. The annuity rules for Medicaid are complex and the usefulness of annuities depends on other financial aspects of the marital estate.

NOTES:

INCOME TAX PLANNING AND LONG TERM CARE EXPENSES

1. Payment of costs of long term care for a “chronically ill” individual is a deductible medical expense.
2. Covered are expenses to provide necessary diagnostic, preventive, therapeutic, treating, mitigating, rehabilitative, and maintenance, or personal care services. (I.R.C. §7702B(c)(1)).
3. Care must be provided pursuant to a plan of care prescribed by a physician, registered nurse, or licensed social worker.
4. A chronically ill person has either a severe functional or severe cognitive impairment.
5. Functional impairment - certification that individual needs substantial assistance with two or more of six activities of daily living and need was for at least 90 days.
6. Cognitive impairment - requires substantial supervision to protect his or her health or safety. “Severe cognitive impairment means a deterioration or loss in intellectual capacity that is measured by clinical evidence and standardized test that measure: (1) short/long term memory; (2) orientation to people, places, or time; and (3) deductive or abstract reasoning.” (H.R. Conf. Rep. No. 104-736 at 117 (1996)).
7. Must be certified annually.
8. Need record keeping and a formal plan of care must be followed to obtain deduction for in-home care.
9. No deduction is available for services provided by a spouse or other relative who is not a licensed professional.
10. Cost of obtaining guardianship may be deductible.

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