

# Medicaid Information

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**R.F. (Ben) Stewart III, JD, LLM**  
**1800 Providence Park, Suite 250**  
**Birmingham, AL 35242**  
**(205) 803-6724**  
**[www.elderlawadvocates.com](http://www.elderlawadvocates.com)**

## Important Facts About Medicaid: Introduction

Medicaid is a joint federal-state program that provides health insurance coverage to low-income children, seniors and people with disabilities. In addition, it covers care in a nursing home for those who qualify. In the absence of any other public program covering long-term care, Medicaid has become the default nursing home insurance of the middle class. As for home care, Medicaid offers very little.

While Congress and the federal Health Care Financing Administration set out the main rules under which Medicaid operates, each state runs its own program. As a result, the rules are somewhat different in every state, although the framework is the same throughout the country.

## Medicaid Resource (Asset) Rules

These are general guidelines for Alabama.

In order to be eligible for Medicaid benefits a nursing home resident may have no more than \$2,000 in “countable” assets.

The spouse of a nursing home resident—called the ‘community spouse’— is limited to one half of the couple’s joint assets up to \$120,900 (in 2017) in “countable” assets (see Medicaid, Protections for the Healthy Spouse). The \$120,900 figure changes each year to reflect inflation. In addition, in Alabama the community spouse may keep the first \$27,000 (in 2017), even if that is more than half of the couple’s assets.

All assets are counted against these limits unless the assets fall within the short list of “non-countable” assets. These include:

1. personal possessions, such as furniture and jewelry;
2. one motor vehicle;
3. the applicant’s principal residence, provided it is in the same state in which the individual is applying for coverage;
4. prepaid funeral plans and a small amount of life insurance; and
5. assets that are considered “inaccessible” for one reason or another.

## **Treatment of Income**

The basic Medicaid rule for nursing home residents is that they must pay all of their income, minus certain deductions, to the nursing home. The deductions include a \$30-a-month personal needs allowance, a deduction for any uncovered medical costs (including medical insurance premiums), and, in the case of a married applicant, an allowance for the spouse who continues to live at home if he or she needs income support.

Alabama is known as an “income cap” state and eligibility for Medicaid benefits is barred if the nursing home resident’s income exceeds \$2,205 a month (for 2017), unless the excess above this amount is paid into a “(d)(4)(B)” or “Miller” trust. Should you need more information about this type of trust, please contact our office.

For Medicaid applicants who are married, the income of the community spouse is not counted in determining the Medicaid applicant’s eligibility. Only income in the applicant’s name is counted in determining his or her eligibility. Thus, even if the community spouse is still working and earning \$5,000 a month, he or she will not have to contribute to the cost of caring for her spouse in a nursing home if he is covered by Medicaid.

## **Keeping Your Home**

In most cases, Medicaid recipients do not have to sell their homes in order to qualify for Medicaid. The home will not be considered a countable asset for Medicaid eligibility purposes as long as the nursing home resident intends to return home. However, Medicaid will most likely file a lien against the home to reimburse itself for any funds spent on the nursing home resident.

The house may always be kept if the Medicaid applicant’s spouse or another dependent relative lives there.

## **Protections for the Healthy Spouse**

The Medicaid law provides special protections for the spouse of a nursing home resident to make sure he or she has the minimum support needed to continue to live in the community.

The so-called “spousal protections” work this way: if the Medicaid applicant is married, the countable assets of both the community spouse and the institutionalized spouse are totaled as of the date of “institutionalization,” the day on which the ill spouse enters either a hospital or a long-term care facility in which he or she then stays for at least 30 days.

In general, the community spouse may keep one half of the couple’s total “countable” assets up to a maximum of \$120,900 (in 2017). Called the “community spouse resource allowance,” this is the most that the state will allow a community spouse to retain without a hearing or a court order. The least amount that the state will allow a community spouse to retain is \$27,000 (in 2017).

Example: If a couple has \$100,000 in countable assets on the date the applicant enters a nursing home, he or she will be eligible for Medicaid once the couple’s assets have been reduced

to a combined figure of \$52,000 — \$2,000 for the applicant and \$50,000 for the community spouse.

In all circumstances, the income of the community spouse will continue undisturbed; he or she will not have to use his or her income to support the nursing home spouse receiving Medicaid benefits. But what if most of the couple's income is in the name of the institutionalized spouse, and the community spouse's income is not enough to live on? In such cases, the community spouse is entitled to some or all of the monthly income of the institutionalized spouse. How much the community spouse is entitled to depends on what the Medicaid agency determines to be a minimum income level for the community spouse. This figure, known as the minimum monthly maintenance needs allowance or MMMNA, is calculated for the community spouse and provides that the community spouse will receive at least \$2,030 (effective 7/1/2017) per month.

If the community spouse's own income falls below his or her MMMNA, the shortfall is made up from the nursing home spouse's income. Example: Mr. and Mrs. Smith have a joint income of \$2,500 a month, \$2,000 of which is in Mr. Smith's name and \$500 is in Mrs. Smith's name. Mr. Smith enters a nursing home and applies for Medicaid. The Medicaid agency determines that Mrs. Smith's MMMNA is \$2,030. Since Mrs. Smith's own income is only \$500 a month, the Medicaid agency allocates \$1,530 of Mr. Smith's income to her support. Since Mr. Smith also may keep a \$30 a month personal needs allowance, his obligation to pay the nursing home is only \$440 a month ( $\$2,000 - \$1,530 - \$30 = \$440$ ). In exceptional circumstances, community spouses may seek an increase in their MMMNAs either by appealing to the state Medicaid agency or by obtaining a court order of spousal support.

## **Is Transferring Assets Against the Law?**

You may have heard that transferring assets, or helping someone to transfer assets, to achieve Medicaid eligibility is a crime. Is this true? The short answer is that for a brief period it was, and it's possible, although unlikely under current law, that it will be in the future.

As part of a 1996 Kennedy-Kassebaum health care bill, Congress made it a crime to transfer assets for purposes of achieving Medicaid eligibility. Congress repealed the law as part of the 1997 Balanced Budget bill, but replaced it with a statute that made it a crime to advise or counsel someone for a fee regarding transferring assets for purposes of obtaining Medicaid. This meant that although transferring assets was again legal, explaining the law to clients could have been a criminal act.

In 1998, Attorney General Janet Reno determined that the law was unconstitutional because it violated the First Amendment protection of free speech, and she told Congress that the Justice Department would not enforce the law. Around the same time, a U.S. District Court judge in New York said that the law could not be enforced for the same reason. Accordingly, the law remains on the books, but it will not be enforced. Since it is possible that these rulings may change, you should contact your financial advisor before filing a Medicaid application. This will enable the advisor to consult with you about the current status of the law and to avoid criminal liability for the advisor or anyone else involved in your case.

# The Medicaid Transfer Penalty

The second major rule of Medicaid eligibility is the penalty for transferring assets. Congress does not want you to move into a nursing home on Monday, give all your money to your children (or whomever) on Tuesday, and qualify for Medicaid on Wednesday. So it has imposed a penalty on people who transfer assets without receiving fair value in return. **Under the *Deficit Reduction Act of 2005 (DRA)*, any assets transferred after February 8, 2006 are subject to new stricter rules.**

This penalty is a period of time during which the person transferring the assets will be ineligible for Medicaid. Under DRA, the penalty period is determined by dividing the amount transferred by what Medicaid determines to be the average monthly private pay cost of a nursing home in Alabama. That number is currently \$5,800 (2017). The period of ineligibility will commence on the later to occur of (1) the first day of the month in which the transfer is made or (2) the date on which an individual is eligible for Medicaid benefits and would otherwise be receiving institutional level of care based on an approved application for such care but for the imposition of a penalty period. Under the "old" pre-DRA rules the penalty would begin to run the month following the date of the transfer. **However, in most cases, the penalty period doesn't begin until an individual is in the nursing home and is otherwise eligible for Medicaid (meaning has less than \$2,000 in countable assets).**

Example: If a Medicaid applicant made gifts totaling \$98,600 in Alabama where the average nursing home bill is \$5,800 a month, he or she would be ineligible for Medicaid for 17 months ( $\$98,600 \div \$5,800 = 17$ ). Another way to look at the above example is that for every \$5,800 transferred, an applicant would be ineligible for Medicaid nursing home benefits for one month. In theory, there is no limit on the number of months a person can be ineligible. Example: The period of ineligibility for the transfer of property worth \$580,000 would be 100 months ( $\$580,000 \div \$5,800 = 100$ ). **Remember, the penalty period won't start until the applicant is out of money!!! The results can be devastating.**

However, the state Medicaid agency can look only at transfers made during the 60 months preceding an application for Medicaid. This is called the "look-back period." **This means that people who make large transfers must be careful not to apply for Medicaid before the 60-month look-back period passes.**

Example: To use the above example of the \$580,000 transfer, if the individual made the transfer on March 1, 2012, and waited until April 1, 2017, to apply for Medicaid — 61 months later — the transfer would not affect his or her Medicaid eligibility. However, if the individual applied for benefits in February 2017, only 59 months after transferring the property, he or she would have to wait the full 100 months **after the penalty starts** before becoming eligible for benefits.

**With proper legal advice and careful planning, the penalties can be minimized and a large portion of your assets can be protected, even if you or your loved one is already in a nursing home.**

# Exceptions to the Transfer Penalty

Transferring assets to certain recipients will not trigger a period of Medicaid ineligibility. These exempt recipients include:

1. A spouse (or a transfer to anyone else as long as it is for the spouse's benefit);
2. A blind or disabled child;
3. A trust for the benefit of a blind or disabled child;
4. A trust for the sole benefit of a disabled individual under age 65 (even if the trust is for the benefit of the Medicaid applicant, under certain circumstances).

In addition, special exceptions apply to the transfer of a home. The Medicaid applicant may freely transfer his or her home to the following individuals without incurring a transfer penalty:

1. The applicant's spouse;
2. A child who is under age 21 or who is blind or disabled;
3. Into a trust for the sole benefit of a disabled individual under age 65 (even if the trust is for the benefit of the Medicaid applicant, under certain circumstances);
4. A sibling who has lived in the home during the year preceding the applicant's institutionalization and who already holds an equity interest in the home; or
5. A "caretaker child," who is defined as a child of the applicant who lived in the house for at least two years prior to the applicant's institutionalization and who during that period provided care that allowed the applicant to avoid a nursing home stay.

Congress has created a very important escape hatch from the transfer penalty: the penalty will be "cured" if the transferred asset is returned in its entirety, or it will be reduced if the transferred asset is partially returned.

## Estate Recovery

Under Medicaid law, following the death of the Medicaid recipient a state must attempt to recover from his or her estate whatever benefits it paid for the recipient's care. However, no recovery can take place until the death of the recipient's spouse, or as long as there is a child of the deceased who is under 21 or who is blind or disabled.

While states must attempt to recover funds from the Medicaid recipient's probate estate, meaning property that is held in the beneficiary's name only, they have the option of seeking recovery against property in which the recipient had an interest but which passes outside of probate. This includes jointly held assets, assets in a living trust, or life estates. Given the rules for Medicaid eligibility, the only probate property of substantial value that a Medicaid recipient is likely to own at death is his or her home.

In addition to the right to recover from the estate of the Medicaid beneficiary, state Medicaid agencies may place a lien on real estate owned by a Medicaid beneficiary during his or her life unless certain dependent relatives are living in the property. If the property is sold while the Medicaid beneficiary is living, not only will he or she cease to be eligible for Medicaid due to the cash she would net from the sale, but she would have to satisfy the lien by paying back the state for its coverage of her care to date. The exceptions to this rule are cases where a spouse, a

disabled or blind child, a child under age 21, or a sibling with an equity interest in the house is living there.

Whether or not a lien is placed on the house, the lien's purpose should only be for recovery of Medicaid expenses if the house is sold during the beneficiary's life. The lien should be removed upon the beneficiary's death.

## **The Top Eight Medicaid Mistakes**

### **1. Thinking it's too late to plan.**

It's almost never too late to take planning steps, even after a senior has moved to a nursing home.

### **2. Giving away assets too early.**

First, it's your money (or your house, or both). Make sure you take care of yourself first. Don't put your security at risk by putting it in the hands of your children. Precipitous transfers can cause difficult tax and Medicaid problems as well.

### **3. Ignoring important safe harbors created by Congress.**

Certain transfers are allowable without jeopardizing Medicaid eligibility. These include: transfers to disabled children, caretaker children, certain siblings and into trust for anyone who is disabled and under age 65; a transfer to a "pay-back" trust if under age 65; and a transfer to a pooled disability trust at any age.

### **4. Failing to take advantage of protections for the spouse of a nursing home resident.**

These protections include the purchase of additional exempt assets, petitioning for an increased community spouse resource allowance, and in some instances petitioning for an increased income allowance.

### **5. Applying for Medicaid too early.**

This can result in a longer ineligibility period in some instances.

### **6. Applying for Medicaid too late.**

This can mean the loss of many months of eligibility.

### **7. Not getting expert help.**

This is a complicated field that most people deal with only once in their lives. Tens of thousands of dollars are at stake. It's penny wise and pound foolish not to consult with people who make their living guiding clients through the process.

## **8. Confusion about the difference between lifetime liens on property and estate recovery.**

There are a number of exceptions to lifetime liens on property, but for estate recovery there is only a deferral for a surviving spouse and a hardship waiver.