A GUARDIAN’S DUTY TO PURSUE BENEFITS: MEDICAID PLANNING IN GUARDIANSHIP

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Overview

• Guardian’s Duties
• 5-Year Lookback
• Trusts
• Planning with Ward’s Children
• Planning with Ward’s Spouse
• Annuities
• Prepaid Funeral and Burial
• Medicaid Liens
Guardian’s Duties


(a) ....the guardian of the estate....shall manage the estate frugally and shall apply the income and principal of the estate so far as necessary for the comfort and suitable support and education of the ward, his minor and adult dependent children, and persons related by blood or marriage who are dependent upon or entitled to support from him, or for any other purpose which the court deems to be for the best interest of the ward....

(a-5) A guardian shall be required to investigate and pursue a ward’s eligibility for governmental benefits.
5-Year Lookback
5-Year Lookback Overview

• Department reviews previous 60 months of asset and transaction info ("Lookback Period")

• Any transactions or transfers of assets deemed “transferred for less than fair market value” will be subject to a penalty period

• Review of all asset info for lookback period prior to applying for Medicaid is crucial
5-Year Lookback Overview

• Review of prior 5 years can reveal potential gifts or non-exempt transfers of assets and allow a Guardian to plan accordingly to avoid penalty or delayed benefits
5-Year Lookback Overview

• Guardianship Planning

  • Depending on circumstances, Guardian could consider using an annuity or promissory note to help address a penalty period for prior gifts or non-exempt transfers

  • If a ward was financially exploited, a Guardian could take steps, including filing a police report and pursuing citations, to show a diligent and good faith effort to recover the funds and support a possible hardship argument to avoid ineligibility for benefits due to no fault of applicant’s
Trusts
Trusts


(a-5) .... Actions or applications of funds may include, but shall not be limited to, the following:

.... (6) creating for the benefit of the ward or others, revocable or irrevocable trusts of his or her property that may extend beyond his or her disability or life
Special Needs Trust

- Enabled pursuant to Federal Statute in 1993:
  - 42 U.S.C. § 1396p(d)(4)(A)
  - 42 U.S.C. § 1396p(d)(4)(C)

- Illinois Trust Code 760 ILCS 3/509
- 89 Ill. Admin. Code § 120.347 – Treatment of Trusts and Annuities
- 89 Ill. Admin. Code § 120.388(m)(2)(A)(iii) – transfers to special needs trusts shall not result in a penalty period
- Department of Human Services’ Policy Manual 07-02-16
Special Needs Trust

For people who are disabled as defined by the Social Security Act under 42 U.S.C. § 1382c(a)(3)(A).

A person who is adjudicated disabled by the guardianship court likely meets this standard, but capacities can vary.
(d)(4)(A) Special Needs Trust

• The trust contains the assets of an individual.
• The individual is under age 65.
• The individual is “disabled” as defined in 42 U.S.C. §1382c(a)(3).
• The trust is established for the benefit of such individual by the individual, a parent, a grandparent, a legal guardian, or a court.
• The trust contains language stating that the state will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under the state plan of medical assistance.

42 U.S.C. § 1396p(d)(4)(A)
(d)(4)(C) Special Needs Trust

- The trust must be established and managed by a nonprofit association.

- A separate account needs to be maintained for each beneficiary of the trust, but the trust pools these accounts for purposes of investment and management of funds.

- Accounts in the trust are established by the parent, grandparent, or legal guardian of such individuals; by such individuals; or by a court solely for the benefit of beneficiaries who are “disabled” as defined in 42 U.S.C. §1382c(a)(3).

- To the extent that amounts remaining in the beneficiary’s account upon the death of the beneficiary are not retained by the trust, the trust pays to the state from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the state plan of medical assistance.

42 U.S.C. § 1396p(d)(4)(C)
(d)(4)(C) Special Needs Trust

305 ILCS 5/3-1.2.

...After a person reaches age 65, any funding by or on behalf of the person to the trust shall be treated as a transfer of assets for less than fair market value unless the person is a ward of a county public guardian or the State Guardian...and a court has found that the expenditures from the trust will maintain or enhance the person’s quality of life.
Special Needs Trust – Funding Sources

• **Personal Injury Proceeds**

State Lien Satisfaction pursuant to 89 Ill. Admin. Code § 120.347(d)

• **Nursing Home Care Act Personal Injury Suits**

210 ILCS 45/3-605.

The amount of damages recovered by a resident in an action brought under Sections 3-601 through 3-607 shall be exempt for purposes of determining initial or continuing eligibility for medical assistance under "The Illinois Public Aid Code", as now or hereafter amended, and shall neither be taken into consideration nor required to be applied toward the payment or partial payment of the cost of medical care or services available under "The Illinois Public Aid Code".

• **Inheritance**

• **Preserving Existing Assets**
Special Needs Trust – Guardianship Procedure

- Appropriateness of Special Needs Trust for Ward
- Testamentary Capacity Evaluation
- Petition
- Notice
  - Ward
  - Governmental Agencies
  - Interested Parties
  - Named Beneficiaries
  - Disinherited Heirs or Legatees
- Ongoing Administration
Special Needs Trust – Irrevocable Assignments

A legally assignable payment that is assigned to a trust or trustee is income for SSI purposes, to the individual entitled or eligible to receive the payment, unless the assigned is irrevocable. We consider assignment of payment by court orders to be irrevocable.
Medicaid Planning with Ward’s Children
Caregiver Child Transfers

Exempt Resources – 89 Ill. Admin. Code § 120.381

Homestead Property

• Any property in which person (and spouse, if applicable) has ownership interest and is principal place of residence
Caregiver Child Transfers

- Homestead Property becomes Countable Resource

- If person moves out of home without intent to return, home is no longer exempt, unless:
  
  - Spouse resides there
  
  - Dependent relative resides there
Caregiver Child Transfers

- *Subject to federal approval*, homestead property transferred to trust is NOT exempt UNLESS Department determines person’s spouse, minor child, or disabled child resides in the property.

- Does this mean if an applicant has property in a trust with no spouse, minor child, or disabled child in the property and moves to a nursing WITH an intent to return home that the house is a countable asset?
- What if applicant is still living in the home but it is held in trust?
Caregiver Child Transfers

A transfer of assets occurs when an institutionalized person or an institutionalized person's spouse buys, sells or gives away real or personal property or changes (e.g., a change from joint tenancy to tenancy in common) the way property is held. 89 Ill. Admin. Code 120.388(e)

Examples (not exhaustive):
- Changing ownership to life estate interest
- Any action that reduces or eliminates a person’s ownership or control of property
Caregiver Child Transfers

• Penalty Period – 89 Ill. Admin. Code 120.388(h)

• If a person transfers assets for less than fair market value, the person is subject to a period of ineligibility for long term care services. . . . If otherwise eligible, persons subject to a penalty remain eligible for all covered medical services except long term care services.

• Penalty Calculation – 89 Ill. Admin. Code 120.388(j)

• Determined based on the uncompensated value of transfers.
• Total uncompensated value of assets transferred divided by the average monthly cost of long-term care services at the private rate at facility where applicant resides at the time of application.
• The result is the penalty period in number of months, days and portion of a day (e.g., $65,000/$4000 = 16.25 = 16 months and 7.5 days).
Caregiver Child Transfers

• Fair Market Value Determination
  • Value of asset sold at prevailing price at time of transfer

• Department is to determine whether asset was transferred for FMV
  • Any portion not transferred for FMV will be subject to penalty period

• Transfers for “love an affection” are not transfers for FMV
  • This includes transfers to friends or relatives for payment for past care
  • Department presumes care by friends or relatives are gratuitous without expectation of payment
    • Can be rebutted by credible documentary evidence that preexists the care or services
      • Receipts, Logs, Care Contract, etc.
Caregiver Child Transfers

• Exceptions to the Penalty Period – *89 Ill. Admin. Code 120.388(m)*

• Transfer of Homestead Property to Caregiver Child
  • *89 Ill. Admin. Code 120.388(m)(1)(E)*
Caregiver Child Transfers

- Applicant not subject to penalty period if homestead property is transferred to:

  - the person's son or daughter provided care and resided in homestead property for the two years immediately prior to the date the person became institutionalized provided credible tangible evidence is presented that:
    - shows person was in need of care that would have otherwise required an institutional level of care; and
    - shows the son or daughter resided with the person for two years immediately prior to the person's institutionalization; and
    - shows the son or daughter provided care to the person that prevented institutionalization.
Caregiver Child Transfers

• Evidence the applicant was in need of care that would have otherwise required institutional level care (not exclusive):

  • Physician’s statement

  • Evaluation conducted by medical professional showing institutional level of care

  • Diagnosis of Alzheimer’s or other dementia-related illness (prima facie evidence)
Caregiver Child Transfers

• Evidence that son or daughter resided in homestead for 2 years prior to institutionalization (not exclusive):
  
  • Tax returns

  • Driver’s license

  • Cancelled checks

  • Other documentation showing residence in home for at least 2 years prior to institutionalization
Caregiver Child Transfers

• Evidence that son or daughter provided care to person that prevented institutionalization (not exclusive):
  
  • Sworn affidavit

  • Statement signed by son or daughter
Caregiver Child Transfers

• Guardianship Planning
  • Transferring otherwise countable non-homestead property to a caregiver child is a great tool for practitioners to use to help a person with disabilities qualify for Medicaid benefits
  • Exempt transfer with no threat of penalty period
  • Reduces expenses in guardianship estate by removing real property
  • Avoids future concerns for applicant with possible Medicaid Lien on property or risk of being over-resourced if property is considered countable
Transfers to Disabled Child

• Exceptions to the Penalty Period – 89 Ill. Admin. Code 120.388(m)

  • Transfer to Disabled Child
    • 89 Ill. Admin. Code 120.388(m)(2)(A)(ii)-(iii)
Transfers to Disabled Child

• Applicant not subject to penalty period if transfer is to:

  • the person's child or to a trust established solely for the benefit of the person's child or to another person for the sole benefit of the institutionalized person's child.

• To qualify, the child must be determined blind or determined disabled (as currently defined by the Social Security Administration – 20 CFR 416, Subpart I, April 1, 1984)
  • If a person is receiving SSI or primary SS benefits, Department accepts SSA’s determination of disability
Transfers to Disabled Child

• “Sole benefit”

• No person or entity except the specified beneficiary can benefit from the property transferred

• Transfer instrument or document provides for the spending of the funds for the benefit of the person on a basis that is actuarially sound, based on the life expectancy of the person involved (as determined under current actuarial tables published by SSA)
  • Not applicable to payback trusts
Transfers to Disabled Child

• Applicant not subject to penalty period if transfer is to:

  • A trust (including 1st Party OBRA Payback Trusts and Pooled Trusts) established solely for the benefit of a person who is determined disabled
Transfers to Disabled Child

• Guardianship Planning

  • Transferring otherwise countable assets to a disabled child is a great tool for practitioners to use to help a person with disabilities qualify for Medicaid benefits.

  • Exempt transfer with no threat of penalty period

  • Spends down countable assets for expedited qualification for benefits

  • Preserves assets for the benefit of Applicant’s disabled child rather than spending down all assets on long-term care expenses without being able to provide for disabled child.
Medicaid Planning with Ward’s Spouse
Spousal Impoverishment Preventions

At the time of application, all nonexempt resources held by either the institutionalized person, the community spouse, or both shall be considered available to the institutionalized spouse.

See 89 Ill. Admin. Code § 120.379(c)(4)

The term “community spouse” means the husband or wife of an NH resident, of an SLF resident or of a customer applying for or receiving DoA HCBS waiver services. A spouse who lives in an SLF or NH is not considered a community spouse....

See PM 15-04-04-a.
Allowable Transfers to Spouse

89 Ill. Admin. Code § 120.388(m).

(1)(A) A person shall not be subject to a penalty period under this Section to the extent that homestead property was transferred to the person’s spouse.

(2)(A) A person shall not be subject to a penalty period under this Section to the extent that the transfer by the institutionalized person was to the person’s spouse or to another person for the sole benefit of the person’s spouse.

See also 42 U.S.C. § 1396p(c)(2)(a); PM 07-02-20(b)
Spousal Impoverishment - Assets

305 ILCS 5/5-4.

...Subject to federal approval, the community spouse resource allowance shall be established and maintained at the higher of $109,560 or the minimum level permitted pursuant to Section 1924(f)(2) of the Social Security Act, as now or hereafter amended, or an amount set after a fair hearing, whichever is greater....


• Up to $109,560 in countable assets

• Exempt (non-countable assets): homestead, one vehicle for each spouse, certain life insurance, funeral/burial

See also 89 Ill. Admin. Code § 120.379(d)
Asset Transfers


The LTC spouse is not required to transfer his or her resources up to the CSRA to the community spouse but, if he or she chooses, is allowed to do so until the first redetermination after one year following the month of application.

If the LTC spouse has not transferred the resources to the community spouse, the resources are considered available to the LTC spouse.
Asset Allowance Increases


...The amount allowed as the CSRA may exceed the resource allowance standard of $109,560 only in the following situations:

• a court order establishes a different resource allowance; or

• an appeal decision determines that the transfer of income-producing resources in excess of the standard CSRA is needed to raise the community spouse's income to the maximum amount permitted as the Community Spouse Maintenance Needs Allowance (CSMNA) (see PM 15-04-04-a).
Asset Allowance Increases


If either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse’s income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f)(2), an amount adequate to provide such a minimum monthly maintenance needs allowance.

(emphasis added)
Asset Allowance Increases

• Income is insufficient to raise the community spouse’s income to $2,739, then substitute CSRA is allowed, but limited to the amount of resources necessary to generate income to raise total income to $2,739.

• Determining income: cost to purchase an actuarially sound single premium life annuity producing monthly payments that will raise community spouse’s total income to $2,739.

• Requesting party must provide annuity quote from reputable company but does not have to purchase the annuity. Monthly income amount the annuity would pay is considered available to the community spouse.

See 89 Ill. Admin. Code § 120.379(f)(3) and PM 07-02-22

Allow a deduction from income to meet a community spouse’s needs when the community spouse does not have enough income to meet his or her own needs.

....Beginning 7/1/12, the CSMNA is the maintenance needs standard of $2,739 minus the community spouse’s gross income.

• Only to the extent income of the institutionalized spouse is made available to the community spouse. See 42 U.S.C. § 1396r-5(d)(1)

• Community spouse income is separate from the income of the institutionalized spouse. See 42 U.S.C. § 1396r(b)(1) – “name on the check rule”
Income Allowance Increases


If a court has entered an order against an institutionalized spouse for monthly income for the support of the community spouse, the community spouse monthly income allowance for the spouse shall be not less than the amount of the monthly income so ordered.

See also 305 ILCS 5/5-4, 89 Ill. Adm. Code § 120.379(e)(1), PM 15-04-04-(a)
Income Allowance Increases


If either such spouse establishes that the community spouse needs income, above the level otherwise provided by the minimum monthly maintenance needs allowance, due to exceptional circumstances resulting in significant financial duress, there shall be substituted, for the minimum monthly maintenance needs allowance in subsection (d)(2)(A), an amount adequate to provide such additional income as is necessary.

(emphasis added)
Income Allowance Increases

Significant financial duress – community spouse expenses in excess of the income standard, including:

- Recurring or extraordinary medical expenses not covered by third party
- Amounts necessary to preserve, maintain or make major repairs to homestead property; or
- Amounts necessary to preserve an income producing resource

See 89 Ill. Adm. Code § 120.379(f)(2)
Asset and Income Transfers - Procedure

- Appropriateness of Request
- Petition
- Notice
  - Ward
  - Governmental Agencies
  - Interested Parties
  - Named Beneficiaries
- Transfer of Assets
- Final Accounting
Annuities
Treatment of Annuities, Generally

• Non-Medicaid Annuities are treated similarly to trusts. See 89 Ill. Admin. Code 120.347(i)

• Revocable and assignable annuities are considered available resources.

• Irrevocable and non-assignable annuities should NOT be considered available resources, if policy cannot be surrendered or paid out.

• However, if the State of Illinois is not named as remainder beneficiary, then eligibility for long term care services will be terminated or denied.

• Irrevocable and non-assignable annuities that are already annuitized and paying out will be treated as income
Treatment of Annuities, Generally

• Guardianship Planning
  • Analyze Ward’s assets and determine if any assets can be converted into annuities to generate more income for the Ward (to pay for long term care costs) or to increase a community spouse’s income.

  • $2,739.00 as a Minimum Monthly Maintenance Needs Allowance (MMMNA)

• If Ward has an annuity that has been annuitized and is irrevocable or non-assignable, look to add State of Illinois as remainder beneficiary through court order to avoid denial or ineligibility for long term care services.
Medicaid Annuities

• Any transfer of assets for less than FMV during 5 years preceding application will result in a penalty period of ineligibility for benefits.

• In order to plan for this, an applicant may choose to purchase a Medicaid-Compliant Annuity to help cover the penalty period imposed (Amount of Non-Exempt Transfer ÷ Private Pay Rate = Penalty Period)

• A Medicaid Annuity can be purchased to help supplement income to cover the private pay during the penalty period.
Medicaid Annuities

Certain types of annuities are exempt. Characteristics include:

• The annuity must be irrevocable;
• The annuity must be in immediate payout status and cannot be cashed out for a lump-sum payment;
• The annuity must have the State of Illinois listed as the primary beneficiary (after a spouse, if applicable);
• All payments must be capable of being made over the lifetime of the beneficiary based on certain life expectancy tables utilized by the State of Illinois; and
• All payments must be of equal size.
Medicaid Annuities

• Guardianship Planning

• Helps with prior gifts or planning to make gift/trust to qualify.

• Can convert countable assets into an income stream to increase Community Spouse minimum monthly maintenance needs allowance.

• Since an annuity is not considered an asset but is treated as a stream of income, it can be helpful in offsetting a penalty period.
Prepaid Funeral / Burials
Prepaid Funerals/Burials

• 89 Ill. Admin. Code 120.381(b)

• Burial spaces that are intended for the use of the person, his or her spouse, or any other member of his or her immediate family are exempt. Immediate family is defined as a person's minor and adult children, including adopted children and stepchildren, a person's brothers, sisters, parents and adoptive parents, and the spouses of these individuals.
Prepaid Funerals/Burials

• 89 Ill. Admin. Code 120.381(c)

• Funds that are set aside for the burial expenses of a person and his or her spouse in a bank account owned by the person that is clearly identified as a burial fund is exempt up to $1500.
Prepaid Funerals/Burials

• 89 Ill. Admin. Code 120.381(d)

• Prepaid Funeral/Burial Contracts. Prepaid funeral/burial contracts are exempt to the following extent:

  • Funds in a revocable prepaid funeral/burial contract are exempt up to $1500, except that any portion of a contract that clearly represents the purchase of burial space is exempt regardless of value.
Prepaid Funerals/Burials

• 89 Ill. Admin. Code 120.381(d) Cont’d

• Funds in an irrevocable prepaid funeral/burial contract are exempt up to $7,248 (2022), except that any portion of a contract that clearly represents the purchase of burial space is exempt regardless of value.

• Adjusted annually for inflation

• Exempt amount limited to price of the funeral goods and services to be provided upon death

• Contract must provide complete description of funeral goods and services to be provided and the price of those goods and services

• Any amount in the contract not so specified shall be treated as a transfer of assets for less than fair market value
Prepaid Funerals/Burials

• 89 Ill. Admin. Code 120.381(d) Cont’d
  • Prepaid, guaranteed price funeral/burial contract, funded by an irrevocable assignment of a person's life insurance policy to a trust, is exempt.

  • Amount exempted limited to amount of the insurance benefit designated for cost of funeral goods and services to be provided upon person's death.

  • Contract must provide complete description of funeral goods and services with prices. Any amount in contract not specified treated as transfer of assets for less than fair market value.

  • Trust must include a statement that, “upon the death of the person, the State will receive all amounts remaining in the trust, including any remaining payable proceeds under the insurance policy up to an amount equal to the total medical assistance paid on behalf of the person.”
Prepaid Funerals/Burials

• Guardianship Planning

  • After apply/receive Medicaid benefits, only spend down on medical expenses
  • Should ensure prepaid funeral/burial arranged and paid for prior to application
  • Some SNTs do not allow funeral expenses to be paid after beneficiary’s death
  • Exempt Asset and good way to spend down assets
  • Helps avoid large bill for family after death
Medicaid Liens
Medicaid Liens

• Department can lien real property owned by a Medicaid recipient for reimbursement of medical assistance paid during recipient’s life.
Medicaid Liens

• How to Avoid Medicaid Liens:

  • List Real Estate for Sale at or above FMV (exempt)
  • Sell Real Estate (exempt, but will require planning post-sale for any proceeds)
  • Transfer to Applicant’s Spouse (exempt)
  • Transfer to Applicant’s child under age 21 (exempt)
  • Transfer to Applicant’s child who is blind or has a disability (per SSA) (exempt)
  • Transfer to Applicant’s brother or sister who has equity interest and was living in home for at least 1 year prior to institutionalization (exempt)
  • Transfer to caregiver child (exempt)
Medicaid Liens

• How to Avoid Medicaid Liens:

  • Transfer Property to Irrevocable Medicaid Asset Protection Trust (MAPT) (non-exempt)

  • Transfer/Gift Property out of Medicaid Recipient’s Name (non-exempt)

  • Both of these options will require further planning due to imposition of a penalty period if done within 5-year lookback or should be done more than 5 years prior to application for Medicaid benefits
Medicaid Liens

• Guardianship Planning:
  • Analyze Ward’s Property, including any ownership in real estate
  • Determine if able to make any exempt transfers of property
  • Determine if property should be sold and prepare for post-sale planning
  • Determine if 5-year planning is possible
Thank You!

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