Medicaid Planning Basics

Molly M. Wood, Attorney, Stevens & Brand, L.L.P

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Molly M. Wood
MWood@StevensBrand.com
(785) 843-0811

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MEDICAID ELIGIBILITY AND DIVISION OF ASSETS:
REVIEW OF THE BASICS

It is a cliché to refer to the Medicaid eligibility rules as "byzantine," but it's true. When representing clients who are seeking assistance with the cost of long-term care, the first obstacle the elder law practitioner encounters is the law's layers of sources including federal law,[1] regulation[2] and policy,[3] state law,[4] regulation[5] and policy,[6] and both federal and state case law.[7]

I. MEDICAID AND LONG-TERM CARE

Medicaid is a welfare program, that is, a Medicaid applicant must demonstrate that he or she does not retain more than $2,000 in "non-exempt resources," among other things, to establish eligibility.[8]

A. Eligibility

A brief review of the eligibility rules: Applications for medical assistance with the cost of nursing facility care are submitted to the KanCare Clearinghouse. Applicants for long-term care assistance must meet a four-part eligibility test.

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[1] *See* 42 U.S.C. §§ 1396p and 1396r-5; 38 U.S.C. §1501 *et seq*.

[2] 20 C.F.R. §§ 416 *et seq*.; 39 C.F.R. 3.1 *et seq.*

[3] Social Security's Program Operations Manual System (POMS) can be found at: https://secure.ssa.gov/apps10/poms.nsf/aboutpoms.

[4] *See* K.S.A. 39-709.

[5] K.A.R 129-6-34 *et seq.*

[6] The latest version of KDHE's operating policy, the Kansas Economic and Employment Services Manual – KEESM – can be found at: https://khap2.kdhe.state.ks.us/KEESM/Apr_2022_Output/2022_Final.htm

[7] See, for example, *Miller v. SRS,* 275 Kan. 349, 64 P.3d 395 (2003); *Brewer v. Schalansky,* 278 Kan. 734, 102 P.3d 1145 (2004); *White v. Kansas Health Policy Authority*, 198 P.3d 172 (2008); *Brown ex rel. Brown v. Day*, 555 F.3d 882 (10th Cir. 2009); *Hutson v. Mosier,* 401 P.3d 673 (Kan. App. 2017); *Baker v. Brown,* 479 F.Supp.3d 1182 (W.D. Okla. 2020).

[8] KEESM 5130.

1. Medical Need

Nursing home care, whether skilled, intermediate, or custodial, must be the appropriate level of care for the medical assistance applicant. In Kansas, anyone seeking nursing facility care must be assessed to determine whether he or she needs a nursing home level of care – a CARE assessment, and the method for doing that is through the Kansas Department of Aging and Disability Services (KDADS).

<u>*Long Digression*</u> . . . A nursing home resident obviously meets the "nursing home level of care" that is documented by a CARE assessment, but all potential nursing home residents must be assessed, even those who are paying privately for their care so as to develop individualized information on long-term care options and appropriate placements in long-term care facilities.[9]

So even though the Medical Need test question – Do you meet a nursing home level of care? – seems as though it should be straightforward, here are a couple of problems:

- There are lots of folks who are living at home who would, if assessed, meet a nursing home level of care, but are not in nursing homes because they have family members – mostly spouses, but also adult children and others – or paid helpers, who are providing enough care to keep them at home. So their functional limitations are not documented.

- If you are married, how do you trigger the snapshot that sets the protected resource amount for the Community Spouse under Division of Assets when you meet a nursing home level of care but do not want to be institutionalized? Contact the local Area Agency on Aging and ask them to complete a "functional assessment" on the client for purposes of documenting if they meet the medical criteria. They will document the need on Form ES-3160. The month this form is completed showing that the client meets the medical criteria and chooses to receive Home and Community Based Services (HCBS) is the month used to determine the Community Spouse Resource Allowance under a Division of Assets.[10]

2. The Income Test

Kansas does not have a specific income limitation for eligibility. Rather, if the Medicaid applicant's countable income is less than the applicant's cost of care at the nursing facility, the applicant meets the income test.[11]

Once a Medicaid applicant becomes eligible for nursing facility assistance, most of his income will be used to meet his patient liability (a/k/a "client obligation"), and he will retain only $62 for his personal use.[12] For a single person without dependent minor children, therefore, all of the Medicaid recipient's income would normally be applied to nursing home expenses except the amount he pays in premiums for health insurance –

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[9] *See* K.S.A. 39-931a & 39-968; K.A.R. 26-9-1 & 120-1-2.

[10] KEESM §8244.1.

[11] KEESM §8172.2.

[12] KEESM §8160(2).

Medicare supplemental insurance and, sometimes, dental[13] – for himself and his $62/month personal needs allowance. Only a Medicaid recipient with qualified dependents—spouse and minor children or adult disabled child—could divert income to those dependents' support and shelter and pay less toward the cost of his care.[14]

Short Digression . . . *Muir v. Kansas Health Policy Authority*, 334 P.3d 876 (Kan.App., Sept. 5, 2014). Medicaid recipient not permitted to deduct court-ordered child support and maintenance payments from available income.

3. The Resource Test

A Medicaid recipient cannot retain over $2,000[15] in available,[16] non-exempt resources. Except for the special Medicaid rules permitting division of assets (married applicants), the resource rules are drawn from the law and regulations governing eligibility for Supplemental Security Income (SSI) which deal with the availability and exempt status of resources.[17] Practitioners can also rely upon the large body of case law in this area for guidance.[18]

a. **Exempt** resources include:

- A home and contiguous acreage valued at less than $636,000.[19] At least for the first 6 months of institutionalization, an applicant is entitled to exempt the home even if there is no real expectation that he or she will be able to return home.[20]

- A car of any value.[21]

- Household goods, tools, personal effects, family keepsakes, memorabilia.[22] Guns?

- Life insurance with a face value of $1,500 (regardless of built-up cash value) or less, and unlimited term insurance.[23]

- Contract Sales. A contract from the sale of real or personal property is exempt if the property is sold at fair market value, is actuarially sound, the proceeds are attributable as income, and the income is commercially reasonable.[24]

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[13] But not Part D prescription drug coverage, because a Medicaid recipient is eligible for "zero premium" coverage of Part D, unless you opt to pay for coverage and the premium is over the benchmark.

[14] KEESM §8144.2 (institutional LTC).

[15] KEESM §5130.

[16] KEESM §5200(3).

[17] 20 C.F.R. §§416 *et seq*.

[18] For a comprehensive treatment of Medicaid and SSI cases, law, and regulations, see Dayton, Garber, Mead, and Wood, ADVISING THE ELDERLY CLIENT (Thompson/West 2022).

[19] KEESM §5331.1; the cap on the homestead exemption is not applicable when a spouse or dependent or disabled child resides there. §5331.1(1)(a), (b), and (c).

[20] KEESM §5331.3.

[21] KEESM §5520.

[22] KEESM § 5430(12), (14), & (21).

[23] KEESM § 5430(17).

- Annuities, IF they are irrevocable, actuarially sound, have no cash value, and Kansas Estate Recovery is named as the primary contingent beneficiary (or the secondary contingent beneficiary, if the annuitant is married) if the Medicaid recipient dies before the annuity payments terminate.[25]

- Burial plans.[26] The recipient can have a revocable burial fund set aside up to $1,500 **or** an irrevocable plan up to $7,000, not including the burial plot or mausoleum, headstone or grave marker, or casket.[27]

- Real property, equipment or materials used in an income-producing trade or business.[28]

b. All other resources are non-exempt, including, but not limited to:

- Cash, stocks, CDs, mutual funds, savings bonds, etc.

- Fair market value of real estate other than the home and contiguous acreage.

- Cash value of life insurance policies of which the applicant or the applicant's spouse is the owner (except if the total face value per person does not exceed $1,500).[29]

- Resources available to the applicant as the beneficiary of a grantor trust created *after* August 10, 1993, assets of a Medicaid applicant conveyed to a trust (other than by Will) for the benefit of the individual or the individual's spouse are considered available, regardless of the purposes of the trust, if the trust is revocable, or, if irrevocable, the trustee has <u>any</u> discretion with respect to distributions of principal or income.[30] Transfers to irrevocable trusts in which all or part of the corpus is unavailable to the applicant will bring into play the transfer penalty provisions.[31]

- Trust property – When owned by a trust, real property is countable, regardless of other potential exemptions.[32] NOTE: To be considered exempt, therefore, the home cannot be owned by the applicant's trust.

B. <u>Division of Assets (a/k/a Spousal Impoverishment)</u>

Division of assets modifies the resource test (<$2,000 of non-exempt resources) in the context of a well spouse (a/k/a "community" spouse) remaining in the community.[33]

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24 KEESM § 5430(7).

25 KEESM § 5630 *et seq.;* Section 6012 of the Deficit Reduction Act of 2005.

26 KEESM § 5430(2).

27 KEESM § 5430(2) & (3).

28 KEESM § 5332 & KEESM § 5430(15); 42 U.S.C. §1382b.

29 KEESM 5430(15)(b).

30 K.S.A. 39-709(e)(3).

31 KEESM § 5434.1; 42 U.S.C. § 1396p(d).

32 KEESM 5340 Nonexempt Real Property – [. . .] Trust Property - When placed in a trust, real property is considered.

1. The community spouse retains all the exempt property. She may wish to transfer all the retained property into her sole ownership for ease of management or estate planning purposes.

PRACTICE TIP: The work-related pension funds of the community spouse—Keogh plans, IRAs, 401(k)s, etc.—are not countable against the community spouse's resource allowance.[34]

2. When the Medicaid applicant is otherwise eligible, typically at the time of institutionalization, all the non-exempt resources of the married couple are pooled, regardless of ownership and regardless of pre- or -post-nuptial agreements—the so-called "snapshot" of the marriage partnership's total non-exempt resources—and a portion is set aside for the community spouse. The community spouse retains a minimum of $**27,480** (2022), and a maximum of $**137,400** (2022);[35] therefore, if the total non-exempt resources of the couple are greater than $54,960 (2 x $27,480) and less than $274,800 (2 x $137,400), the community spouse retains one-half of the couple's non-exempt resources. This amount is designated the "community spouse resource allowance."

3. After the institutionalized spouse has spent his share down to the protected $2,000 amount, he has met the resource test. (Actually, it would be more precise to say that once the combined non-exempt resources of the marriage partnership are reduced below the community spouse resource allowance as determined through the Division of Assets process, plus $2,000, the applicant has met the resource test.)

Proper spenddown techniques include:

- purchase of prepaid exempt burial plans for both marital partners;
- pay off or reduce the principal on any loans, including a mortgage;
- any and all improvements and repairs to the exempt home;
- any and all improvements to exempt income-producing property;
- upgrade of exempt family car;
- payment of medical and other expenses for both marital partners;
- payments to care providers under an appropriate personal services contract.[36]
- purchase of a "Medicaid compliant annuity"

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[33] KanCare's general operating procedure with respect to Division of Assets is found at KEESM §§8140 & 8240 *et seq.*

[34] KEESM § 5430(20)(c)(iii); but see *Houghton ex rel. Houghton v. Reinertson*, 382 F.3d 1162 (10th Cir. 2004).

[35] KEESM § 8144.1(1). Amounts in bold are for 2022 and increase annually with cost of living adjustments. See also Form ES-3162.

[36] *See* K.S.A. 39-709(e) (4).

4. The community spouse of a Medicaid recipient is also potentially eligible for a spousal income allowance, sort of a "division of income," in which her income can be supplemented up to **$2,177.50** (as of July 2021)[37] (known as the Minimum Monthly Maintenance Needs Allowance, or "MMMNA") from the income of the institutionalized spouse after the Medicaid applicant has become eligible. Community spouses who pay rent, have mortgage payments, or high costs of property taxes and homeowners insurance premiums, can become eligible for an additional amount—an "excess shelter allowance"—of up to $1,257.50 per month. The maximum Community Spouse Income Allowance as of July 2021 is $3,435.[38]

PRACTICE TIP: Pre-eligibility transfers between spouses are exempt from the transfer penalty provisions.[39] Therefore:

- *Generally*, the home should be transferred to the community spouse.

- Significant income-producing property should ordinarily be transferred to the community spouse so that all the income is attributable to him/her and not countable as part of the Medicaid eligible spouse's income for client obligation calculation purposes.

- Purchase of an actuarially sound, irrevocable, annuity which pays equal payments (no balloon) to the Community Spouse -- a Medicaid compliant annuity – is an opportunity to transfer "spenddown" excess resources by converting a non-exempt asset into a stream of income attributable to the Community Spouse.

C. Transfers

Transfers for less than adequate consideration – gifts – may incur eligibility penalties if the transfers took place within 5 years of application for Medicaid assistance. The penalty is calculated by taking the total amount of the gift and dividing that amount by $221.96 (April 2022)[40] which produces the number of penalty days. The Medicaid applicant who is *otherwise eligible* is not eligible for Medicaid during a penalty period, which gets him or her in hot water with the nursing home.

1. KDHE defines transfers that may incur a penalty to include:

• Purchase of an annuity or insurance plan to make the resource value unavailable except as income, *unless* it is "Medicaid compliant."[41]

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[37] KEESM §8144.2(1)(a); see also Form ES-3163.
[38] KEESM §8144.2(1)(b); see also Form ES-3163.
[39] KEESM §5721(8).
[40] KEESM § 5724.4. The penalty divisor is adjusted quarterly to reflect the average daily cost of nursing facility care in Kansas.
[41] KEESM § 5720. KEESM 6220.2 explicitly defines annuities as "countable unearned income." KEESM 5630 describes an annuity as "a contract or device which conveys a right to receive a

• Disclaimer of an inheritance[42] or failure to exercise spousal election[43] which diminishes the applicant's resources;

PITFALL: If the community spouse dies first, the institutionalized spouse has a right to an elective share, right? So don't be in a hurry to permit the survivor to be disinherited.

• A triggering event which makes a revocable trust irrevocable; and

• Addition of other owner in joint tenancy or as remainderman to real property.[44]

PRACTICE TIP: One can "cure" a problematic transfer at any time by restoring the transferred asset to the applicant.[45]

2. Exempt transfers include:

• Transfers beyond the lookback period;[46]

• Transfers of the institutionalized person's home to the spouse, a child under age 21 or an adult child who is blind or disabled, a sibling with an equity interest in the home and who was residing in the home for one year immediately before institutionalization, or an adult child who has resided in the home for two years before institutionalization and who provided care permitting the applicant to stay at home;[47]

• Transfers at or near fair market value;[48]

• Transfers pre-approved by KDHE;[49] and

• Transfers of assets to the spouse or conservator or relative, if the assets are used solely to support the community spouse.[50]

• Transfer to a 42 U.S.C. 1396p(d)(4)(C) pooled supplemental needs trust.

CASE LAW NOTE: Funding of a d(4)(C) Trust by Medicaid Applicant >64-years-old

Hutson v. Mosier, Kansas Ct. of Appeals, 54 Kan.App.2d 679 (2017)

Transfers into the ARCare Trust II and other pooled supplemental needs trusts are clearly exempt from transfer penalty IF the Medicaid application is under age 65, but the statutory analysis for disabled applicants age 65 and older is not clear. Ms. Huston

fixed, periodic source of income for a specified period of time." *See, also,* Section 6012 of the Deficit Reduction Act of 2005.

42 KEESM § 5722(3).

43 KEESM § 2124.1(4).

44 KEESM § 5720.

45 42 U.S.C §1396p(2)(C); KEESM § 5721(10).

46 KEESM § 5721(1).

47 KEESM §5721(2)(a-d).

48 KEESM §5721(9).

49 KEESM §5721(6).

50 KEESM §5721(8).

transferred approximately $60,000 into a pooled supplemental needs trust prior to applying for Medicaid. The Court held that persons over 64 who transfer assets to a pooled supplemental needs trust under 42 U.S.C. 1396(d)(4)(C) are subject to the transfer penalty IF the transfer is for less than fair market value. However, the court also found that the determination of fair market value of property- whether real or personal- is generally a question of fact. The case was remanded to the Office of Administrative Hearings to rule on whether fair market value for the transfer was received, however the plaintiff died before the hearing on remand.

PRACTICE TIP: Pre-eligibility transfers between spouses do not incur transfer penalties.[51] This exception creates some planning opportunities. Depending upon the relative health of the spouses, it is usually a good idea to convey ownership of the home or other exempt property to the community spouse. The community spouse can, after the institutionalized spouse becomes eligible for assistance, liquidate the house and use the proceeds as she chooses, because under the federal law[52] there is no post-eligibility assessment of the assets of the community spouse.

3. Suggestions for addressing a transfer penalty:

- Promissory note – convert the gift into a loan and set up a payment schedule that the donee can manage. NOTE: Be on the lookout for issues arising from "self-dealing" if the donee is the attorney-in-fact.
- Cure the gift, that is, the donee either returns the gift voluntarily or pays the long-term care expenses until the penalty period expires.

4. Medicaid Divorce -- Is divorce ever an option?

a. Do Medicaid liens change anything? Spouse's estate is subject to estate recovery, therefore, divorce cuts off claim or lien.

b. Consider a divorce when:
   - Enforceable Prenuptial Agreement which produces a more desirable outcome than Division of Assets methodology.
   - Inherited property which has not been co-mingled.
   - Other assets to protect, for example the family farm.
   - Large disparity in ages or health (or both) of spouses.

PRACTICE TIP: Proceed with caution.

- Medicaid may take a close look at a divorce that looks like it was for the purpose of achieving Medicaid eligibility.
- Be careful about a property settlement agreement – recitation that agreement was "fair, just, and equitable." Is it really?
- Consider an equitable division of the assets.

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51 KEESM §5721(2)(a) & (8).

52 42 U.S.C. §1396r-5.

II. ESTATE RECOVERY

Since 1993, the federal government mandated estate recovery against, at least, the probate estate of the Medicaid recipient, and Kansas has had an estate recovery program since 1992. Kansas's estate recovery program was generally limited to the probate estate and Transfer/Pay on Death designations, but the Kansas legislature expanded the definition of estate for medical assistance recovery purposes and imposed a pre-death lien provision in 2004,[53] and added a post-death lien provision in 2013.[54]

A. The State has a **claim** for the amount of medical assistance provided against <u>any property owned by the Medicaid recipient or her spouse at or immediately prior to the death of the survivor</u>. The 2004 Kansas legislature clarified estate recovery's reach in amendments to K.S.A. 39-709(g)(3) by instituting a new definition of the "all real and personal property and other assets in which the deceased individual had any legal title or interest immediately before or at the time of death to the extent of that interest or title. The medical assistance estate includes, without limitation, assets conveyed to a survivor, heir or assign of the deceased recipient through joint tenancy, tenancy in common, survivorship, transfer-on-death deed, payable-on-death contract, life estate, trust, annuities or similar arrangement." In cases involving a decedent's estate, the claim will be a first class claim against the estate of the deceased person. Payments of reasonable funeral expenses are the only allowable claim superior to a medical assistance claim.

1. The claim may not be collected while the deceased Medicaid recipient has a surviving spouse, but the claim may be asserted against the survivor's estate.

2. An adult disabled or minor dependent child can defer the estate recovery claim, too.

3. Credit against estate recovery claim for every dollar paid by long-term care insurance.

B. Since 2004, the state has been authorized to file and enforce a **pre-death lien** against the real property of a living recipient of medical assistance—usually the home, but it could include the acreage contiguous to the home — when the property is not occupied by a spouse or other qualified dependent.[55] Although the lien may only be enforced upon competent medical testimony that the Medicaid recipient cannot reasonably be expected to return home, once the fair market value of the real property is consumed by the lien, HMS may force the sale of the real property to satisfy the lien. (The lien "will be dissolved" if the nursing facility resident gets well enough to return home, however.) If the medical assistance recipient has a spouse, a minor child, an adult disabled child, or a sibling who's

[53] K.S.A. 39-709(g)(2); KEESM 1725 *et seq*.

[54] K.S.A. 39-709(g)(3).

[55] K.S.A. 39-709(g)(4-7).

resided in the home for at least one continuous year, HMS cannot enforce the lien.[56]

PRACTICE TIP: It is generally advisable to transfer the home and other exempt property to the sole ownership of record of the community spouse, if possible. This transfer does not incur a penalty but, of course, does not cut off the institutional spouse's inchoate claim on the real property or an estate recovery claim at the death of the survivor.

C. **Post-death lien**. K.S.A. 39-709(g) (4) (substitute for HB 2183 – expansion of estate recovery) became effective on July 1, 2013:

- Requires KDHE to notify estate recovery (HMS) within 60 days of becoming aware of death of a Medicaid recipient; and
- Permits state to "place a lien on any interest in real property owned by" a Medicaid recipient after death within one year. NOTE: One-year exposure to lien provision exceeds non-claim period for creditors.

[56] These exemptions parallel the protected transferees in federal regulation and state operating procedure.