

Starting Soon:



# **Paying for Long Term Care and the Impact of New York's New Medicaid Rules**

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- We are sharing our webcam; please note your lines are muted
- Interactive Program: please have your mouse ready
- Type questions in the Q&A pod on the bottom of your screen
- Presentation is posted at this web page  
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# Paying for Long Term Care and the Impact of New York's New Medicaid Rules

January 21, 2021

## Our Speakers:

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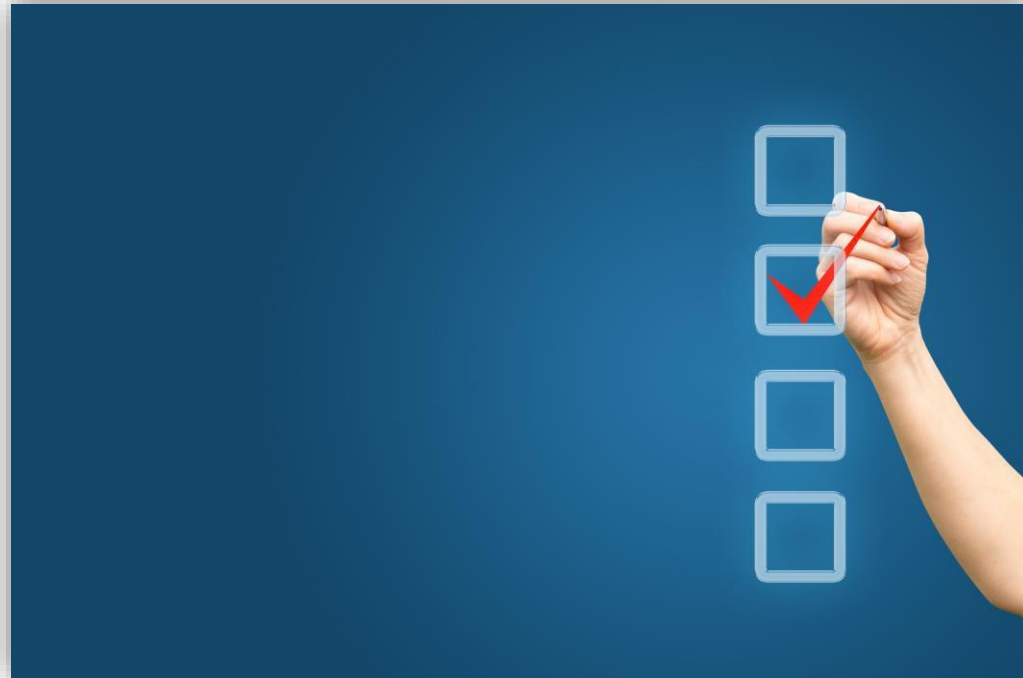
Michael Gadomski

# Agenda

- Changes to NYS Medicaid rules
- What the changes mean to you or a loved one
- The issue of “unknowns” and what is being done to clarify the rules
- Steps you can take now if you need Medicaid Home Care or want to plan ahead
- Steps to take once the new rules take effect



# A Brief Poll



# KEY QUESTIONS ON PAYING FOR LTC

1. **Where** would you want to live?
2. **Who** would take care of you?
3. **How** would you pay for it?

Medicaid

Private LTC  
Insurance  
+ Life  
Products

Self-  
Insuring

# MEDICAID BASICS – FINANCIAL ELIGIBILITY



## Medicaid LTC Services are Divided into Two Categories:

### Chronic Care

- Care provided in nursing home
- 5-year lookback
- Transfer penalties
- “Rule of Halves” planning

### Community

- *Home health care*
- Assisted living facility
- Medicaid managed long-term care
- Adult day care
- No lookback under current rules



**Changes Effective 10/1/20 – 4/1/21**



# NEW 2021 MEDICAID ELIGIBILITY NUMBERS



## Monthly Income

Individual (at home)	\$884 (+\$20) <sup>1</sup>
Couple (both at home)	\$1,300 (+\$20) <sup>1</sup>
Minimum Monthly Maintenance Needs Allowance (MMMNA) <sup>2</sup>	\$3,259.50

## Resources

Individual	\$15,900
Couple (both at home)	\$23,400
Comm. Spouse Resource Allowance	\$74,820 (or the spousal share of 1/2 combined resources up to a maximum of \$130,380)

*1 - The first \$20 of monthly income per household will not be counted when determining the eligibility of those Medicaid applicants who are aged, blind, or disabled. Income includes monies coming in each month such as Social Security, pension, rent payments, and disability payments*

*2 – If Community Spouse makes less than \$3,259.50 of their own income, they will receive a portion of their spouse's to reach \$3,259.50*

# THE MEDICAID PENALTY



## The Penalty is a Number of Months of Ineligibility



- **Example: Transfers of \$140,268  
(in Northeast NY Region)  
 $\$140,268 / \$11,689 = 12$  months  
without Medicaid**
- **Application before 4/1/2021**
  - **NO PENALTY FOR HOME CARE**
- **Application on or after 4/1/2021**
  - **12-month penalty**
- **Penalty begins to run when the applicant is “otherwise eligible” to receive services were it not for the penalty period, and actually applies.**

# 2021 NYS MEDICAID REGIONAL RATES



Region	Counties	2021	2020	2019
New York City	Bronx, Kings (Brooklyn), NY (Manhattan), Queens, Richmond (Staten Island)	<b>\$13,037</b>	\$12,844	\$12,419
Long Island	Nassau, Suffolk	<b>\$13,834</b>	\$13,407	\$13,407
Northern Metropolitan	Dutchess, Orange, Putnam, Rockland, Sullivan, Ulster, Westchester	<b>\$13,206</b>	\$12,805	\$12,636
Western (Buffalo)	Alleghany, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Orleans, Wyoming	<b>\$11,054</b>	\$10,720	\$10,556
Northeastern (Albany)	Albany, Clinton, Columbia, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Montgomery, Otsego, Rensselaer, Saratoga, Schenectady, Schoharie, Warren, Washington	<b>\$11,689</b>	\$11,295	\$11,280
Rochester	Chemung, Livingston, Monroe, Ontario, Schuyler, Seneca, Steuben, Wayne, Yates	<b>\$13,020</b>	\$12,460	\$12,342
Central (Syracuse/Utica)	Broome, Cayuga, Chenango, Cortland, Herkimer, Jefferson, Lewis, Madison, Oneida, Onondaga, Oswego, St. Lawrence, Tioga, Tompkins	<b>\$10,857</b>	\$10,451	\$10,068

# WHEN DO THE HOME CARE CHANGES TAKE EFFECT?



- The law imposes a “Medicaid lookback” for transfers after October 1, 2020 for Community Medicaid.
- However, the Director of the Budget may, in consultation with the Commissioner of Health, delay the effective date of the enforcement of the penalty period for a period of time not to exceed ninety days.
- According to DOH – Full implementation of the new law will commence 4/1/21

October 2020						
S	M	T	W	T	F	S
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

**Thursday, Oct 1st 2020**

# YOUR TREATING PHYSICIAN CAN'T HELP



- Personal care and CDPAP services must be prescribed by a qualified **independent physician** selected or approved by DOH.
- Physicians familiar with patients and specialized to treat them are **ineligible**.
- This requirement will add even more delays to applying for services as the consumer will need to arrange an assessment by this independent physician (with no medical history) in order to apply.

# NEW ASSESSMENT TOOL



- DOH will replace the function now performed by local districts, MLTC plans and mainstream Medicaid managed care plans with a **new “Independent Assessor,” likely Maximus**, charged with determining how much Personal Care and CDPAP to be authorized.
- This new independent assessor will apply the more rigid standards using the assessment tool that the State will develop by April 1.



# 3 ADL REQUIREMENT AFTER APRIL 1, 2021



## **Applicants for personal care or CDPAP:**

- Will require “Limited assistance with physical maneuvering with **more than two” ADL’s (3+ ADLs)** or
- Persons with dementia or Alzheimer’s diagnosis must need “**at least supervision with more than one ADL**” (2+ADLs)
- People already receiving personal care, housekeeping or CDPAP services as of 4/1/21 are “**grandfathered in**”

Citation: HLT-28-20-00019-P

# 3 ADL REQUIREMENTS – WHICH ADLS?



Will DOH use the ADLs scored on the Uniform Assessment System nurse assessment (UAS):

1. Bathing
2. Personal Hygiene
3. Dressing (upper body/lower body)
4. Walking/locomotion
5. Transfer to toilet
6. Toilet use/incontinence care
7. Bed mobility - Turn & Position
8. Eating

Or add these additional “Level II” personal care tasks listed in 18 NYCRR 505.14(a)?

1. Administration of Medications
2. Preparation of meals with modified diets
3. Providing routine skin care
4. Changing of simple dressings



# OTHER CONCERNS



- New requirement requires consideration of “whether an individual is capable of safely remaining in the community”
- “Safety” is raised to potentially limit high hour users - 24x7 - requiring institutionalization
- For Personal Care services DOH can adopt “standards” – the Medicaid Redesign Team (MRT) recommended 12+ hours/day would trigger assessment

# OTHER CONCERNS CONT.



MLTC Lock-In Rules started as of December 1, 2020

- New Medicaid recipients allowed to change MLTC plans within 90 days of enrollment.
- If transfer to new plan doesn't occur within first 90 days following enrollment,  
plan cannot be changed for 9 months (meaning total enrollment = 1 year)

Are there exceptions?

# OTHER CONCERNS CONT.



## Good Cause Exceptions:

- Plan closed
- Enrollee is moving outside of service area
- Plan failed to furnish accessible and appropriate medical care, services and/or supplies
- Current provider doesn't have a contract with enrollee's plan
- Plan and enrollee agree transfer is appropriate
- NYS determines the plan has failed to meet its contractual obligation with the State and that such failure directly impacts plan enrollees.



After completion of lock-in period, can freely transfer, but then subject to new grace period and lock-in.

## OTHER CONCERNS CONT.



MLTC plans can involuntarily disenroll for reasons specified in their contract, including:

- Failure to pay spend-down
- Hospitalization for greater than 45 days
- Enrollee was absent from the service area for more than 30 consecutive days

# WILL THE NEW RULES AFFECT EXISTING CASES?



- Applications filed:
  - Prior to October 1, 2020 will be processed under existing rules
  - From October 1 to March 31, 2021 will be processed under existing rules (according to DOH)
  - On or after April 1, 2021 will be processed under the new rules

# ISSUE: WILL THE LOOKBACK BE RETROACTIVE?



- **NO, Transfers made on or after October 1, 2020 are subject to the new lookback period, but penalties from the new lookback period will not be enforced until 4/1/21.**
  - Example of Phase In
    - 6-month lookback for applications in April 2021
    - 7-month lookback for applications in May 2021
  - *Question – Will existing Medicaid Beneficiaries be Grandfathered, or re-examined on Recertification?*

# ISSUE: WHEN IS THE START DATE TRIGGERED?



- **Pending Legislation: S. 8337 (Rivera)/ A. 10489 (Gottfried)**
  - The bill defines the “start date” of the transfer penalty to take into consideration the practical differences between the community and nursing home setting.
  - Without this clarification, the statute will incentivize nursing home care, potentially violating *Olmstead* and the ADA.

## **According to DOH - will follow the pending legislation**

- Bill S. 8337 – Passed NYS Senate on 7/22/20 and was delivered to NYS Assembly
- Bill A. 10489 – Currently In Committee within NYS Assembly

**No other official written guidance given to date**

# WHICH MEDICAID TRANSFER EXEMPTIONS STILL APPLY?



Transfers to the following individuals/trusts are **EXEMPT**:

1. Spouse
2. Disabled or blind child, or a trust for the benefit of such child
3. A trust established solely for the benefit of an individual under sixty-five years of age who is disabled



# REMEDIES THAT WILL BE AVAILABLE AS TO THE ASSET TRANSFER PENALTY



Transfer penalties may not apply if a satisfactory showing is made that...

- the individual or the individual's spouse intended to dispose of the assets either at fair market value, or for other valuable consideration; or
- the assets were transferred exclusively for a purpose other than to qualify for medical assistance; or
- all assets transferred for less than fair market value have been returned to the individual

...if the burden of proof is met, then the transfer is exempt.

# ISSUE: ARE TRANSFERS TO A POOLED TRUST EXEMPT?



- **Income**
  - DOH “Informal” Position
    - Transfers by an individual age 65 or older who is disabled to a Pooled Income Trust will be subject to a penalty
    - Unless there is a satisfactory showing that the funds will be utilized for the benefit of the Beneficiary (for full fair market value)
  - Ongoing Advocacy
    - NYSBA Elder Law and Special Needs Section
    - NAELA NY Chapter
    - Pooled Trust Coalition
- **Assets**
  - Historically, per the NYS Medicaid Reference Guide (pg. 360), there is no exception to the transfer rules for transfers of assets to pooled trusts created for the benefit of persons 65 years of age or older.

# INCOME OVER \$904/MO.



- Under current law, a Medicaid recipient's excess income can be contributed to a Pooled Trust to avoid the Medicaid Spend-down
- NEW INCOME ALLOWANCE – 2021 - \$904 for Single, \$1,300 for couple
- Pooled trust can pay any expense incurred by Medicaid recipient—rent, mortgage, food, technology, etc.



# WHAT STEPS CAN YOU TAKE NOW TO ACCESS COMMUNITY MEDICAID?

# UNTIL 4/1/21, EXISTING RULES APPLY



- If a Community Medicaid Application **IS FILED PRIOR** 4/1/21, existing rules apply, meaning there is no lookback for homecare and no penalty or waiting periods.
- Applicant must have assets below \$15,900.00 and income less than \$904.00 per month
  - **Assets**
    - Use Medicaid Asset Protection Trust (MAPT)
    - Spend Down on Legitimate Expenses
      - Home repairs
      - Automobile
      - Prepaid Burial
    - Transfer assets to Community/Non-Applying Spouse
  - **Income**
    - Use Pooled Income Trust for excess monthly income, or shift income to Community Spouse if their income is below MMMNA of \$3,259.50

## EXAMPLE- MEET EVELYN ANDERSON

- ◇ Income \$2,370/ Month
- ◇ Assets
  - ◇ IRA \$75,000
  - ◇ Savings & Checking \$25,000
  - ◇ Home \$250,000
  - ◇ \$100K in Stock



## MEDICAID HOME CARE EXAMPLE

**Query: When can Evelyn  
be eligible for Medicaid  
Home Care if we start  
planning today?**

## MEDICAID HOME CARE EXAMPLE

**Answer:**

- ◇ February 1, 2021
- ◇ How is that Possible?



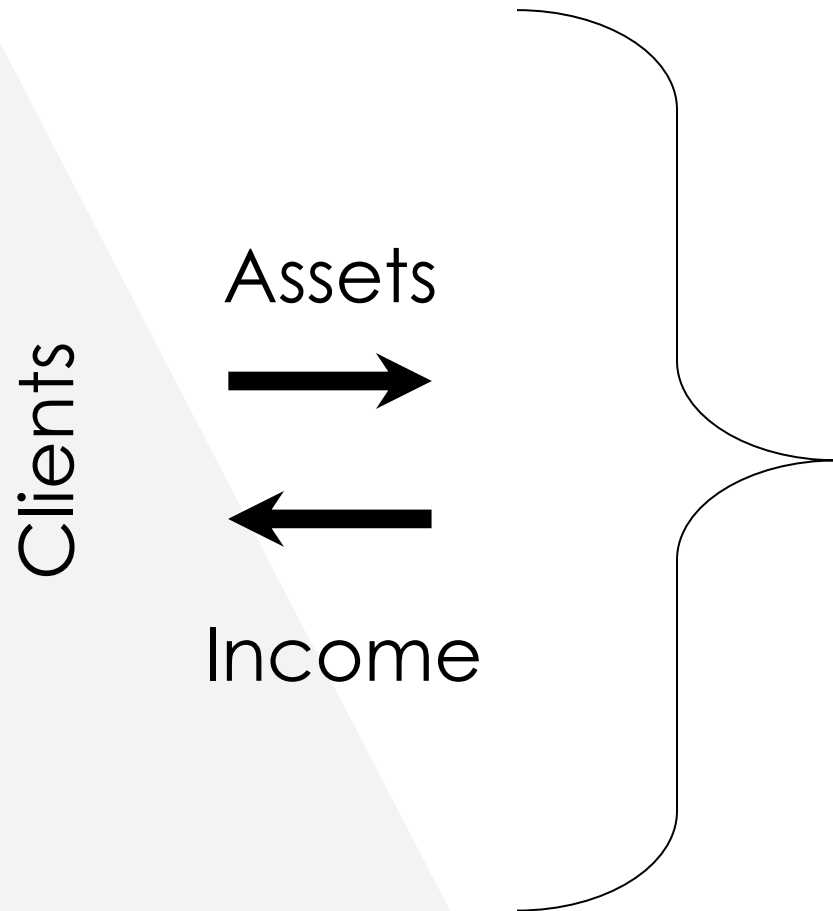
## MEDICAID HOME CARE EXAMPLE

- ◇ Step 1 – Evelyn creates and funds a Medicaid Asset Protection Trust with her home, stock and \$11,000
- ◇ Step 2 – Evelyn creates a Pooled Trust and assigns \$1,466 of income per month

## MEDICAID HOME CARE EXAMPLE

- ◇ Step 3 – Evelyn applies for Medicaid –  
What counts?
  - ◇ Assets = \$15,900
  - ◇ Income = \$904
- ◇ Medicaid Trust and Pooled Trust funded- income and asset protected
- ◇ No Waiting Period!

# MEDICAID ASSET PROTECTION TRUST (MAPT)



- Trustee – manages trust assets
- Beneficiaries
  - Client – income for life and right to use real property
  - Heirs = Remaindermen - inherit when trust ends

# MAPT

- ▶ Home
- ▶ Bank Accounts
- ▶ Stocks & Bonds
- ▶ Annuities
- ▶ Life Insurance
- ▶ Business
- ▶ Real Estate

## Medicaid Asset Protection Trust

- Income is yours if you want it
- Principal can NOT be given back to you directly, but
- Principal can be given to children or other beneficiaries

# MAPT

## KEEP OUT

Cash

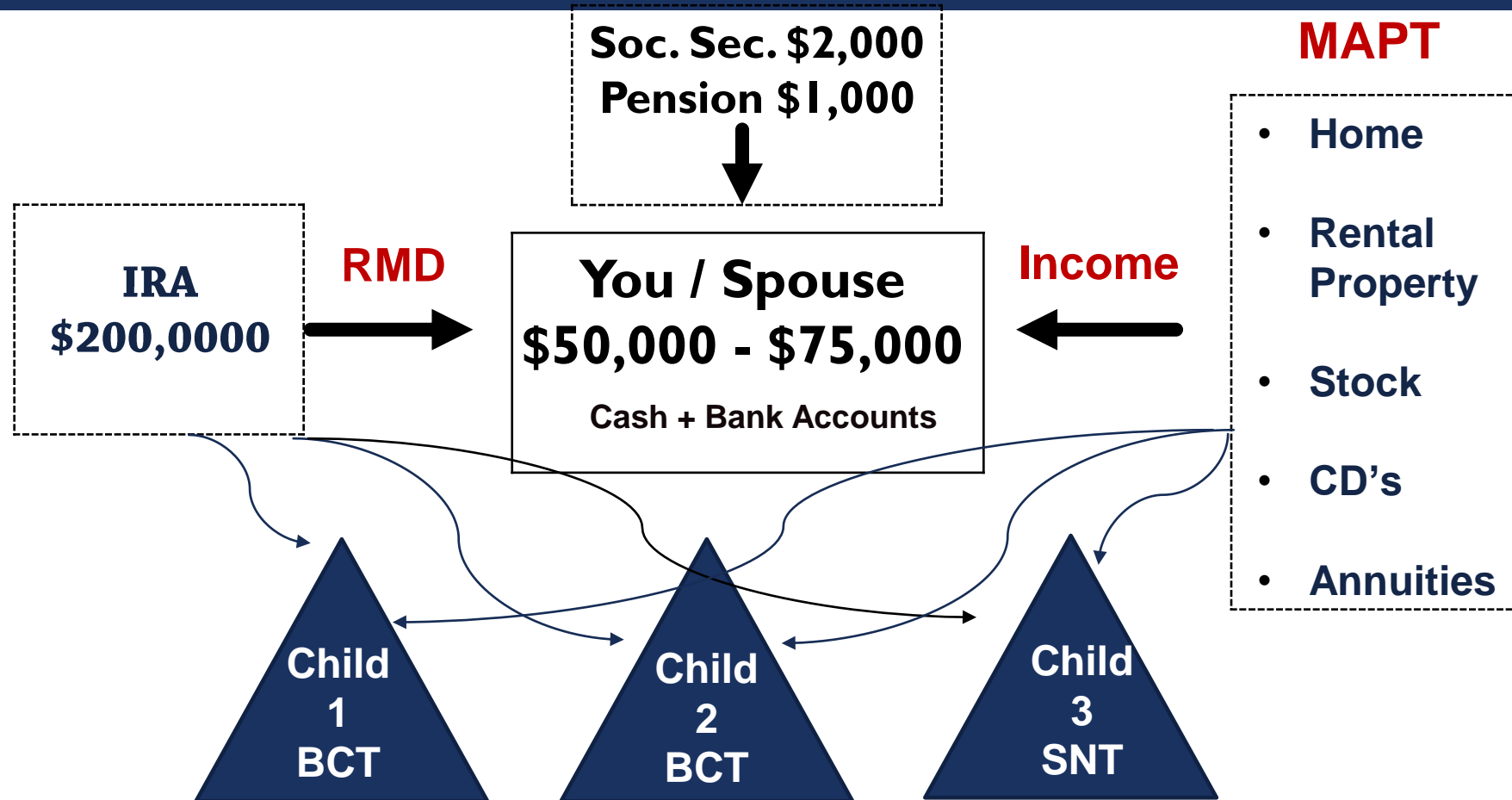
Bank Acct.

IRA, 401(k)

## Security Features

- ❖ Choose initial Trustee, and change at any time
- ❖ Choose initial beneficiaries, and change at any time
- ❖ With the consent of all beneficiaries, in some jurisdictions the trust can be “amended or revoked”

# ASSET PROTECTION PLAN – LIMITED TIME ONLY?



# WHAT IF EVELYN NEEDED CARE EVEN FASTER??



## Fast Track Medicaid Application if Immediate Need for Personal Care or CDPAP (Can't Wait Out 4+ Month MLTC Process)

- 2015 Law requires new procedures to process a Medicaid application in **SEVEN DAYS** for any applicant with an immediate need for personal care (PCS) or consumer-directed personal assistance (CDPAP) services & to approve PCS/CDAP in 12 days.
- Question – How will the new transfer penalties and lookback affect the Immediate Needs application?

# HOW LONG WILL THE LOCAL AGENCY HAVE TO MAKE AN ELIGIBILITY DETERMINATION?



- The new lookback will likely cause long delays in processing by local agencies
- Medicaid agencies must respond with approvals in:
  - (i) 45 days
  - (ii) 90 days if there is a disability determination (Pooled Trust)
- New rules change the process and standards for medical qualification







# WHAT STEPS CAN YOU TAKE AFTER 4/1/21 TO ACCESS COMMUNITY MEDICAID?

# PLANNING FOR HOME CARE VARIABLES



What if you or a family member needs care after 4/1/21 and no planning as been done?

**Plan A**      Gift/Promissory Note Strategy with a Side Fund

**Plan B**      Gift of 100% of Excess Resources Outright  
(Gift-Back)

**Plan C**      Self-Pay for 30 months; transfer the balance

**Plan D**      Spousal Refusal

# PLAN A – GIFT/PROMISSORY NOTE STRATEGY WITH A SIDE FUND



- Utilize a Gift/Promissory Note strategy where roughly half of applicant's assets are saved from Medicaid
  - Example – Applicant has \$249,680 of non-exempt assets,
    - \$15,900 remains with Medicaid applicant
    - \$116,890 – gifted to Applicant's Family/used as side fund to help pay for Applicant's expenses
    - \$116,890 – used to pay for homecare
- Applicant's retained exempt assets (house, resources allowance \$15,900.00, etc.) place into a **revocable living trust**
- Penalty = 10 months ( $\$116,890 \div \$11,689$ )
- Monthly note payment sets the baseline for 10 months - \$11,689
- **Side fund used to gift back** – direct gift to children of some assets, establish a bank account used to pay Applicant's unanticipated home care expenses

# PLAN B – GIFT OF 100% OF EXCESS RESOURCES OUTRIGHT



- Applicants remaining retained assets (residence, resource allowance \$15,900.00, etc.) placed into a Revocable Living Trust
- Medicaid applicant transfers all or portion of the gift amount to a child or children
- The children of their own volition (not a pre-arranged transaction) **enter into a “Children’s Trust” or a Family Agreement** as to the control and distribution of the Side Fund for the parent
- Children gift back from the Children’s Trust to pay for services
- Each gift back reduces the penalty accordingly, resulting in Medicaid eligibility when the penalty expires (similar to using the note)

## PLAN C – SELF-PAY FOR 30 MONTHS + GIFT



- For individuals with significant assets
- Client retains sufficient assets to private pay for 30 months
- All other “excess resources” transferred into an Irrevocable MAPT Trust (this is Plan A without the Promissory Note and the Side Fund)
- If possible, consider planning in advance with an LTC Policy that would pay for 30 months

## PLAN D – SPOUSAL REFUSAL WITH POST ELIGIBILITY TRANSFERS TO MAPT BY THE SPOUSE



- All excess resources are transferred to Spouse who files a Spousal Refusal with the MA Application
- Once the ill spouse is approved for Medicaid Home Care, the well spouse transfers excess resources to a MAPT to start their own look back period
- Transfers by the well-spouse after eligibility is established **do not impact the applicant spouse's Medicaid.**

# SPOUSAL REFUSAL



- A spouse who is not applying for Medicaid can **refuse to turn over income or assets to support the spouse** who is, in order to obtain Medicaid eligibility



Proposed elimination in 2020 Budget  
**DID NOT PASS!**



**EVEN IF YOU ARE NOT APPLYING FOR MEDICAID IMMEDIATELY,  
THE TIME TO PLAN IS NOW.**

- Planning to pay privately
- Purchasing insurance to cover long term care
- Planning to access Medicaid in the future.

**GIVEN LOOMING BUDGET DEFICITS, IT WILL ONLY BECOME  
HARDER TO ACCESS BENEFITS.**



## NEXT STEPS?



Every situation is unique and requires an individualized plan

- If you think you can qualify for Medicaid now
  - Get a comprehensive assessment by an independent geriatric care manager (EverHome Care Advisors)
  - Conduct thorough review of your income and resources (LTC questionnaire)
  - Consult with a qualified elder law attorney
  - Asset transfers must be completed by 2/28/2021
  - Medicaid Applications must be filed by 3/30/2021

# NEXT STEPS?

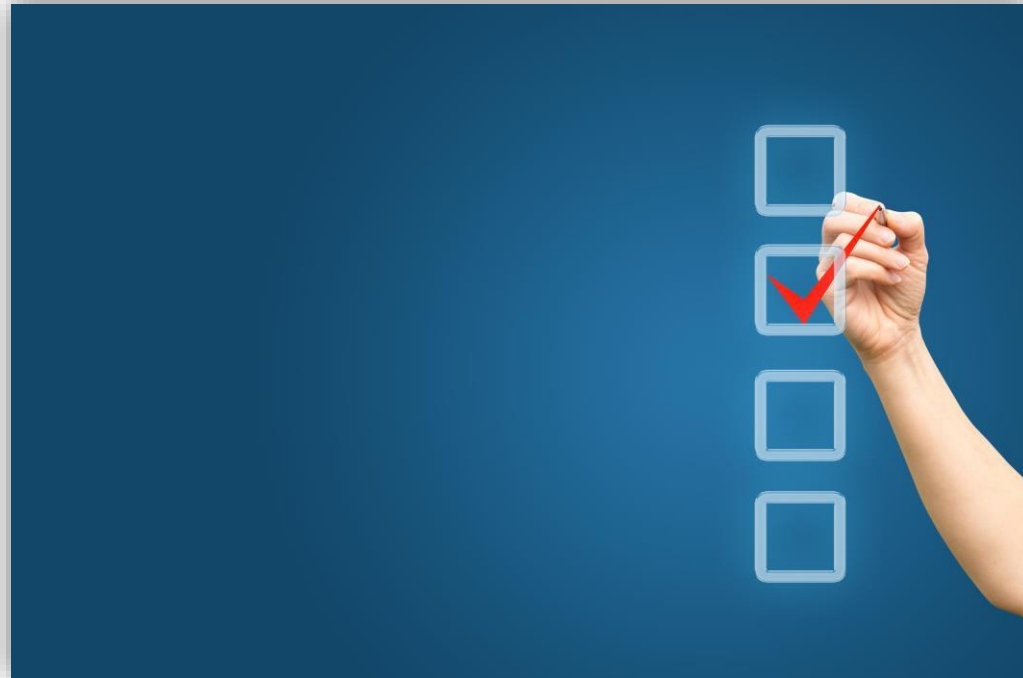


## Every Situation is Unique.



- If you are planning for the future:
  - Begin with a financial and legal analysis (LTC Questionnaire)
  - Consult with a qualified insurance professional
  - Consult with a qualified elder law attorney to explore legal planning to access Medicaid and protect your assets.
  - Purchase insurance and enact trusts as soon as possible

# A Brief Poll





# SCHEDULE YOUR FREE CONSULTATION

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- Email: [info@pierrolaw.com](mailto:info@pierrolaw.com)

## **Capital Region:**

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