FOCUS:
ELDER LAW

"I Don't Qualify for Community Medicaid Because I Have Too Much Income"

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This is a refrain many Elder Law attorneys hear quite frequently from clients. Many clients are aware that Medicaid is a means tested program, but too many do not realize that even if they have income over the monthly maximum amount, which in New York is $904 for Community Medicaid in 2021,[1] you can still qualify for services.

Ostensibly, under the current Community Medicaid program, there are three ways for a disabled individual over age 65 to become eligible for community-based Medicaid services if the client's income exceeds the limit: the Excess Income program, the Pay-In program, and enrolling in a pooled income trust.

Many times, the only fiscally sensible option is to deposit one's surplus income into a pooled income trust each month, which then allows for the funds to be spent on the client's expenses. This article will briefly discuss the first two options and then take a deep dive into pooled trusts discussing what they are, how they work and how to join one.

Excess Income Program

The Excess Income program allows a Community Medicaid recipient to provide paid or unpaid medical bills to their local Department of Social Services that are equal to or greater than the amount of the surplus income for the month.[2] Upon providing the medical bills to Medicaid, Medicaid will then use the bills to reduce the applicant's surplus income, and pay for additional services above and beyond.[3] Each month the Community Medicaid recipient will need to bring in, mail, or fax the medical bills to the local Department of Social Services. The bills can also be provided to Medicaid in increments of six months.

Medical bills including, but not limited to, doctor visits, dental visits, prescription drug costs, medical transportation, deductibles and co-pays for medical insurance, or even chiropractic services can be used towards the excess income amount as long as the balance is owed by the recipient.[4] This program works well for the Community Medicaid recipient whose surplus income amount is relatively low and who has high uncovered medical expenses. A person with high income will likely not benefit greatly from the Excess Income program.

Pay-In Program

Under the Pay-In program, Community Medicaid recipients can pay the surplus income directly to the local Department of Social Services.[5] This is the simplest option available to the Medicaid recipient, but it also is the only option that does not allow the person to make personal use of the surplus funds. One can imagine that living in the community with only the Medicaid monthly allowance of $904, and having to send all of your surplus income to Medicaid is not usually an appetizing prospect.

The Pay-In program can be useful for the client whose surplus income is very low and joining a pooled trust is not an economical option. For example, if a client has a total monthly income of $1,200, a Medicare premium of $148.50 and supplemental insurance premiums of $126 per month, the client's surplus income is calculated to be $21.50 once you subtract the Medicaid income exemption of $904. Joining a pooled trust with such a small surplus income amount would likely cost more than it is worth in time and effort. In addition, turning over medical bills to your local Department of Social Services each month would also be cumbersome and not worth the effort. In this case, just paying the $21.50 to Medicaid each month would likely be the best option.

Pooled Income Trust

A pooled income trust is a special type of supplemental needs trust ("exemption trust") authorized by both federal law[6] and New York state law[7] that allows for disabled Community Medicaid recipients to deposit their surplus income into the exemption trust, which eliminates the surplus income. Under the law, a disabled Community Medicaid recipient can deposit his or her income, on a monthly basis, into a trust managed by a non-profit association. Though the trust will pool the accounts for investment purposes, the funds deposited for each disabled individual should be readily identifiable.[8] This means that each pooled trust beneficiary has his or her own sub-account and access to his or her own monies deposited into that sub-account.

There are a number of different pooled income trusts in New York, each run by different charities. Each of the pooled income trusts have different monthly fees and start-up costs associated with them, so it is beneficial to identify and assess the different pooled trusts available and have knowledge of the costs involved. Some of the pooled trusts also have minimum monthly deposits and minimum balances that must remain in the trust each month. A list of the non-profit associations that offer pooled income trust options, along with the associated fees can be found on the Western New York Law Center website.[9]

Each and every month the Community Medicaid recipient must deposit the amount of the deemed surplus income into the pooled trust. Once the funds are deposited into the pooled trust, the recipient then makes monthly requests for the trustee to pay bills that were incurred by recipient for his or her own benefit.

The goal is for the recipient to spend down the funds deposited into the account each month, as upon the death of the Medicaid recipient, any funds remaining in the pooled trust remain with the charity. Spending down the surplus income each month is especially important in light of the impending Community Medicaid program changes ordered by Governor Cuomo which will implement a new 30-month look-back for community-based long-term care services which were incorporated

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into the 2020 New York State Budget.[10] It is anticipated that when the new rules regarding home care services are finally implemented the transfer of income into the pooled trust for Community Medicaid recipients over the age of 65 will be viewed as a transfer of assets.[11] If the pooled trust pays bills for the recipient's benefit in the month of receipt, those paid bills will offset the amount that was transferred. This means, for example, that if a person deposits $800 into his or her pooled trust in January and in that same month directs the pooled trust to pay bills equal to $800, Medicaid will look at it as if the transfers were compensated transfers and the Medicaid recipient will not be penalized.[12]

Before the new transfer penalty for community-based Medicaid came into being, the mechanics of the pooled income trust were not as crucial so long as the surplus funds were deposited each month. However, if the new rules are implemented as currently written, if the funds are not utilized for the recipient's benefit during the month of deposit into the pooled trust, a transfer penalty can be imposed.[13] Under the current implementation of the rules, the Community Medicaid recipient is able to accumulate income in the pooled trust to be used at a later time for items such as a large upcoming expense, such as property taxes. The only risk would be that if the recipient dies before the funds are used, any remaining funds in the pooled trust account are forfeited. Also, there could be potential issues if the recipient needs to convert his or her Medicaid to nursing home level of care. Advocacy groups are hoping to get the Department of Health to change its position on this, but it has not happened as of yet.[14] The best option at this point is to make sure the client has enough expenses so that his or her surplus income will be used up each month.

Enrolling in a Pooled Trust

Joining a pooled income trust is relatively straight forward. The individual must submit to the trust a completed Beneficiary Profile and Joiner Agreement. Each pooled trust has its own Joinder Agreement that can usually be found on the individual pooled trust's website. When submitting the Joinder Agreement to the pooled trust, the individual will also need to send his or her first month's surplus income deposit in addition to other documentation. At this point, careful attention should be paid to the pooled trust's enrollment fee, making certain that the initial amount deposited is enough to cover the enrollment fee and the monthly maintenance fee. If one month's surplus income does not cover these fees, it will be necessary to make an additional deposit that first month.

An individual should sign up with a pooled trust before the Medicaid application is submitted. Getting a pooled trust approved by Medicaid first can be a long process as disability approval must first be obtained from the Department of Health.[15] Medicaid can be approved and the client can sign up with a Managed Long Term Care plan to start receiving services while the disability approval is still pending. At this point, it will look as if the Medicaid recipient has surplus income, but once the disability and the pooled trust are approved, the recipient will be re-budgeted and the surplus will be zeroed out to the date of the first pooled trust deposit or the date of Medicaid approval (whichever is later). Most Managed Long Term Care plans will approve a client for services pending the pooled trust approval.

When submitting the Community Medicaid application to Medicaid, the client will want to include the approved pooled trust Joinder Agreement; a Disability Questionnaire form (LDSS-1151) completed by the client or the client's representative; and a Medical Report for Determination of Disability (LDSS – 486T) completed by the client's physician.[16] Your local Department of Social Services will send the disability information to the Department of Health to receive disability approval. Once disability is approved, the local Department of Social Services will reach out to obtain verification of deposits into the pooled trust for the months of Medicaid approval and then the pooled trust will be approved. It is very important to remind the Community Medicaid recipient to make the monthly deposits of the surplus income into the pooled trusts. Most of pooled trusts have direct withdrawal options that the Medicaid recipients can take advantage of to ensure that their monthly deposits are being made.

Utilizing a Pooled Trust

As a starting point, it bears noting that the pooled trust cannot distribute funds directly to the Medicaid recipient. The pooled trust will pay the expenses of the Medicaid recipient directly to the provider or vendor. The Medicaid recipient should start requesting expenses be paid the first month of pooled trust approval so that funds do not accumulate. Each pooled income trust has its own disbursement request forms that will need to be completed. As a general matter, the client sends a completed disbursement form and a copy of the bill he or she wants paid each month.[17]

Pooled trusts can pay for expenses such as rent or mortgage payments, utilities, cable or phone bills, credit card purchases, food, certain legal fees, and even entertainment. While the expenses must be for the sole benefit of the Medicaid recipient, the expense can still be paid even if it benefits another person collaterally.[18] For example, if the Medicaid recipient and his wife lease a home jointly, the full rent bill can still be paid from the Medicaid recipient's pooled income trust.

Some pooled trusts will charge a fee for any disbursement requests over a minimum amount. Due to this, advising the Medicaid recipient to pay larger reoccurring bills from the pooled trust each month may be prudent. Advising a client to charge all expenses to one credit card each month and then request the pooled trust to pay that bill can also simplify things. It seems obvious, but keep in mind that the pooled trust will only make disbursements each month that equal the amount it is funded with, less applicable fees.

Conclusion

As discussed in detail, income in excess of the Medicaid income allowance is not a barrier to receiving personal care services in the community. The Excess Income program, the Pay-In program and pooled income trusts are all tools in the Elder Law attorney's arsenal to help his or her client in need. Which option is right depends on a thorough evaluation of the individual client's circumstances.

1. GIS 20 MA/13.
2. https://on.ny.gov/3jKRm74.
3. *Id.*
4. *Id.*
5. *Id.*
6. 42 USC 1396p (d)(4)(c).
7. NY Soc Serv Law § 366(2)(b)(2)(b)(2)(iii).
8. *Id.*
9. https://bit.ly/379hDXL.
10. NY Laws Chapter 56, Part MM, Sections 13 & 14. Implementation of the new rules has been delayed until at least April 1, 2021, and is likely to be delayed further.
11. Nolfo, *Matt, Memo to Elder Law and Special Needs Section ("ELSN") Members* (12/15/2020).
12. GIS 08 MA/020.
13. Nolfo, *supra* n.11.
14. *Id.*
15. 05 OMM/INF-1.
16. GIS 12 MA/027.
17. https://wnylc.com/health/afile/6/4/1/.
18. *Id.*

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