

## INTRODUCTORY EXERCISES IN ELDER LAW AND MEDICAID

To: Elder Law Clinic Students  
From: Prof. Kate Mewhinney, Wake Forest University School of Law

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While you are waiting for your first clients, these projects will help you prepare for this course. If you have problems, please ask me! If I am not available, move on to another item. These are due by **5 p.m. on Thursday, September 18**. You may collaborate with each other on these tasks. Item # 5 (the “Mary Jones” memo) is time-consuming, so please start on it by the second week here.

-1- Look through the **form docs** and **form letters** in your word processing directory. Now, you are going to draft your first living will, health care power of attorney, and durable power of attorney. Please find another student to interview, in the clinic, or prepare these for yourself. (You can discard them after they are signed, of course.)

Create a client subdirectory to save these to. (Ask Jan if you need help on this.) Print out drafts, attach typing slips, and bring them to me. (If I am busy, please put them in my box, which is next to your mailboxes here.)

-2- Take a look at the **books** on the conference room table, for an overview.

-3- Take the portable **video** monitor and watch the videos that are on the library table. Each lasts about an hour. They provide information about advance directives and end-of-life (EOL) decision-making. The videos can also be borrowed overnight or for the weekend, if you return them ASAP.

-4- Scan your “E-Clinic Bookmarks” on the computer desktop. Also, log onto Lexis/Nexis, and:

- Click on the tab “Research System.”
- Click on “Area of Law – By Topic” and then on “Elder Law.” [Please remember this location, in case you need to do research on your cases.]

- On the lower left, click on “Tax, Estate, and Financial Planning for the Elderly.” This is a very good resource, which has a companion book of forms. We mainly use the resource book. Both items are also available in our library, in hard copy!

I’ll be assigning some short questions to be answered using the internet bookmarks and this on-line research tool. Also, I will assign a separate Medicaid hypothetical regarding married couples.

\* **On the following items**, again, if you feel lost, see me. It’s OK to ask questions!

-5- To help orient you to the exciting world of health law, especially Medicaid and Medicare, here’s some information. Most of this is to teach you – so I encourage you to take some notes – and a small part of this involves your looking up some information about a typical client.

You’ll need to prepare and give me a file memo on a hypothetical client, **Mrs. Mary Jones**, who has a **Medicaid** question. **Her goal is to avoid losing her home to the costs of nursing home care.** The house is basically all she has and it took her a lifetime to pay for it. **Mrs. Jones, who is now 74 years old, wants to leave this to her daughter and grandchildren.** Medicaid, she knows, is a health care program that often pays for nursing home costs. (It doesn’t send the beneficiary a check, like Social Security does, but rather pays the bill at a facility). Unlike Medicare (another health care program for which most retirees are eligible), Medicaid limits what you can own. And unlike Medicare, the Medicaid program also recovers from your estate what it’s paid out for you, in most cases.<sup>1</sup>

Your memo should be laid out in a user-friendly fashion. Print it out and put it on my door, please. Generally, I review these memos, make suggested changes, and give them back to you for a final draft. It should include things like headings, underlining, #'s, bullets... [Please create another client subdirectory for this memo, on the Clinic’s PCs and not just on your own PC.] **Give the citations to Manual sections** so that I can go back and check, or a student

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<sup>1</sup> Some call this a 100% tax for long-term health care. Compare it to the so-called “death tax” – the federal estate tax that only kicks in on estates of over \$2 million (for tax years 2006-2008). Medicaid is a dollar for dollar “tax” to recover all that is paid by Medicaid for long term care. And it kicks in on estates of over \$2,000; that’s right, for single people the asset limit on savings is \$2,000!

working on this file later could go back easily. For example, MA-2300 III.C.2 is an example of the cite format.

I recommend the following memo format for the heading, and for file memos, in general:

Memo to file of Mary Jones  
Sam Student *[please never turn in things w/o your name]*  
[date]

- a. [short summary of question, with answer]
- b. [short summary of question, with answer]
- c. ....

Ready? First, what is Medicaid? It is a government program that is designed to provide comprehensive medical care, including nursing home care, to poor individuals who are aged, blind, disabled, or members of families with dependent children. Federal and state governments jointly fund the Medicaid program. Each state sets rules for eligibility, subject to federal guidelines. The rules may differ from state to state.

Congress made major changes in the Medicaid program on **February 8, 2006**, under the **Deficit Reduction Act of 2005** (though the bill was signed in '06, it's a 2005 law). The law is referred to as the DRA. These changes went into effect in North Carolina on November 1, 2007.

The main changes:

- Change in the start date for “transfer sanctions.”

This is the most drastic change. First, some background. In most cases, giving away property (transferring it) causes a person to be denied Medicaid benefits. You might be wondering: who gives away sizeable amounts of property? When families face the prospect of paying \$60,000 to \$100,000 per year for nursing home care, they often want to know how to protect their property. They might still have a spouse living at home, or children or grandchildren for whom they want to provide. So they might transfer property to these relatives. Medicaid rules **disqualify** the person who does this, with few exceptions.

Under the DRA, disqualification penalties start when the person needs the Medicaid and NOT necessarily at the time of the transfer.<sup>2</sup> So, the disqualification that causes the person to be

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<sup>2</sup> The rule really isn't this clear, unfortunately. But this explanation will suffice for now. The statute is found at 42

denied Medicaid will usually start in the future – generally, at the time that the person needs the Medicaid. This makes it very risky for most people.

Example:

Client Claudia gave \$15,000 (all she owned) to her adult son in December 2007. What happens if she later needs nursing home type care? Under MA-2400-XII.C, the amount of this gift (\$15,000) will be divided by \$5,000, for a result of a **3** month disqualification. (The concept is that a person *could have used* the \$15K to privately pay for 3 months of her own nursing home care.)

Under DRA, the 3 month disqualification period will start when Client Claudia needs the nursing home care and is otherwise eligible. So, let's say she slips on the ice a year from now. Medicaid will refuse to pay for her first 3 months of nursing home care. Presumably, her family would pay – if they have that kind of money. (There is a rule on “undue hardships” but it's not easy to show this and get around the disqualification.) Same result if Claudia Client later has a stroke, in 2009 or 2010. Obviously, it's pretty hard to predict what her health will be that far in the future, so she probably should **not** transfer assets – unless her situation falls within the few permitted exceptions to the rule.

- A change in the “lookback period.” The look back period is the period of years back that the government will look to see if asset transfers took place. The government used to look back 36 months (3 years) for asset transfers, but 60 months (5 years) for transfers to a trust. Under DRA, there's now a 5 year lookback for **all** transfers. But it will be phased in, so for three years after the DRA was implemented, our state will still use the 3 year lookback. That is:
  - Until November 2010, there's a 3 year lookback.
  - In December 2010, there's a 3 year and one month lookback.
  - In January 2011, there's a 3 year and two months lookback.
  - Etc...

So, if your grandmother has a severe stroke in January 2011 and needs to enter a nursing home, if she doesn't have the funds to pay out-of-pocket, the government (the

Medicaid agency) would want to know what asset transfers she made since November 2007. That is, they would look back to that date to see if she gave assets or money away. (By the way, did she help you with tuition or a down payment on a car?)

- New rules on annuities. An annuity is an investment, where you give a bank or insurance company a lump sum and they invest it and send a check to you or someone you name. The new rules are very complex and we are not likely to use them in the E-Clinic.

Generally, people want to be able to buy annuities and have them not “count” as assets. This way the assets are used up more slowly. The nursing home is generally paid from the stream of income from the annuity. But if there’s money left in the annuity at the patient’s death, the patient prefers leave it to their family.

Under the new DRA rules, the government requires, for some annuities, that the government be named as the “**remainder beneficiary**” – to be reimbursed for what it paid under the Medicaid program – after the Medicaid recipient dies. Only the spouse or disabled child of the Medicaid recipient is allowed, for some annuities, to come before the government.

- Purchase of a life estate – if a parent buys a “life estate” (right to live there for his/her life) in an adult child’s house, for example, this is one way to shelter the money. The parent might pay, for example, \$25,000 to the adult child for this right. Only if the parent actually lives with the child for at least a year, is this permitted. If the parent does not, this payment is considered a transfer of assets and it is penalized.
- No rounding down. States used to be allowed to round down fractional penalties. So, for example, a gift that triggered a 5.3 month penalty would result in only a 5 month disqualification. Under the DRA, it results in a 5.3 month disqualification. Also, fractions from different gifts are cumulated.

Undue hardship waivers. States have to have a process for “waiving” disqualifications if this would endanger the applicant’s health or safety. If you’d like, take a look at MA-2245 to see what our state’s rules are. (The Medicaid Manual that we use in E-Clinic covers its Aged, Blind, and Disabled (ABD) program. It can be found on your PC desktops and also bookmarked on your student PCs at <http://info.dhhs.state.nc.us/olm/manuals/dma/abd/man/index.htm>.

- Cap on exempt home equity. While a home can sometimes be considered “non-countable” or exempt, and not have to be sold for the applicant to get Medicaid, there’s now a limit on how much equity in a home may be exempted. It is capped at \$500,000 unless a state chooses to exempt up to \$750,000. For states like New York and California, where real estate is very expensive, their legislatures have already decided to allow this higher cap on home equity. Note, however, that this does not change the “estate recovery” rules, so generally the home (while exempt for eligibility purposes) is a sitting duck (*so to speak*) at the patient’s death.

**Let’s get started.** Title XIX of the Social Security Act requires states to establish Medicaid programs to provide medical assistance to low income individuals and families. Within broad federal rules, each state decides eligible coverage groups, eligibility criteria, covered services, payment levels, and administrative and operating procedures.

In North Carolina, the Medicaid program is administered by the Department of Human Resources, Division of Medical Assistance (**DMA**). Eligibility for Medicaid is determined by the county departments of social services (DSS) and the Social Security Administration (SSA) for Supplemental Security Income (**SSI**) recipients. It is jointly financed with federal, state, and county funds.

The Social Security Act mandates certain groups of individuals who must be covered by Medicaid. The mandatory groups include individuals who receive, or are deemed to be receiving, cash assistance. Aid to Families with Dependent Children (AFDC) and Supplemental Security Income (SSI) are the major cash assistance programs. In addition, the State is mandated to cover certain Medicare beneficiaries and pregnant women and children.

The Act also describes optional groups the state may elect to cover. Two of the optional groups North Carolina covers are individuals described as Medically Needy and individuals who receive Special Assistance.

In order to receive Medicaid, individuals must meet the requirements under a specific categorical group covered by North Carolina. In addition, financial and non-financial criteria for each group must be met.

As I mentioned, the Medicaid Manual that we use in E-Clinic covers its Aged, Blind, and Disabled (ABD) program. It can be found on your PC desktops and also bookmarked on your student PCs at <http://info.dhhs.state.nc.us/olm/manuals/dma/abd/man/index.htm>.

FACTS: Your client, Mary Jones, is a widow who lives alone and who now needs permanent nursing home care.<sup>3</sup> She'd like to return home one day, but for now her home is no longer her "principal place of residence." The Medicaid classification that she is in is referred to

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<sup>3</sup> This sentence has 3 critical facts:

- she is single;
- she lives alone; and
- she expects to need long-term nursing home care.

The rules are different if a person is married, or has certain dependents living with them, or is returning home within a few months. When you come discuss a client with me, be sure to tell me this information. We have a lot of clients with questions about Medicaid. So, it's helpful to say, "I have a question about Mrs. J's Medicaid eligibility. She's single and her daughter lives with and cares for her. She has made no asset transfers during the lookback period [still 3 years], and owns only a home, which is fully paid for and worth \$35,000."

as **MAABD**, for Medicaid for Aged, Blind and Disabled.

**Three Important Assumptions:**

- Assumption 1 - She is *income eligible* – i.e, her income is low enough for her to qualify. This is generally the case when a person needs Medicaid assistance; the person’s income (as calculated under detailed rules) just has to be less than the monthly nursing home bill, and most folks have incomes that meet that standard. Monthly nursing home costs range from about \$5,000 to \$10,000 these days. Before we dive in, one other thing ---- **income** is *different* from **assets or resources**. When you refer to an applicant’s **assets**, don’t include their Social Security or monthly pension income.

Income ≠ assets (in most cases).
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- Assumption 2 – She is going to enter a *Medicaid-certified facility*. You could be Medicaid eligible but not get Medicaid if you were not in a Medicaid-certified facility. Rest assured that most nursing homes **are** certified by the federal government to accept Medicaid and, in a separate certification, Medicare. “High end” facilities, especially those in continuing care retirement communities (“CCRCs”), however, sometimes aren’t Medicaid certified. Want to know more about a place? Check out [www.medicare.gov](http://www.medicare.gov) and look at the “Nursing Home Compare” section.
- Assumption 3 – She has not made *disqualifying transfers* of assets, unless otherwise stated. You’ll learn more about this below.

**So, remember: always check to see if the person:**

- \_\_\_\_\_ **is income-eligible,**
- \_\_\_\_\_ **is entering a Medicaid-certified facility, and**
- \_\_\_\_\_ **is not affected by the transfer sanction rules. Let’s get started.**

**-a- If Mrs. Jones “resource-eligible” under Medicaid if her assets consist of a \$50,000 house that’s paid off, and a new car? Your answer will be found in MA-2230, <http://info.dhhs.state.nc.us/olm/manuals/dma/abd/man/MA2230.htm#TopOfPage>.**

**-b- Is she resource-eligible if her assets (*reserve*) consist of \$50,000 in savings and an old car?**

**-c- What would be the impact of the *Transfer of Resources* rule, if she gives (“gift deeds”) the house to D.D., her dutiful daughter? See MA-2240. Please show any calculations. Note that “giving” does not mean “selling.” Giving means “no compensation” is provided. In Medicaid parlance, the word “transfer” generally means a gift (that is, uncompensated), BUT you always need more information to determine what exactly occurred. So:**

Transfer = gift = no compensation
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Also, leaving a house to someone *in a will* is not penalized under Medicaid rules, so “giving the house” to the daughter, **through a will**, does not create a Medicaid transfer penalty. There may be other problems, but we can wait on that!

**-d- Are there any circumstances in which a gift/transfer (i.e., uncompensated) to D.D. would not result in a penalty? If so, what are they?**

**-e- What types of interests in real property are not countable assets? Can a person transfer one of these interests without a transfer penalty?**

**-f- Mrs. Jones’ daughter calls you to find out whether this nursing home stay is covered by Medicare. What is your response? What if her *neighbor* calls you with this question? Her neighbor’s *daughter*?**

**MORE FACTS:** Mrs. Jones is disappointed that she can't give her house to DD without facing months of ineligibility for Medicaid. She doesn't have the resources to "private pay" during this period, if she needs nursing home care, and her family doesn't either. Isn't there anything you can do to help her protect the house? Let's see.....

Assume that Mrs. Jones is **age 74**, living in this house worth \$50,000 on which there are no liens of any kind. You now know that this means she has \$50,000 in equity. Now assume she transfers only a "remainder interest" in the house to DD, but retains a life estate (sometimes known as lifetime rights). What does that mean? The house is hers during her life, but at her death the "remainder" goes to DD, known as the remainderman. (Incidentally, Mrs. Jones couldn't leave the house to someone else in her **will**, if she has already transferred or sold a remainder interest.)

**-g- What is the value of the remainder interest?**

You can calculate the value by using the Remainder Interest Table, which appears at the end of this memo. The **Remainder Interest Table**, which is well-hidden in MA-2230VII.B.4.b, at MA-2230, <http://info.dhhs.state.nc.us/olm/manuals/dma/abd/man/MA2230f4.pdf>, (there should also be a copy in each office's desk, in the plastic covered packet). Start by multiplying the remainder percentage that corresponds with her age, times her equity in the house:

\_\_\_\_% x \$50,000 = \_\_\_\_\_.

So, a gift of this remainder interest value is worth: \_\_\_\_\_.

Next, divide this gift's value by 5,000, to get \_\_\_\_\_.

This results in a penalty period (a/k/a "sanction period") of \_\_\_\_\_ month(s).

**-h-** That's a lot better than what would happen if she transferred her entire interest in the house, right? Plus, if she and DD have a big fight in a few years, and she's deeded the entire

home interest to DD, she's likely to be put out of the house! **Can you think of other events that could threaten her ability to live in the house, if she's transferred her entire interest in it to DD?**

**-i- How would the value of the remainder interest change if Mrs. Jones was 94 and not 74?**

**-j- So, how does increased age affect the value of the remainder interest? Why?**

Now we will discuss another twist: any **reduction in the sale price** is considered a gift or transfer. So, for example, the sale of a \$50,000 house (w/o liens) for \$40,000 is a gift of \$10,000. Here's the math:

$$\begin{array}{r} \text{Fair market value (FMV): } \$50,000 \\ - \text{ Compensation: } \quad \quad \quad \underline{- 40,000} \\ \text{Amount of gift: } \quad \quad \quad 10,000 \end{array}$$

\$10,000 gift ÷ 5,000 = 2 months. So, a Medicaid disqualification of 2 months would result.

What if this \$50,000 house had had a \$10,000 tax lien or mortgage on it? There, if it was sold for only \$40,000, that would be **full** compensation for the equity that's been sold. So, you must find out about liens and **don't just do your calculations based on the property's value.** OK so far? It's not VALUE but EQUITY that matters, when applying the transfer of asset rules under Medicaid.

Again: It's not VALUE but EQUITY that matters, when applying the transfer of asset rules under Medicaid.

Now it's your turn.

**1. Mrs. Jones, age 74 with a home worth \$50,000 (with no liens), would like to protect her home for her children and grandchildren to get some inheritance. What is the value of the remainder interest? If they buy this interest, what items or services could Mrs. Jones pay for, to “spend down” to her \$2,000 resource limit, if she wants to be sure to get the benefit of this money?**

*Nice work!*

## REMAINDER INTEREST UNISEX TABLE

- 1) Locate the age of the life estate holder at their last birthday. It may not necessarily be the owner or the life estate holder.
- 2) Multiply the figure shown under "REMAINDER %" times the current market value of the real property.

<u>AGE</u>	<u>REMAINDER %</u>	<u>AGE</u>	<u>REMAINDER %</u>
0	.02812	38	.07433
1	.01012	39	.07917
2	.00983	40	.08429
3	.00992	41	.08970
4	.01019	42	.09543
5	.01062	43	.10145
6	.01116	44	.10779
7	.01178	45	.11442
8	.01252	46	.12137
9	.01337	47	.12863
10	.01435	48	.13626
11	.01547	49	.14422
12	.01671	50	.15257
13	.01802	51	.16126
14	.01934	52	.17031
15	.02063	53	.17972
16	.02185	54	.18946
17	.02300	55	.19954
18	.02410	56	.20994
19	.02520	57	.22069
20	.02635	58	.23178
21	.02755	59	.24325
22	.02880	60	.25509
23	.03014	61	.26733
24	.03159	62	.27998
25	.03322	63	.29304
26	.03505	64	.30648
27	.03710	65	.32030
28	.03938	66	.33449
29	.04187	67	.34902
30	.04457	68	.36390
31	.04746	69	.37914
32	.05058	70	.39478
33	.05392	71	.41086
34	.05750	72	.42739
35	.06132	73	.44429
36	.06540	<b>74</b>	<b>.46138</b> ←←
37	.06974	75	.47851

**REMAINDER INTEREST UNISEX TABLE, cont.**

<u>AGE</u>	<u>REMAINDER %</u>	<u>AGE</u>	<u>REMAINDER %</u>
76	.49559	93	.75308
77	.51258	94	.76272
78	.52951	95	.77113
79	.54643	96	.77819
80	.56341	97	.78450
81	.58033	98	.79000
82	.59705	99	.79514
83	.61358	100	.80025
84	.63002	101	.80468
85	.64641	102	.80946
86	.66236	103	.81563
87	.67138	104	.82144
88	.69141	105	.83038
89	.70474	106	.84512
90	.71779	107	.86591
91	.73045	108	.89932
92	.74229	109	.95455