
OLR Bill Analysis

sHB 6607 (as amended by House "A")*

AN ACT CONCERNING NURSING HOMES.

SUMMARY:

This bill changes how the law treats the (1) assets of Medicaid long-term care applicants and beneficiaries and (2) amount of income Medicaid nursing home residents must apply to their care costs (applied income).

By law, Medicaid long-term care applicants who transfer assets for less than fair market value within five years of applying for coverage are presumed to have done so solely to qualify for Medicaid. People who cannot successfully rebut this presumption face a "penalty period" (period of Medicaid ineligibility). The value of the transferred asset is considered a debt the transferor or transferee owes the Department of Social Services (DSS).

The bill:

1. creates a second debt owed to nursing homes that serve these residents without payment during a penalty period and allows homes to sue to collect this debt;
2. allows the court to award damages and associated court fees for cases brought by the state or nursing homes regarding improper Medicaid asset transfers;
3. allows a court, including a probate court, to order assets or proceeds associated with an improper transfer to be held in a constructive trust to satisfy a debt owed a nursing home;
4. requires DSS to make certain considerations when determining a Medicaid nursing home resident's applied income amount;

5. requires nursing homes to provide written notice of applied income obligations and potential consequences for nonpayment to the resident and any person controlling the resident's income;
6. allows nursing homes to sue to collect applied income they are owed and courts to award both the amount due and associated legal fees;
7. requires nursing homes, when filing an applied income or improper asset transfer suit, and after a court issues a related judgment or decree, to mail copies of the complaint and court documents to the attorney general and DSS commissioner; and
8. prohibits DSS, to the extent federal law allows, from rendering a Medicaid long-term care applicant ineligible for assistance solely based on owning a life insurance policy with a surrender value of less than \$10,000.

*House Amendment "A" replaces the underlying bill, which required a study of nursing homes.

EFFECTIVE DATE: October 1, 2013

MEDICAID LONG-TERM CARE ASSET TRANSFERS

Transfers that Create a Debt

By law, when an asset transfer results in a penalty period, such transfer creates a debt owed to DSS by the person transferring the asset or the transferee. The amount of the debt equals the amount of Medicaid services provided to the transferor beginning on the date the assets are transferred (CGS § 17b-261a).

During a penalty period, DSS does not make Medicaid payments to the nursing home for the transferor's care. The bill creates a statutory debt, due the nursing home, in an amount equaling the unpaid cost of care the facility provides during the penalty period. The debt amount may not exceed the fair market value of the transferred assets subject to the penalty period at the time they are transferred.

Lawsuits

The bill provides that its provisions do not affect any other rights or remedies the parties may have. It permits a nursing home to sue either the asset's transferor or transferee to collect a debt for the unpaid care if (1) the debt recovery is no more than the transferred asset's fair market value at the time of transfer and (2) the transfer that triggered the penalty period occurred no more than two years before the nursing home resident applied for Medicaid.

The bill allows a court to award actual damages, court costs, and reasonable attorneys' fees to a plaintiff nursing home if it determines, based on clear and convincing evidence, that the defendant caused the debt to the home by (1) willfully transferring assets that are the subject of the penalty period, (2) receiving the assets knowing their purpose, and (3) making a material misrepresentation or omission concerning the assets.

The court costs and attorneys' fee must be awarded as a matter of law to a defendant who successfully defends an action or a counterclaim that is brought.

By law, the DSS and administrative services commissioners and the attorney general may seek administrative, legal, or equitable relief.

The bill further allows the court, including a probate court, to also order the assets or proceeds from the transfer to be held in constructive trust to satisfy the debt.

Under the bill, these provisions do not apply to a conservator who transfers income or principal with the probate court's approval (see BACKGROUND).

APPLIED INCOME

Definition

In general, nursing home residents determined Medicaid-eligible must spend any income they have, except for a monthly needs allowance, on their nursing home care. This is commonly referred to as "applied income," which means it is applied to the Medicaid

recipient's care costs. If the resident's spouse is living elsewhere, some of the resident's monthly income may go to support that spouse (see below). Under the bill, applied income is also the amount required to be paid to the home for the cost of care and services after the exhaustion of all appeals and in accordance with federal and state law.

Considering Community Spouse's Needs and Notice

The bill requires DSS, when determining the amount of applied income, to take into consideration any modification to the applied income due to (1) revisions in the community spouse's minimum monthly needs allowance (MMNA, see BACKGROUND) and (2) other modifications allowed by state or federal law.

Under the bill, nursing homes must provide written notice to Medicaid recipients and anyone the law authorizes to control the recipient's applied income. The notice must indicate (1) the amount of applied income due the home and the recipient's legal obligation to pay it and (2) that the recipient's failure to pay it within 90 days of receiving the notice may result in a lawsuit.

Lawsuits

The bill authorizes a nursing home to sue to recover any applied income amount it is owed. But a home may not initiate a suit when a Medicaid recipient has asserted that his or her applied income is needed to increase the recipient's community spouse's MMNA. In this instance, the home must wait until the Medicaid recipient, the community spouse, or their legal representative, exhausts their appeal right before DSS and in court.

The bill allows the home to sue either (1) the Medicaid recipient who owes the money or (2) someone with legal access to the applied income who acted with the intent to deprive the recipient of the income or appropriate it for himself, herself, or a third person.

If, based on clear and convincing evidence, a court finds that a defendant wilfully failed to pay or withheld applied income due and owing to a home for more than 90 days after receiving the notice, it

may award the home the amount of debt owed, court costs, and attorneys' fees. The court costs must be awarded as a matter of law to a defendant who successfully defends an action or a counterclaim brought under the bill's provisions. These provisions do not apply to a conservator who transfers income or principal with the probate court's approval (see BACKGROUND).

A nursing home may not sue to recover applied income until 30 days after providing the applied income notice or, if the resident did not receive the notice, 91 days after providing the resident notice of the suit along with the information in the applied income notice.

LIFE INSURANCE POLICIES

The bill provides that, to the extent permitted under federal law, institutionalized individuals cannot be determined ineligible for Medicaid solely based on having a life insurance policy with a cash surrender value of less than \$10,000, provided (1) the individual is pursuing the policy's surrender and (2) once it is surrendered, the proceeds are used to pay for the individual's long-term care.

Currently, a Medicaid applicant may not have more than \$1,600 in liquid assets to qualify for long-term care assistance. (If the applicant is married, this is after the state performs a spousal assessment and gives the community spouse a share of the combined assets.) DSS counts the cash surrender value of any life insurance policy with a face value of more than \$1,500 towards the asset limit. DSS also excludes certain transfers of such policies to cover funerals. DSS will not grant eligibility until the policy is surrendered and the money is "spent down" to the asset limit on the individual's care.

BACKGROUND

Constructive Trust

A court can order a constructive trust against someone who, through wrongdoing, fraud, or other unconscionable act, obtains or holds legal property rights to which he or she is not entitled. It is often used to prevent undue enrichment. It can be used to order the person who would otherwise be unjustly enriched to transfer the property to

the intended party.

Community Spouse Allowance and Monthly Needs Allowance

When one spouse is living in a nursing home and the other spouse lives elsewhere, the spouse who is not living in the nursing home (called the community spouse in Connecticut) is allowed by Medicaid to keep a portion of the institutionalized spouse's income. This income, called the community spouse allowance, is determined by subtracting the community spouse's monthly gross income from the MMNA. The MMNA amount will vary from case to case, but for 2013 the minimum is \$1,892; the maximum is \$2,898. The MMNA takes into account the community spouse's housing costs (e.g., rent, and utilities).

The minimum and maximum are set by federal law and the state must update the amounts each year. The maximum may only be exceeded if a DSS fair hearing orders it.

Conservators of the Estates of Medicaid Recipients

The law requires conservators of the estates of individuals receiving Medicaid to apply towards the recipient's cost of care any assets exceeding the limits set in law. Similarly, the law prohibits conservators from applying, and courts from approving, net income of the conserved person to support a community spouse in excess of the federal MMNA, unless such limits would result in significant financial distress.

The law further permits the probate court to authorize a conservator to make gifts or other transfers of income and principal from the conserved person's estate to certain trusts (CGS § 45a-655 (d) and (e)).

Related Bill

sSB 523 (File 19), which passed the Senate, requires the DSS commissioner, to the extent federal law allows, to reduce the penalty period for certain returned assets.

COMMITTEE ACTION

Human Services Committee

Joint Favorable

Yea 16 Nay 2 (04/02/2013)

Judiciary Committee

Joint Favorable

Yea 30 Nay 14 (05/21/2013)