



Legal *Lines*

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Medicaid Waiver Agreements

An administrator at a senior housing community that provides independent living, assisted living, and skilled nursing care services on a single campus meets with a senior couple applying for residency. The husband will reside in the skilled nursing facility and the wife in independent living quarters. The couple completes all necessary application paperwork including the financial disclosure. The administrator reviews the financial disclosure and discovers that the couple has approximately \$500,000 in joint assets. The couple's application is approved and they move into the facility after paying the lump sum entrance fee. The administrator believes that the remainder of the couple's net worth is available to fund the care provided by the facility. But within months of admission, the administrator is informed that the husband has applied and been declared eligible for Medicaid. The administrator asks the couple whether the financial disclosure provided during the application process still accurately reflects their financial position. They reply that the account with the bulk of their assets has been transferred out of the husband's name and is held in joint ownership by the wife and the couple's daughter, rendering the husband Medicaid eligible because his assets and income fall below Medicaid eligibility limits. Now the facility will receive lower monthly fees for the husband's residency, but will continue to provide health care, meals, activities and a variety of other services.

Does this sound familiar? Clearly, senior housing facilities have an obligation to all of their residents to maintain financial solvency. So should senior housing facilities make efforts to maintain private pay revenues by influencing patients' applications to Medicaid?

One strategy implemented to retain private payment revenues has been to require residents to enter a formal agreement not to become Medicaid beneficiaries for a certain period of time. Such agreements, called "Medicaid Waiver Agreements," can take many forms. They often require the resident to contractually pledge the entirety of his or her assets to pay for care before the resident will apply for medical assistance. They may contractually prohibit the resident from making asset transfers to family or friends. They may also ask residents to waive their rights to any public medical assistance, i.e. Medicaid and Medicare.

But are Medicaid Waiver Agreements legal and enforceable? This question has been the subject of recent debate, and even recent federal legislation and state court cases. This article recaps some of this debate, and examines the legality of Medicaid Waiver Agreements in long term care facilities ("LTCFs") and continuing care retirement communities ("CCRCs").

LTCFs

By federal regulation, LTCFs are not allowed to seek Medicaid Waiver Agreements from residents. LTCFs are allowed to legally decline to participate in Medicaid, and therefore they can decline a Medicaid patient's entry into their facility; but if LTCFs do participate in Medicaid, they cannot force residents to waive their right to public medical assistance. Any LTCF that participates in Medicaid is subject to state and federal Medicaid rules. Some of these rules appear in federal regulations, at 42 C.F.R. § 483.1 *et seq.*



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Within these regulations, it states that LTCFs must not require residents or potential residents to waive their rights to Medicare or Medicaid, and not require oral or written assurances that residents or potential residents are not eligible for, or will not apply for, Medicare or Medicaid benefits.

CCRCs

Prior to 2006, it was unclear whether a CCRC could legally enter a Medicaid Waiver Agreement with a resident. Although the federal government and most states were silent on the issue, some state courts began ruling that CCRCs could not require Medicaid Waiver Agreements of their residents.

For example, in 2004, in Oak Crest Village, Inc. v. Sherwood R. Murphy, the state of Maryland's highest court ruled that a provision in a CCRC's admission agreement was invalid because it contained a Medicaid Waiver Agreement.¹ At the time of a couple's admission to a CCRC with a nursing home component, the wife signed an admission agreement that contained a "condition" that the residents not divest themselves of any assets if such changes would result in the resident's qualification for Medicaid, or any other reduction in monthly fees to the facility. Shortly after moving to the facility, the wife transferred a substantial amount of assets, including bank accounts and proceeds from the sale of their home, into joint ownership with herself and her daughter. Due to the transfer, the husband qualified for Medicaid, and immediately went directly into the CCRC's Medicaid qualified nursing facility, eventually applied for Medicaid, and was found eligible. The CCRC, however, insisted that the couple breached its contract with the CCRC by divesting themselves of assets to which the CCRC considered itself contractually entitled. The Maryland court ruled that the Medicaid Waiver Agreement was unenforceable because the clause affected a CCRC resident's admission to the CCRC's Medicaid qualified nursing facility. In other words, the Medicaid Waiver Agreement between the resident and the CCRCs was invalid, as applied to a long term care resident, because the agreement attempted to restrict the resident's right to seek Medicaid assistance.

Following this case, CCRCs across the country were unsure whether they could ask residents to sign Medicaid Waiver Agreements. Clearly in Maryland such agreements were not recognized, but in other states it remained an open question. Some CCRCs lobbied congress to pass federal law to allow CCRCs to enter Medicaid Waiver Agreements, arguing that Medicaid dollars should be reserved to provide high quality health care to the truly needy.

These lobbying efforts proved fruitful, as in 2006, Congress adopted the Deficit Reduction Act (the "DRA") which, among other things, effectively overruled the holding of the Maryland court in Oak Crest Village. The enactment of the DRA in 2006 made major changes to what conditions may be imposed where a nursing care facility is part of a CCRC's overall care plan. These changes were a direct response to the concerns raised by CCRCs after the Maryland court's decision. The DRA appears calculated to permit CCRCs to have greater security in determining how, and how much, they will be paid. For example, the DRA amended the Social Security Act to provide that CCRCs may seek Medicaid Waiver Agreements from residents. Specifically, the DRA states that contracts for admission to a state licensed, registered, certified, or equivalent CCRC or life care community may require residents to spend on their care the resources that were declared by the resident for the purpose of admission to the CCRC prior to applying for Medicaid. The DRA does not define the scope of their use of the terms "continuing care retirement community" or "life care community" and therefore presumably relies on the states to determine what entities meet these definitions.



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Although the DRA allows CCRCs to enter Medicaid Waiver Agreements with their residents, it is important to note that all admission agreements are subject to the Medicaid rules relating to the prevention of impoverishment of a community spouse. Therefore, any contractual provision requiring the expenditure of a resident's private assets must take into account the required allocation of resources or income to the community spouse before determining the amount of resources that a resident must spend on his or her own care.

Conclusion

The moral of this story is basically twofold. First, an organization that is exclusively an LTCF should not seek to enter into Medicaid Waiver Agreements with residents. Do not ask residents to pledge their assets to the facility, to willfully forego their right to public medical assistance, or to restrict their rights to transfer property. Second, if an organization is a CCRC, it may enter Medicaid Waiver Agreements, even if it has a long term care component on campus. However, keep in mind that the Medicaid Waiver Agreement is still subject to all other Medicaid rules, including those pertaining to allocation of resources to the community spouse. In any event, seek legal counsel before entering any such agreement with a resident.

(Footnotes)

¹Oak Crest Village, Inc. v. Sherwood R. Murphy, 379 Md. 229 (2004)