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Understanding New Medi-Cal Asset Limits and Recovery Rules

Speaker: Julianna Malis, JD, LL.M.
Santa Barbara Estate Planning and Elder Law

Julianna Malis, J.D., LL.M.

Julianna Malis is the founding attorney of Santa Barbara Estate Planning & Elder Law. She focuses her estate planning practice on elder care and special needs planning. Julianna holds a BA in philosophy from University of California, Santa Barbara, a JD from University of the Pacific, McGeorge School of Law and an LLM in taxation law, emphasis in estate planning from Golden Gate University School of Law. She is a member of the Trusts & Estates Section of the California State Bar, and Certified Dementia Practitioner-Trainer.

Learning Objectives

- ❖ Understand the New Asset Limits and Recovery Rules
- ❖ Medi-Cal Eligibility Strategies and Recovery Avoidance

Current Developments

- AB 133 signed by Governor Newsom in 2021
- Massive changes to Medi-Cal programs
- Significant changes to asset limits
- What the end of the Public Health Emergency means for Medi-Cal recipients

End of the Public Health Emergency in CA

- Since early in the pandemic we had been in a government declared Public Health Emergency
- On February 28, 2023, PHE expired almost 3 years after it began. What this means for Medi-Cal recipients:
  - Medi-Cal will no longer automatically renew enrollment
  - Increase in share of cost
  - No retroactive negative actions
  - People could start losing benefits as of April 2023.

After Public Health Emergency –DHCS Implementation

- Counties shall resume processing annual redeterminations following normal annual renewal schedule.
- Counties will not need to process any outstanding annual renewals or change in circumstances from 2020, 2021, and 2022.
- For the first and second months after the PHE ends, renewal activities will focus on completing ex-parte review and sending annual renewal packets.
- The third month following the end of the PHE is when the first redeterminations will be processed. Negative action **can** occur, beneficiary can cure issue by taking action then.

Understanding the New Asset Limits

- AB 133: signed by Governor on 7/27/21
- 426 Sections; 442 pages
- Massive changes to Medi-Cal program in coverage
- And—working toward an end to counting assets for eligibility

AB 133 and Asset Limits

- Section 364 of the Act (pages 255-56), adds W&I Code 14005.62:
  - (a): For Non-MAGI eligibility—
    - A disregard of $130,000 in nonexempt property for a one member household;
    - $65,000 for each additional household member up to ten members
    - Beginning July 1, 2022

AB 133 and Asset Limits

- Subdivision (b): ….”resources, including property or other assets, shall not be used to determine eligibility under the Medi-Cal program to the extent permitted by federal law.”
- Beginning January 1, 2024

What we are used to:

Conventional Medi-Cal:

- Limit on nonexempt assets: $2,000 for an individual; $3,000 for a couple

- Spousal Protection Limits: $137,400 for community spouse; $2,000 for institutional spouse

- Spousal protection now applies to many in home waiver programs

Effects of AB 133

Provisions of AB 133, signed by the Governor in July 2021, increased the asset limit on July 1, 2022, and will eliminate the asset limit completely by Jan 1, 2024

Asset Limit Prior to July 1, 2022
Single Person = $2,000
Couple = $3,000
Spousal Impoverishment:
$2,000 + $137,400 = $139,400

Effective July 1, 2022
Single Person = $130,000
Couple = $195,000
Spousal Impoverishment:
$130,000 + $137,400 = $267,400

Medi Cal: An End to Asset Limits

- As of 7/1/22: Asset limit raised to $130,000 for a Medi-Cal beneficiary; $65,000 for each additional household member;
- As of 1/1/24: No asset limits at all.

AB 133 and Asset Limits

A Quick Note on the Medi-Cal Family Budgetary Unit:

- The MFBU is the KEY to understanding how the increased limit applies:
  - View the “household” as the MFBU [and not all the people living in the house]
  - The Medi-Cal Beneficiary gets the $130,000 limit; the other members of the MFBU count each for $65,000 more
  - If spouses are in the same MFBU: the limit is $195,000, NOT $267,400

Household v. Medi-Cal Family Budget Unit

- Family members can be defined as individuals included within the Medi-Cal Family Budget Unit (MFBU).
- The MFBU shall be the basic unit of persons considered in determining a person's or family's eligibility and share of cost.
- The MFBU shall be established in accordance with Title 22 CCR § 50373 through § 50379.
- Members of the MFBU may be excluded from an established MFBU in accordance with § 50381.

Examples of Individuals in the Same MFBU

Husband and wife living together at home, both Medi-Cal beneficiaries, enrolled in the Aged and Disabled Program, neither on HCBS.

$130,000 + $65,000 = $195,000

Husband (on a Non-MAGI Medi-Cal program) and wife living at home, both beneficiaries, with dependent son.

$130,000 + $65,000 + $65,000 = $260,000

Examples of Separate MFBU with Spousal Impoverishment Provisions

When spousal impoverishment provisions are applied, couples are separated into their own MFBUs,giving them separate asset limits. The community spouse retains up to the CSRA, and the Medi-Cal spouse retains up to the asset limit.

Husband is institutionalized in a nursing home, and wife at home (community spouse) is not on Medi-Cal.

$130,000 + $137,400= $267,400.00

Husband is considered institutionalized because he is enrolled in a Home and Community-Based Services (HCBS) program. Community spouse is not on Medi-Cal.

$130,000 + $137,400 (CSRA)= $267,400.00

ACWDL 18-19, ACWDL 21-34

Examples of Separate MFBU when both spouse are enrolled in Medi-Cal

Husband in a nursing home and wife at home on Medi-Cal

$130,000 + $130,000 = $260,000

Two spouses in a nursing home

$130,000 +$130,000 = $260,000

Two spouses at home enrolled in HCBS

$130,000 +$130,000 = $260,000

Both spouses at home, husband enrolled in HCBS and wife on Medi-Cal

$130,000 + $130,000 = $260,000

CCR Tit. 22, § 50377, MEM § 50373(F)
ACWDL 18-19, p. 13, question 6

Transfer of Assets after July 1, 2022

- Penalties for transferring or gifting away non-exempt assets will still only apply if a Medi-Cal beneficiary or applicant enters a nursing home.

- Transfer rules apply only to non-exempt (countable) assets.
  For example, there will be no transfer penalties for someone who has $125,000, and transfers $100,000, which is under the new $130,000 asset limit.

- Transfer penalty only applies to those subject to the 30-month look back period when they are entering a nursing home.

- A transfer penalty does not apply when the person is in the community, but they should take into consideration how and when transfers are made, in the event they enter a nursing home in the future.

Example: Transfer of Assets after July 1, 2022

David lives in a SNF and has $150,000. In December, 2022, he transfers $20,000 to his son.

He applies for Medi-Cal in January of 2023.

Because David is in a nursing home, and the amount transferred is over his asset limit of $130,000, a transfer period will be applied.

$20,000 / $10,933 (2022 APPR)= 1.8 period of ineligibility

Partial months are not counted, and David will be ineligible for one month, running from the month of transfer - December, 2022.

David will not be eligible for December, but he will be eligible as of January 1, 2023.

Considerations

- Income guidelines will remain the same
- Asset limit changes are only for California's Medi-Cal program
- SSI recipients will still need to comply with SSI asset limit rules
- Asset limit changes will not change create new rules for exempt and nonexempt assets
- Medi-Cal Recovery rules are not changed by the increase of the asset limit - Estates subject to probate may be open to Medi-Cal Recovery

Relevant Resources

ACWDL 21-31: Increases to the Asset Limits for Non-Modified Adjusted Gross
Income Medi-Cal Programs

ACWDL 21-34: Regarding Spousal Impoverishment Caps, includes changes to
the Asset Limit and Spousal Impoverishment evaluations

MEDIL 22-02: Older Adult Expansion and Asset Limit Changes Global Outreach Language

DHCS Asset Limits Webpage https://www.dhcs.ca.gov/services/medical/eligibility/Pages/Asset-Limit-Changes-for-Non-MAGI-Medi-Cal.aspx

Eligibility Strategies After AB133

- Eligibility
- Recovery Avoidance
- Control Share of Cost

Eligibility Strategies

- Review our basic eligibility rules for single and married beneficiaries

- Understand the “household” definitions Medi-Cal will follow

- Remember to plan for recovery avoidance—a lot of folks will be new to Medi-Cal and will jump to conclusions

Evaluating Medi-Cal Eligibilty After 7/1/22

Asset Limits

- Property reserve for institutionalized person
  $130,000

- Community Spouse Resource Allowance
  $137,400

Evaluating Medi-Cal Eligibilty After 7/1/22

MAGI Eligibility Based on **<u>income</u>**, not resources (<65)

Traditional LTC Eligibility was based on **resources**, not income

Snapshot evaluation based on qualifying one day in the month 22 CCR § 50420

Includes both community and each spouse's separate property for initial eligibility puroses ACWL 90-01 § 50490.3

Annually reviews institutional person's assets to maintain eligibility (reconsideration)

Eligibility Strategies After 7/1/22

Evaluating Property

Exempt or Unavailable	**Countable**
$0 value	Value based on regulations and guidelines

Eligibility Strategies After 7/1/22

Evaluating Property

Exempt or Unavailable	**Countable**
Principal residence	Investment Property
Sale pending property	Stocks/Bonds
Retirement Accounts	Brokerage Account
1 Motor vehicle	Cash
Life insurance up to $1500	Revocable Trust $
CSRA $137,400	
Property reserve $130,000	

Eligibility Strategies After 7/1/22

Unavailable Property

Unavailable vs. Exempt

Unavailable property can become available
Exempt property remains exempt

Examples of Unavailability:

Lack of capacity to access asset
Asset listed for sale
Court proceeding required to liquidate asset
Co-owner refuses to sell asset
Asset has no equity value

ACWDL 90-01 § 50402(b) ACWDL 97-41 U

What Is Medi-Cal Recovery?

When a Medi-Cal recipient dies, the state can seek repayment for the cost of certain services received that were paid for by Medi-Cal.

After the Medi-Cal recipient dies, the state will send the heirs or survivors an “estate recovery claim” requesting payment for the amount of Medi-Cal benefits paid on behalf of the deceased individual.

The state does not put a lien on the home and the state does not take away your home. The state will, however, try to collect, and, if you cannot get the claim waived and still cannot afford to pay, the state will negotiate a “voluntary lien.”

What Is Medi-Cal Recovery?

The recovery law:

- Prohibits claims on the estates of surviving spouses and registered domestic partners; even if the Medi-Cal spouse died prior to January 1, 2017;

- Limits recovery for those 55 years of age or older to nursing home and Home and Community Based Services;

- Limits recovery to only those assets subject to California probate;

- Requires the state to waive the claim as a substantial hardship
when the estate subject to recovery is a homestead of modest value, i.e., a home whose fair market value is 50 percent or less of the average price of homes in the county where the homestead is located; and

Recovery: SB 33 (2016) [Welf.& Inst. Code Section 14009.5

THREE CONSIDERATIONS: Look at recovery as a

1. WHO is subject to recovery?
2. WHAT PROPERTY can be recovered from?
3. WHAT SERVICES provided by Medi-Cal can be recovered?

Estate Recovery

- 1. Who Is Subject to Recovery?

  - Individuals who received services at age 55 or greater, or individuals who were in long term care facilities or equivalent programs, as long as they have been subject to a hearing that determined they were unable to return home.

  - Complete bar to recovery where:

    - Medi-Cal recipient married and survived by a spouse at time of death
    - Medi-Cal recipient survived by blind or disabled child or child under age 21

Recovery

- Note This Change:
  - Prior Law: If a married beneficiary died, the state could recover after the death of his or her spouse, from what the survivor had received from the deceased beneficiary spouse
  - Now, so long as the survivor lived past the end of 2016, there could be NO recovery for services provided to the Medi-Cal beneficiary spouse

Recovery

2. What Services Provided by Medi-Cal Can be Recovered

- Only services required to be recovered in federal law: nursing facility services, home and community based services, and related hospital and prescription drug services
  - "home and community based services" means services under federal waiver programs, not conventional at home, doctor visits, pharmacy
  - Managed care: now only the actual services not the capitation rate is subject to recovery

Recovery

- **3. What Property Can Be Recovered From?**

  - Only property subject to administration under Division Seven—conventional probate

  - "All property in the individual's probate estate that is required to be recovered under federal law."

  EXCLUDED FROM RECOVERY:

  - Property in trust, beneficiary designated property, retirement accounts (unless left to "the estate"), property collected under Division 8

  - Real property having a value of less than half the median price of a residence in the county is considered as subject to a hardship exemption - Tax Assessed Valule (not FMV)

Eligibility Strategies After AB 133

- We have to deal with Medi-Cal Eligibility now
- Until Jan 1, 2024: Only partial protection
- Jan 1, 2024: Full protection
- Medi-Cal Recovery Remains
- Strategies until 2024

Eligibility Strategies After AB 133

Range of Options to use until January 1, 2024 and beyond:

- Convert Assets
- Transfer Assets
- Expand Assets

Eligibility Strategies After AB 133

Converting Assets:

- Deferred maintenance
- Mortgage Pay Down
- Annuity Strategies

Eligibility Strategies After AB 133

Spend down (or Asset Dump):

- Transfer to Third Party
- Can be considered early estate planning
- In best of worlds: beneficiaries establish third party trust
- Transfer strategy: keep transfer rule in mind where long-term care may be needed

Eligibility Strategies After AB 133

Transfer Assets

Community Based Key Concepts

- Presumption that transfer of non-exempt assets was made to establish eligibility only applies to institutionalized individuals

- No penalty period applied while living in the community

- BUT…

- If applicant enters nursing home while penalty period is running = ineligibility

ACWDL 90-01 §50408.5c

Transfers

Long Term Care Key Concepts

- Look Back Period: **30**/36/60 Month
- APPR : $10,933
- Period of Ineligibility
- Start Date: First day of month of transfer

Eligibility Strategies After AB 133

Conventional Legal Devices for Eligibility Planning

- **Revocable Living Trusts**- best mechanism for holding substantial assets and providing control and dispositive provisions
- **Special Needs Trusts** –use where Non-Medi-Cal benefits(i.e. SSI or Section 8) are involved and where it is necessary to control access to assets
- **3100 Petitions** to expand the CSRA

Recovery Avoidance Devices:

- **Payable on Death Accounts**
- ***Heggestad* Petition** to avoid recovery

Eligibility Strategies After AB 133

Revocable Living Trust:

- Provides disposition plan for passing on assets
- Medi-Cal Estate Recovery Avoidance – not helpful if over asset limit
- Can hold exempt assets such as personal residence, windfalls received during asset rule transition period
- As alternative to first party trust for Medi-Cal only beneficiaries
- Although easiest to explain for clients with capacity, also available for clients through use of existing powers of attorney or through court proceedings such as conservatorships

Eligibility Strategies After AB 133

Revocable Living Trust:

- Medi-Cal Trust Rules: 22 CCR 50489-50489.9; Medi-Cal Eligibility Procedures Manual Section 9J
- Rules come from OBRA 1993
- Trusts "count" if set up by individual, spouse, or court

  Revocable Trusts: Available assets; distributions of principal or income considered income

  Irrevocable Trusts: If any principal can be used by beneficiary, entire amount considered available; any distributions are considered income

Eligibility Strategies After AB 133

Special Needs Trusts:

- Where SSI is involved
- No suitable alternative is available
- First Party Special Needs Trusts – likelihood of payback is small because of special needs expenditures
- Third Party Special Needs Trusts - inheritance

Eligibility Strategies After AB 133

3100 Petitions:

- To increase Community Spouse Resource Allowance (22 CCR 50490 et seq.) Draft)

- To increase spousal monthly income allowance 42 USC 1342r-5(d) and (f)

- For creation and modification of trusts where one spouse lacks capacity

- Can be used where some separate property is involved

An Irrevocable Trust?

- Should you counsel the transfer of assets to an irrevocable trust?
  - The intentionally defective grantor trust, aka IDGT, has been marketed for years as a device to remove real property from the countable estate of a Medi-Cal beneficiary—if it is the principal residence, there is no transfer issue—in order to deflect income to another generation
  - But in using these devices, keep in mind that the person who has the greatest need for both income and principal is the Medi-Cal beneficiary.

An Irrevocable Trust?

- Should you counsel the transfer of assets to an irrevocable trust?
  - An “AB 133” Trust, or a Medi-Cal Asset Protection Trust:
    - This is an irrevocable trust in which the Medi-Cal beneficiary gives away his/her assets, up to the amount that is permitted under AB 133, currently $130,000 (in lump sum)
    - Countable assets over $130,000 will need to be transferred according to old transfer rules until 2024
    - The trust, like a revocable trust, is exempt—assuming it and all other countable assets of the Medi-Cal beneficiary are under $130,000
    - The goal of setting up something like this is to avoid recognition of income—but the entire trust is exempt, so should it make any difference?
    - Under the OBRA 1993 Rules, undistributed income should not count as income to the individual beneficiary. But, since the entire trust is exempt, again, should it make any difference?

Recovery Avoidance

- Pay on Death Accounts: Probate Code Division Five (Nonprobate Transfers), Sections 5011-5705
  - Can be used to name beneficiary of a specific asset—bank account, brokerage account, real estate (through transfer on death deed)
  - All assets remain the property of owner during owner's life
  - Susceptible to undue influence in naming beneficiary
  - Can lead to confusion in preparing a unified estate plan
  - Need for clear intent of person establishing joint account-clear desire to pass on asset vs. naming someone to administer asset

Recovery Avoidance

- Pay on Death Accounts: Probate Code Sections 5000-5705
  - Clients often use as shortcut around setting up trusts

Problems with Transfer on Death Deeds: Prob C. Secs 5600-5698

Sale of a property that passes through a TOD deed can be full of complications and is likely to be held up by title companies for four months

Post death notice provisions to heirs are required

Recovery Avoidance

- Other Beneficiary Designated Assets:
  - Life Insurance
  - Annuities
  - IRAs
  - Common problem to all: Failure of asset to pass to a named beneficiary; this is a classic probate trap. Account holders will treat the asset as belonging to the decedent’s estate.

Recovery Avoidance

- Division Eight Proceedings (Probate Code Sections 13000-13660):
  - Useful for curing problems with accounts where there is no living beneficiary
  - Use of the 13100 procedure to pull insurance policies, annuities, IRAs into an existing trust, to avoid a probate

Recovery Avoidance

- Division Eight Proceedings (Probate Code Sections 13000-13660)
  - Mobile homes, vehicles, boats: All excluded in determining the property or estate of decedent or its value
  - Collection of Assets under Section 13100 Declarations or Affidavits—where gross value of decedent's property in California does not exceed $184,500
  - Small Real Estate Holdings Section 13200-Where real property does not exceed $61,500

Recovery Avoidance

- *Heggstad* Petitions:
  - There was some debate in the fall of 2016 about whether the DHCS would consider that a court procedure used to bring into a trust an asset that was outside of the trust would be accepted
  - It really depends on your court: If you have a viable claim that an asset was supposed to be in the trust—It was on Schedule A and somehow did not get deeded to the trust; or it was in the trust and then removed for a financing and not returned to the trust—and your Superior Court buys your argument, you should be ok.
  - If the property has been successfully "Heggstaded," then it will pass through the trust, no probate will be necessary, and there can be no recovery.

Planning Going Forward

Planning Scenarios:

We look at two families of fact patterns:

- Situations where persons seek to qualify when they previously were over asset limit
- Situations where existing Medi-Cal beneficiaries get windfalls-gifts, inheritances, that lucky Lottery ticket

Planning Going Forward

Case 1:
Kelly, 32 yr old, currently on Medically Needy Medi-Cal, very high monthly bills for psychotherapy and prescriptions

- Grandmother left her $150k and she should receive it "sometime in 2023"
- Client is fully functional but probably not up to managing a lot of money

Planning Going Forward

Case 1 (continued):
Uncertainty: we don’t know when in 2023 the money will be here. If receive in December, may not be an issue.

- Uncertainty: Lots of dependable family members, so we could have client do 1st party special needs trust BUT
  - --WHY BOTHER IF SHE CAN KEEP $130K?
  - (she can buy a car, spend the other $20k up front)
  - Why not have her set up a revocable living trust?
  - And state payback in her case would be 100%

Planning Going Forward

Case 1 (continued):

We know now Kelly can keep $130k without issue;

- She can set up a simple RLT—useful if mom leaves her money later
- No need for any fancy planning
- She can spend down or transfer the amount over $130,000

Planning Going Forward

Case 2:

Patty (75) is in a SNF on Medi-Cal; Ben (92) got a court order raising his CSRA to $500,000 a couple years ago.

- Ben calls you: he broke his leg, cannot walk wants to join Patty in the SNF
- He moves in—Can Patty keep Medi-Cal; and Can Ben qualify?

Planning Going Forward

Case 2 (continued):

- Because they are both in a SNF, they are treated as being in separate MFBUs
- So each can have $130,000; but they are still way over assets

Planning Going Forward

Case 2 (continued):

- They can use the excess to buy a personal residence: a mobile home, for $240,000; or
- They can purchase a tenant in common interest in their son’s residence nearby
- Can they instead transfer the excess $240,000 to their kids?

Planning Going Forward

Case 2 (continued):

- What about transfer penalties? If they make an outright gift of $60,000 each to each of their two children? Or to an Irrevocable Medi-Cal Asset Protection Trust?
- Each would be ineligible for approximately 5 months (APPR=$10,993); remember—they are not on Medi-Cal yet—they have to apply, and the transfers would be disqualifying.
- So they could do stacked gifting, giving away a sum under the APPR--$10,500-5 times in a month
- What if this happens in 2024? Any need for planning?

Planning Going Forward

Case 3:

John lives with Jenny, his wife.

- Both have Medi-Cal; they are both 66 years old
- His mother died in April, left him $250,000. Can he keep the money? ($130k for each?)

Planning Going Forward

Case 3 (continued):

- John and Jenny are both in the same MFBU, so the limit is $195,000;
- They will have to make plans for the additional $55,000
- What if—John is on SSI?
- Medi-Cal limits have changed, but the SSI limits remain the same
- John is ok—for Medi-Cal; BUT there is no asset limit increase for SSI.

Planning Going Forward

Case 3 (continued):

- Can he set up a SNT? He’s too old for a d4A
- Can he transfer the money? It would disqualify him for SSI
- Can he join a pooled trust? Yes-but is this the way to go?

Planning Going Forward

Case 3 (continued):

So in John's case, he has to weigh:

- loss of SSI for up to three years, being able to transfer the money to his sister Sally, who would be willing to set up a third party trust for him; or joinder into a pooled trust

Planning Going Forward

Case 4:
Melissa is 67. It is March 2023; she's in a Skilled Nursing facility (SNF), she just got on Medi-Cal, has $125,000 in bank; and a home, paid off.

- Mom just died, left her $500,000
- She has dementia; everything handled by her friend Patsy, who has a General Durable Power of Attorney
- Private pay in the SNF is $15k/month

Planning Going Forward

Case 4 (continued):

- Assume the GDPA permits third party gifting and that there are meritorious beneficiaries
- Melissa, through Patsy, can start a gifting program, pay privately for several months, perhaps carry out improvements to the house to bring in more rent
- What if: No Power of Atty?

Planning Going Forward

Case 5:

Larry, 68, and Rachel, 66, are married. Rachel is in a SNF; Larry is at home

- They have private long term care insurance that will pay 100% of Rachel’s care until March 2024
- Their assets total $700,000, some nonexempt, some in retirement accounts.
- Larry has been told he should start transferring assets; Should he?

Planning Going Forward

Case 5 (continued):

- They don't have to transfer anything. Rachel does not need LTC coverage through Medi-Cal now—her insurance takes care of everything
- And when the coverage lapses, they will be ok because there will no longer be asset limits
- Remind them of recovery avoidance planning: a living trust; beneficiaries on those retirement accounts

Longer Range Consequences of Changes

- Allowing Medi-Cal beneficiaries to hold substantial assets will generally promote greater use of conventional trust and less reliance on special needs trusts
- Those beneficiaries on other means-tested programs will however have to hew to existing asset and transfer rules and may rely on first party trusts
- More possible exposure to elder abuse—with vulnerable seniors having assets available to them, needing protection
- And more likely reliance on professional fiduciaries to manage trusts for incapacitated Medi-Cal beneficiaries

Speaker Contact Info

Julianna M. Malis

julianna@sbelderlaw.com | 805-946-1550

CEB Resources to Check Out

- ❖CEB Publication – *California Estate Planning*

- ❖CEB Publication – *California Will Drafting* (Chapter 23 – Special Needs Trusts)

- ❖CEB CLE Program – *Crisis Planning for Medi-Cal* (recorded 9/8/2022)

History

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