

Elder Financial Abuse and Medicaid Denials

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Justice in Aging

Justice in Aging is a national organization that uses the power of law to fight senior poverty by securing access to affordable health care, economic security, and the courts for older adults with limited resources. Since 1972 we have focused our efforts on populations that have traditionally lacked legal protection such as women, people of color, LGBT individuals, and people with limited English proficiency.

Introduction

Elder financial exploitation can have disastrous consequences for older adults who need long-term services and supports through the Medicaid program. Let's take the example of Mrs. K. Mrs. K is a 94-year-old Russian-speaking woman who has resided in a nursing home since 2015 due to recurring medical issues. Mrs. K's family visits her daily in the nursing home. Recently Mrs. K's nursing home sent her family a bill for \$65,000 stating that Medicaid would not cover her bills because, among other issues, she appeared to be over the asset limit to receive Medicaid-funded nursing home care. However, when Mrs. K received help from a legal services attorney, they discovered that Mrs. K was the victim of identity theft, and the assets in question were not hers. Without the help of legal services advocating for Mrs. K with the Medicaid agency, Mrs. K would have been at risk of eviction from the nursing home. Unfortunately, situations like Mrs. K's are all too common.

Elder Financial Abuse

What is elder financial abuse?

Elder financial abuse, also called elder financial exploitation, is a widespread problem. In 2010, the annual financial loss from elder financial abuse was \$2.9 billion.¹ Elder abuse is very difficult to measure, as many victims do not come forward to report it. However, a recent New York study found that 1 in 20 older adults reported experiencing financial exploitation after age 60. More than half the time, a family member was the perpetrator.²

According to the Older Americans Act, the term 'exploitation' means the fraudulent or otherwise illegal, unauthorized, or improper act or process of an individual, including a caregiver or fiduciary, that uses the resources of an older individual for monetary or personal benefit, profit, or gain, or that results in depriving an older

1 *The MetLife Study of Elder Financial Abuse* (June 2011), at 2, available at metlife.com/assets/cao/mmi/publications/studies/2011/mmi-elder-financial-abuse.pdf.

2 Janey C. Petersen et al., *Financial Exploitation of Older Adults: A Population-Based Prevalence Study*, *Journal of General Internal Medicine* (2015), available at nyselderabuse.org/documents/07-14ElderExploitation.Fulltext.pdf.

individual of rightful access to, or use of, benefits, resources, belongings, or assets.³

Elder financial abuse can take many forms, including: misuse of an older adult's personal checks, credit cards, or bank accounts; stealing cash, income checks, or household goods; forging an older adult's signature; identity theft using an older adult's information; misuse or abuse of a financial power of attorney; and scams that target older adults—such as lottery scams, home repair scams, sweetheart scams, and grandparent scams.⁴

How can legal services attorneys identify elder financial abuse?

Financial exploitation cases often present as the underlying cause of other substantive issues. It can take careful and considerate interviewing and investigation to discover that there are issues of exploitation occurring in someone's life. As with other types of abuse, an older adult may not readily share their story of financial abuse.

Any older adult can be a victim of elder financial abuse. However, legal services attorneys should particularly watch for the following factors, which can indicate increased risk of exploitation:

1. Individuals with diminished capacity, such as older adults with dementia;
2. Social isolation, e.g. the older adult has limited interaction and may be vulnerable to financial exploitation by a caregiver or a scammer; and
3. Family history of domestic violence.

Dementia is one of the primary risk factors in elder abuse—studies have shown nearly 50% of persons with dementia experience some form of abuse, whether it is physical, emotional or financial.⁵

Some signs of financial exploitation can include:

- Financial activity the person could not have done herself, such as ATM withdrawals for someone who is bedridden;
- Bills not being paid, when previously the individual was paying them;
- Different signatures on checks;
- Unexplained disappearances of funds or valuable possessions;
- New individuals (either relatives or “friends”) who are suddenly showing an interest the adult's rights, affairs, and possessions;
- Unexplained, sudden transfers of assets or finances to an individual; and
- Sudden changes in a will, financial documents, bank accounts, or banking practice.⁶

Careful interviewing and review of the older adult's financial documents can reveal elder financial abuse, even when it does not immediately present itself.

Financial Eligibility Criteria for Medicaid

Medicaid is a federal-state partnership that provides health insurance and/or long-term services and supports to

3 Older Americans Act, Section 102(a)(18)(A), 42 U.S.C. §3002(a)(18)(A).

4 National Center on Elder Abuse (NCEA), *Types of Abuse—Financial or Material Exploitation*, available at ncea.acl.gov/faq/abusetypes.html#financial.

5 A. Wiglesworth et al, *Screening for Abuse and Neglect of People with Dementia*. Journal of the American Geriatrics Society, Vol. 58, Issue 3, (2010) at 493–500, available at centeronelderabuse.org/docs/ScreeningAbuseNeglectPwDementia_Wiglesworth2010.pdf.

6 NCEA, *Types of Abuse – Financial or Material Exploitation*, *supra* note 4.

over 6 million low-income older Americans each year.⁷ Unlike Medicare, Medicaid plays a particularly key role in the financing of long-term care, including both nursing home care and home and community-based services. Six out of ten nursing home residents rely on Medicaid funding.⁸

To qualify for long-term care through Medicaid, there are strict rules regarding the maximum income and assets that older adults can have. Individuals are prohibited from transferring assets for less than fair market value for the purposes of qualifying for the Medicaid program.⁹ If someone is found to have transferred assets improperly, a penalty period can be imposed based on the amount that was transferred, and the individual will not be eligible to receive Medicaid until the penalty period is completed.¹⁰ The Deficit Reduction Act of 2005 imposed a sixty month “lookback period” for Medicaid applications, and as a result, applicants must provide significant financial documentation, including bank records from the past five years.¹¹

Once an individual is found eligible for Medicaid long-term care, he or she must pay most of their funds to the nursing home to pay their “share of cost.” The individual is allowed to keep only a very small portion of their funds as a personal needs allowance.¹² When an individual is married, a spousal or family allowance may also be deducted.

Common Medicaid Denials Related to Financial Abuse

The following scenarios are common problems that victims of elder financial abuse may have when trying to access Medicaid, and how legal services attorneys can help.

- 1. Being denied eligibility.** Older adults who are victims of financial exploitation may be denied Medicaid benefits because they cannot not provide their financial documents, are missing documents, or have questionable records. Without the necessary bank records, becoming eligible for Medicaid is extremely challenging. Legal services attorneys can help individuals and their representatives access bank records that are needed, or argue why such records are not actually needed.
- 2. Penalty periods based on “gifts.”** As described earlier, when someone applies for Medicaid long-term care, they may be penalized if they gave away assets without receiving fair market value within the past five years. Financially exploited older adults may appear to have given away cash, real estate or other valuables, when really those resources were stolen, or the person faced undue influence and duress to make such a “gift.” Legal services attorneys can represent older adults in Medicaid fair hearings to argue that those transfers were not actually “gifts,” and help eliminate or reduce any penalty periods.
- 3. Eviction or involuntary discharge from nursing homes.** Individuals may also be threatened with eviction or involuntary discharge from a nursing home because of nonpayment—either because they did not qualify for Medicaid or because they did not pay the resident’s share of costs that was assessed by the Medicaid program. Legal services attorneys can challenge those discharges and help the individuals become Medicaid-eligible.
- 4. Need for a hardship waiver.** In order to become eligible despite financial exploitation, people with

7 Molly O’Malley Watts et al., *Medicaid Financial Eligibility for Seniors and People with Disabilities in 2015*, Kaiser Family Foundation (March 1, 2016), at 1, available at files.kff.org/attachment/report-medicaid-financial-eligibility-for-seniors-and-people-with-disabilities-in-2015.

8 Charlene Harrington et al., *Nursing Facilities, Staffing, Residents and Facility Deficiencies, 2009 Through 2014*, Kaiser Family Foundation (August 4, 2015) at 8, available at kff.org/medicaid/report/nursing-facilities-staffing-residents-and-facility-deficiencies-2009-through-2014/.

9 42 U.S.C. § 1396p(C)(1)(A).

10 42 U.S.C. § 1396p(E)(i).

11 42 U.S.C. § 1396p(C)(1)(B). See also guidance from the Center for Medicare and Medicaid Services, *New Medicaid Transfer of Asset Rules Under the Deficit Reduction Act of 2005*, (July 27, 2006), available at downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/TOAEnclosure.pdf.

12 42 U.S.C. § 1396a(q).

Medicaid may need to apply for a hardship waiver to explain why it appears they gave away money, and now they cannot get it back.¹³ Legal advocates can represent clients with their state Medicaid agencies to access hardship waivers and gain needed health and long-term services and supports.

Tips to Help Older Adults Prevent Future Medicaid Problems

If an older adult has been the victim of elder financial exploitation, here is what you as an advocate can do to prevent future problems applying for or receiving Medicaid benefits:

1. Make sure the financial exploitation has been documented. For example, if there is a scam, help the older adult file a report with the Federal Trade Commission.¹⁴ If an individual has stolen or improperly transferred an older adult's money, the older adult may need assistance with documenting the exploitation in one or more ways: through the bank, Adult Protective Services, and/or local law enforcement.
2. Help the older adult obtain copies of all financial records. Review the past bank records with him or her and help correct any errors that may be in place.
3. If the financial abuse is being perpetrated by a person with a power of attorney, help the older adult revoke the power of attorney and appoint a new agent.
4. If the older adult gets a new agent, explain how that person's fiduciary responsibilities include the responsibility to pay the older adult's share of cost to the nursing facility, if required to do so by Medicaid.

Elder financial abuse also requires a community response. Elder abuse prevention coalitions, multi-disciplinary teams, increased awareness, and public education can all be critical in combatting elder financial abuse and preventing it from causing denials of Medicaid benefits.

Conclusion

Elder financial abuse can pose a significant barrier to receiving Medicaid benefits. Legal services attorneys should watch for signs of financial exploitation among the older adults they serve, and consider how such exploitation may affect a future Medicaid application. If an older adult is being denied Medicaid eligibility or subjected to an involuntary discharge from a nursing facility based on nonpayment (related to lack of Medicaid), consider whether financial exploitation may be a factor. Legal services attorneys can play a critical role in ensuring that victims of elder financial exploitation can access Medicaid long-term care benefits.

Additional Resources

- Statutes
 - » Older Americans Act, Section 102(a)(18)(A), 42 U.S.C. §3002(a)(18)(A)
 - » Deficit Reduction Act of 2005 (DRA) (Pub.L.109-171), Section 6011-6016
 - » 42 U.S. Code § 1396p—Liens, adjustments and recoveries, and transfers of assets
- Elder Abuse Resources
 - » National Center on Elder Abuse, ncea.acl.gov
 - » Department of Justice, Online Elder Abuse Training for Legal Services Providers, justice.gov/elderjustice/practitioner
 - » *Money Smart for Older Adults*, Federal Deposit Insurance Corporation and Consumer Financial Protection Bureau, fdic.gov/consumers/consumer/moneysmart/olderadult.html

¹³ 42 U.S.C. § 1396p(c)(2)(D).

¹⁴ Federal Trade Commission, identitytheft.gov

- » Federal Trade Commission, Spotting Elder Financial Abuse, consumer.ftc.gov/blog/spotting-elder-financial-abuse
- Medicaid Resources
 - » LongTermCare.Gov: Medicaid Eligibility longtermcare.acl.gov/medicare-medicare-more/medicaid/medicaid-eligibility/
 - » *Important Facts for State Policymakers, Deficit Reduction Act*, January 8, 2008, cms.gov/Regulations-and-Guidance/Legislation/DeficitReductionAct/downloads/TOAbackgrounder.pdf
 - » *Medicaid Financial Eligibility for Seniors and People with Disabilities in 2015*, Kaiser Family Foundation, kff.org/medicaid/report/medicaid-financial-eligibility-for-seniors-and-people-with-disabilities-in-2015/
 - » Donald D. Vanarelli, *Financial Exploitation of the Elderly: impact on Medicaid Eligibility*, NAELA Journal, at 39 (2010) naela.org/app_themes/public/PDF/Library%20Tab/NAELAJournal-Vol6No1.pdf
 - » *20 Common Nursing Home Problems and How to Resolve Them*, justiceinaging.org/20-common-nursing-home-problems/.

Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at NCLER@justiceinaging.org.

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