

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 1323 Medicaid Eligibility  
**SPONSOR(S):** Health Innovation Subcommittee; Nuñez  
**TIED BILLS:** **IDEN./SIM. BILLS:** SB 1748

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health Innovation Subcommittee	11 Y, 2 N, As CS	Poche	Shaw
2) Health Care Appropriations Subcommittee	9 Y, 4 N	Clark	Pridgeon

### SUMMARY ANALYSIS

The bill amends s. 409.902, F.S., relating to Medicaid eligibility.

Currently, some individuals applying for long-term care Medicaid services are using various methods to shelter their assets in order to become eligible for Medicaid.

The bill requires the Department of Children and Families (DCF) to apply additional asset transfer limitations for individuals applying for Medicaid nursing facility services, institutional hospice services, and home and community-based waiver programs.

- The bill provides certain restrictions on personal services contracts, which are used to transfer assets to a family member or caregiver in return for specific services.
- The bill requires DCF to determine an institutional spouse ineligible for Medicaid if he or she refuses to provide information about the community spouse or cooperate in the pursuit of court ordered medical support or the recovery of Medicaid expenses paid by the state on the behalf of the institutional spouse.

The bill requires the Agency for Health Care Administration (AHCA) to seek recovery of all Medicaid-covered expenses and pursue court-ordered medical support in instances of a spouse refusing to make their resources available to a spouse seeking Medicaid long-term care services.

The fiscal impact of the bill is indeterminate, but will likely have a significant positive impact to the state through imposing stricter regulations on eligibility requirements for Medicaid long-term care. The bill directs AHCA to seek recovery of improper Medicaid payments which may require the Agency to amend their contingency based contract for third party liability recoveries. The cost of this contract is funded through the recoveries received through the vendor's efforts. The amounts recovered are expected to exceed the contract cost.

The bill is effective upon becoming law.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Background**

###### *Medicaid Overview*

Medicaid is the health care safety net for low-income Floridians. Medicaid is a partnership of the federal and state governments established to provide coverage for health services for eligible persons. The program is administered by AHCA and financed by federal and state funds. AHCA delegates certain functions to other state agencies, including the Department of Children and Families (DCF), the Agency for Persons with Disabilities (APD), and the Department of Elderly Affairs (DOEA).

The structure of each state's Medicaid program varies, but what states must pay for are largely determined by the federal government, as a condition of receiving federal funds. Federal law sets the amount, scope, and duration of services offered in the program, among other requirements. These federal requirements create an entitlement that comes with constitutional due process protections.

Florida Medicaid is the second largest single program in the state behind public education, representing 30 percent of the total FY 2012-13 budget. Medicaid general revenue expenditures represent 20 percent of the total general revenue funds appropriated in FY 2012-13. Florida's program is the 4th largest in the nation, and the 5th largest in terms of expenditures. Current estimates indicate the program will cost \$20.8 billion in FY 2012-2013. By FY 2013-2014, the estimated program cost is \$22.1 billion.

###### *Medicaid Long-Term Care*

Long-term care is currently provided to elderly and disabled Medicaid recipients through nursing home placement and through home and community based services. Home and community based services provide care in a community setting instead of a nursing home or other institution. Home and community based services are provided through six Medicaid waiver programs and one state plan program administered by DOEA in partnership with AHCA. These waiver programs are administered through contracts with the 11 Aging Resource Centers<sup>1</sup> and local service providers, and provide alternative, less restrictive long-term care options for elders who qualify for skilled nursing home care.

The Medicaid eligibility income threshold for institutional care placement, home and community based care services, and hospice services, is 300 percent of the Supplemental Security Income (SSI) federal benefit rate.<sup>2</sup> The current SSI federal benefit rate is \$710 for an individual,<sup>3</sup> therefore, individuals with incomes under \$2,130 per month are eligible for Medicaid long-term care services.<sup>4</sup>

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<sup>1</sup> The 2004 Legislature created the Aging Resource Center initiative to reduce fragmentation in the elder services system. To provide easier access to elder services, the Legislature directed DOEA to establish a process to help the 11 area agencies on aging transition to Aging Resource Centers.

<sup>2</sup> Rule 65A-1.713(1)(d), F.A.C.

<sup>3</sup> Social Security Administration, see <http://www.ssa.gov/oact/cola/SSI.html> (last viewed on March 17, 2013).

<sup>4</sup> Florida Department of Children and Families, *SSI-Related Programs Fact Sheets*, January 2013, page 10, available at [www.dcf.fl.us/programs/access/docs/ssifactsheet.pdf](http://www.dcf.fl.us/programs/access/docs/ssifactsheet.pdf)

A 2009 study by the National Alliance for Caregiving and AARP found that about 43.5 million Americans look after someone age 50 or older, which is a 28 percent increase from 2004.<sup>5</sup> Some individuals, with assistance from financial planners and attorneys, have developed methods of arranging assets in such a way that they are not countable when Medicaid eligibility is determined. Elder law attorneys across the country actively advertise services to assist elderly individuals with personal service contracts and other asset protection methods. For example, the website of a South Florida law firm prominently displays the following sentences on their website:

- “Asset Protection For People With Too Much Income or Assets to Qualify for Government Programs;” and
- “For ten years we have successfully helped families preserve their assets and qualify for Florida Nursing Home Medicaid benefits and Assisted Living public benefits.”<sup>6</sup>

### Transfer of Assets

According to DCF, some individuals, prior to entering a nursing facility or enrolling in a Medicaid home and community based service waiver program, transfer accumulated assets to a relative through a contract which provides that the relative will provide personal services to the individual for a specified period of time.<sup>7</sup> Current DCF policy does not preclude the transfer of funds to relatives when contracts are drawn up to prepay for future personal services.<sup>8</sup> According to DCF, many of the contracted services incorporated into the contracts are services that close relatives would normally provide without charge such as visitation, transportation, entertainment, and oversight of medical care.<sup>9</sup>

If a transfer of assets was made in the form of a personal services contract, within a 36 month (3 year) look back period, DCF must make a determination if the contracted services were for fair market value.<sup>10</sup> The look back period is calculated from the date of application for Medicaid.<sup>11</sup> If a transfer of assets for less than fair market value is found, the state must withhold payment for nursing facility care and other long-term care services for a period of time referred to as the penalty period. The length of the penalty period is determined by dividing the value of the transferred asset by the average monthly private-pay rate for nursing facility care in the state.<sup>12</sup>

### Spousal Impoverishment

Section 1924 of the Social Security Act provides requirements to prevent “spousal impoverishment,” which can leave the spouse who is still living at home in the community with little or no income or resources.<sup>13</sup> When the couple applies for Medicaid, an assessment of their resources is made and a protected resource amount of \$115,920<sup>14</sup> is set aside for the community spouse and the remainder is considered available for the individual applying for Medicaid.<sup>15</sup>

Additionally, section 1924 of the Social Security Act provides that an individual applying for Medicaid cannot be determined ineligible for assistance based on assets of their spouse when:

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<sup>5</sup> National Alliance for Caregiving (in collaboration with AARP), *Caregiving in the U.S., Executive Summary*, 2009, available at <http://www.caregiving.org/pdf/research/FINALRegularExSum50plus.pdf> (last viewed on March 17, 2013).

<sup>6</sup> See <http://www.buxtonlaw.com/flmedicaidplanning.shtml> (last viewed on March 17, 2013).

<sup>7</sup> Florida Department of Children and Families, *Staff Analysis and Economic Impact- HB 1323*, pages 1-2 (on file with the Health Innovation Subcommittee staff).

<sup>8</sup> Id.

<sup>9</sup> Id.

<sup>10</sup> Rule 65A-1.712(3), F.A.C.

<sup>11</sup> Id.

<sup>12</sup> Rule 65A-1.712(3)(g)1., F.A.C.; the average monthly private pay nursing facility rate is \$7,362 per rule 65A-1.716(5)(d), F.A.C.

<sup>13</sup> 42 U.S.C. 1396r-5(d).

<sup>14</sup> This is an amount is known as the “community spouse resource allocation”. See *supra*, FN 4 at page 12.

<sup>15</sup> Rule 65A-1.712(4), F.A.C.

- The applicant assigns his or her rights to support from the community spouse to the state;
- The applicant is physically or mentally unable to assign his right by the state has the right to bring a support proceeding against the community spouse; or
- The state determines the denial of eligibility would work an undue hardship.<sup>16</sup>

According to DCF, when an applicant signs a document assigning his or her rights to the state, the state has the authority to seek financial support from the community spouse for Medicaid funds spent on the spouse of the nursing facility.<sup>17</sup> While DCF indicates that it has authority to seek financial support from the community spouse under these circumstances, there is no mechanism to actually recover funds from the community spouse.<sup>18</sup>

### *Deficit Reduction Act*

The Federal Deficit Reduction Act of 2005 (DRA)<sup>19</sup> contained provisions aimed at discouraging the use of “Medicaid planning” techniques and to impose penalties on transactions which are intended to protect wealth while enabling access to public benefits.<sup>20</sup> The Congressional Budget Office (CBO) estimated that the DRA would reduce federal Medicaid spending by \$11.5 billion over the first five years and \$43.2 billion within ten years. The DRA made changes to:

- Medicaid transfer of asset rules;
- Medicaid annuity rules;
- spousal impoverishment rules;
- home equity rules; and
- rules pertaining to treatment of continuing care retirement community entrance fees.

### Transfer of Assets

The Act extended the “look-back period” for any transfers of assets from 36 months to 60 months, on or after February 8, 2006. In addition, the Act changed the start date of the penalty period, which is the period during which an individual is ineligible for Medicaid payment for long-term care services because of a transfer of assets for less than fair market value.<sup>21</sup> The Act changed the start date of the penalty period from the month of the transfer of assets to the date of application for Medicaid.<sup>22</sup>

### Spousal Impoverishment

When a couple applies for Medicaid, an assessment of their resources is made and a protected resource amount of \$115,920 is set aside for the community spouse and the remainder is considered available for the individual applying for Medicaid. This protected amount is known as the Community Spouse Resource Allowance (CSRA). The DRA provided that an increase in the CSRA cannot be granted until the maximum available income of the institutionalized spouse is allocated to the community spouse.<sup>23</sup>

### *Recovery of Medicaid-Covered Expenses*

Federal regulations<sup>24</sup> and the Florida Medicaid Third-Party Liability (TPL) Act<sup>25</sup> allow for recovery of amounts paid for medical expenses by Medicaid for which there is another liable third party (i.e., the

<sup>16</sup> 42 U.S.C. 1396r-(5)(c)(3)(C).

<sup>17</sup> See supra, FN 7 at pages 2-3.

<sup>18</sup> Id. at page 3.

<sup>19</sup> P.L. 109-171 (2005).

<sup>20</sup> Department of Health and Human Services, Centers for Medicare and Medicaid, *The Deficit Reduction Act: Important Facts for State Government Officials*, available at <https://www.cms.gov/DeficitReductionAct/Downloads/Checklist1.pdf> (last viewed on March 18, 2013).

<sup>21</sup> Id.

<sup>22</sup> Id.

<sup>23</sup> Id.

<sup>24</sup> 42 U.S.C. §1396k(a).

recipient has other insurance coverage, such as private insurance or Medicare). AHCA has a current contract with a Medicaid third party liability vendor, Affiliated Computer Services (ACS). It is the role of the ACS to identify potential third party payors and to recoup from them costs that have been paid by Medicaid. Contract costs are paid through the funds recovered by the contractor.

### **Effect of Proposed Changes**

The bill requires DCF to apply additional asset transfer limitations for individuals applying for Medicaid nursing facility services, institutional hospice services, and home and community-based waiver programs. The new limitations apply to asset transfers made after July 1, 2013.

The bill applies the following new conditions to individuals who enter into personal services contracts:

- The contracted services must not duplicate services that would be available through other sources or providers, such as Medicaid, Medicare, private insurance, or another legally obligated third party;
- The contracted services must directly benefit the individual and are not services that are normally provided out of consideration for the individual;
- The cost to deliver the services must be computed in a manner that reflects the actual number of hours to be expended and the contract must clearly identify each specific service and the average number of hours required to deliver each service each month;
- The hourly rate for each contracted service must be equal to or less than the amount normally charged by a professional who traditionally provides the same or similar services;
- The cost of contracted services must be provided on a prospective basis only and does not apply to services provided before July 1, 2013; and
- The contract must provide fair compensation to the individual during her or his lifetime as set forth in the life expectancy tables published by the Office of the Actuary of the Social Security Administration.

The bill requires DCF to determine an institutional spouse to be ineligible for Medicaid if she or he, or the person acting on her or his behalf, refuses to provide information about the community spouse or cooperate in the pursuit of court-ordered medical support or the recovery of Medicaid expenses paid by the state on her or his behalf.

The bill requires AHCA to seek recovery of all Medicaid-covered expenses and pursue court-ordered medical support from the community spouse when she or he refuses to make her or his assets available to the institutional spouse.

The bill provides an effective date of upon becoming a law.

#### **B. SECTION DIRECTORY:**

**Section 1:** Amends s. 409.902, F.S., relating to designated single state agency; payment requirements; program title; release of medical records.

**Section 2:** Provides an effective date of upon becoming a law.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

#### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

##### **1. Revenues:**

The bill could result in savings to the state by applying stricter asset transfer limitations for certain individuals applying for nursing facility services under the Medicaid program. Additionally, AHCA is directed to seek recovery for monies paid by Medicaid on behalf of the eligible recipient.

2. Expenditures:

AHCA would pursue the recovery of Medicaid funds from the community spouse through the use of the Medicaid Third Party Liability (TPL) vendor. The current TPL contract would need to be amended in order to include this function. This vendor is typically paid a contingency fee based on its collections. The fee paid to the vendor for pursuing the Medicaid funds from this legislation would be netted from the recoveries received.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Nursing home and Medicaid long-term care managed care providers may experience a positive fiscal impact if a greater number of individuals are required to pay for their care with private pay, rather than Medicaid.

D. FISCAL COMMENTS:

The fiscal impact of the bill is indeterminate; but will likely be positive due to the amount of collections exceeding the cost of the contingency contract.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill grants appropriate rule-making authority to DCF to implement the provisions of the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

On lines 34 and 35, the terms “directly benefit” and “consideration” lack specificity. It will be difficult to determine how a provided service directly benefits the recipient of the service. Also, services and acts “normally provided out of consideration” are not clear in the meaning of “consideration”.

On lines 38 and 39, the bill requires a contract for personal care services to specify the number of hours to be expended. It does not specify over what time period those hours will span. It is recommended that language be added indicating that the contract must specify the number of hours to be expended “over the life of the contract.”

On lines 42 through 44, the bill requires the hourly rate at which personal care services are to be billed under the contract is no more than the amount normally charged by a professional who traditionally provides the same or similar services. Professionals who provide personal care services charge different rates according to the market in which they operate. The hourly rate to provide certain services may likely be higher in a major city compared to the hourly rate compared in a rural county. It is recommended that language be added to the bill to read:

“4. The hourly rate for each contracted service is no more than the usual and customary amount charged by a professional who traditionally provides the same or similar services in the community where the contracted services are to be performed.”

#### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On March 19, 2013, the Health Innovation Subcommittee adopted one amendment to House Bill 1323. The amendment removed specific requirements to be met by DCF if a community spouse refused to make his or her resources available to his or her institutional spouse. The amendment required DCF to declare an institutional spouse ineligible for Medicaid if he or she refused to provide information about the community spouse, or cooperate in the pursuit of court order medical support or the recovery of Medicaid benefits paid by the state on his or her behalf.

The bill was reported favorably as a committee substitute. The analysis reflects the committee substitute.