

FREE **Legal Helpline**

for Seniors



Legal Resources *for the* **Elderly Program**

*A statewide, free legal helpline
for New Mexico residents
55 and older.*

Albuquerque 505-797-6005

Statewide 1-800-876-6657

www.sbnm.org/LREP

Monday–Friday • 8 a.m.–5 p.m.



New Mexico State Bar Foundation
Legal Resources for the
Elderly Program

***LREP staff
attorneys often answer
the following questions:***

Can I do anything about the harassing calls I'm receiving from my creditors?

Will I have to give up my home to get Medicaid assistance for my spouse's nursing home care?

My child wants me to co-sign on a loan. Should I do it?

How can I tell whether my estate will require probate?

Should I mortgage my house to pay my creditors?

Social Security says I have been overpaid. What can I do?

I have heard about living trusts. What are they and should I have one?

Do I need a financial power of attorney or a living will?

LREP Services:

- Legal Advice
- Brief Legal Services
- Legal workshops

Who Is Eligible?

All New Mexico residents 55 and older, regardless of income.

What Will It Cost?

There is no charge to speak with an LREP staff attorney.

About Our Attorneys

LREP staff attorneys specialize in legal issues affecting seniors. Services available in both English and Spanish.

Legal advice is available for most civil legal issues, such as:

- Financial Problems
- Bankruptcy
- Landlord/Tenant Disputes
- Long-Term Care
- Medicare/Medicaid
- Estate Planning
- Employment
- Grandparent Caregivers
- Social Security Disability
- Probate

(LREP does not provide legal help for criminal matters)



Power of Attorney

For more information call the LREP toll-free Legal Helpline
at 800-876-6657 or 505-797-6005 (Albuquerque area)
www.sbnm.org/lrep

What is a Power of Attorney (POA)?

You, the principal, are giving someone else the power to act on your behalf. That person is called your agent or attorney-in-fact.

Why do I need to give someone POA?

The POA is a very important document in financial planning. If you become too ill to handle your affairs, you will probably need someone to make financial decisions for you and to help you with your financial affairs. Without a POA your family may need to apply to the court for guardianship or conservatorship. The process for guardianship or conservatorship can be expensive and time-consuming.

Can anyone give a POA?

Anyone, 18 years of age or older, who understands both what they are doing and the contents of the document they are signing can give a POA.

Who should I choose as my agent?

A POA gives the person you name as your “agent” a great deal of power over your affairs. The person you choose as your agent should be someone you trust implicitly to act in your interests instead of in his or her own interest. Your agent should be someone who will try to make the same decisions you would have made for yourself. You can make a relative or friend your agent, or you can hire a bank or corporation to act as your agent. The most important thing is to choose someone who is trustworthy.

How can I be sure my agent follows my wishes?

When you make someone your agent through a POA, you should talk to them about what you want them to do. For example, you should inform your agent about your bills and bank accounts and make



sure they know where you keep your records and important papers.

Can my agent use my money for personal gain?

Your agent has a fiduciary duty to act in your interest and try to do what you would do for yourself if you were able. Third parties will presume the person is acting on your behalf. There have been agents who have used their power for their own benefit, so it is very important that you choose someone you trust.

How can I hold my agent accountable?

You can ask your agent to provide an accounting. This means that the person acting as your agent provides a record of all money spent from your assets. The accounting can be made annually, semi-annually, quarterly, or monthly. You should specify in the POA document how often and to whom your agent must provide an accounting.

What can I do if someone is trying to force me to sign a POA?

You should not sign a POA if you are not comfortable doing so. Call your lawyer or Legal Resources for the Elderly (LREP) if someone tries to persuade you to sign any documents against your will.

What powers should I grant to my agent?

A power of attorney can be specific or it can be general. You may want to give powers such as health decisions (using an Advance Health Care Directive), to one person and give a financial POA to someone else to make financial decisions. If your agent is going to transfer real estate, pay taxes, or purchase and sell stocks and bonds, your POA should specifically state that you grant your agent this authority. If your agent ever uses the POA to transfer real estate, the agent will need to record the POA with the county clerk in the county where the real estate is located.

How long does a POA stay in effect?

A POA can specify that it is effective for specific period of time or that it is to remain in effect until it is revoked. A POA can also be “springing,” which means that it will only become effective if you become incapacitated.

What is a durable POA?

A durable POA states in the document that it remains in effect even after you (the principal) become incapacitated. This is important, because without the “durable” clause, the power of attorney will be void just when you need it the most.

Can my agent use the POA after I die?

No. Your agent’s power ends upon your death. If your agent knowingly uses the POA after your death, he or she is committing fraud.

How do I revoke a POA?

You can revoke a POA at any time as long as you are of sound mind. One way to revoke a POA is to

tear up the document and all copies. Otherwise, the revocation must be in writing and signed in the presence of a notary. If the original POA was recorded, then the revocation must also be recorded. A copy of the revocation should be given to banks, stockbrokers, your doctor, or anyone else who might be relying upon the POA.

Is my POA made in another state valid here in New Mexico?

Probably. However, it is wise to update your POA because requirements vary from state to state.

Would my spouse need a POA?

A husband or wife will need POA to transfer property held jointly. For example, if you and your spouse are joint owners of your home, and your spouse becomes incapacitated, you would need your spouse’s POA to sell or refinance the home.

Do I need a lawyer to draw up a POA?

Not necessarily. There is a statutory form that has been approved by the New Mexico State Legislature. However, you should proceed with caution because a POA is such an important document. A lawyer can ask about your specific needs and include provisions in the POA to fit those needs. LREP recommends that you consult an attorney before signing a POA.

Do I need witnesses?

The POA must be signed in the presence of a notary public to be valid. New Mexico law does not require a POA to be witnessed, but witnesses may strengthen the validity of the document if it is challenged.

Financial Power of Attorney

- **Name agent to handle finances**
- **Avoids guardianship or conservatorship**
- **Name someone you trust who is available**
- **Options include**
 - **Name successor agents**
 - **Authorize agent to pass on power to someone else**
- **Immediate POA – you give the power now**
- **Springing POA – not in effect until you lack capacity**

Capacity

- **Able to understand**
- **Able to make a decision**
- **Able to communicate a decision**
- **Determined by health care professionals**

Limits on Power of Attorney

- You give specific powers
- You can revoke in writing anytime
- Must be notarized
- Only good while you're alive



Advance Health-Care Directive

For more information call the LREP toll-free Legal Helpline
at 800-876-6657 or 505-797-6005 (Albuquerque area)
www.sbnm.org/lrep

You have the right to make your own health care decisions as long as you have the **capacity** to do so. Having **capacity** means that you understand the nature and consequences of proposed health care and that you are able to make and communicate your decision. An **Advance Health Care Directive (AHCD)** allows you to specify who will make health care decisions for you if lose the capacity to make those decisions for yourself.

The AHCD Form has three parts: The Power of Attorney for Health Care; Instructions for Health care (sometimes referred to as a Living Will); and Primary Physician designation. You can use or delete any parts you choose and you can change any language in the form to make it meet your needs.

An AHCD does not need to be witnessed or notarized to be effective in New Mexico. You can change your directive any time. A copy is as good as an original.

Your Advance Health Care Directive goes into effect when two health care professionals determine that you lack the capacity to make your own decisions.

Power of Attorney for Health Care

The Power of Attorney for Health Care is the first part of the AHCD. It allows you name an agent to make health care decisions for you in the event you do not have the capacity to make those decisions for yourself. Your agent should be someone who understands your wishes and whom you trust to act in accordance with those wishes. You can also name other people as backup agents in case the person you name isn't able to act for you when the time comes. Unless you say otherwise, your agent can only make decisions for you if doctors determine you lack capacity.

Naming an agent must be done in writing. If you have not named an agent in writing, you can designate a "surrogate decision maker" by personally informing your health care provider, if you have the capacity to do so at the time. If you have not named an agent and you



do not, or cannot, designate a surrogate, New Mexico law identifies and prioritizes who can make health care decisions for you.

Instructions for Health Care

The second part of the AHCD form allows you to give instructions regarding the types of end-of-life care you wish to receive. You can state whether you want to prolong life or not, and what methods you want to be used. The form also allows you state your wishes regarding organ donation. Putting this information in writing makes it easier for your loved ones to know your wishes. Alternatively, you can choose to let your agent decide about any or all of these matters when the time comes.

Primary Physician

The third part of the form lets you designate your primary physician, who would also be one of the two health care professionals to decide whether you have capacity.

Revoking an AHCD

As long as you have capacity, you can revoke an AHCD. You can revoke your designation of an agent by a signed writing or by personally informing your health care provider. You can revoke the other parts of the directive in any way that communicates your intent to revoke them.

Advance Health-Care Directives:

Q. What health care decisions can my agent or surrogate make?

A. Unless you limit your agent's authority, your agent has the right to consent or refuse to consent to medical care for you, decide who treats you and where the treatment takes place, and approve or disapprove tests and orders not to resuscitate (DNRs).

Q. What is a DNR?

A. DNR stands for Do Not Resuscitate. It is an order that your doctor writes, with your consent (or your agent's consent if you lack capacity). This order instructs emergency medical technicians not to resuscitate you if you stop breathing.

Q. When will my instructions for health care go into effect?

A. When you are unable to make or communicate decisions, and either have an incurable or irreversible condition that will result in your death within a relatively short time or you become unconscious and are not expected to regain consciousness.

Q. Can my agent or surrogate have access to my medical records?

A. Yes. Your agent or surrogate has the same rights as you do to request, receive, examine, copy and consent to the disclosure of health care information.

Q. If I appoint someone to be my agent, will I lose my right to make my own health care decisions?

A. No. As long as you have the physical and mental capacity to make your own decisions, you are entitled to do so. Generally, an agent acts only after you become incapacitated.

Q. Can I name anyone I want to be my agent?

A. You can name any adult (over the age of 18) you choose. You should be sure the person you name is someone you trust to carry out your wishes. It should also be someone who is likely to be available when needed.

Q. How does the law prioritize surrogate decision-makers?

A. The law prioritizes surrogate decision-makers according to their relationship to you. The priority of decision makers is as follows:

1. The spouse;
2. An individual who has been in a long term relationship with the patient, similar to the commitment of a spouse and where the individual and the patient consider themselves to be responsible for each other;
3. An adult child;
4. A parent;
5. An adult brother or sister;
6. A grandparent.

Q. What if none of these people is available?

A. An adult who has exhibited special care and concern for you, who is familiar with your personal values and who is reasonably available may act as your surrogate.

Advance Health Care Directive

Three optional parts:

- 1. POA for health care decisions - agent**
- 2. Instructions for end-of-life care**
 - Formerly called a Living Will
 - Prolong life or not
 - Methods – artificial nutrition/hydration
 - Organ donation
 - Can let agent decide
- 3. Primary physician – for capacity determination**

Advance Health Care Directive

- **No need for witness or notary**
(Notarize if you often travel out of state)
- **You can make changes any time**
- **A copy is as good as an original**
- **Give copies to doctors and family**
- **If you don't have one, the law sets who decides for you**



Probate and Estate Planning

Your estate is everything of value that you leave to others after your death. Probate takes place after your death. In probate, a personal representative is named to be sure your debts are paid and your estate is distributed to your heirs or beneficiaries according to your will or through the laws of inheritance that govern the distribution of your property when you don't have a will (intestate succession). Probate is the legal process that makes this happen.

How can I tell if my estate will require probate? If your heirs or beneficiaries can obtain ownership of your property through a **non-probate transfer**, your estate will not have to go through probate. There will usually be no need for probate if you have arranged for title to your property to be transferred by other means, as described below. If you own property to which there is a "title", such as automobiles, real estate, bank accounts or stocks and bonds, these assets may not require a probate proceeding. The way title to your property is held determines whether the property will need to go through probate. Also, if the only property you own when you die consists of personal items such as furniture, appliances, and clothing, your estate may not require probate.

Non-Probate Transfers

Property you own which is held in the following ways passes to your beneficiaries without a will and is not transferred through probate:

Real estate or other assets held in **Joint Tenancy with Right of Survivorship** passes directly to the other joint owner.

A **Transfer on Death Deed** transfers title to a house or land directly upon your death. This is a special deed that you can revoke or change at any time without the consent or knowledge of the beneficiary.

Assets like bank accounts may be held in Payable on Death (POD) accounts. On the death of the owner,



this type of account is paid to the beneficiary when that named beneficiary presents a copy of the death certificate to the bank or credit union.

Securities like stocks and bonds may be held in **Transfer on Death (TOD)** accounts. The transfer is carried out when the named beneficiary presents a copy of the death certificate to the company issuing the stock. The company will provide any other forms needed to make the transfer to the beneficiary.

Life insurance policies and annuities pay money directly to the named beneficiary without a will or probate.

Other Ways to Transfer Assets without Probate:

Affidavit of Successor in Interest (estates under \$50,000): If the total amount of your estate is less than \$50,000, and at least 30 days have passed since your death, if no one has applied to be appointed Personal Representative of the estate, a person entitled to your property can collect it by presenting a sworn statement ("affidavit") to the person holding the property. This process can be used to transfer title to motor vehicles with a form from the Motor Vehicle Department.

Transfer of title to homestead to surviving spouse by affidavit: If a home is titled only in the deceased spouse's name, the surviving spouse may be able to transfer title to the community property home to himself/herself. This is done through the use of an affidavit which would be filed six months after the spouse's death.

Q. I'm worried that if I don't make a will, the State of New Mexico will take my property when I die. Is that true?

A. No, if you die without leaving a will and you have property which needs to be transferred to your heirs, the property will be distributed to your heirs under the New Mexico laws of inheritance. Generally, that means that your closest relatives will receive your property, not the State. Probate is the process used whether there is a will or not.

Q. I have money in a bank account which I want my three children to have when I'm gone. I think I'll put one of my children on that account. When I die, she can give her sister and brother their share of the money. Is this a good idea?

A. We do not advise people to do their estate planning this way. Sometimes the child who is supposed to share the money with his/her siblings does not do so. The better way to achieve the same result would be for the account to be held "payable on death" (POD) to the children. Then each child would automatically receive his/her share. (Note: putting a child's name on your account makes that child a joint owner of the money while you are alive and could make the money in the account available to your child's creditors.)

Q. I want my son to have my house when I'm gone. Would it be a good idea to transfer title to him now? Or maybe I should make him a joint-tenant with me?

A. Although both methods allow your house to pass to your son without probate, there are other possible problems which you should consider before you change title to your home. Once the title to the house is in your child's name (either as sole owner or joint tenant), the house becomes an asset which may be available to your child's creditors. If you transfer title to someone else, you lose control over what will happen to the property while you are alive. This can also affect your ability to qualify for Medicaid for nursing home care. The better solution would be for you to execute and record a Transfer on Death Deed. An owner of real estate located in New Mexico may execute a deed that designates a beneficiary who will become the

owner of the property at the owner's death. This deed can be revoked any time before the owner's death and does not give the beneficiary any rights of ownership until the owner has died. When the owner dies, the beneficiary files a copy of the death certificate with the county clerk in the county where the real estate is located and title passes to the beneficiary without going through probate.

Another advantage to this type of deed is that the beneficiary gets a stepped-up tax basis in the property to the value of the property at the date of death. This means the beneficiary won't have to pay capital gains taxes on the amount the property increased in value while the original owner owned it.

Q. How long does it take to probate an estate? Is it really expensive?

A. If no one contests the Will and there are no property or other issues to resolve, probate can often be completed in four to six months. There is no specific cost for probate, other than filing fees. Depending on how complicated the probate proceeding may be, the cost could range from a few hundred dollars to several thousand dollars if you hire a lawyer to help.

Q. Will my estate have to pay an estate tax?

A. If in 2020 your estate will not be over \$11.58 million, you probably don't have to worry about your estate paying "estate taxes". Persons who own substantial amounts of property (money/real estate) should consult with a tax advisor about this matter. Legal Resources for the Elderly Program does not provide advice in regard to taxes.

Q. If I owe money to people when I die, will they and other creditors be paid?

A. An important part of the probate process is paying valid debts owed to creditors. Your Personal Representative will be responsible for notifying your creditors about your death and asking those creditors to submit their bills. If your estate does not have enough money to pay the debts, these debts may be charged off by the creditors. Your Personal Representative does not use his/her own funds to pay your bills.

What is Probate?

- Legal process to transfer assets and pay debts after death
- Personal representative takes your estate through probate court
- If you use non-probate transfers, there's no probate for that property

The State does not get your property unless you haven't named any recipients and none of your living relatives claim it

Do You Need a Will?

Will

- You say who gets your property
- You name personal representative

No Will (Intestate Succession Law)

- Property goes to closest relatives in equal shares
- They agree on personal representative or court decides

Non-Probate Transfers

- You say who gets your property
- No probate

Non-Probate Transfers

Transfer assets without a will or probate

- Joint tenancy
- Transfer on Death Deed (real estate)
- Payable on Death (bank accounts)
- Transfer on Death (stocks, investment accounts)
- Beneficiaries of insurance, annuities, retirement accounts
- Trusts

Property transferred by the above methods is not distributed according to your will because the property is no longer part of your PROBATE estate.

Joint Tenancy With Non-Spouses

Putting your children on your deed or accounts:

- Gives joint owner power over your assets now
- Joint owner's creditors can take your assets
- May make you ineligible for Medicaid because it's a transfer



Transfer on Death Deed

The law in New Mexico allows an owner of real property (land or house) to transfer that property to another person (grantee beneficiary) through the use of a **Transfer on Death Deed (TODD)**. This deed allows the owner to designate a person or persons who will become the owner of the property when the original owner dies without any need for that property to go through probate.

There is no transfer until the owner dies.

The owner keeps control of the property until the owner dies. The owner does not have to have permission from the grantee beneficiary to sell the property, borrow money on it, or give it away. The owner can **revoke** (cancel) the deed at any time and can execute (sign), acknowledge (sign before a notary) and record a new TODD providing for a different person to get the property. The grantee beneficiary does not have to be notified of the recording of the TODD and does not have to be notified if the TODD is revoked. Since the grantee beneficiary has no claim on the property during the lifetime of the owner, the property can't be taken by the grantee beneficiary's creditors while the owner is still alive. A TODD also will not disqualify an owner from receiving Medicaid assistance for nursing home care, because the owner has not given the property away.

How does an owner make a TODD?

It is very important that a TODD be properly drafted (written), executed and acknowledged. Therefore, it is advisable that the owner consult with an attorney to be certain that all of the requirements have been met. The TODD must then be recorded at the county clerk's office in the county in which the property is located.

A Joint Tenancy is not affected by a TODD.

If joint tenants record a TODD, the property does not go to the grantee beneficiary when the first joint tenant dies. Instead, the surviving joint tenant becomes the sole owner of the property. The property goes to the



grantee beneficiary once the last joint tenant dies unless that joint tenant does a new TODD.

A TODD controls over a will.

If the owner's will states that a certain person or persons will inherit real property and the owner recorded a TODD for that property, the grantee beneficiary inherits the property through the TODD. The owner's will has no effect on the TODD. **No matter what you say in your will, the TODD will control the distribution of your property.**

The grantee beneficiary gets the owner's interest in the property subject to any claims against the property when the owner was alive.

If the owner had a mortgage, if there was a lien against the property, or if the owner had given away an interest in the property such as an easement, the grantee beneficiary's interest in the property is subject to those claims and obligations.

When the owner dies, the owner's creditors can make a claim against the property.

The real property is transferred at the death of the owner. If the deceased owner owes money to creditors, the creditors can attempt to be repaid out of the real

property if there are no other assets available to pay them. To make that claim, the creditor would have to open a probate proceeding (if there wasn't one already

open). The transfer is also subject to allowances for the owner's surviving spouse and minor children if the owner didn't leave enough assets to provide those allowances.

Frequently Asked Questions About TODDS:

Q. How does the grantee beneficiary get title to the property after the owner's death?

A. The grantee beneficiary takes a certified copy of the owner's death certificate to the county clerk's office to be recorded. This completes the transfer. Title is transferred without having to open a probate proceeding.

Q. If I were to die after being in a nursing home, getting Medicaid, would my house go to my TODD beneficiary or would the house be sold so Medicaid could be paid back for money it paid for my nursing home care?

A. There is no easy answer to this question. Under New Mexico law, Medicaid can recover from probate estates. The TODD property will not be in the probate estate. However, the TODD law also allows creditors to make claims against the TODD property. Currently, Medicaid is in the process of stepping up its estate recovery procedures and it is yet to be seen whether Medicaid will make claims against this type of transfer.

Q. After my death, if my beneficiary wants to sell my house immediately, could my creditors create a problem with the sale?

A. If there isn't enough money in your estate to pay your creditors, the TODD property would be subject to your creditors' claims. A creditor has one year from the date of the original owner's death to make a claim against the estate of the

deceased. Title insurers would likely be reluctant to issue title insurance before that one-year time period had passed.

Q. Does my beneficiary get a stepped-up tax basis in my real property when I die?

A. Yes, the property received at your death would get a stepped-up tax basis as property your beneficiary inherited from you. This means the beneficiary will not have to pay capital gains taxes on the amount the property increased in value while you owned it.

Q. I have rental properties. Can I use a TODD to transfer those assets?

A. Yes. The TODD is for any real estate located in New Mexico. Any existing leases would continue in effect after the owner's death. Before you execute a TODD for business or investment property, you should consult with an attorney as there may be tax consequences you need to consider.

Q. What effect would a TODD have on taxation of my estate?

A. The TODD itself would have no effect. Estate Taxes are calculated on one's taxable estate. A TODD removes your real estate from your probate estate, not your taxable estate. Your taxable estate is basically everything of value you own when you die. If you have concerns about estate taxation, you should consult with a tax professional.

Transfer on Death Deed (TODD)

- **Allows NM real estate to be transferred to a beneficiary after your death**
- **Owners keep title and control while they are alive**
 - **Sign deed now and record it**
 - **Title transfers after your death**
 - **You can revoke the deed and execute a new one**
 - **You can sell the property or borrow money on it**

Transfer on Death Deed (TODD)

- **Beneficiary can't take property or borrow money on it until after owner's death**
- **Property not part of probate estate**
- **Won't affect Medicaid eligibility because no transfer until after death**
- **TODD not advised for multiple beneficiaries because all have to agree on what's to be done with the property.**



Medicaid & Long-Term Care

Paying for **long-term care**, whether in a nursing home or through care provided in the home, is a cause of concern for many seniors. Medicaid is a publicly-funded program that can help with these costs, either through **Institutional Care Medicaid** for nursing home care or through **Centennial Care Community Benefit (formerly known as CoLTS)** for home care. Medicaid is a **needs-based** program, meaning recipients are required to pay for their own care as long as their income and assets exceed the eligibility guidelines. All Medicaid recipients must meet the Medicaid **financial eligibility requirements**. This requires an examination of the individual's and, if the applicant is married, the couple's income and assets.

Medical Eligibility

To qualify medically for **Institutional Care Medicaid** benefits, you must meet certain threshold requirements, including age (65 years old) or disability (including blindness), U.S. citizenship and New Mexico residency. You must require nursing home level care as certified by a physician. If you are younger than 65, your disability must be expected to last at least 12 months.

To qualify medically for the **Centennial Care Community Benefit**, you must be medically eligible for nursing home care but be able to receive services at home or in assisted living. The Centennial Care Community Benefit pays for specific services, but in most cases not for the whole cost of assisted living. Funding for this program is limited and there is usually a waiting list.

Financial Eligibility

Person in Need of Long-Term Care

If you are **single, divorced, widowed or your spouse is also in a nursing home**, you are eligible for Medicaid if you require long-term care, and you



meet **both the income and assets requirements**. Your **monthly income** must be less than about \$2,901 per month (the amount changes every year in January). You are allowed to keep about \$94 of your income in a personal needs account, with the rest of your monthly income paid directly to the nursing home for your care. Medicaid then pays the rest of the monthly cost.

You can have no more than \$2,000 in "**assets**" such as life insurance cash value, bank accounts, IRA's, etc. You can also have no more than \$1,500 in a **burial account** (or you may have a pre-paid burial agreement in any amount as long as it is pre-paid and irrevocable, meaning you cannot get your money back). You can have one **vehicle** worth any amount. If you own a **home**, you are not required to sell it as long as you state you intend to return home and you do not have over \$730,000 in equity. After your death, the state can recover the costs paid by Medicaid for your care by making a claim against the assets in your estate.

Stay-at-Home Spouse

The **stay-at-home spouse** of a person in need of long-term care is able to keep at least half of the couple's income (sometimes more than half). The stay-at-home spouse is also allowed to keep a significant portion of

the couple's community assets including the family **home** (with no limit on the amount of equity) and one **vehicle** of any value as long as the vehicle is needed for transportation to work or medical care. In addition to the home and vehicle, the stay-at-home spouse is allowed to keep a maximum of one half of the community assets up to about \$157,920 (the amount changes every January). This protects the stay-at-home spouse financially when the other spouse requires long-term care.

Transfer of Assets

Medicaid is a needs-based program that operates on the principle that people who can afford to pay for their own care should do so before requesting public funds. To be sure people are truly needy, Medicaid reviews an applicant's financial records to see if any assets have been given away within the last 5 years. This "**look back period**" covers all types of transfers, whether directly to another individual or into a trust, except for transfers made between spouses. Transfers between spouses must be completed within one year of the initial resource determination of Medicaid eligibility for the spouse requiring nursing home care.

If you have given away assets within the look back period, Medicaid requires those assets be returned to you so you can spend them on your care. If assets transferred cannot be returned to the recipient, a penalty will be assessed against the recipient. The **penalty** is based on the value of the asset transferred and begins running as of the date of application for Institutional Care Medicaid. During this penalty period, you will be responsible for paying the costs of your care.

For example, if nursing home care costs \$8,900 per month, and you give away \$89,000 of assets within 5 years of needing care, Medicaid won't pay for your care for 10 months (\$89,000 divided by \$8,900 = 10).

Frequently Asked Questions

Q. Am I required to sell everything I own before Medicaid will pay for long-term nursing home care?

A. You are allowed to keep some assets, even if you are single. If you are married, your spouse is able to keep many of your assets to live on. But if you sell or give away your assets in the 5 years before you need long-term care, you may be subject to penalties and be unable to receive Medicaid assistance for some period of time. You can spend your assets on your own needs in order to qualify for Medicaid, but you can't give your assets away or save them to pass on to your children after you die.

Q. Will I have to sell my home to meet the eligibility requirements for Medicaid?

A. In most cases, your home will not be considered an asset which must be sold, provided you state that you intend to return home. For most people, it's better not to sell the home because the cash from the sale would have to be used to pay for long-term care before Medicaid would assist. Medicaid will only consider your home as an asset if you are single and have \$730,000 or more in equity in the home, even if you intend to return home. Additionally, the state may recover reimbursement of the amount Medicaid paid for your care under the Medicaid Estate Recovery Act. This recovery may occur when your estate is probated.

Q. What about transferring my home to my children or adding their name to the title?

A. Both of these are considered giving away an interest in your assets and will result in penalties that will delay your access to Medicaid funds. Also, once someone else owns your property in whole or in part, you can't make them give it back.

Q. What if my income is too high for Medicaid, but I can't afford the whole cost of long-term care?

A. If your income is too high, but you meet the asset tests, you may be able to consult a lawyer to prepare an **income diversion trust** that sets aside your excess income and makes you eligible for Medicaid funding. After you die, the excess income accumulated in the trust goes to reimburse Medicaid for your care.

Medicare vs. Medicaid

- **Medicare – insurance you pay for through Social Security**
 - People who are 65 or older or are disabled
 - Covers only short-term *skilled care* in a nursing home, not *custodial care*
- **Medicaid – government benefit for people who can't pay for care**
 - Custodial care
 - Income and assets tests

Medicaid – Income Limits

- \$2,901 monthly income limit
- Nursing home resident keeps \$94 a month for personal needs
- Rest of income goes to nursing home to pay for care
- Average cost of care \$8,760 a month
- If income too high – call for advice

Medicaid – Assets – Single Person

- **\$2,000 in a non-interest-bearing account**
- **\$1,500 in a burial account or pre-paid burial agreement of any value**
- **One car of any value**
- **Home with up to \$730,000 in equity**
 - **If you state you intend to return home**
 - **Claim is possible against your estate**

Medicaid – Married Persons

At-home spouse keeps:

- **One-half (or more) of the couple's monthly income**
- **The house of any value**
- **One car of any value**
- **One-half of the couple's other assets (min. \$31,584, up to max. \$157,920)**
- **Treated like a single person when both need long-term care**

Transferring Assets to Qualify

- **5 year “look back” period:**
Penalty for giving away assets within the last five years – disqualified for a time equal to value of assets transferred, that is, the amount of time in a care facility that the money could have paid for at the rate of approximately \$8,947 per month.
- **Putting someone’s name on an account or deed is a transfer**
- **No penalty for transfer between spouses**
- **Alternative is to SPEND DOWN your assets on yourself**



Debt Problems

If you are having financial problems and cannot make the payments on your credit card bills or other debts, you should be aware of protections that are available to you under New Mexico law before you consider filing for bankruptcy.

New Mexico Exemptions

If your creditor sues you, New Mexico law may protect some of your assets and income by making them exempt from collection to pay your debts. Each person has the following exemptions protecting property from most **judgment creditors**. A judgment creditor is someone who goes to court and gets a court order or judgment stating that you owe them money.

Homestead Exemption

Your home equity up to \$150,000 per person (\$300,000 for a married couple owning the home jointly). **THIS EXEMPTION DOES NOT APPLY WHEN SOMEONE IS COLLECTING TAXES, MORTGAGES, HOME EQUITY LOANS, OR LIENS PLACED ON THE TITLE BECAUSE OF WORK DONE ON YOUR HOME.**

In lieu of the Homestead Exemption

If you don't own a home, you may be able to exempt up to \$15,000 of personal property in addition to the standard personal property exemption listed below.

Other Exemptions

- Personal property worth \$75,000.
- Tools used for your work worth \$15,000.
- Motor vehicle equity valued at \$10,000 (a married couple could have one vehicle valued at \$20,000).
- Jewelry worth \$5,000.
- Clothing, furniture, books, medical-health equipment, used for the health of the person, not for his/her work, worth unlimited value.

Income and Pension Exemptions

- Pension funds, 401(k), 403(b) and pension annuities have unlimited exemptions. Most IRA funds are



exempt; however very high value IRA funds are subject to some exemption limitations.

- Life insurance proceeds, accident and health insurance benefits-unlimited value.
- Social Security benefits-unlimited value exemption. Social Security Benefits are also protected in a segregated bank account.

The above exemption rules do not apply when:

- Personal property is used as security (collateral). So, if you bought a car and it was security for the loan you used to buy it, there would be no exemption protection for the car.
- The attempt to collect is based on your owing taxes, child support, alimony or student loans.

If your only income and assets consist of items listed in the above exemptions, then you are what is commonly called “**judgment-proof**”. This means that, if your creditor or a collection agency sues you, there is nothing they can take away from you. If you are judgment-proof and your creditor is not trying to collect taxes, student loans, child support or alimony, you may not need to file for bankruptcy since you are already protected under New Mexico law.

If your creditors sue you for the debt, you should file an Answer within the time indicated on the summons. **If you do not file a timely Answer you will lose the lawsuit by default and the creditor will get a judgment against you.** If the creditor gets a judgment

against you, you should complete your Claim of Exemption form and file the form with the court. If you need assistance, call LREP at 800-876-6657 or 505-797-6005.

Home Equity Loans

Sometimes people take out home equity loans to pay off creditors. **The Homestead Exemption does not apply to loans against your home.** If you borrow money on your home to pay off your credit cards and can't keep up the payments on that loan, there may be a foreclosure and you may lose your home. On the other hand, if you didn't pay the credit card debt to begin with and were sued by the creditor, you would be able to protect \$150,000 worth of equity in your home (or \$300,000 for a married couple).

Frequently Asked Questions

Q. I owe a lot of money to credit card companies. I haven't made payments for a long time and now collection agencies are contacting me. I feel bad about not making the payments, but I just don't have enough money for food and medicine. What should I do?

A. If you own only property as listed in the New Mexico exemptions and have only Social Security and retirement income, you may be judgment-proof. This means that, if your creditor or a collection agency sues you, there is nothing they can take away from you. If your creditor sues you and gets a judgment against you, you need to file a **claim of exemption** with the court. This claim of exemption lets the judge and your creditor know that your property and income are exempt from collection.

Before they sue you, collection agencies can be aggressive in trying to collect. You have rights under Federal law not to be harassed by debt collectors. Call us for information about how to assert your rights.

Q. I hear ads from debt consolidators or negotiators who say they can help me fix my debt problems. Can they help me?

A. You should be cautious of any business that offers a quick fix for debt problems. You may end up paying money to them for services that won't help your situation. It's better to get information from a lawyer who understands how the law applies to your circumstances and can give you objective advice.

Q. I have very little income and don't own any property. Car insurance is too expensive. Since I seem to be judgment-proof, would I have any problems if I drive without insurance and get into an accident?

A. The State of New Mexico requires that drivers take financial responsibility for any damage they may cause another person. So, if you're in an auto accident, are sued, and a judgment is entered against you, you must pay that judgment. If you don't, your driver's license (and sometimes your car license) may be revoked and you will not be able to drive.

Q. I think I am judgment-proof except for the equity I have in my home. My equity is over the exemption amount. Should I get a home equity loan to pay off my creditors?

A. As explained above, if you do not meet your payments on a home equity loan, you may lose your house. There is another type of loan that might help you. It's called a **reverse mortgage**. With this type of loan, you don't repay the debt with monthly payments. Instead, the loan is paid off either when you move out of the home or when you die and your estate is probated. You must be at least 62 years old to qualify for a reverse mortgage. Because your home is a valuable asset, be sure you read and understand all of the terms and costs of a reverse mortgage before you sign any papers.

Call us!

New Mexico State Bar Foundation
Legal Resources for the
Elderly Program

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