

MEDICAID APPLICANTS MAY PRE-FUND BURIAL SPACE ITEMS FOR IMMEDIATE FAMILY MEMBERS

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One area of Medicaid spend downs that generates a fair amount of confusion concerns the pre-purchase by Medicaid applicants of burial space items for immediate family members. It is widely recognized that a Medicaid applicant may spend down funds or irrevocably assign the ownership of an insurance policy to pre-fund irrevocable preneed funeral contracts for the Medicaid applicant and his or her spouse. But what is not universally recognized is that, in addition to pre-purchasing preneed funeral goods and services by an irrevocable preneed contract for the applicant and the spouse, the Medicaid applicant may also lawfully spend down resources (cash or insurance policies) for burial space items for immediate family members.

This article will walk through the maze of the Ohio Administrative Code to show that Ohio Medicaid permits applicants to pre-fund burial space items for immediate family members. It will also examine the restrictions on those pre-purchases and the preneed contract forms that funeral homes may use to document those pre-purchases. In addition, since the Ohio Department of Jobs and Family Services (“ODJFS”) just re-codified the applicable Medicaid regulations in the Fall of 2014, this article will cite those new regulations so that funeral directors and Medicaid caseworkers know exactly which regulations permit the pre-purchase of burial space items for immediate family members.

1. Burial Spaces are Excluded Resources. There are three separate Ohio Medicaid regulations that recognize that burial space items are excluded resources (assets owned by a Medicaid applicant that are not counted for Medicaid eligibility purposes). Those three Medicaid regulations are as follows:

- **OAC §5160:1-3-06.2 Medicaid: resource assessment**

(C) Documentation of ownership and current value of the couple’s countable resources shall be completed in accordance with Chapter 5160:1-3 of the Administrative Code. The only resource exclusions for the resource assessment and the determination of countable resources at the time of application are:

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(4) The value of any burial space and/or irrevocable preneed fund contract (including the interest that accumulates) for the individual, spouse and any member of the immediate family.

- **OAC §5160:1-3-05.6 Medicaid: preneed funeral contracts**

(F) Purchase of burial space. Any portion of the contract that clearly represents the purchase of a burial space is excludable as a countable resource if it meets the requirements of 5160:1-3-05.7 of the Administration Code.

- **OAC § 5160:1-3-05.14 Medicaid: resource exclusion**

(C) The following are considered excluded resources:

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(6) The value of a burial space as described in rule 5160:1-3-05.7 of the Administrative Code.

As is clear from the three Medicaid regulations quoted above, burial space items are an excluded resource. Furthermore, as indicated in the latter two regulations, the scope of the burial space exclusion is governed by Regulation 5160:1-3-05.7.

2. The Specifics of the Burial Space Exclusion. Medicaid Regulation 5160:1-3-05.7 reiterates that a burial space agreement is an excluded resource for Medicaid eligibility purposes. Regarding that exclusion, Subsection (C) provides in relevant part:

“(C) An agreement which represents the purchase of a **burial space** held for the burial of the individual, his or her spouse, **or any other member of his or her immediate family** is an excluded resource, regardless of value.” (Emphasis supplied).

Having established that a Medicaid applicant may spend down resources to pre-purchase burial space items for immediate family members, the issues now became what constitutes a burial space item and who qualifies as an immediate family member. Regulations 5160:1-3-05.7 addresses both of these issues in the definitions section found in Subsection (B) as follows:

“(B) Definitions.

(1) “Agreement,” for the purpose of this rule, means a contract with a burial provider for a burial space held for the eligible individual or a member of his/her immediate family.

(a) An individual’s immediate family includes his parents, including adoptive parents, minor or adult children, including adoptive and stepchildren, siblings, including adoptive and stepsiblings and the spouses of the immediate family members.

(2) "Burial space," means a burial plot, gravesite, crypt, mausoleum, casket, urn, niche, or other repository customarily and traditionally used for the deceased's bodily remains. The term also includes a contract for care and maintenance of the gravesite, sometimes referred to as an endowment or perpetual care and necessary and reasonable improvements or additions to such spaces, including but not limited to vaults, headstones, markers, or plaques, burial containers (e.g., for caskets) and arrangements for the opening and closing of the gravesite."

To the extent that a Medicaid applicant has cash, he or she may spend it down by pre-purchasing any of the burial space items listed above for any of the immediate family members identified above. A funeral home may enter into its regular irrevocable preneed funeral contract for any of the immediate family members listing the burial space items to be provided upon their death. Funds to prepay those burial space items may then be trusted or used to purchase insurance policies on the lives of the immediate family members. It is, of course, important that only burial space items be pre-purchased and that the preneed funeral contract not include any funeral services or other items that do not qualify as a burial space item.

3. Assignment of Insurance Policies to Pay for Burial Space Items.

In many preneed funeral funding situations, the Medicaid applicant is looking not to spend down cash, but to transfer the ownership of an existing life insurance policy. Since only life insurance policies with a face value of less than \$1,500 are excluded from the Medicaid applicant's resources, it is necessary for most Medicaid applicants to transfer the ownership of existing life insurance policies in order to qualify for Medicaid. One lawful way to transfer the ownership of a life insurance policy is to use it to pre-fund the purchase of preneed funeral services and/or burial spaces.

Medicaid Regulation 5160:1-3-5.6 addresses the use of existing life insurance policies to fund preneed purchases. It is clear from that regulation that a Medicaid applicant may assign ownership of an existing insurance policy to fund preneed funeral contracts, including burial space contracts. However, there are certain requirements that must be addressed in the documentation. These include the following:

- The ownership of the life insurance policy must be irrevocably transferred to the funeral home. It is not sufficient to simply change the beneficiary of the policy to the funeral home. Rather, the ownership of the policy must be transferred. The insurance company will need to verify that the ownership of the insurance policy has been transferred.
- The preneed contract must contain a provision giving the funeral provider the irrevocable right to the proceeds of the insurance policy upon the death of the insured.

- The preneed contract must also contain a provision directing that any excess funds remaining after the purchase of all preneed funeral goods and services must be paid to the estate of the decedent.

4. OFDA Preneed Contract Forms.

If a Medicaid applicant is preplanning and looking to spend down cash,¹ a funeral home can simply use its regular preneed contracts to document the purchase of burial space items for immediate family members. Regardless of whether the cash proceeds paid to the funeral home will be placed into trust or used to purchase an insurance policy on the immediate family member's life, the funeral home's regular preneed contracts may be used. As noted above, if a burial space preneed contract is being made for an immediate family member, make sure that the only items that are purchased qualify as burial space items. No funeral services should be included in the preneed contract.

Unlike cash purchases, the assignment of an existing life insurance policy presents some unique issues. First, the face amount of the policy may substantially exceed the cost of the funeral arrangements for the Medicaid applicant. In these cases, excess funds may be available to purchase burial space items for immediate family members. However, since these pre-purchases must be arranged when the Medicaid applicant applies for Medicaid, the funeral home needs a contract that documents the pre-purchase of the burial space items even though the funeral home will not know how much excess funds will be available when the Medicaid applicant dies.

A second issue that introduces uncertainty in these arrangements is that no one can predict the order of death for the surviving spouse and immediate family members. In addition, the Medicaid applicant may want surplus funds to be used for particular family members depending upon when their deaths occur in relation to other family members. Another factor that needs to be addressed is whether the preneed applicant wants only to purchase particular burial space items, such as a grave plot, instead of the full range of burial space items, such as caskets and vaults.

To address these contingencies, OFDA designed two specialized Medicaid documents. One is the Addendum to Preneed Contract (the "Preneed Addendum") which has been available for the last decade. The other document, the Irrevocable and Non-Guaranteed-Price Preneed Funeral Contract funded by the Assignment of Insurance for Medicaid Applicants (the "Medicaid Preneed Contract") has been available for the past two years and is the preferred vehicle to use to address these situations. Both of these contract forms are available online to OFDA members at www.ohio-fda.org.

In Section 4 of the Medicaid Preneed Contract, the consumer may select up to three payment options which will be funded by the insurance proceeds. The first payment option is for the funeral

¹ Cash purchases include payments by check, credit card, and cash.

expenses of the Medicaid applicant. This payment option will always be selected. The funeral home will complete its normal Statement of Funeral Goods and Services Selected and attach it to the Medicaid Preneed contract as Schedule A detailing the funeral goods and services to be provided upon the death of the Medicaid applicant.

The second payment option available to the Medicaid applicant is to fund the funeral expenses of his or her spouse. If the spouse is still alive and does not have his or her own preneed funding, Medicaid allows the insurance proceeds of the Medicaid applicant to be used for the spouse's funeral. Again, the funeral home will fill out its normal Statement of Funeral Goods and services Selected listing the goods and services to be provided for the spouse and attach this Statement of Funeral Goods and Services Selected as Schedule B.

The third payment option is to use excess insurance proceeds to purchase burial space items for immediate family members. If the Medicaid applicant wants to use surplus insurance funds to make these purchases, the funeral home needs to fill out Schedule C attached to the Medicaid Preneed Contract. The Schedule C that is attached to the Medicaid Preneed Contract provides for burial spaces for up to five immediate family members. If there are more than five immediate family members to be included under the Medicaid Preneed Contract, the funeral home should make additional copies of Schedule C.

Schedule C also includes a funding option choice. The Medicaid applicant may opt to create one trust fund after his or her death for the surplus insurance proceeds. Those trust funds would be used to make burial space purchases for immediate family members in the order in which they died. The other option is for the funeral home to take the surplus insurance proceeds and set up individual trust or insurance policies for each of the individual immediate family members who are listed in Schedule C.

OFDA also makes the Preneed Addendum available for use by member funeral homes. However, because the Medicaid Preneed Contract combines all of the preneed purchases under one contract, OFDA recommends that funeral homes utilize the Medicaid Preneed Contract for preneed purchases by Medicaid applicants assigning existing life insurance policies.

OFDA members with questions regarding this article may contact Scott Gilligan at 513-871-6332.