

Department of Legislative Services
 Maryland General Assembly
 2016 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

Senate Bill 449
 Finance

(Senator Kelley, *et al.*)

Health and Government Operations

Maryland Medical Assistance Program - Guardianship Fees - Personal Needs Allowance

This bill requires that, when determining the “available income” of a Medicaid recipient who is a disabled person and has a guardian, the Department of Health and Mental Hygiene (DHMH) must include as part of the personal needs allowance guardianship fees payable for guardianship services. The personal needs allowance for guardianship fees are (1) \$50 per month if one person serves as both the guardian of the person and the guardian of the property and (2) \$50 per month for *each* guardian if one person serves as the guardian of the person and a different person serves as the guardian of the property. If a guardian is appointed as the guardian of a disabled person receiving Medicaid long-term care services and supports, the guardian is not entitled to receive more than \$50 per month in compensation unless the court makes a finding that unusual circumstances exist.

Fiscal Summary

State Effect: Department of Human Resources (DHR) expenditures (50% general funds, 50% federal funds) increase by \$217,600 in FY 2017 to reprogram the Client Automated Resource and Eligibility System (CARES) to account for guardianship fees as part of the personal needs allowance. Medicaid expenditures (50% general funds, 50% federal funds) increase by a minimal but indeterminate amount beginning in FY 2017. Revenues are not otherwise affected.

(in dollars)	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021
FF Revenue	-	-	-	-	-
GF Expenditure	\$108,800	\$0	\$0	\$0	\$0
FF Expenditure	\$108,800	\$0	\$0	\$0	\$0
GF/FF Exp.	-	-	-	-	-
Net Effect	(\$217,600)	(-)	(-)	(-)	(-)

Note: (-) = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate effect

Local Effect: Local area agencies on aging (AAAs) collect approximately \$311,400 or more in guardianship fees beginning in FY 2017 under the bill.

Small Business Effect: Minimal.

Analysis

Bill Summary: “Available income” means the portion of income of a Medicaid recipient that the recipient must contribute to the recipient’s cost of care under Medicaid. “Disabled person” means a person other than a minor who has been judged by a court to be unable to (1) manage his property for specified reasons and, as a result, requires a guardian of his property or (2) provide for his daily needs sufficiently to protect his health or safety for specified reasons and, as a result, requires a guardian of the person. “Guardianship services” means services provided to a Medicaid recipient who is a disabled person by a guardian while acting in the capacity as a guardian.

Current Law: When determining Medicaid eligibility for individuals in long-term care, Medicaid must deduct certain expenses to determine the available income for covering the cost of care. These deductions include (1) a personal needs allowance (about \$76 per month); (2) a spousal or family allowance; (3) a residential maintenance allowance for a single person; and (4) incurred medical expenses that are not subject to payment by a third party (*i.e.*, Medicare and health insurance premiums and necessary medical care or remedial services recognized under State law but not subject to Medicaid reimbursement). Medically needy individuals are required to contribute all of their available income to the long-term care facility, with Medicaid making up the difference in cost.

Under the Code of Maryland Regulations (10.09.24.10(B)(4)), when calculating an institutionalized recipient’s available income for the cost of care in a long-term care facility, guardianship fees *may not* be allowed as an income deduction.

The court may (1) superintend and direct the care of a disabled person; (2) appoint a guardian of the person; and (3) pass orders and decrees respecting the person as seems proper, including an order directing the disabled person to be sent to a hospital. On petition and after any required notice or hearing, a guardian of the person of a disabled person is appointed if the court determines from clear and convincing evidence that (1) the person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his or her person, including provisions for health care, food, clothing, or shelter, because of any mental disability, disease, habitual drunkenness, or drug addiction and (2) no less restrictive form of intervention is available which is consistent with the person’s welfare and safety.

Unless the alleged disabled person has counsel of his or her own choice, the court must appoint an attorney to represent the alleged disabled person during the pendency of the guardianship proceeding. The court is required to fix the fee of an appointed attorney, which is paid out of the fiduciary (guardianship) estate or as the court directs. In relation to a guardianship proceeding, a fiduciary estate is the real or personal property administered by a guardian of the person of a disabled person to the extent that the guardian exercises control over any property of the disabled person. Once a guardian is appointed, no attorney's fee in an amount exceeding \$50 may be paid in a fiduciary estate administered under court jurisdiction unless the amount of the fee has been approved by court order first.

If the alleged disabled person is indigent, the State is required to pay a reasonable attorney's fee. In any action in which payment for the services of a court-appointed attorney for the alleged disabled person is the responsibility of the local department of social services, unless the court finds that it would not be in the best interests of the alleged disabled person, the court must (1) appoint an attorney who has contracted with DHR to provide those services, in accordance with the terms of the contract, and (2) strike the appearance of a previously appointed attorney and appoint an attorney who is under contract with DHR, in accordance with the terms of the contract.

Background: *Dept. of Health & Mental Hygiene v. Campbell*, 364 Md. 108 (2001), presented the issue of whether guardianship commissions and attorney's fees of an attorney appointed guardian of the property of medically incompetent Medicaid recipients constitute available income under Medicaid, specifically whether such fees qualify as a personal needs allowance. The Court of Appeals of Maryland held, contrary to the Circuit Court for Baltimore City, that they are not.

Anecdotal evidence suggests that guardians of long-term care residents frequently retain the residents' monthly personal needs allowances to cover guardianship commissions or legal fees, which may leave unmet personal care needs for long-term care residents. In some states, the cost of guardianship commissions or legal fees are being placed on the long-term care facility. Other states include an allowance for guardianship fees, typically as part of or supplemental to the personal needs allowance. For example, in Virginia, up to 5% of an individual's gross monthly income can be deducted for guardianship fees.

State Fiscal Effect: DHMH is responsible for administering and overseeing Medicaid and determines the eligibility rules. DHR is responsible for management of CARES, the computer system for all eligibility information, and the initial determination and annual redetermination of eligibility for most Medicaid programs, including long-term care.

DHR expenditures increase in fiscal 2017 to reprogram CARES to allow guardianship fees to be included as part of the personal needs allowance when determining a Medicaid

recipient's available income. DHR estimates the cost to do so at \$217,584 (50% general funds, 50% federal funds). Federal fund revenues increase correspondingly.

According to DHMH, permitting guardianship fees to be included as part of the personal needs allowance reduces the income available to help offset the cost of care for impacted individuals by \$600 to \$1,200 annually (depending on whether the individual has one or two guardians). Thus, Medicaid expenditures (50% general funds, 50% federal funds) increase by a minimal but indeterminate amount beginning in fiscal 2017. Federal fund revenues increase correspondingly.

Local Effect: The Maryland Department of Aging (MDoA) oversees a State guardianship program in which AAAs may be appointed guardian of the person for individuals age 65 and older who are found incompetent and have no family or friends willing to serve as guardian. In fiscal 2015, AAAs provided guardianship services to 911 individuals, an estimated 692 (75%) of whom were on Medicaid. According to MDoA, under the bill, local AAAs could collect guardianship fees from approximately 692 individuals. In fiscal 2017, revenues for local AAAs increase by approximately \$311,400, which reflects the bill's October 1, 2016 effective date. On an annualized basis, local AAAs could collect approximately \$415,200. MDoA advises that any additional reimbursement received by AAAs enables the agencies to serve the growing population of elderly Marylanders who require guardianship program services.

Additional Information

Prior Introductions: Similar legislation, SB 216 of 2015, would have required DHMH to deduct, as a remedial service, \$50 per month for guardianship commissions and attorney's fees. SB 216 passed the Senate and was heard by the House Health and Government Operations Committee, but no further action was taken on the bill.

Cross File: HB 981 (Delegate Kelly, *et al.*) – Health and Government Operations.

Information Source(s): Maryland Department of Aging, Judiciary (Administrative Office of the Courts), Department of Health and Mental Hygiene, Department of Human Resources, Department of Legislative Services

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