

TennCare/Medicaid/CHOICES

What's New?



**ELDER LAW PRACTICE
OF TIMOTHY L. TAKACS**
Life Care Planning Firm

Presenters

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Objectives

- Increase awareness of TennCare LTSS Program changes over the past 12 – 18 months; including changes in LOC determination and estate recovery case law.
- Discuss anticipated future changes

Overview

- Medicaid
- TennCare
- Long-Term Care Community Choices Act of 2008: “CHOICES in LTSS”
- Medicaid Managed Care
- Case law and Estate recovery

Outline

- What's new with TennCare / CHOICES
 - Medicaid Managed Care
 - "PAE" revision
 - CHOICES Groups 1 and 2
 - CHOICES Group 3

CHOICES Program Goals

- Provide ease in navigation of LTC services
- Provide members with more options for care
- Streamline enrollment
- Provide comprehensive care coordination
- Refocus LTC spending from NF to HCBS

LTCCA of 2008

- Integrated all services into Managed Care System
- Acute Medical
 - Home Health and Private Duty Nursing
- Behavioral Health
- Long-Term Care
 - Nursing Facility (NF) Care
 - Home- and Community-Based Services (HCBS)

CHOICES: Level of Care (LOC)

- Two components of LOC eligibility
 - Medical necessity of care
 - Need for inpatient care

CHOICES: LOC Changes

- Introduction
 - Each state sets its own criteria
 - Federal govt (CMS) approval not required
 - Assessment of functional needs and/or clinical needs
- Prior to July 1, 2012
 - Only one significant deficiency in any of these areas

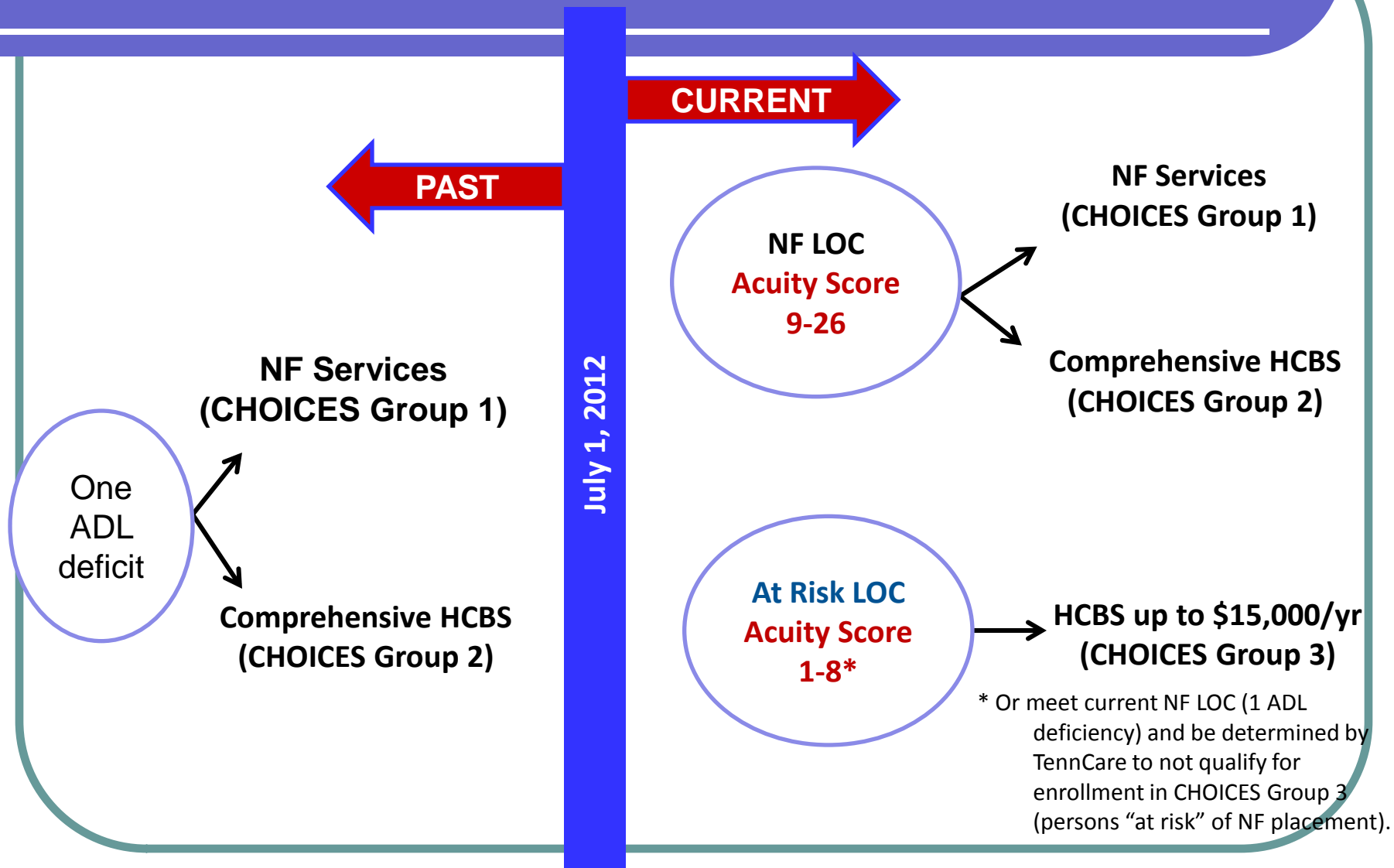
CHOICES: LOC Changes

- After July 2012
 - Weight components
 - Cumulative score
 - Not affect anyone already approved and receiving care
 - New criteria applied only to new people seeking admission to a NF-CHOICES 1 or HCBS-CHOICES 2

CHOICES: LOC Changes

- CHOICES Group 3
 - New applicants that do not meet the new higher NF LOC standard in effect as of July 1, 2012, but would have qualified under the LOC criteria in place today will still be eligible to receive home-based care in a new CHOICES Group 3 for persons “at risk” of NF placement
 - Cost of care capped at \$15,000/year

CHOICES: Then and Now



ADL (or related) question	Acuity Score for this Group of Conditions	Always	Usually	Usually Not	Never	Maximum Individual Acuity Score	Your estimate for your client	Highest Score for your client in this Measure Group
Transfer	Highest Value of two measures	0	1	3	4	4		
Mobility		0	1	2	3	3		
Eating		0	1	3	4	4		
Toileting	Highest value of three questions for the toileting measure	0	0	1	2	2		
Incontinence Care		0	1	2	3	3		
Catheter/Ostomy Care		0	1	2	3	3		
Orientation		0	1	3	4	4		
Expressive Communication	Highest value of two questions for the communication measure	0	0	0	1	1		
Receptive communication		0	0	0	1	1		
Self-administration of medication	First question only; excludes sliding scale insulin	0	0	1	2	2		
Behavior		3	2	1	0	3		

Total

PAE Appeals

- **Case: Elmer and Irene**
 - Elmer is in the Nursing Home for rehab following a severe stroke. When therapy is discontinued he still is incontinent, needs lots of help with transfers and has limited communication skills.
 - Irene, the community spouse, can not care of him at home and needs him to stay in the nursing home.
 - Elmer scores a 7 on the PAE
 - Now what?



Estate Recovery

What is “Estate Recovery”?

- Statutory: Federal and State
- Applies ONLY to TennCare & Medicaid benefits
- Applies ONLY to dead people (there is no recovery from the living for benefits correctly paid)

Three Situations Where Permitted

- Where the State is authorized to impose a lien on the NH resident's real property*
- Where the individual received benefit under a Long-Term Care Insurance Partnership Program
- Where the individual was 55 years+ when TennCare benefits were received

Where Federal Law Prohibits Estate Recovery (42 USC §1396p)

1. The individual is survived by a spouse, in which case benefits may not be recouped from the individual's estate until the death of the surviving spouse;
2. The individual has a surviving child who is under age **21 or** ;
3. The individual has a surviving child who is blind; or
4. The individual has a surviving child who is permanently and totally disabled;
5. Application of estate recovery "would work an **undue hardship*** as determined on the basis of criteria established by the Secretary" of the U. S. Department of Health and Human Services; or
6. The assets out of which recoupment is sought are not included within the state's definition of "probate estate" unless, at the option of the state, the state has included "any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest)."

Where Tennessee Law Prohibits Estate* Recovery (1-5)

1. The individual is survived by a spouse, in which case benefits may not be recouped from the individual's estate until the death of the surviving spouse,
2. The individual has a surviving child who is under age 18,
3. The individual has a surviving child who is blind,
4. The individual has a surviving child who is permanently and totally disabled,
5. The individual has a surviving child who became blind after reaching majority if undue hardship would result upon application of estate recovery,

Where Tennessee Law Prohibits Estate Recovery (6-10)

6. The individual has a surviving child who became permanently and totally disabled after reaching majority if undue **hardship** would result upon application of estate recovery,
7. The assets out of which recoupment is sought are not included within the state's definition of "probate estate,"
8. The individual was not receiving TennCare or Medicaid benefits at the time of his death, 71-5-116 (c) (2)
9. The Department of Human Services did not inform the Medicaid applicant or recipient of estate recovery as required by TENN. CODE ANN. § 71-5-118(d), or
10. The Bureau of TennCare did not file a claim for recovery in accordance with the requirements of Tennessee Code Annotated, Title 30, Chapter 2, Part 3 (the laws governing administration of decedents' estates).

TennCare Reform Act of 2002

- PR must notify TennCare of decedent's death
- PR must file affidavit in probate court that notice was given
- TennCare "release" is required to close probate estate

Tennessee Cases

- Case Law prior to 2009
- Case Law since 2009
 - *Tanner*
 - *Trigg*
 - *Gregory*
 - *Stidham*

In re Martha M. Tanner

- Tennessee Supreme Court, October 7, 2009
- §30-2-310(b) amended in 2006, effective for decedent's dying on or after January 1, 2007
- Rep. McMillan: "*to make sure that the state is treated like any other creditor*" re the one-year limitation (emphasis added by Supreme Court)
- "[S]ome members of the General Assembly were concerned that the 2002 statute had allowed the Bureau to effectively circumvent the one-year limitations period."
- "At least until the first day of January 2007...claims by the Bureau were not subject to the one-year statute of limitations, regardless of whether it received a notice to creditors."

In re Estate of Trigg, Tennessee
Supreme Court, May 30, 2012

- Is real property that is solely owned by the deceased Medicaid recipient included in the “probate estate”?
- Yes: if it can be reached by the PR to satisfy debts of an insolvent estate, it is subject to a TennCare claim

In re Estate of Gregory, Tennessee
Court of Appeals, June 29, 2012

- Even if TennCare claim is filed more than one year after decedent's death, one-year statute does not apply.
- Actual notice required to start 1 year SOL

In re Estate of Stidham, Tennessee
Court of Appeals, August 23, 2012

- Assets titled to trustee of revocable trust can be reached by PR to pay debts of the estate
- TennCare claim is a debt of the estate; the assets in the RT are subject to recoupment
- Federal statute (see 42 USC 1396p) -- that only probate assets are subject to recovery unless State explicitly opts to include non-probate assets --

Estate recovery

- Questions
- Hardship
- Reverse mortgages

“Undue Hardship”

- The asset is the “sole income-producing asset of survivors”
- A sibling of the decedent meets certain criteria
- A child of the decedent meets certain criteria

Odds and Ends

- Requirement of recovery information
- Time frame for recovery (after death no lien)
- Exceptions – spouse, disabled child, hardship
- Estate must be opened – avoid probate
- Tracing situations
- Extent of recovery – dollar limitations, recipients estate assets only
- When is estate recovery mandatory – some special needs trusts and some annuities

What's Coming in 2014 and beyond

- TennCare Plus?
- Amendments to CHOICES Groups?
- Health Insurance Exchanges
- Medicaid Expansion?

Thank you



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