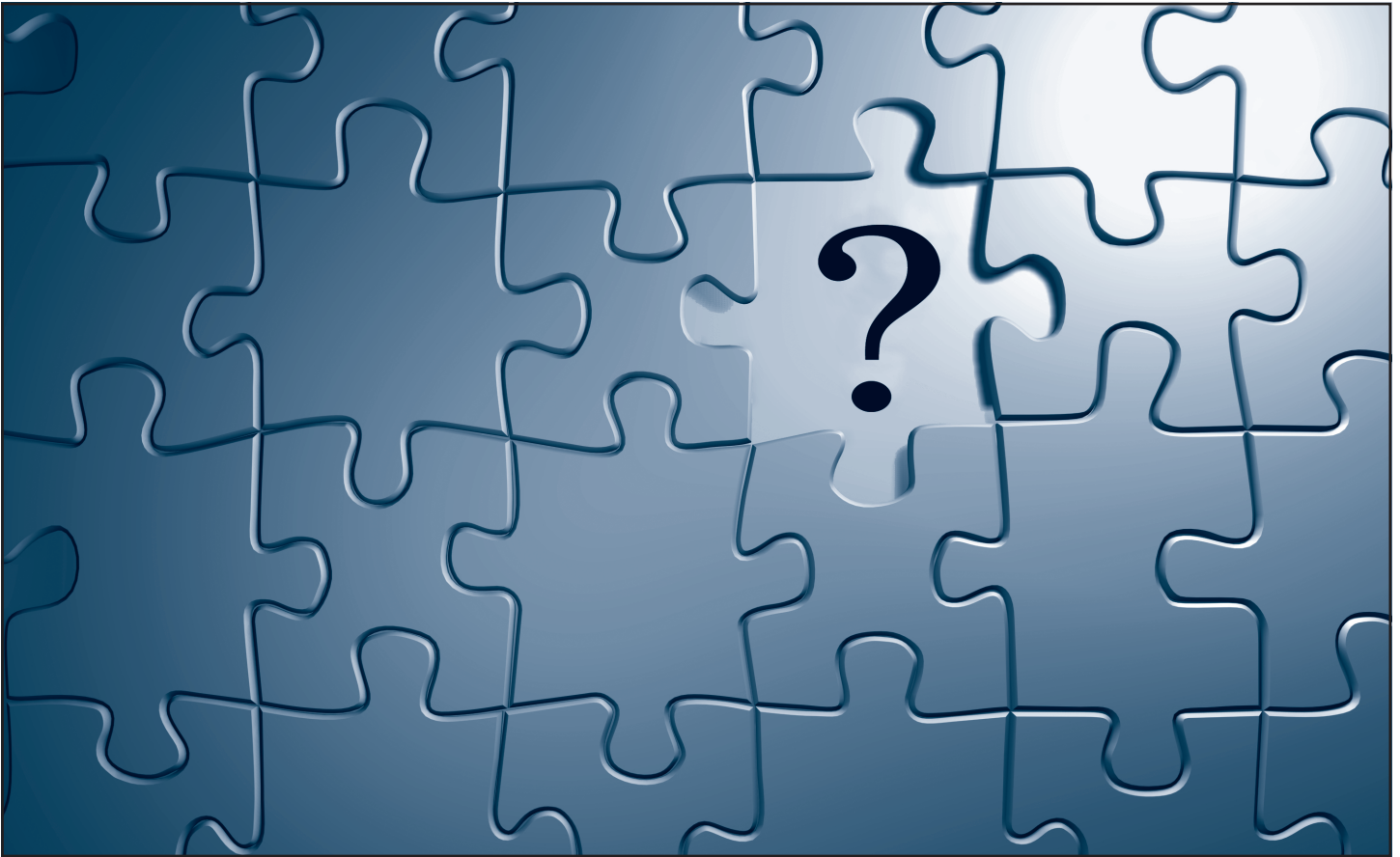


If You Think You Need A Nursing Home...



A Consumer's Guide to Financial Considerations and Medi-Cal Eligibility

CANHR

Long Term Care Justice and Advocacy

此小冊印有中文版本
Este folleto tambien se
publica en español



ABOUT CANHR

California Advocates for Nursing Home Reform (CANHR), founded in 1983, is a private, not for profit organization dedicated to improving the quality of care and the quality of life for long term care consumers in California. CANHR seeks to educate consumers and to advocate for their rights and remedies under the law and to create a united voice for long term care reform and viable alternatives to institutionalization.

For more information about CANHR or about Long Term Care Medi-Cal, call CANHR at (800) 474-1116 or visit our web site (www.canhr.org).

Copies of this booklet are also available in Spanish and Chinese. Contact the CANHR office for additional copies or bulk orders.

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Preface

This book is intended as a resource for consumers who have questions about Long Term Care Medi-Cal, i.e., those who are in a nursing home or who may need nursing home care. *The information in this book is up to date as of September 2016, and any changes in the law will be posted on CANHR's website at www.canhr.org.*

On February 8, 2006, President Bush signed the Deficit Reduction Act (DRA) of 2005 (S. 1932), which includes numerous provisions aimed at denying Medicaid benefits to current and prospective long term care beneficiaries. Although SB 483 was signed by the Governor in 2008 to implement the DRA in California, none of the statutory provisions will become effective until final regulations are filed with the Secretary of State.

Please note that, until the regulations are final and counties have been instructed otherwise, the policies and practices as outlined in this booklet are based on current law.

Planning for long term care sometimes involves complex evaluations and may require extensive estate planning. You may need to change your will or your trust, provide for substitute decision making (durable powers of attorney, advance directives or conservatorships) or transfer assets through a court order.

Be Aware: This booklet is not a substitute for an attorney. It is important to consult with someone who is current on the Medi-Cal laws. We strongly advise that consumers needing estate planning for Medi-Cal purposes consult an attorney who is experienced in estate planning for long term care and Medi-Cal. If you already have an attorney, ask if he/she is familiar with the law in this area. If not, contact your legal services program or CANHR's hotline for up-to-date information on Medi-Cal or call CANHR's Lawyer Referral Service for a referral to an attorney experienced in estate planning for long term care and Medi-Cal.

CANHR's Lawyer Referral Service

The California Advocates for Nursing Home Reform (CANHR) Lawyer Referral Service is certified by the State Bar of California and specializes in issues related to long term care. Clients are referred to panel attorneys who are experienced in the following areas: Estate Planning for Long Term Care (Medi-Cal, wills, trusts, asset preservation, special needs trusts and protective services); Residents' Rights Violations; Elder Fiduciary Abuse; and Abuse and Neglect in nursing homes and residential care facilities. Contact CANHR's Lawyer Referral Service Program at (800) 474-1116.



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MEDI-CAL ELIGIBILITY

Medi-Cal is California's version of the Medicaid program that is funded jointly by the state and federal governments. It is designed to help pay for medical care for low income persons and others with limited resources and high medical bills. Although Medi-Cal recipients often receive Medicare, the Medi-Cal program is not related to Medicare Insurance. Medi-Cal is a need-based program: that is, eligibility primarily depends on the amount of income and resources a person has.

Who is Eligible?

If you are 65, blind or disabled and on SSI, you are automatically covered by Medi-Cal. Even if your income is too high to qualify for SSI, you may still be eligible for Medi-Cal if:

- ☐ you meet the Medi-Cal resource limits (\$2,000 for an individual, \$3,000 for a couple);
- ☐ you are aged 65 or older, blind, or disabled;
- ☐ payment of your medical bills would leave you with less than the available "need standard" for your other living expenses;

Note: *There are a number of other Medi-Cal programs for special categories of consumers. This book focuses on long term care Medi-Cal.*

What are the Income Limits?

California law has a fixed maintenance need standard for those who are living at home, i.e., the amount of monthly income the state has determined you need for necessary monthly expenses, not including medical bills. The need standard for a single elder (over 65) or disabled person is \$600 per month; for an elder/disabled couple it is \$934 per month, unless you qualify for the Aged & Disabled Federal Poverty Level Program. (see page 10)

Generally, if your monthly income is higher than the need standard, or above the aged and disabled level, you will have a "share of cost" for your medical bills each month. Once you pay or agree to pay your monthly "share of cost" towards your medical bills, you will receive a Medi-Cal card, which you can use to pay for Medi-Cal covered services you receive in that month.

The share of cost works much like an insurance deductible and is determined by the Medi-Cal office. The amount of the share of cost is equal to the difference between your gross monthly income, minus deductions, such as insurance premiums (Medicare and/or private insurance), and the need standard.

EXAMPLE**SHARE OF COST AT HOME**

Seth is 68, lives alone at home and receives \$1,300 per month in Social Security. His resources meet the state standards, but his income is higher than the state need standard. He would qualify for Medi-Cal with a share of cost.

\$1,300.00	Seth's monthly income
- 20.00	(Standard Medi-Cal deduction)
= \$1,280.00	Seth's net monthly income
- 600.00	State need standard (single)
= \$680.00	Seth's monthly share of cost (assuming no other deductions)

Note: If his net income was \$1,220.00 or less, Seth would qualify with no share of cost (see page 9).

EXAMPLE**SHARE OF COST IN A NURSING HOME**

Seth enters a skilled nursing home. His income is \$1,300 per month, in Social Security.

\$1,300.00	Unearned Income/Social Security
- 35.00	Personal Needs Allowance For Long Term Care
= \$1,265.00	

Assuming no other medical Premium deductions, \$1,265 is Seth's Share of Cost. The \$35 is Seth's "Personal Needs Allowance."

Seth's Share of Cost is the amount he must pay each month to the nursing home minus medical expenses not covered by Medi-Cal.

Are Nursing Home Residents Eligible for Medi-Cal?

Due to the high cost of nursing home care, a majority of California's nursing home residents have part or all of their care paid for by the Medi-Cal program. If your income and resources meet the Medi-Cal standard, you will be eligible for Medi-Cal. *For information on spouses qualifying for Medi-Cal, please see Chapter 2.*

Nursing home residents with outside income may keep \$35 per month for personal needs. Residents whose only income is Supplemental Security Income/State Supplemental Program (SSI/SSP), will receive a payment of \$50 per month as a personal needs allowance.

What Are the Resource Limits?

Medi-Cal classifies property as "exempt" and "non-exempt." Exempt property is not counted in determining eligibility; non-exempt property is counted.

The following property is generally exempt and, therefore, not counted in determining eligibility:

- ❑ **The Home:** totally excluded, if it is the principal residence. Includes mobile home, houseboat, or an entire multi-unit dwelling, as long as any portion serves as the principal residence of the applicant. The property remains exempt if a person in a nursing home or the person's representative expresses a hope or intent to return home on the current Medi-Cal Application and Statement of Facts (see Chapter 3, "Your Home").
- ❑ **Other Real Property:** can be exempt if the net market value of the property is \$6,000 or less and if the beneficiary is "utilizing" the property, i.e., receiving yearly income of at least 6% of the net market value.
- ❑ **Business Property:** may be excluded if it is used in whole or in part as a business or means of self-support. It must meet

business property guidelines in order to be considered exempt.

- ☐ **Household goods and personal effects:** totally exempt.
- ☐ **Jewelry:** for a single person, wedding, engagement rings and heirlooms are totally exempt and other items of jewelry with a total net market value of \$100 or less are exempt; for spouses (when one spouse is in a nursing home) there is no limit on exempt jewelry for determining institutionalized spouse's eligibility.
- ☐ **One car** is exempt if used for the benefit of the applicant/beneficiary or if needed for medical reasons.
- ☐ **Whole Life Insurance** policies with a total face value of \$1,500 or less. If the total face value of the policy or policies is over \$1,500, then the entire cash surrender value is counted toward the cash reserve (limited to \$2,000 for a nursing home resident).
- ☐ **Term Life Insurance:** totally excluded.
- ☐ **Burial plots:** totally excluded.
- ☐ **Prepaid irrevocable burial plan of any amount and \$1,500 in designated burial funds:** the designated funds must be kept separate from all other accounts. Accumulated interest on burial funds is also exempt.
- ☐ **IRAs and work-related pensions:**
 - In the applicant's or beneficiary's name: the cash surrender value or balance, regardless of value, shall be considered unavailable if the applicant or beneficiary receives periodic payments (of any amount) of interest and principal. (Title 22, §50402(e)) These do not need to meet the Medi-Cal requirements for annuities. The payments will count toward the monthly share of cost.
 - In the community spouse's name: totally exempt from consideration, regardless of value; nor is the cash surrender value included in the CSRA. (Title 22, §50458) However, any income the community spouse receives will be counted in determining the community spouse's allocation from the nursing home spouse, if he or she receives such an allocation.
- ☐ **Non work-related annuities:**
 - Annuities purchased prior to 8/11/93: the cash surrender value or balance of the annuity is considered unavailable if the applicant/beneficiary is receiving periodic payments (of any amount) of interest and principal. (Title 22, §50402(e)) Remember, this is the old law, so annuities purchased before the new federal law will be treated under the old law.
 - Annuities purchased between August 11, 1993 and March 1, 1996: annuities purchased between 8/11/93 (the date the federal law changed) and 3/1/96 (the date the state regulations went into effect) must meet the new regulations, which can be waived for hardship. Once the individual or spouse takes steps to receive periodic payments of interest and principal, the balance is considered unavailable. However, the payments must be scheduled to exhaust the balance at or before the end of the annuitant's life expectancy.

For example, under the actuarial table used for Medi-Cal, an 85-year-old female has a life expectancy of 6.63 years. Thus, the annuity must be structured to pay out the balance of the annuity at or before 6.63 years. If the annuity is scheduled for longer than that,

10 years for example, it will be considered to be a transfer of assets, and a period of ineligibility could be imposed.

- **Hardship:** annuities purchased during this period that cannot be restructured to meet the new requirements will continue to be treated under the old rules (§50402). Written verification that the annuity cannot be restructured must be obtained from the company or agent who issued or sold the annuity.
- **Annuities purchased on or after March 1, 1996:** must meet the new requirements, no annuity hardship provisions apply. The individual or spouse must take steps to receive periodic payments of interest and principal, scheduled to exhaust the balance of the annuity at or before the end of the annuitant's life expectancy. Annuities structured to exceed the life expectancy of the annuitant will result in denial or termination of benefits due to transfer of assets.

Note: Annuities purchased on or after September 1, 2004: the Department of Health Services has promulgated emergency regulations effective August 2, 2004, pertaining to recovery on annuities. Annuities purchased by the beneficiary on or after September 1, 2004, will now be subject to recovery regardless of whether the annuity is designed to pay a lump sum or periodic payments upon the death of the decedent.

Note to Consumers: be cautious of annuity sales agents who state that annuities are the "only" way to become eligible for Medi-Cal without losing all your assets. There are many exceptions in the Medi-Cal rules, and buying an annuity is not a substitute for responsible estate planning.

- ❑ **Cash Reserve:** applicant/beneficiary may retain up to \$2,000 in liquid assets, e.g., savings, checking, excess cash surrender value of life insurance policies.
- ❑ **Community Spouse Resource Allowance (CSRA):** community (at-home) spouse may retain up to \$119,220 as of 1/1/2016 in liquid assets, not including the home, IRAs and other exempt assets (*see Chapter 2 for spousal rules*).
- ❑ **Trusts:** assets held in revocable living trusts will be considered available, depending on the asset. Assets held in certain types of trusts created after August 11, 1993, will no longer be considered exempt and the corpus and income from these trusts will be counted. See your attorney if you have questions about whether your trust meets the Medi-Cal guidelines.

Any assets **above** the property reserve limit of \$2,000 or any asset that is not exempt will be counted by Medi-Cal in determining eligibility. These include cash, savings, stocks, the cash surrender value of whole life insurance if the face value exceeds \$1,500, and any other non-exempt resource. Gift cards, however, regardless of value, are considered exempt assets and not counted in the property reserve. Note that, with the exception of the spousal protection provisions, these same exemptions apply to those who receive Medi-Cal who are not in nursing homes.

Treatment of Reverse Mortgage Payments/Home Equity Payments

Any Equity borrowed from your home in the form of a lump sum or a line of credit may be counted as an asset for the purposes of Medi-Cal eligibility.

Lines of credit, if not drawn down, are not included in the property reserve and therefore do not count as countable assets. If the line of credit is drawn down, it is counted as a loan requiring repayment and included in the property reserve, i.e., counted as part of the assets. However, most lines of credit are drawn down for a specific purpose - to repair a roof, for example - and are spent down at the same time they are drawn down.

Annuities: some organizations will advise that a lump sum equity loan be used to purchase an immediate annuity or even that a reverse mortgage be used to fund an annuity. Not only are the periodic proceeds from these annuities counted as income and toward the share of cost, but annuities purchased on or after September 1, 2004, are subject to estate recovery. RAMs are reverse annuity mortgages. If the lender (the bank) purchases an annuity to fund a stream of payments to the borrower from the equity in the home, then the payments to the borrower are treated as income in the month received, because they are annuity payments. However, the annuity is owned by the lender and is not subject to the state's annuity rules. If the borrower purchases the annuity, then it is also treated as income in the month received, but must meet the state's annuity rules and it will be subject to the recovery provisions.

Other Reverse Mortgage Lump Sums/Stream of Payments: reverse mortgages may also be made in a stream of income from the lender directly to the borrower or the payment may be in the form of a lump sum payment. In either case, since an annuity has not been purchased, these payments would be considered property in the month of receipt, and any excess would have to be spent down in order to avoid being disqualified for excess property.

California law mandates that potential borrowers receive financial counseling from a Department of Housing and Urban Development (HUD) approved counselor before applying for a reverse mortgage. The law also prohibits lenders from requiring a borrower to purchase an annuity as a condition of obtaining a reverse mortgage loan.

While reverse mortgages can be a beneficial option for some homeowners, they are rarely beneficial to those individuals who are likely to enter a nursing home in the near future.

There are many reputable reverse mortgage lenders. However, consumers should beware of phone and mail solicitations and always seek third party professional advice before signing any loan documents. For more information on reverse mortgages, see CANHR's web site.

Can You Spend Down Resources?

You may spend down your resources to the \$2,000 limit in order to become eligible for Medi-Cal. Resources must be reduced to the \$2,000 level by the end of the month in which you want to be eligible. If, for example, you apply for Medi-Cal on January 3, 2016, your resources must be reduced to \$2,000 by January 31, 2016.

Considering the average cost of nursing home care is \$8,000+ per month, assets can be spent down rather quickly. You may spend down your assets on any item for your own benefit: to remodel or repair the home, buy new furniture or pay off a mortgage or car loan, pay off other bills and debts, buy new clothing, or medical equipment. You can also convert nonexempt assets into exempt assets, e.g., using nonexempt cash reserves to buy a burial plot and/or create a prepaid burial fund. You must provide evidence regarding these expenditures to Medi-Cal, so keep receipts and check stubs.

While spending down is usually easy to do and document, it may be difficult to find a nursing home if you have no resources and must find a bed in a Medi-Cal certified facility. The longer you can pay as a private pay resident, the more options you will have when looking for a nursing home. Medi-Cal pays less per day than the amount a facility will charge a private pay resident.

Although “duration of stay” requirements (i.e., making a resident pay privately for a set period of time) are illegal, nursing homes are legally permitted to review potential residents’ finances prior to admission. In some cases, even though Medi-Cal discrimination is illegal, facilities are unwilling to accept residents who are eligible for Medi-Cal upon admission.

Keep in mind that, once you have been admitted to a Medi-Cal certified facility, you cannot be transferred or evicted simply because of a change from private pay to Medi-Cal payment status even when a (illegal) duration of stay contract has been signed. This applies while the Medi-Cal application is pending, as well.

Can You Give Away Assets and Still Be Eligible for Medi-Cal?

The Medi-Cal application includes a question that asks if you gave away or gifted any non-exempt (countable) assets in the previous 30 months. This 30-month “look-back” period is used to determine if an institutionalized Medi-Cal applicant made a transfer or gift of nonexempt assets to a third party, excluding the spouse. If such a transfer is determined, a period of ineligibility may be imposed. An “improper” transfer is basically giving away property in order to qualify for Medi-Cal, without receiving something of equal value in return. This does not mean that every gift you made in the previous 30 months will result in a penalty. You can still give away (gift) or transfer property and be eligible for Medi-Cal depending on *when* you gave away the asset, *how much* you gave away and whether or not you enter a nursing home. The new federal laws under the DRA require a 60-month look-back for transfer of assets. However, California has not implemented the federal laws yet, and **Medi-Cal offices are still required to use the 30-month look-back period.**

The transfer rules will be applied to transfers made **during the 30 months prior to the date** when a nursing home resident **applies** for Medi-Cal or when a Medi-Cal recipient enters a nursing home. In addition, current Medi-Cal beneficiaries who are nursing home residents can also be penalized for transfers made for less than fair market value. There are no restrictions on gifting until or unless the applicant enters a nursing home.

How is the Transfer Rule Triggered?

The transfer rule is only triggered when you enter a nursing home and apply for Medi-Cal. The Medi-Cal application (called the Statement of Facts) will ask if you transferred any property or made any gifts within the prior 30 months. The Eligibility Worker will ask to review all of your bank statements, etc., for that period. The transfer rules apply only to non-exempt (countable) assets.

An improper transfer can result in a period of ineligibility, which is the lesser of 30 months or the value of the transferred asset divided by the monthly average nursing home private pay rate at the time of application. For 2016, this amount is \$8,189. It is important to note that a “period of ineligibility” runs from the date of the transfer, not the date of application. So, for example, if you transferred \$10,000 to your child 6 months ago, and are now applying for Medi-Cal in a nursing home, your period of ineligibility has already expired, and the transfer won’t affect your eligibility.

EXAMPLE

TRANSFER OF ASSETS

John transferred \$35,000 to his son in July 2016. He plans to enter a nursing home and apply for Medi-Cal in January 2017.

Because John gave away the money within 30 months before applying for Medi-Cal, he could be denied eligibility for a period of time. This period would be the lesser of 30 months or \$35,000 (the amount he transferred) divided by the Average Private Pay Rate (APPR) for nursing homes in California.

The rate is set by the state each year. Under the 2016 rate of \$8,189 per month, the penalty period would be four (4) months starting from the month of transfer, July 2016, and ending October 2016 ($\$35,000 \div \$8,189 = 4.3$ months). The state does not count partial months yet.

Because John will not apply until January 2017, he will be eligible for Medi-Cal because his penalty period will have already expired. Thus, a period of ineligibility will not be imposed.

It is very important to wait until the penalty period has expired before you apply for Medi-Cal.

In John’s case above, for example, if he applies for Medi-Cal while the penalty period is running (i.e., between July 2016 and October 2016), he will not be eligible for Medi-Cal.

Non-Penalized Transfers

Transfer restrictions apply only to persons who are in or are going into nursing homes and who are on or applying for Medi-Cal. **There are currently no transfer restrictions for beneficiaries who receive Medi-Cal at home.** Not all transfers result in a period of ineligibility. Transfer penalties *will not apply* if the transfer was made:

- with the intent to dispose of the resource either at fair market value or for other valuable consideration;
- exclusively for a purpose other than to qualify for Medi-Cal;
- to a spouse (*see Chapter 2*);
- to a blind or totally disabled child of any age;
- if the asset was exempt; or
- if denial of eligibility would result in undue hardship.

You can make a gift of any exempt property, (e.g., a wedding ring, car, etc.,) at any time without affecting Medi-Cal eligibility. You can also transfer anything at any time to a blind or disabled child of any age. Because of tax issues and other restrictions, it is wise to check with your attorney if you would like to make a gift of some part of your resources.

Joint Accounts

If an applicant has unrestricted access to a checking or saving account, the entire amount of the account will be included in the property reserve, unless it can be shown that all or a portion of the funds do not belong to the applicant. Thus, if you keep your mother's name on your savings account to avoid probate, this could be a problem if your mother applies for Medi-Cal, unless you can clearly establish that all or a portion of the funds are yours.

Share of Cost

If you meet the eligibility requirements and if there is authorization from a doctor or health care provider, your nursing home care will be covered. You must be admitted on a doctor's order and the stay must be "medically necessary."

If you have income, you must pay a "share of cost" (SOC) of the nursing home charge, and Medi-Cal will pay the rest of the costs. The share of cost is calculated by the Medi-Cal office, and you will receive a Notice of Action from the Medi-Cal office informing you: a) whether the application has been approved; and b) the amount of the share of cost. Once you pay the share of cost, Medi-Cal will pay the facility the difference between the share of cost and the Medi-Cal per diem rate.

Old Medical Bills: if you have unpaid medical bills (going back as far as four years), you can ask the Eligibility Worker to deduct the payments for these from current and future share of cost. Ask the Eligibility Worker about Hunt v. Kizer deductions.

If you qualify for Medi-Cal, you may not need private insurance, though if other insurance is carried, the premiums are deducted from income when computing the share of cost.

Gross v. Net Income: since the "gross" income rather than the "net" income is used, some beneficiaries end up having to pay a share of cost that is higher than their net incomes. One way to avoid this problem is to terminate tax liability, i.e., have the pension fund stop deducting taxes from the beneficiary's pension. You can change the amount of taxes deducted by filing a Form W-4P. Contact your accountant or a tax specialist for this and to determine how payments made for nursing home care can be tax deductible.

Always Pay SOC: if the resident receives Social Security or other monthly income, he/she will usually have a share of cost. Do not let that income accumulate in the resident's account, as this could potentially jeopardize Medi-Cal eligibility. It is usually best to pay a monthly "estimated" share of cost to the facility if approval of Medi-Cal is delayed. This will avoid accumulating more than the \$2,000 asset limit and avoid an unpaid share of cost later.

Signing the Admission Agreement

If you are signing the admission agreement on behalf of a resident, be careful to sign as an "agent" and not as a "responsible party," which can make you personally liable for unpaid charges in the facility. Facilities are prohibited from requiring that you sign as a "responsible party" for the resident. However, some admission agreements are misleading. Note that an agent under a power of attorney, a conservator or a representative payee is not a responsible party even if the admission agreement is signed as such.

If you are an agent for the resident, i.e., you manage or have control over the resident's income or assets, be sure to use the resident's monthly income to pay the share of cost. Willful shirking of this duty can be a misdemeanor. An agent is only responsible for the amount of the resident's funds received but not distributed to the facility as required and does not assume personal responsibility for the resident's debts.

Expenses Not Covered By Medi-Cal

Residents of nursing homes may deduct the costs for uncovered medical expenses, such as certain drugs, hearing aid batteries, extra eye glasses, dentures, etc., and other medical equipment and supplies not covered under the Medi-Cal program from the monthly share of cost. A current physician's prescription is necessary and must be put in the resident's record at the facility. This prescription must be a part of the physician's plan of care. Ask the facility about this.

When and Where to Apply

You should apply for Long Term Care Medi-Cal as soon as you know your (or your spouse's) assets will be \$2,000 or less by the end of the month of application. If you are a single individual, you need to have long term care status, i.e., inpatient medical care which lasts for more than the month of admission and is expected to last for at least one full calendar month after the month of admission. For spousal impoverishment rules to apply, the spouse must have a continuous period of institutionalization, i.e., when the spouse has remained or is expected to remain in a medical institution or nursing facility for 30 or more consecutive days. Contact the county welfare or social services department (Medi-Cal Eligibility Unit) to apply for Long Term Care Medi-Cal benefits. If you are on Medi-Cal at home, you still need to apply for Long Term Care Medi-Cal if you need Medi-Cal in a nursing home. *See CANHR's web site for a list of local offices.*

What If Your Application is Denied?

You can file for a fair hearing if you think your application for benefits was improperly denied. The Notice of Action must tell you why you were denied and the applicable regulations or laws. The reverse side of the Notice of Action will inform you as to your rights to a hearing. You can also file for a hearing when the county takes more than 45 days to process your application (as long as the delay is not your fault) or to contest the share of cost. It is important to file for a hearing within the time limits.

If you are *not* already on aid and you win the hearing, the benefits could be retroactive to the month of application. If you *are* already receiving Medi-Cal, a timely appeal will ensure that your Medi-Cal is not terminated until the outcome of the hearing. Contact your local legal services office for assistance with Fair Hearings.

Aged and Disabled Federal Poverty Level Program

As of April 1, 2016, an aged or disabled person with countable income at or below \$1,220 or couples with an income at or below \$1,645 could be qualified for the Aged & Disabled Medi-Cal Program (A&D FPL) and pay no share of cost. Qualified individuals must be aged 65 or older or disabled and **not in long term care**. For more information, contact your county Medi-Cal office and see *A&D FPL* fact sheet at www.canhr.org.

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IF YOUR SPOUSE MUST ENTER A NURSING HOME

What is the Law?

Federal laws enacted in 1988 included provisions to prevent the impoverishment of the at-home spouse when one spouse entered a nursing home. California implemented these “spousal impoverishment” provisions in January 1990. Although the federal laws were amended by the August 10, 1993, passage of the federal OBRA 93 Medicaid amendments and again by the federal Deficit Reduction Act of 2005, California has not yet implemented the new federal laws.

It is important to note that, for California purposes, the spousal impoverishment provisions apply to opposite sex spouses, same sex spouses and registered domestic partners.

Resources

The California law allows the community spouse (i.e., the at-home spouse) to retain a certain amount in non-exempt resources available to the couple at the time of application. This Community Spouse Resource Allowance (CSRA) increases every year according to the Consumer Price Index. For 2016, the at-home spouse can keep up to \$119,220 and the institutionalized spouse can keep up to \$2,000 in a separate account (*see Chapter 1*).

EXAMPLE

SPOUSAL RESOURCE LIMIT

John and Mary have \$50,000 in joint savings. John enters a nursing home on February 1, 2016.

John can be eligible for Medi-Cal immediately.

Under the spousal impoverishment law, Mary can keep all of the \$50,000 since it is below the \$119,220 limit.

What If You Have Separate Property?

Separate property, i.e., money from an inheritance or bequest or from a previous marriage, will be counted in the total resources and subject to the \$119,220 CSRA limit for the community spouse, with the exception of IRAs and work-related pensions in the at-home spouse’s name, which are not counted toward the CSRA.

What If You are Separated from Your Spouse

For the purposes of Medi-Cal spousal impoverishment provisions, a couple is married until that marriage is dissolved or annulled. A legal separation, for Medi-Cal purposes, means that the couple is still married. However, the hardship provisions in ACWDL 90-01, draft regulation Section 50096.5 may apply. This provision notes that the property of the non-institutionalized spouse will be considered legally “unavailable” without the signature of the community spouse if the community spouse’s whereabouts are unknown or there has been a break in marital ties and the community spouse refuses to cooperate.

What Resources are Counted?

Only non-exempt resources are counted in the spouses’ combined countable resources at the time of application for Medi-Cal. Assets such as household goods, personal effects, jewelry, the principal residence, one car, burial plots, burial trusts, and term life insurance are all totally excluded, regardless of their value (*See Chapter 1, “Resource Limits”*).

Work-Related Pensions and IRAs

Pension funds and IRAs *do not have to be liquidated* in order to qualify for Medi-Cal. Under California law, the cash surrender value, or balance, of pension funds and IRAs, regardless of value, are considered unavailable if the applicant or beneficiary is receiving periodic payments of both interest and principal. A “periodic” payment can be weekly, monthly, annually, etc. There is no minimum amount of periodic payment required for Medi-Cal purposes. Any income received, however, will be counted toward the share of cost.

Pension funds or IRAs in the name of the community spouse are totally exempt from consideration and do not have to be generating income. These funds are not counted as part of the CSRA, either.

EXAMPLE

SPOUSAL SEPARATE PROPERTY

John and Mary have \$65,000 in a joint account, and Mary inherited \$65,000 from her mother years ago, which she put in a CD in her own name. John enters a nursing home on April 15, 2016.

John can be eligible for Medi-Cal in April as soon as they reduce their total resources of \$130,000 to \$121,220 (which is the \$119,220 CSRA for Mary, plus \$2,000, which is the Medi-Cal resource limit for John.)

The \$8,780 excess will have to be spent down or converted to exempt assets before John will be eligible for Medi-Cal. However, if Mary’s income is low, she might be able to keep all of the resources (*See page 15*).

Non Work-Related Annuities

Annuities purchased prior to August 11, 1993, are treated like work-related pensions and IRAs, and only have to generate periodic payments of interest and principal. However, effective March 1, 1996, the expected return on the annuity must be commensurate with the life expectancy of the beneficiary (See Chapter 1, “Resource Limits” for details). **Be careful:** a non-qualifying annuity can result in a denial of eligibility and, if the annuity is purchased by the beneficiary on or after September 1, 2004, it will be subject to recovery.

After Your Spouse is Eligible for Medi-Cal

Resources you acquire *after* your spouse is institutionalized *but before* she or he goes on Medi-Cal *are not protected* and will be counted at the time of application for Medi-Cal. However, once your spouse is eligible for Medi-Cal, any resources acquired by you will not affect your spouse’s Medi-Cal eligibility.

Mary, for example, could inherit \$100,000 after John is found eligible for Medi-Cal, and this will not affect John’s eligibility. If you are thinking of selling an asset like your home, for example, it is best to wait until after your spouse is on Medi-Cal. You must also remove your spouse’s name from the home before you sell it or half of the proceeds will be considered available to the institutionalized spouse, disqualifying him or her from Medi-Cal.

Physical Separation of Assets/Recordkeeping

Once the resource limit has been reached, the institutionalized spouse must transfer to the community spouse any ownership interest she or he maintains in the community spouse resource allowance. Whenever possible, that which can be physically separated should be (e.g., a joint account with the nursing home spouse to pay the share of cost; a separate checking account for the at-home spouse and a savings account in the at-home spouse’s name alone), keeping accurate records for each of you. Medi-Cal allows a 90-day period from the date of application to separate spousal assets, so it’s important to apply for Medi-Cal if you want coverage for this period.

When your spouse applies for Medi-Cal (or if you apply for him/her), you will need to show the total amount of separate and community assets you have as of the date of application.

Once your spouse is on Medi-Cal, you don’t have to account for your own assets, except to the extent that any changes in income may affect the share of cost. However, any assets the Medi-Cal spouse receives may affect his or her eligibility. Changes in either of your incomes or an increase in your spouse’s assets must be reported to Medi-Cal within 10 days.

Spending Down Resources

Your spouse can always spend down resources by purchasing an exempt asset (see *Chapter 1, "Resource Limits"*). In addition, your spouse can spend down resources on anything, whether or not it is for her or his "own benefit." For example, the nursing home spouse could pay off the mortgage on the home even if the home is later transferred to the at-home spouse.

How is Your Income Divided?

California law has established a floor of income for the at-home spouse called the "minimum monthly maintenance needs allowance" (MMMNA). This allowance is adjusted annually by a cost of living increase. The 2016 MMMNA is \$2,981. If the at-home spouse's income is in his or her name only, under the "name on the instrument" rule, he or she will be able to keep it all regardless of the amount of income. If the at-home spouse's income is less than the MMMNA (\$2,981 in 2016), he/she can receive a spousal allocation from the nursing home spouse's income. If it is higher than the annual MMMNA, then he/she will not receive an allocation unless there is a court order or fair hearing decision allowing an allocation.

EXAMPLE

COMMUNITY SPOUSE MAKES LESS THAN \$2,981

John is in a nursing home and Mary lives at home.
John receives a pension of \$2,500 per month.
Mary receives a pension of \$600 per month.
Since Mary is allowed to retain at least a minimum income of \$2,981 per month, Mary can keep her \$600 and can receive \$2,381 per

month from John's income to bring her income up to \$2,981.

John's remaining income of \$84, which is \$119 minus the personal needs allowance of \$35, will be John's share of cost paid to the nursing home.

EXAMPLE**COMMUNITY SPOUSE MAKES MORE THAN \$2,981**

Mary receives \$3,000 in a pension and John receives only \$400. John is in the nursing home.

Since Mary's pension is in her name only, she can keep it all.

However, she will not be allowed to keep any of John's income, since she already receives more than the \$2,981 per month MMMNA.

John's income, minus \$35, goes to his share of cost.

EXAMPLE**INCREASE IN SPOUSAL ASSETS THROUGH COURT ORDER**

John and Mary have \$200,000 in assets, not including the home. Mary (the at-home spouse) receives \$300 per month in Social Security, while John (the nursing home spouse) receives \$2,000 per month in income.

Mary can retain \$119,220 for her CSRA, and she can file for a court order to keep additional assets to bring her income up to the minimum level of \$2,981 for 2016.

Mary would show that, if she could keep all of the \$200,000, even at an interest rate of 5% (not likely in today's market), it would only bring her an additional \$833 per month in income, bringing her income to \$1,133 – well below the MMMNA of \$2,981.

Thus, Mary would be able to keep all of the \$200,000 in assets, plus her income of \$300, plus \$1,848 of John's income, bringing her total income up to the MMMNA of \$2,981.

This is a very good method to protect both spouses, as when the nursing home spouse dies, his income often dies with him.

Fair Hearings

Either spouse can file for a Fair Hearing to allow the at-home spouse to keep additional income-generating resources. This is one way to increase the CSRA above the \$119,220 limit if the spouse at home has limited income, i.e., income below the \$2,981 level and if the nursing home spouse's income, when added to the at-home spouse's income, would still not be enough to meet the \$2,981 MMMNA level.

A Fair Hearing can also be filed to allow the at-home spouse to retain additional income if it can be shown that exceptional circumstances exist that are the cause of extreme financial distress. For example, extraordinary medical expenses for the at-home spouse could result in extreme financial distress warranting a Fair Hearing to increase the income allocation (MMMNA) above the \$2,981 level.

Court Orders

A court order can be obtained to allow the community spouse to retain assets over the community spouse resource allowance of \$119,220 or to retain income over the \$2,981 MMMNA:

- If you (the at-home spouse) receive less than \$2,981 per month in income, and you need to retain resources to generate additional income.
- If your spouse is mentally incapacitated and you need to transfer the home, transfer other assets or gain access to accounts.

Contact your attorney or CANHR's Lawyer Referral Service for an attorney if you need a court order.

3

YOUR HOME

Transfer of Interest in Your Home

It is strongly suggested that you consult with an attorney experienced in Medi-Cal and Estate Planning for Long Term Care before any transfer is made. There could be legal issues, as well as tax considerations, that will affect your decision.

Under federal law, title to the principal residence may be transferred at any time to the following persons:

- a spouse;
- a son or daughter under age 21 or who is blind or permanently disabled;
- a sibling who has equity in the home and who was residing there for at least one year immediately prior to the individual's admission to a nursing home;
- a son or daughter who was living in the home for at least two years immediately prior to the individual's admission to a nursing home and who provided care which enabled the parent to live at home;
- to anyone, so long as the home was exempt at the time of transfer.

When Your Home is Exempt

Your home is exempt from consideration as a resource (and remember, you can transfer an exempt resource) when you are on Medi-Cal under any of the following circumstances:

- If the beneficiary's spouse, child under age 21, or "dependent relative" continues to reside in the home.
- The residence is inhabited by the recipient's sibling or son or daughter who has resided there continuously for at least one year prior to the date the recipient entered the nursing home.
- There are legal obstacles preventing the sale of the home, and the applicant/beneficiary provides evidence of attempts to overcome such obstacles.

- The home is a multiple dwelling unit, one of which is the principal residence of the beneficiary.
- If during any absence, including nursing home stays, the beneficiary intends to return home, and states so in writing. If the beneficiary is mentally incapacitated, a family member or someone acting on her or his behalf may state this intent. The Medi-Cal application simply asks whether or not the applicant intends or hopes to return home. **Always indicate “yes.”** Under California law, it is not necessary to show that the applicant can actually return home.

If your home is exempt under one of the above circumstances, you can transfer your home without affecting Medi-Cal eligibility. If your home is exempt on the basis that you “intend or hope to return home,” you need a declaration from the person to whom you are transferring the home stating that you “...can return to live there at any time.”

Just because your home is exempt for the purposes of Medi-Cal eligibility while you are alive, it does not prevent the state from placing an estate claim on the property *after your death*; the manner in which you transfer your home is equally important.

Transfer of the Home to a Spouse

The law allows the spouse in the nursing home to transfer his or her interest in the home to you, the at-home spouse. This applies whether the transfer occurs prior to or after your spouse enters a nursing home. *If the nursing home spouse no longer has any interest in the home*, you can do anything you want with the home without worrying about affecting the Medi-Cal eligibility of your spouse. You can move out of the home, rent it, sell it (and retain all of the money from the sale), all without affecting your spouse’s Medi-Cal eligibility.

However, if you sell the home *before* your spouse applies for Medi-Cal, even if the home is in your name alone, the assets from the home will be considered with all the other nonexempt assets held by both of you, and you will still be limited to the community spouse resource allowance of \$119,220. If you intend to sell the home, it is best to wait until after your spouse is on Medi-Cal and the home is in your name only, because assets acquired by the at-home spouse after Medi-Cal eligibility is established are not counted.

Life Estates, Occupancy Agreements and Other Options

Nursing home residents, in particular, tend to be concerned about losing their family homes. Most nursing home residents transfer property to avoid probate and to avoid future Medi-Cal estate claims that would force the sale of the property. Tax issues are also considerations, as inter vivos (during life) transfers of property can result in substantial capital gains taxes.

At the same time, nursing home residents, already stripped of most of their independence, are often reluctant to completely relinquish control of their property. However, there are a number of ways in which nursing home residents can transfer their homes and 1) avoid probate; 2) avoid capital gain consequences; 3) avoid Medi-Cal estate claims; and 4) retain some control over their property.

- **Life Estates:** allow you to transfer title to the home while retaining control over the property during your life; avoid tax consequences attached to an outright transfer; and avoid probate. Under the current Medi-Cal recovery rules, claims on irrevocable life estates are waived. For individuals who die on or after January 1, 2017, claims on any real property or assets not subject to probate are waived. See below for more details on the changes to Medi-Cal Recovery for those who die on or after 1/1/17.
- **Occupancy Agreements:** allow you to transfer title to the home, while retaining a current right of occupancy; avoid probate; avoid tax consequences; and avoid estate claims.
- **Other Options:** there are a number of other legal options available under the new recovery laws, such as revocable or irrevocable trusts, to meet some or all of the above considerations. If you are considering any real estate transfer, you should consult a qualified attorney who is knowledgeable about Medi-Cal and property transfers.

Note: *You should always check with legal services or an experienced estate planning attorney if you are considering transferring your home or an interest in your home.*

4

LIENS & ESTATE CLAIMS

Consumers often confuse liens and estate claims. Both have been used by the state in attempts to reimburse the Medi-Cal program for payments made on behalf of beneficiaries. Liens are imposed on living beneficiaries' estates to "hold" the property until the beneficiary dies. Estate claims are claims made against the estate of the deceased Medi-Cal beneficiary.

Your home, for example, may be an exempt asset while you are alive and is not counted for Medi-Cal eligibility purposes. However, *if the home is in your name when you die*, the state may be entitled to make a claim against your estate to recoup the amount of certain Medi-Cal benefits paid.

Please note that in 2016, comprehensive Medi-Cal Recovery reforms co-sponsored by CANHR were signed into law. Effective for individuals who die on or after January 1, 2017, the new Medi-Cal Recovery laws contain some of the most progressive changes to California's estate recovery program in decades. The information below can assist you in understanding your rights regarding recovery under both the current law, and the new law effective 1/1/17.

Can the State Place a Lien on Your Home?

For a brief period of time, California law permitted liens against the homes of nursing home Medi-Cal beneficiaries who were not "reasonably expected" to return home, and against the real property of the surviving spouse of a deceased nursing home beneficiary.

California is no longer permitted to impose liens against the homes of nursing home residents or their surviving spouses except in cases where the home is not exempt and is being sold or where the heirs or survivors have signed a "voluntary" lien for Medi-Cal recovery purposes after the beneficiary has died.

Estate Claims

What is Current Law?

For individuals who die before January 1, 2017, the current Medi-Cal Recovery laws will apply. After the beneficiary's death, the state can make a claim against the estate of an individual who was 55 years of age or older at the time he or she received any Medi-Cal benefits, or an individual of any age who received Medi-Cal in a nursing home, unless there is a surviving spouse or a surviving minor, blind or disabled child (of any age). Thus, if there are any assets left in the estate of the deceased beneficiary, Medi-Cal will seek to be reimbursed for benefits paid, whether or not the beneficiary was in a nursing home, including insurance premiums paid and payments made to managed care plans.

Managed Care: Estate claims can be much higher if the beneficiary is enrolled in managed care. When a managed care beneficiary dies, the estate will receive a claim for the total amount paid by Medi-Cal to the managed care plan, regardless of how much the actual services cost the managed care plan. Any share of cost paid to the nursing home, for example, is not deducted from the monthly amount paid to the managed care plan. If the deceased beneficiary was enrolled in a managed care plan, the itemized bill will only include a lump sum paid to the plan. The plan will have to be contacted to find out what providers were actually paid by the plan.

For individuals who die before January 1, 2017, California now seeks recovery from any real or personal property or any other assets in which the individual had any legal title to or interest in at the time of death. This means that the state can place a claim against joint tenancies, tenants in common, living trusts, or revocable life estates. This includes assets received by a surviving spouse by distribution or survival, e.g., assets left by a will or in community property. Thus, the state could recover after the surviving spouse dies, if the property has not been transferred to the well spouse during life. The state can also recover from annuities purchased on or after September 1, 2004.

What are New Medi-Cal Recovery Laws?

Thanks to comprehensive reforms that were recently signed into law, Medi-Cal Recovery has been severely restricted for those individuals who die on or after January 1, 2017. The new recovery law:

- Prohibits claims on the estates of surviving spouses and registered domestic partners;
- Limits recovery for those 55 years of age or older to nursing home and home and community based services (see list below);
- Limits recovery to only those assets subject to California probate (see below);
- Restricts the amount of interest that the state can charge on liens;

- Requires the state to waive the claim as a substantial hardship when the estate subject to recovery is a homestead of modest value, i.e., a home whose fair market value is 50 percent or less of the average price of homes in the county where the homestead is located; and
- Requires the state to provide a current or former beneficiary or their authorized representative a copy of the amount of Medi-Cal expenses that may be recoverable.

Furthermore, the state can no longer recover for most basic health services such as doctor's visits, prescription drug costs or managed care reimbursements – unless the services are related to nursing home care or Home and Community Based Services. Home and Community Based Services include the Assisted Living Waiver, Multipurpose Senior Services Program, In Home Operations Waiver, and Nursing Facility/Acute Hospital waiver programs.

Estate Recovery Limited to Probate Estate

The new law also limits recovery to only those estates that are subject to probate under California law. So, for individuals who die after 1/1/17, assets transferred via living trusts, joint tenancies, survivorship and life estates will no longer be subject to recovery. A will, however, depending on the value of the estate, is usually subject to probate in California.

Right to a Hearing / Hardship Claims

Once the Medi-Cal beneficiary has died, the estate (the estate attorney, the personal representative or the person in control of the property) is required to send notice of death and a copy of the death certificate to the Director, Department of Health Care Services, Estate Recovery Unit, Mail Stop 4720, P.O. Box 997425, Sacramento, CA 95899-7425. Registered or certified mail is recommended so you have proof of date of mailing. You do not have to complete any estate recovery "questionnaires," as your only legal obligation is to send notice of death and a death certificate. However, you do need to inform the Department of what, if anything, was left in the Decedent's estate. It is recommended you speak with a legal services or private bar attorney experienced in Medi-Cal before you complete the questionnaire or call the CANHR office.

You have the right to file for a waiver of the claim, to contest the amount of the claim and to appeal any denials of hardship waivers. For more information on Medi-Cal Recovery, see the *Medi-Cal Recovery Frequently Asked Questions* on CANHR's web site at www.canhr.org.

How Can You Avoid an Estate Claim?

After January 1, 2017, only those receiving nursing home or home and community based services will have their estates subject to recovery. So, if you are receiving such services, estate planning is highly recommended to ensure that your estate will not be subject to probate and thus, subject to recovery. A number of low-risk estate planning mechanisms will now be available to avoid recovery such as living trusts, joint tenancies, etc. A Medi-Cal recipient can also transfer any exempt property, including the exempt home, to anyone prior to death without impacting eligibility for Medi-Cal.

It is important to consider tax consequences and the risk of losing your home prematurely before any outright property transfer. Any transfers of real property should be reviewed with a knowledgeable Medi-Cal estate planning attorney.

For more information about the new Medi-Cal recovery laws, see the CANHR website, Medi-Cal for Long Term Care page. www.canhr.org

CANHR SERVICES

- ☼ **Consumer Information Service:**
Provides pre-placement counseling, including information on choosing a nursing home, Medi-Cal, residents' rights, services and quality information on California's nursing homes and residential care facilities; assistance with complaints; and community education on long term care issues. Please contact us at (800) 474-1116 (consumers only).
- ☼ **Lawyer Referral Service:**
Provides referrals to qualified attorneys in California specializing in estate planning, conservatorships, special needs trusts, residents' rights, elder financial abuse and elder abuse in nursing homes and other institutions.
- ☼ **Family Council Organizing:**
Assists relatives and friends of nursing home residents in forming Family Councils in individual facilities.
- ☼ **Legal Information Network:**
Provides legal services and private bar attorneys with training and information in the areas of estate planning and long term care issues.
- ☼ **Legal Services Support:**
Provides training, technical assistance and advocacy support to Legal Services Programs throughout California.
- ☼ **Legislative and Administrative Advocacy Support:**
Develops corrective legislation and clarification of current regulations and policies related to long term care issues.
- ☼ **Social Worker Advocacy Program (SWAP):**
Designed specifically for long term care social workers, geriatric case managers, admission and discharge planners and other community-based service providers to keep up to date on long term care issues.

CANHR is supported primarily through donations, fees for services and foundation grants. If you have a loved one in a nursing home or residential care facility or have found our services helpful, we urge you to become a "CANHR Advocate." You will receive our quarterly newsletter, *The Advocate*, which provides news on long term care, Medi-Cal, and pending legislation, as well as our Citation Report, detailing citations received by nursing homes statewide. Through your donation, you help CANHR bring information and support to California's nursing home residents and their loved ones. See www.canhr.org for more information.

www.canhr.org

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