RESOLVED, That the American Bar Association urges Congress, and all federal, state and territorial administrative bodies to continue efforts to expand the availability of home and community based services (HCBS) as a viable long term option by:

1. Making HCBS a mandatory service under Medicaid available to anyone who would otherwise qualify for institutional long-term care.
2. Providing comparable financial eligibility standards and procedures for nursing home care and HCBS.
3. Permanently mandating Medicaid spousal impoverishment protections for spouses of HCBS enrollees, as already exist for spouses of institutional long-term care.
4. Allowing Medicaid enrollees to retain sufficient income to pay their reasonable living expenses in the community.
5. Initiating and expanding other HCBS efforts to help people with disabilities of all ages to live with dignity in the community.
REPORT

This policy resolution urges government officials at all levels to continue efforts to make home and community based services available as a viable alternative to nursing home care as envisioned in the 1999 U.S. Supreme Court case Olmstead v. L.C., et al.. The proposal urges changes to overcome barriers that make Medicaid payment for home and community based services more difficult to obtain than for nursing home care, despite the fact that home and community based services are preferred by the majority of persons and have a proven track record of costing less. Responsibility for establishing and implementing such programs is shared in a complex interplay of several federal and state authorities, including Congress, the Centers for Medicare and Medicaid Services, among other federal entities, and state legislatures, state Medicaid programs and an array of state-funded long-term care services.

I. Background of the Right to Community Based Care

The watershed moment in encouraging home and community based care as an alternative to inpatient institutional care was the 1999 United States Supreme Court decision in Olmstead. The Court in Olmstead held that under Title II of the Americans with Disabilities Act, states are required to provide community based services when appropriate and reasonable. Olmstead makes clear that community based services should be available when deemed appropriate by health care professionals, when desired by the individual, and when the request can be reasonably accommodated.

Home and community based services (HCBS) and supports are essentially those services and other supports needed to help people with disabilities of all ages to live in the community. In the Medicaid program, they are presently defined at 42 C.F.R. 440.180 and 440.181 to include “case management services, homemaker services, home health aide services, personal care services, adult day health services, habilitation services, and respite care services” as well as “other services requested by the agency and approved by CMS.” (the Centers for Medicare and Medicaid Services). These services make it possible for adults with disabilities to live independently by providing assistance with basic health care, personal care, socialization, nutrition and necessary housekeeping. HCBS services provide assistance to enable adults to live in the community who would otherwise become inpatients in long term institutional care facilities.

While significant progress has been made in recent years, with a shift from 17 percent of Medicaid long term care spending to 41 percent being spent on home and community based care, significant obstacles to obtaining home and community based services exist when compared to nursing home services paid for by Medicaid. While nursing home services are a core required service, home and community based services are optional “waiver” services allowing states to limit coverage.

2 Id., at 607.
3 10-Plus Years After the Olmstead Ruling, NSCLC, Eric Carlson and Gene Coffey, September 2010, p. 7.
States may apply to the Centers for Medicare and Medicaid Services (CMS) for a “waiver” from the requirements of certain provisions of the Medicaid program. In many instances these waivers have permitted states to expand benefits under Medicaid to provide a variety of home and community based services that would not otherwise be covered. But the unintended consequence of the waiver option is that individuals who are mandatorily covered for nursing home care, may be denied coverage for home and community based long term care. This result follows from the state’s authority to limit the number of waiver applicants they accept. Further as a waiver service, states can impose different eligibility standards for home and community based services than for nursing home care.

Some states do not provide the same protections against spousal impoverishment for home and community based services that they do for nursing home services. This forces some married couples to choose nursing home care to be allowed limited financial protection for the well spouse. The income and living expense allowances under the waiver services program can be so limited that it can be impossible for the individual to maintain a home in which to receive care.

In a 2010 National Senior Citizens Law Center report, “10-Plus Years After the Olmstead Ruling, Progress, Problems, and Opportunities,” long term care experts Eric Carlson and Gene Coffey conclude:

> Overall, post-Olmstead developments have improved consumer access to HCBS. However unnecessary institutionalization is still a routine problem for too many older adults and people with disabilities, especially those with lower incomes.4

(10-Plus Years After the Olmstead Ruling, Eric Carlson and Gene Coffey, National Senior Citizens Law Center, September 2010).

II. Weaknesses of the Current System Addressed by this Policy

Each of the five action items in this policy address very real weaknesses of current Medicaid long-term care law and policy.

1. Providing home and community based services and supports under the Medicaid program are “optional” waiver services for all states. Nursing home coverage is a core required service under Medicaid. The states are required to pay for nursing home care for every person who needs it and is eligible for it – but home and community based care is “optional” and states can limit access. Nursing home care is frequently more expensive and must be covered, but coverage of less expensive community based care5 does not share the same status as a required service. Because of the optional status of home and community based care, states regularly limit the number of people they will cover and the amount that they will

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4 Id., at 8
5 Across the States – profiles of long term care and independent living, AARP, 2009
spend on community based care. Only by moving home and community based care into the mandatory services category, as called for by action item 1 will all eligible persons be afforded the opportunity to receive home and community based care. Under the reasonableness test in *Olmstead*, states are allowed to take cost into consideration in determining if home and community based care is a reasonable option.6 Home and community based services consistently result in a lowered cost of care when managed in a responsible way.7

2. Inconsistent rules result with persons with higher incomes being eligible for nursing home coverage under Medicaid, while being denied coverage for home and community based care. Applicants who are over the income limit for Medicaid coverage of nursing home care, but whose income is not sufficient to pay for the private rate for nursing home care, are either covered by transferring excess income to a qualified income trust (the money in the trust is either paid toward the cost of care or reimburses Medicaid after death) or by being covered under a medically needy category. These same options are not consistently available for persons seeking home and community based care – furthering the disparity in access. Action item 2 of this policy would correct the disparity by calling for comparable financial eligibility standards and procedures for nursing home care and HCBS.

3. To prevent the total impoverishment of the well spouse of a nursing home resident, federal law requires states to exempt limited assets and income for the spouse of a Medicaid beneficiary who is receiving Medicaid payment for institutional or nursing home services.8 These exemptions allow the spouse living in the community to retain a home with limited equity, a car, furniture and other defined personal property, a modest amount of the couple’s life savings and a limited share of the family income. States do not consistently afford this same protection to couples seeking HCBS services. The result is that some married couples face a Hobson’s choice between either impoverishing the well-spouse in order to receive long term care at home for the ill spouse or forcing placement in a nursing home to protect a modest amount of the couple’s life savings. Action item 3 of this policy calls for protections from spousal impoverishment in all Medicaid long term care options, including HCBS and nursing home services.

4. Medicaid services frequently require the long-term care enrollee to pay some share of the cost of services as a patient liability, based on the person’s income. This can range from a modest co-pay for a prescription to nearly all of the income of a nursing home resident (generally the beneficiary is allowed to keep only a tiny monthly personal needs allowance.) In many states, the income disregard for home and community based services leave the beneficiary without enough money to maintain a home in the community. In some states the patient is left with as

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8 42 U.S.C. 1396a, 1396d, 1396r-5.
little as $108 per month to maintain a home in the community in which to receive services. The patient liability formulas vary widely from state to state. Action item 4 supports policies that result in the beneficiary having sufficient money after payment of patient liability to maintain basic food, shelter and clothing needs in the community. Under the reasonableness test in *Olmstead*, the states are allowed to take cost into consideration in determining whether home and community based care is a reasonable alternative, so changing these rules does not have to result in an increase in overall cost to the state.10

5. Action item 5 calls for other efforts to help people with disabilities of all ages to live with dignity in the community by developing HCBS options. Several existing efforts to expand HCBS are described in the next section. This policy supports those efforts and efforts like them.

III. Limited Progress in Implementing Home and Community Based Services Options

Various steps have been taken over the past dozen years to expand access to community based long term care services for low-income older adults and adults with disabilities. The federal Centers for Medicare & Medicaid Services has initiated a demonstration project known as Money Follows the Person (MFP.) This optional program provides incentives to states that choose to participate to transition willing nursing home residents to community based care. To qualify for the program individuals must have been admitted to a nursing home for 90 days (reduced from 180 by the Affordable Care Act of 2010.) As an optional waiver service, states must compete for limited funding, and the program is available in a limited number of states. New, yet to be implemented, grants issued in February of 2011 expand the program to 45 jurisdictions (43 states, DC and one territory).11 As of June 2010, money follows the person had resulted in 8,517 people returning from nursing homes to a community based setting.12 This number is truly tiny in light of the fact that of 1.5 million nursing home residents in the U.S., over 900,000 are on Medicaid.13 Even in MFP states, institutional care receives the vast majority of funding14 raising the question a dozen years after *Olmstead*; are we making a reasonable effort to accommodate the desire of Americans to receive care in the community?

In overwhelming numbers, older Americans and adults with disabilities prefer community based care. Research by AARP shows that over 80% of middle aged adults

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9 10-Plus Years After Olmstead – page 31.
12 Id., slide 13.
13 [http://www.cdc.gov/nchs/fastats/nursingh.htm](http://www.cdc.gov/nchs/fastats/nursingh.htm); Money Follow the Person Demonstration Program: A profile of participants, Debra Lipson and Susan Williams, Mathematica Policy Research, Reports From the Field, Number 5, January 2011.
14 65 percent of the funding. See supra n. 11, at slide 19.
want to remain in their homes, even if they require assistance.\textsuperscript{15} Loss of independence and admission into a nursing home facility are the two most common fears of older Americans.\textsuperscript{16} And yet nursing home care is a core required service under Medicaid and home and community based care remains an optional waiver service with limited availability, limited funding, and, in many areas, substantial waiting lists.

Money Follows the Person and other efforts to transition nursing home residents have some structural challenges. The required 90 day stay in a nursing home results in a loss of housing, furniture and personal belongings for many nursing home residents making it difficult for them to return home. Many communities lack affordable, disability accessible housing. MFP is very limited in availability due to restricted funding. MFP is supplemental funding, it does not move money from the nursing home to the community based care. It moves the beneficiary from nursing home funding that is a core required Medicaid service to Home and Community Based Waiver Services, optional services that frequently have limits on funding and availability.

Community First Choice State Plan (Choice) is a new “waiver or optional” program included as part of the health care reform package passed in 2010.\textsuperscript{17} The Choice program is intended to continue to move states toward implementation of the promises of the \textit{Olmstead} decision.\textsuperscript{18} Under the Choice plan, persons eligible for nursing home services, would receive home and community based services if the state determines that “but for the provision of home and community based services” the person would require inpatient institutional care.\textsuperscript{19} Plans for this “optional” state service are moving forward, proposed regulations were published in the Federal Register on February 25, 2011 (Vol. 76, No. 38 page 10736-10753.) Action is needed to provide comments and encourage approval of regulations, ensure funding as part of the existing Medicaid program, encourage states to apply for this optional program and assure successful implementation in states that choose to participate in Choice. Conversion of the Choice program into a mandatory Medicaid service would represent a very direct implementation of step #1 our proposed resolution.

IV. The Need for ABA Action

While progress has been made in improving access to home and community based care, much is left to be done, and current state and federal budget crises threaten to undermine the progress that has already been made. There are opportunities at hand with respect to encouraging continuation and expansion of Money Follows the Person and other nursing home transition programs and rule-making and implementation of the Community First Choice Plan option and other opportunities to expand home and community based care. The critical issue of placing home and community based services on an equal footing to

\textsuperscript{15} These Four Walls, AARP (2003).
\textsuperscript{16} Attitudes of Seniors and Baby Boomers Aging in Place, Clarity (2007).
\textsuperscript{17} Patient Protection and Affordable Care Act of 2010 Pub. L. 111-148, as amended by the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111-152).
\textsuperscript{18} Federal Register Vol 76, No. 38 page 10737 (B.).
\textsuperscript{19} Id., at 10739.
nursing home care is yet to be addressed. ABA policy on this issue will make it possible for our voice to be heard in this vital issue.

The ABA stands in a unique position as a major spokesperson for the legal profession in the United States. Where legal barriers stand in the way of the individual’s right to full integration into the community, as was the situation addressed by the Supreme Court in *Olmstead*, ABA action in support of the principles established in *Olmstead* best serves the public and its own Goal III, “To provide ongoing leadership in improving the law to serve the changing needs of society.”

V. Related ABA Policy

There is no existing ABA policy addressing the issue of expanding access to home and community based care as an alternative to institutional care. The ABA has three policies that touch on access to long-term care services generally and Medicaid specifically:

**August 2005:**
RESOLVED, THAT The ABA recognizes the financial burden of maintaining the Medicaid program and the need for innovation in shaping more effective health care systems, but opposes any structural or financial changes in the Medicaid program that would weaken the current entitlement nature of the program or shared legal obligation that the federal, state, and territorial governments have to provide a comprehensive set of benefits to all individuals who meet eligibility criteria.

FURTHER RESOLVED, that the ABA supports Medicaid restructuring that:
1. Encourages the states and territories to experiment with new and innovative approaches to delivering health and long-term care to economically needy and uninsured populations that do not create unreasonable barriers or burdens on access to care;
2. Continues the entitlement nature of the program in providing medically necessary health care benefits to historically eligible populations: chronically ill older people, persons with disabilities, children, pregnant women, and families; and ensures that this entitlement will not be undermined by block grants, capped allotments or other funding mechanism;
3. Recognizes that many middle income Americans have no other option for meeting the catastrophic costs of long-term care other than Medicaid, and that federal, state, and territorial policy must better define and implement a system that permits this population to share fairly in the cost of long-term care without having to become impoverished;
4. Protects participants’ rights to appropriate quality care through strong due process safeguards, including impartial decision-making, internal and external review of decisions, meaningful notice of all major care decisions in language that is easily understood, full access to information, assistance with appeal to an impartial decision maker in a timely manner, and continuation of coverage during the review process;
5. Ensures that consumers have a meaningful voice in any restructuring process.
6. Ensures that Medicaid Section 1115 research and demonstration waiver proposals are evaluated predominantly on their potential to expand or improve the quality, delivery, and effectiveness of care with recognition of their potential for budget savings or budget neutrality.
February, 1992:
BE IT RESOLVED, that the American Bar Association supports the adoption of legislation, regulations and other initiatives which encourage private insurance, employment related benefits and other mechanisms that will address the long-term care needs of our aging population. Such legislation, regulations, and other initiatives should include:
1. Tax law changes and interpretations which foster, rather than restrict, the growth of private insurance, employment related benefits and other mechanism that offer benefits for long-term care;
2. Better enforcement of existing consumer protection provisions and the possible adoption of additional measures that will protect the consumer in the sale, financing, and deliver of long-term care products and services;
3. Generally, the initiation of creative public and private options for providing, financing, and delivering long-term care, including home and community based care.

February, 1989:
BE IT RESOLVED, that the American Bar Association supports the enactment of Federal and State legislation providing a coordinated and comprehensive system of care and support for Americans of all ages with long-term care needs. Any system of long-term care should be consistent with but not limited to the following principles:
1. Provide equitable access to care without undue financial hardship, such as impoverishing spouses or dependents;
2. Provide procedural fairness;
3. Provide for appropriate beneficiary choice with respect to the nature and setting for delivery of care, including institutional and home care, subject to costs and other constraints;
4. Assure appropriate quality consistent with the principles recommended by the Institute of Medicine for nursing home care and by the American Bar Association in its 1987 resolution with respect to home care quality;
Ensure responsible financing through appropriate means, which could involve a mixture of public funding and individual cost sharing.

VI. Conclusion

This resolution builds upon existing ABA policy to enable the Association to direct its advocacy efforts more effectively in furtherance of the principles established in Olmstead. Nothing in this proposal is contrary to the above existing policies. The proposed policy reinforces while not duplicating or changing in any way the policy of encouraging the creation of a system that is “coordinated and comprehensive” and retaining the “current entitlement nature of the program.”

Accordingly, the Commission on Law and Aging requests the House of Delegates to adopt the resolution herein.

Respectfully Submitted,
Jeffrey J. Snell, Chair
Commission on Law and Aging
August 2011
GENERAL INFORMATION FORM

Submitting Entity: ABA Commission on Law and Aging

Submitted By: Jeffery Snell, Chair of the ABA Commission on Law and Aging

1. Summary of Resolution.
   This resolution urges all federal, state and territorial administrative bodies to continue efforts to expand the availability of home and community based services (HCBS) as a viable long term care option by:
   - Making HCBS a mandatory service under Medicaid available to anyone who would otherwise qualify for institutional long-term care.
   - Providing comparable financial eligibility standards and procedures for nursing home care and HCBS.
   - Permanently mandating Medicaid spousal impoverishment protections for spouses of HCBS enrollees, as already exist for spouses of institutional long-term care.
   - Allowing Medicaid enrollees to retain sufficient income to pay their reasonable living expenses in the community.
   - Initiating and expanding other HCBS efforts to help people with disabilities of all ages to live with dignity in the community.

2. Approval by Submitting Entity.
   This proposal was approved by the ABA Commission on Law and Aging at their meeting on April 29, 2011.

3. Has this or a similar resolution been submitted to the House or Board previously?
   No

4. What existing Association policies are relevant to this resolution and how would they be affected by its adoption?
   There is no existing ABA policy directly on point, but there are related policies consistent with this resolution. This resolution will reinforce and add needed detail to a 2005 ABA policy urging exploration of cost effective Medicaid programs; reinforce the provision of a 1992 ABA policy urging innovative payment for long term care that specifically included home and community based care in the spectrum of long term care options; and continue and apply to emerging programs a 1989 policy urging fairness and avoidance of undue financial hardship in programs providing long term care.

5. What urgency exists which requires action at this meeting of the House?
   The movement toward leveling the playing field between institutional care and home and community-based care has been slow over the last several years. However, several program changes included in the Affordable Care Act of 2010 (i.e., the health reform law) present new opportunities to overcome access barriers...
to home and community-based services and implement the promise of access mandated by the *Olmstead* decision in 1999. (*Olmstead v. L.C., et al., 527 US 581 (1999)*). The ABA stands in a unique position to support and advocate for this goal.

6. **Status of Legislation.** (If applicable.)
   None

7. **Cost to the Association.** (Both direct and indirect costs.)
   None

8. **Disclosure of Interest.** (If applicable.)
   Not Applicable

9. **Referrals.**
   - Commission on Mental and Physical Disability Law
   - Center for Human Rights
   - Government and Public Sector Lawyers Division
   - Senior Lawyers Division
   - Young Lawyers Division
   - Section of Administrative Law and Regulatory Practice
   - Section of General Practice, Solo and Small Firm
   - Section of Individual Rights and Responsibilities
   - Section of Real Property, Probate, and Trust Law
   - Section of State and Local Government Law
   - Section on Administrative Law and Regulatory Practice
   - Health Law Section

10. **Contact Person.** (Prior to the meeting.)
    Charlie Sabatino, Director
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11. **Contact Person.** (Who will present the report to the House.)
    Jeffery Snell, Chair
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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution urges all federal, state and territorial administrative bodies to continue efforts to expand the availability of home and community based services (HCBS) as a viable long term care option by:

- Making HCBS a mandatory service under Medicaid available to anyone who would otherwise qualify for institutional long-term care.
- Providing comparable financial eligibility standards and procedures for nursing home care and HCBS.
- Permanently mandating Medicaid spousal impoverishment protections for spouses of HCBS enrollees, as already exist for spouses of institutional long-term care.
- Allowing Medicaid enrollees to retain sufficient income to pay their reasonable living expenses in the community.
- Initiating and expanding other HCBS efforts to help people with disabilities of all ages to live with dignity in the community.

2. Summary of the Issue that the Resolution Addresses

In 1999 the US Supreme Court in Olmstead v., L.C., et al., (527 US 581 (1999)), ruled that under the ADA Medicaid beneficiaries who desired it, had a right to receive home and community based care as an alternative to institutional care, as long as the request could be reasonably accommodated. Studies show that the majority of Americans prefer to receive care in their home. While progress has been made in making home and community based care available, significant obstacles persist limiting access to HCBS by low income Americans.

- First among the obstacles is the status of HCBS as an “optional waiver service” while institutional care is a mandatory core service that all participating states must provide under Medicaid to all eligible beneficiaries. As an optional waiver services states can and do impose capacity limits on HCBS, forcing persons needing long term care to enter inpatient long term care institutions, or forgo needed care while on waiting lists.
- Inconsistent financial rules result with persons with higher incomes being eligible for nursing home coverage under Medicaid, while being denied coverage for home and community based care.
- Medicaid spousal impoverishment provisions, applicable to nursing home care, protect the well spouse of a beneficiary by allowing the spouse to retain a higher level of savings and income than basic Medicaid eligibility rules require in order to prevent impoverishing the well spouse. This same protection is not uniformly available to beneficiaries receiving home and community based long term care services.
Medicaid long term care beneficiaries pay a significant portion of their income toward the cost of care. The formulas used to calculate the patient liability in many states make it impossible for a home and community based services beneficiary to maintain a home in which to receive community-based care. While residents in inpatient settings may be able to meet personal needs with a tiny amount of their income, residents in the community need to be allowed to retain sufficient income to maintain a home and provide basic food, clothing and basic utilities. States are protected against excessive costs by the reasonableness analysis in the Olmstead decision allowing states to take the overall cost of care into consideration in determining the feasibility of providing community based care.

3. Please Explain How the Proposed Policy Position will Address the Issue

The proposed policy will make it possible for the ABA to urge continuation and improvements in programs and policies aimed at leveling the playing field between institutional long term care and home HCBS initiatives, by treating both forms of care equally in access and availability of services, eligibility for services, providing limited financial protections to spouses of HCBS that are equal to those of the spouses of institutional care recipients and allowing home and community based recipients to retain enough of their income to maintain a home in which to receive home and community based services.

4. Summary of Minority Views

None have been identified.