

Elder Law Insight...

Addressing the Legal Issues of Aging and Asset Protection

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Special points of interest:

- How few people know about Medicaid Planning and how it can help. Read [Pass the Word! Medicaid/Asset Protection Planning Works](#)
- How the “Look-back” works. Read [Medicaid Gifting and the Look-back Explained](#)
- Special Needs Trusts for the disabled; the means to a brighter future

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Pass the Word! Medicaid/Asset Protection Planning Works

It’s surprising how many people, even attorneys, accountants, financial planners and other professionals have no idea what Medicaid/Asset Protection Planning is and how it can save families thousands of dollars.

On a recent Friday I was meeting with an insurance advisor and his supervisor to discuss a new long term care product they had available. As they were describing the pros and cons of the product the supervisor told me how his clients were responding so favorably to it.

He said he was recently meeting with an attorney and his wife to discuss her mother’s long term planning needs. He explained that despite the mother’s healthy amount of assets he could

not get her long term care insurance due to her physical condition. He suggested, however, that the couple look into long term care insurance for themselves. At that point the attorney said, “I guess if there is nothing we can do to protect mom’s assets we might as well make sure that we protect ours.”

At that point I could hardly contain myself so I blurted, “Did you tell them about Medicaid Planning for her mother and how that could protect at least some of her assets from being spent on nursing home care?” He responded, and I



A Medicaid/Asset Protection Plan opens the gate to savings and provides peace of mind to the elder and family.

kid you not, “What is Medicaid Planning and how does it work?”

Stunned silence was my only response. Here I was meeting with a professional who had recently referred me a guardianship matter and he did not know anything about Medicaid Plan-

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Medicaid Gifting and the Look-back Explained

Medicaid is a program that provides vitally needed medical assistance for people 65 or older and for blind or disabled individuals. It is a “needs based” program which in simple terms means the applicant must have minimum resources

and limited income. The limitations notwithstanding, millions of middle-class Americans can and do qualify for Medicaid.

In evaluating an applicant’s assets Medicaid examines all gifts and transfers made by the individual

within 36 months of the date of the application (the look-back is 60 months for gifts to trusts). In other words, Medicaid “looks back 36 months” to examine the applicant’s financial transactions. Financial transactions

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Medicaid Gifting and the Look-back Explained

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made more than 36 months before the application are not subject to the look-back. Medicaid is looking to see if the applicant received “fair market value” for all transfers or whether the transfers were really “gifts.” Transfers for which the applicant did not receive fair market value and gifts are subject to penalties imposed by Medicaid.

The penalty is a period of time during which the applicant will be disqualified from receiving Medicaid. During this period of disqualification the applicant will need sufficient funds to cover his or her living expenses. For example, if Mr. Smith made a gift to his daughter which resulted in a two-month period of disqualification he would have to be financially capable of covering his expenses for the two month period.

That the gift was made during the look-back period and the resulting penalty are what matter. The fact that the gift was made, however, does not mean the applicant is disqualified from receiving Medicaid for the entire 36 months. 36 months is a time period of evaluation not disqualification. The applicant is only disqualified for the penalty period relating to the gift(s) in question.

For example, if Mr. Smith applied

for Medicaid on January 1, 2003, Medicaid would ask if he made any gifts or transfers within the prior 36 months thereby looking back to January 2000 (nothing before January 2000 will be evaluated except a transfer to a trust). Let us assume that in March 2001 Mr. Smith made a gift to his daughter that resulted in a 10-month penalty. The penalty would begin in the month the gift was made (March 2001) and extend until and through December 2001. As of January 2002 Mr. Smith’s penalty expired and upon his application for Medicaid in January 2003, assuming he otherwise qualifies, he will be eligible for Medicaid.

Although an application for Medicaid is generally made after an individual enters a nursing home or other long-term care facility, gifting can take place at any time. Frequently, an elder will begin a gifting program months, and in some cases years, before entering a facility. Generally, the financial need when a person is still at home is far less than after entering a facility. The result is that the sooner an individual begins a gifting program the more he or she can preserve and protect.

Every gift, whether money, goods or real estate, incurs a penalty for Medicaid purposes. Penalties are measured, as previously indicated, not

in dollars but in periods of time. The penalty period is the length of time during which the individual making the gift is ineligible to receive Medicaid benefits. The penalty is imposed because if the individual had not made the gift the funds represented by the value of the gift would have been available to pay for a certain period of time in a nursing home (whether the person is at home or in a long-term care facility at the time the gift is made is not important).

It may seem that gifting and the look-back pose little problem but that is far from the truth. First, it’s a violation of law to file an application for Medicaid during any penalty period. Second, an error in calculations regarding the relationship of the penalty to the look-back can cost the individual thousands of dollars. And lastly, mistakes in either the design or implementation of an asset protection plan can result in significant civil penalties and even criminal sanctions.

Gifting is an appropriate strategy to be used by many individuals in Medicaid/Asset Protection Planning. If, however, an individual is considering designing and implementing a plan he or she should consult a qualified Elder Law Attorney.

Some Medicaid Myths:

“I have to give away everything I possess to qualify for Medicaid!”

...*The truth:* An individual is permitted to own assets and still be eligible for Medicaid. Knowing what can be kept is the ticket, and when there is a community spouse a great deal can be retained.

“I can’t give anything away and qualify for Medicaid!”

...*The truth:* By working within the rules gifts can be made and the individual can qualify for Medicaid. See Medicaid Gifting and the Look-back Explained at page 1.

“I can only spend-down my assets on medical or nursing home bills!”

...*The truth:* Assets may be spent for any obligation or even for gifting. Conversion of assets from “countable” to “non-countable” is also an available strategy.

“The trouble is, old age is not interesting until one gets there. It’s a foreign country with an unknown language to the young and even to the middle-aged.”

*Another
Country, Navigating the
Emotional*

Terrain of our Elders, by Mary Pipher, Ph.D.



Pass the Word!

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ning. Of course I had no one to blame but myself; how could I not have explained Medicaid Planning to him before this? I quickly gave him a Medicaid Planning primer and explained how with planning, no matter how late it may seem, at least some assets can be protected to provide a benefit to the person in the nursing home and eventually to pass to that person's heirs.

A few days after our meeting the supervisor called to tell me I could expect a call from his clients. He had discussed and explained Medicaid Planning to the couple and they were relieved to know there was something they could do to protect mother's assets. Shortly after we got off the phone

the attorney called and the rest, as they say, is Medicaid Planning history.

The next situation occurred the following Monday when I was visiting one of my clients in a nursing home. She told me she was visiting her neighbor in the next room earlier that day when the neighbor's niece arrived. The niece explained she was selling her aunt's house as she had requested so that her aunt would have funds to pay for her nursing home care. Upon hearing that the aunt began to cry and said she was so upset that all of her money was being spent on the nursing home and how she wished she had been able to leave something for her niece and grand nephews instead.

I told my client that her neighbor

doesn't have to spend all of the proceeds from the sale of her house on the nursing home. I explained about Medicaid Planning, the same exact thing I was doing for my client, and told her to tell her neighbor's niece to call me so we can discuss how Medicaid Planning might benefit her aunt.



Medicaid Planning means savings for families!

...recent cases and law of interest from here and there:

...Son instituted suit seeking appointment as guardian of mother also sought permission to engage in Medicaid/Asset Protection Planning. Court ruled that son failed to show that mother would have engaged in planning had she been competent. Without evidence that mother would have elected to gift her assets in order to obtain Medicaid benefits and avoid spending-down all her assets the court refused to allow the guardian the power to do it for her. *In the Matter of Mildred Keri*, 2002 N.J. Super. Lexis 501 (App. Div. 2002).

Comment: Medicaid/Asset Protection Planning is permitted in New Jersey although the case law in this area is limited. To avoid problems counsel should, if at all possible, draft documents for the elder's signature which reflect his/her intentions in this regard. A power-of-attorney which discusses and permits Medicaid/Asset Protection Planning is strongly advised.

...New Jersey is imposing, in addition to the traditional inheritance tax, an estate tax on estates of residents dying after December 31, 2001. A unified credit of \$675,000 is applicable in New Jersey notwithstanding the Federal unified credit, currently \$1,000,000. See NJSA 54:38-1.

Comment: Estate planners must now take the New Jersey as well as the Federal estate tax into consideration for tax purposes when planning. Counsel would be well advised to review client files and where appropriate contact clients to make them aware of change.

...To determine required spend-down for Medicaid purposes an initial evaluation of assets of a couple is performed as of the date an individual enters a nursing home on a continuous basis. The community spouse's share of resources (assets) is determined at this time but does not include the home or other exempt assets. Once the assets allocated to the institutionalized spouse have been spent he/she should qualify for Medicaid. Assets which appreciate in value during the "spend-down" period must, however, be considered in their appreciated value at time of application. *A.K. v. Division of Medical Assistance and Health Services*, 350 N.J. Super. 175 (App. Div. 2002).

...In a case of first impression the Chancery Court held that successor fiduciary is holder of the attorney-client privilege with regard to all prior communication between estate's attorney and prior fiduciaries. Access is necessary for effective, continuous administration of the estate. *In Re Estate of Fedor*, 811 A2 970, 2001 N.J. Super. Lexis 514 (Ch. 2001).

...Lawyer who acted as co-trustee along with client's daughter was sued and held liable in probate court for damages based on breach of fiduciary duty. Lawyer filed bankruptcy and beneficiaries objected to discharge because judgment was based on breach of fiduciary duty. Bankruptcy court allowed discharge. District Court overturned bankruptcy court and was in turn overruled by the U. S. Court of Appeals for First Circuit. The First Circuit determined that the lawyer's actions were not so egregious as to approach the level of fraud that bankruptcy code requires and held that the probate judgment was dischargeable. *In Re: Carl E. Baylis*, United States Court of Appeals for the First Circuit (2002).

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A Concept Not to be Missed!

Medicaid /Asset Protection Planning protects and provides the elder with benefits that would otherwise be lost. Simply put, if an elder gifts funds to a trusted child, or possibly a trust, the funds will be available to that child or trust to be used for the elder's needs in the future and once Medicaid is covering the bills. Without planning the funds would be spent on nursing home care and thus unavailable. Suppose, Mom, who planned and is now on Medicaid, needs a new large screen TV because her eyesight is failing. With planning the funds will be there to cover the cost. Only after Mom passes away will the funds be available to the children.

The *Elder Law Insight...*, a publication of The Elder Law Firm of PRICE & PRICE, LLC, is published quarterly and is written for attorneys, accountants, financial advisors, doctors, geriatric care-managers, health care and other professionals.

The Elder Law Firm of PRICE & PRICE, LLC, concentrates its practice in the areas of Elder Law, Medicaid/Asset Protection Planning, Guardianship, Special Needs Planning, Estate Planning and Probate. If you have a legal question or concern in any of these areas, please feel free to contact us.

PRICE & PRICE, LLC, will be pleased, upon request, to provide copies of any of the following articles produced by the firm:

- » Medicaid/Asset Protection Planning - An Overview
- » Medicaid Myths: Fact or Fiction
- » Medicaid Gifting and the Look-back Explained
- » South Jersey Nursing Home and Assisted Living Guide
- » Understanding Medicaid Spend-down

Special Needs Trusts for Disabled Individuals

A "Special Needs Trust" may be the only way to protect funds of a disabled individual while continuing to maintain eligibility for governmental benefits such as SSI and Medicaid, both of which are needs based programs.

The funds are frequently the proceeds of a personal injury lawsuit and if given directly to the individual result in disqualification for benefits. When this happens the individual must spend the funds to a predetermined limit (e.g. \$2,000 for Medicaid) before again being qualified for the program. During the period of disqualification the individual is undoubtedly without desperately needed medical coverage since the recovery

would disqualify the individual from receiving Medicaid.

A "Special Needs Trust" is created to hold the funds and is used to supplement, not replace, governmental benefits. Careful drafting of the trust document will permit the individual to retain benefits while, at the same time, realizing the rewards of the settlement.

Travel, entertainment, even the purchase of a home or specially equipped van are examples of the things a "Special Needs Trust" can acquire.

For a "Special Needs Trust" to qualify vis-à-vis Medicaid or SSI it must be for an individual under the age of

65, contain the individual's assets, and be established for the individual's benefit by either his guardian, parent, grandparent or a court. A further condition is that any funds remaining at the death of the individual must be paid to Medicaid to cover the cost of services provided by Medicaid. Any funds remaining after that will pass to the remaindermen of the trust.

Failure to consider creation of a "Special Needs Trust" when settling a personal injury case may constitute professional negligence. Therefore, attorneys and other professionals should discuss this option with the client and, should the client decline to have a trust approved by the court, counsel should obtain a statement from the client to that effect to avoid claims or problems in the future.



Special Needs Trusts, a means to a brighter future