

Elder Law Insight...

Addressing the Legal Issues of Aging and Asset Protection

VOLUME I, Issue 2

MAY 2003

Special points of interest:

- Spend down does not mean payment to a nursing home. Read [Planning: A Case Study...Medicaid/Asset Protection Planning at Work](#)
- Learn how Medicaid "Spend down" works. Read [Medicaid Spend Down Explained](#)
- When to start planning and for whom to plan the Special Needs Trust. Read [Special Needs Trusts: Time to Plan](#)

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Planning: A Case Study... Medicaid/Asset Protection Planning at Work

We recently met with Mary, whose husband, John, had just been admitted to a nursing home. She was concerned, as was he and the children, that they were going to lose everything. They owned their home and a vacation property. The home, worth \$175,000.00, was free and clear and the vacation property was encumbered with an \$80,000.00 mortgage. Their equity in the property was \$20,000.00. On top of this they had \$225,000.00 in assets.

John's monthly income was \$1,050.00 from Social Security and \$500.00 from a pension. Mary's income was \$675.00 a month from Social Security.

They wanted to know if it was too late to protect their assets and, if not, what

could we do to help them?

Our first task was to reassure Mary that it's never too late to plan. Something, except in the most unusual



Planning is a family event and everyone benefits!

of circumstances, can always be saved. Our second task was, following a thorough interview, to design and then, in conjunction with Mary and John, implement a Medicaid/Asset Pro-

tection Plan. Our goal was to save as much of the marital assets as possible for Mary, John and the family.

The first thing we did was to determine Mary's community spouse resource allowance. This allowance permits Mary to retain a certain portion of the couple's assets and, in determining her allowance, also tells us how much John has to spend before being Medicaid eligible. Mary's allowance was set at the maximum of \$90,660.00 plus the marital residence. This meant John would have to spend \$234,340.00.

Initially, we recommended that Mary make investments in the marital home. This resulted in converting available resources to exempt resources since

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Medicaid Spend Down Explained

"Spend down" is the process of reducing the assets an individual possesses in order to qualify for Medicaid. Simply stated, spend down is nothing more than spending one's money until the appropriate asset limit is reached. At present

the asset limit in the State of New Jersey is \$2,000.00 for the "Medicaid Only" program and \$4,000.00 for the "Medically Needy" program. It is important to understand, however, that different rules apply to married couples than apply to indi-

viduals.

To qualify for Medicaid an individual must be at least 65 years old, have limited income (\$1,656.00/month or less for the "Medicaid Only" program or more than

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Medicaid Spend Down Explained

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\$1,656.00/month for the “Medically Needy” program but otherwise be incapable of paying for needed medical care), have limited assets (as indicated above) and have a medical need. In most cases, when dealing with senior citizens the individual is in, or anticipates entering, a nursing home or assisted living facility.

Depending on the facts of the individual case, not all assets, including cash, have to be spent down. Certain assets are exempt from spend down. For example, in the case of a single individual, the individual’s home is exempt if the person intends to return to it. In New Jersey, it should be noted, it is assumed by Medicaid that the person will not return home if the person does not return home within six months of entering a nursing home. This is, however, an assumption that can be rebutted. If, on the other hand, the individual in the nursing home is married and the “community spouse” remains in the home, then it is exempt from spend down. Similarly, in the case of a married couple, the family car is exempt.

The community spouse, that is, the non-institutionalized spouse, enjoys a “community spouse resource allowance,” which means that he/she gets to keep one-half of the assets of the couple up to a predetermined maximum (\$90,660.00). The assets that comprise the community spouse resource allowance are exempt from spend-down. All assets in excess of the community spouse’s share are subject, if not otherwise exempt, to spend down. For example, if the couple have a house and \$100,000.00 cash, the community spouse would get to keep the house and \$50,000.00. The institutionalized spouse, in order to qualify for the Medicaid Only Program, would have to spend \$48,000.00 of the funds

allocated to him/her. Thus, in this simple example the spend down is \$48,000.00.

The maximum amount of assets the community spouse is allowed to keep is determined by Medicaid. For example, if the assets are \$200,000.00 then the allowance is \$90,660.00, and all assets in excess of that (\$109,340.00) are deemed to belong to the institutionalized spouse and are subject to spend-down. As indicated previously, exempt resources are not included in the calculation. Thus, for example, if the couple had a house and \$250,000.00, the community spouse would get to keep the house regardless of its value plus \$90,660.00, and the institutionalized spouse would have a spend-down of \$159,340.00. In all examples it is assumed that the institutionalized spouse has monthly income of \$1,656.00 or less.

The amount of spend-down is determined based on the assets of the couple as of the day the institutionalized spouse enters the nursing home for an extended stay. Regardless of the date the analysis is performed, it relates back to the day of admission. This date is referred to as the “snapshot date” by Medicaid because a “snapshot” is taken of the couple’s assets as of that date. Medicaid regulations then evaluate the assets as of the first day of the month the spouse entered the facility.

Various exemptions and allowances are available to couples which are not available to single individuals. As indicated, the family home is exempt from spend-down as is the family car. A community spouse is also entitled to a “community spouse resource allowance” (the 50% of the assets discussed previously) and a “minimum monthly maintenance needs allowance.” A single individual is not entitled to any allowances (other than a

\$35.00/month personal needs allowance) and to only limited exemptions. The allowances for the community spouse are intended to protect the community spouse from being pauperized. A detailed explanation of the community spouse’s allowances is the subject of another report. Suffice it to say that these allowances are significant items when engaging in Medicaid/Asset Protection Planning.

Thus, “spend-down” is the process of disposing of assets in order to qualify for Medicaid. One thing it does not have to be, however, is the robotic spending of money. In other words, an individual or couple can design a Medicaid/Asset Protection Plan, the goal of which is to “dispose” of assets in a systematic, planned manner in order to protect and preserve those assets for future use. Disposal of assets does not necessarily mean “spending” assets. For a couple disposition may mean conversion of assets from “countable” to “exempt” status. One example of conversion from countable to exempt is the purchase of a funeral for the institutionalized spouse. The funds used for this purchase would, if not so used, have to be spent down. By converting the funds to exempt status they are protected from spend-down.

Medicaid/Asset Protection Planning thus is the process of designing a plan for the disposition of assets in such a fashion as to save a maximum amount from spend down, thereby protecting those assets for the couple or institutionalized individual. Those protected assets can be used for their benefit in the future once the institutionalized individual qualifies for Medicaid. When the couple or individual no longer needs the funds, usually after the person or couple have passed away, the protected funds are available for their families and loved ones.

A Medicaid Myth:

“I have to wait 3 years after giving anything away before I can qualify for Medicaid.”

...The Truth: 3 years is a “look back” period. It means that Medicaid evaluates any gifts or transfers that took place within that time period. The fact that a gift was made does not mean the applicant is disqualified from receiving Medicaid. The issue to be resolved is, “what is the affect of the transfer?” In many cases transfers are of no significance and the person is Medicaid eligible.

Planning: A Case Study...Medicaid/Asset Protection Planning at Work

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the marital residence, so long as the community spouse lives there, is exempt from spend down. We had her purchase a funeral for John, also an exempt resource, and we looked for other conversion strategies.

They were very concerned about the vacation home as, although not terribly valuable, it had belonged to John's parents. This property was not exempt and was subject to spend down along with all the liquid assets. We discussed the situation with Mary, John and their oldest daughter, Julie, who was willing to work with us.

We suggested she assume the mortgage and, in return, John and Mary would transfer the property to her.

This resulted in a \$20,000 gift of the equity from Mary and John to Julie. The Medicaid penalty for this gift was 3 months and would expire 3 months after the deed was recorded in the Office of the County Clerk. Julie, by assuming the mortgage, was providing "fair market value" for the bulk of the transfer and no penalty was imposed for this portion of the transaction. We documented and recorded the assumption and obtained an appraisal for the property to prove its value.

Other possible strategies we discussed were the purchase of a van for \$30,000.00 to carry John in his wheelchair (the community spouse is entitled to a car as an exempt asset) and payment of the couple's debt (\$15,000.00). These transactions, combined with the

investment of \$30,000.00 in the house and the funeral in the amount of \$6,500.00, resulted in savings to Mary and John of \$81,500.00. None of this was spent for nursing home care.

Thus, Mary increased the value of the marital residence from \$175,000.00 to \$205,000.00 and was debt free.

Their vacation home was secure and Mary had a new, reliable vehicle. Lastly, we were still able to transfer a substantial sum to the children to be held in their names for their future use.



Planning for the future

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

...N.J.S.A. 46:8-9.1 and 9.2 provide substantial protection to elderly tenants of rental units. 9.1 permits termination of a lease for a residential unit by the executor or spouse of a deceased individual upon 40 days notice to the landlord. 9.2 permits termination of a lease upon the disability of the lessee or his/her spouse upon proper notice and compliance with the procedural aspects of the statute.

Comment: Elders are often confronted with significant financial burdens when a spouse needs to enter a nursing home. These statutes provide financial relief to the community spouse. Although 9.2 does not directly address entering a nursing home as grounds to terminate there is no doubt that the need to enter a nursing home would constitute "a disabling illness" within the intent of the statute.

...An elderly resident in a nursing home fell and injured herself. As a result her monthly expenses increased. The liability carrier for the home agreed to pay the increased cost so long as the patient continued to pay as before. Daughter brought suit for breach of contract and negligence when the carrier stopped paying. The carrier had paid until the statute of limitations expired with regard to the negligence action. On motion for summary judgment the case was dismissed. Daughter appealed with regard to the breach of contract cause of action but did not pursue the negligence case (daughter told the carrier when it first agreed to make payments after her mother's fall that she did not intend to bring suit). The Idaho Supreme Court reversed and remanded based on evidence of the payment history. It held that the pattern of payment was admissible as evidence of a contract to pay. *Estate of Lenox-McColm v. Valley View, Inc.*, decided March 7, 2003.

...Husband's 1978 discretionary, testamentary trust, with wife as income only beneficiary was held, by the Kansas Supreme Court, to contain assets of spouse to be spent down for wife's nursing home care. Husband had created trust for the benefit of his spouse with his children as remainder beneficiaries. Spouse at the time Husband's will was executed signed a document essentially accepting Husband's testamentary scheme and upon his death failed to pursue her "elective share" portion which equaled 50% of the augmented estate. The Supreme Court held that failure to pursue the elective share, worth approximately \$95,000, resulted in her funds becoming part of the principal of the trust and made wife ineligible for Medicaid until those funds were exhausted. The fact that the trustee had complete discretion to disburse principal with the result that the funds were inaccessible was not discussed by the Court. *Miller v. State of Kansas Department of Social and Rehabilitation Services*, No. 88,761, March 2003.

Comment: Husband's attempt to draft a "supplemental benefits trust" for wife failed because, as the Court said, the funds of the spouse formed part of the principal and that violated 42 U.S.C.A. 1396p(d)(2)(A). The rules regarding trusts are strictly enforced by Medicaid. Counsel, when preparing trusts, living or testamentary, must be careful, except in the case of a "special needs trust" sanctioned by 42 U.S.C.A. 1396p(d)(4)(a), not to use funds of the beneficiary. Situations like these are especially difficult if the funds are beyond the control of the beneficiary and the trustee refuses to disburse funds for the beneficiary's use. A similar result can occur when the funds are placed in an annuity and are beyond the beneficiary's control. The funds may be the beneficiary's but, by contract, they are inaccessible and yet must be spent for the beneficiary's needs.

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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
- » Medicaid Spend Down Explained
- » New Jersey Death Taxes Explained
- » Life & Estate Planning: The Basic Documents

Special Needs Trusts: Time to Plan

In the last issue of *Elder Law Insight* we discussed the need for a Special Needs Trust (hereinafter SNT) for disabled individuals. Many readers asked, "when is the time to start looking into creation of the SNT and what clients need one?"

Initially, it should be noted that an SNT is a result of 42 U.S.C.A. 1396p (d)(4)(A) which allows creation of a trust with the funds of a person under the age of 65 who is disabled. The trust must be established by a parent, grandparent, legal guardian of the individual, or a court. The purpose is to supplement the benefits received from either SSI and/or Medicaid.

It is important to note that the state must be the primary remainderman in order to reimburse the state for all payments made to the beneficiary. All re-

maining funds, if any, after the state's lien has been satisfied will go to the beneficiary's estate.

The need for an SNT frequently arises as a result of successful personal injury litigation. The time to begin considering the SNT is at the time counsel institutes discussions with Medicaid and/or Medicare regarding satisfaction of their liens. Often trial counsel will engage the attorney to draft the SNT at this time and that attorney will handle the negotiations. In reality, the time to engage the SNT attorney is once it is clear the case will, or should, resolve favorably.

Not every recovery requires or justifies an SNT. The SNT is most appropriate in those cases where the recovery will be insufficient to cover the recipient's monthly needs to include medical

requirements. Therefore, it is important to carefully consider the client's need in relation to the income the recovery will generate. Do not tie up the funds in an SNT unless retention of governmental benefits is necessary. If the funds are tied up, the beneficiary's use of the funds is limited and the state is the primary taker at the beneficiary's death, a most unsatisfactory result.

And remember, before disbursing the recovery counsel must satisfy any lien to Medicare and Medicaid. These are priority liens imposed by 42 U.S.C.A. 1396a(a)(25)(A) and pursuant to N.J.S.A. 30:4D-7.1(b). Every Medicaid recipient or legal representative must notify Medicaid of any third party recovery and shall reimburse Medicaid in full from the proceeds of the suit or settlement.