

Elder Law Insight...

Addressing the Legal Issues of Aging and Asset Protection

VOLUME I, Issue 4

AUGUST 2004

Special points of interest:

- What programs service Seniors? Read [A Primer of Programs for Seniors](#).
- Assets in jeopardy. Read [Medicaid Planning in Everyday Practice](#).
- When to start planning and for whom to plan the Special Needs Trust. Read [Special Needs Trusts: Time to Plan](#).
- Protecting our children and grandchildren. Read [Children with Special Educational Needs have an Advocate at Price & Price](#).

Inside this issue:

A Medicaid Myth	2
Recent cases and law	3
Hot off the Press!! Keri Decision Reversed	4
The Law Firm of PRICE & PRICE, LLC	4
About Elder Law Insight	4

A Primer of Programs for Seniors

New Jersey has a number of programs available to seniors as well as disabled and blind individuals. Knowledge of the offerings will enable advisors to guide their clients and families when the need arises.

Medicaid encompasses under its banner a cornucopia of programs. The best known one is the *Medicaid Only* program which is most frequently associated with nursing home care for seniors. It is also available to individuals who live in the community and who meet the requirements of the SSI (Supplemental Security Income) program. It pays for medical care, pharmaceuticals and associated services.

Medicaid Only is complemented by the *Medically Needy* program which pro-

vides community based health care services, as well as nursing home care, for aged, blind or disabled individuals as well as for pregnant women and needy children under 21 years of age. The program is for those whose income exceeds the



Programs for seniors benefit those in need

limit set for the Medicaid Only program. Unfortunately, the services provided are not as extensive as in the Medicaid Only program.

A lesser known program is *New Jersey Care*

which is open to aged, blind and disabled people who live in the community but, because of income and resources, do not qualify for SSI and thus do not qualify for Medicaid Only. This program, as with the other two, provides health care and nursing home services.

Each of these programs has specific qualifying criteria which an applicant must meet. Collectively they provide much needed medical coverage to our senior citizens and others in need.

The *Community Care Program for the Elderly and Disabled (CCPED)* is a special program that includes specific home care services. It pays for services to supplement Medicare and other health insurance programs. The intent of the program is

(Continued on page 3)

Medicaid Planning in Everyday Practice

We were recently retained by a family to assist them with planning for their future. The family consists of an elderly husband in his 90's, a frail and mentally failing wife in her 80's and a group of children who are vitally concerned with the

physical, mental and financial health of their parents.

The husband is the day-to-day caregiver and the physical and mental fatigue resulting from the demands of his wife are taking their toll on his health. With the exception of their home,

which is an exempt resource, they have about \$70,000.00 in countable resources. Although the wife is still at home there is no doubt she will be entering a long-term care facility in the very near future. The only

(Continued on page 2)

Medicaid Planning in Everyday Practice

(Continued from page 1)

questions are how soon will she enter a facility and how do we plan for this eventuality?

If these were the only relevant facts, planning would be relatively simple. The home, so long as the husband is in it, is exempt from spend down. This means the value of the house will not be counted by Medicaid as an asset

With planning we can take some portion of the \$33,000 and invest it in the house thereby converting the funds to exempt resources.

for spend down purposes. Only those assets which are liquid, or capable of being liquidated, will be counted. And, of those assets the husband is entitled to keep 50%. Thus, of the \$70,000.00 in the mix, the husband is entitled to retain \$35,000.00 as his own, exempt from spend down (note, however, there is a cap on the assets a community spouse may retain which, at present, is \$92,760.00). He will also be entitled to control his wife's \$2,000.00 Medicaid allowance for a total of \$37,000.00 leaving \$33,000.00 subject to spend down.

With planning we can take some portion of the \$33,000.00 and invest it in the house thereby converting the funds to exempt resources. We can also purchase funerals for the couple. Funerals, so long as the funds are in irrevocable trusts, constitute exempt funds. Without going into the complete planning process, as space limits our ability to do so, it should be apparent that most, if not all, of the couple's funds could be saved and the wife could qualify for Medicaid almost im-

mediately.

There is, however, an asset that the family forgot to disclose on their initial visit to our office. As it developed, dad was named an owner, along with one of his children, of a bank account of the child's worth more than \$150,000.00. The funds are entirely those of the child but, due to the fact that dad is an "owner" of the account, the account must be disclosed when mom applies for Medicaid.

This problem arose because the child, who is not married and has no children, wanted someone to have access to the funds in the event of an emergency. We regularly encounter accounts such as this although we generally are dealing with the parent's, and not the child's, funds. More often than not the account is set up as an "or" account thus providing each "owner"

And, to complicate things, a third sibling passed away in 1962 and her estate was never probated.

with complete, unfettered access to the entire account. In cases such as these Medicaid says that all the funds are subject to spend down.

The funds in our case will not, however, have to be spent down so long as ownership of the funds can be traced to the child. Otherwise the entire fund is in the mix. Fortunately, the child, as well as dad, maintained excellent records and the entire account can be traced. At the time we present the Medicaid application we will disclose the existence of the account and, at the same time, trace all the funds coming into the account.

In another recent case we experienced a similar situation when two siblings, who lived together their entire

lives, created joint accounts and joint ownership of everything they possessed. They were the beneficiaries of each other's estates and insurance policies. They owned, as tenants in common, their home. But, they never planned nor considered what to do with their assets when the second of them passed away. And, to complicate things, a third sibling passed away in 1962 and her estate was never probated. This was not a problem since, although an inheritance tax should have been paid, more than 15 years elapsed since she died and no lien continued in existence.

Still, however, we had to deal with Medicaid which wanted proof that the bank accounts were to be treated as the property of the respective sibling and not as funds in the general mix.

Proper planning for elders can avoid these problems and enable families to save assets for the future. It is important to make elders, as well as all family members, realize that joint bank accounts (as well as joint ownership of property in general) is usually an inappropriate planning device. Generally, the elder places a child's name on an account as a convenience to the elder without regard to the ultimate disposition of the account.

In our two cases this form of "planning" created great difficulty, as well as apprehension, for the families. Significant sums were in jeopardy of having to be spent for long-term health care when, with proper planning, that would never have been an issue. Use of a properly drafted power-of-attorney would have avoided the problems and would have provided the comfort of knowing a family member could handle the accounts if necessary.

It is counsel's obligation to counsel elders and their families regarding properly drafted estate plans as well as properly drafted Medicaid/Asset Protection Plans.

A Medicaid Myth:

"Medicaid takes all my money when I enter a nursing home."

...The Truth: When a person enters a nursing home the individual pays the home its "private pay rate" directly to the home. Medicaid does not take any money but it expects the individual to use all their funds subject to spend down before Medicaid will pay for care. Proper Medicaid/Asset Protection Planning can avoid the expenditure of all the individual's funds and protect significant assets for the family.

A Primer of Programs for Seniors

(Continued from page 1)

to help individuals return to the community from a nursing home or to help individuals remain in the community rather than be admitted to a nursing home.

The program covers case management, home health services, homemaker services, medical day care, medical transportation, respite care and social adult day care. Sadly, the program has a limited number of "slots" available in any county and more often than not an individual is placed on a waiting list for an extended period before being accepted.

Another significant program is the *Caregiver Assistance Program* which supplements the CCPED program. It is

designed to assist eligible individuals to either remain in the community or return to it by offering community based services designed to supplement the assistance the individual receives from his/her natural support network. The program, which is similar to CCPED, includes more services such as hospital and medical care.

The high cost of medications is effectively dealt with for seniors by the *Pharmaceutical Assistance to the Aged and Disabled* program. As with the other programs there are income requirements an individual, or couple, must meet but there are no asset limitations. This program provides medications and the individual only pays a \$5.00 deductible. A less generous

pharmaceutical program is the *Senior Gold Prescription Discount Program*, for higher income individuals and couples, which requires payment of higher deductibles and co-pay.

The preceding discussion is not all encompassing. It is a brief overview which is intended to alert the attorney or advisor to a number of programs available to seniors and other qualifying individuals. For further information on the above programs or other ones available, contact your County Board of Social Services. Price & Price also has resources available and we would be happy to answer any questions you have or to send you brief descriptions of the programs.

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

...Attorney drafted living trust and other estate planning documents for decedent who had four children, two with "special needs." The trust directed the successor trustees, following grantor's death, to use the net income and principal for the disabled children for their support, education and health needs. Suit was instituted against the attorney for failure to establish a "special needs trust" to protect the governmental benefits to which the disabled were entitled. Plaintiffs claimed counsel, who knew of the children's disabilities, concealed his actions from the successor trustees when he would not provide a copy of the trust for their review notwithstanding their request for a copy of the trust. The defendant attorney filed, and the trial court granted, a motion to dismiss the action on the basis of the statute of limitations. On appeal the appellate court reversed and remanded the matter for further proceedings. *Rajcan v. Donald Garvey and Associates*, Ill. App. Ct., No. 2-03-0270 (April 5, 2004).

Comment: This case is important because the appellate court allowed a cause of action against an attorney for failure to consider the appropriateness of a special needs trust to protect disabled children. This legal malpractice cause of action was based on fraudulent concealment due to the attorney's apparent refusal to disclose to the successor trustees the contents of the trust document as a result of which they could not take corrective action, prior to the death of their father, to protect the interests of their disabled siblings. Counsel must always be mindful, when representing families of disabled individuals, that special needs trusts may well be required, when the disabled stand to inherit or otherwise receive (through the results of a personal injury recovery or similar process) substantial funds, to protect against the loss of governmental benefits and the subsequent financial impact that could have.

...Attorney who, at the request of friend and colleague, drafted bedside will for dying testatrix, in which friend was a beneficiary, was sued for negligence and breach of contract following successful challenge by disinherited family members. The Oregon Appellate Court held that residuary takers, who were intended third-party beneficiaries of the attorney's work, set forth causes of action and remanded case to the trial court. The court held that drafter of will had an obligation to the third-party beneficiaries for negligent nonperformance and that contract action flows from failure to provide a specific result promised to the client. *Caba v. Baker*, Oregon Court of Appeals, 0107-0728; A118089 (filed June 16, 2004).

Comment: One of the claims alleged against the attorney was a failure to independently interview and assess the facts, needs and wishes of the testatrix. It would appear defendant relied, to his detriment, in large part upon his colleague (who stood to gain from the will provisions) for information in drafting the will. Clearly, the scrivener must exercise independent judgment in undertaking to write a will.

...Daughter, pursuant to apparently valid power of attorney, changed beneficiary of father's life insurance policies. Precluded heir brought suit against the carrier alleging carrier had obligation to investigate sister's action. The trial court dismissed and appellate court affirmed holding that, absent knowledge of facts that require inquiry, the carrier does not have a duty to investigate a change of beneficiary and that attorney-in-fact can effect the change. An action against the attorney-in-fact might exist, however, for action(s) in excess or abuse of the granted authority. *Demerath v. Knights of Columbus*, 268 Neb. 132 (No. S-03-377, filed June 4, 2004).

THE LAW FIRM OF PRICE & PRICE, LLC

35 Kings Highway East
Suite 110
Haddonfield, New Jersey 08033
Phone: 856-429-5522
Fax: 856-429-8946

Email:

Carl Ahrens Price: caprice@priceandpriceelderlaw.com
Casey Price: caseyprice@priceandpriceelderlaw.com
Maisie A. Chin: mchin@priceandpriceelderlaw.com
Alvin R. Schomer, of Counsel

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

The Law Firm of PRICE & PRICE, LLC, concentrates its practice in the areas of Medicaid/Asset Protection Planning, Guardianship, Special Needs Planning, Special Education, Estate Planning and Probate. Consider us your source for answers or information in any of these areas.

Hot off the Press!!

The Supreme Court, in the landmark decision of In the Matter of Mildred Keri, a Mentally Incompetent Person (decided August 5, 2004) approved Medicaid/Asset Protection Planning by guardians. The unanimous opinion adopted and applied the rationale set forth in the case of In re Trott, 118 N.J. Super. 436. Chief Justice Poritz wrote that the Court was impliedly establishing "a presumption in favor of spend-down proposals by recognizing the benefit to the ward's estate of increasing the amounts available to beneficiaries by reducing payments to the government out of the estate."

Children with Special Education Needs have an Advocate at Price and Price

As of July 1, 2004, Price and Price has expanded our practice to include Special Education issues. We have added this area of law to our practice due to the overwhelming demand of our clients who are planning for children/grandchildren with "special needs."

Our services in this area include the review of Individualized Education Plans, including goals and services provided; counseling, negotiating and litigating disputes relating to the child's education; and, discipline issues involving learning disabled children.

Our goal is to ensure our clients' children and grandchildren receive a free, appropriate public education tailored to their individual needs that will prepare them for employment and independent living.

We will be starting a newsletter dealing exclusively with Special Education issues soon and look forward to sharing it with you. In the meantime, if you have any questions in this regard please feel free to call.

Remember, every child is entitled to a free, public education.

Special Needs Trusts: Time to Plan

For litigators, the process of creating a Special Needs Trust (SNT) is very simple when a practitioner who concentrates in this area is engaged. As discussed in prior issues of *Elder Law Insight*, an SNT is created from the funds of the disabled individual who must be under 65 years of age at the time the trust is established. The need for an SNT is to preserve governmental benefits which the individual is entitled to receive. Most likely the person is receiving Supplemental Security Income (SSI) and/or Medicaid.

If the individual is entitled to SSI then Medicaid is an additional entitlement and provided essential medical coverage. Frequently and usually, this benefit is far more important than the few dollars provided by SSI.

The funds used to create the trust frequently result from a successful law suit which generates recovery of substan-

tial funds. They could also come from an inheritance or divorce. Interesting enough is the fact that the individual can never have possession or control of the funds.

Although the trust can, pursuant to 42 U.S.C.A. 1396p(d)(4)(A), be created by the individual's parent, grandparent or legal guardian, it will generally be established by the trial judge. The process requires preparation of a motion, directed to the court, in which permission to establish the trust is sought. The request is carefully briefed and counsel must be prepared to educate the court on the purpose and need for the trust. The motion is usually filed by counsel who is specifically retained for that purpose.

Annexed to the moving papers is a copy of the proposed trust. It must be drafted in compliance with the requirements of the Social Security Administra-

tion and/or the Medicaid agency in the state where the trust is to be administered. The trust must be submitted to the appropriate agency for its review, as part of the filing process, as the agency is an essential party to the application and must be put on notice.

Once the trust is approved by the court, counsel must educate and guide the trustee(s) in the performance of their duties. And, depending on the facts of the case and the recovery in question, consideration should be given to making a financial institution one of the trustees. Bear in mind that in administering the trust the trustee(s) must be careful not to do anything that could disqualify the beneficiary from the governmental benefits that the trust is designed to protect.

If you have questions about whether or not an SNT is appropriate for your client, please feel free to give us a call.