CzepigaDalyDillman LLC

ESTATE PLANNING, PROBATE & ELDER LAW

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Veterans Accreditation

We are pleased to announce that all of the attorneys at CzepigaDalyDillman have received their Veterans Administration accreditation and may now prepare, present, and prosecute claims before the VA. This includes claims for service connected benefits as well as non-service related benefits, such as Aid and Attendance, Housebound and Low Income Pension benefits. The most common program, Aid and Attendance, requires that a Veteran has served 90 days of active duty, one day of which had to be during a "war time" period during World War II, the Korean War, the Vietnam War or the ongoing Gulf War. These programs can apply to a wide variety of Veterans and their spouses. The financial eligibility rules for Aid and Attendance, for example, are much more lenient than the more restrictive Medicaid program.

In addition to being accredited, all of the attorneys at CzepigaDalyDillman have met their continuing education requirements, necessary to retain accreditation.

Real Estate Sales Proceeds Remain Available Until Delivered to Nursing Home

The Supreme Court of North Dakota determines that a nursing home resident who entered into a binding oral agreement to sell his property and deliver the proceeds to the nursing home to avoid eviction was not eligible for Medicaid until the money from the sale was actually transferred out of his checking account. HYPERLINK "http://www.ndcourts.gov/_court/opinions/20100263.htm" Christensen v. North Dakota Department of Human Services (N.D., No. 20100263, April 12, 2011).

Edward Christensen had been a resident of a nursing home since 2004. In 2007, Mr. Christensen ran out of liquid assets and stopped paying his nursing home bill, which led to threats of eviction. In late 2007, Mr. Christensen's attorney-in-fact entered into an oral agreement with the nursing home whereby Mr. Christensen would sell two properties that he owned in California and give the sale proceeds to the nursing home in exchange for the facility's promise not to evict him. The properties were sold in July 2008, and the proceeds were placed in Mr. Christensen's checking account, where they remained until September 2008, when they were paid to the nursing home.

In July 2008, Mr. Christensen applied for Medicaid, requesting eligibility as of April 1, 2008. The county Medicaid agency determined that Mr. Christensen was not eligible for benefits until September, when the funds in his account were transferred to the nursing home. Mr. Christensen argued that the proceeds from the sale were not "available assets" because they could only be paid to the nursing home pursuant to the binding oral agreement. After the Department of Human Services and the district court upheld the initial denial of benefits, Mr. Christensen appealed.

The Supreme Court of North Dakota upholds the denial of benefits, explaining that "[u]nder the regulatory scheme promulgated in N.D. Admin. Code ch. 75-02-02.1, eligibility for Medicaid benefits is not established by showing that an applicant's outstanding debts exceed his available assets. [The code] looks solely to the value of the applicant's actually available assets, and the applicant is ineligible if the value of those assets exceeds $3,000 . . . these assets were at the disposal of [Mr. Christensen] and [he] retained a legal interest in the assets until payment was made to [the nursing home]."

Paul's Note: If the asset is under the control of the Medicaid recipient it is considered available. Here, once the real estate was sold, the cash should have immediately been spent down for income taxes and payments to the nursing home.

Transfer Penalty Does Not Start Until Medicaid Applicant Is Financially Eligible

A New Jersey appeals court rules that the penalty period for a Medicaid applicant who transferred funds to her son could not begin until she became financially eligible for Medicaid. HYPERLINK "http://www.judiciary.state.nj.us/opinions/a6118-09.pdf" S.S. v. Div. of Medical Assistance and Health Services (N.J. Super. Ct., App. Div., No. A611809T1, April 28, 2011).

Some time before September 2008, nursing home resident S.S. transferred $76,570.40 to her son. Her son used $42,909.75 of S.S.'s money to pay for her care through February 2009. S.S. applied for Medicaid benefits, and the state imposed a transfer penalty, which it determined should begin March 1, 2009.

S.S. filed an administrative appeal, arguing that the penalty period should begin when she became financially eligible for Medicaid, in September 2008. The hearing officer found that she was not financially eligible at that time because she had transferred funds to her son, so the penalty period should begin on March 1, 2009. S.S. appealed to court.

The New Jersey Superior Court, Appellate Division, affirms, holding that S.S. became eligible for Medicaid on March 1, 2009, which is when the penalty period should begin. The court determines that although S.S.'s "resources purportedly fell below the level required to establish Medicaid eligibility on [September 1, 2008], this was a 'false eligibility' created by the transfer of assets for less than their fair market value."

Paul's Note: Due to the Medicaid changes Congress made in 2006, it is harder than before to get a penalty started on a gift intended to protect assets. Although the term "penalty" may sound frightening, the early establishment of a penalty is critical to protecting assets. It is now settled law that a penalty cannot begin until such time as a balance is due the nursing home for which Medicaid would be responsible for payment had it not been for the asset transfer.

Connecticut Case: Son Liable for Breach of Oral Contract for Not Promptly Establishing Mother's Medicaid Eligibility

A Connecticut trial court finds that a son is liable for breach of oral contract with a nursing home after he did not promptly establish his mother's eligibility for Medicaid even though he did not sign the nursing home's admission agreement as the responsible party. Glastonbury Healthcare Center, Inc., v. Esposito (Conn. Super. Ct. No. CV 01-0811032, June 23, 2008).

Carmine Esposito admitted his mother to a nursing home and signed the admission agreement on her behalf. The agreement stated that the "Responsible Party" agrees to provide all the information necessary to apply for Medicaid and act promptly to establish eligibility for Medicaid. Although Mr. Esposito did not sign the admission agreement as a responsible party, the nursing home representative informed him at the signing that he was the responsible party.

Mr. Esposito applied for Medicaid on behalf of his mother, but he did not immediately provide the state with all the information requested and did not immediately reduce his mother's assets. This resulted in a delay in his mother's eligibility. The nursing home sued Mr. Esposito for breach of contract, among other things, asking for damages caused by the loss of Medicaid benefits.

The Connecticut Superior Court holds that Mr. Esposito breached an oral contract with the nursing home and awards damages. According to the court, because Mr. Esposito did not sign the admission agreement as a "responsible party," there was no written contract. However, the court finds that Mr. Esposito violated an oral contract by not providing the information requested by the state and not promptly establishing his mother's eligibility for Medicaid.

Paul's Note: This seems like a harsh result at first. The lesson here is that if a child is going to "help out" in filing Medicaid, they better do it right or not get involved in the first place. There are similar legal theories the Court could have used, such as detrimental reliance (the nursing home relied, to its detriment, on the son's representation that he would provide necessary data to establish Medicaid eligibility).

States May Now Extend Medicaid's Spousal Protections to Same-Sex Partners

The U.S. Department of Health and Human Services (HHS) has announced it will now permit states to extend Medicaid long-term care protections long available to spouses of nursing home residents to same-sex domestic partners as well.

While nursing home residents must spend down to $1,600 (or slightly more in some states) of countable assets before Medicaid will pick up their cost of care, Medicaid law has provisions to avoid forcing the healthy (or "community") spouse to give up the family home and retirement savings, and live in poverty, in order for the nursing home spouse to receive Medicaid coverage.

The community spouse may keep up to approximately $110,000. If she has less than this amount, the nursing home spouse may transfer his assets to the spouse to make up the difference. Further, if the community spouse has low income, she may keep some or all of the nursing home spouse's income as well as her own. These protections are not available to non-spouse partners of nursing home residents.

The new HHS policy, which the Obama administration will soon be notifying state-run Medicaid programs about, will permit states to extend these protections to same-sex domestic partners as well as spouses of nursing home residents, but it will not require states to do so.

HHS will also notify states of their ability to provide same-sex domestic partners of long-term care Medicaid beneficiaries the same treatment as opposite-sex spouses in the contexts of estate recovery, imposition of liens, and transfer of assets. This includes, according to HHS, not seizing or imposing a lien on the home of a deceased Medicaid beneficiary if the same-sex domestic partner still resides in the home, and allowing Medicaid beneficiaries needing long-term care to transfer the title of a home to a same-sex domestic partner, allowing the partner to remain in the home.

It is important to be aware that the asset and income protections primarily help lower-income seniors. Although under the Medicaid rules non-married seniors may not freely transfer assets to each other, they are not subject to the asset limits. The healthy partner can keep all of his assets and the nursing home partner need only spend down his own assets. If the healthy partner in a same-sex couple is well off or has all of the couple's assets in his name, the introduction of spousal protections will mean he may keep less of his assets if his partner is to qualify for Medicaid.

Paul's Note: Connecticut has taken this position.

Medicaid Applicant Denied Benefits Due to Loan to Daughter is Entitled to Restraining Order Against the State

A federal district court holds that a Medicaid applicant who was denied benefits because she transferred assets to her daughter even though the transfer was for a purpose other than to qualify for Medicaid is entitled to a temporary restraining order so she can receive benefits while the case is pending. Behning v. Palmer (U.S. Dist. Ct., S.D. Iowa, No. 4:11-cv-228-HDV-CFB, May 18, 2011). In 2008, Dolores and Robert Behning took a second mortgage on their home and loaned their daughter $60,263 so that she could consolidate her debts. They did not put their loan agreement in writing, but their daughter made all her monthly payments on time. In 2010, Mrs. Behning became ill and entered a

nursing home. She applied for Medicaid, but the Iowa Department of Human Services denied her benefits because of the transfer of assets to her daughter.

Mrs. Behning appealed. The administrative law judge (ALJ) agreed that the transfer was not made with the purpose of evading Medicaid rules, but he concluded that intent didn't matter. The ALJ then determined that the transaction was a transfer of assets and not a loan because there was no written contract. Mrs. Behning appealed to federal court and asked for a temporary restraining order to prevent the state from continuing to deny her Medicaid benefits while the case is pending.

The U.S. District Court for the Southern District of Iowa grants the temporary restraining order, holding that Mrs. Behning has a likelihood of succeeding on the merits. The court rules that under federal law, the ALJ cannot deny benefits if the Medicaid applicant's reason for transferring assets was for a purpose other than to qualify for Medicaid.

Paul's Note: This case is a good outcome because there are valid reasons for a parent to lend money to a child. Intent should certainly be a factor, although it should not be determinative.