

# CZEPIGADALYDILLMAN<sup>LLC</sup>

ESTATE PLANNING, PROBATE & ELDER LAW

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# Eldercare Management/Coordination of Resources

We are pleased to announce the first article in a series highlighting Geriatric Care Services of Czepiga Daly Dillman, LLC.

Czepiga Daly Dillman is proud to be one of the few law firms in Connecticut with a Certified Care Manager on staff. We added Linda to our staff to address those client needs concerning safety, independence, dignity and lifestyle.

According to the US Census bureau, there were 39.6 million people over the age of 65 in 2009. It is predicted that by 2050 that number will increase to 88.5 million. As the population ages, planning for meeting the care needs of the elderly is going to be critical. Planning needs to start early and those involved must have an understanding of the complexities of care delivery and reimbursement.

A professional Geriatric Care Manager, such as Linda, can help seniors and their families through individualized assessment and planning to successfully negotiate the complex patchwork of elderly services that is a challenge to access and manage. The care manager can assist in identifying and securing assistance with both medical and non-medical care.

A Geriatric Care Manager can reduce the stress associated with dealing with the overwhelming issues that arise for aging individuals and their families. The process begins with a comprehensive assessment of individual needs. This can include health issues, functional status, cognition, home safety, medication management, support systems and financial or legal concerns. Can an individual's needs be met safely in the community or should an alternative be found? Care managers can facilitate referrals to appropriate providers, coordinate services to decrease fragmentation and ensure quality.

They assist with housing transitions, determining reasonable costs for care, identifying alternative payment sources and advocate for individuals across the continuum of care.

Linda, who primarily works with older adults, brings more to her practice than an expertise in geriatrics. She brings knowledge of aging issues that allows Czepiga Daly Dillman to overcome the myths relating to aging and to focus on the problems at hand. At the same time, Linda will bring an experience of working with resources in your community. Linda is more aware of real life problems, health and otherwise, that emerge as persons age and the tools that are available to address those issues. Linda is also connected with a community of social workers, nurses, psychologists, elder law attorneys, advocates, and other elder care professionals who may be of assistance to you.

For more information on how Linda and Czepiga Daly Dillman can help you, please call us.

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## Court Upholds Nursing Home Resident's Eviction Prior to Resolution of Medicaid Appeal

A Kentucky appeals court holds that a nursing home may evict a resident for nonpayment despite a pending Medicaid appeal. *King v. Butler Rest Home, Inc.* (Ky. Ct. App., No. 2010-CA-001467-MR, June 17, 2011).

In June 2009, nursing home resident Geneva King applied for Medicaid benefits and stopped her private payments to the nursing home. After Medicaid twice denied Ms. King's application for benefits, the nursing home notified her that she would be discharged to her daughter's residence one month later for nonpayment of the outstanding balance of \$41,683.55.

Ms. King appealed the involuntary discharge to the state's Medicaid agency. An administrative law judge (ALJ) upheld the discharge and Ms. King appealed the decision in court, seeking an injunction to prevent the nursing home from discharging her before Medicaid ruled on her pending appeal of the benefit denial. The court granted a temporary injunction but later dissolved it and affirmed the ALJ's decision. Ms. King appealed, arguing that state Medicaid regulations and the Centers for Medicare and Medicaid Services' State Operations Manual prohibited the nursing home from discharging her prior to a final ruling from Medicaid on her appeal of the denial of benefits.

The Court of Appeals of Kentucky affirms the ALJ's decision and upholds the nursing home's involuntary discharge of Ms. King for nonpayment. The court finds no requirement in the Medicaid regulations or the Manual that the appeal process be exhausted for a claim to be considered "denied."

**Paul's Note:** This case came as a bit of a surprise. Involuntary discharge proceedings occur very rarely, mostly because there is a problem with where the discharged resident would go. It is the practice in Connecticut that an involuntary discharge cannot take place while an application is pending, but once denied, all bets are off.

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## Transfer to Daughter Without Written Agreement Triggers Medicaid Penalty

A New York appeals court rules that because there was no written agreement providing for repayment of past financial assistance between a mother and a daughter when the mother transferred funds to the daughter, the transfer was for less than fair market value for purposes of Medicaid eligibility. *Matter of Komanoff Ctr. for Geriatric & Rehabilitative Medicine v Daines* (N.Y. Sup. Ct., App. Div., 2nd Dept., No. 2010-05776, June 28, 2011).

Bernadette Jordan entered a nursing home and applied for Medicaid. The state found she was ineligible for benefits for a period of 14.31 months because she transferred money from a revocable trust to her daughter for less than fair market value.

On behalf of Ms. Jordan, the nursing home requested a hearing, arguing that the transfers were repayments for documented expenses that Ms. Jordan's daughter had made on behalf of Ms. Jordan with the expectation of repayment and that the revocable trust provided for the repayment. The hearing officer ruled the transfer was not for fair market value, and the trial court affirmed. The nursing home appealed.

The N.Y. Supreme Court, Appellate Division, Second Department, affirms, holding the transfer was not for fair market value. According to the court, because there was no contemporaneous written agreement that provided for the repayment of the past financial assistance to Ms. Jordan, there was a presumption that the financial assistance was made without the expectation of repayment.

**Paul's Note:** Oftentimes what is really intended by a family is not documented. When the State later questions what occurred earlier, the family provides an honest and innocent explanation of the transaction, which, had it been documented properly, would not have created a Medicaid eligibility problem. But, because of a lack of documentation, the Medicaid agency takes the position that the family is, after the fact, trying to "back into" a fabricated story in an attempt to qualify for Medicaid benefits. The lessons: first, document what is taking place at the time that the transactions are occurring and, secondly, try NOT to intermingle the parent's finances with the child's.

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## Son May Be Responsible for Mother's Unpaid Nursing Home Bill Caused by Medicaid Penalty Period

A Connecticut trial court ruled that a nursing home may sue the son of a nursing home resident for breach of contract after the resident received a Medicaid penalty period due to a transfer to the son and the son refused to pay for his mother's care. *Torrington Health & Rehabilitation Center v. Cisowski* (Conn. Super. Ct., No. LLICV105007241S, April 29, 2011) (unpublished).

Robert Cisowski admitted his mother, Blanche Cisowski, to a nursing home. He signed an admission agreement as the responsible party for his mother, agreeing to apply for Medicaid assistance on her behalf. He also agreed that if he received a transfer from his mother that resulted in her ineligibility, he would pay for her care. Mrs. Cisowski was eventually granted Medicaid benefits, but had to wait out a transfer penalty due to a transfer of assets to Mr. Cisowski.

When Mr. Cisowski did not pay for Mrs. Cisowski's care during the penalty period, the nursing home sued him for breach of contract. Mr. Cisowski filed a motion to strike, arguing that he did not have authority to enter into the contract on behalf of his mother and that the contract was not enforceable because his mother did not sign it. According to the nursing home, however, Robert Cisowski, as the responsible party, agreed that if he received a transfer of assets from his mother that resulted in her ineligibility for Medicaid that the assets or an equal amount of Robert Cisowski's funds would be used to pay for the costs and care of the services rendered to his mother.

The Connecticut Superior Court denies the motion to strike, holding that the nursing home presented a valid claim for breach of contract. The court rules that Mrs. Cisowski's signature was not necessary to make the contract valid.

**Paul's Note:** The outcome of this case should not be surprising. Many times a child will co-sign a nursing home agreement as the Responsible Party. The term "Responsible Party" is a term of art of the nursing home industry and typically obligates the Responsible Party to apply for Medicaid when the resident's funds run out, to complete the Medicaid application in a timely and diligent manner, and, if the Responsible Party has access to the Resident's income or assets, to use those to pay the nursing home. In this case the Admission Agreement that the responsible party signed also included language that if the responsible party received a gift, he would use the gift to pay for his mother's care.

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## Payments to Caregivers of Dementia Patient Are Deductible Medical Expenses

The U.S. Tax Court rules that payments to caregivers of a dementia patient are deductible medical expenses, even though the caregivers were not licensed health care providers. *Estate of Lillian Baral* (U.S. Tax Ct., No. 3618-10, July 5, 2011).

Lillian Baral suffered from dementia. Her doctor recommended that she get 24-hour-a-day care, so her brother hired caregivers to assist her with activities of daily living. After Ms. Baral failed to file a tax return, the IRS filed a substitute return with a standard deduction and found that she owed taxes.

Ms. Baral's estate argued that the payments to the caregivers were deductible medical expenses. Under tax law, expenses for medical care may be claimed as an itemized deduction if they exceed 7.5 percent of adjusted gross income. The definition of medical care includes long-term care services required by a chronically ill individual and provided under a physician's plan of care.

The U.S. Tax Court holds that the payments to the caregivers for supervising Ms. Baral's care are deductible medical expenses. Even though the caregivers were not medical personnel, the services provided to Ms. Baral were necessary maintenance and personal care services required because of her diminished capacity and were provided pursuant to a plan of care. Therefore, they are qualified long-term care services.

**Paul's Note:** This is a great outcome because many caregivers are friends, neighbors, temporary U.S. workers, and other “nonprofessional” untrained workers. Remember, however, that these informal arrangements can backfire if the person is deemed to be an employee and the person makes a claim for unemployment or workers compensation and you are now responsible for payroll taxes and similar withholdings. Although many agreements state that the caregiver is an “Independent Contractor,” this is rarely the case—if the family dictates the hours and terms of the care, then the caregiver, under law, is truly an employee.