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ESTATE PLANNING, PROBATE & ELDER LAW

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# Making the Move to Senior Living

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

As a Geriatric Care Manager for Czepiga Daly Dillman, one of the questions I am frequently asked by clients is when is there a “right” time to move to senior living? The answer is complicated and varies depending on each individual’s circumstances. It is usually a crisis situation that creates the need to take some action immediately. The biggest problem is that many families do not plan ahead and making decisions in the midst of a crisis is stressful and can lead to making the wrong choices. Planning and communication are key components of ensuring a safe and appropriate living environment.

It is a complex issue that is most often fraught with emotion and anxiety for everyone involved. Seniors, when contemplating a potential move, often ask themselves:

Do I need more help than family/friends can provide? Am I a burden to my family? Do I worry for my safety? Do I feel lonely and isolated at home? Am I tired or unable to maintain my home? Should I be driving and if not how will I get around? These are difficult questions when you consider the seniors of today come from the “stiff upper lip generation”. Many have had one job, one spouse, one house and the thought of moving is scary. The fear of loss of independence and control can be paralyzing. They are frugal and often reluctant to invest in their own care.

Planning ahead can prevent many of the problems that lead to a crisis. Seniors should be involved in the process whenever possible. Educating oneself in the realistic options that may be available based on an individual’s needs is an important component. When doing the planning one must take into consideration health issues, cognition, functional ability, financial concerns, options for senior living and possible alternatives. This is often emotionally driven for families who may disagree on needs or be frustrated by seniors who deny the need for changes in their current situation.

It is important that needs be addressed as soon as possible again to prevent a crisis and to ensure safety. Some red flags for families should be problems with balance or falls, medication mishaps, signs of depression or isolation, weight loss, poor hygiene, inappropriate behavior or memory and cognitive changes. These things in and of themselves are not necessarily a reason to move but an indication that interventions are required. It is important to not dismiss any changes but instead pay attention and begin to implement a plan for the safety and wellbeing of the individual.

There are multiple senior housing options available including independent senior congregate apartments, Assisted Living Facilities, Memory Care Assisted Living and long term care facilities. Each has a different set of services available depending on need.

Independent apartments offer a safe environment, often at least one meal a day and there are usually some kind of medical services available. Assisted living has round the clock supervision, three meals a day, nursing services, transportation and staff available to meet scheduled and unscheduled needs. Long term care provides 24/7 skilled nursing services.

Sometimes a home care plan can be put in place and a move can be avoided.

To find the right plan for an individual requires planning, knowledge of resources, options for living and reimbursement. It often takes negotiation, understanding, patience and compromise. Families should educate themselves and work to put together a long term plan to avoid crisis and ensure individuals maintain quality of life and safety. Often a move provides much needed relief. A spouse who has been acting as a nurse can go back to being a spouse, a daughter who has been torn between her own kids and her parents can go back to her role as mother and daughter. Staff advocates can manage the caregiving role so families can go back to spending quality time together.

Making a move to senior living is difficult. Families and individuals should begin the planning process early to avoid the crisis and ensure quality of life can be preserved. For more information, visit [www.NAPGC.org](http://www.NAPGC.org), [www.ctassistedliving.com](http://www.ctassistedliving.com) or [www.cahcf.org](http://www.cahcf.org)

**Paul’s Note:** 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. In this article, Linda is right on, as usual. Don’t ignore the aging of a loved one or pretend things will just get better. I urge any of you reading this who have concerns about the safety and welfare of a relative, whether the concern is about health or finances, to call Czepiga Daly Dillman and talk to us about your concerns.

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## Millions of Seniors Could Lose Medicaid LTC Coverage Under GOP Plan, Reports Warn

A U.S. district court in New Jersey denies a Medicaid applicant’s request for an injunction forcing the state to disregard his wife’s purchase of a life estate in their daughter’s home. The court rules that issues of fact are in dispute, including whether an appraisal of the property was “a sham.” *Traister v. Velez* (U.S. Dist. Ct., D.N.J., No. 11–3851, Oct. 13, 2011).

James Traister entered a nursing home on August 4, 2009. On August 25, 2009, his wife transferred \$498,500 to their daughter and her husband as payment for a life estate in their property. Mrs. Traister claimed that the life estate was purchased for fair market value based on her age. On September 16, 2009, Mr. Traister applied for Medicaid coverage and the New Jersey Department of Human Services (DHS) denied the application based on the asset transfer. Rather than utilize the state administrative appeal process, Mr. Traister brought an action in federal court seeking a preliminary injunction to enjoin DHS from treating the transfer as uncompensated.

In its opposition brief, DHS claimed that Mrs. Traister failed to reside in the property for a period of at least one year, as required by the Deficit Reduction Act of 2005. According to the DHS, the one-year residency requirement must be met before the applicant applies for Medicaid. Mr. Traister countered that the one-year requirement can be met at any time.

The U.S. District Court for the District of New Jersey writes that there is “not much guidance” on the issue of the one-year requirement, although the court observes that regardless of the requirement, “the purchase of a life estate will trigger neither ineligibility nor a penalty period if the life estate was purchased for fair market value.” Nevertheless, the court declines to issue an injunction because it finds at least three disputed issues of fact: the value of the residence when the transfer was recorded; the fact that the Traisters had lived on their daughter’s property for nearly seven years, which “gives rise to a credibility issue as to the Traister’s intention for making the payment seven years later”; and DHS’s “claim that the appraisal may be a sham because it allowed the Traisters to retain the maximum amount an applicant may hold and qualify under the regulations.”

**Paul’s Note:** The purchase of a life estate is permitted by federal and Connecticut law, but the amount that a parent pays must be mathematically and actuarially sound. Given a valid and independent appraisal, this should not be a problem. As for the one year requirement, there is little guidance here but in Connecticut the one year residency need not be continuous (breaks are permitted).

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## Medicaid Applicant’s Transfer to Daughter Created Trust-Like Device

A federal district court rules that when a Medicaid applicant transferred money to her daughter with the intention that the daughter pay for her care during the resulting penalty period, she created a trust-like device, so the money is still an available resource. *Pfeffer v. AHCCCS* (U.S. Dist. Ct., D. Ariz., No. CV-11-0891-PHX-GMS, Sept. 29, 2011).

Helen Pfeffer moved into an assisted living facility in Arizona. On the advice of counsel, she transferred \$92,000 to her daughter and applied for Medicaid. Her daughter used the funds to pay privately for her care. The state denied Ms. Pfeffer Medicaid benefits and did not impose a penalty period, claiming that because the transfer to her daughter was not a gift, it was an available resource.

When the state denied Ms. Pfeffer’s appeal, she filed suit in federal court and asked for a preliminary injunction for immediate benefits until the case is resolved. Ms. Pfeffer argued the money was a gift, so a penalty period should apply. The state argued the transfer of funds created a trust-like device, which meant the funds were an available resource.

The U.S. District Court for the District of Arizona denies the preliminary injunction, holding that Ms. Pfeffer does not show a likelihood of succeeding on the merits because the transfer was actually an arrangement that was similar to a trust. According to the court, the fact that Ms. Pfeffer’s daughter used the transferred funds only to pay for Ms. Pfeffer’s care indicated that she was holding the funds for Ms. Pfeffer’s benefit.

**Paul’s Note:** The “trust like device” argument is being used increasingly by States to thwart asset protection. IF money is intended to be a gift, then the recipient must treat the money like it belongs to them and should not segregate it from their other assets and use it for the applicant’s care. Substance over form—if it looks like a trust, smells like a trust, and quacks like a trust, then it is and no penalty commences.

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## Court Declines to Dismiss Malpractice Action Charging Firm Failed to Advise Family of DRA

In a malpractice suit alleging that a law firm failed to advise a family of changes in Medicaid law stemming from the Deficit Reduction Act, a New York court denies the firm’s motion to dismiss the action as time-barred, rejecting the firm’s argument that the continuous representation doctrine does not apply. *Annemarie v. Lissner & Lissner LLP* (N.Y. Sup.Ct., No. 109329/10, Sept. 19, 2011).

In 2003, the Hadda family retained the law firm of Lissner & Lissner LLP to draft estate planning documents, including an irrevocable trust. On July 15, 2010, the family sued the firm, claiming that the firm was negligent and had committed malpractice by failing to advise them of changes to Medicaid law as a result of the Deficit Reduction Act of 2005 (DRA).

The law firm filed a motion asserting that its representation of the Hadda family ended in April 2006 and that the lawsuit should be dismissed for being barred by the three-year statute of limitations. The family claimed that it terminated the representation by letter on July 16, 2007, and that the continuous legal representation doctrine applied to toll the statute of limitations until that date.

The Supreme Court of New York, a trial court, denies the motion to dismiss, concluding that Lissner & Lissner failed to conclusively establish when the cause of action accrued or that the continuous representation doctrine does not apply. The court rejects the firm’s argument that its failure to return a June 2007 phone call from the Haddas within two weeks placed the family on notice that the firm was no longer addressing their needs.

**Paul’s Note:** This outcome does not seem fair at first blush, but it is just another reminder to stick to ethics and good business practices. Use an engagement letter to start a matter, a declination letter to decline a matter, and a file closing letter to conclude a matter.