

# CZEPIGADALYDILLMAN<sup>LLC</sup>

ESTATE PLANNING, PROBATE & ELDER LAW

[www.ctseniorlaw.com](http://www.ctseniorlaw.com)

*Planning Today for Your Tomorrow*



APRIL 2011

## IN THIS ISSUE:

CLAIM AGAINST ESTATE ATTORNEY TO FILE  
MEDICAID APPLICATION FOR CLIENT IS  
SUSPENDED

N.Y. HIGH COURT RULES WIFE'S ORDINARY  
LIVING EXPENSES DO NOT JUSTIFY  
INCREASED MMMNA

MEDICAID APPLICANT'S TRUST IS  
AVAILABLE ASSET BECAUSE IT IS A  
SUPPORT TRUST

A PROFILE OF OLDER AMERICANS: 2010

COURT RULES HOUSE WAS OWNED WITH  
SON, SO STATE CAN RECOVER MOTHER'S  
MEDICAID BENEFITS

# Claim Against Estate of N.Y. Refusing Spouse Is Time-Barred

A New York appeals court rules that the state's claim against the estate of a Medicaid recipient's wife who had refused to support her spouse so he could qualify for Medicaid is time-barred because the statute of limitations for implied contracts had run. *Christopher v. Tomeck* (N.Y. Sup. Ct., App. Div., 3rd Dept., No. 508882, March 3, 2011).

When Edward Tomeck applied for Medicaid in 1997, his wife, Margaret, had excess resources. Mrs. Tomeck filed a spousal refusal form, refusing to make her income and resources available for her husband's care, which allowed Mr. Tomeck to qualify for Medicaid while Mrs. Tomeck kept the excess resources. Mrs. Tomeck's assets were held in a revocable trust that she created in 1996.

Mrs. Tomeck died in 2002, and the state filed a claim against her estate in 2004, seeking reimbursement for the Medicaid payments made to her husband. The state argued that by executing the spousal refusal, Mrs. Tomeck created an implied contract with the state regarding her obligation to pay for her husband's nursing home care. After several years of litigation, the appeals court dismissed the claim because Mrs. Tomeck's trust was not named as a party to the litigation. The state filed another claim against the estate in 2008 also naming the trust as a party. The trial court granted the estate summary judgment, agreeing with it that the six-year statute of limitations on implied contract claims had run, and the state appealed.

The New York Supreme Court, Appellate Division, affirms, holding that the statute of limitations has run. According to the court, the six-year statute of limitations "either arose when [Mrs. Tomeck] executed the spousal refusal . . . or otherwise during her lifetime when she engaged in some allegedly fraudulent or illegal transfer to the trust or, at the latest, when plaintiff learned of some allegedly fraudulent activity." Because the state learned about the final transfer of funds into the trust in February 2002 and the state did not file a claim until June 2008, the court finds that the six-year statute of limitations has run.

The New York Supreme Court, Appellate Division, affirms, holding that the statute of limitations has run. According to the court, the six-year statute of limitations "either arose when [Mrs. Tomeck] executed the spousal refusal . . . or otherwise during her spousal refusal, similar to the New York court, but that essentially ended in 2006 with the passage of new federal rules and State implementing regulations. To my knowledge, Connecticut has not subsequently attempted to collect from the community spouse, either during such spouse's lifetime or at death, for the benefits previously paid to the ill spouse. But it may happen yet. In addition, spousal refusal, based on a current federal lawsuit in Connecticut, may come back as a viable planning tool, but we need to remember that the State may claw back for some funds. Even if the State is successful in obtaining reimbursement, the reimbursement will be at the Medicaid rate, which will be much less than if the community spouse had continued to pay privately.

## N.Y. High Court Rules Wife's Ordinary Living Expenses Do Not Justify Increased MMMNA

New York's highest court rules that the wife of a Medicaid recipient was not entitled to an increased minimum monthly maintenance needs allowance (MMMNA) for ordinary living expenses even though her expenses were nearly double her income. *Balzarini v. Suffolk County Dept. of Social Services* (N.Y., No. 17, Feb. 15, 2011).

John Balzarini entered a nursing home and applied for Medicaid. As part of his application, Mr. Balzarini requested that his wife receive an increased MMMNA because her expenses were nearly double her income. The state approved his application but did not increase the MMMNA.

On appeal, Mr. Balzarini argued that the express purpose of the Medicaid law is to prevent a community spouse's everyday expenses from impoverishing her when her spouse is institutionalized. The state countered that ordinary household expenses do not give rise to the exceptional circumstances necessary to increase the MMMNA. The appeals court overturned the state's decision and called for an increased MMMNA, finding that reasonable, ordinary expenses can be a basis for an increased MMMNA. (Mr. Balzarini died in 2009.)

The New York Court of Appeals, the state's highest court, reverses, holding that Mrs. Balzarini was not entitled to an increased MMMNA because she did not show that her financial duress was caused by exceptional circumstances. According to the court, "the spousal impoverishment provisions do not guarantee a community spouse the same standard of living . . . that he or she enjoyed before the institutionalized spouse entered a nursing home. Congress itself has decided what is a reasonable basic living allowance for the community spouse: the MMMNA."

**Editor's Note:** This case is further evidence that the standard by which an additional allowance can be granted to the healthy spouse—"exceptional circumstances resulting in significant financial duress"—is nearly impossible to meet. In Connecticut, too, this standard is nearly unobtainable.

# Medicaid Applicant's Trust Is Available Asset Because It Is a Support Trust

A Rhode Island trial court rules that a Medicaid applicant's trust that did not give the trustee sole discretion to distribute funds to the applicant is a support trust, making it an available asset. Biagetti v. R.I. Dept. of Human Serv. (R.I. Super. Ct., No. PC 09-7370, Feb. 25, 2011).

Jeanne M. Biagetti established a revocable living trust in 1998. The trust provided that Ms. Biagetti would be trustee until she became incapacitated or disabled, whereupon her son would be trustee. It also provided that if Ms. Biagetti became disabled, the trustee must pay the net income to her as necessary for her health and welfare, but the trustee had discretion as to whether to pay the principal to Ms. Biagetti.

When Ms. Biagetti applied for Medicaid benefits in 2009, the state denied her application after finding that the assets in the trust were an available resource. Ms. Biagetti appealed, arguing the trust became irrevocable once she was disabled. The hearing officer ruled for the state, and Ms. Biagetti appealed.

The Rhode Island Superior Court affirms the hearing officer's decision, holding that the trust is an available asset because it is a support trust. According to the court, "as a result of the lack of sole discretion on the part of the trustee and the requirement that Ms. Biagetti is paid the net income and supported, this trust is a support trust." The court rules that because it is a support trust, whether it is revocable or irrevocable is of no consequence.

**Editor's Note:** There were two paths the court could have taken here. The fact that the trust was a revocable trust (also known as a living trust) would have led to the same result (assets available) more directly than making a determination that the trust is a support trust. Either way be warned: If there are any circumstances under which principal could be made available to the applicant or if the trust uses the word "support," it bodes trouble for the application. A better standard than support, if Medicaid is a future possibility, is to allow the trustee to use income/principal as the trustee, "in the trustee's sole, absolute and unfettered discretion deems advisable" and don't say "for the [applicant's] support or accustomed manner of living" or words to that effect.

## A Profile of Older Americans: 2010

The annual update to The U. S. Department of Health & Human Services Administration on Aging compendium of useful statistical information on the nation's older population has just been released. Highlights of "A Profile of older Americans: 2010" include the following tidbits. Principal sources of data for the Profile are the U.S. Census Bureau, the National Center for Health Statistics, and the Bureau of Labor Statistics.

- The older population (65+) numbered 39.6 million in 2009, an increase of 4.3 million or 12.5% since 1999.
- The number of Americans aged 45-64 – who will reach 65 over the next two decades – increased by 26% during this decade.
- Over one in every eight persons, or 12.9%, of the population is an older American.
- Persons reaching age 65 have an average life expectancy of an additional 18.6 years (19.9 years for females and 17.2 years for males).
- Older women outnumber older men at 22.7 million older women to 16.8 million older men.
- Older men were much more likely to be married than older women--72% of men vs. 42% of women and 42% older women in 2009 were widows.
- About 30% (11.3 million) of noninstitutionalized older persons live alone (8.3 million women, 3.0 million men).
- Half of older women (49%) age 75+ live alone.
- About 475,000 grandparents aged 65 or more had the primary responsibility for their grandchildren who lived with them.
- The population 65 and over will increase from 35 million in 2000 to 40 million in 2010 (a 15% increase) and then to 55 million in 2020 (a 36% increase for that decade).

- The 85+ population is projected to increase from 4.2 million in 2000 to 5.7 million in 2010 (a 36% increase) and then to 6.6 million in 2020 (a 15% increase for that decade).
- The median income of older persons in 2009 was \$25,877 for males and \$15,282 for females. Median money income (after adjusting for inflation) of all households headed by older people rose 5.8% (statistically significant) from 2008 to 2009. Households containing families headed by persons 65+ reported a median income in 2009 of \$43,702.
- Social Security constituted 90% or more of the income received by 34% of beneficiaries in 2008 (21% of married couples and 43% of non-married beneficiaries).
- About 11% (3.7 million) of older Medicare enrollees received personal care from a paid or unpaid source in 1999.

## Court Rules House Was Owned with Son, So State Can Recover Mother's Medicaid Benefits

An Iowa appeals court rules that a son did not present clear and convincing evidence to overcome the presumption that he owned his house with his mother, so the state can recover Medicaid benefits from her interest in the property. *In re Estate of Lovan* (Iowa Ct. App., No. 1-038 / 10-1314, Feb. 23, 2011).

Sammy Lovan and his mother, Mrs. Lovan, purchased a house together. Over the years, they refinanced the mortgage on the house several times and each time they both signed the mortgages as tenants in common. When Mrs. Lovan died, the state filed a claim against her estate to recover Medicaid benefits provided on her behalf.

Mr. Lovan claimed the house was not a part of his mother's estate. He maintained that his mother signed the mortgage in order to help him obtain financing, but that he paid the mortgage and managed the house on his own. The probate court found that Mrs. Lovan had a one-half interest in the house, and Mr. Lovan appealed.

The Iowa Court of Appeals affirms, holding that Mr. Lovan did not produce clear and convincing evidence to overcome the presumption that he and his mother held the property as tenants in common. According to the court, while Mr. Lovan may have needed his mother's signature originally, there was no reason to have her continue as owner on the subsequent mortgages.

**Editor's Note:** It is always a good idea to document what the true situation is. Why the son would allow his mother on the title to real estate (and give her creditors access to her interest) is not clear, but at some point, as the Court notes, the mother and child should have cleared up the record to reflect the true state of affairs. The fact that they did not create a presumption in the mother's favor that she owned one half the house and after her death, the probate court and trial court agreed. The lesson: never commingle your assets with an aged parent.