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BROOKS & BROOKS, LLP

Estate Planning with Certainty

Gifts Causing Medicaid Penalty - Return Policy

One rule of Medicaid is that if a person makes a gift within 60 months of applying for Medicaid, that gift will cause a penalty for Medicaid eligibility, measured in terms of a number of months one must wait to begin receiving Medicaid. A follow-up Medicaid rule is that such a penalty period can be mitigated by a return of the gift to the Medicaid applicant by the donee. A return of all of the gifted assets clearly causes the penalty period to be extinguished. There have been some situations we are aware of where a particular Medicaid examiner allowed a partial return of assets to cause a partial discharge of the penalty period. However, a 2015 New Jersey Superior Court, Appellate Division, case holds otherwise. In C.C. v. Division of Medical Assistance and Health Services (N.J. Super. Ct., App. Div., No. A-429-13T4) the appellate court holds that a Medicaid penalty cannot be reduced at all unless all of the assets transferred during a look back period or returned to the Medicaid applicant.

In this case, a woman sold her house and gave one-half of the proceeds ($99,233.75) to her nephews. She later applied for Medicaid and the State imposed a 387 day penalty period based upon the transfer. During the penalty period, the nephews returned $17,000.00 to her to pay for care. The aunt's argument was that the State should reduce the penalty period because the nephews returned $17,000.00. The State's position was that it could not unless all of the transferred assets were returned. The aunt appealed to Court.

The New Jersey Superior Court agreed with the State and held that the penalty period should not be changed. The Court found that both federal and state law require the return of all assets transferred during the look back period in order to modify the penalty.

The upshot of this case, even though not a New York case, is to be weary of making gifts within the look back period. If New York State adopts this position and all but one donee of a gift are willing to give the assets back to the Medicaid applicant, the penalty period will still not be extinguished. A more controlled way to make gifts would be to establish an Asset Protection Trust, transfer the assets to the trust and then after 60 months has passed, if allowed by the terms of the trust, the trustee can make the gifts. If something should happen to the elder person before the end of the 60th month, the family can be in a position, if the trust is designed properly, to modify the plan and return the assets to the elder.

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Free Workshops

June 7, 2016

Irving Colony House
with Rick Andersen
6:30 to 8:30 p.m.

June 21, 2016

Bartlett Country Club, Olean
6:30 to 8:30 p.m.

July 12, 2016

Springville Country Club
6:30 to 8:30 p.m.

The Second (or Third) Marriage Medicaid Trap When Nursing Home is Involved

An interesting 2015 Nebraska case raises an issue that is often a problem. The case, Binder v. Binder (Neb., No. S-14-783, June 26, 2015), comes to us from Nebraska's highest court and involves a 90+ years old couple. Mr. & Mrs. Binder had been married for 30 years, it being the second marriage for both of them. In 2012, Mrs. Binder moved into a nursing home. Her income was not enough to cover the cost of care, so Mr. Binder had to contribute the remaining amount.

Thereafter, Mr. Binder filed for divorce from Mrs. Binder (he was 94 and she was 95). The Court dissolved the marriage and awarded Mrs. Binder alimony in order to offset her nursing home cost. Mr. Binder appealed, arguing that the amount of alimony was presumptively an abuse of discretion because it drove his income below the poverty line in violation of Nebraska State Child Support Guidelines.

The Nebraska Supreme Court affirmed the lower court's decision. It held that the State Child Support Laws do not apply in this case because there are no minor children involved (no argument there….at their ages!). The Supreme Court concluded that the alimony awarded by the lower court was not unreasonable, especially since Mr. Binder had the power to dispose of farm land that he owned.

The point… **beware of second marriage liabilities**. While parties may be able to protect their assets from each other with the use of a Pre-nuptial or Post-nuptial agreement, when Medicaid was involved, those agreements are irrelevant! The State imposed obligation to support one's spouse trumps any agreement between the spouses. The best approach, when considering entering into a second (or third) marriage, especially when one is of an older age, is to have an Asset Protection plan in place for both parties, so that there are no unwanted surprises later on.

New Federal Law Dealing with "Observation" Status of Medicaid Patient's Hospital Stay

A new federal law now in effect directs hospitals to give notice to Medicare patients of their status in the hospital. This is in response to the all too often situation where Medicare patients had to spend several days in the hospital, only to learn that they were never officially "admitted". Their status was merely for "observation." The difference can be critical.

If a Medicare patient is **admitted** to a hospital for three nights and then is transferred to a skilled nursing facility for further treatment or rehabilitation, Medicare pays the first 20 days of nursing home services and the next 80 days at a reduced rate. However, if the Medicare patient had been in the hospital for three days under **observation** and then was transferred to the skilled nursing facility, Medicare pays nothing...zero! In the meantime, the Medicare patient will be assuming that since he/she spent three nights in the hospital, the stay at a skilled nursing facility for rehabilitation will be covered by Medicare.

What is the cost difference? Assuming an average skilled nursing facility daily rate of $300 (roughly the charge for nursing homes in South Western New York) the difference between "observation" and "admitted" could be $18,000. It would come to quite a shock to a Medicare patient to find out that his or her stay in the nursing home was not covered by any insurance and he or she had to bite the bullet and pay the full amount to the nursing home.

Thus, it is important to know one's status in the hospital, especially if it involves staying several days. The three night hospital stay rule for Medicare coverage at a skilled nursing facility is very technical and, as we have seen in the past, too easy to miss. The new federal legislation is intended to at least make hospital patients aware of what their official Medicare status is while in the hospital.