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Specializing in Elder & Disability Law

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SPENDING DOWN *By Thomas D. Begley, Jr., Esquire*

The client who engages in Medicaid planning is usually a person of modest means who has been diagnosed with an illness and therefore the option of long-term care insurance is no longer available. A typical client may own a home and have countable assets of between \$100,000 and \$400,000. Most clients' goals are as follows:

1. To obtain the best quality of care for the institutionalized person
2. To maintain the standard of living of the community spouse, including providing sufficient income and assets so that the community spouse can continue to reside in the family home
3. Avoid Medicaid liens being placed on the home
4. Preserving a modest legacy for the children
5. Addressing tax issues, including:
 - o Federal and state income taxes
 - o Federal and state gift taxes
 - o Federal estate tax
 - o State estate tax
 - o State inheritance tax

At the beginning of the initial client meeting, the attorney must begin the process of managing client expectations.

There are many strategies available to obtain or accelerate Medicaid eligibility. Significant factors include whether the client is married; whether the client is in crisis; the nature and extent of the client's assets; and the size of the IRAs of the respective spouses.

Spending Down

Most states limit a Medicaid recipient to approximately \$2,000 of countable resources.¹ One way to achieve this limit is to “spend down” all but the permissible amount of countable resources. What clients typically want to avoid is spending all of their assets on nursing home care. There are several ways a client might spend down his assets.

Pay Off Debts

Repayment of a debt is not considered a transfer, because the individual is receiving fair market value, and transfers are penalized only if the transferor does not receive fair market value.² Typical debts clients might have include mortgages, home equity loans, car loans, and credit card bills. In order for the spend down to be accomplished, the check must actually be written and delivered. An outstanding debt is simply a liability that does not reduce assets for Medicaid eligibility purposes.

Payment for Services

Payment for services, including medical bills and legal fees, does not constitute a transfer. The services performed by the attorney are the value the client receives for the payment. Therefore, there is no uncompensated transfer of funds.

Prepayment of Real Estate Taxes

In situations where the home is occupied by a community spouse it makes sense to prepay real estate taxes. Since the home is occupied by the community spouse it is a noncountable resource. Expenditure of the funds for payment of the real estate taxes constitutes valid spend down.

Buy Household Goods or Personal Effects

Personal effects and household goods are excluded to the extent that the total equity value of such resources does not exceed \$2,000.³ In practice, Medicaid does not appear to enforce the \$2,000 limit.

The personal effects actually should be used by the community spouse. An excellent example of a violation of the “pig principle” is a recent New Jersey case.⁴ In that case, a 92-year-old grandmother was penalized for transfer of assets. The grandmother lived in a nursing home and purchased a computer that was kept at her granddaughter's home. The court held that there was no evidence that the Medicaid applicant received anything of value for her \$1,478.61 expenditure.

Make Home Improvements

¹ 42 U.S.C. §1382(a)(3)(B).

² HCFA Transmittal 64 §3258.1.

³ 42 C.F.R. §416.1216.

⁴ M.G. v. Division of Medical Assistance and Health Servs., A-5161-02T5 (N.J. App. Div. April 5, 2004) (not approved for publication).

Making home improvements is a way to convert countable assets (i.e., cash and securities) into a noncountable asset (i.e., a personal residence). A home and lot used as a principal residence are excludable resources.⁵

Purchase New Home

Occasionally, when one spouse enters a nursing home, the community spouse decides that the current home is too big and decides to move to a smaller home or a condominium. Since the home is a noncountable resource,⁶ if the home is sold and the proceeds of sale from the original principal residence are reinvested into a more expensive home, the additional funds spent on the new home are converted from a countable asset to a noncountable asset. This strategy relies on the principal residence exemption.

Purchase Life Estate from Children

The Deficit Reduction Act–2005 exempts from the transfer of assets penalties the purchase of a life interest in another individual's home if the purchaser resides in the home for a period of at least one year after the date of the purchase.⁷ The Act is silent as to how the life estate is to be valued, but elsewhere there are references to the publication of the Office of Chief Actuary of the Social Security Administration.

In a New Jersey case, a parent purchased a life estate in a child's house for \$126,665.10. The decision noted that a life estate entitles the person to use and occupy the home. There was no evidence that the daughter or her family vacated the home. The daughter and her family had no legal right to remain in the home absent payment of rent.⁸

The CMS Guidance contains some troubling language: “Unless a state has a provision for excluding the value of life estates in its approved State Medicaid Plan, or the property in which the individual has purchased a life estate qualifies as the individual's exempt home, the value of the life estate should be counted as a resource in determining Medicaid eligibility.”⁹

The child would not receive a Section 121 exclusion from the sale of a principal residence, because he did not sell his entire interest in the residence.¹⁰

Prepaid Funeral

Most states do not count funds in an irrevocable funeral trust as countable assets. Also, most states do not have a dollar limit on the amount that can be expended for the funeral. The monies must be put in an irrevocable trust; the trust must be for the benefit of the Medicaid applicant; and the trust must be established by an individual who reasonably anticipates applying for or receiving Medicaid benefits.

An alternative to an irrevocable funeral trust is an irrevocable assignment of a life insurance policy in exchange for funeral services of the same or greater value as the cash surrender value of the policy. Funeral directors require a paid-up policy.

⁵ 42 C.F.R. §§416.1210, 415.1212.

⁶ 42 C.F.R. §416.1210.

⁷ Deficit Reduction Act of 2005 §6014(d).

⁸ A. R. v. DMHAS, Administrative Action, The Final Agency Decision, OAL Dkt. No. HMA8802-04.

⁹ Center for Medicaid and State Operations, SMDL No. 06-018, July 27, 2006, §§6011 and 6016 iv.

¹⁰ Rev. Rul. 84-43.

Irrevocable policies issued by companies, such as Choices or Forethought, are also acceptable to Medicaid and to most funeral homes. One of the nice features of these policies is that insurance companies having significant assets back them and they can be used in most funeral homes.

Purchase of burial spaces for adult children and their spouses do not constitute transfers for Medicaid penalty purposes. The burial space resource exemption applies to burial spaces for the Medicaid Applicant and also any member of his or her immediate family. Immediate family means an individual's minor or adult children, including adopted children and stepchildren, an individual's brothers, sisters, parents, adoptive parents, and the spouses of those individuals. Neither dependency nor living in the same household will be a factor in determining whether a person is an immediate family member.¹¹

Purchase New Car

Frequently, when one spouse enters a nursing home, the other spouse is driving an old car with high mileage. A good strategy is to have the community spouse purchase a new car as part of the spend down. Under current law the best time to purchase the car would be after the institutionalized spouse enters a nursing home. Under federal law, the first \$4,500 of the value of a car is excluded from the calculation of countable assets.¹² However, if the car is used for medical transportation or transportation in connection with employment, the entire value of the car is noncountable.¹³ Many states simply permit one car to be noncountable regardless of value or use.

Thomas D. Begley, Jr.

www.begleylawyer.com/begleyJR.htm



Announcements

“Begley, Begley & Bookbinder, P.C.” has expanded its representation of our senior citizen client base to advocate them in claims for veterans benefits, particularly those for Aid and Attendance. Over the past month, Thomas D. Begley, Jr., Thomas D. Begley, III, Dana E. Bookbinder and Austin DuBois have been designated as accredited attorneys authorized to undertake this work.

Speakers

¹¹ C.F.R. §416.1231(a)(4).

¹² 42 U.S.C. §1382b.

¹³ 42 C.F.R. §416.1218.

If you are interested in having an Elder & Disabilities Law Attorney from Begley, Begley, & Bookbinder speak at an event, please contact Colleen Caruso at (856) 787-4237.

Begley, Begley & Bookbinder

Begley, Begley & Bookbinder, P.C. is an Elder & Disability Law Firm with offices in Moorestown, Stone Harbor and Lawrenceville, New Jersey and Huntington Valley, Pennsylvania and can be contacted at 800-533-7227. The firm services southern and central New Jersey and eastern Pennsylvania.

The Firm provides services in connection with protecting assets from nursing home costs, Medicaid applications, Estate Planning and Estate Administration, Special Needs Planning and Guardianships. If you have a legal problem in one of these areas of law, contact Begley, Begley & Bookbinder at 800-533-7227.

Begley, Begley & Bookbinder has prepared *Special Reports* concerning:

- ❖ *Planning for Long Term Care*
- ❖ *Estate Planning for Parents with Children with Disabilities*
- ❖ *Understanding Estate Planning*
- ❖ *Estate Administration*
- ❖ *Blended Families*
- ❖ *Bloodline Trusts*
- ❖ *Vacation Area Homes – Tax and Management Issue*
- ❖ *Special Needs Trusts*
- ❖ *Utilizing Special Needs Trusts in Matrimonial Cases.*
- ❖ *Using Special Needs Trust to Protect Public Benefits*
- ❖ *Resolving Your Nursing Home Medicaid Application Challenge*
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