

# ELDERLAW

## NEWS

New Jersey

®

Legal News for the Aging and Disabled

March 2004

### ESTATE PLANNING FOR THE HEALTHY SPOUSE WHEN THE ILL SPOUSE IS CONFRONTING LONG-TERM HEALTH ISSUES

### Interim Benefit Under the New Medicare Law: The Drug Discount Card

When one spouse is a resident of a nursing facility or medical institution (the "institutionalized spouse"), but the other spouse continues to live in the community (the "community spouse"), the community spouse may take a number of steps to retain a maximum level of resources without jeopardizing the institutionalized spouse's Medicaid eligibility.

Medicaid is a joint federal and state program created under Title XIX of the Social Security Act of 1965. It provides a source of funding for long-term care to those aged, blind and disabled individuals who qualify financially. 42 U.S.C. §1396 et seq.; N.J.A.C. 10:71-1 et seq. Eligibility for Medicaid is based upon financial need. For example, under the "Medicaid Only" program, an applicant's countable resources cannot exceed \$2,000.00. N.J.A.C. 10:71-4.4.

Following the enactment of the Medicaid program, based upon concern over the widespread practice of purposeful asset divestiture, mostly by the wealthy, to obtain Medicaid eligibility, Congress enacted legislation to impose periods of ineligibility, or "penalty periods," in cases in which a Medicaid applicant divested himself of assets for less than fair market value in an attempt to render himself "needy." See *Rainey v. Guardianship of Mackey*, 773 So. 2d 118, 119 (Fla. Dist. Ct. App. 2000); *In re John XX*, 652 N.Y.S.2d 329 (Sup. Ct. 1996), appeal denied, 659 N.Y.S.2d 854 (1997). This legislation imposes a 36-month "look-back period," in which Medicaid officials will "look back"

from the application date to analyze asset transfers by the applicant. *Id.* If a Medicaid applicant disposes of assets for less than fair market value within the 36-month look-back period, the applicant may be subject to a period of Medicaid ineligibility (a "penalty period"), based upon the value of the uncompensated transfer. 42 U.S.C. §1396(p).

By understanding the Medicaid rules and designing strategies consistent with those rules, the attorney can assist the community spouse in planning his or her estate when the spouse is confronting health issues.

#### **A. Asset Titling -- Deeds, Bank Accounts, And Life Insurance.**

##### ***Transfer Of The Institutionalized Spouse's Interest In The Principal Residence to the Community Spouse***

The Medicaid transfer penalties do not apply to all uncompensated asset transfers. For example, under current Medicaid law, certain transfers of the Medicaid applicant's principal residence are "exempt" for purposes of determining Medicaid eligibility. One such exempt transfer—a transfer of the applicant's principal residence for less than fair market value to the Medicaid applicant's community spouse—is a significant estate planning measure for the community spouse.

Among the benefits of transferring the applicant's interest in the home to the community spouse  
**(Continued on Page 2)**

The Medicare-Approved Drug Discount Card, created by the Medicare Prescription Drug, Improvement

and Modernization Act signed into law last December, will be available in June 2004. The U.S. Centers for Medicare & Medicaid Services (CMS) will contract with private companies to offer the new cards.

This is an interim benefit that is being offered until the Medicare prescription benefit starts in 2006. The cards could save beneficiaries between 10 to 25 percent of the pharmacy cost of prescription drugs.

Here's a summary of what Medicare beneficiaries and their health care providers need to know about the cards, from CignaMedicare: Enrollment:

- Voluntary enrollment begins in 5/04
- Card is effective beginning June 1, 2004 and ending December 31, 2005
- Annual enrollment fee of up to \$30; waived if income is below 135% of the Federal Poverty Level (FPL)
- Beneficiaries with Medicare Part A or B are eligible unless enrolled in Medicaid or covered through a Medicaid 1115 state waiver
- Choice of at least two Medicare-approved card programs per state, but only one program at a time
- Special election period if change in residence or Medicare Advantage plan
- Discounts on prescriptions only at participating pharmacies.

**(Continued on Page 3)**

## **Estate Planning By The Healthy Spouse (Continued from Page 1)**

is that the home will escape the imposition of a "Medicaid lien" as mandated by the Medicaid estate recovery program. N.J.S.A. 30:4D-7.2 et seq.; 42 U.S.C. §1396p(b)(1)(B). Under the estate recovery program, the State of New Jersey is entitled to recover payments made on behalf of a Medicaid recipient through the imposition of liens on any real or personal property owned by the Medicaid recipient or in which the Medicaid recipient held legal title at the time of death. Id. New Jersey seeks recovery only from estates of deceased Medicaid recipients.

Thus, by engaging in Medicaid planning and transferring the institutionalized spouse's interest in the home to the community spouse, Medicaid will not penalize the transfer; moreover, Medicaid will be unable to impose a lien on the home because the institutionalized spouse will have no legal title to or legal interest in the home at the time of his or her death.

Other techniques involving the principal residence may assist in maximizing the resources of the community spouse. The community spouse-occupied principal residence is an exempt asset. N.J.A.C. 10:71-4.4. Consequently, prepayment of real estate taxes constitutes a valid spend-down. Begley, T. and Jeffrey, J., Representing the Elderly Client: Law and Practice, §8.02[C] at 8-7 (Aspen 2003). In addition, because personal effects and household goods are excluded up to a total value of \$2,000, N.J.A.C. 10:71-4.4, such goods may be purchased as part of a spend-down plan.

In fact, because the community spouse-occupied principal residence is an exempt asset, N.J.A.C. 10:71-4.4, resources may be converted from countable to excludable by selling the residence and purchasing a more expensive home. Begley,

T. and Jeffrey, J., Representing the Elderly Client: Law and Practice, §8.03[C] at 8-9 (Aspen 2003).

### **Retitling Of Bank Accounts And Life Insurance**

If the community spouse has a life insurance policy, a retirement account (e.g., an IRA), or an annuity naming the institutionalized spouse as beneficiary, the beneficiary designation should be changed to a third party (for example, the couple's children). Otherwise, if the beneficiary is designated as the institutionalized spouse, the proceeds would be paid to the institutionalized spouse, who would become ineligible for Medicaid until those funds were expended for his or her nursing care.

Similarly, bank accounts should be retitled so that they are not in the name of the institutionalized spouse.

### **B. Changing The Will To Exclude The Disabled Spouse.**

If the community spouse has a Last Will and Testament naming the institutionalized spouse as beneficiary, and the will is not changed to name the children or other third parties as beneficiaries, the estate would be distributed to the institutionalized spouse, who would become ineligible for Medicaid until those funds were expended for his or her nursing care. For this reason, a revision to the community spouse's will is a necessary element of a Medicaid plan.

Of course, when changing the Last Will and Testament of the community spouse, the attorney must consider the impact that such a change would have on the elective share.

A successful strategy for addressing these two concepts is the execution of a new will in which the community spouse leaves the institutionalized spouse's elective share in a testamentary Special Needs Trust that will not affect his/her eligibility

for Medicaid or other needs-based governmental programs.

Under the state elective share statute, N.J.S.A. 3B:8-1, et seq., the surviving spouse has a right to take one-third of the augmented estate of a deceased spouse. Because the statute also provides that half of anything placed in a trust for the surviving spouse counts against the elective share, if the community spouse puts two-thirds of his or her estate in a Special Needs Trust for the surviving spouse, the elective share is satisfied.

The testamentary elective share trust may be designed as a Special Needs Trust so that all distributions of principal are left to the sole discretion of the trustee and may be made only for products and services which supplement governmental benefits received by the disabled spouse.

The amount of the estate above the elective share may be left outright to the children or other heirs.

### **C. Durable Power Of Attorney With Gift-Giving Power.**

A financial power of attorney is a legal instrument by which an individual (the "principal") authorizes another person(s) (the "attorney(s)-in-fact" or "agent(s)") to perform specific acts enumerated in the instrument on behalf of the principal. See N.J.S.A. 46:2B-8.2; 2A C.J.S. Agency § 44; Regan, J., Morgan, R. and English, D., Tax, Estate & Financial Planning For The Elderly, §13.03[1] at 13-5 (Matthew Bender 1999). An agent under a power of attorney is specifically authorized by New Jersey statute to conduct banking transactions on behalf of a principal. N.J.S.A. 46:2B-11.

Care must be taken by the attorney in the structuring and execution of a power of attorney instrument. In order to execute a power of

*(Continued on Page 3)*

## Estate Planning By The Healthy Spouse (Continued from Page 2)

attorney, the principal must possess the capacity to contract, or to understand the nature and the effect of the act of appointing an agent. See Mazart, G., New Jersey Elder Law Practice, §2 at 2-3 (New Jersey Institute for Continuing Legal Education 1999).

Because an ordinary power of attorney is only effective during the time that the principal is competent, it is void when the principal becomes incapacitated, rendering it ineffective as a tool for addressing disability. Consequently, New Jersey statutory law authorizes the use of a "durable" power of attorney, in which the instrument is not affected by the disability of the principal. N.J.S.A. 46:2B-8.2. A power of attorney is "durable" if it states: "This power of attorney shall not be affected by subsequent disability or incapacity of the principal;" or "This power of attorney shall become effective upon the disability or incapacity of the principal;" or similar words. Id.

When a power of attorney is durable, all action taken by the agent pursuant to that power during the principal's disability or incompetence has the same effect, and binds the principal as if the principal were competent. N.J.S.A. 46:2B-8.3. Thus, the durable power of attorney provides the principal with the opportunity to select his or her own agent to act in the event of incapacity, which is a favorable alternative to, and may avoid, resorting to the courts for such appointment in a guardianship or conservatorship proceeding. See J. Regan, R. Morgan and English, D., Tax, Estate & Financial Planning For The Elderly, §13.03[2] at 13-6 (Matthew Bender 1999).

Critical for purposes of Medicaid planning is the fact that a power of attorney cannot be construed as authorizing the attorney-in-fact to "gratuitously transfer property

of the principal to the attorney-in-fact or to others except to the extent that the power of attorney expressly and specifically so authorizes." N.J.S.A. 46:2B-8.13a. Consequently, if the power of attorney is to be used to conduct Medicaid planning including gifting strategies on behalf of the institutionalized spouse, it must specifically include gifting powers.

While blanket gifting provisions, giving authorization generally to make gifts of the principal's property, allow the agent authority to conduct Medicaid planning, blanket gifting powers may also create problems. For example, such a provision could be used by an agent/child to make gifts favoring himself over the principal's other children. While such conduct could be considered contrary to the agent's fiduciary duty to avoid self-dealing, the blanket gifting provision could also be deemed to be a waiver of the agent's fiduciary duty to avoid self-dealing.

For these reasons, as well as the fact that blanket gifting provisions may trigger tax traps, it may be prudent to tailor gifting provisions.

### D. Other Techniques: Divorce.

Divorce from an institutionalized spouse may be a troublesome concept, from a personal standpoint. In fact, a divorce consummated in the context of Medicaid planning is considered to be one of the more "extreme Medicaid planning strategies." H. Fliegelman and D. Fliegelman, Giving Guardians The Power To Do Medicaid Planning, 32 Wake Forest L. Rev. 341, 364 (Summer 1997). Nevertheless, it may be a prudent financial strategy for a community spouse. ❖ ❖ ❖

- Change enrollment, if desired, between November 14 and December 31, 2004.
- Drug cards approved by CMS will carry a Medicare-approved seal on the card authenticating that it is a

## Medicare's Drug Discount Card

(Continued from Page 1)

"Medicare-approved" card program.

Special \$600 Credit for Low-Income Beneficiaries:

- \$600 credit in 2004 and 2005 for incomes below 135% FPL (For 2003--\$12,123 or less if single, or \$16,362 or less if married.)
- Persons with drug coverage through Medicaid, TRICARE for Life, or an employer group health plan cannot qualify for the credit.
- The \$600 credit will flow through the card; 2004 balance carried over to 2005.
- 5% coinsurance for individuals with incomes below 100% FPL.
- 10% coinsurance for individuals with incomes below 135% FPL.
- No asset test for the discount drug card or for the \$600 credit.

Drug Card Plan:

- Drug card discounts required to be available to all enrollees; can be limited to a formulary.
- Formulary must include one discounted drug in each of 209 classes commonly used by elderly.
- Must provide convenient access to pharmacies; cannot require mail-order only.
- May offer discounts on over-the-counter drugs (OTC); \$600 credit cannot be used to purchase OTC.
- Required to offer price comparisons on a Web site and a grievance policy.



## ➡ ANNOUNCEMENT OF NEW OFFICE LOCATION ◀

Donald D. Vanarelli, Esq. is pleased to announce the relocation of his law firm to a larger facility at 242 St. Paul Street in Westfield, NJ. The new office is conveniently located near downtown Westfield, about two blocks away from the former office. Phone, Fax and Email remain the same. The larger office will enable the law firm to better serve an expanding client community of seniors, the disabled and their families. The new office will also permit the law firm to serve an additional client population in the firm's newest practice area, family and divorce mediation.

## APPROVED AS A MEDIATOR UNDER THE NEW JERSEY COURT RULES

Mr. Vanarelli is pleased to announce that he has been approved under the New Jersey Court Rules as a Mediator in family and divorce matters. He was previously approved as a Mediator in civil, equity and probate litigation. ***Mr. Vanarelli provides mediation services in probate matters, guardianship disputes, will contests and other elder law and estate matters. In addition, Mr. Vanarelli also mediates divorce and family matters, including parenting arrangements, child support disputes, alimony and equitable distribution issues.***

## DONALD D. VANARELLI, ESQ. OFFERS SEMINAR FOR "SPECIAL NEEDS" TRUSTEES

Through the use of a Special Needs Trust (SNT), disabled persons can prevent the elimination or reduction of needs-based public benefits such as Supplemental Security Income (SSI) or Medicaid. Thus, SNTs are critical estate planning tools for the disabled and their families. Making the decision to establish a SNT is not enough, however. Trustees must be carefully selected, and they must understand the complicated rules governing public benefits, estate planning and SNTs. To help provide more information about SNTs, ***Donald D. Vanarelli, Esq. is pleased to announce his first ever training session on the administration of Special Needs Trusts.*** The free two-hour seminar will be held at 10:00 am on April 22, 2004 at Mr. Vanarelli's office in Westfield. ***Parents of disabled persons and other family members, trustees and case managers should all consider attending. Reservations are required. Call (908) 232-7400.***

## Winter – Spring 2004 Speaking Engagements – To Date

### February

- 3 National Business Institute-Estate Planning for Nursing Home Admission; 9:00 am-4:30 pm; Saddle Brook
- 4 UBS Seminar for CPAs-Use of Trusts in Public Benefits Planning; 8:00am-10:00 am; Red Bank
- 5 Westfield Old Guard- Estate Tax Law Changes; 11:00 am-12:00 pm; Westfield
- 26 Raritan Bay Medical Center-Planning for Disability; 7:00-8:00 pm; Perth Amboy

### March

- 25 Woodbridge Library-Planning for Disability; 1:30 & 7:00 pm

### April

- 29 Springfield Library-Planning for Disability; 10:00 am & 7:00 pm
- 30 Alzheimers Association Conference; 9:00 am-4:00 pm; Princeton

### May

- 20 Union Library-Planning for Disability; 1:00 & 7:00 pm

# ELDERLAW NEWS

LAW OFFICES OF  
DONALD D. VANARELLI  
242 St. Paul Street  
Westfield, NJ 07090  
Tel: (908) 232-7400  
Fax: (908) 232-7214

Email: [dvanarelli@dvanarelli.com](mailto:dvanarelli@dvanarelli.com)  
Websites: [dvanarelli.lawoffice.com](http://dvanarelli.lawoffice.com) -and-  
[elderlawanswers.com/attorney/vanarelli.html](http://elderlawanswers.com/attorney/vanarelli.html)