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ALIMONY AND THE INSTITUTIONALIZED EX-SPOUSE: CONSENTING TO ALIMONY REDUCTION MAY JEOPARDIZE MEDICAID ELIGIBILITY

When a divorced elder is receiving Medicaid benefits, alimony payments the elder may be receiving will do little, if anything, to improve the elder's standard of living. Thus, an ex-spouse's attempt to reduce court-ordered alimony might be seen as an opportunity to accomplish Medicaid-planning transfers, ultimately for the benefit of the divorced couple's children. But how can the institutionalized elder consent to an alimony reduction without jeopardizing his/her Medicaid eligibility?

Although an institutionalized ex-spouse receiving Medicaid benefits may receive no direct benefit from continued alimony, to consent to a request to reduce or eliminate that alimony would be to jeopardize the institutionalized ex-spouse's Medicaid eligibility.

The risk to consenting to an alimony reduction is that Medicaid could conclude that the reduction was not the result of a contested court action. Consequently, Medicaid could deem the consent to be a "gift" of the alimony payments from the institutionalized ex-spouse, and could impose a penalty for the transfer.

In L.H. v. DMAHS, 93 N.J.A.R.2d 107 (OAL 1993), the couple filed a complaint for separate maintenance and entered a QDRO by consent, assigning the husband's pension to the wife. The husband entered a nursing

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ASSET PROTECTION FOR SENIORS: ESTATE PLANNING WHEN ONE SPOUSE IS FACING CATASTROPHIC NURSING HOME CARE

Introduction

Medicaid planning for a spouse facing catastrophic nursing home care typically involves the transfer or disposition of the Medicaid applicant's resources. When those transfers occur within the 36-month "look-back" period, the strategy must recognize and take into account various considerations such as the value and nature of the assets of the couple, individually and jointly.

Spending Down Of Assets

Given that New Jersey denies Medicaid coverage when a individual's total resources exceed \$2,000.00, N.J.A.C. 10:71-4.5(c), a common general Medicaid planning technique is to "spend down" all but the resource maximum. Notably, "spending down" differs from asset transfers for less than fair market value because, with "spend-downs," the individual is receiving fair market value in return.

Examples of valid spend-downs are the repayment of debts, such as mortgages, automobile loans, and credit cards; payment for services such as medical and legal bills; and prepayment of real estate taxes, where the principal residence is occupied by the community spouse. Id.

Transfer Of The Principal Residence

Under current Medicaid law, certain transfers of the Medicaid applicant's principal residence are "exempt" for purposes of determining

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home and applied for Medicaid but was found ineligible based on excess income from the pension. Although the husband argued that the consent order rendered the pension income unavailable to him, the court disagreed. It concluded that the divorce action and consent order were the result of collusion, and that the couple intended to transfer income from the institutionalized spouse to preclude that income from being used for nursing care. The administrative law judge in L.H. concluded that, "while it is true that a wife has certain rights to a spouse's pension ... in the event of divorce and equitable distribution, he or she does not have a right, even in a legitimate case, to the entire amount so as to require one spouse to be cared for by public welfare." The judge affirmed the denial of Medicaid benefits, and the Acting Director of the DMAHS affirmed that holding.

In B.S. v. DMAHS, 93 N.J.A.R. 2d 35 (OAL 1993), a nursing home resident filed a motion seeking compliance with a court order requiring her ex-husband to pay her medical expenses. After extensive negotiations, a consent order was entered which, *inter alia*, reduced the ex-husband's alimony obligation. The Director reversed the decision of the ALJ and held that the transaction amounted to a voluntary transfer of resources for less than fair market value, rendering the wife subject to a Medicaid penalty period.

In G.E. v. DMAHS, 271 N.J. Super. 229 (App. Div. 1994), after a spousal support order directed an institutionalized husband's pension benefits to be paid directly to the wife, DMAHS determined that those funds were nonetheless "available" to the husband for purposes of Medicaid eligibility. The G.E. court acknowledged the DMAHS Director's finding that "to disregard [the institutional-

ized spouse's] pension benefits would constructively eliminate the income standard ... for a class of Medicaid applicants. Court-ordered spousal support would become a vehicle to circumvent Medicaid laws...." The court concluded that the pension funds were "available income" to the husband, for purposes of Medicaid eligibility, even though the wife was entitled to receive the funds pursuant to the support order.

However, in L.M. v. DMAHS, 140 N.J. 480 (1995), the New Jersey Supreme Court permitted a similar arrangement without Medicaid penalty. There, after the institutionalized husband was denied Medicaid based upon excess income, he (through his guardian) and his wife divorced and his pension was equitably distributed, pursuant to a separation agreement, to his wife. The Court held that, pursuant to the equitable distribution order, the wife was now the sole owner of the pension, and that the pension income could not be considered "available" to the husband for Medicaid eligibility purposes. Id. at 498. In so ruling, the Supreme Court recognized that its decision "might encourage persons to divorce to protect assets for the spouse of the nursing-home resident ... [which would] unfairly place a further burden on the limited financial resources of the State." Id. at 500.

Following L.M., however, in H.K. v. Cape May Board of Social Services, 2004 WL 374397 (OAL 2004), the ALJ refused to permit a spousal support order to be used to alter a Medicaid community spouse allowance. In H.K., after a husband entered a nursing home and applied for Medicaid, his wife filed for a Divorce from Bed and Board, which resulted in a property settlement agreement ordering that the husband's pension income be paid to his wife as support. The ALJ found that the support order did not render the wife entitled to an increased community spouse allowance under the Medicaid rules and regulations: "The Divorce Decree that included an alimony payment was not evalu-

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merits by the Superior Court The Property Settlement Agreement ... is not a determination, on the merits, that is binding upon the Director in terms of the [Medicaid] community spouse allowance calculation." Id.

Of course, in many cases, the divorced couple may be of advanced age, and the moving party may be facing retirement or semi-retirement that would justify the reduction or elimination of alimony. See Lepis v. Lepis, 83 N.J. 139 (1980); N.J.S.A. 2A:34-23. However, the issues presented by a community ex-spouse's motion to reduce or eliminate alimony are complex: Medicaid may look beyond the resulting alimony order to the underlying issues and positions of the parties.

In sum, although the attorney for the institutionalized ex-spouse receiving Medicaid benefits may acknowledge that his client will receive no direct benefit from continued alimony, to consent to an ex-spouse's request to reduce or eliminate that alimony would be to jeopardize the institutionalized ex-spouse's Medicaid eligibility. Instead, the best course of action is to object to the application, even if based upon nothing more than the risk that a consent could pose to the institutionalized spouse's Medicaid eligibility.

ASSET PROTECTION FOR SENIORS

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Medicaid eligibility. One such exempt transfer is a transfer to the Medicaid applicant's community spouse.

Another exempt transfer is a transfer to the Medicaid applicant's "caregiver child," pursuant to 42 U.S.C. §1396p(c)(2)(A)(iv). Transfers of the home to a "caregiver child" are exempt under N.J.A.C. 10:71-4.7(d)(4) which provides, in pertinent part, as follows:

[A]n individual shall not be ineligible for [Nursing Home Medicaid] because of the transfer of his or her equity interest in a home which serves ... as the individual's principal place of residence and the title to the home was transferred to:

A ... son or daughter of the institutionalized individual ... who was residing in the individual's home for a period of at least two years immediately before the date the individual became an institutionalized individual and who has provided care to such individual which permitted the individual to reside at home rather than in an institution or facility.

Another such exempt

transfer of the applicant's principal residence for less than fair market value is the transfer to a child who is under 21, blind or disabled, pursuant to 42 U.S.C. §1396p(c)(2)(A)(ii).

Transfers of the home to a "disabled child" are exempt under N.J.A.C. 10:71-4.7(d)(2) which provides, in pertinent part, as follows:

[A]n individual shall not be ineligible for [Nursing Home Medicaid] because of the transfer of his or her equity interest in a home which serves ... as the individual's principal place of residence and the title to the home was transferred to:

A child of the institutionalized individual ... who is blind or totally and permanently disabled.

Transfers of the home to a sibling of an institutionalized spouse who already has an equity interest in the home are exempt under N.J.A.C. 10:71-4.7(d)(3) which provides, in pertinent part, as follows:

[A]n individual shall not be ineligible for [Nursing Home Medicaid] because of the transfer of his or her equity interest in a home which serves....

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as the individual's principal place of residence and the title to the home was transferred to:

A brother or sister of the institutionalized individual who already had an equity interest in the home prior to the transfer and who was residing in the home for a period of at least one year immediately before the individual becomes an institutionalized individual.

Among the benefits of transferring the applicant's home to the community spouse, caregiver child, disabled child or sibling with an equity interest is that the home will escape the imposition of a "Medicaid lien" as mandated by the Medicaid estate recovery program, pursuant to which 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. N.J.S.A. 30:4D-7.2 et seq.; 42 U.S.C. §1396p(b)(1)(B).

Converting Countable Assets To Exempt Assets

A variety of techniques may be employed in order to convert assets that would otherwise be countable by Medicaid into assets that are exempt.

For example, because property used as a principal residence is an exempt resource, countable liquid assets may be used to purchase a home in order to convert those assets to exempt assets. In fact, because the community spouse-occupied principal residence is an exempt asset, N.J.A.C. 10:71-4.4, one residence may be sold and a more expensive one purchased.

Because an automo-

bile is an excluded resource (up to a current market value of \$4,500), countable assets may be converted to exempt by purchasing an automobile. Notably, if an automobile is needed for medical treatment, or has been specially modified for use by a handicapped person, the total value of the automobile is excluded. Because repairs made to an exempt asset are likewise exempt, the individual should consider making repairs to the personal residence or automobile.

Burial plots for the individual, spouse and members of the immediate family are entirely exempt, as are agreements to purchase burial space for the individual, spouse and immediate family members. In addition, the individual may purchase personal effects and household goods, which are exempt up to a total value of \$2,000. N.J.A.C. 10:71-4.4.1 ❖ ❖ ❖



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Estate Planning: Alimony and the Institutionalized Spouse
Nursing Home Planning: Asset Protection for Seniors