

ELDERLAW

NEWS

New Jersey

Legal News for the Aging and Disabled

May 2002

THE TOP SEVENTEEN "MYTHS" THAT CAN GET YOU IN TROUBLE WITH NURSING HOME MEDICAID

Many people have questions about Medicaid coverage for nursing home costs, which can run \$90,000 a year or more in New Jersey. Few people could afford to pay those costs out of their regular income. Therefore, before long, a person's life savings could be lost. Long-term care insurance is often too expensive for many older people, and may be unavailable for those who are already ill. So, folks will ask friends and neighbors how to get Medicaid to pay for the cost of nursing home care rather than pay from their own limited savings. Unfortunately, few people know this area of law. Since Medicaid and other public benefits law is complicated, reliable information is often hard to come by. There are seventeen common "myths" about Medicaid that can get you into trouble:

1. Myth: "I have to give away everything I own to get Medicaid."

The truth: Basically, a person is permitted to own some property and still be eligible for Medicaid. The trick comes in knowing what is "countable" and what is "non-countable" under the Medicaid rules. For a married couple, the marital home that is occupied by the healthy spouse is "non-countable" under Medicaid. Whether you are married or not, certain types of prepaid burial contracts are "non-countable." There are many other types of "non-countable" property. The bottom line is, you don't need to be completely without assets to be eligible for Medicaid.

2. Myth: "I can't give anything away and get Medicaid."

The truth: The Medicaid rules provide that a person can be disqualified for giving away property, in some cases. But a lot depends on what is given away, its value, to whom it is given and when. So, again, it's complicated. Some asset transfers are not penalized under the Medicaid rules.

3. Myth: "I have to wait 3 years after giving anything away to get Medicaid."

The truth: The disqualification period isn't always 3 years long. Sometimes there is no disqualification, and sometimes the period of disqualification is more or less than 3 years. True, there is a 3 year "lookback" period for some asset transfers. This means that the Medicaid agency will look back at all transfers of property, including sales for less than fair market value. For some transfers, the "lookback"

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Most Americans understand that there will be no federal estate tax (and, in most cases, no state inheritance tax) due

U. S. CONSTITUTION DOES NOT PROTECT AGAINST POOR ESTATE PLANNING

on their deaths so long as they own less than a threshold amount – \$1 million in 2002. Many married couples realize that they can take fairly simple steps to ensure that each spouse can "use" the \$1 million exemption amount, and pass up to \$2 million total to heirs without taxation.

Earl and Mildred Koester owned a farm, a home and other assets. They were not millionaires, but had substantial estate assets. Like many couples, they had "sweetheart" wills leaving everything to one another and directing that the survivor's estate would be divided equally among their children after both died.

When Mildred died in 1988, her share of the couple's assets was valued at just over \$200,000. Since her estate plan was to leave everything to her husband, Earl received the entire estate.

When Earl died 8 years later, the total of his estate was just barely more than \$1 million. In the year of his death, the amount that could be passed to children without estate tax liability was only \$600,000. Since Earl's estate was larger, the estate paid taxes of more than \$150,000.

The Koesters' heirs (the couple's children) petitioned for return of the tax money. They argued that everyone knows that married couples can construct their estate plans to avoid the tax liability, and that the Koesters' failure to take advantage of the usual tax planning devices was caused by their lack of education. In fact, argued the children, the Koesters' poor education prevented them from even hiring a competent attorney to prepare their estate plans.

The U.S. Constitution protects individuals from government action that unfairly targets one group over another. The Koesters' heirs argued that the tax code discriminates against the uneducated, and that the Koesters' estates should have been treated as if they had implemented the kind of estate plans that other couples know how to execute. They argued that the failure to treat the Koesters as favorably as better educated taxpayers denied them the equal protection of the laws.

The U.S. Tax Court disagreed. It refused to reduce the estate tax based on what the Koesters might have done
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estate actually is constructed, and the courts are not permitted to rewrite the estate plan just to reduce the taxes due. *Estate of Koester v. Commissioner*, March 28, 2002.

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period is actually extended to 5 years. However, the rules penalizing transfers do not apply to all transfers. See #2 above.

4. Myth: "I can keep all marital property and my inherited property when my spouse gets Medicaid."

The truth: When a married person applies for Medicaid, assets in either or both spouse's names are considered by the Medicaid agency. However, some assets won't be "countable" and you may keep some as an asset allowance if your spouse enters a nursing home. See #1 above.

5. Myth: "If I put my property into my spouse's name, I will be eligible for Medicaid."

The truth: If assets are countable, they are counted regardless of which spouse's name they are in. The healthy spouse will be given several months to re-title non-countable assets from the name of the spouse in the nursing home into the name of the healthy spouse.

6. Myth: "Medicare will cover my nursing home bill."

The truth: Medicare, the medical insurance that comes with your Social Security retirement benefits, only covers a small amount of the nursing home care provided in this country. Many older people are surprised to learn this fact. In general, there are 20 days of full coverage if you go into the nursing home after at least 3 days in the hospital, and are getting skilled nursing care (not custodial care like most nursing home residents get). Then, if you still need skilled care, you can get up to 80 more days from Medicare, but only of partial coverage. After that, you will pay out-of-pocket from your savings, unless you have private nursing home insurance or receive Medicaid benefits.

7. Myth: "If I enter a nursing home as a private pay resident, I must use up my assets before I can get Medicaid."

The truth: You are not required to use your assets to private pay for nursing home care. However, some nursing homes might try to make you believe that you must do this. That's because nursing homes are paid less under the Medicaid program than they collect from private pay patients. You may wish to seek advice from an elder law attorney to find out how to become Medicaid eligible before spending a significant part of your assets on nursing home costs.

8. Myth: "I can only 'spend-down' my assets on medical or nursing home bills."

The truth: See #7 above. Nursing homes may tell you that you must spend your savings on the private pay rate before applying for Medicaid, but this is not true. In fact, it's against the law for them to tell you this!

9. Myth: "My power-of-attorney automatically has the power to take property out of my name, if I ever need

Medicaid."

The truth: Your best tool to be able to plan for Medicaid eligibility, should you ever need it, is to sign a general, durable power of attorney that includes a "gifting" power. Your agent under the power of attorney will be able to re-title your assets only if your power of attorney contains a "power to make gifts". Most powers of attorney don't contain this power, and without it, Medicaid planning cannot be done.

The court procedures to transfer assets without a "gifting power" can be expensive and time-consuming, and may not allow the type of asset protection that many people would like to accomplish.

Without a "gifting power", your agent is generally limited to selling your assets to a "gifting power" is recommended assets allowed under

a "gifting" provision, but year. This figure is too high, and is related to a issue. (See #11 below,

10. Myth: "If I give away assets, it will cause me to be ineligible for Medicaid."

The truth: Any asset transfer will cause a person to

11. Myth: "If I give away assets, I will be ineligible for Medicaid for 30 months."

The truth: This is a rule under federal estate and gift tax law, not under Medicaid law. (Actually, the amount has increased to \$11,000 for federal gift tax purposes.) In 2002, this tax law only applies to people who have more than about \$1 million in assets.

Right now, NJ Medicaid law disqualifies a person from getting Medicaid for one month for every \$5,540 given away, in most circumstances. This disqualification starts in the month of the transfer. So, if my grandmother gives me \$10,000 in May, she will be ineligible for one month - for May. On June 1, the "penalty" or "disqualification period" is over, unless additional gifts are made.

12. Myth: "Now that my spouse has entered the nursing home, it's too late to plan."

The truth: It's almost never too late to take planning steps, even after a spouse has been admitted.

13. Myth: "I can apply for Medicaid when the nursing home tells me to."

The truth: Applying for Medicaid too early can result in a longer ineligibility period, while applying too late can mean the loss of many months of eligibility.

14. Myth: "My income may have to be used to pay my spouse's nursing home bill."

The truth: This is not true in New Jersey or the majority of states.

15. Myth: "All of my spouse's income must be used to pay

the bill if my spouse is on Medicaid in a nursing home.”

The truth: The law allows you to keep a portion of your spouse's income if your own income is below certain limits. In addition to this allowance, you may be entitled to a greater allowance if the cost of maintaining your home exceeds a certain amount or if a state hearing officer or a judge orders a greater allowance for good cause.

16. Myth: “I can hide my assets and get eligible for Medicaid.”

The truth: Intentional misrepresentation in a Medicaid application is a crime and can be costly. The IRS shares any information concerning income or assets you have with the county department of social services. You or whoever applied may have to pay Medicaid back and may face prosecution.

17. Myth: “Medicaid rules that applied to my neighbor when he went in a nursing home will also apply to me.”

The truth: Medicaid rules change quite often, so don't count on the law that applied to your neighbor still applying to you. Also, there may have been facts about your neighbor's situation that you just don't know. It's best to have your situation analyzed by a Certified Elder Law Attorney.

Planning for nursing home admission and Medicaid eligibility is complicated and should only be handled by an attorney who knows Medicaid and tax law. Your best bet is to consult with an attorney who is certified as an Elder Law Attorney by the National Elder Law Foundation. The Foundation's web site is www.nelf.org. The National Academy of Elder Law Attorneys, www.naela.com, in Tucson, Arizona, can assist consumers in locating elder law attorneys. (This article was adapted from information provided on the web site of the Legal Clinic for the Elderly, Wake Forest University School of Law, located at www.law.wfu.edu/eclinic.)

if they had received better advice. Taxes are calculated, ruled the Court, based on how the decedent's estate actually is constructed, and the courts are not permitted to rewrite the estate plan just to reduce the taxes due. *Estate of Koester v. Commissioner*, March 28, 2002.

What might the Koesters have done if they had gotten better advice? Mrs. Koester could have left her estate in a trust for Mr. Koester's benefit, giving him the right to receive all the income and access to the principal in some

CONSTITUTION DOES NOT PROTECT AGAINST POOR ESTATE PLANNING

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circumstances. This kind of trust, often called a “bypass” or “credit shelter” trust, causes the assets of the first spouse to die to escape taxation at both the first and second deaths. That simple plan would have saved the Koesters' children over \$150,000. ☺☺☺

1. What if you become incompetent?

Without a plan, the courts select the manager of your estate assets. With a plan, you select the manager.

2. Who raises your children?

Without a plan, a judge decides. With a plan, you nominate the guardian of your choice.

3. How does your family inherit your assets?

Without a plan, New Jersey's intestacy statute controls. With a plan, your family enjoys the benefits of the plan you set up for responsible management of your estate.

4. What happens if you have children from a “blended” or multiple marriage family?

TEN REASONS TO PLAN YOUR ESTATE NOW

... That Have Nothing To Do With Estate Taxes

Without a plan, children from different marriages may not be treated according to your wishes. With a plan, you decide what assets go to your current spouse and children from different marriages.

5. What happens if you have a Special Needs Child?

Without a plan, Medicaid, SSI and other public benefits needed by your disabled child are at risk. With a plan, public benefits may be preserved through a Supplemental Needs Trust.

6. How can you ensure that your hard earned money stays in your family?

Without a plan, your child's spouse may benefit from your assets. With a

plan, a trust can provide your child with absolute asset protection.

7. How can you ensure that your spouse and children have sufficient income?

Without a plan, your family may not have the funds to maintain their current standard of living. With a plan, you can purchase life insurance to replace lost income without increasing federal estate taxes at death.

8. How can you ensure that your spouse and children obtain maximum benefit from your IRA and other retirement assets?

Without a plan, your beneficiary may experience burdensome income tax consequences because of large required distributions within a short period of time. With a plan, your beneficiary may be able to minimize the income tax bite by “stretching” out distributions over time.

9. Who inherits your business?

Without a plan, there is no succession planning. With a plan, you may choose your successor and design a succession plan.

10. What will happen during the estate administration process?

Without a plan, distribution of your estate may be subject to delays and substantial fees. With a plan, your assets may avoid probate.

(This article was adapted from information contained on the UBS/Paine Webber web site located at www.ubspainewebber.com. Mr. Vanarelli has been selected as a member of the Paine Webber Approved Attorney Network.)

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LAW OFFICES OF DONALD D. VANARELLI



Donald D. Vanarelli, Esq., **certified as an Elder Law Attorney** by the National Elder Law Foundation, an ABA-approved certifying organization, and **certified as a Registered Guardian** by the National Guardianship Foundation, will be conducting **free** seminars on various estate and elder law topics in coming months. In these hands-on workshops, participants are encouraged to ask questions and participate actively in the learning process.

UPCOMING WORKSHOPS

How To Protect Your Estate From Catastrophic Nursing Home Costs

Thursday, June 6 Woodbridge Library 1:00 PM-2:30 PM *and*
7:00 PM-8:30 PM

Estate Planning Update

Thursday, June 20 Westfield Law Office 1:00 PM-2:30 PM

Powers of Attorney, Living Wills and Guardianships

Tuesday, June 25 Westfield Law Office 10:30 AM-12 NOON

Planning for Disabled Children

Thursday, July 11 Westfield Law Office 1:00 PM-2:30 PM

Medicare Coverage and Appeals and Medigap Insurance

Wednesday, July 17 Westfield Law Office 10:30 AM-12 NOON

To register, please call 908-232-7400

FIRM MISSION

The Law Firm of Donald D. Vanarelli is devoted to helping seniors and the disabled in their desire to maintain their independence and quality of life, pay for all needed care, including nursing home care, and preserve assets for family and others. We strive to provide estate and legal planning services to our clients with the highest level of legal expertise, compassion and sensitivity. Through our publications and seminars, we educate other professionals and our client community about how best to address the legal needs of seniors, the disabled and their families.

For more information, visit Mr. Vanarelli's web sites at
dvanarelli.lawoffice.com and elderlawanswers.com/attorney/vanarelli.html

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ficiaries is permitted, and tax savings result.



LAW OFFICES OF
DONALD D. VANARELLI
The Legal Centre
211 North Avenue East
Westfield, NJ 07090
Tel: (908) 232-7400
Fax: (908) 232-7214
Email: dondv@superlink.net
Website: dvanarelli.lawoffice.com