

YOUR LEGAL RIGHTS

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- CP Good Morning and welcome to this week's version of your legal rights. My name is Chris Placitella. I'm a partner here at Wilentz, Goldman & Spitzer. Today's topic focuses on elder law and nursing homes. A topic we have received numerous requests for from our audience so we are trying to comply with your requests. During the course of today, you are going to hear from Elizabeth Dell. Elizabeth is an attorney with Wilentz, Goldman & Spitzer who is state-wide renowned for her knowledge in elder law. What you will hear from Elizabeth is an overview of some of the issues facing families dealing with nursing homes. This is not specific legal advice but general information that will allow you to ask the right questions when you go to see a lawyer or when you are planning for the next transition in life. So, if you have specific legal questions and you need specific legal advice, you need to consult a lawyer. That is not the purpose of this show. However, during the course of the show, you can email questions to us that we will ask Elizabeth and she will attempt to answer them to the best of her ability keeping in mind that she can not give you specific legal advice without knowing all the facts and circumstances of your particular situation. So with that prelude, I'd like to welcome this morning Elizabeth Dell. Good Morning Elizabeth, how are you?
- ED Fine thank you. How are you?
- CP Thank you for agreeing to appear here and to help our audience understand the issues surrounding elder law and nursing homes.
- ED Thank you. I'm happy to be here. There are a lot of misconceptions out there that I see when people come in to be our clients and I'd like to clear some of those up.
- CP Okay, and what we're going to try to do to start is to get some building blocks – we're not going to talk about as I understand it today the emotional issues that you have to deal with when you're going to make these plans when you have to decide whether someone has to go into a nursing home but rather the financial issues that people have to come to grips with which are significant.
- ED Exactly.
- CP And I guess the first question is that when it comes to the point in time when a family situation when people have to decide whether an elder member of their family should go into a nursing home, what are the financial considerations that people have to take into account in making those kinds of plans?
- ED Okay, well I guess the main financial consideration is that it is extremely expensive.

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Nursing homes are generally about \$6 to \$7 thousand dollars a month in the state of New Jersey now and there are very few people who can afford that. People who've planned ahead and have had the resources to do it may have long-term care insurance but other than that, you are relying pretty much on your own resources that you have saved over your lifetime or there are two government programs that can cover the costs. One, to a very limited extent is Medicare and there is one misconception among a lot of people I find is that people think they don't need to do any kind of planning because they assume that since they are over 65 and getting social security and their Medicare is helpful to them when they go into the hospital or when they go to the doctor that they don't have to have any other than Medicare and maybe a Medicare supplement. But, unfortunately, Medicare is very limited in its coverage of long-term care because Medicare covers skilled care not custodial care. So, it covers the hospitals, it covers the doctor, but it doesn't cover a nursing home stay with very limited exceptions and those are if you meet certain requirements like you are in the hospital first, you go to the nursing home within a certain number of days, you're getting skilled care like, you're on a feeding tube or you're getting rehab – some other requirements, but the main one is that you can get no more than 100 days of coverage in a nursing home, if it's a skilled care facility. So really, for most people, that's a drop in the bucket and it really is not going to cover the costs so I want to clear that up because many people think that there's no need to do any planning, there's no concern that they have because they have Medicare and that's really not true unfortunately.

CP I want to just back up one second because even I get confused sometimes . . .

ED They are confusing.

CP What is the difference between Medicare and Medicaid?

ED Unfortunately, they sound a lot alike but they're very different. Medicare is a federal health insurance program for people who are over 65, getting social security, or people who are disabled and has been getting social security disability for two years. And again, that covers doctors, nurses, skilled care. Medicaid is very different in that it will cover long care so that it will cover a nursing home indefinitely but the patient needs to meet certain financial eligibility requirements. There used to be a significant income tax which is not as important any longer in New Jersey. What's most important is the resource test. So originally, it was designed as a program for poor people so people that want to get Medicaid have to get into a position where their resources are relatively low in order to get Medicaid.

CP So, just for review, Medicare is not a need based system . . .

ED That's correct – that's correct.

CP It's a system you're entitled to under our current law . . .

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- ED Exactly.
- CP . . . based upon your age or health status.
- ED Right. No matter what your resources are, you get Medicare.
- CP Okay, but you have to either be disabled or be 65.
- ED Right, exactly.
- CP Medicare does not have kind of needs based component to it.
- ED Medicaid does.
- CP Medicaid rather. Okay. You said there's a resource test for Medicaid. What does that mean?
- ED Right. That's a little bit complicated but the main thing is that the patient, the person who is in the facility may have no more than \$2,000 of resources. If there is a spouse, in Medicaid lingo, that's called a community spouse, the spouse is not in a facility, living at home, can keep certain resources and those are primarily the home, that's the most important one for most people obviously, one car, personal belongings, prepaid funeral expenses, some other items and then a certain amount of non-exempt resources or a certain amount of cash or stocks or whatever it may be and that amount changes every year. Its called a community spouse resource allowance. And right now, the minimum that the community spouse may keep is \$18,552. The maximum is 50% -- one half of the couple's total non-exempt resources, so the total cash and stocks and so forth, but there's a cap on that.
- CP What do you mean by non-exempt resources?
- ED Well the exempt resources would be the home, the car, the prepaid funeral . . . and then most people have some cash or some other items that are not specifically exempted. So, out of that, the community spouse gets to keep a minimum of \$18,552 this year – it goes up a little bit every year – or a maximum of one-half of what their non-exempt resources are, except that there's a cap on that – and the cap goes up every year. This year its \$92,760. So, what you want to do in a situation like this is to get the family in a position where the patient has \$2,000, the community has the most that she can keep, the most exempt resources and there's cash whatever the other amount is and then you do things with the other assets that are not protected in order to get those assets down to the appropriate level so that the patient can get Medicaid as soon as possible.
- CP So, this is a pretty serious issue as we have an aging population and people believe they are saving their whole life, that they're going to have a certain lifestyle . . .

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- ED Right.
- CP . . . you know until the time they pass and then they want to hand money over to their children for what they've worked for their entire life, but that may not be the case . . .
- ED That's exactly right.
- CP . . . should – you know – their life take a wrong turn.
- ED Right.
- CP Whether its dementia, Alzheimer's or just general care. So this is something people really need to know about.
- ED That's exactly right.
- CP So, because what you're telling me is if a family works their whole life and they save a million dollars and they have a separate – they have a real sense of how they want to live the rest of their life out – whether they want to be in Florida or here, its really immaterial – but the most they're able to keep if one spouse goes into a nursing home is \$92,000 plus their house and care and those kinds of things.
- ED Right. Most of the people who I see who are doing this kind of planning, don't have a million dollars – its more maybe they have a house that they bought for \$20,000 years ago which is now worth \$200,000 and maybe they have an extra \$100 or \$200,000. Those are really the people who are getting crunched because they can't afford to pay \$7,000 per month for one and have the other spouse live in the home.
- CP So, what happens – let's say you have \$300,000 in non-exempt assets and your spouse goes into a nursing home, do you have to automatically have to hand over the excess over the \$92,000 or do they chew it up until the point where it comes down to \$92,000 and there's nothing left?
- ED They chew up month-by-month. Uhhh – what happens is you would just pay the nursing home privately, month-by-month and when you go to apply for Medicaid – if you had not gotten down to those appropriate levels – Medicaid would say come back when you have gotten down to this point and they'll give you the number that you have to be down to and then you just need to spend that on your expenses – whether it's the nursing home or other expenses until you're down to that level.
- CP Now, who makes that kind of examination when you're getting close to the wire?
- ED What happens is the family goes to the County Board of Social Services in the county where they live – that's where the Adult Medicaid Office is – and you file an application.

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- CP And how long does that application take?
- ED It usually takes two or three months or something like that and there's an extensive review of the family's resources, tax returns, all kinds of documentation has to be supplied, birth certificate, marriage certificate, death certificates, it's a lot of information, three years worth of bank statements, so it's a difficult process to go through.
- CP Is that something you would recommend people do on their own or should they have some kind of help?
- ED It depends on the situation, many people are able to handle a lot on their own. If they're not, they can certainly have an attorney help them do it.
- CP Or their accountant?
- ED Or their accountant – whoever they feel is appropriate.
- CP Now, what happens – you often hear stories where people are getting the sense that they are going to have to place a grandparent or a spouse in a nursing home because they can see them kind of going down hill . . .
- ED Right.
- CP And seven months before that, six months before that they start transferring assets to their children or to their nieces or whatever the circumstances are. Can you do that kind of thing?
- ED You can. What you have to know is what the transfer rules are for Medicaid purposes. And this is a big area where there's a lot of misinformation. Basically, what happens is there's what's called a 36-month look back so that on this application that the family files, there will be a question that asks what assets have been transferred by the patient in the last 36 months. If there were none then that's fine and as long as they are down to the appropriate level of resources and the person can qualify. If there were transfers, some other questions are asked and what happens, unfortunately for many people, they think that if they haven't done any transfers 36 months (3 years) before the person goes into the nursing that its too late, that there's no planning that can be done. And that is not the case, even at the last minute, you can generally save at least half of the assets, the non-exempt resources. So what happens is if you say that assets have been transferred in the prior 36 months, then the next question is well how much? And assuming you have transferred less than about \$200,000, the waiting period – what Medicaid calls the penalty period, the period for which you are disqualified from getting Medicaid is not the 36 months, its actually a shorter period and the way that period if determined is they take the amount you have transferred and they divide it by a number which changes. Its generally – its supposed to be the average state-wide cost of a nursing home in New Jersey. It used to be a very low figure but more recently its

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been raised to a closer level to what's appropriate. Right now the number is 6,050. So this gets a little bit confusing. But basically, let's say, for instance, that somebody gave away \$100,000, they would review on the application that in the last 36 months they gave away \$100,000, but Medicaid doesn't say, they can't get Medicaid for three years. They take the \$100,000 or whatever has been transferred in that 36 month period and they divide it by 6,050 and if you do that math you get 16. So, that would mean that because the person transferred \$100,000 they can't get Medicaid for 16 months and you can use that to plan because what you do generally, is you do some transfers but you keep enough to pay for the penalty period, so in most cases, you can say that again, at least half. Now depending upon what the transfers were, the rules are little bit different so I wouldn't want anybody to go out and act upon this without anybody looking at their specific situation but let's say somebody gave away \$300,000. If you divide the \$300,000 by the 6,050 you're going to get more than 36, so what happens in that case is Medicaid would actually look at the number of months that you got if you went in and applied and they said well, you're disqualified for this number of months which is more than 36. So, if you're making a large transfer, more than about \$200,000, you have to wait the full 36 months so that when the question is raised on the application, have you made any transfers in the last 36 months, you can answer no. So, you can give basically at least half, if you've done no planning in advance and you may be able to do more than half depending upon what the assets are.

CP So, for instance, if you have significant assets and its within 36 months, you can transfer – how much of that – all of it?

ED You could give everything – if its significant meaning over \$200,000 -- . . .

CP Right.

ED . . . if you're giving away more than \$200,000, you need to give that away, keep what you need to pay for 36 months factoring in what your income is and what your costs will be and then at the end of the 36 months, you have no money left or you're down to the \$2,000, if you have a spouse, then she has what she's allowed to keep and then you can say on the application that you've given away nothing in the last 36 months and you would be eligible.

CP Okay. So, that's obviously for people of a higher net worth.

ED Right.

CP And there are some of those – some of those people don't know what to do sometimes.

ED Right.

CP Is there a different kind of planning for this kind of long term care, if you plan for it. In other words, more than 36 months out.

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- ED Yes, yes.
- CP How would you approach it differently?
- ED Well, the earlier you do this the better off you are. I mean, if you've given away \$400,000 and you don't get sick for 36 months well then you're fine because no one is even looking at that transfer until 36 months has gone by.
- CP Right.
- ED So, that's free and clear. Even if you have a smaller amount that you're giving away, if you wanted to give away \$50,000 and you didn't get sick for a few months, then that \$50,000 is free and clear. So, yes, it is better to do it sooner rather than later but if I had a nickel for every client who said gee I should have done this sooner, we knew that there was a problem coming up and we didn't do anything, yeah, that's the ideal situation, you'd like to do it sooner but even if you haven't, there are things you can do even when the person is going into the nursing home the next day or is already in the nursing home.
- CP And what again, specifically, what should be done?
- ED Well, it depends on everybody's situation. You know, sometimes its giving more to the community spouse, sometimes its transferring to children, sometimes its doing things like, for instance, Medicaid is more and more interested in putting liens on estates of deceased Medicaid recipients, so sometimes it something like taking the name of the patient off the deed and putting the deed in the community spouse's name so that she can leave it in her will to children, so that if she dies before her husband, now the husband may have done all this planning to get him onto Medicaid, she dies and if he now takes the house by right of survivorship, he can have only \$2,000, he no longer has a spouse living in the home so its no longer exempt, so that's a problem. So, a lot of things have to be looked at in this situation. You need to look at people's documents, their wills, whether they have powers of attorney, whether the power of attorney may authorize their children or their spouse to make gifts so that if the time comes when these transfers are appropriate and the person's no longer able to do it because he or she is incapacitated mentally, then the children might do it in the appropriate situation. You have to look at other people's documents – let's say that you have someone that might leave something to their patient in his or her will – you want to make sure that doesn't happen. So, there's a lot to look at, really, you need an attorney to review your situation and everyone's is different. But, there really are things that can be done and a lot of people spend month-by-month-by-month and they don't really know how other people got onto Medicaid but they think that there's nothing they can do because they didn't do anything 36 months earlier and that's really not the case.
- CP Okay, I'm going to try to take a couple of assets and figure out how we're going to deal with that.

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- ED Okay.
- CP The house.
- ED Okay.
- CP Now, if you and I are married and I have to go into a nursing home – don't laugh about that . . .
- ED Okay, I'm glad its you. (Laughter)
- CP And I have to go into a nursing home, what can you do – do you have to do anything or what can you do to give yourself the maximum protection for the home that we've lived in?
- ED Okay, well, as long as I'm living in the home, its exempt. So many people thing that there's nothing that needs to be done. But the first thing that I would probably do would be to have you sign your interests in the home over to me, so that I would own it because if I die before you, I don't want you to take the home, I want to leave it to the children in my will, so that's the first thing I would do.
- CP Because, just so we are clear. Because if its in my name and you pass first I know I get you but if you pass first then the home essentially goes to the nursing home?
- ED Well, yes. When you're off Medicaid and you're spending month-by-month until its gone. Also, if your name remains on the deed and you die, even though Medicaid won't try to do anything to take the home while I'm alive, they will put a lien so that when I at some point sell the home or if I die and try to leave it to the children, there's going to be a lien on it for the costs of your care.
- CP Okay, but let's say its within the 36 month period . . .
- ED Right
- CP We own the home together. I eventually have someone go to the nursing home.
- ED Uhmm hmmm
- CP The fact that I sign the deed over to you at that point, the title over to you exclusively, there's no penalty . . .
- ED That's correct. There's no penalty for assets which are transferred between spouses. Since both spouses assets are considered in the Medicaid application, there's no penalty on what we give to each other. Now, if you said, we're also concerned that I'm going to go into the nursing home, let's give it to the children and we did a deed signing it over to the children, now, that is a transfer that needs to be revealed and that would be

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subject to a penalty.

CP Suppose you do that in two steps.

ED Well, that's a good question.

CP The question is I sign the deed over to you, you wait some respectable amount of time and you sign it over to our children.

ED If I signed it over . . .

CP By the way, there's nothing going . . . its hypothetical.

ED LAUGHTER – if I signed it over during the time before you applied or before your application is approved, that's a problem, because they're looking at my transfers to the children as well as yours. If, however, you're in the nursing home, you get on Medicaid and then I chose to sign it over to the children, that should not affect your eligibility, however, it would affect my eligibility if I got sick, when I'm applying, they're looking at what I've done in the last 36 months but it should not make you ineligible.

CP So, that's a good thing . . .

ED That's one of the second things to look at in that situation whether a second transfer should be made, not only taking the ill person's name off the deed but whether then the spouse should do a deed to the children.

CP Now, you said something before about transfer of assets between spouses, now are you talking about non-exempt assets?

ED Any assets.

CP Well, let me ask you this question then, we jointly own our stock account and I sign over all title and rights of that stock to you. Then I decide I'm going to go into a nursing home. Does that protect all that stock?

ED No, because you can have only the \$2,000 and I can have the \$96,000, so it does not protect that stock. They look at all of our resources and they say you have \$2,000 and I can have \$96,000, anything above and beyond, we can't have so we need to spend until the point that we are down to that level and then you can get Medicaid.

CP Cause that's why its different with the home . . .

ED Right.

CP Because its an exempt asset, you can move it around a little bit more easily.

