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January 20, 2012 by Deirdre Wheatley-Liss

Top 10 Elder Law Cases of 2011



New Jersey accounted for 30% of the most important court rulings on elder law issues in 2011. **The crib notes version? Stay within the line and intent of the law to get the results that you want.** The courts are supporting Medicaid's ability to create a period of denial because of a transfer of assets to family members. This is in line with one of the core principals of Medicaid eligibility - the state will pay for your long term care if you have a dire financial need, but not if you manufactured that need in the past 5 years by transferring assets to your family.

The key takeaway - effective plans are put into place well before they are needed and fully conform to the law.

This "Top 10" list comes courtesy of elderlawanswers.com:

1. Medicaid Applicant's Penalty Period Does Not Begin Until Returned Assets Are Spent Down

The U.S. Court of Appeals, Third Circuit, rules that a New Jersey Medicaid applicant who transferred assets and then had some of the transfers returned cannot get credit toward her penalty period for the time before the transfers were returned that she was resource-eligible. *Marino v. Velez* (U.S. Ct. App., 3rd Cir., No. 10-2324, Jan. 10, 2011).

What do you need to take away? If you made a gift in the 5 years before you applied for Medicaid, and you lost the "bet" that you wouldn't need Medicaid for 5 years, the ENTIRE gift needs to be returned, and spent down, before you will qualify for Medicaid. To be successful, you need to plan early so that you have a greater likelihood of not needing care for 5 years.

2. State Cannot Recover Assets That Were Transferred Before Medicaid Recipient Died

In a case pursued by ElderLawAnswers member attorney Peter C. Sisson, an Idaho district court rules that the state cannot recover assets from the estate of a Medicaid recipient's spouse that were transferred to the spouse before the Medicaid recipient died. *In Re: Estate of Perry* (Idaho Dist. Ct., 4th Dist., No. CV-IE-2009-05214, March 16, 2011).

3. Federal Court Rules Ahlborn Does Not Bar Medicaid Recovery From Future Medical Expenses.

A federal district court rules that a state Medicaid agency may recover the cost of a beneficiary's medical care from the portion of her personal injury settlement that was allocated to medical expenses, regardless of whether the funds were allocated to past or future medical care. *Perez v. Henneberry* (D. Colo., No. 09-cv-01681-WJM-MEH, April 26, 2011).

4. Court Upholds Nursing Home Resident's Eviction Prior to Resolution of Medicaid Appeal

A Kentucky appeals court holds that a nursing home may evict a resident for nonpayment despite a



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pending Medicaid appeal. *King v. Butler Rest Home, Inc.* (Ky. Ct. App., No. 2010-CA-001467-MR, June 17, 2011).

5. Payments to Caregivers of Dementia Patient Are Deductible Medical Expenses

The U.S. Tax Court rules that payments to caregivers of a dementia patient are deductible medical expenses, even though the caregivers were not licensed health care providers. *Estate of Lillian Baral* (U.S. Tax Ct., No. 3618-10, July 5, 2011).

What do you need to take away? This is a win for caregivers. Catastrophic medical expenses in excess of 7.5% of your adjusted gross income are deductible. This may offset some of the costs of care.

6. Third Circuit Affirms That N.J. May Count Promissory Notes As Available Resources

In a long-running case that has bounced back and forth between two federal courts, the Third Circuit Court of Appeals rules that New Jersey's Medicaid agency may analyze promissory notes as trust-like devices and count the notes as available resources. *Sable v. Velez* (U.S. Ct. App., 3rd Cir., No. 10-4647, July 12, 2011).

What do you need to take away? While the court specifically advised that this case was not precedential, if you are making loans, they need to be real and fit within the requirements of the law. They need to be in writing, actually repaid, and consistent with the law.

7. Transfer of Medicaid Applicant's House to Son Falls Within Caregiver Child Exception

A New Jersey appeals court rules that the transfer of a Medicaid applicant's house to her caregiver son is not subject to a Medicaid penalty period because it falls within the caregiver child exception. *V.P. v. Dept. of Human Services* (N.J. Sup. Ct., App. Div., No. A-2362-09T1, Sept. 2, 2011). To read the full summary, [click here](#).

What do you need to take away? The Medicaid applicant was successful because the caregiver child was able to prove that he actually provided a high level of care including walking, bathing, and cooking. In short, he had good facts. If you are a caregiver child looking to someday keep your home by taking advantage of this exemption, you will also need good facts. Start keeping a log of what you do now.

8. U.S. Court Rules Connecticut Likely Cannot Refuse Spousal Refusal Doctrine

Ruling that a state statute violates federal Medicaid law, a federal district court grants a preliminary injunction preventing Connecticut from denying Medicaid benefits to an applicant seeking to disregard his spouse's assets using the doctrine of spousal refusal. *Fortmann v. Starkowski* (D. Ct., No. 3:10cv1562 (JBA), Sept. 28, 2011).

9. Medicaid Applicant's Transfer to Daughter Created Trust-Like Device

A federal district court rules that when a Medicaid applicant transferred money to her daughter with the intention that the daughter pay for her care during the resulting penalty period, she created a



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trust-like device, so the money is still an available resource. *Pfeffer v. AHCCCS* (U.S. Dist. Ct., D. Ariz., No. CV-11-0891-PHX-GMS, Sept. 29, 2011).

10. Irrevocable Trust Set Up by Medicaid Applicant's Children Is Available Asset

A Wisconsin appeals court rules that a Medicaid applicant who transferred funds to her children, who then put them in an irrevocable trust for her benefit, is ineligible for Medicaid because the trust is an available asset under state law, even though the transfer occurred 17 years before she applied for Medicaid. *Hedlund v. Wisconsin Dept. of Health Services* (Wis. Ct. App., No. 2010AP3070, Oct. 13, 2011).

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