

Medicaid Listening Tour – Testimony

Real Life Medicaid Estate Planning

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October 2005

A number of comments submitted for this Listening Tour propose that Pennsylvania crackdown on financial planning strategies supposedly used by middle-class families to preserve personal assets while obtaining eligibility for Medicaid nursing home care. They denounce such planning as "legal loopholes" that turn Medicaid into an asset protection program, instead of what it is supposed to be — the insurer of last resort for elderly people too poor to afford care.

Before Pennsylvania goes down this path, the Commonwealth should look beyond the accusative catch phrases to find out what really goes on in families faced with serious long-term care needs, why they seek legal help, and what planning actually accomplishes. My practice offers one window into that world.

The Birth of "Medicaid Estate Planning" in my Practice

In 1981, I opened my law practice in the small town of Jersey Shore, Pennsylvania, not far from Lock Haven where I grew up. Curiously named, Jersey Shore is located in predominately rural North-Central Pennsylvania. There are over 1300 farms in the county, most of them small. The county seat, Williamsport, is known as the home of Little League Baseball. This is Northern Appalachia and people work hard for their

modest incomes. Sixteen percent of the population is over age 65 – well above the national average.

In the summer of 1982, I met with a client named Betty about the sale of her home. Betty was in her late 70's and was having a hard time of it. Her husband, Carl, was in a nursing home, and the money to pay for his care was running out. The nursing home administrator told her she would have to sell her home to pay for Carl's costs. Betty didn't know where she was going to go, but she had found a buyer for the house, and wanted me to draft an agreement of sale.

I told Betty that it didn't sound right to me that she would have to sell her home to pay for her husband's care. Didn't Medicare or some other government program help? I asked her to give me a couple of days to see what I could find out.

Information on financing nursing home care was hard to come by. But, eventually, I did learn that Medicaid should pay for Carl's care and that Betty really shouldn't have to sell the couple's home.

The local Medicaid office initially agreed with the nursing home. The caseworker said "lawyers don't know anything about this stuff." Nevertheless, I convinced her to check out her interpretation of the Medicaid policy with her supervisor. She learned she was wrong. Betty could keep her house.

Carl qualified for Medicaid, which helped pay for his care until his death the next year. Betty never did sell her home. She continued to live there for another 15 years, and died in her own bed at age 92.

Thus, began my work as a Medicaid estate planner. Betty and Carl were the first of my Medicaid planning clients. Word slowly spread that there was a lawyer in Jersey Shore who could help families struggling with nursing home costs understand the rules. In 1991, I hired a social worker to assist with the care-planning concerns of my

clients and to help them navigate the fragmented and complex federal and state long-term care support systems. Later I added additional social work and nursing professionals.

The Characteristics of My Medicaid Planning Clients

My average Medicaid planning client is someone in his or her 80s, slightly more likely than not to be married, a homeowner, with a net worth of \$50,000 to \$200,000 including their home. Their incomes are too low to have made long-term care insurance a viable option for them. Based on my 23 years of experience, these are the people who are engaging in Medicaid Estate Planning. These are the people who will be most impacted by any changes in the transfer rules.

But these are just the numbers. Let me introduce you to two of my clients who are representative of the group at large. I have included one client whose net worth is above the average. (The following names and identifying information have been modified slightly to protect my clients' privacy).

The Weland's: Parkinson's vs. Cancer

I meet with Hubert Weland and his children Joan and Mike, at Mr. Weland's home. Hubert's wife, Gloria, is 74 years old and was admitted to a nursing facility four months before. She is suffering from advanced Parkinson's disease and dementia. She requires total nursing care, and does not always recognize family members. Hubert pays \$5,850 per month for his wife's care.

Hubert is 78, a retired tailor. Devoted to his wife, he cared for her for years at home. But now he is suffering from cancer that started as prostate cancer and has spread to the bone. Even with the help of his children, he could care for her no longer.

Hubert is still living relatively independently, although Mike spends nights at Hubert's apartment with him. Hubert does not have home care or hospice and says he does not want these services. The children say that Hubert is extremely depressed and has talked of suicide. Hubert is refusing his cancer treatments and refuses antidepressants or to see a professional for treatment of his depression.

Several years ago, Hubert and Gloria sold their home and moved to the apartment. Hubert still has about \$78,000 in savings left from that sale. But the Medicaid rules will allow him to keep a resource allowance of only \$44,000. His wife is permitted to retain \$2,400. This leaves him with \$31,600 in available resources to spend down before Gloria will qualify for Medicaid.

After much discussion, Hubert decides to give \$10,000 each to Mike and Joan as their "inheritance." He tells them they need to take care of their mother when he is gone. Mike and Joan agree to accept the money only if their father will agree to get treatment for his cancer and for his depression. Hubert reluctantly agrees.

The gift to the children will make Gloria ineligible for Medicaid for 3 months. Hubert will use his remaining funds to pay for her care for the three-month period. He also decides to update his will so that the allowed portion of any estate that might remain at his death will go to a special-needs trust to supplement his wife's care.

About six months later, Hubert dies. Joan later tells me that he did accept Medicare-covered Hospice which was a great help in easing his passing. And, being able to set aside a little money for his wife and children was an incredible relief to him.

Joan asks me why we make things so difficult for people at the end of their lives. Why do we take everything away from people who worked hard all their lives when they are old if they get sick with the wrong kind of illness? Why was her father's cancer and hospice care covered, but her mother's Parkinson's is not? I tell Joan I don't have any answers for her. It doesn't make sense to me either.

The Lewis Family Farm

Marguerite Lewis is 83. She lives on a 91 acre farm known as “Greencastle.” It is a “Century Farm” -- the family has owned, lived on, and farmed this land for over 100 years.

Marguerite’ son, Perry, and his wife Beth, live on the farm adjoining Greencastle. Perry and his father Dean had worked both the farms until Dean had a stroke 10 years ago. Beth helped Marguerite care for Dean at home until his death 6 years later. Now, Perry works both parcels himself with some help from his son-in-law. They grow mostly corn and some beans and hay. It is hard work for Perry who is now in his 60s himself. But, he was born on this land, and could never leave it.

Perry and Beth come in to see me. They tell me that, since Dean’s death, Marguerite has been in slow decline. She has COPD (Chronic Obstructive Pulmonary Disease) and she seems to be getting confused more and more easily. Beth is the main caregiver -- she moved from caring for Dean to Marguerite. Beth’s daughter helps some, but she works and has school-aged children, so Beth really never gets a break. “She is worn out,” says Perry. “There is no choice,” responds Beth.

Marguerite has a total monthly income of \$779 in Social Security and \$500 in farm rent from Dean. Her assets total \$5,000 in checking and savings plus about \$240,000 equity in Greencastle Farm.

The local Agency on Aging has done an assessment of Marguerite and determined that she would qualify immediately for services under the Medicaid-financed home waiver program. But, the case worker told the family that getting services under the waiver program will mean that Greencastle will be subject to Medicaid Estate Recovery when Marguerite dies.

Perry and Beth ask me if anything can be done to save Greencastle farm and keep it in the family. Perry says his mother and father wanted to give him the farm many years ago, but he refused to accept it because of his precarious financial situation at the time. I can hear the guilt and shame in his voice - he may be the one to lose the family farm because he didn't understand the Medicaid rules. Now, it may be too late.

After a later meeting with Marguerite, and going over the complicated options, it is decided that she will deed the farm to Perry but retain a life estate. This transfer will be penalized and will make Marguerite ineligible for home waiver services for a lengthy period of time. But the retained life estate will reduce the transfer penalty period somewhat because she is giving away less than the full value of the farm. Eventually, the penalty period will expire and Marguerite will qualify for Medicaid long-term care benefits. And, under current Pennsylvania law, at Marguerite's death, the property will pass to Perry free of Medicaid Estate Recovery.

There are a lot of risks to this plan and a lot of burdens. But Marguerite and her family have limited choices. During the Medicaid penalty period, Beth will ask her daughter for additional help. And Perry will re-finance the mortgage on his farm to free up some money to hire additional help to supplement the care that Beth and her daughter can provide. They understand that, if Marguerite needs nursing home care during the penalty period, they may have to deed the farm back to her to cure the penalty. In that case, the farm will have to be sold after Marguerite's death to pay off the Medicaid Estate Recovery claim. If that happens, they will not be able to borrow the additional money needed to buy the farm and it will go out of the family.

What "Transfer Reform" Will Do

These are relatively typical examples of the people who transfer assets in the manner currently permitted by the Medicaid rules. They don't want to go on Medicaid. They don't want to share a tiny room in a nursing home. They are not "greedy-geezers" trying to game the system and get something for nothing. And I don't see myself as

part of some cottage industry of Medicaid lawyers. I provide needed information on all options for families in crisis.

No doubt a few people take unfair advantage of Medicaid rules. But they are not the norm. The good people who will be penalized by tightening the transfer rules are the people I've described above. The most egregious proposal would delay the start of the penalty for property transfers to the date of Medicaid application. This would leave the Weland's, the Lewis', and others like them without needed long-term care, without alternatives, and without hope.

These are people of virtue who find themselves in crisis. They may be facing the most desperate circumstances of their lives. They are trying to care for and protect their families, and to maintain a little dignity and security and quality of life. They are not taking advantage of "loopholes." They transfer assets as a last resort.

Their goals are modest: keep a loved-one home as long as possible; protect a spouse; avoid total impoverishment; set aside some funds to pay for items and services that are not covered by Medicaid; provide a small legacy to pass on to their children from their years of hard work. If government rules totally prohibit transfers of assets, even these modest goals will be unattainable.

Proponents of proposals to further restrict transfers of assets are missing a vital principle - we need to reward the virtue of families, like the Weland's and Lewis', who have worked hard all of their lives and have contributed so much to our society.

As a matter of principle, isn't it wrong for us to say to people "work hard, save your money, do all the things that represent an A+ on the American Dream scorecard, so that when you are old and get sick we can take everything away from you. We will take your income and all your savings, and your pride and dignity. You followed the rules and worked and saved - but you got Alzheimer's. Tough break. Your reward is to lose everything."

This policy is immoral, un-American, and is an attack on economic virtue and the American family. My clients say to me - "why did we work so hard and scrimp and save for our later years? The people who didn't work and didn't contribute get their care paid for. Why are they rewarded for their laziness, while we are being punished for working and saving? It's not fair."

My clients are right. It is not fair.

People who work hard all of their lives ought to be able to retire with dignity and access to needed care without totally impoverishing themselves. We shouldn't punish their virtue. They did what society wanted them to do. They paid their taxes, raised their children, served their country during war, and worked hard their whole lives. Now that they are old, and frail, and sick, and dependent on others for even their most basic needs, we shouldn't take everything away.

Why do we force people into destitution before helping them meet their care needs? Is this the message we want to send to today's workers? Is this the type of society we want to face when we retire? If we live long enough, this time will come for all of us.

Thank you for the opportunity to submit these comments.

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