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Top Elder Law Decisions of 2010

February 24, 2011 by [Deirdre Wheatley-Liss](#)



Courtesy of ElderLawAnswers.com, below is a roundup of the most influential elder law court decisions of 2010, together with my thoughts as to how those cases might carry into New Jersey. The Medicaid Annuity is still generating decisions across the county, as well as questions as to when a penalty period created by a transfer begins to run.

1. Nursing Home Resident May Not Transfer Assets Beyond the CSRA to Spouse

A U.S. district court holds that under Medicaid law an institutionalized spouse may not transfer assets beyond the CSRA to a community spouse after the Medicaid recipient's eligibility has been determined. *Burkholder v. Lumpkin* (U.S. Dist. Ct., N.D. Ohio, No. 3:09CV01878, Feb. 9, 2010). To read the full story, [click here](#).

(DWL – this is an unusual factual situation with a Medicaid recipient received inheritance after they were already nursing home and receiving benefits. Essentially, this maintains that the Community Spouse can only keep one half of the couple's assets up to a maximum of approximately hundred and \$10,000, the Community Spousal Resource Allowance or “CSRA”)

2. Mass. Court Finds a Contract Transferring House Is Valid / California Court Finds that it is Not

A Massachusetts appeals court finds that a contract in which parents transferred property to their daughter so that they might avoid a Medicaid lien does not fail for lack of consideration because the daughter's promise to sell the property after her parents' death and distribute the proceeds to her sisters constituted valid consideration. *Cascio v. D'Arcangelo* (Mass. Ct. App., No. 09-P-1039, March 30, 2010). To read the full story, [click here](#).

The *Cascio* summary is paired with a similar, and also much-read, case from California, *Lizaso v. Lizaso*.

(DWL – in the *Lizaso* case the court found the opposite, namely that a contract entered into solely for the purposes of obtaining Medicaid is void.)

3. Medicaid Recipient's Life Estate Is Part of Probate Estate

An Iowa court of appeals finds that a Medicaid recipient's life estate in her house is part of her probate estate for the purposes of satisfying debt, so the house does not pass directly to the remainderman. *Escher v. Estate of Escher* (Iowa Ct. App., No. 09-1198, April 8, 2010). To read the full story, [click here](#).

(DWL - Here again, this case presents rather unusual factual circumstances in that the remainder person purchased life estate interest; normally, we do have a situation where a person makes a gift of the remainder interest while retaining a life estate. The point here was that the purchaser still needed



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to pay the agreed upon price for the life estate, which the purchaser has stopped paying upon the Medicaid recipients death)

4. Medicaid Applicant's Penalty Period Begins When Applicant Is Eligible for Medicaid

A federal district court determines that when imposing a penalty on a Medicaid applicant who made uncompensated transfers within the look-back period, the penalty period should begin to run when the applicant was otherwise eligible for Medicaid, not when the applicant is actually receiving benefits. *Frugard v. Velez* (U.S. Dist. Ct., D. N.J., No. 08-5119 (GEB), April 8, 2010). To read the full story, [click here](#).

(DWL – This is a New Jersey case, and falls squarely within a plain language reading of the Deficit Production Act in that the penalty period begins to run at the later of (1) the date of the uncompensated transfer, or (2) when the applicant would have begun to receive Medicaid benefits if not for the transfer penalty).

5. Penalty Period Does Not Start Until Applicant Has Spent Down Returned Funds

A U.S. district court finds that the penalty period for a New Jersey Medicaid applicant who transferred assets and then had some of the transfers returned does not start running until the applicant has spent down the funds from the returned transfers to below the resource limit. *Marino v. Velez* (U.S. Dist. Ct., Dist. N.J., No. 10-911 (JAP), May 4, 2010). To read the full story, [click here](#). (A U.S. appeals court has subsequently affirmed this ruling.)

(DWL - this is another New Jersey case. This is similar to the other case New Jersey case in that it deals with when does the penalty period begins to run when there's been a transfer. Here, some of the money transferred was returned. The court found that plaintiff did not "become otherwise eligible for Medicaid" until she'd spent down the money that was returned her.)

6. Son Is Responsible for Medicaid Overpayment to His Father

A Pennsylvania trial court rules that the state may seek repayment of a Medicaid overpayment from the son of a Medicaid recipient rather than from the Medicaid recipient's estate. *Maloy v. Dept. of Public Welfare* (Pa. Commw. Ct., No. 1575 C.D. 2009, June 10, 2010). To read the full story, [click here](#).

(DWL - Here, the Medicaid recipient's son was his Guardian, and after the Medicaid recipient began to receive Medicaid, the son transferred some of Medicaid recipient's assets to himself. The court found that Pennsylvania could pursue the son not only because it was legally allowed, but it was equitable in that son was the one who made the transfers to himself in the first place, thus making the father no longer eligible for Medicaid).

7. Payments Under Personal Service Agreement Are Compensated Transfers

A New York appeals court "annuls" a Medicaid determination that a nursing home resident's payments to his son pursuant to a personal services agreement were uncompensated transfers. *In the Matter of Warren Kerner v. Monroe County Dept. of Human Services* (N.Y. App., 4th Dept., No. TP 10-00197, July 2, 2010). To read the full story, [click here](#).



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(DWL - this upholds that a personal care contract, if properly drafted and reasonable, provides value to the recipient Medicare in terms of services, and as such is not an uncompensated transfer for Medicaid purposes, which would otherwise create a penalty period.)

8. Assets in Trust Created by Husband Are Available for Purposes of Determining Wife's Medicaid Eligibility

A Massachusetts appeals court holds that a trust created by the husband of a Medicaid applicant independently of his will is a Medicaid qualifying trust even though the bulk of the assets in the trust passed through the husband's will. *Victor v. Mass. Executive Office of Health & Human Services* (Mass. Ct. App., No. 09-P-1361, July 21, 2010) (unpublished). To read the full story, [click here](#).

(DWL - this case turns on Massachusetts state law as to what is a Medicaid Qualifying Trust and what is not. In New Jersey, generally speaking, a discretionary trust created by a third party, with that third parties own assets for person's benefit is not a countable asset for Medicaid qualification purposes.)

9. Income Stream from Annuity Is Not Asset for Medicaid Eligibility Purposes

In a case pursued by the ElderLawAnswers member firm of CzepigaDalyDillman, a U.S. district court holds that Connecticut cannot treat the income stream from an annuity as an available asset for the purposes of Medicaid eligibility. *Lopes v. Starkowski* (U.S. Dist. Ct., Dist. Conn., No. 3:10-CV-307, August 11, 2010). To read the full story, [click here](#).

(DWL - under federal law, income and assets are separated in determining Medicaid eligibility. Here, Connecticut tried to argue that the income stream from annuity was an asset, not income. The court held that the income stream is just that, income."

10. Annuity Purchased Post-Eligibility Determination Is Available Resource

A federal district court rules that an annuity purchased by a Medicaid applicant's husband post-eligibility determination is an available resource. *Morris v. Oklahoma Department of Human Services* (U.S. Dist. Ct., W.D. Okla., No. CIV-09-1357-C, Sept. 24, 2010). To read the full story, [click here](#).

(DWL - Here, a husband was determined Medicaid ineligible. In order to create eligibility, the wife purchased an annuity, thus transforming what had been his asset into an income stream for herself. The Oklahoma court found that the now annuity should still be treated as an asset, because to do otherwise would make the law required the spend down of assets totally superfluous. The purchase of the annuity would have been a successful transfer had it been done prior to the state determining Medicaid eligibility for the husband.

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