Overcoming Presumption of Non-Exempt Transfers to Qualify for Medicaid

By Kim M. Smith

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Quite recently and consistently in Suffolk County, as well as several other counties, there have been favorable fair hearings decisions whereby the Administrative Law Judge (hereinafter "ALJ") has determined that prior gifts and/or transfers made within the look-back period by a Medicaid applicant, were made exclusively for a purpose *other* than to qualify for Medicaid. I recently succeeded on such an appeal in Suffolk County (FH No. 5679409R) and will discuss the factors and evidence presented within this article.

As most of you know, when an individual makes a non exempt transfer of assets within the five year look-back period, the presumption, for Medicaid eligibility purposes, is that the transfer was made for purposes of qualifying for Medicaid. Until proven innocent, the Department of Social Services (hereinafter "DSS") presumes the applicant is guilty. The burden of proof is on the applicant to establish that a transfer was made *exclusively for a purpose* other than Medicaid qualification. To best advice their clients as to whether or not there is a possibility of overcoming this presumption, the attorney assisting a client with Medicaid application needs to investigate the facts and circumstances surrounding any transfers or gifts made within the look back period.

Social Service Law Section 366.5(e) governs the transfer of assets made by an applicant after February 8, 2006 pursuant to the Deficit Reduction Act (DRA). For chronic care applications (those for coverage of Nursing Home care) filed on or after August 1, 2006, the "look-back" period is the period immediately preced-

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ing the date that an institutionalized individual is both institutionalized and has applied for Medicaid.

However, Social Service Law Section 366 (5)(d)(3)(iii) provides that "an individual will not be ineligible for Medicaid as a result of a transfer if a satisfactory showing is made that the asset was transferred exclusively for a purpose *other* than to qualify for Medicaid." In the normal course of practice this is not something that is usually addressed or evaluated at the Department of Social Services (hereinafter "DSS") caseworker or even the supervisor level, but more frequently requires a fair hearing. If the gift was one specific transfer that is easily proven to be for a purpose exclusively for a purpose other than to qualify for Medicaid, you may be able to address it with the caseworker and get the supervisor to sign off on it. For example in one case that I handled, the mother had given her son a check for approximately $20,000.00 during the look-back period for purposes of having a medical procedure performed that was not covered by the son's insurance. When the application was submitted I outlined the reason for the gift in my cover letter and included a copy of a check written from the son's checking account (the same account in which he had deposited the monies given to him from his mother) to his doctor in the same amount along with a copy of the doctor's bill. This satisfied Medicaid at the caseworker/supervisor level and no penalty ensued as a result of that gift.

Conversely, when the gifts are large or there are multiple gifts made during the look-back period, the caseworker/supervisor normally will not address the issue that the transfer was made for reasons other then for qualifying for Medicaid and you will usually need to argue your case at the Fair Hearing level.

In the case I recently argued, a penalty period was applied for multiple gifts given to the applicant's daughter, son, grandson, and granddaughter totaling in excess of $118,000.00. The caseworker had credited back some legal fees and medical bills prior to coming to this number. The resulting penalty was just shy of 11 months. I had not prepared or submitted the original application and to the best of my knowledge, the attorney who prepared the original application had not submitted an explanation of the transfers in his or her cover letter to Medicaid.

At the time the gifts were made, the applicant was living in the community and was not suffering from any severe medical issues other then the normal health problems and minor cognitive deficits that arise with age. The applicant was hospitalized as a result of sudden cardiac issues which magnified her dementia and rendered her unable to return to the community.

The health of the applicant is a major factor given consideration by the agency when determining whether the gifts were made for purposes other then for qualifying for Medicaid. If the individual was healthy for the most part, and living independently when the gifts were made, this will weigh greatly on your case. If the ultimate need for skilled nursing care was due to an unexpected fall, heart attack or even a stroke, you could argue that this was an unforeseeable catastrophic event that led to the ultimate need for skilled care. A letter or affidavit from a treating physician as supporting evidence and/or medical records included in your memorandum packet is helpful.

The gifts made by the applicant should not render him or her insolvent. If the applicant made gifts but still had enough assets to support them in the community your argument is more likely to be successful then if you had an applicant that made gifts that left the applicant with little or no monies because then you have a hard argument to substantiate as to why someone would give all of their money away if they planned on staying in the community.

You also want to show that the applicant and or his or her agent under the power of attorney tried to have the gifts returned. In my case I included affidavits from the daughter and the grandson, who were both agents under the power of attorney. They both attested to the fact that they tried to retrieve and/or return the gifts but that each individual had spent the monies and were not economically able at this time to return the monies. Also included in the affidavits were explanations of why the return of monies was not feasible. For example the grandson had broken his back (post transfers) while deployed and was unable to work and the daughter had been diagnosed and undergoing treatment for cancer and was also unable to work and unable to return the gift. The son and granddaughter did not submit affidavits as to why they could not return the monies or the specific purpose of the gifts and ulti-

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mately the original determination that these transfers were made for purposes of Medicaid eligibility was not reversed.

Additionally, your argument should point out that your applicant has no legal recourse under the fraudulent conveyance theory since an action under this theory can only be commenced where "transfers" are made that render the donor insolvent and to delay, defraud or hinder creditors. By demonstrating in your memorandum that the applicant was neither insolvent or had any unpaid creditors at the time the gifts were made, makes these gifts unrecoverable under State Law as a fraudulent conveyance.

I believe when possible it is important to include in your argument the purpose of the gift. In the case at hand, the grandson had received several gifts totaling in excess of $34,000.00 in 2007 and a separate gift in the amount of $8,000.00 in 2006. I included an affidavit that attested that the 2007 gifts were made for the purpose of reconfiguring a house purchased by the grandson to provide separate living quarters for the applicant and the grandson and that the 2006 monies were simply a gift. Included in my memorandum, were exhibits including all of the receipts for the items purchased for the renovations done by the grandson (i.e. Home Depot, Lowe's, PC Richards, etc.).

With regards to the daughter's gifts totaling approx. $30,000.00, it was explained in the form of an affidavit by the daughter that her gifts were given upon the occasion of her second marriage for purposes of purchasing a home. Included in my memorandum exhibits were the closing papers to the daughter's home along with the wedding invitation and marriage license of the daughter which were dated around the same time that the gifts were made.

When gifts cannot be returned and it is not safe for the applicant to return home, you may want to include an argument based on the hardship exception pursuant to Social Services Law Section 366.5(d). This statute provides that an individual will not be ineligible for Medicaid if the denial of benefits will result in an undue hardship. When the DRA was enacted, the promise from the legislature was that the undue hardship exception would be a viable alternative for seniors who made gifts, not in contemplation of applying for Medicaid. The New York Codes, Rules and Regulations lay out the conditions constituting undue hardship under 18 NYCRR Section 360-4.4. Under the Provision for Undue Hardship Waiver, the Agency's Administrative Directives provide (06 OMM/ADM-5 at p. 19): "An individual who is unable to demonstrate that a transfer was made exclusively for a purpose other than to qualify for nursing facility services, may have coverage authorized for these services if the individual meets the undue hardship qualifications." The four prong standard that needs to be met is as follows: (1) the applicant is otherwise eligible for Medicaid, (2) despite the applicant's "best efforts" he or she is unable to have the transferred assets returned, (3) the applicant's life or health would be endangered without the provision of Medicaid for nursing facility services and (4) the penalty would deprive the applicant of food, clothing, shelter, or other necessities of life.

Finally, if you have an applicant that has had a pattern of consistent gift giving over a significant period of time and the gifting did not make the applicant insolvent then you should demonstrate these facts to rebut the presumption that these gifts were made for the purpose of becoming eligible for Medicaid in the future by laying out the pattern of the gifts clearly along with supporting evidence for the caseworker or fair hearing officer.

There are still many cases out there where the decisions are not favorable and for the most part the determination made by the ALJ's in those cases is that the applicant had not offered enough evidence to rebut the presumption that the transfer made was motivated in part by the desire to qualify for Medicaid in the future. Therefore, it is important to draft a good argument with as much supporting evidence as possible to rebut this presumption and prove that the transfers of the applicant were transferred exclusively for a purpose other than to qualify for Medicaid.

Note: Kim M. Smith is solo practitioner in Islandia where she practices in the areas of Elder Law, Trust & Estates, Guardianship, Medicaid and Special needs planning. Ms. Smith is currently serving her second year of a two year term as Co-Chair of the Suffolk County Bar Association's Elder Law and Estate Planning Committee and is a frequent lecturer at the bar association. Ms. Smith is also the current President of the Suffolk County Women's Bar.