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# ❖ ELDER LAW REVIEW ❖<sup>TM</sup>

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## How Medicaid Treats a Return of Gift

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This month's Elder Law Review addresses the topic of transfers of assets, subsequent returns, and the effect on institutional Medicaid eligibility. When an applicant makes gifts to individuals other than "exempt" recipients such as a spouse or a disabled child, the result is a period of ineligibility for nursing home Medicaid. When the recipient subsequently returns part or all of the funds, depending on the county, the local Medicaid agency may consider allowing the transaction to be categorized as a 'return of gift', thereby undoing the original transfer and reducing or eliminating a Medicaid penalty period.

A recent Article 78 proceeding challenging a fair hearing decision addresses the issue of returns of gifts. In the *Matter of Martha Weiss*, Suffolk County Department of Social Services (DSS) imposed a penalty period of 6.84 months based upon the finding that the applicant transferred \$78,236

to her daughter, Beverly Blier.

The daughter objected to the imposition of the penalty period because she paid \$41,600 for assisted living care for her mother before she entered a nursing facility. DSS imposed a penalty nonetheless and the fair hearing affirmed DSS' position that daughter's payment to the assisted living facility did *not* constitute a return of gift.

The Suffolk County Supreme Court upheld the fair hearing decision citing Department of Health's 06 ADM 8, the administrative directive that provides that the period of ineligibility can be reduced when a portion of the transferred assets is returned to the applicant. The directive indicates that assets are considered returned when the transferee gives the applicant cash or liquid assets or uses the assets to pay for nursing facility services (pages 23-24).

The daughter made the claim that the \$41,600 used for assisted living was a return of assets. However, the Court's interpretation of the directive was that the

funds had to be returned either **directly to the applicant or used for nursing home care and that assisted living does not qualify as such.** Hence, daughter was not deemed to have returned the assets to her mother.

Another issue recently addressed by the Court is the partial return of gifts after an initial determination of Medicaid eligibility. Federal law provides that transfers will not result in a penalty period "if all assets transferred for less than fair market value have been returned to the individual". New York State typically allows for partial returns when made prior to the beginning of the imposition of a penalty period. There is a question, however, as to what happens when returns are made after the penalty has begun.

In order for a penalty period to begin, an individual must be "otherwise eligible," i.e., within the allowable resource and income levels. The penalty begins when a person is receiving nursing home care and applies for

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Medicaid. *Aplin v. McCrossen*, decided on August 26, 2014, consolidated two cases in which partial returns were made *after* decisions on initial eligibility were established. In February 2008, DSS determined that Medicaid applicant Ms. Aplin made \$379,957.90 in gifts resulting in a penalty of 47.48 months, beginning November 1, 2007. Thereafter, the Medicaid agency determined that additional gifts had been made between October 2008 and June 2009, but there were \$153,811.40 in returns to Ms. Aplin. In the case of another applicant, Mr. Ciardi, Medicaid imposed a 51.9 month penalty beginning January 2010 for gifts totaling over \$470,000. In 2012 the recipient of Mr. Ciardi's gifts returned some assets, reducing the transfers to \$302,885.75.

Although credit was given for returns and the total amount of gifts was reduced in both cases, the beginning date of the penalty period was pushed to a later date. Ms. Aplin's date went from November 1, 2007 to July 1, 2009. Mr. Ciardi's beginning date was moved from January 1, 2010 to August 1, 2011. In other words, the applicants were not considered "otherwise eligible" on the initial application dates because the returned assets were deemed to be owned by them on those dates.

The outcome reflects the fact that it is advisable to return transferred assets PRIOR to the initial eligibility date. It is imperative that competent elder law counsel be consulted whenever returns of gifts have been effectuated.

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***- Annual Elder Law & Medicaid Lunch and Learn -***

***June 3, 2015 - 12:30 pm - 2:00 pm - Russo's on the Bay***

***For Health Care Professionals, Nursing Homes, Geriatric Care  
Managers and Other Professionals***

***RSVP to Judy Goodbinder at: 516-466-4422***

***Clients: Please stay tuned for our upcoming client appreciation events!***