

# ESTATE PLANNING & ELDER LAW NEWS

WINTER  
2007

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## MISSION

The mission of Skelton Law Offices is to provide legal services of the highest quality, professionally, efficiently and compassionately, with the goal of preserving the independence, the dignity, and the emotional and financial security of older and disabled Mainers.

**HAPPY NEW YEAR!**



BACK ROW, LEFT TO RIGHT: Dale St. Louis, Jeannie Valley, Jennifer Reynolds  
FRONT ROW, LEFT TO RIGHT: Juliette Malmstrom, Jane Skelton, Virginia Putnam, Kelly Fergola

## 15 MYTHS Regarding Medicaid Nursing Home Benefits in Maine

No one chooses to live in a nursing home. But some older Mainers eventually need care in a nursing home setting. For many, this means not only the loss of personal autonomy but also the depletion of all assets. That is because nursing home care can cost \$80,000 per year or more. According to the Cost of Care Survey for 2006 conducted by Genworth Financial, the average rate in Maine is \$197 (semi-private) and \$219 (private) per day.

Elder law attorneys provide advice to individuals who want to preserve assets from long-term care costs. They offer legitimate strategies for hastening eligibility for Medicaid benefits to pay for care in nursing homes, in assisted living facilities, and at home. But Medicaid law is complex and became more complicated with the adoption of the Deficit Reduction Act on February 8, 2006. This article highlights some of those changes and dispels certain myths about the Medicaid program.

*(Continued on next page)*

**1 Medicare will cover my nursing home bill**

**THE TRUTH:** Medicare pays for only a small amount of the nursing home care provided in the United States. In general, Medicare covers the full cost of the first 20 days in a skilled nursing facility if the individual is admitted following at least a 3-day hospital stay and is receiving skilled care as opposed to custodial care. Medicare will cover a portion of the cost of the facility for up to 80 more days; the deductible for 2007 is \$124 per day which is sometimes covered by Medigap insurance. When the Medicare coverage ceases, the patient must pay out-of-pocket unless he or she has private long-term care insurance or qualifies for government benefits under the Medicaid program. In Maine, the Medicaid program is called MaineCare, and it is administered by the Department of Health and Human Services (DHHS).

**2 I have to give away everything I own to get Medicaid**

**THE TRUTH:** An individual is permitted to own certain assets - called non-countable or exempt assets - and still be financially eligible for Medicaid. The following assets are typically not counted when an individual applies for MaineCare nursing home benefits: the primary residence located in Maine with a value of less than \$750,000; a motor vehicle; personal belongings and household furnishings; mortuary trusts; \$2,000 and an additional \$8,000 in an interest bearing account. There are other, less common categories of exempt assets, and an elder law attorney can determine if these allow for the legitimate protection of certain assets from spend-down on long-term care expenses.

**3 The State will take my house.**

**THE TRUTH:** Federal law requires each state to seek reimbursement of medical assistance paid through the Medicaid program. In Maine, repayment is pursued after the death of the MaineCare recipient through a claim against the decedent's estate. Maine's DHHS never takes a home or even files a lien against a home while a MaineCare recipient is living, although often the individual in the nursing home is forced to sell the home when there is no longer adequate income to maintain it.

**4 I have to wait 3 years after giving anything away to get Medicaid**

**THE TRUTH:** There is now a 5-year lookback for all transfers made on or after February 8, 2006, for which

the individual did not receive fair market value in return. Certain transfers are exempt from the transfer penalty, including transfers to spouses and children with disabilities. For all other transfers made within the lookback, a transfer penalty calculation is applied. The "penalty" is a period of time that the individual is ineligible for MaineCare long-term care benefits. The value of what was transferred is divided by the "transfer penalty divisor"; the quotient is the number of months that the individual is ineligible for benefits. Currently, the divisor is \$6,255.

The most significant change in Medicaid law since February 8, 2006, is the start date for the ineligibility period caused by a transfer. For transfers that pre-date the change in the law, the penalty period started running in the month the transfer was made. The penalty period now starts to run on the date of the transfer or the date the applicant would otherwise be entitled to receive Medicaid but for the penalty, whichever is later.

**5 I can keep all our marital property and my inherited property when my spouse gets Medicaid**

**THE TRUTH:** When a married person applies for MaineCare nursing home benefits, assets in the name of either spouse or in the joint names of both spouses (his, hers or theirs) are considered by DHHS. As explained above, some assets are exempt. In addition to the exempt assets, a spouse who remains at home can keep the Community Spouse Resource Allowance which is \$101,640 as of January 1, 2007. In certain cases, the allowance for the community spouse can be increased.

**6 If I put my property in my spouse's name, I will be eligible for Medicaid**

**THE TRUTH:** This is not true when the application is for nursing home benefits. In that case, all of the couple's countable assets are considered, regardless of how they are titled. The community spouse has 12 months to re-title assets from the name of the spouse in the nursing home ("the institutionalized spouse"), although in many cases it is best to transfer assets to the community spouse before the application is filed.

**7 If I enter a nursing home as a private pay resident, I must spend all my assets on my medical care and my nursing home bills before I can get Medicaid**

**THE TRUTH:** It is true that MaineCare nursing home benefits are only available to applicants who are financially eligible. But there are legitimate strategies

for preserving assets, particularly for the community spouse and even after an individual has entered a nursing home.

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### **My spouse or my agent under my Power of Attorney has the power to take property out of my name if I ever need Medicaid**

**THE TRUTH:** The best tool for planning for future MaineCare eligibility is a general, durable power of attorney for finances that includes gifting authority. Just being married does not mean one spouse is able to legally remove the name of an incapacitated spouse from real estate and bank accounts. And unless a power of attorney explicitly authorizes the agent to make gifts of the principal's property, the agent cannot re-title assets.

Many powers of attorney do not contain gifting authority or, if they do, the power is inadequate. For instance, many documents have a gifting provision that limits the agent to making transfers of \$10,000 or \$11,000 per year per person. This figure is too limited for and irrelevant to effective Medicaid planning.

Keep in mind that there are risks to giving authority to someone to make gifts of your assets. Your agent must be trustworthy and willing to become knowledgeable, if necessary, about you, your circumstances, and MaineCare rules. You may want to require that the agent make gifts consistent with your estate plan or that he or she consult an elder law attorney before making any asset transfers.

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### **I can only give away \$10,000 per year under Medicaid rules.**

**THE TRUTH:** This figure was the "annual exclusion amount," and it has increased to \$12,000. This concept is important in planning to minimize estate and gift taxes, but it has no relevance in planning for Medicaid eligibility. In 2007, Maine estate tax law only applies to decedents whose taxable estates total more than \$1 million in assets; the federal estate tax threshold is \$2 million. People who are concerned about estate and gift tax law rarely need to do Medicaid planning.

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### **My income has to be used to pay my spouse's nursing home bill**

**THE TRUTH:** This is not true in Maine.

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### **All of my spouse's income must be used to pay the bill if my spouse is on Medicaid in a nursing home**

**THE TRUTH:** The law allows the community spouse to keep some of the institutionalized spouse's income if the community spouse's income is below certain limits. In addition, the community spouse may be entitled to a greater allowance if her own income is insufficient to maintain the home.

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### **I can hide my assets and get eligible for Medicaid**

**THE TRUTH:** Intentional misrepresentation in a Medicaid application is a crime. Generally, financial information dating back at least 36 months must be produced with any application for MaineCare benefits, and those records are carefully scrutinized.

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### **Medicaid rules that applied to my neighbor when he went into a nursing home will also apply to me**

**THE TRUTH:** Medicaid law and MaineCare rules change, so do not expect that the same laws and rules that governed your neighbor's application are still in effect today.

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### **I can research Medicaid strategies on the Internet**

**THE TRUTH:** This is only true to a very limited extent. Medicaid is a highly complex benefits program that is jointly funded by federal and state taxes but separately administered by each state. Each state creates its own rules, so the eligibility rules can - and do - vary significantly from one state to another. A strategy that works in one state could be disastrous for an individual in another state.

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### **I should transfer my assets now to get Medicaid benefits in the future**

**THE TRUTH:** Most elder law attorneys discourage their clients from making premature transfers of money and property. While the elder is healthy and living independently, retained assets represent freedom of choice for the elder. And transfers to even the most trusted child expose the transferred assets to problems the child might encounter like lawsuits and divorce. Most important, Medicaid law and the MaineCare rules are constantly changing. A transfer made today may be scrutinized under very different rules in the future, rules that could leave the then-impooverished elder ineligible for government benefits for necessary care.

*This article is intended to provide information of a general nature only and does not replace or provide professional legal advice. Consult an attorney for advice regarding your specific circumstances.*

## SKELTON LAW OFFICES LAUNCHES NEW WEBSITE

We invite you to visit our website at [www.maineelderlaw.com](http://www.maineelderlaw.com). The website includes introductions to everyone in the firm, a copy of our current Fee Schedule, and our most recent Newsletters.

You will find a number of articles on the topics of Medicaid planning and long-term care planning, guardianship and conservatorship, estate administration, special needs trusts, and estate planning. From the Home page, click on one of the topics under Our Services. For example, if you click on the Estate Planning link, you can reach all of these articles and more: Duties and Responsibilities of an Agent under a Power of Attorney; Advantages of a Last Will and Testament; Introduction to Revocable Living Trusts; and Estate Tax Planning in Uncertain Times with Flexible (but Risky) Disclaimer Trusts.

Through the Forms link, you will find our Estate Planning Questionnaires and Long Term Care Planning Questionnaires, our Advance Health Care Directive Worksheet, and our Checklist for Suitability of Special Needs Trust.

## 2006 UPDATE ON SPECIAL NEEDS TRUSTS

Skelton Law Offices is committed to providing the best and most current advice to its clients in planning for the protection of public benefits for individuals with special needs. To that end, Jane Skelton and Jeannie Valley traveled to Clearwater Beach, Florida, in October to attend the semi-annual meeting of the Special Needs Alliance and the annual Special Needs Trust seminar hosted by the Stetson University College of Law.

This is the eighth year that Stetson has offered its excellent seminar. The topics covered included:

- Investment and Management Issues for Trustees
- Pursuing a Court Order to Modify Trusts
- Tax Planning for Special Needs Trusts
- Current Issues in Supplemental Security Income and Medicaid
- Creating a Trust Distribution Plan
- Special Needs Trusts and Qualified Plans
- Interstate and Multistate Special Needs Trusts
- Effect of Changes in the Kiddie Tax

Jane served on Stetson's Special Needs Trust VIII faculty and presented a program for trustees regarding termination of and final distributions from "self-settled" special needs trusts created pursuant to 42 U.S.C. §1396p(d)(4)(A). Jane's written materials are available through the Articles link on the firm's website at [www.maineelderlaw.com](http://www.maineelderlaw.com).

The members of the Special Needs Alliance (SNA) then met. The SNA was founded in 2002, and Jane is one of the original members. The SNA is a national network of elder law attorneys with experience in disability and public benefits law, and it maintains an informative website at [www.specialneed-salliance.com](http://www.specialneed-salliance.com). Trust professionals turn to SNA attorneys for guidance in administration of these complex trusts. Trial lawyers representing both plaintiffs and defendants consult SNA members in maximizing the resources in the resolution of cases involving personal injury or medical malpractice. And families rely on SNA attorneys for advice on maintaining public benefits for themselves and for loved ones.

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