

Thursday, January 23, 2014

Protection for Nursing Homes or a Danger to Relatives???

Last year, the New Hampshire legislature passed a bill known as SB 138_FN. This bill was effective July 2, 2013. This bill allows nursing homes and certain assisted living facilities to bring a cause of action to recover the "costs of care" from a person who received a "disqualifying transfer" or someone who has the authority to apply for Medicaid and either does not do so or does so negligently.

Nursing homes have a fairly large problem in cases where a nursing home resident is disqualified from receiving Medicaid either due to a "disqualifying transfer" or because a Medicaid application is never appropriately submitted. It is very difficult if not impossible for a nursing home to discharge a resident for non-payment of their stay even though it is technically legal to do so. The issue is that the resident must have an appropriate place to go and there must be an adequate plan for their care. Other facilities will be very unlikely to accept an admission under these circumstances.

A little background: in order to be eligible for Medicaid, an unmarried individual must have no more than \$2500 in total assets with some exceptions. (The rules for married couples are much more complex) The State agency will count as a current asset any asset transferred "for less than fair market value" within the last 60 months (five years). So, for example, if a Medicaid applicant had conveyed his/her house to a child or to children three years before making application, that applicant will be disqualified for Medicaid for a period of time equal to the amount of days the value of the house would have paid.

In the past, this would have presented issues for the resident that might have been solved with a hardship appeal or the nursing home would simply be stuck providing care with no compensation. Now, this statute allows the nursing home to bring an action- sue in court- the recipients of any such transfer. The liability would be limited to the value each transferee received. Often such a transfer is made innocently in order to avoid probate and it can come as a complete surprise. Other transfers that can cause havoc are any gifts made in that five year period. For example, a grandmother wants to help a granddaughter with college and pays four years of tuition. Then the grandmother falls ill and needs nursing home care. The granddaughter may be liable to the nursing home for the costs of care up to an amount equal to the four years tuition.

Even more dangerous is a provision that will create liability on the part of a "fiduciary": (an agent under a power of attorney or a guardian- anybody who has control over the applicant's assets and has the authority to submit a Medicaid application) For example, Mary has power of attorney over her mother who is incapacitated. Mary doesn't consult with an elder law attorney resulting in an incomplete Medicaid application. Her mother would be qualified if only a complete application had been submitted but she is disqualified because that did not happen. Under this statute, Mary is personally liable for all costs not covered by Medicaid. With today's nursing home costs sometimes exceeding \$10,000 per month. Mary may soon be bankrupt. I strongly recommend that anyone thinking about becoming an Agent under a Power of Attorney obtain legal advice before accepting that responsibility and potential liability. **Note: this is not to say that one should not become an Agent, just that anyone thinking of doing that should be aware of the responsibilities and potential liabilities.**

If you wish a copy of the bill as passed, please contact me at Dwight@sowerbylawoffice.com and I will be happy to send it to you.