



The Arkansas Voice

From the Law Office of
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May I Have Your Attention, Please

I meet with families all the time where a loved one needs nursing home care and property has been transferred. Generally the conversation goes like this: "Mom and Dad deeded their home to us three years ago. Now that Mom has applied for Medicaid, DHS say she is not eligible. We thought the look-back was three years. Dad gave Little Bill (their grandson) \$1200 to help pay for his education. DHS says they gave away \$51,200. The house is worth \$50,000 so the penalty will be 10 months before Medicaid will pay for her care. Mom and Dad have no money. What can we do? "

Under the current Medicaid policy, repairing the problem is not difficult; the children deed the home back to Mom and Dad. Returning that asset will reduce the penalty down to the \$1,200 given to Little Bill that cannot now be returned. Mom would be eligible after a penalty of only a few days. This makes sense. If you transfer assets you only get penalized for the assets you actually transferred. This has been the law and policy in Arkansas since 1993.

The Arkansas Department of Human Services (DHS) plans to change the transfer policy on January 1st of next year. DHS runs the Medicaid program. The change DHS wants to make will prevent any repair of transferring assets. The change basically says that unless you get it "all" back, we will not reduce the penalty.

What? You mean that if the kids return Mom and Dad's house (above), that Mom will still have a 10 month penalty even though the transfer valued only \$1,200? Why, yes it does.

Why? DHS says it is to comply with the law. How can that be if the law has not changed in the last 18 years? There is no good reason for this change and it will harm a lot of people.

If you believe this is fine (first think about what YOU have done over the last 5 years) then ignore this request. But if you believe that this change will cause irreparable harm to you or a family member, then you must speak out. The deadline to voice your concern to DHS is November 3rd. Write to the address below and tell them why you think this change is wrong. If you feel strongly enough, call your local State Legislative member and speak to them about it. Reference the proposed change to DHS Policy MS 3334.8.

Division of County Operations
P.O. Box 1437, Slot S-332
Little Rock, AR 72203
Attention: Office of Program Planning & Development

Thank you for your attention.

ABOUT US

We are an Elder Law and Special Needs Trust Law Firm. Located in Little Rock, Arkansas, we focus on helping individuals obtain Medicaid benefits without losing their home, Long Term Care Planning for victims of Alzheimer's Disease and other related disorders, Special Needs Trust solutions for families with children with special needs, and Preserving Eligibility for Public Benefits for personal injury victims.

DISTRIBUTION OF THIS NEWSLETTER

Raymon B. Harvey, P.A. encourages you to share this information with anyone who is interested in issues pertaining to the elderly, the disabled and their advocates. The information in this newsletter may be copied and distributed, without charge and without permission, but with appropriate citation to Raymon B. Harvey, P.A.

If you are interested in a free subscription to The Arkansas Voice, then please contact us at:

info@arkansaselderlaw.com, call us at 501-221-3416, or fax us at 501-221-2689.

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WHAT IS SPEND DOWN?

People with special health care needs and limited funds of their own often rely on public benefits for their well-being. Some of the most common public benefits include Supplemental Security Income (SSI), administered by the Social Security Administration, and Medicaid, administered by the Arkansas Department of Human Services (DHS). To be eligible for SSI and/or Medicaid, an individual usually is limited to \$2,000 in resources (or \$3,000 for a couple).

Because the resource limits for SSI and Medicaid are so low, the receipt of a lump sum, including an inheritance or a settlement, can easily disqualify the individual. Upon the receipt of sums in excess of the resource limits, the individual can opt to discontinue benefits, shelter the excess amounts in certain types of special needs trusts, or attempt to re-qualify for benefits through a process known as a "spend down."

What is a Spend Down?

The term "spend down" describes the process of literally spending the excess money received by a benefits recipient down to the maximum allowable resource limits. By spending the excess funds in the month in which they are received, the individual can remain eligible for benefits.

When Might a Spend Down be Appropriate?

There are legal strategies that can help an individual maintain public benefit eligibility after receiving a lump sum. Transferring excess funds to a properly drafted and administered special needs trust is a common strategy. In several instances, however, a spend down might be a better choice. If the amount of the excess resources is relatively small, it might make more sense to spend the money rather than to incur the set-up and ongoing administration costs associated with a special needs trust. A spend down could also be a strong option in the situation where the beneficiary has current need for high-ticket items such as a home, a handicap-modified vehicle, or even to pay off debt. Spending for these items would not be possible if the beneficiary were to rely solely on public benefits.

Timing a Spend Down

It is wise to have a spending plan in place prior to receipt of the lump sum. In order to minimize the loss of SSI and Medicaid, goods and services must be purchased in the same calendar month in which the lump sum is received. Note that the individual does not have a period of a month or 30 days to complete the spend down. If a lump sum is received on the 20th of August for example, the spend down must be completed in 11 days (the last day of August) to bring resources below the applicable limit before September 1st.

Prioritizing Items and Services to Purchase

I do not encourage the frivolous wasting of money. It is important that the funds be spent only on exempt resources and that the items purchased are solely for the benefit of the disabled recipient. There are certain resources that the SSI and Medicaid programs do not count in determining eligibility, including one's residence, a vehicle, household furnishings and certain burial arrangements. These are referred to as "exempt resources." Purchasing exempt assets will ensure that the items will not be counted toward the asset limitation in determining eligibility.

In conclusion, spending down a lump sum can be a great option in certain circumstances, either alone or in conjunction with other options. Keep in mind, however, that a downside to a spend down is that the money will not be available in the future to pay for special needs. Careful thought and planning must go into the preparation for a spend down to minimize the ineligibility period and to avoid wasting critical funds. Although funds will no longer be available, if the spend down is done properly, the beneficiary's quality of life can be improved for years to come through use of the items and services purchased.

My thanks to Carol Battagila of San Diego, an attorney and member of the Special Needs Alliance.



THE DILEMMA FOR MILITARY PARENTS OF CHILDREN WITH DISABILITIES

Military parents of children with disabilities face a serious dilemma at retirement - whether or not to choose the military Survivor Benefits Plans (SBP) retirement option for their children. Saying "yes" to a monthly income for your child seems the obvious choice BUT it may well be the wrong one under current law.

The SBP will pay up to 55% of the military member's retirement pay to a spouse and/or dependent child when the retiree dies. The member can also select a lesser benefit at a lesser cost, if they choose. The military member can select between coverage for a spouse only, a spouse and children, or children only. The member takes a reduction of pays about 6.5% of retirement pay for SBP for a spouse and only about \$20/month for dependent children.

In addition to (or in place of) the survivor benefit SBP, a military member can provide an array of benefits for a child with a disability. In most cases a disabled child over age 18 can be designated as an Incapacitated Dependent and be permanently eligible for military post privileges as well as TRICARE health benefits. However, unfortunately, these military benefits do not include supportive living programs or vocational opportunities. The SBP and TRICARE benefits are often not enough to pay privately for all the help that may be needed by an adult child with a disability. So the military family must often look to other programs to provide for a child's needs.

If the disabled child over age 18 has assets of less than \$2,000 and minimal income, the disabled adult child will usually be eligible for Supplemental Security Income (SSI) and Medicaid. Although SSI pays only \$674 monthly (2011 benefit) and Medicaid may seem to duplicate TRICARE's health benefits, Medicaid "waiver" programs pay for a wide variety of programs and services that TRICARE does not cover. If a disabled child is living independently, SSI money pays for food and shelter while Medicaid pays for supported living programs, day programs, job coaching and other services. Thus, TRICARE and Medicaid provide a complementary mix of health care benefits and support services needed by many adults with disabilities.

The dilemma is that receiving SBP income payments after following a military parent's death may cause the loss of SSI and essential Medicaid benefits because SSI payments are offset by other income received (including SBP payments) by the disabled child. Any unearned monthly income over \$20 offsets SSI income dollar-for-dollar. Once SSI income reaches zero, SSI is lost and, in many cases, Medicaid is lost. If the military member dies having chosen SBP for his or her child, the disabled child will receive as much as 55% of the retiree's income. If that SBP payment to the child with a disability amounts to more than \$674 monthly, the child with a disability will lose SSI and Medicaid health care and community support benefits. (In Arkansas and in many states, if the SBP exceeds \$2,022 per month, then all supported living assistance, job coaching, respite care and other services provided under Medicaid "waiver" programs are lost.)

What about just canceling the SBP beneficiary payments? If the military retiree has already made an SBP election that includes a benefit for children, and has a child with a disability, then the retiree can apply to the Board for Correction of Military Records to modify the SBP election. This option must be completed while the retiree is still alive since SBP beneficiary payments to the disabled child start upon death. The member must justify why the SBP selection option must not include children (i.e. spouse only). For example, the retiree might tell the Board that he or she did not understand when the retiree originally made the election including children how the SBP benefit would negatively impact the disabled child's other benefits. The individual services have separate Boards for the Correction of Military Records that will consider such requests.

Unfortunately, once the retiree has died and payments begin, there is no way to stop them. Medicaid will not allow the renunciation of the SBP payment and will continue to count it as income even if not collected and the child with a disability will lose Medicaid. The only true option under current law is NOT to elect the SBP benefit when the military member retires.

Military families who have a family member with a disability face numerous challenges not faced by most families. Frequent transfers make meeting the educational needs of their child a moving target. Those same transfers mean that obtaining Medicaid and other benefits for their child is repeated often as they

THE DILEMMA FOR MILITARY PARENTS OF CHILDREN WITH DISABILITIES

move from state to state. A military family may spend years on a waiting list for Medicaid waiver services in one state, finally receive benefits, only to be transferred to another state and start the waiting list process all over again. The inability to assign SBP payments to a special needs trust is one challenge facing military families that can and should be fixed.

This article is by Kelly A. Thompson, a lawyer for 32 years, practicing law in Arlington, Virginia for the last 16 years. Her clients include many military families and her practice focuses on planning for individuals with disabilities and the elderly, special needs trusts, trust administration and estate planning.

ODDS AND ENDS

Tax Deductions for Assisted Living Facility Costs

Some medical expense for assisted living facilities are deductible if the expenses exceed 7.5% of the taxpayer's adjusted gross income. Additionally, the resident must be "chronically ill" (as certified by a doctor or nurse), and the facility must provide personal care services according to a care plan stipulated by a licensed health care provider.



If the above requirements are met, then the living costs (e.g. room and board) associated with assisted living facilities may be deductible. Limited deductions are also available for residents living in facilities for custodial care. For residents who are not chronically ill, deductions are available for expenses attributable to medical care.

Adult children of residents may also receive tax deductions if the resident qualifies as a dependent. The adult child must provide over half of the resident's yearly support and be a U.S. citizen, legal resident, or resident of Canada or Mexico. If the adult child contributes to the resident's support under a "multiple support agreement," but does not pay for over half of the resident's support, he or she may still be eligible for a tax deduction.

See [Tax Deductions for Assisted Living Costs](#), Elder Law Answers, 2011.

New York Court Holds that Medicaid Penalty Triggered by Transfer to Daughter Without Written Agreement

Bernadette Jordan applied for Medicaid and began living in a nursing home. The state of New York found Jordan was not eligible for Medicaid benefits for a period lasting over a year because she had transferred funds to her daughter from a revocable trust for less than fair market value. The nursing home requested a hearing, arguing that Jordan's daughter had paid documented expenses for Jordan and the transfer was simply repayment for these expenses. The nursing home further argued that Jordan's daughter paid Jordan's expenses with the expectation of repayment.



The hearing officer held that the transfer was below fair market value for purposes of Medicaid eligibility. The trial court affirmed the hearing officer's holding, and the nursing home appealed.

In [In Matter of Komanoff Ctr. For Geriatric & Rehabilitative Medicine v. Daines](#), (N.Y. Sup. Ct., App. Div., 2nd Dept., No. 2010-05776), a New York appeals court affirmed the trial court's ruling. The court stated that no presumption of expectation of repayment for the past financial assistance existed because the two women did not have a contemporaneous written agreement providing for such repayment.

[Transfer to Daughter Without Written Agreement Triggers Medicaid Penalty](#), Elder Law Answers, Jul. 5, 2011.

ODDS AND ENDS

Providing for Disabled Heirs



Twelve percent of the U.S. population has a severe mental or physical disability, according to United State Census data. Additionally, two-thirds of caregivers do not have a plan for the future support of the disabled individual they care for. Three tips for planning for the future support of disabled heirs are below:

1. Create a trust that will make mortgage and tax payments on a home for a disabled adult, or create a qualified personal residence trust. A qualified personal residence trust allows the homeowner to continue living in the home for a number of years before ownership is transferred to an heir at a discount.
2. Provide assets to a disabled heir without endangering government benefits by creating a special needs trust. The trust provides long-term care to the beneficiary and is not considered available to the beneficiary for Medicaid purposes.

Leave a disabled child's inheritance in a trust instead of providing an additional inheritance to a sibling with instructions that he or she must care for the disabled child. A caregiver can fund the disabled child's trust further with a permanent life insurance policy.

See Kelly Greene, [Taking Care of Disabled Heirs: When Loved Ones Need Help, Estate Planning Can be Tricky](#), The Wall Street Journal, Sep. 3, 2011.

Five Reasons to Be Wary of Joint Ownership With Your Children



Joint ownership with your children can cause problems after the death of the older joint owner. Five reasons an older individual should be wary of using joint ownership with their children:

1. The jointly owned assets are available to creditors of you and your children.
2. If a child gets divorced, the divorcing spouse may be able to claim the joint assets as part of the marital estate.
3. Both owners can take jointly owned assets at will, meaning that irresponsible son could take elderly mom's money right from under her nose.
4. The surviving joint owner has no obligation to divide the jointly owned funds among other heirs at your death.

Joint ownership with children can often lead to family court fights after the death of the predeceasing owner, especially if the surviving owner refuses to divide funds with other heirs.

For more information on potential problems with joint ownership between generations, see Danielle and Andy Mayoras, [Top 5 Reasons to Beware of Joint Ownership Between Generations](#), Forbes, Sep. 13, 2011.

HOLIDAY CLOSINGS



Our office will be closed for the following holidays:

- Thanksgiving Day: November 24th & 25th**
- Christmas Eve: December 23rd—Close at Noon**
- Christmas Day: December 26th**
- New Year's Day: January 2nd**

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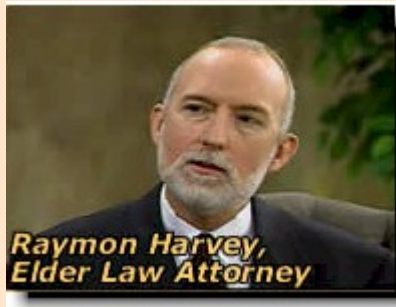
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Raymon B. Harvey, P.A.

Arkansas Elder Law & Special Needs Trusts

Raymon B. Harvey, P.A. is an Elder Law and Special Needs Trust Law Firm. We represent older persons, disabled persons, their families, and their advocates. The practice of Elder Law and Special Needs Trusts includes estate planning, estate and trust administration, powers of attorney, advance medical directives, guardianships, conservatorships, and public entitlements (Medicaid and SSI), disability planning, and long-term care planning. For more information about Raymon B. Harvey, P.A., please visit our web site at www.ArkansasElderLaw.com.



As the Arkansas member of the Special Needs Alliance, Raymon B. Harvey, P.A. assists injured plaintiffs and personal injury attorneys create special needs trusts. We also assist parents seeking supplement to their disabled child's benefits and maintain a quality of life. The Special Needs Alliance is a nationwide network of disability attorneys. For more information about the Special Needs Alliance, visit its website at www.specialneedsalliance.com.

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MEMBER



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