



A public benefits conundrum: **Matrimonial settlements**

Eligibility for means-tested programs such as Medicaid, Supplemental Security Income (SSI) and subsidized housing can be greatly impacted by matrimonial settlements. An analysis of how delicate the balance is between tenets of matrimonial law and principles of elder and disability law.

By Gary Mazart and Regina M. Spielberg

When a spouse or a child of a dissolving marriage is in need of Medicaid benefits, the qualification requirements of the Medicaid program must be considered in the matrimonial settlement. Tenets of matrimonial law should be balanced with principles of elder and disability law.

The purpose of the laws of equitable distribution is to distribute fairly marital property acquired in the course of the marriage between the spouses. In contrast, support obligations, such as alimony and child support, are intended to maintain the future income of both spouses by using one spouse's income to support the other.

Kikkert v. Kikkert, 88 N.J. 4 (1981). Medicaid law, like matrimonial law, distinguishes between resources and income — collectively referring to both as assets — in determining eligibility. Medicaid also imposes an ineligibility period on an applicant for the transfer of resources or income by the applicant or applicant's spouse. In 2007, the Appellate Division issued three decisions involving matrimonial issues where one spouse is in need of Medicaid benefits.

Equitable distribution

In accordance with New Jersey matrimonial law, all property in which a spouse acquired an interest during marriage is subject to equitable distribution. *Painter v. Painter*, 65 N.J. 196 (1974). Equitable distribution is determined pursuant to N.J.S.A. 2A:34-23, which expressly excludes gifts and inheritances if they are not subsequently commingled with marital property. Pensions are subject to equitable distribution. *Kruger v. Kruger*, 73 N.J. 464 (1977). On the other hand, Medicaid pools marital assets for purposes of determining the benefits eligibility of a spouse, regardless of the origin of the assets or the duration of marriage. 42 U.S.C. §1396r-5; N.J.A.C. 10:71-4.8.

W.T. v. Div. of Med. Assistance & Health Servs. and Ocean County Bd. of Social Servs., 391 N.J. Super. 25 (App. Div. 2007) addressed the denial of Medicaid eligibility where equitable distribution under a property settlement agreement resulted in more than half of the property distributed to the non-applicant spouse. The Appellate Division reversed the final decision by the Division of Medical Assistance and Health Services (DMAHS) denying



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Medicaid benefits to a 59-year-old nursing home resident who was paralyzed following a medical treatment, because the property settlement agreement between him and his non-applicant wife provided more than 50 percent of the marital assets to his wife. Disregarding accepted principles of matrimonial law, Medicaid deemed the property settlement agreement a transfer of assets and imposed a penalty period of ineligibility.

The Appellate Division held a property settlement agreement providing for a distribution of marital assets favoring the non-applicant spouse did not trigger a transfer of assets because the division of assets was rationally related to equitable distribution principles independent of Medicaid eligibility requirements. The court held all DMAHS rules established by "in-house" policy violate the Administrative Procedure Act.

Further, the court found invalid as contrary to New Jersey's matrimonial law DMAHS' policy that equitable distribution of less than 50 percent of marital assets to an applicant spouse within the Medicaid look-back period — the 36 or 60-month period prior to an applicant's eligibility during which asset transfers of less than fair market value will result in a Medicaid ineligibility period — is a *per se* transfer of assets triggering a Medicaid ineligibility period. The *W.T.* court relied on a 1995 New Jersey Supreme Court decision holding that Medicaid must recognize a state court order effecting equitable distribution. *L.M. v. State of New Jersey, Div. of Med. Assistance & Health Servs., et al*, 140 N.J. 480 (1995).

In *L.M.*, the Medicaid applicant's pension was distributed to the non-applicant spouse pursuant to a qualified domestic relations order that named the non-applicant spouse the alternate payee of the nursing home spouse's pension benefits. Medicaid, however, denied benefits, deeming the pension available income to the applicant spouse despite the order. The court held that the qualified domestic relations order shifted ownership of the pension to the non-applicant spouse under equitable distribution and thus was not available income to the Medicaid applicant spouse.

Special Needs Trusts

The use of a Special Needs Trust funded with the assets of a disabled beneficiary — such as proceeds of a personal injury action, inheritance or amounts paid pursuant to a property settlement agreement in a matrimonial proceeding — can preserve a disabled person's eligibility for public benefit programs such as Medicaid. A Special Needs Trust is authorized by, and must comply with, federal and state law. 42 U.S.C. § 1396p(d)(4)(A) and (C); N.J.S.A. 3B:11-36 and -37; N.J.A.C. 10:71-4.11(g).

A Special Needs Trust must be established for the benefit of a disabled individual by a parent, grandparent, legal guardian or court and the trust must provide that, upon the death of the disabled individual, the state will receive all amounts remaining in the trust up to the total medical assistance (Medicaid) paid on behalf of the individual. Pursuant to 42 U.S.C. § 1396p(d)(4)(A), funding the trust with the assets of the disabled individual is not considered a transfer of assets so long as the disabled individual is under 65.

In *J.P. v. Div. of Med. Assistance & Health Servs.*, 392 N.J. Super. 295 (App. Div. 2007), the Appellate Division addressed the availability for Medicaid purposes of alimony payable to a Special Needs Trust. The Special Needs Trust was created by the Family Part judge in a divorce proceeding at the request of defendant spouse, J.P., a disabled nursing home resident. The subsequent divorce judgment incorporated an agreement requiring J.P.'s former spouse to pay the equitable distribution and monthly alimony to the trust. Medicaid then notified J.P. that alimony was income which must be paid to the nursing home. The Appellate Division, holding that Special Needs Trusts are legitimate planning tools clearly provided for under federal and New Jersey laws, found:

1. Alimony received directly by the Special Needs Trust is not income for Medicaid purposes since J.P. had no legal right to receive it, and
2. A Medicaid recipient's benefits cannot be reduced by that amount.

J.P. was under 65 and thus her Special Needs Trust was established pursuant to 42 U.S.C. § 1396p(d)(4)(A). Alternatively, for disabled beneficiaries of any age, under 42

U.S.C. § 1396p(d)(4)(C) a non-profit association may pool the assets of multiple disabled beneficiaries under a single trust without triggering a Medicaid ineligibility period as to any individual beneficiary if a separate trust sub-account is maintained for each disabled beneficiary.

Forum shopping

The Appellate Division affirmed the order of a Family Part judge dismissing without prejudice a non-applicant spouse's application for a support order when the non-applicant spouse, in an ongoing administrative proceeding, had secured an increase in her minimum monthly maintenance needs allowance (MMMNA) — the amount that may be deducted from a Medicaid beneficiary's income and used to bring the community spouse's income to 150 percent of the federal poverty guidelines, as provided under the Medicaid Catastrophic Care Act of 1988, 42 U.S.C. § 1396r-5(d)

and New Jersey regulations N.J.A.C. 10:49-1.1 *et seq.*, stating she had yet to exhaust her administrative remedies to enhance her MMMNA further. *M.E.F. v. A.B.F.*, 393 N.J. Super. 543 (App. Div. 2007). In short, the Appellate Division found the Family Part action was invalid as parallel litigation and a form of forum shopping. The court also held that standards for awarding spousal support in a Family Part action under N.J.S.A. 2A:34-24 could be applied in an administrative proceeding for purposes of determining the MMMNA even though the New Jersey MMMNA standards are more stringent than the Family Part standards requiring a showing of exceptional circumstances and that financial duress be demonstrated.

Conclusion

For many years, New Jersey's higher courts have recommended regulations be adopted "To address an appropriate

balance between legitimate provisions for division of property and income in cases of divorce, and protection of the intended purpose of the medically needy nursing home program." *H.K. v. Div. of Med. Assistance & Health Servs. and Cape May County Bd. of Social Servs.*, 379 N.J. Super. 321, 331 (App. Div. 2005). See also *L.M. v. State of New Jersey, Div. of Med. Assistance & Health Servs., et al.*, 140 N.J. 480 (1995) and *W.T. v. Div. of Med. Assistance & Health Servs. and Ocean County Bd. of Social Servs.*, 391 N.J. Super. 25 (App. Div. 2007). The lack of such regulations or guidelines can create traps for the unwary practitioner: Eligibility for means-tested programs such as Medicaid, Supplemental Security Income (SSI) and subsidized housing can be greatly impacted by matrimonial settlements. Elder and disability law attorneys should work closely with matrimonial attorneys to assure the best results for their clients. ©