

Help! My Long-Term Care Client Owns a Business!

This article explores planning strategies for clients facing the crossroads of business ownership and the need for long-term care.

I've always found legal trailblazers fascinating; the people who don't set out to rock the courthouse boat, but whose cases make waves that change the rules as we know them.

Such was the case of "Inez Miller," a Maine resident who, back in 1991, was disqualified for Medicaid and SSI benefits. An applicant must meet asset requirements to establish eligibility for Medicaid and Supplemental Security Income (SSI), which generally means spending down to \$2,000. Certain assets are excepted out by statute, however, including an active trade or business. Miller's resources were minimal: a certificate of deposit of \$5,000 and a checking account balance of \$1,440. She sued, in *Miller v. Ives* [Ives being Maine's Commissioner of the Human Services Department] (780 F. Supp. 49 (D. Me. 1991), claiming that the \$32

per month of income from the \$5,000 CD was essential for her self-support, rendering the asset exempt. At issue: whether a Social Security Administration regulation properly followed a federal statute defining eligibility for SSI benefits.

Game-Changing Case Law

The crux of the matter was Miller's monthly income of just \$32 generated by her certificate of deposit. Her lawyers argued this income contributed to her "self-support." Still, according to state regulations then in effect, an applicant's liquid resources not used in a trade or business can be counted and may disqualify him or her for SSI benefits. In the U.S. District Court for the District of Maine (42 U.S.C 1382b), Miller argued that both state and federal regulations were contrary to federal law.

Although the Court affirmed, the waves washed ashore on federal ground, as Congress ultimately clari-

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fied the law, amending the statute to exempt certain assets:

Other property which is so essential to the means of self- support of such individual (and such spouse) as to warrant its exclusion, as determined in accordance with and subject to limitations prescribed by the Secretary, *except that the Secretary shall not establish a limitation on property (including the tools of a tradesperson and the machinery and livestock of a farmer) that is used in a trade or business or by such individual as an employee.* (This amendment does not affect the analysis in this case.)

The law now provides that property essential to an applicant's self-support is exempt if it is "used in a trade or business or nonbusiness income-producing activity." (20 CFR 416.1222) Under the revised regulation for SSI and Medicaid, business property is excluded *regardless of its value or rate of return.*

For elder law attorneys, the new regulation may affect clients ranging from individuals like Inez Miller on up to more affluent owners of active businesses who seek Medicaid benefits. The Social Security Program Operations Manual System (POMS) further guides how government agencies are to consider a claim for benefits that includes an active trade or business, instructing them to consider:

- If a valid trade or business exists and if the property is in current use,
- A description of the trade or business and its assets,
- The number of years it's been operating and the identity of any owners,
- The estimated gross and net earnings of the trade or business for the current tax year, verified with business tax returns,
- Verify the estimated gross and net income for tax purposes, and
- Determine if the trade or business actually exists if operating a year or less (*bona fides*).

Tips for Using LLCs for Control

Attorneys can use an LLC to formalize "quasi" business activities or to retain management control over other assets. Medicaid Asset Protection Trusts can be intimidating, but LLCs can help:

- Some clients want direct control of assets, but should they be a trustee?
- Form an LLC and transfer in brokerage, bank accounts, rental properties, and other assets.
- Operating agreement — the key — manager — managed by client.
- Transfer membership interests to Trust.
- No ownership of LLC, but operational control by your client.

If an applicant establishes that a valid trade or business exists, the value of the business, including "all liquid resources used in its operation," are exempt. What then?

Transfers of Exempt Businesses

Let's say, for example, that with proper planning, your business owner qualifies for Medicaid. Good work! But then things get messy. Your client decides to sell or transfer the business. Do any exceptions apply, or does the timing of the transfer matter? What can legal counsel do to avoid Medicaid's right of recovery?

Now we get to that gray area: intent. The law states if it can be proven that he or she intended to dispose of

the assets at fair market value, or if the assets were transferred "exclusively for a purpose other than to qualify for medical assistance," an individual shall not be ineligible for medical assistance. (42 USC 1396p).

There will be a rebuttal presumption that your client transferred property for the purpose of obtaining SSI or Medicaid benefits. It is incumbent upon you, the elder law attorney, to establish that the resources were transferred *exclusively* for a reason other than to become or remain eligible. If your client had some other purpose for transferring the resource, but an expectation of establishing or maintaining SSI or Medicaid eligibility was *also* a factor, the period of ineligibility would apply.

General and Categorical Eligibility Requirements

Can you make the argument the transfer of an asset was exclusively for a purpose other than to obtain Medicaid because the individual is already eligible for Medicaid? It may be a valid argument. Determining the validity of the argument, however, is done on a case-by-case basis, based on the individual's specific circumstances.

Consider the following example:

Mr. Smith files for Medicaid on June 1, 2020. During his interview, he admits that he transferred ownership of a house to his son on December 25, 2019, while he lived there and received no monetary compensation. Smith alleges that he did not transfer the home to become eligible for Medicaid. The claims representative (CR) begins by getting a statement from Smith documenting the reasons for the transfer, the reason for accepting less than the fair market value, his relationship to the person getting the house, and his allegation he did not transfer the house to get

SSI. The CR obtains a statement from Smith's son to corroborate his allegations. Additionally, Smith submits evidence establishing upon transferring ownership of the house the home was his permanent residence at the time of the transfer. Based on the facts, the CR determines that Smith did not transfer the house to get Medicaid *because the house would have been an excludable resource in the month he transferred it.*

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Notwithstanding that Mr. Smith may currently be eligible for Medicaid, according to HCFA Transmittal 64, this asset (e.g., a home) might be counted as a resource in the future, thus compromising the individual's future eligibility. In such a situation, the argument that the individual was "already eligible" for Medicaid does not suffice. The question then becomes, "How would an active business become 'countable' in the future?" The arguments that apply to a residence do not appear to apply to an active business, but before undertaking the transfer of an exempt business, consult with local law and practice to determine whether a penalty will apply. Although transferring the business to a third-party during lifetime may be risky, utilizing a revocable trust should not, as it is not a "transfer" by the Medicaid applicant. A revocable trust would allow the business to escape probate, and in some states, estate recovery.

Planning Strategy: Is This "Business" an Opportunity?

Let's say you want to do legal planning to enable your 95-year-old client with excess resources to qualify for Medicaid: Should she buy a business? The answer is "maybe," provided you use this strategy wisely. Your client can convert non-exempt assets to an exempt business, as long as she pays full consideration. The business can be managed by children through a revocable trust, with the income going to the parent business owner. Starting a business and having it "in

current use" presents challenges, as the entity should exist over 12 months (POMS "bona fides" test). Consider, however, Florida Rule 1640, which excludes income-producing property if the property "produces income consistent with its fair market value." Purchasers of rental properties can become Medicaid eligible in Florida simply by converting nonexempt cash to exempt real estate.

Bottom line: Can your clients who need long-term care buy individual businesses or pool resources to buy a business and have it professionally managed? Can a business be formed to emulate Florida's "income property" model?

Conclusion

For family-owned business clients, elder law attorneys need to master the "operating trade or business" exception rules, and the planning available to preserve the value of the business, while qualifying for SSI or Medicaid. For some enterprising entrepreneur, could this exception become a business opportunity? ■

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