

Paying For a Nursing Home: Medicaid (Part 4) Is Medicaid Planning Legal?

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Medicaid planning – when properly done -- is most certainly legal, just as legal and ethical as tax planning and other common estate-planning options. However, there are still some folks who think that making gifts that create a “penalty” for Medicaid eligibility means they are not legal. Indeed, some believe this may even be a crime! Where did they get that idea?

Well, back in 1996 Congress did pass a law making such gifts a crime, complete with a fine of up to \$10,000 and a possible one year of jail time. But when the press picked up on this, calling it the “Granny Goes to Jail Act,” apparently enough members of Congress were sufficiently embarrassed by what they had done that the very next year they changed the law. Now it was not Granny who was the criminal, but the person who charged a fee to advise or assist her in making such a gift, who could be fined up to \$25,000 and face up to five years of jail time. That law was immediately dubbed the “Granny’s Attorney Goes to Jail Act.” And it’s still on the books.

OK, so “Granny” and other seniors are free to make gifts to protect their assets from being spent down on long-term nursing care, just as they can make gifts to save on taxes or any other estate planning purpose. But how are they going to get good help if their attorney risks jail time if he or she explains to them their rights or assists them in making such gifts?

To answer that question, we need to review what happened after the “Granny’s Attorney” law went into effect. In 1998 the New York State Bar Association sued the United States Attorney General in federal court, asking the judge to enjoin (that is, legally prohibit) the government from enforcing this law. Why? Because it was unconstitutional under the freedom-of-speech protection of the First Amendment.

In response to this lawsuit, the then U.S. Attorney General, Janet Reno, took the unusual step of sending a letter to Newt Gingrich, Speaker of the House, and Vice President Al Gore, President of the Senate, *stating that the United States government would not defend this lawsuit because the statute – which would prohibit “professional advisors such as attorneys . . . from providing truthful, non-misleading advice to their clients” about “an estate-planning strategy that itself is lawful” – was clearly unconstitutional under the First Amendment.* The Federal Court for the Southern District of New York then entered a permanent injunction against the United States Government to prohibit it from enforcing this law. So while the law remains on the books, since 1998 there has been no known attempt to enforce this law anywhere in the country.

That is, not until 2013. In the federal court case of *Zahner v. Pennsylvania Department of Human Services*, in which I represented the Plaintiffs, the Pennsylvania Medicaid Agency raised this issue, arguing that the New York Court's injunction was not binding on any court in Pennsylvania, that the "assistance" portion of the Granny's Attorney Goes to Jail Act was constitutional, and that the court should uphold this law. The Judge, however, was not persuaded. As he stated in his opinion:

"This Court will decline to enforce the statute in this case on the grounds that it clearly appears to be unconstitutional. Therefore, on the issue of criminal sanctions against Plaintiffs' attorney for counseling or assisting Plaintiffs in the transfer of their assets to become eligible for medical assistance, summary judgment will be granted in favor of Plaintiffs. Because the statute is unenforceable on constitutional grounds there is no genuine issue of material fact."

Zahner v. Mackereth, CV No. 11-306, 2014 WL 198526, at 11 (W.D. Pa. Jan. 16, 2014).¹ In other words, a second federal district court has now ruled this law to be unconstitutional and unenforceable, and that should be the final nail in the coffin for the "Granny's Attorney Goes to Jail Act" and the only attempt by Congress to outlaw Medicaid planning.

In 2015 Medicaid planning is clearly a legally recognized estate planning option. Indeed, in its September 2, 2015 opinion, the Third Circuit on appeal in the *Zahner* case upheld Plaintiffs' purchase of short-term annuities, *notwithstanding their acknowledged Medicaid-planning motive in doing so*, stating "we do not believe that the annuitant's motive is determinative" and noting that "[f]inancial planning is inherent in the Medicaid scheme." *Zahner v. Secretary PA Dept. of Human Services*, Nos. 14-1328, 14-1406, p. 21 (Third Circuit, 2015).

However, while such planning is legal in general, there are detailed rules regarding what particular planning options are available and what restrictions apply, and there is also a five-year look back for gifts. *This does not mean that it is too late to protect any part of your life savings once you are in a nursing home – to the contrary, it is generally possible to protect half or more of what is otherwise at risk, even in a crisis situation with no advance planning.* But it does mean that getting expert legal advice and assistance with any gifting or other Medicaid planning is very important in order to protect part of your lifetime of savings and achieve your estate-planning goals.

Remember, caring for a loved one doesn't have to cost a lifetime of savings.

¹ The District Court decision was appealed to the Third Circuit and reversed on other grounds, but the ruling on the unconstitutionality of the Granny's Attorney Goes to Jail Act was not affected.

Note: This information is for general informational purposes only and does not constitute legal advice. For specific questions you should consult a qualified elder law attorney.

Note: *With the restrictions in the Deficit Reduction Act that came into effect in 2006, it is more true than ever that “time works against you” when planning for long-term care. It is important that families who have a spouse, parent or other loved one needing long-term nursing care contact a knowledgeable and experienced elder law attorney for advice as soon as possible. While ideally this should be done when there is at least five years before such care will be needed, families need to realize that even with the new restrictions in the DRA, there remain opportunities for seniors to protect a significant portion of their life savings when facing an immediate crisis, with no advance planning. But every day of delay represents a potential \$220 (or more) of irretrievable loss, so seek advice sooner rather than later.*

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