

AGING WISELY

Can promissory notes be used in Medicaid planning?

Promissory notes can be a valuable tool in Medicaid planning, as illustrated by a recent federal district court case. Using promissory notes in Medicaid planning when a spouse needs long term care can allow the spouse at home to save all of the couple's assets for his or her



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needs, which often are significant. A single person living in a nursing home can often save approximately half of their assets by properly using a Medicaid compliant promissory note.

In Rhode Island, to be eligible for Medicaid benefits, a nursing home resident may not have more than \$4,000 in assets. If used properly, a promissory note can help a nursing home resident reach the appropriate level of assets.

On April 18, 2012, Oklahoma resident Juanita Lemmons transferred her farm and her Edwards Jones investment account to her son, Gary, in exchange for a promissory note in the amount \$84,600, and then applied for Medicaid coverage. A promissory note is normally given in return for a loan and it is simply a promise to repay the amount stated in the note. Under federal Medicaid law, a loan is not supposed to be treated as a transfer of assets for Medicaid eligibility purposes if it satisfies these three standards: (1) the term of the loan must not last longer than the anticipated life of the lender, (2) payments must be made in equal amounts during the term of the loan with no deferral of payments and no balloon payments, (3) and the debt cannot be cancelled at the death of the lender.

The note in this case met the requirements of Medicaid law, but Oklahoma rejected Mrs. Lemmons' application for Medicaid benefits on a number of grounds, including its contention that (1) it was a sham transaction, (2) the note was

worthless because it could not be resold, and (3) the transfer of the farm and investment account was subject to a transfer penalty.

Rather than appeal the case through the Oklahoma state system, Mrs. Lemmons (or her attorneys) went immediately to federal district court to assert her rights. In *Lemmons v. Lake* (U.S. Dist. Ct., W.D. Okla., No. CIV-12-1075-C, March 21, 2013), the court first discusses whether it has jurisdiction over the matter, deciding that it does because Mrs. Lemmons is seeking to enforce an individual right to benefits under federal law.

Turning to the substance of the case, the court finds the action is not a sham because an enforceable promissory note exists. The court rejects Oklahoma's argument that the note is worthless, finding that a note is not worthless just because it can't be sold on the open market. Finally, the transfer of property to Mrs. Lemmons' son in exchange for the note does not constitute a disqualifying transfer of assets because Mrs. Lemmons received the promissory note in return.

Shockingly, despite cases like the Lemmons' case, some states regularly reject promissory notes, especially if they are between family members. Why? I believe, because they

can — most elderly individuals living in a nursing home cannot afford to wage a battle in court against the state government. Fortunately, the Rhode Island Medicaid authorities understand the law and elder law attorneys here use promissory notes as an essential asset protection strategy. For other states, however, the Lemmons case raises the prospect of bringing these actions in federal, rather than state court, which could have a number of advantages, including: shortening the appeal process, being in front of courts less likely to be swayed by the effect of the decision on the state budget, and the possibility of the state paying legal fees in successful cases.

The use of Medicaid-compliant promissory notes is very complicated and requires special training. Before doing any type of Medicaid planning, it is essential that you consult an elder law attorney.

Attorney Macrina G. Hjerpe is a partner in the Providence law firm Chace Ruttenberg & Freedman. She practices in the areas of Estate Planning, Probate, Estate Administration, Trust Administration, Trust Litigation, Guardianship, Business Succession Planning, Asset Protection Planning, Elder Law and Estate Litigation.

PHOTO PROVIDED BY NAMI RHODE ISLAND



NAMIWalks participants walk together to end the stigma associated with mental illness.

NAMIWalks Rhode Island this Saturday

Walk to end the stigma of mental illness

On Saturday, Oct. 22, the National Alliance on Mental Illness of Rhode Island (NAMI) invites the public to help end the stigma associated with mental illness by participating in NAMI-Walks Rhode Island at the Temple to Music, Roger Williams Park, 1000 Elmwood Avenue, Providence. The 3.5-mile walk kicks off at 10:15 am.

"We can't afford to be silent anymore," says NAMI Rhode Island Executive Director Cindy Elder. "Across this country, one in five people are living with mental illness. These complicated conditions affect virtually every family and every community. We have to start finding a common language to discuss mental illness and provide the same level of support that we do for people with other diagnoses."

More than 35 teams have already registered to participate in NAMIWalks Rhode Island. You can register a team, join a team or donate at namiwalks.org/rhodeisland. Unregistered walkers are welcome the day of the race; you do

not need to donate to participate. All proceeds benefit NAMI Rhode Island.

NAMI seeks facilitators for support groups

NAMI is currently seeking individuals who would like to train to be volunteer facilitators of Connection Recovery Support Groups. The next training takes place Friday, Nov. 18 and Saturday, Nov. 19, from 8 a.m. to 5 p.m. at the NAMI Office, 154 Waterman St., Suite 5B, Providence. Facilitator training is offered free of charge.

To be eligible for training, you must be learning to live well with a mental illness and feel ready to help others. In advance of training, you must participate in a screening interview and attend at least one Connection Recovery Support Group session. Connection groups are offered at no charge to people with any mental health diagnosis.

To request a screening interview for the Connection Facilitator Training, email annette@namirhodeisland.org or call 401/331-3060.



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