

# The Elder Law Exchange™

Summer 2007

LAMSON & CUTNER, P.C.

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We are excited and proud to celebrate the formation of our new firm, Lamson & Cutner, P.C., a law firm dedicated solely to providing a lifeline to the elderly and disabled. Our mission is to dispel the lament “I can’t qualify for Medicaid. I have too much income.” Or, “I have too much money.” Our response is “YES! YOU CAN QUALIFY for valuable Medicaid and other public benefits with correct planning.”

Each issue of *The Elder Law Exchange* will be dedicated to providing you with vital information on how to avoid the catastrophic costs of nursing home care or home care. There is no reason to deplete your life’s savings or lose your home. Our entire team is dedicated to maintaining our clients’ quality of life, while at the same time protecting their hard-earned assets — including their life’s savings, home, apartment and virtually any type of financial asset — and their income. To accomplish this goal, we employ a variety of legal tools, including: durable powers of attorney, trusts, annuities, personal care contracts and guardianships.

Federal and New York State Medicaid laws are vast and changing. Our attorneys make sure that you receive the full benefits available under the law, whether for Medicaid home care or for Medicaid nursing home care. The most important thing to remember is that it is never too late to start planning, even if your needs are urgent and immediate.

As a service for everyone interested in the legal and financial aspects of caring for the elderly or disabled, Lamson & Cutner, P.C., provides its newsletter, *The Elder Law Exchange*, free of charge. To be added to our mailing list, please call the Lamson & Cutner, P.C., offices at (212) 447-8690. □



Carole C. Lamson



David A. Cutner

## The Pooled Income Trust Saves All Income and Preserves Medicaid Eligibility

It is commonly thought that, if a disabled person applies in New York State for community Medicaid benefits — including home care services, adult day care and prescription drugs — that person will be forced to “spend-down” all of his “excess” income over the 2007 Medicaid guidelines of \$720 per month. Let’s say a disabled person receives Social Security and other income totaling \$3,220 per month. Typically, it is incorrectly assumed that, for an individual to become “Medicaid eligible,” he would be obligated to contribute \$2,500 (\$3,220 minus \$720) to the Medicaid program, reserving the remaining \$720 for all other living expenses. This scenario would be quite a hard-

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### MEDICAID ALERT 2007! SEMINARS FOR PROFESSIONALS AND CONSUMER GROUPS

Lamson & Cutner, P.C., is proud to announce the launching of “MEDICAID ALERT 2007!” This informative seminar is designed to educate elder care professionals and consumer groups about the complex Medicaid system and is provided free-of-charge by Lamson & Cutner, P.C.

Discover all that Medicaid offers in New York State, and the rules that apply. If your company, your church or synagogue, or any other group, would like a free seminar that includes information about Planning and Paying for Long-Term Care, please call our office at (212) 447-8690.

David A. Cutner will present our seminar, “MEDICAID ALERT 2007!” at your organization’s location. Or if you wish, you may schedule any of your group for an in-house seminar at our offices that are located in midtown Manhattan close to Grand Central Station. Make informed decisions for yourself or your family about planning and paying for long-term care. “MEDICAID ALERT 2007!” is provided free-of-charge as a public service to all interested groups in the Greater Metropolitan Area, Westchester and Long Island.

STATEMENTS UNDER THE NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY:

ATTORNEY ADVERTISING

PRIOR RESULTS OBTAINED BY THE FIRM DO NOT GUARANTEE A SIMILAR OUTCOME IN FUTURE CASES

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## MEDICAID HOME CARE — A PRIMER

**A**s you may be aware from frequently published newspaper and magazine articles, the costs of private pay home care for the chronically ill or disabled can be, in the words of New York's highest court, "ruinously expensive." These costs can quickly wipe out all of the money that you have managed to save. However, this unfortunate outcome need not happen to you. Many people are unaware that New York State offers the most generous Medicaid home care program in the United States. Here, in a nutshell, is how it works.

**WHAT IS MEDICAID?** Medicaid is a joint federal and state program providing home care or nursing home care for chronically ill or disabled individuals whose income and financial resources are within the program's eligibility limits. To be eligible for Medicaid, in-home, custodial care services (as opposed to nursing home care) a Medicaid applicant in 2007 cannot have more than \$4,200 in resources, \$1,500 in a burial account and an irrevocable prepaid funeral contract costing any amount. The Medicaid applicant also cannot receive more income than \$720 per month.

**CASE STUDY** Barbara Franklin has been living alone in her fully paid home with a fair market value of \$700,000. She receives a monthly Social Security payment of \$1,800 as well as a small pension of \$289 and about \$1,250 generated monthly from \$300,000 in savings and stocks and bonds. Her total monthly income is \$3,339. Ms. Franklin has early stage Alzheimer's disease and needs around-the-clock assistance in her home for which she has been privately paying at the weekly rate of \$1,750. Can Ms. Franklin become eligible for Medicaid services in her home? Do the current laws afford Ms. Franklin a way to protect all her assets, including her home, and still receive Medicaid benefits? Will Ms. Franklin, be able to protect all of her income too? With proper planning, the amazing answer is YES!

**MS. FRANKLIN'S HOME** Although a Medicaid applicant's home (including a condo or co-op) is an "exempt" asset for purposes of initial Medicaid eligibility, ultimately, upon the Medicaid applicant's death, it will be subject to a Medicaid lien for reimbursement of the amount spent by Medicaid for her home care. An effective strategy is to transfer the home to a protective grantor trust. In doing so, the home will be protected from any creditors, Medicaid included. Ms. Franklin's ability to live in her home for the rest of her life will not be affected, as she would retain a "life estate" in the home. Upon her death the trust and the life estate will terminate and her intended heirs (her two daughters) will receive the property. If the property were transferred outright to the two daughters, they would be burdened with a large capital gains tax upon sale of the property, since Ms. Franklin had paid only \$60,000 when she bought the property in 1965. In other words, with an outright transfer, her daughters would "inherit" her "tax basis" along with the gift of the property. However, when the property is transferred to a trust, upon Ms. Franklin's death, the two daughters will receive what is called a "stepped-up" basis which is the value of the house at the date of death. If the two daughters sell the property promptly after Ms. Franklin's death, the capital gains tax will likely be zero. Another feature of the grantor trust is that it avoids probate. **CAUTION:** A different strategy will be needed if Ms. Franklin needs nursing home care.

**MS. FRANKLIN'S ASSETS** The assets in Ms. Franklin's brokerage account also have a low tax basis and, therefore, it would be prudent to transfer these assets to the trust as well. Ms. Franklin would continue to receive all the income from the investments as she had in the past.

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**MS. FRANKLIN'S INCOME** Ms. Franklin was informed that, because of her monthly income of \$3,339, she was not eligible to receive home Medicaid services since Medicaid guidelines allow the Medicaid applicant only \$720 in monthly income. Anything in excess of this amount would have to be contributed to the Medicaid system and is called a "spend-down." This forced many people out of their homes because they simply could not afford to live there with the loss of their income. NO MORE! Now, disabled persons of any age, Ms. Franklin included, may participate in a "Pooled Income Trust." The Pooled Income Trust is a supplemental needs trust that contains the assets of many disabled individuals and is managed by a non-profit organization that maintains separate accounts for each individual.

Currently, Ms. Franklin has excess income of \$2,619 monthly (\$3,339 minus \$720 = \$2,619). Her daughters would send a check each month for the excess income amount to the trust office, and Ms. Franklin would keep the \$720 and would do with it as she wishes. The Pooled Income Trust, in turn, would pay all Ms. Franklin's expenses, house upkeep, gas, electric, taxes, clothing, food, etc. Ms. Franklin or her representative would instruct the trust regarding the specific bills to be paid each month.

In order for a disabled person to participate in the trust, a "joinder" agreement must be drafted between the beneficiary (Ms. Franklin) and the trust. The agreement must be signed by the disabled individual (assuming she has capacity to do so) or by guardian or a person acting under a Durable Power of Attorney. Often, the non-profit organization will not complete a joinder agreement if the Durable Power of Attorney does not give the agent the *SPECIFIC* power to sign it. It is imperative that the Durable Power of Attorney be carefully crafted for Medicaid planning. (Powers of Attorney will be the topic of a future article.)

**HOME CARE ELIGIBILITY** Now that Ms. Franklin's home and life savings have been transferred to, and protected by, a grantor trust, and her excess monthly income is put into a Pooled Income Trust, Ms. Franklin is eligible for Medicaid home care services. This eligibility will occur the month following the month in which the final transfers to the grantor trust occurred. Thus, if all assets are transferred by August 31, 2007, then on September 1, 2007, Ms. Franklin is eligible to receive home Medicaid services for up to 24 hours per day, seven days a week. All her drug prescriptions will be included. She will also be eligible for special, medical model day-care centers which are costly if one does not receive Medicaid benefits. Finally, Ms. Franklin will apply for, and receive, live-in home care services from a home attendant. All of these Medicaid benefits, available in New York State, allow Ms. Franklin to age in her own home environment and, perhaps, never require a nursing home facility. □

LAMSON & CUTNER, P.C., provides legal services for the elderly and disabled, including home care Medicaid applications, nursing home Medicaid applications, fair hearings, re-certifications, wills, trusts, powers of attorney, health care proxies, guardianships, estate planning, probate, annuities and personal care contracts. CAROLE C. LAMSON has practiced exclusively in the Elder Law field in excess of eighteen years. She is a member of the National Academy of Elder Law Attorneys (NAELA) and the New York State Bar Association, Elder Law Section and Trusts and Estate Section. Ms. Lamson is a Certified Estate Planner who is widely published. Her articles have appeared in the *Journal of the New York State Bar Association*, the *Newsletter of the New York City Alzheimer's Association* and the *Journal of NAMI California* among many others. Ms. Lamson is a founding editor of *The Elder Law Exchange*. Since 1971, DAVID A. CUTNER has represented nursing home owners, doctors, disabled individuals, and a variety of other clients in litigation and business transactions. He has also served as a court-appointed guardian. Mr. Cutner is a member of NAELA, the Elder Law Section of the New York State Bar Association and the Federal Bar Council.

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## The Pooled Income Trust Saves All Income and Preserves Medicaid Eligibility

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ship for anyone but, fortunately, this is not the law!

The fact is that a disabled individual, of any age, may now put his “excess” income, no matter what amount, into a Supplemental Needs Trust called a Pooled Income Trust, and such “excess” income will not be counted for purposes of determining eligibility for community Medicaid services.

The Pooled Income Trust operates as follows:

Suppose Dad is receiving home care Medicaid benefits and has been paying his monthly “spend-down” amount as his contribution to the agency providing his Medicaid services. Now, Dad, or his representative, aware of the possibility of conserving his entire income, contacts an Elder Law attorney who advises that his entire income in excess of \$720 can be put to use for his benefit to pay his rent, food, clothing, utilities and anything else, including taxes and home repairs.

Dad, or his representative, now joins as one of the participants in a Pooled Income Trust. Dad’s monthly excess income will be deposited in a Supplemental Needs Trust that has its assets “pooled” with the assets of other disabled persons, but is

managed as a separate account for Dad for whose benefit the trust was established. Dad will keep \$720 in his bank account and can spend this amount for anything he wishes. The remainder of his income will be sent to the Pooled Income Trust with instructions as to which bills the trust should pay. The bill payments, of course, cannot exceed the amount sent to the trust. There is a small monthly processing fee that the trust charges for overseeing the process.

In order to access benefits under the Pooled Income Trust, Medicaid applicants of any age must first establish “disability” through Medicaid’s disability determination process. The NYS Disability Review Team in Albany will make all final disability determinations for Medicaid applicants. For people over 65, this process is similar to the Social Security process for people under 65. Since individuals who are more aged are more likely to suffer severe and/or chronic or persistent impairments, establishing “disability” is typically not an obstacle.

Individuals who need Medicaid home care services or other community services and whose incomes exceed \$720 per month should not hesitate to consult an Elder Law attorney to assist in creating a Pooled Income Trust in order to obtain Medicaid services without a “spend-down.” □