Intent to Return Home

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To: **Attorney Staff**

From: **Managing Attorney**

The following is excerpted from *Intent-to-Return-Home.pdf* at Mullen Law Offices, Bristol, RI.

The home is exempt from being counted as a resource, subject to an asset cap established in the Deficit Reduction Act of 2005, so long as the individual, a spouse, or a disabled or minor child lives in the home. If the home is no longer the owner's principal place of residence, and none of the specified relatives is living in the house, it loses its exempt status. In turn, that will cause the individual to be ineligible for Medicaid to pay for nursing home care because of excess resources, assuming his equity in the home exceeds $2,000.

A solution for this problem is to have the Medicaid applicant file a statement with the Medicaid application that he or she intends to return home. If that is done, the home should continue to be counted as his principal place of residence and therefore an exempt resource for Medicaid eligibility. That is the general rule, but, as with much of Medicaid, the devil is in the details.

A) Establishing the intent-to-return-home subjective test.

1) *Anna W. v. Bane*, 863 F.Supp. 125 (W.D. NY. 1993)

Anna W., the seminal case regarding this issue, held that "state regulations contravened federal law and regulation inasmuch as homestead exemption could be lost under state regulations based solely on objective criteria without considering recipient's subjective intent to return to home."

The Facts:

The plaintiff, Anna W., has been receiving periodic inpatient treatment for bi-polar or manic-depressive disorder at the Rochester Psychiatric Center ("RPC") since 1958. In 1985, she was admitted to RPC as an inpatient. At that time, her doctors considered that her prognosis for recovery was poor, and believed that she would most likely need inpatient hospitalization for the rest of her life. She was not permanently admitted to RPC, however, and had the status of "temporary inpatient" at RPC. She remained an inpatient until 1991, when her condition improved to the point that she could be placed in shared, unsupervised housing, returning to RPC for one full day and night per week for continuing treatment. During the 7½ years that plaintiff was an inpatient, she was occasionally placed in structured residential settings outside RPC.

Plaintiff owns a home with an approximate value of $60,000, where her son has lived from 1987 to the present. She has returned to this home relatively frequently during the years that she was an patient at RPC, although she has not resided there since 1985.

Plaintiff began receiving New York State Medical Assistance ("Medicaid") benefits in the summer of 1986, when she turned sixty-five. In April 1988, DSS notified the plaintiff that her benefits would be discontinued because her home counted as an excess resource and thus disqualified her from eligibility. She successfully challenged the original notice on the ground that she was given improper notice. After receiving proper notice of discontinuance, Plaintiff requested and was granted a fair hearing on the issue of the homestead exemption on January 7, 1992. Plaintiff testified at the hearing that she wanted to return to her home and that she intended to live at her home permanently when she fully recovered.

On February 12, 1992, the Commissioner's Designee issued an order affirming DSS, holding that plaintiff's "permanent absent status" from her home allowed DSS to count it as a resource. He

noted that "[s]ince appellant is not residing in her property it has not regained its status as a homestead." He stated, however, that Plaintiff "testified that she is living one day at a time and would eventually like to return to the house, but did not know when she would be able to do this."

The Analysis:

In a November 1991, letter to a DSS official, the Associate Regional Administrator of the Medicaid division stated the HHS interpretation of the regulations:

> * * * These guidelines hold that a home continues to remain as a principal place of residence, and therefore an exclusion, even if the individual is away from home but he/she intends to return to the home. The file must, of course, be documented with a signed statement to that effect and the statement is accepted without challenge unless it is self-contradictory.

This letter makes clear that the proper standard to be applied is a subjective "intent" standard, and not an objective "expectations" standard. It also demonstrates that the application of these regulations against Plaintiff was improper.

The State regulations establish presumptions that claimants will not return home based upon objective criteria (i.e. entrance into a nursing home or residence in an acute care facility for more than six months), which do not take into account the subjective intent to return. Although competent medical evidence can overcome these presumptions, the focus of the analysis is still upon objective "expectations" that claimants will return as opposed to the subjective "intent" that they return.

In the present case, Anna W. has indicated her subjective intent to return to her home when her condition has improved to the point that this is feasible. This intent is reflected in the Commissioner's Designee decision which indicates that the plaintiff "testified that she is living one day at a time and would eventually like to return to the house, but did not know when she would be able to do this." The inclusion of her home as a "countable resource" was improper in light of her manifested intent to return to this home.

B) When is the intent-to-return-home statement self-contradictory?

2) *Inglese v. Nirav Shah*, 121 A.D.3d 688 (Supreme Court, Appellate Division, New York 2014)

The Facts:

In November 2010, the petitioner, Ophelia Inglese, was a resident in a Westchester County nursing home. On November 30, 2010, the petitioner's daughter, in her capacity as attorney-in-fact for the petitioner, executed a "Statement of Intent to Return Home" on behalf of the petitioner. This document stated that the petitioner intended to return to her Bronxville home, a cooperative apartment, "upon completion of rehabilitation at the St. Cabrini Nursing Home." On January 27, 2011, the petitioner entered into a contract to sell her home and, on March 10, 2011, the closing of that transaction took place. On March 31, 2011, the petitioner submitted an application to the WCDSS for Medicaid benefits, retroactive to December 1, 2010. The application reflected that the petitioner's home had been sold. As indicated, the WCDSS deemed the value of the petitioner's cooperative apartment as a countable resource in determining her eligibility for Medicaid benefits, and denied the application.

The petitioner then requested and received a fair hearing before the NYSDOH. At the hearing, the petitioner argued that the fact that she entered into a contract on January 27, 2011, to sell her home was irrelevant to WCDSS's financial analysis, because the November 30, 2010, statement reflected that the petitioner had expressed in writing her intent to return to her home. Thus, the petitioner contended that she was entitled to Medicaid benefits from the first retroactive date of her application until January 26, 2011, when the contract of sale for the relevant shares of the cooperative corporation was executed. In its decision after the hearing, the NYSDOH affirmed

the denial of Medicaid benefits, concluding that "the contract of sale and sale of the house [sic] ... negate[d] the [petitioner's] intent to return home for the entire three month period prior to the application for [Medicaid]; [and] while the [petitioner] might still return to the community, the homestead became a countable resource for the entire period in question."

The Analysis:

In light of the above, when the petitioner submitted her application for Medicaid benefits to the WCDSS seeking benefits retroactive to December 1, 2010, it was incumbent upon the WCDSS to evaluate her available resources on three different dates: December 1, 2010, January 1, 2011, and February 1, 2011. The petitioner does not dispute that her homestead was properly included as a countable resource with respect to the "snapshot" of her assets as of February 1, 2011, since at that time she had already contracted to sell the homestead. However, it was error to include that resource as of December 1, 2010, and January 1, 2011.

In light of the petitioner's November 30, 2010, "statement of intent to return home," the mere existence of the January 26, 2011, contract of sale did not overcome the presumption in favor of recognizing the homestead exemption, nor did the existence of the contract establish that the petitioner did not intend to return home for the period in question. While it may very well be that the petitioner's home was listed for sale prior to the execution of the contract of sale, no evidence was adduced at the fair hearing as to the precise date on which the home was listed for sale and, thus, the petitioner's intent to return was determinative of that issue, at least until the contract of sale was executed. Consequently, as of December 1, 2010, and as of January 1, 2011, the petitioner, in connection with the determination of her eligibility for Medicaid benefits, was entitled to have her home excluded from her available resources under the Medicaid homestead exemption. Thus, the petitioner was eligible for Medicaid benefits for this period.

3) *Manning v. Iowa Dep't of Human Svcs.*, Case no. CVCV046502 (Iowa Dist. Ct. Polk Co. Mar. 24, 2014)

The Facts:

Mrs. Manning had moved into an assisted living residence on August 6, 2012, and the home was for sale. When the Medicaid agency learned of that in January, 2013, it terminated her Medicaid benefits effective February 1, 2013. At a fair hearing the son testified that his mother "wanted to return to live in her home, but that the family ultimately realized she cannot safely do so," and that the family did not dispute that she "will not be returning to her home."

Subsequently [the family hired legal counsel and] a new Medicaid application was filed along with a statement signed by the son as "POA" stating the Mrs. Manning intended to return to her primary residence "at such time as I am released from medical treatment in a hospital or residential care facility." The Medicaid agency requested further documentation of that intent, and received a statement from Mrs. Manning's daughter that her mother's "intent is to return to her home."

The Analysis:

The application was again denied and upheld at a fair hearing, from which Mrs. Manning appealed to the court. The court held that the intent to return standard was a "subjective intent to return, not merely a subjective wish, desire or hope to return. Petitioner could have a subjective desire to return to her former residence without having the requisite intent to do so." It continued that "[p]utting a home on the market is not necessarily conclusive evidence of no intent to return to that home as a residence, but it is persuasive evidence that militates against an intent to return." The court concluded that while Mrs. Manning may have "desired" to return to her home, she had no "intent" to do so in light of the initial statements of her children at the first fair hearing and the offering of the property for sale.

The court stated that an intent was something more than a mere wish or desire, quoting the dictionary definition of intent as "the thing that you plan to do or achieve. The court also looked to

the example in the Social Security Program Operations Manual System ("POMS") in which a statement that "Yes, I want to go home, but I really don't know if I should" was considered to be "self-contradictory," containing "conflicting or unclear expressions of intent" requiring development of further information.

> POMS SI 01130.100E2: Examples of self-contradictory statements. If the individual's statement of intent is self-contradictory, contact someone who knows the situation, such as a physician, family member, or close friend or relative to clarify the situation:
>
> "Sometimes I want to go home and sometimes I don't."
>
> "I intend to go home but I also want to stay here."
>
> "Yes, I want to go home, but I really don't know if I should."

So, while the court recognized that "A person can have a subjective intent to return home even if it is objectively unlikely," such self-contradictory statements could make what seemed to be a statement of intent merely a statement of desire.

The court was critical of the lack of any statement from the Medicaid applicant herself about her intent and the lack of any medical evidence about her physical and/or mental limitations. The judge was skeptical of the statements filed by the children on the second application that their mother intended to return when they had testified a week and three weeks respectively after the first fair hearing that the family realized she could not return safely and did not dispute that she would not be returning home. The court discounted their statements in light of "their motives as potential heirs of their mother's estate," apparently being unaware that the Medicaid program probably would have an estate recovery claim against the home after Mrs. Manning died unless one of the children were disabled.

The court also distinguished the situation of someone in a medical facility, like a hospital or nursing home, from someone like Mrs. Manning living in an assisted living facility, which was not a medical facility under state law. To add to the difficulties of proof for Mrs. Manning, the manager of the assisted living facility had written a letter stating that it took a while for her to "adjust to her new living situation," but that it "has become apparent that Elsie is in an appropriate place for her needs" making the children more comfortable in the decision to put her home up for sale.

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4) Lessons Learned

   a. Hire Knowledgeable Counsel – In the *Manning* case, the family lost the first state hearing before consulting with an elder law attorney who attempted to salvage things by filing a new application. But the family's statements on the first application and the first fair hearing decision were fatal to the case.

   b. Make the Intent-to-Return Statement Unambiguous – Don't qualify the intent to return in any fashion. If at all possible, have the Medicaid applicant sign the statement. Though statements by the applicant's agents are accepted, they are given less credence.

   c. Nursing Facility v. Assisted Living Facility – Moving to an ALF may mean that have established a new principal place of residence. You can intend to return home from a medical facility, but an assisted living facility, because it is not a medical facility, may become your home. If you are living in one home (the assisted living facility), you cannot exempt another home by saying you intend to return to it.

d. List the home for sale after you have been approved for Medicaid – Listing the home for sale prior to having the Medicaid application approved, should not contradictory with an intent to return home, see *Inglese,* but yet may be problematic for the eligibility caseworker.

e. Renting The Home – Equally problematic could be renting the home, since that would conflict with the owner/applicant's ability to live there. But if the written rental agreement is a month-to-month, arguably the owner could quickly kick the tenants out and move back in. Of course since any rental income received would merely increase the owner's patient liability, a better idea may be to rent the home for maintenance only. The renters would thus pay the mortgage, taxes and other maintenance directly to the third party, thus avoiding any income attributable to the owner. Also make the renters tenants-at-will to avoid even a month's delay in returning to the home.

f. Medicaid Estate Recovery – Of course, in most instances the State would have a Medicaid Estate Recovery claim against the home, raising the issue of what benefit there is in exempting the home. But at least there would be a potential benefit of the Medicaid monthly rate being lower than the monthly private pay rate. Although if the individual were on Medicaid long enough, the MER claim could exceed the value of the house in any event. Moreover, exempting the home initially gives the owner time to list it for sale while simultaneously receiving Medicaid and making a plan for the sale proceeds.