

A Big Problem — For The Long Term

Recently Passed Legislation Dramatically Changes The Landscape of Medicaid Planning

Hyman G. Darling and Brett A. Kaufman weigh in below.

BY GEORGE O'BRIEN

Hyman Darling says some people are calling it the 'Nursing Home Bankruptcy Act.'

That's just one of the many, often colorful, descriptors being used to assess the Deficit Reduction Act of 2005, or DRA. The measure includes several legislative and policy changes, designed to limit the ability of the elderly to transfer assets before qualifying for Medicaid coverage for nursing home care, until their own funds are exhausted.

One of the provisions of the DRA, a policy which concerns the penalty period for transfers of assets to individuals other than spouses, dictates that the penalties — in the form of months of nursing home care that Medicaid won't pay for (roughly \$7,000 per month) — kick in *after* the individual is in the nursing home and has less than \$2,000 in assets. Under the old law, the penalty period began on the date of the transfer.

"That's why they call it the Nursing Home Bankruptcy Act," said Darling, an estate planning specialist with the Springfield-based law firm Bacon & Wilson. "Who's going to pay those bills? A lot of times, they simply won't be paid, and the nursing homes will really suffer."

But they won't be alone, said Bruce Devlin, an estate planning specialist with the Springfield firm Robinson Donovan. There are many losers with this new legislation, he believes, particularly middle-income couples who will find themselves with far less flexibility and freedom when it comes to their assets.

This is especially true for those who fall into a category Devlin calls "the 11th-hour Medicaid planners."

These are individuals who, as the name suggests, wait until very

late in the game to initiate the planning process and disposition of assets. "With these new changes," said Devlin, "it will that much more difficult to do any 11th-hour planning."

Meanwhile, the DRA has created a large headache for estate planners, who are scratching their heads trying to figure out how to advise clients, said Devlin, who expects the measure to actually take effect in Massachusetts by late summer. "We're not really sure what to tell people."

One thing he's telling them is that if people are contemplating gifts to loved ones or charities, they should make them now, before the new law with its longer look-back period and changed penalty period take effect in the Commonwealth. Meanwhile, in general, he plans to tell individuals with the wherewithal to make contributions and transfer assets when they are young, or younger, and not when they run the risk of running afoul of the DRA's provisions.

And he and others are also telling people to take a hard look at long-term care insurance. This product is currently being embraced by only about 8% of the population, said Sandy Grant, a long-term care insurance specialist with the Novak Charter Oak Financial Group, but it could provide individuals with measures of flexibility and security that the DRA will remove from the equation.

"I definitely see sales of the product growing," she explained, adding that there has been a steady increase in interest over the past several years and an accompanying decrease in the age of those seeking the insurance. "It can be an important component in the funding of a continuum of care for an individual."

The Healthcare News looks this month at the provisions of the DRA,

and how they change the rules of the road when it comes to Medicaid planning.

Age-old Problem

"A health care crisis of unprecedented magnitude for our most vulnerable citizens."

That's a sampling of the language used by the National Academy of Elder Law Attorneys as it expressed its concern over pending passage of the DRA nearly a month ago.

Similar, though less dramatic, terminology was used by estate planning specialists who spoke with *The Healthcare News*. They said the law hurts everyone from the elderly to their family members, to the charities and churches that have been on the receiving end of donations.

Meanwhile, says Darling, it simply flies in the face of the traditional view that people should put money away for a rainy day. "Why? Where is the incentive for doing so?" he asked. "The government is simply determined to take it all away from you."

As he talked about the DRA and its impact, Devlin drew a sharp distinction between those who merely want Medicaid to pay for their nursing home care so they can pass their assets on to their children, and those who are likely to endure financial hardship because of the measures.

"The biggest victims in all this are middle-class to lower-middle-class elderly people," he explained. "It's hard to say that people like you and me should be paying taxes so someone else can get an inheritance. But when it comes to someone being able to realistically survive on the money they've spent their whole lives building up — meaning the healthy spouse — that's when you start to feel bad for

the person. And those are the ones who are the real victims here."

In general, what the new law is designed to do is make it harder for individuals to qualify for coverage, said Darling, adding that Medicaid is one of the biggest budget busters that state and federal lawmakers must contend with. To reduce Medicaid expenditures, and cut the deficit in the process, as the name of the bill suggests, legislative leaders crafted legislation clearly aimed at making individuals and their families assume more of the cost of long-term care — and the taxpayers less.

Here are some of the provisions included to accomplish that mission:

A Longer Look-back Period

Under the current law, when an individual applies for Medicaid, he or she is required to disclose to Medicaid any gifts made by the institutionalized or healthy spouse within the 36-month period preceding the date the medication application is filed. The new measure will extend that period to five years, or 60 months. This will make it more difficult to make such gifts, said Darling, and it will also make the Medicaid application process even more complex than it already is.

The new measure will require elderly individuals to keep organized financial records and accurately account for transactions several years in the past, he explained, and for many, this will be challenging.

While the longer look-back period may discourage transfers in the long run, said Devlin, it may encourage people to make such gifts over the next few months, before the law takes effect in the Commonwealth.

"There is definitely an incentive to attempt to make gifts immediately before the act is enacted in order to avoid having you gifts be subject to a 60-month look-back period instead of a 36-month impact," he said.

• Changes to the Transfer Penalty Starting Date:

This is the provision for which many estate planners borrow the adjective *draconian*, because they believe it to be unnecessarily harsh, and because it would impact many different constituencies — from the elderly individuals making the gifts to family members who will likely have to pick up the tab for several months of nursing home care, to the nursing homes themselves.

Here's why:

If transfers are made during the look-back period, a penalty may be imposed, said Devlin, noting that Medicaid takes the position, right or wrong, that individuals who transfer cash or property are essentially giving away assets that could otherwise have been utilized to pay for long-term care. Such penalties have been metted out in the form of months of nursing home care that Medicaid believes have been gifted away

But the change in the starting date for the penalties represents real trouble for the elderly and their families, he continued, using the example of someone who gives away \$70,000 to a child.

If that gift was made on Jan. 1, 2005, he said, a 10-month transfer penalty (\$70,000 divided by \$7,000 per month) would be imposed. It would begin to run on the date of the gift, and end 10 months later. Assuming that the individual's remaining assets were below \$2,000 ceiling, he or she would qualify for Medicaid on Nov. 1, 2005.

The legislation passed Feb. 8 provides that the penalty will begin to run on the date one enters the nursing home and would otherwise qualify for Medicaid. In the example above, but under the new measure, an individual who makes a gift on Jan. 1, 2005 and enters a nursing home nine months later would be facing a 10-month penalty *after* entering the nursing home and with just \$2,000 in assets.

"Apparently, the government expects that the person to whom the gift was made will pay for those 10 months of care in the nursing home," said Devlin, adding that many parties will be affected.

"This will not only have a devastating impact on an institutionalized person who has made gifts within the look-back period, but it could also have a terrible financial impact on the nursing home as well," he explained. "Nursing homes will be forced to make the difficult decision of evicting a resident who is unable to pay his or her costs or the home would have to attempt to absorb the monthly cost of keeping the patient until he or she qualified for Medicaid."

Given the fiscal crunch facing many nursing homes, this is simply not a realistic option, he said.

Annuities

Under the old law, an elderly couple with one spouse in the nursing home could purchase an annuity to protect the excess assets for the community (non-nursing home) spouse and name their child as the beneficiary of the annuity upon the community spouse's death, said Brett Kaufman, another estate planning specialist with Bacon & Wilson. This provided an excellent planning technique to protect assets for the community spouse and preserve assets for their children.

But under the new law, the use of annuities in Medicaid planning is limited, he continued. "The DRA

still allows the use of annuities to protect assets for the community spouse; however, the Commonwealth may now be required to be named as the beneficiary on certain annuities. Therefore, it is uncertain whether the use an annuity still provides a viable option for a single person or an elderly couple looking to preserve their assets for their family and/or friends."

There are several other provisions of the law, said Kaufman, adding that, in sum, they add up to an extreme challenge for elderly individuals, the disabled, and the professionals trying to help them find ways to conduct effective Medicaid planning.

But, and this is a big but, there are still several months (how many isn't known as this point) before Massachusetts comes into compliance with the new law. This provides ample opportunity for individuals who want to make transfers that would, in essence, be grandfathered

Devlin agreed. "In many respects, it is still business as usual, especially with smaller gifts of \$50,000 and under," he said. "If you're thinking about doing some gifting, now is definitely the time to do it."

As for the future, and the days after the new law takes effect, estate planning specialists say individuals will have to pay much more attention to planning, and begin the process decades before they will likely need nursing home care.

Which brings Darling back to the subject of long-term care insurance.

"I think we're going to see a real boom for that product," he said, adding quickly that is and will continue to be beyond the reach of some individuals. "In some cases, people won't have any real choice but to buy it."

Grant told *The Healthcare News*

that the provisions of the new Medicaid law should prompt more individuals to at least look closely at a product that has been on the market for more than 20 years.

Policies come in a number of different plan designs and price ranges — from a few thousand dollars a year to several times that amount, she explained, adding that the older one gets the more difficult (and expensive) it is to obtain the insurance. And while those who attain it a younger age will likely be paying for it for a longer time, they would, in the end, pay less.

Given the changes in eligibility for Medicaid, long-term care insurance will likely give elderly individuals greater ability to preserve the assets they have accumulated for retirement, Grant explained, an important consideration given the fact that people are living longer and life expectancy will only increase in the future.

"If your expectation is that you're going to live through a long retirement — and most people I deal with on retirement-planning want their money to be there until at least 90 then you have to plan for that," she said. "If such an individual were to become chronically ill, they're going to need to protect those assets so they can enjoy a quality of life."

The Bottom Line

When asked for a quick appraisal of the DRA, Devlin said, "this is a real bear ... it slams the door shut on a lot of the loopholes."

By doing so, it makes the broad assignment of Medicaid planning more challenging, but also more important.

"That's what people need to realize," he said. "They really have to think about things and think early in the game — much earlier than many thought. This new law really changes things."❖