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Medicaid Madness Continues as the Rules Change Once Again

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On February 8, 2006, President Bush signed the Deficit Reduction Act of 2005 ("DRA") and significantly changed the Medicaid rules. Medicaid is a joint federal and state program that provides benefits to qualified applicants based on financial need. In Massachusetts, eligibility is determined by the Division of Medical Assistance. When faced with nursing home costs, many seek to maximize the retention of assets for their family by obtaining Medicaid eligibility as soon as possible. This article focuses on the changes that will affect an applicant's ability to obtain benefits as a resident of a nursing home.

Although the DRA changes the federal rules as of February 8, 2006, each state has until the first day of the first calendar quarter beginning after the end of the legislature's next session to comply with the DRA. Thus, if the legislative session

begins on September 1, 2006, and ends in December of 2006, the deadline is January 1, 2007. Until the state laws and regulations are implemented, eligibility for any applicant will be determined under the current rules.

When applying for Medicaid, the date of the application will control which rules will apply. If the application is filed before the new rules are implemented in Massachusetts, the old rules will apply, but if the application is filed after the new rules are implemented, the new rules will apply. As planning and structuring assets for eligibility often takes months to complete and it is unknown when the new Massachusetts regulations will be implemented, there is a great deal of uncertainty among elder law practitioners regarding proper planning strategies, as a plan crafted under the old rules may not pass muster under the new

rules. Unfortunately, this may hasten institutionalization in order to apply for care sooner in order to qualify under the old rules.

The first significant change is to the look back period, which is the length of time the Division of Medical Assistance ("DMA") will review back from the date of application to determine if any gifts have been made. The look back period for gifts made under the new rules is five years for all gifts, whereas under the old rules, the look back period was three years for outright gifts and five years for transfers to or from a trust.

When gifts are found within the look back period, a disqualification period is incurred during which the applicant can not obtain Medicaid benefits even if they were otherwise eligible to obtain benefits. The disqualification period for a gift is equal to the number of

months obtained when dividing the amount of the gift by the average monthly cost of nursing home care as established by the DMA, which is \$7,380 for applications filed on or after February 1, 2006.

Another significant change is that the disqualification period will begin when the individual is in the nursing home, applies for Medicaid benefits, and would have been eligible for benefits but for the gift(s) made and the resulting disqualification period. Under the old rules, the disqualification period began on the first day of the month in which the gift was made. Under the old rule, if a gift of \$73,800 was made on June 1, 2005, the disqualification period would have expired on April 1, 2006, ten months after the gift. Under the new rule, the disqualification period will not even begin until the applicant is in the nursing home and otherwise eligible for Medicaid benefits.

Clearly, the new rules are designed to minimize asset retention for the family by prevent gifting; however, such draconian measures will result in significant problems for applicants and nursing facilities alike. Many applicants will have made gifts under the old rules assuming that their disqualification period will have expired by the time they enter the nursing home and that they will receive Medicaid benefits. Since benefits will not be available due to the later application of the disqualification period,

the facility will be forced to request that the children pay for their parents' care. In the most extreme cases, the DMA will entertain a request for a hardship waiver, which would allow an applicant to be approved despite disqualifying gifts; however, qualifying for such a waiver is expected to be rather difficult. Should the hardship waiver be denied, as a last resort, the nursing home facility may seek to evict the residents who are unable to pay for their care.

Another significant change affects the use of annuities with respect to obtaining Medicaid benefits. Under the old rules, a single person was allowed to purchase an immediate annuity with any assets they held over the asset level for Medicaid eligibility, which is presently \$2,000. This would change the excess assets into an income stream and would allow for immediate approval for Medicaid benefits. When purchasing the annuity, the institutionalized person was able to name a beneficiary of their choosing to receive the remaining benefits of the annuity if they passed away before all of the annuity payments had been made. Under the new rules, the annuity must provide that the state Medicaid program is the primary beneficiary up to the amount of Medicaid benefits paid so that the state may recoup the payments made on behalf of the Medicaid qualified person upon that person's death.

With respect to annuity planning with a married

couple, the spouse remaining at home is still allowed to purchase an immediate annuity with any excess assets, thereby providing the spouse at home with an additional income stream and allowing for immediate approval of the Medicaid application for the institutionalized spouse. Under the new law, this technique should still be available. Note well, however, if the spouse who was in the community becomes institutionalized in the future, the annuity must provide that the state Medicaid program is the primary beneficiary as set forth above.

Fortunately, despite the drastic changes in the Medicaid laws, planning opportunities still exist and will be discussed next month. In the meantime, should you desire to explore your planning opportunities, the best course of action is to contact an attorney specializing in elder law who can review your specific situation and provide you with the best options even in these most uncertain times.

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