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The Medicaid Rules Have Changed - but the Planning Continues

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Last month, this article reviewed the changes to the Medicaid program resulting from the enactment of the Deficit Reduction Act of 2005 (“DRA”) on February 8, 2006. The changes reviewed were those affecting an applicant’s ability to obtain benefits as a resident of a nursing home, including (1) the lengthening of the look back period, (2) the delaying of the beginning of applicable penalty period for disqualifying gifts until the applicant is “otherwise eligible” for Medicaid and the tightening of the available uses of annuities to obtain benefits. Fortunately, even though planning opportunities have been reduced, it appears as though some options will continue to exist.

At this time, planning is speculative because the federal rules changed as of February 8, 2006, but State regulations have yet to be issued. As it is expected that the old rules will apply to applications filed before the new regulations are issued, it is possible, albeit risky, to rely on planning completed under the old rules; however, elder law practitioners are now recommending planning strategies that should pass muster under the new rules. As no applications have yet been filed under the new rules, it is unclear whether certain strategies will be effective.

When it is necessary to spend down excess assets in order to obtain benefits, under the old rules or the new rules, the applicant should consider establishing non-countable assets including an irrevocably prepaid funeral of a reasonable amount and a burial account of no more than $1,500. In addition, in some cases, the payment of outstanding debts of the applicant can be beneficial.

As the first significant change to the rules is the lengthening of the look back period from three years to five years, the first obvious planning opportunity is to make all disqualifying transfers, i.e. gifts, more than five years prior to applying for benefits. If all disqualifying transfers made by an applicant occur outside of the applicable look back period, these transfers do not need to be reported when applying for benefits. If the disqualifying transfers do not have to be reported, the Division of Medical Assistance will be unable to assess a penalty period with respect to those transfers. Clearly, this strategy would not be effective for an individual who is already institutionalized or soon to be institutionalized.

When an individual is institutionalized or soon to be institutionalized, it may be possible to carry out a gifting plan that saves some portion of the excess assets. Oversimplified, this strategy requires the gifting of all excess assets and then the return of gifted assets to pay for care and to simultaneously shorten the resulting penalty period all in accordance with a carefully calculated plan. As this planning strategy has not yet been proven via successful applications for benefits by individuals using such a plan, caution must be used when undertaking such a plan and it is important that the risks of being unsuccessful are clearly understood before beginning such a plan.

As opposed to a gifting plan, if the soon to be applicant is being cared for in their home or in the home of a caretaker, who is normally a child of the applicant, the execution of a caretaker agreement should be considered. In this situation, rather than gifting assets to the caretaker child, the parent pays the child for the care being provided to the parent in accordance with the terms of the caregiver agreement. As the parent is paying for care, they are spending their assets to purchase services, as opposed to gifting the assets and thereby avoiding disqualifying transfers.

Although annuity planning with respect to individual applicants has been restricted as the State must be named the primary beneficiary of any remaining benefits upon the applicant's death to the extent benefits were paid, annuity planning with respect to married couples should still be possible under the new rules. The spouse remaining at home is 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.

The planning strategies addressed in this article are extremely complex and risky. This article was intended to highlight the remaining possibilites; however, every applicant's case has specific details that must be considered before undertaking any planning. As such, it is highly recommended that the advice of an elder law professional be sought before any planning begins.

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