THE NURSING HOME MEDICAID MINEFIELD – PART II

By Joseph A. Bollhofer, Esq.

The subject of nursing home medicaid coverage became much more complex during the past several years. Part I of this article appeared last month and explained the basic rules that were in existence before recent changes. Except where noted, those rules still apply. Part II explains the changes. Part III will appear next month and will describe tools for last-minute planning.

CHANGES IN THE RULES

All of the rules stated in Part I of this article have been in place, to varying degrees, for years, and were not changed by the DRA ("Deficit Reduction Act") that took effect in 2006. What has changed is as follows:

Since DRA, the "look-back period" for any transfers of property, previously three years (and five years for transfers to a trust), is now five years no matter how the transfer is accomplished. When an application is made, the Department of Social Services will require that the applicant and the spouse disclose all "uncompensated transfers" (gifts) to other people or trusts during the prior five year period. Applicants are required to provide bank and investment records going back to February 8, 2006. All applications must disclose all uncompensated transfers made during the previous five years and, remember, it is a crime to lie on a medicaid application.

The increase in the look-back period from three years to five years is by far not the worse aspect of the DRA. That honor goes to the date from which the "penalty period" for uncompensated transfers is measured. Essentially, when you make an uncompensated transfer (gift other than to an allowed person), the Department of Social Services will impose a penalty period during which you will be ineligible for medicaid coverage. The greater the amount of the gift, the longer the penalty period.

Before DRA, the penalty period began on the first day of the month after the month in which the gift was made. Therefore, if a gift of $100,000.00 was made 24 months before a medicaid application was made, a penalty period of approximately 10 months would be imposed. Since that penalty period would begin to run 23 months before the medicaid application was made, it would have long since expired before the application, and there would be no problem.

However, under the new rules, the penalty period does not begin until after the applicant is in a nursing home, is "otherwise eligible" for medicaid but for the transfers that were made, and a medicaid application is filed. The applicant therefore cannot now simply wait out a penalty period before entering a nursing home and applying for medicaid. This is an extremely important change in the law that has turned medicaid planning on its head.

Early planning has now become more important. Before DRA, medicaid planning was not something to which most people in their sixties would even give a thought. However, since DRA, if no advance planning is done, a sudden deterioration in health could result in a lost opportunity if a medicaid application needs to be made.

LONG TERM CARE INSURANCE

Long-term care insurance policies have been in existence for many years. Those policies pay all or some of the cost of nursing home care. However, the policies have been too expensive for many people. With the change in the DRA, these policies might be considered by some to be more attractive than the prospect of giving away their property, even to well-meaning children, or to an irrevocable trust, and possibly losing control and the benefit of those hard-earned assets. Of course, long-term care policies become more expensive when they are started at an older age, and at some point an individual might not be at all eligible because of health problems. In any case, long-term care policies are an alternative that should be explored, especially in the case of a single person who does not have the "luxury" of transferring property to a spouse before making a medicaid application.

In choosing a policy, and even for those who have policies, it is important to understand exactly what services are covered, the monetary extent of coverage and the length of time that coverage lasts. All policies are not created equal.

Another alternative are policies offered through the New York State Partnership for Long Term Care program. Some or all of your property (but not income) can be protected. The program combines private long term care insurance with Medicaid Extended Coverage.

Those who do not consider long term care insurance a realistic option should be prepared to pay for their nursing home care if the need arises. Of course, whether someone will enter a nursing home is anyone's guess, and very few see such an event steadily approaching from more than five years away. Therefore, some form of last minute or "crisis" planning is more common, and will be discussed next month.

The rules regarding nursing home medicaid eligibility are extremely complex, and many alternatives exist. Since each particular case has its own unique facts, the reader is cautioned that the above summary can not be considered legal advice and should consult with an appropriate legal advisor. Please also note that the monetary figures stated herein are applicable to applications filed in 2010, and might vary in later years.

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Editor's Note:

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