THE NURSING HOME MEDICAID MINEFIELD – PART III

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 in the October edition and explained the basic rules that were in existence before recent changes. Except where noted, those rules still apply. Part II appeared last month and explained the changes. This part will describe tools for last-minute planning.

Since the Deficit Reduction Act of 2005 ("DRA") took effect on February 8, 2006, the ability of applicants for nursing home medicaid coverage to protect their property has been severely affected. While applicants may still transfer their property to their spouses (and certain other persons under limited circumstances) and become immediately eligible for medicaid, gifts made to anyone else will result in penalty periods of ineligibility that do not begin to run until the applicant is in a nursing home, unless those gifts were made more than five (5) years before the date of a medicaid application. However, certain methods have been developed to deal with the issue of "last minute" planning.

PROMISSORY NOTES AND ANNUITIES

A technique called the "modified rule of halves" can be used once someone is in a nursing home and has "excess resources" which would make them ineligible for medicaid. The technique works essentially the same way with a promissory note and an annuity.

Under the promissory note technique, some of the applicant's resources are used to loan money to someone else who pays it back. At the same time, the applicant makes a gift or gifts to loved ones. Under the annuity technique, the same gifts are made, but the other resources are used to purchase an annuity that pays the applicant income. In both cases, the "income stream" created pays the applicant monthly, with interest, to help pay for the cost of nursing home care. These methods must be used correctly in order for medicaid to approve the applicant. The best way of explaining this is by example:

If the applicant has $100,000.00 and makes a gift to her son of $50,000.00, the applicant will have a penalty period during which she will be ineligible for medicaid coverage. In the Nassau – Suffolk area, the penalty period will be approximately five months. At the same time that the gift is made, the applicant loans $50,000.00 to her son, and he signs a promissory note, promising to pay it back over the course of approximately five months. The payments back to the applicant will of course be used to pay for her nursing home care, together with her other income.

An annuity works in much the same way. In each case, the documents must be carefully drafted, and the amounts must be carefully calculated so that the penalty period expires approximately at the same time that the income stream runs out, and the applicant then becomes eligible for medicaid coverage.

Grantor Retained Annuity Trust (GRAT)

The method described above regarding the use of promissory notes can also be used with a grantor retained annuity trust to gift approximately one-half of the applicant's property and use the remainder to establish an annuity trust with a corporate trustee, giving the applicant monthly income. This technique is useful for someone who does not have any close family members to hold a promissory note (and pay it back timely) or for someone who is not able to purchase a commercial short-term fixed annuity.

Essentially, the money that is deposited into the annuity trust is viewed as a conversion of property into an income stream and the income is paid back to the medicaid applicant to cover the cost of nursing home care during the penalty period. However, it is a potentially complicated arrangement that should only be considered if other methods will not work, and if there is enough money to make it worthwhile.

Caregiver Agreements

Another alternative is a written agreement between the applicant and someone else ("the caregiver") where the caregiver provides certain services to take care of the personal needs and/or finances of the applicant.. Essentially, the contract specifies all of the services being provided and establishes a reasonable rate of pay in accordance with the type of service performed.

This arrangement was a medicaid planning tool before the DRA started, and continues to be so. However, it is more likely to be approved by medicaid in the context of a community medicaid application (where the applicant remains in his or her home) rather than in a nursing home application.

A caregiver agreement is considered an employer/employee arrangement, where the recipient of the services is responsible for collecting, reporting and maintaining information on the employee, as well as paying withholding, social security, medicare and unemployment taxes. The payment to the caregiver is income for which taxes must be paid. Therefore, if the agreement is used in a family situation for purposes of preserving property, it likely would not be a welcome alternative in most cases.

Conclusion

It must be emphasized that the medicaid laws are still being interpreted, sometimes with conflicting results. In New York, we have 57 counties, plus New York City, and therefore have 58 local Departments of Social Services (Human Resources Agency in NYC) that sometimes interpret the nuances of planning techniques differently.

In some cases we therefore must proceed carefully, or understand the risks of denial and the possibility of having to appeal the local decisions to higher legal authorities.

The circumstances of each case of course are different, not just in the amounts and types of property that someone owns, but also in his or her particular long-term care needs and his or her feelings about how best to pay for those needs. Above all else, in planning to meet those needs, the applicant must be satisfied that his or her desires are met with the best possible alternative. Despite the harsh changes imposed by the DRA, there remain several alternatives to help individuals plan to preserve assets while providing for their long term care.

The rules regarding nursing home medicaid eligibility are extremely complex. 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.

Editor's Note:

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