

Congress Passes Major Medicaid Legislation

By Bernard A. Krooks, Esq. | 02/01/06
Harrison Herald

Planning for your and your family's future has always been important, but it has never been more important than now. These issues are taking on a special urgency now that Congress has passed (and the President has signed into law) the Deficit Reduction Act of 2005 (DRA). The DRA has made substantial changes to the Medicaid rules that will make it much more difficult for seniors and those with disabilities to access much-needed long-term health care.

The DRA contains three major changes to Medicaid eligibility rules, along with many other significant changes to existing Federal Medicaid laws. First, the look-back period has been increased from 36-months to 60-months for all transfers. Transfers made outside the look-back period need not be disclosed to Medicaid. However, transfers made within the look-back period must be documented and explained to Medicaid. Under prior law, outright transfers were subject to a 36-month look-back period and transfers to or from certain trusts were subject to a 60-month look-back period. This change will require record-keeping that is far beyond normal practices, especially for victims of Alzheimer's disease or dementia.

Second, the start of the penalty period for someone who has transferred assets does not commence until the date that individual applies for Medicaid and is receiving institutional level care (i.e., in a nursing home or pursuant to a waived home care program) and whose application for Medicaid would be approved but for the imposition of a penalty period at that time. Thus, the individual must be otherwise eligible (*i.e.*, have less than \$4,150 in non-exempt resources at that time). Under prior law, the penalty period for

institutional Medicaid commenced on the month after the transfer is made. Under the new Medicaid law, the penalty period may not commence until five years after the assets have been transferred if that is when the person who made the gift is in a nursing home and applies for Medicaid.

By way of example, if someone transferred \$15,000 to his child prior to the date of enactment, he would incur a two-month penalty which would begin in the month after the month in which the transfer occurred. Under the new law, the penalty period on that same \$15,000 gift does not begin until the individual is in a nursing home, is receiving a level of care in any institution equivalent to that of nursing facility services, or is receiving home or community based services furnished pursuant to a Medicaid waived program and that individual has applied for Medicaid and is otherwise eligible. Thus, if the gift was made in 2006 and the individual went into a nursing home in 2010 and was otherwise eligible and applied for Medicaid, the two-month penalty would not begin until 2010. Thus, the individual would not be eligible for Medicaid for two months and would not have any funds to pay for his care during that period. Fortunately, the rules for home care have not changed. You may still transfer assets and not incur a Medicaid penalty so long as you are applying for a non-waivered home care program.

Third, the equity in a Medicaid applicant's otherwise exempt home is countable to the extent it exceeds \$500,000. The DRA gives states the option of increasing this \$500,000 cap to \$750,000. The home equity cap amounts will be indexed for inflation beginning in 2011. The home equity cap does not apply to an individual whose spouse, child under twenty-one, blind or disabled is living in the home. Without proper planning, seniors will be forced to sell their homes or take out reverse mortgages in order to receive long-term

care. Under prior law, a home was exempt regardless of value, if certain conditions are met. Unfortunately, even if the home is exempt it may still be subject to estate recovery if proper planning is not implemented.

The effective date for most of the provisions of the DRA is the date of enactment (the date the President signed the bill). However, in order for Federal Medicaid changes to become law in New York, the state must first adopt enabling legislation. At this time, it is not clear when this law will become effective in New York. This could happen during the current legislative session. It is also not clear how the law will be applied to transfers occurring after the Federal effective date but before New York adopts enabling legislation. The ultimate treatment may depend upon when the Medicaid application was filed or when a determination is made by the Medicaid agency. In 1993, the last time we had major Federal Medicaid legislation, New York State did not adopt the legislation until the following year but it still applied to transfers after the Federal date of enactment. There are many other provisions in the DRA which limit your ability to do advance planning. It is critical that you get your affairs in order while you still have the opportunity.