ELDERLAW NEWS

New Jersey ®

Legal News for the Aging and Disabled

October 2006

ACADEMY OF SPECIAL NEEDS PLANNERS

Donald D. Vanarelli, Esq., Certified Elder Law Attorney, is pleased to announce that he is a charter member of The Academy of Special Needs Planners . "Special needs" law deals with the financial and care needs of individuals with physical, mental or learning disabilities - many of whom are the middle-aged children of aging Americans.

Special needs lawyers believe that wills are often insufficient to ensure adequate care for disabled children. We advise clients that leaving an estate to a child with special needs can result in the loss of benefits and medical coverage.

Some parents try to deal with this problem by disinheriting the child and leaving the money to another child or individual. But this creates numerous other difficulties.

A better approach is to create a special needs trust, which preserves assets by ensuring that Supplemental Security Income, Medicaid or other public benefits aren't lost. The trust can stipulate that its proceeds are supplemental to government benefits and cannot be used for the beneficiary's food, clothing or shelter. Typically, special needs trusts will be used to provide for extra medical care, personal items, public transportation, home improvements and services to enhance the child's self-esteem or living situation. Special needs trusts can also be funded by personal injury settlements, if an individual's special needs are the result of an accident.

The Academy's website, www.specialneedsplanners.com, provides information for lawyers and consumers alike.

It's Official: Restrictive New Medicaid Transfer Rules Enacted

Earlier this year, President Bush signed into law the Deficit Reduction Act of 2005 (the "DRA") which, among other provisions, places severe new restrictions on the ability of the elderly to transfer assets before qualifying for Medicaid coverage of nursing home care. This new federal law applies to all transfers made on or after the date of enactment, February 8, 2006.

A Look at the Major Changes in the New Medicaid Law.

The Effective Date of the New Law

The new DRA rules apply to all transfers occurring on or after the date of enactment of the law, i.e., February 8, 2006. Transfers that occurred prior to the date of enactment are governed by the old rules.

However, the law gives states additional time to enact legislation to meet the new requirements. This gives many people in most states a little time to plan. The deadline for states to enact their own laws varies from state to state, but generally it is the first day of the first calendar quarter beginning after the end of the next full legislative session.

So what about someone who transfers assets after the DRA enactment date but before his state comes into compliance? This will likely depend on the date of the application for Medicaid. If the application is filed before enactment of the state law, it will probably come under the old transfer rules. If it is filed after the

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enactment of the state law, it will come under the new transfer rules.

The Lookback Period

Under the new DRA rules, all transfers are subject to a five-year lookback period. Under the old rules, the lookback period was three years for gifts to individuals and five years for transfers to trusts.

Start Date of the Penalty Period

The new law delays the start of the period of ineligibility for transfers of assets from the first day of the month of the transfer to the date on which the Medicaid applicant is admitted to a nursing home and is eligible for Medicaid but for the gift. In other words, the penalty period does not begin until the applicant is eligible for Medicaid (and probably out of money to pay the nursing home) and would be approved had the gift not been made. At that time, a penalty for the gift is imposed.

Annuities

The DRA annuity provision still permits the use of non-balloon annuities, but requires that the state be "named the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the annuitant." The provision also provides that the state be the secondary beneficiary where a community spouse or minor or disabled child is the primary beneficiary.

Income-First Rule

The new law requires all states to apply the so-called “income-first” rule to community spouses who appeal for an increased resource allowance based on their need for more funds invested to meet their minimum income requirements. Increased resources may only be granted to those who still have income shortfall after first receiving the income of the nursing home spouse.

The Valuable House Rule

Under the DRA, equity in homes of nursing home residents exceeding $500,000 shall be countable unless the nursing home resident’s spouse, child under age 21, or blind or disabled child is living in the house. States may, however, elect to raise this threshold up to $750,000. Those with homes of greater value would be ineligible for Medicaid coverage of long-term care. The problem with this proposal is that it is inequitable. In some parts of the country a $500,000 (or $750,000) home is a mansion. In others, very modest homes have market values exceeding this amount.

Continuing Care Retirement Communities (CCRCs)

The DRA allows Continuing Care Retirement Communities (CCRCs) to require residents to spend down their declared resources before applying for medical assistance. The new law also sets forth rules under which an individual's CCRC entrance fee is considered an available resource.

Other Key Changes

The DRA extends long-term care partnership programs to any state. It also authorizes states to include home and community-based services as an optional Medicaid benefit. (Previously, states had to obtain a waiver to provide such services.)

In addition, the law closes certain asset transfer "loopholes":

* The purchase of a life estate will now be included in the definition of "assets" unless the purchaser resides in the home for at least one year after the date of purchase.

* Funds to purchase a promissory note, loan or mortgage will now be included among assets unless the repayment terms are actuarially sound, provide for equal payments and prohibit the cancellation of the balance upon the death of the lender.

* States will now be barred from "rounding down" fractional periods of ineligibility when determining ineligibility periods resulting from asset transfers.

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* States will now be permitted to treat multiple transfers of assets as a single transfer and begin any penalty period on the earliest date that would apply to such transfers.

What a Good Long-Term Care Policy Should Include

As nursing home and long-term care costs continue to rise, the Deficit Reduction Act has made it more difficult to qualify for Medicaid to pay for nursing home costs. Long-term care insurance can help cover expenses, but long term care insurance contracts are notoriously confusing. How do you figure out what is right for you? The following tips will help you sort through your options.

Find a strong insurance company. The first step is to choose a solid insurance company. Make certain that the insurer is rated in the top two categories by one of the services that rates insurance companies, such as A.M. Best, Moodys, Standard & Poor's, or Weiss.

What is covered. Policies may cover nursing home care, home health care, assisted living, hospice care, or adult day care, or some combination of these. The more comprehensive the policy, the better.

Waiting period. Most long-term care insurance policies have a waiting period before benefits begin to kick in. This waiting period can be between 0 and 90 days, or even longer. You will have to cover all expenses during the waiting period, so choose a time period that you think you can afford to cover. A longer waiting period can mean lower premiums. Some policies may have different waiting periods for home health care and nursing home care, and some companies waive the waiting period for home health care altogether.

Daily benefit. The daily benefit is the amount the insurance pays per day toward long-term care expenses. If your daily benefit doesn't cover your expenses, you will have to cover any additional costs. Purchasing the maximum daily benefit will assure you have the most coverage available. If you want to lower your premiums, you may consider covering a portion of the care yourself.

Benefit period. When you purchase a policy, you need to choose how long you want your coverage to last. In general, you do not need to purchase a lifetime policy – 3 to 5 years worth of coverage should be enough. In fact, a new study from the American Association of Long-term Care Insurance shows that a 3 year benefit policy is sufficient for most people. According to the study of in-force long-term care policies, only 8 percent of people needed coverage for more than 3 years. So, unless you have a family history of a chronic illness, you aren't likely to need more coverage. If you do have a history of a chronic disease in your family, you may want to purchase more coverage. If you are buying insurance as part of a Medicaid planning strategy, however, you will need to purchase at least enough insurance to cover the five-year lookback period.

Inflation protection. As nursing home costs continue to rise, your daily benefit will cover less and less of your expenses. Most insurance policies offer inflation protection of 5 percent a year, which is designed to increase your daily benefit along with the long-term care inflation rate of 5.6 percent a year. Although inflation protection can significantly increase your premium, it is strongly recommended. There are two main types of inflation protection: compound interest increases or simple interest increases. If you are purchasing a long-term care policy and are younger than age 62 or 63, you will need to purchase compound inflation protection. This can, however, more than double your premium. If you purchase a policy after age 62 or 63, some experts believe that simple inflation increases should be enough, and you will save on premium costs.

CAP™
Council of Advanced Practitioners
NAELA™
National Academy of Elder Law Attorneys, Inc.

Donald D. Vanarelli, Esq., has joined the prestigious Council of Advanced Practitioners (CAP) of the National Academy of Elder Law Attorneys (NAELA). NAELA Members who are invited to join the CAP must either be certified as an Elder Law Attorney by the National Elder Law Foundation or be a NAELA Fellow. In addition, the individual must have high professional and ethical ratings (AV) by the Martindale-Hubbell Bar Registry, and have been a member of NAELA for 10 years. An "AV" rating signifies that the lawyer is recognized by his peers as having achieved very high to preeminent legal ability and very high ethical conduct. Only about 20% of all lawyers who have been rated have achieved an "AV" rating.

Mr. Vanarelli represents older or disabled persons and their representatives in financing long-term medical care, nursing home issues, qualifying for Medicare, Medicaid and other public benefits, estate planning, probate and guardianship proceedings.

Law Office of Donald D. Vanarelli
FREE WORKSHOPS

NEW Medicaid Rules for Long Term Care Planning.

How to protect your home and life savings under the NEW Medicaid rules.

Fall 2006 Seminar Dates and Locations

Springfield Library 1:00 p.m. & 7:00 p.m.
October 19
Westfield Office 6:30 p.m.
October 26
Edison Library 1:00 p.m. & 7:00 p.m.
November 28
Westfield Office 6:30 p.m.
December 6

Advance Registration Required,
by calling: 908-232-7400,

Donald D. Vanarelli, Esq. chosen to speak at NAELA's Council of Advanced Practitioners Inaugural Program.

Mr. Vanarelli was chosen to speak on the Recent Historical Treatment of Annuities and Post-DRA Planning Techniques at NAELA's Council of Advanced Practitioners Inaugural Program held in August 2006 at Chicago, IL. The speech explored the treatment of annuities by Medicaid and the courts, and included a survey of the treatment of annuities in various states, a review of the new rules regarding annuities, and a discussion of the various types of annuities and their uses in Medicaid planning.

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