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LONG-TERM CARE PLANNING - 2010

THE BASIC RULES OF NURSING HOME MEDICAID ELIGIBILITY.

For all practical purposes, in the United States the only "insurance" plan for long-term institutional care is Medicaid. Medicare only pays for approximately 2% of skilled nursing care in the United States. Private insurance pays for even less. The result is that most people pay out of their own pockets for long-term care until they become eligible for Medicaid. While Medicare is an entitlement program, Medicaid is a form of welfare or at least that's how it began. So to be eligible, you must become "impoverished" under the program's guidelines.

Despite the costs, there are advantages to paying privately for nursing home care. The foremost advantage is that by paying privately, an individual *is more likely to gain entrance to a better quality facility*. The obvious disadvantage is the expense; in the Capital Region, nursing home fees average $10,000 per month. Without proper planning, nursing home residents can lose the bulk of their savings.

Many of our clients are interested in protecting their assets from the cost of long-term care. It is very important for a married couple that the spouse remaining in the community be able to live in dignity. Many of our clients also want to preserve a modest inheritance to pass along to their children. We can help achieve these goals by preparing a specially designed Asset Protection Plan tailored to the client's income, assets and objectives.

WHAT IS MEDICAID?

The Medicaid program is a partnership of the federal government and the state government. Each state submits its Medicaid program to the federal government for approval. After approval, the federal government assists with the funding of the state Medicaid program. Every state program is different, and the differences between the state programs are significant. This explanation is a summary of the New York program. The programs of other states differ from New York's program. There are six principal tests for New York Medicaid eligibility for long-term care assistance. They are (1) New York residency, (2) membership in a covered group, (3) functional and medical criteria, (4) resource eligibility rules, (5) income eligibility rules, and (6) asset transfer rules. Spouses of nursing home residents are given special protection under the resource and income eligibility rules.

RESIDENCY AND COVERED GROUP

Medicaid is a state program, partially funded by the federal government, therefore, an applicant for New York Medicaid long-term care assistance must be a New York resident. The New York Medicaid program pays for nursing home care for the aged (65 or older), the blind (as defined by the federal Social Security Income (SSI) program) or the disabled (as defined by SSI or the Social Security Disability Income Program) who need nursing home care and meet certain eligibility requirements.

FUNCTIONAL AND MEDICAL CRITERIA

In order to qualify for Medicaid payment for long-term care, an individual must not only be in a covered group, but must also meet both the functional and medical components of the nursing home level of care criteria. The hospital screening team determines if a patient placed in a nursing home directly from a hospital meets this level of care criteria.

RESOURCE ELIGIBILITY RULES

In New York, the Department of Health (DOH) administers Medicaid. Eligibility is determined by each county Department of Social Services (DSS). In order to qualify for federal reimbursement, however, the state program must comply with applicable federal statutes and regulations. Thus, the following explanation includes both New York and federal law as applicable.

The basic rule of nursing home Medicaid eligibility is that an applicant, whether single or married, may have no more than a specified amount of "Countable" assets for 2009. For 2009, the specified amount is $13,800 and generally includes all belongings except for (1) personal possessions, such as clothing, furniture, and jewelry, (2) one motor vehicle without regard to value, (3) the applicant's principal residence with an equity limit of $750,000.00 (4) certain prepaid burial arrangements, (5) term life insurance policies, (6) a life estate in real property, (7) d(4)(A) and d(4)(C) Special Needs Trusts, and (8) assets that are considered inaccessible for one reason or another (Excluded Resources). All resources must be reported and include money on hand in banks and in a safe deposit box, stocks, bonds, certificates of deposit, trusts, prepaid burial plots, cars, boats, cash value of life insurance policies with a face value greater than $1,500.00 and real property.

INCOME ELIGIBILITY RULES

A nursing home resident is eligible for New York Medicaid long-term care assistance if the resident's income is insufficient to pay for the resident's nursing home care at private payment rates. The nursing home resident must spend down all of his or her income, less certain deductions, by payment to the nursing home. The deductions include $50.00 per month personal needs allowance, a deduction for any uncovered medical costs (including medical insurance premiums), and, in the case of a married applicant, an allowance he or she may pay to the spouse that continues to live at home. The New York Medicaid program pays the nursing home the difference between the amounts paid by the resident and the Medicaid contract rate. All income and wages received must be reported including earned income, such as wages as well as unearned income such as Social Security, interest on savings, retirement pensions, Veteran's benefits and other public benefits.

SPOUSAL PROTECTIONS

Assets

Medicaid law provides for special protections for the spouse of a nursing home resident, known in the law as the "Community Spouse". Under the general rule, the spouse of a married applicant is permitted to keep one-half of the couple's combined assets (as of the date of institutionalization) up to $109,560 (the Community Spouse Resource Allowance). In additional, there is a minimum resource allowance for the community spouse of $74,820.

So, for example, if a couple owns $190,000 in countable assets on the date the applicant enters the hospital, he or she will be eligible for Medicaid once their assets have been reduced to a combined figure of $95,000 for the at-home spouse. If the couple owned $250,000 in assets, the spouse in need of care would not become eligible until their savings were reduced to $109,560 for the Community Spouse.

The determination of the level of the couple's assets is made as of the first day of the month of institutionalization of the nursing home spouse (the "snapshot date"). It is advantageous for the couple to have as much money as possible in their names on the snapshot date up to $219,120 ($109,560 x2) so that the amount the community spouse is allowed to keep will be as high as possible. After the spouse in the nursing home qualifies for Medicaid long-term care assistance, the community spouse's resources are no longer deemed available to the institutionalized spouse.

INCOME

Except as described in the following paragraph, the income of the Community Spouse will continue undisturbed; he or she will not have to use his or her income to support the nursing home spouse receiving Medicaid benefits. In some cases, the Community Spouse is also entitled to share in all or a portion of the monthly income of the nursing home spouse. The DSS determines an income floor for the Community Spouse, known as the Minimum Monthly Maintenance Needs Allowance (MMMNA). The MMMNA is $2,739.00 per month or $32,686.00 per year:

- The MMMNA cannot exceed $2,739 unless a court orders a greater amount of support.

Under New York law, however, a spouse is legally obligated to support his or her needy spouse. Based on this requirement, the DSS is required to inform a Community Spouse of his or her legal obligation to provide support. If the Community Spouse's monthly gross income exceeds $2,739, the DSS is required to pursue a contribution of 25% of excess income toward the costs of the institutionalization from the Community Spouse.

If the Community Spouse's gross monthly income is $3,641, he or she will be expected to contribute $225.50 per month to the cost of the institutionalized spouse's nursing home care.

Increase Resource Allowance

A Community Spouse whose income is less than his or her MMMNA after contributions by the institutionalized spouse may petition the DSS for an increase in the standard resource allowance so that these additional funds may be invested in order to generate income to make up the shortfall. Given current low rates of return, this often can permit the Community Spouse to retain a substantial amount of savings.

ASSET TRANSFER RULES

The other major rule of Medicaid eligibility is the penalty for transferring assets. If an applicant or the applicant's spouse transfers assets, then the applicant will be ineligible for Medicaid for a period of time beginning on the date of the transfer for transfers occurring prior to February 8, 2006. For transfers occurring on or after February 8, 2006, the penalty period begins when an applicant is otherwise eligible for Medicaid but for the penalty period. This would normally occur when the applicant is in a nursing home and meets the income requirement and the $3,800 maximum resource requirement, but is ineligible for Medicaid because of the penalty period for the transfer. The period of ineligibility expressed in months is determined by (1) dividing the amount transferred by the average monthly nursing home cost in New York as set by the DSS, and (2) for gifts made prior to February 8, 2006, rounding the result down to the next whole number to determine the number of months of ineligibility. For gifts made on or after February 8, 2006, the result is not rounded down, and a partial month eligibility period may result. Gifts with overlapping periods of ineligibility are aggregated for the calculation of the period of ineligibility. Effective January 1, 2008, the DSS has set the average monthly nursing home costs at $7,431 per month for the Capital District. For example, if an applicant in Albany made gifts totaling $60,000 prior to February 8, 2006, the applicant would be ineligible for Medicaid for 8 months ($60,000 ÷ $7,431 = 8.07, rounded down to 8) If the gifts were made on or after February 8, 2006, the penalty period for Medicaid nursing home benefits would be 8.07 months.

For transfers made after August 10, 1993, there is no cap on the period of ineligibility. Thus, the period of ineligibility for the transfer, prior to February 8, 2006, of property worth $160,000 is 21 months ($160,000 ÷ 7,431 = 21.53 rounded down to 21). DSS, however, may only consider transfers made during the 36-month period (60 months in the case of some trusts) preceding an application for Medicaid (the "look-back" period) for transfers occurring prior to February 8, 2006. In this example, this transfer would be disregarded and no penalty period would be computed. For transfers occurring on or after February 8, 2006, the look-back period is 60 months for all transfers. In this example, if the $160,000 transfer occurred on or after

February 8, 2006, and the individual applied during the 60 months following the transfer (the new look-back period), DSS would not disregard the transfer and would compute the penalty period of 21.53 months.

Exceptions to the Transfer Penalty

Transferring assets to certain recipients will not trigger a period of Medicaid ineligibility. These exempt recipients include:

- A spouse (or anyone else for the spouse's benefit),
- A blind or disabled child,
- A trust for the benefit of a blind or disabled child,
- A trust for the benefit of a disabled individual under the age of 65 years (even for the benefit of the applicant under certain circumstances.)

Special rules apply with respect to the transfer of a home. In addition to being able to make the transfers without a penalty to one's spouse or blind or disabled child, or into a trust for other disabled beneficiaries, the applicant may freely transfer his or her home to:

- A child under the age of 21 years,
- A sibling who has lived in the home during the year preceding the applicant's institutionalization and who already holds an equity interest in the home,
- A "caretaker child," who is defined as a child of the applicant who lived in the house for at least two years prior to the applicant's institutionalization and who during that period provided such care that the applicant did not need to move to a nursing home.

A transfer penalty can be cured by the return of the transferred asset.

LIENS AND ESTATE RECOVERY

New York does place a lien against a recipient's residence.

After the recipient's death, if the recipient received Medicaid after the age of 55, the State has the right to recover from the recipient's estate whatever benefits it paid for the care of the Medicaid recipient. The definition of "estate includes all real and personal property and other assets held by the individual at the time of death.

The state cannot initiate estate recovery if a spouse or a dependent or disabled child survives the beneficiary.

THE MEDICAID APPLICATION

You may file an application for Medicaid benefits with the DSS office for the county in which you live or lived prior to entering a nursing home. Applicants must report all assets under the penalty of perjury. The DSS considers an application for Medicaid benefits for nursing home care as a priority. The DSS will approve or deny the application within 45 days of the date on which you complete the application. You have the right to appeal adverse determinations.

Medicaid eligibility usually starts on the first day of the month of application. Medicaid can begin as early as three months just before the months in which you applied, if there are unpaid medical bills that need to be covered, and eligibility existed at the time.

The Medicaid eligibility rules are complex. Errors are easily made that will result in delayed eligibility. All entries on the application must be accompanied by supporting documentation.

Many applicants will benefit from legal assistance from an Elder Law attorney during the application process.

In addition, after Medicaid eligibility is achieved, the eligibility must be re-determined every year.

PRESERVING RESOURCES AND INCOME

An experienced Elder Law attorney can assist a senior in qualifying for Medicaid assistance while preserving assets and income for the senior's Community Spouse, dependent children, disabled children or other family members. For a single individual there are approximately 30 strategies, which can be employed to protect assets. For a married couple, there are about 60 strategies available.

When one member of a family member enters a nursing home, the estate plans of the Community Spouse and other family members must frequently be revised to insure that the institutionalized family member is not disqualified if the Community Spouse or other family member dies first and leaves the institutionalized family member an inheritance. The Community Spouse or other family member's will should be revised to provide that any gift to the institutionalized family member is left in a special needs trust.

Implementation of these planning strategies frequently requires legal instruments, including wills, special needs trusts, powers of attorney, deeds, private annuities, family agreements and personal care contracts.

ABOUT THIS MEDICAID EXPLANATION

This Medicaid Explanation is a summary of the New York Medicaid program. The programs of other states will differ. This Explanation is provided as a courtesy to help you recognize potential Elder Law problems. It is not intended as a substitute for legal advice. It is distributed with the understanding that if you need legal advice, you will seek the services of a competent Elder Law attorney. While every precaution has been taken to make this Explanation accurate, we assume no responsibility for errors or omissions, or for damages resulting from the sue of the information in this Explanation.