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National Academy of Elder Law Attorneys, Inc.

Elder Law and Life Care Planning, Strategies & Solutions

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"Hardship Waivers"

In the last several issues of the newsletter we have been discussing the impact of the new Deficit Reduction Act signed by the President on February 8, 2006. In the April 2007 issue we explained that under the new rules "any gift or transfer (e.g. gifts to children, charities, church tithing, any gifting whatsoever) is now subject to the new transfer rules). That is the law in Texas.

As we explained, this poses a serious issue for nursing homes and their residents. The reason is that the Medicaid transfer penalties will not begin until the resident is in a nursing home (or receiving an institutional level of care) and already spent down to the Medicaid limits. Only at that point will the penalty start. So if the resident is spent down and has given away funds to a church or charity or child, how can the situation be corrected?

One way is to assert that the penalty was a non Medicaid-motivated transfer. In other words, the person who gives the gift can assert that this was done without any Medicaid motive in mind and therefore there should be no penalty. It is certainly an argument which can be made and we will simply have to wait to see how the State will treat these situations and whether the non Medicaid-motivated transfer argument will be successful. In addition to that, however, what other tools and techniques are available under the new law? One tool is the Hardship Waiver.

According to the new law ***"...the facility in which the institutionalized individual is residing may file an Undue Hardship Waiver application on behalf of the individual with the consent of the individual...and the State may provide for payments for nursing facility services in order to hold the bed for the individual at the facility, but not in excess of payments for 30 days."***

And herein lies the dilemma. The reason is that under the law, a hardship exists ***"...when application of the transfer of assets provision would deprive the individual (A) of medical care such that the individual's health or life would be endangered; or (B) of food, clothing, shelter or other necessities of life."***

In other words, the nursing home or resident will file an application stating that discharge would jeopardize the resident's life or health. And if they win, the penalty is waived. But what if they lose? Can the facility now discharge the non-paying resident? It would be extremely difficult to do so since they would have just argued that discharge would jeopardize the resident's health and welfare...and if it would, then discharge under the Nursing Home Reform Act would not be permitted

Bottom line: the facility is stuck in the middle. That's why it's critically important that planning in these cases be done early. Someone with a full understanding of the Medicaid laws should review applications...and this should be done at least a month or two before filing so that potential problems can be identified and appropriate steps taken.

Our law firm has developed educational seminars for nursing home administrators, social workers, staff and residents and their loved ones. These informative seminars simplify the latest rules, regulations and estate planning/medicaid planning techniques as they pertain to the new Federal and State Rules for Medicaid and Medicare DRA-2005.

These educational seminars have limited seating and are held in various places throughout Grayson, Cooke, Denton, Collin and Fannin Counties. We can also provide on-site seminars with select facilities. Please call us to receive the updated schedule and to reserve your seat today. **903-564-3663 or 800-939-9093**