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Immediate Strategies to Obtain Nursing Home Eligibility

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I. Introduction

This outline provides a brief review of the general requirements for nursing home Medicaid eligibility. It then leads into a discussion of various planning techniques available to both married and single applicants who have failed to implement asset protection techniques in advance of requiring nursing home care.

II. Basic Nursing Home Eligibility Rules

General Requirements

To be Medicaid eligible an applicant must be (a) a New York State Resident, (b) a legal resident of the United States and (c)(i) under the age of 21, (ii) over the age of 65 or (iii) disabled, blind, eligible for public assistance or a recipient of Social Security Income.

Resources

For Medicaid eligibility purposes, resources include property of all kinds. Resources include those of the applicant and the applicant's legally responsible relative. Legally responsible

relatives include (a) spouses and (b) parents for a child under the age of 21. Additionally, resources held in joint accounts are considered resources of the applicant, unless, the resource can be traced back to the non-applicant joint owner or the joint ownership diminishes the applicant's access to the account. For example where the applicant has joint ownership of stocks or other accounts that require the signatures of both parties in order to sell, transfer or otherwise access the stocks, the full joint account will not be considered the resource of the applicant rather only the portion attributable to the applicant's ownership interest will be considered a resource of the applicant.

An applicant is allowed no more than \$13,800.00 in non-exempt resources. Non-exempt resources include bank accounts, brokerage accounts, certain IRAs and life insurance policies. Exempt resources include \$1,500 in cash or life insurance set aside as a burial allowance, burial spaces, irrevocable burial trusts, personal property, one automobile and the homestead (provided the fair market value of the homestead is less than \$750,000). The homestead is the primary residence of the applicant, the applicant's spouse or the applicant's minor, disabled or blind child. The homestead includes a one, two, or three family home, a condominium, a co-op and a mobile home.

Transfers, Look-Back Period and Penalty Period

Prior to the enactment of the Deficit Reduction Act of 2005 ("DRA"), which became effective on February 8, 2006, the look-back period for transfers to trusts was sixty months, or five years. The look-back period for all other transfers was thirty-six months, or three years. If a transfer was made prior to the enactment of the DRA, the penalty period computed on such transfer would commence on the first day of the first month following the date of transfer. Thus, prior to the DRA, it was possible to transfer assets and "wait out" the penalty period.

If the total countable resources are less than \$149,640, the CSRA is equal to \$74,820. If the total countable resources exceed \$149,640, the CSRA is equal to one-half of the total countable resources not to exceed \$109,560.

However, in order to avoid paying resources in excess of the CSRA, the community spouse can execute a spousal refusal indicating that they refuse to provide their resources for the care of their spouse in the nursing home.

Income

Income includes both earned and unearned income. Earned income includes salary, wages, and tips. Unearned income includes required minimum distributions from a retirement arrangements, rental income, dividend payments, pensions and social security.

New York State requires that all income of the applicant less certain allowances must be paid to the nursing home. This is commonly referred to as the applicant's Net Available Monthly Income ("NAMI"). An applicant's NAMI is calculated by subtracting from the applicant's total monthly income certain allowances such as medical insurance premiums, a \$50.00 income disregard and where applicable the Minimum Monthly Maintenance Needs Allowance ("MMMNA") of the community spouse.

The MMMNA protects the community spouse from having insufficient income to live off of where the institutionalized spouse received the greater share of income. In 2010, if the community spouse's income is below \$2,739.00 then the applicant's income will first be budgeted to the community spouse to raise her monthly income to the MMMNA with the balance having to be paid to the nursing home. This is commonly referred to as the "income first" rule. See *Golf v. NYS Dept. of Soc. Serv.*, 221 A.D. 2d 997, 634 N.Y.S. 2d 581 (4th Dept 1991).

Under the DRA, all transfers are subject to a five year look-back period. Moreover, if a transfer was made after the enactment of the DRA, the penalty period resulting from such transfer will not commence until three conditions are met. First, the applicant must be in the nursing home or require institutional level care. Second, the applicant must be otherwise eligible for Medicaid meaning that the applicant cannot have more than \$13,800 in non-exempt resources. Finally, the applicant has to submit a Medicaid application.

Calculating the Penalty period

A penalty period is calculated by dividing the fair market value of the transfer by the Monthly Regional Rate. The Monthly Regional Rate differs based on the region in which you live. Westchester is located in the Northern Metropolitan region and the 2010 Monthly Regional Rate is \$10,163.00. A copy of GIS MA/001 showing the Medicaid Regional Rates is annexed hereto.

For example, if an applicant residing in Westchester County transferred \$50,000.00 to a child in 2010, the penalty period would be calculated by dividing \$50,000.00 by \$10,163.00 for a total of 4.92 months. The penalty period would not commence until the applicant entered a nursing home, had resources under \$13,800 and filed a Medicaid application. During this period the applicant is ineligible for Medicaid, but once the penalty period expired, the applicant is Medicaid eligible and Medicaid starts to pay for the applicant's Nursing Home care.

Community Spouse Resource Allowance

The Community Spouse Resource Allowance ("CSRA") is the amount of assets that a community spouse is allowed to maintain where the other spouse enters a nursing home. There is no CSRA in a home care situation. The amount of the CSRA ranges from \$74,820 to \$109,560 in 2010 depending on the total countable resources of the couple.

III. Nursing Home Eligibility Strategies

A. Strategies not to be overlooked

Exempt Transfers

The first analysis by any elder law practitioner should be to uncover the opportunity to make exempt transfers. Sometimes these opportunities are not readily apparent so a thorough understanding of the client is imperative. If a transfer falls within the category of an exempt transfer, no penalty will be imposed when applying for nursing home Medicaid. The following transfers are exempt for Medicaid eligibility purposes:

1. Transfers of an exempt resource such as a burial fund, property contiguous to the homestead, an automobile, etc.
2. Transfers to a spouse or to another for the sole benefit of a spouse;
3. Transfers to a blind or disabled child or to a trust established for the sole benefit of the child;
4. Transfers to a trust established for the sole benefit of a disabled person under the age of 65; or
5. Transfers of a homestead to the applicant's (a) spouse, (b) minor child, (c) disabled or blind child of any age, (d) adult child who has lived in the home of the parent for at least two years prior to the parent's institutionalization and has been providing care or (e) a sibling of the applicant who has resided in the home at least one year prior to institutionalization and who has an equity interest in the home.

Pre-Planning a Funeral

An applicant can convert a significant amount of otherwise available resources by pre-planning and funding a funeral. Since there is not limit on the amount that can be used to pre-

plan a funeral, clients should be counseled to explore this option. When doing so, the pre-need agreement must be irrevocable to be disregarded for eligibility purposes.

Improvements to Homestead

Where the homestead is an exempt asset, it may be prudent to explore making capital improvements. Clients should be cautious not to make such improvements that would cause the value of the home to exceed the equity limitation cap of \$750,000.00. See 06 OMM/ADM 05.

Purchase U.S. Savings Bonds

U.S. savings bonds are considered unavailable resources during the minimum period of time that they must be held before being converted to cash ("retention period"). For Series EE and I bonds, the minimum retention period is six months for bonds issued on or before January 1, 2003 and twelve months for bonds issued on or after February 1, 2003. See GIS 08/MA/006.

B. Strategies for an applicant and community spouse

Spousal Impoverishment/Refusal

The most common technique being implemented to protect the assets of a married couple is spousal impoverishment and spousal refusal. This technique is useful in a last minute planning scenario since transfers to the applicant's spouse ("community spouse") are exempt transfers. The technique works as follows. All non-exempt assets are transferred to the community spouse. Once the assets are transferred to the community spouse, the community spouse executes a "spousal refusal" refusing to contribute his/her resources and income to the cost of the applicant's medical care. A form of a spousal refusal is annexed hereto. The applicant must then assign to the New York State Department of Social Services all rights of support from the community spouse. A form of an assignment is annexed hereto. Once implemented, the resources belonging to the community spouse in excess of the CSRA are exempt and Medicaid

must review the applicant's application without considering the resources or income of the community spouse.

Notwithstanding the spousal refusal, the community spouse must still provide documentation regarding his/her resources and income in the application for Medicaid or the application will be denied.

The spousal refusal should be submitted with the application and dated as of the pick up date. It is the practice of Westchester County DSS to honor a spousal refusal as of the date it is signed regardless of when the assets were transferred and the requested pick-up date. Thus, the elder law practitioner should make it a practice to have the community spouse sign a spousal refusal at the initial meeting rather than when the application is signed and ready to be filed.

Spousal refusal does not relieve the community spouse from his/her liability for the medical care of the applicant under New York State law. Since a community spouse remains a legally responsible relative, DSS can sue the refusing spouse for support after Medicaid eligibility is granted.

After the institutionalized spouse passes away DSS has a claim for monies it expended on the decedent's care out of the decedent's estate and also a claim against the community spouse. This claim arises from the duty of the legally responsible relative to provide for their spouse. While DSS will waive this obligation during the institutionalized spouses lifetime, they may seek contribution after the institutionalized spouse has passed away.

Enhanced Community Spouse Resource Allowance

An increase in the CSRA is only allowable where the community spouse's income with the institutionalized spouse's contribution is below the MMMNA. If the combined income is below the MMNA, and there are excess resources, the Department of Social Service may allow

enhanced resources. Generally, the formula for determining the amount of resources that a community spouse can maintain in excess of the CSRA to generate enough income to make up the shortfall in the MMMNA is the amount necessary to purchase a single premium immediate life annuity. See 07 OHIP/INF 3. The community spouse does not have to actually purchase the annuity, however, if he/she does, it needs to meet the requirements of the DRA.

Increased Minimum Monthly Maintenance Needs Allowance

If the community spouse does not execute a spousal refusal and requires income in excess of the MMMNA, the community spouse may request a fair hearing seeking an increase to the MMMNA. The community spouse must show that the spouse needs income above that set by Medicaid based upon exceptional circumstances which result in significant financial distress. Significant financial distress mean exceptional expenses which the community spouse cannot be expected to meet from the monthly maintenance needs allowance or from amounts held in resources. An example where this may be granted is if the community spouse has very high medical expenses or a home health aid. See In the Matter of Virginia, FH No. 5435325M (5/18/2010)

Post-Eligibility Transfers

Once the applicant is Medicaid eligible and the application is accepted, the community spouse may transfer assets without creating a penalty for the applicant. However, those transfers will affect the community spouse's eligibility for Medicaid should they need care.

Revising the Community Spouse's Last Will and Testament

When spousal refusal is implemented it is important to change the community spouse's Will. Many people's Wills leave their assets to the surviving spouse first. If the community spouse dies leaving all of his/her resources to the institutionalized spouse then the

institutionalized spouse will no longer be eligible for Medicaid and such assets will be used to private pay the nursing home. However, it is important to remember that under New York Law the surviving spouse has a right of election against the deceased spouse's estate, so even where the will has been changed, DSS may require that the institutionalized spouse exercise their right of election.

C. Strategies for an individual or where husband and wife both enter a nursing facility

Promissory Note Strategy

Implementation of a promissory note strategy effectively replaces the old rule of halves planning eliminated by the DRA. It is the preeminent planning technique for individuals or couples who enter a nursing home, having assets, and without any prior planning. A promissory note strategy can only be implemented at the time an applicant enters a nursing for reasons discussed below.

The strategy has two main components: a gift and a loan. The concept is simple. A portion of the applicant's assets (approximately half) will be gifted, perhaps to a child or a trust, creating a penalty period. The remaining assets are then transferred to an individual (the child) in exchange for a DRA compliant promissory note. During the penalty period, the maker of the note (the child) is obligated to repay the principal and interest to the payee (parent) who will then use such income stream coupled with his/her remaining income (e.g. social security) to pay the nursing home. If the structure is set up properly, the term of the loan will nearly equal the penalty period. Thus, at the end of the penalty period the loan will have been repaid and the applicant will be eligible for Medicaid, thereby preserving the amount of assets originally gifted to the child. The promissory note transaction has been sanctioned by several local DSS offices.

See Matter of AG, FH No. 4733471N, 8/29/07); Matter of Geraldine A., FH No. 4733466Z, 8/29/07; Matter of MK, FH No. 4733465H, 8/29/07; Matter of AA, FH No. 4733476H, 9/07/07; Matter of Norma DeGroat, FH No. 5061459Y, 10/01/08 (existence of prepayment penalty clause does not violate requirements of DRA); *but see* Matter of Guiseppe F, FH No. 5013919Q (promissory note planning with real property where formalities of note not respected).

The Gift

As mentioned above, the gift creates a penalty period. As you may recall, under the DRA, the penalty period does not commence until the applicant (a) is in a nursing home, (b) is otherwise eligible for Medicaid and (c) submits a Medicaid application. Therefore, this strategy cannot only be applied at the last minute, meaning when someone enters a nursing home.

In order to achieve asset protection over the gifted amount, some practitioners have the client make the gift to an irrevocable trust.

Practitioners should be sure to include language in a power of attorney and statutory major gifts rider allowing the agent to make unlimited gifts, create inter vivos trusts and fund such trusts.

The Note

Pursuant to the DRA, the purchase of a promissory note will not be treated as an uncompensated transfer if the note (1) has a repayment term that is actuarially sound, (2) provides for payments to be made in equal amounts during the term of the loan, (3) does not include deferral or balloon payments and (4) prohibits the cancellation of the balance upon the death of the applicant. Strict adherence to these requirements is imperative. In addition, it is advisable to take certain steps to ensure that the note is non-negotiable to avoid an argument that the note can be considered a resource notwithstanding compliance with the DRA. For

instance, a properly drafted note would explicitly state on its face that it is non-negotiable and non-assignable. Also, the note should be stripped of certain provisions often found in negotiable instruments such as provisions relating to default, attorneys fees and waivers. The idea is to make the note unattractive in a secondary market. A form of a promissory note is annexed hereto.

The calculation of the gifted and loan is best explained by illustration. Attached hereto is a real case scenario that resulted in preservation of the gifted amount and Medicaid eligibility. A subtle but important aspect of this planning technique is that the sum of the monthly note payment and other monthly income cannot exceed the nursing home private pay rate. If it does, the client will not be eligible for Medicaid because there will be no outstanding medical bills. As mentioned earlier, some practitioners increase the private pay rate by other medical expenses not included in the base rate such as prescriptions, etc., however, it is my practice to simply use the base pay rate which produces a more conservative result.

Purchase of an Annuity

See materials annexed hereto generously provided by Lee A. Hoffman, Jr.