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MEDICAID & LONG-TERM CARE PLANNING

On February 8, 2006, President Bush signed the Deficit Reduction Act of 2005. The new law changes Medicaid eligibility rules that will make it much harder for many citizens to access the Medicaid (MaineCare) program to pay for nursing home, assisted living and other long-term care. Because nursing home costs in Maine can easily exceed \$65,000 per year, these changes will result in a significant hardship to many people who worked hard their whole lives to have a small retirement nest egg and leave a meaningful inheritance. The State of Maine, through the Department of Health and Human Services, the agency that administers MaineCare, also has made substantial changes to the MaineCare rules.

This article is intended to review some, not all, of the issues regarding MaineCare and long-term care planning. It should not be used on its own without advice from counsel. MaineCare is quite complex and one's personal situation and circumstances are different from another person and require in depth analysis and planning.

PLANNING AHEAD

These Medicaid changes make it so important for you to implement your estate planning early on so that you won't be caught too late doing emergency planning. It is imperative to have your planning in place should you become disabled, so that your family does not have to go to court to be appointed your guardian and conservator.

Important documents: Durable Financial Power of Attorney and Healthcare Power of Attorney.

Having these documents in place allows you to maintain control over your life by making decisions while you are healthy as to how you want to be cared for if disabled, as well as how you want your assets to be used for yourself and your loved ones. A Financial Power of Attorney allows your agent to stand in your shoes and do anything you could do with your assets, only limited by what you state in the Power. The Power of Attorney can allow your agent to be able to "gift" assets to the people who are important to you. With gifting language in the Power, gifts (such as conveyance of your home) can be made without a court proceeding. Conveying assets may be necessary if you (or your spouse) had to go to a nursing home, as well as for continued estate planning purposes.

A Healthcare Power of Attorney lets you now make end-of-life choices that your agent will follow should you become disabled. It also allows your agent to make general medical decisions in accordance with your wishes.

You should also consider how you leave assets to your beneficiaries at your death. When assets are left outright, they have no creditor protection, remarriage protection or disability protection. Assets in joint tenancy pass outright to the survivor. This can include your home and bank accounts. Assets with beneficiary designations, such as an IRA or insurance, pass directly to the beneficiary named. They don't pass through your Will.

A more meaningful way of planning that integrates your assets into your planning and allows for asset protection, is to establish trusts in your Will for your beneficiaries. For instance, you can establish a Marital Trust for your spouse, (or for unmarried people, a trust for a life companion) with specific provisions to protect the assets. Your spouse can act as a Trustee. The assets in the trust would be available for your spouse's general needs and welfare. If your spouse later needed nursing home care, or had creditor problems, the assets in the Marital Trust would be protected yet still be available for the spouse's needs. Any assets in the trust upon the spouse's death would pass to your children or other beneficiaries.

SUMMARY OF MEDICAID/MAINECARE

It is important to understand that Medicare and your private supplemental insurance only covers the costs of rehabilitation in a nursing home, and only if the rehab is needed, as determined by the nursing home. Medicare and private insurance only pay up to 100 days; generally most people don't qualify for that length of rehab. If the person must continue in the nursing home, he or she must either private pay or apply for MaineCare.

1. Allowable Assets

The basic rule of nursing home MaineCare eligibility is that an applicant (the person applying for care), may have no more than \$2,000 in "countable" assets in his or her name, plus another \$8,000 in other liquid assets. "Liquid assets" includes savings and checking accounts, CDs, IRAs, stocks, bonds and mutual funds. "Countable" assets generally include all of one's assets except for (1) personal possessions, such as clothing, furniture, and jewelry, (2) one motor vehicle, (3) the applicant's principal residence (if it is in Maine), and (4) assets that are considered inaccessible for one reason or another.

The home will not be considered a countable asset and, therefore, will not be counted against the asset limits for MaineCare eligibility purposes as long as the nursing home resident intends to return home or his or her spouse or a dependent, blind or disabled child lives there. It does not matter if it appears unlikely that the nursing home resident will ever be able to return home; the intent to return home by itself preserves the property's character as the person's principal place of residence and thus as a non-countable resource.

As a result, for all practical purposes, nursing home residents do not have to sell their homes in order to qualify for MaineCare. **But see the discussion below regarding estate recovery.**

Certain assets, such as other real estate and stocks, bonds or accounts that require two signatures, can be exempt for eligibility purposes if the co-owner is not willing to sell or sign off. **However, the MaineCare recipient's interest is recoverable under the estate recovery rules.**

Income producing property may be exempt only if it produces net income in an amount determined by DHHS regulations, taking into account a rate of return for a 12-month CD at banks in Maine. This is a complex issue to be reviewed on a case-by-case basis.

2. Look-back Period

The look-back period is now 5 years, not three years. Under the new law, any financial transactions that occur on or after February 8, 2006 will be subject to a single 5-year look-back period. Transactions reviewed during the look-back period continue to include not only transfers of assets (gifts), but also sale of real property, sale of personal property, sale of stocks, bonds, and mutual funds, closing accounts and all other financial transactions. ***It is therefore very important to keep good records.***

3. Changes in Calculating the MaineCare Penalty Period Following a Gift of Assets

When an elder gives away something of value without receiving something of equal value in return, he/she will be deemed to have made an "uncompensated transfer," otherwise known as a gift. If an uncompensated transfer occurred within the relevant 5-year look-back period, an individual will be penalized, which will result in a period of ineligibility ("penalty period") for MaineCare benefits. The penalty period is calculated by dividing the amount of the uncompensated transfer by the average cost of one month of nursing home care. The penalty period may be shorter than the look-back period. DHHS has set the average cost of nursing home care at \$7258 a month. This amount will be updated yearly. This number will be used for all MaineCare long-term care applications received on or after January 1, 2006.

4. Determination as to when the Penalty Period Commences: The Most Serious Change.

Under the old law, the penalty period commenced the month a gift was made. So if a gift in January caused a ten-month penalty period, the penalty period would be over on November 1st, and the applicant would then be eligible for MaineCare, even though the gift was still within the look-back period.

Under the new federal law, the result is dramatically different. Now, the penalty period does not begin to run until the month of the gift or the date on which the individual is otherwise qualified for MaineCare, but for the application of the penalty period. So, what does all this

legalese really mean? In short, it means that the penalty period for any gifts made after February 8, 2006 and within 5-years of a MaineCare application, **will begin to run on the date of the Medicaid application, a change that requires new and more complex ways of planning.**

Let's look at the same 10-month penalty period discussed above, but this time the gift is made on March 1, 2006 – after the effective date of the new law. The elder then applies for MaineCare benefits one year later, March 1, 2007. The penalty period will still be 10 months, but this time, the penalty period will not begin to run until the date of application – March 1, 2007. As a result, even though the application is filed 12 months after the gift occurred, the individual will be required to wait an additional 10 months before he or she will be eligible for MaineCare benefits!

This postponement of the penalty start date for transfers that occurred within the 5-year look-back period is the harshest of the new rules. Will the applicant be able to remember every transaction that occurred within 5 years of application for MaineCare benefits? What about gifts made to charity, are they treated differently? How will the nursing home be paid during the prospective penalty period when the MaineCare applicant only has \$10,000 in assets? The reality right now is that we just don't know how these new rules will be implemented by DHHS. What we do know is that it is imperative to implement planning as early as possible, and to keep good financial records for at least 5 years.

5. Calculating the Penalty Period: Partial Month Transfer Penalty

A gift of \$8000 incurs a 1.10 penalty period. The fraction now counts. The penalty period is determined by dividing \$7258 into the amount of the gift. In addition, the new law also requires the aggregation of all gifts made during the five years.

6. Exempt Transfers of Assets

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

- (1) A spouse (or anyone else for the spouse's benefit);
- (2) A blind or disabled child;
- (3) A trust for the benefit of a blind or disabled child; or
- (4) A trust for the benefit of a disabled individual under age 65 (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 penalty to one's spouse, or a blind or disabled child, or into trust for other disabled beneficiaries, the applicant may freely transfer his or her home to:

- (1) A child under age 21;

- (2) 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; or
- (3) 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 nursing home.

7. Restriction on the Use of Annuities

There are generally two broad categories of annuities: deferred and immediate. A deferred annuity is an investment that you purchase from a life insurance company that permits your investment to grow income tax deferred. Even though an annuity is deferred, you have the ability to terminate the annuity any time you want. As a result, the money invested in the deferred annuity is considered an available asset for MaineCare purposes. An immediate annuity is not considered an asset for MaineCare purposes. An immediate annuity is similar to a pension that you receive after retirement. With an immediate annuity you only receive the income stream and have no ability to reach the principal. Therefore, the income derived from the annuity is counted. If the MaineCare recipient owns the annuity, the income will be paid to the nursing home. If there is a spouse, the spouse may be able to keep some of the income.

The new law does not do anything to change deferred annuities – they are still considered assets for purposes of MaineCare eligibility. What is changed is the treatment of immediate annuities.

Under the new law, effective March 1, 2006, the annuitant can only be the MaineCare applicant, the spouse or a dependent, or blind or disabled child. The law prohibits a residual beneficiary (except for a child) in the event the spouse dies before the payout period. The law further provides that there must be no benefit to spouse or child other than a regular stream of income in equal payments over a period of no longer than the spouse's life expectancy. Also, the remainder beneficiary of the annuity, after the spouse, must be the State of Maine.

8. Limitations on the value of Medicaid Applicant's homestead

Under the new federal law, the home will only be exempt for MaineCare qualification purposes if the equity in the property is \$750,000 or lower. However this does not apply if the spouse is living in the home.

9. Requiring use of the income-first rule in providing support to the Community Spouse

When a nursing home resident becomes eligible for MaineCare, all of his or her income, less certain deductions, must be paid to the nursing home. The deductions include a \$40-a-month personal needs allowance, a deduction for any uncovered medical costs (including medical insurance premiums), and in

the case of a married applicant, where appropriate, an allowance he or she must pay to the spouse that continues to live at home. Under the old law, if the spouse of the MaineCare applicant still lived at home (referred to as the "Community Spouse") and receives income that was below the minimum amount permitted by federal law, we could raise the spouse's income through one of two methods known as the "income first" and "resource first" tests. When using the "income first" technique, we simply pulled income from the nursing home spouse and gave it to the Community Spouse to raise his/her income to the amount permitted by Medicaid regulations.

However, by using the "resource first" technique, assets could be exempt in excess of the Community Spouse's \$109,560 asset limitation that were necessary to produce income to raise the Community Spouse's income to the amount permitted by MaineCare regulations. By using this technique, it was not unusual to allow the Community Spouse to keep more in assets.

The federal law does not abolish either the "income first" or "resource first" techniques. Instead, the federal law mandates the use of the "income first" technique. If the Community Spouse can raise his or her income to the amount permitted by the MaineCare regulations by utilizing income of the nursing home spouse, then the spouse will not be able to keep any assets in excess of the \$109,560 limitation. However, if the Community Spouse's income still does not meet the amount permitted under MaineCare after full utilization of the nursing home spouse's income, the spouse may still be able to exempt assets in excess of the \$109,560 limitation, to the extent they are needed to produce income.

In all circumstances, 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. 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. DHHS determines an income floor for the community spouse, known as the minimum monthly maintenance needs allowance, or MMMNA, which, under a complicated formula, is calculated for each community spouse based on his or her housing costs. The MMMNA may range from a low of \$1,822 to a high of \$2,739 (in 2009) a month.

10. Requiring States to implement a "hardship waiver" policy

An important change to the federal law is the specific requirement that States must implement a "hardship waiver" policy to address the potential denial of MaineCare benefits because of an uncompensated transfer made during the 5-year look-back period when the imposition of a penalty period would cause an "undue hardship" to the MaineCare applicant.

The federal law defines an "undue hardship" as a hardship that would deprive the individual of food, clothing, shelter or other necessities of life, or would deprive the individual of medical care such that the individual's life or health would be endangered. Each State is required by the new law to create a formal hearing procedure to process the requests for a hardship waiver. Because nursing homes may

have the most at risk with the denial of MaineCare of someone who no longer has any assets to pay the nursing home bill, the new law permits nursing home representatives to file for and represent the nursing home resident at the hearing for the hardship waiver determination.

11. Burial Contracts and Mortuary Trusts

There is now a limit on pre-paying burial contracts and mortuary trusts of \$12,000. Any contract made after March 1, 2006 that costs more than \$12,000 will cause the balance over the \$12,000 to be non-exempt unless the contract or trust provides that funds remaining after the funeral/burial go to the individual's estate. Passing to the individual's estate means that it is amenable to estate recovery by the State.

12. Estate Recovery

The State can seek recovery against the MaineCare recipient's estate upon his or her death for care given to anyone over the age of 55. The recovery is against not just the probate assets, but any real and personal property and other assets in which the recipient had any legal interest at the time of death, to the extent of that interest, including assets conveyed to a survivor or heir, through tenancy-in-common, survivorship, life estate, living trust, and joint tenancy in personal property. And now, recovery will also be against the deceased's interest in real estate owned as joint tenants. However, any conveyances of real estate to joint tenancy before February 8, 2006 is not recoverable under the estate recovery rules. There is a limited hardship waiver that can be applied for. A "life lease" is not a "life estate" and is not included in estate recovery.

Delayed Recovery. Claims by the State at the recipient's death will not be made if the recipient's spouse is living. Nor will a claim be made if the recipient has a surviving child under 21 or a child who is blind or permanently and totally disabled. However, upon the death of the surviving spouse or such child the State will seek recovery against the estate of these beneficiaries.

Under the new legislation, if the exempt transfers are made while a person is receiving MaineCare benefits, rather than before application for benefits is made, then when the person to whom the transfer was made dies, the State can seek recovery against the value of the property from the estate of the transferee. Therefore, it is very important to plan ahead and if possible, transfer the property to the well spouse before applying for MaineCare.

The estate recovery rules also provide for what is called a "care given exception" for family caregivers to get compensated to some extent when the MaineCare recipient dies if they cared for the recipient during part or all of the two years immediately prior to the recipient's death or entry into a nursing home. The exemption will not exceed \$32,000 per year, prorated for each month of approved care and could be lower, depending on the type of care. It is therefore important for the caregiver to keep good records.

Also, when the collection of the State's claim would deplete the estate fully, the State, at its discretion, may reduce its claim to avoid damage or loss of value to real property. There may be new beneficial estate recovery rules for those recipients who have long term care insurance. These have not yet been implemented by Maine.

Applying For MaineCare

Applying for MaineCare is cumbersome and tedious. Every fact asserted in the application must be verified by documentation. DHHS can require documentation (bank statements, tax returns, etc.) going back five years. The application process can drag on for several months as DHHS may require more verification regarding such issues as the amount of assets and dates of transfers. However, the approval will be retroactive to the date the application is docketed at DHHS.

If the applicant does not comply with the requests for additional information on a timely basis, DHHS will deny the application. In addition, after MaineCare eligibility is achieved, it generally is re-determined every six months or every year by completing an updated asset report for the applicant.

Note that besides passing the financial test for MaineCare, one must first pass the medical test, i.e., be qualified medically as defined by the standards of DHHS. This article does not address the medical requirements.

CONCLUSION

This summary covers the major changes on the State and Federal levels. Not all changes have been covered in this summary. Although the new law does take away many previously available planning opportunities, there are still opportunities for planning and preserving assets.

The biggest message sent by the new law changes is that planning in advance of need is now more important than ever, as is working with qualified professionals experienced in long-term care and asset protection planning.