Transfer of Assets in the Medicaid Program

The Deficit Reduction Act of 2005 introduced new rules that discourage the improper transfer of assets to gain Medicaid eligibility and receive long-term care services.

Background

The Medicaid program provides coverage for long-term care services for individuals who are unable to afford it. Some individuals, with assistance from financial planners and attorneys, have found ways of arranging assets so that they are preserved for the individual and/or family members, but are not countable when Medicaid eligibility is determined. In order to ensure the availability of long-term care services for people that truly need them, the Deficit Reduction Act of 2005 (DRA) addresses key areas related to transfers of assets for less than fair market value. Tightening Medicaid asset transfer rules discourages the use of such "Medicaid planning" techniques and makes it more difficult for individuals with the resources to pay for their own long-term care services to inappropriately transfer assets in order to qualify for Medicaid. These key areas are: asset review "look-back" periods; asset transfer penalty periods; the treatment of annuities; life estates; notes and loans; the "income first" rule; excluded coverage for substantial home equity; and Continuing Care Retirement Community deposits.

Key Transfer of Asset Provisions in the DRA

Extension of Look-Back Period and Beginning Date of Penalty Period

When an individual applies for Medicaid coverage for long-term care, States conduct a review, or "look-back," to determine whether the individual (or his or her spouse) transferred assets (e.g., cash gifts to children, transferring home ownership) to another person or party for less than fair market value (FMV). The DRA lengthened the "look-back period" to 60 months (five years) prior to the date the individual applied for Medicaid.

When individuals transfer assets at less than FMV they are subject to a penalty that delays the date they can qualify to receive Medicaid long-term care services**.** Previously the penalty period began with the month the assets were transferred. This provided an opportunity for individuals to avoid part or all of a penalty by transferring assets months or years before they actually entered a nursing home. Under the DRA, the penalty period, for transfers made on or after February 8, 2006, now begins on either the date of the asset transfer, or the date the individual enters a nursing home and is found eligible for coverage of institutional level services that Medicaid would pay for were it not for the imposition of a transfer penalty—whichever is later.

Treatment of Annuities

Prior to the DRA, annuities were often used to shelter assets, especially in situations where one member of a couple entered a nursing home. To discourage the use of annuities to shelter funds for heirs while qualifying for Medicaid long-term care services, the DRA changed the treatment of annuities. As a condition of eligibility for coverage of long-term care services, Medicaid applicants are now required to disclose any interest in an annuity. Also, annuities must name the State as the primary remainder beneficiary (or as the second remainder beneficiary after a community-based spouse or minor or disabled child) for at least the value of the Medicaid assistance provided. If the annuity does not name the State as a remainder beneficiary in the proper position, the annuity must be treated as a transfer of assets for less than fair market value. The full purchase price of the annuity is the amount that is subject to penalty.

Annuities purchased by or on the behalf of an individual who applied for Medicaid coverage for long-term care shall be treated as an asset transfer for less than FMV unless the annuity meets certain requirements pertaining to retire plans as set forth in the Internal Revenue Service code, or unless the annuity is irrevocable, non-assignable, actuarially sound, and provides for payments in equal amounts during the term of the annuity, with no deferral and no balloon payments.

Life Estates

Under a typical life estate, an individual transfers ownership of his or her own home or other property to another person; for example a son or daughter, but retains a right to live in the home for the remainder of the individual's life. However, some individuals have used this planning mechanism to purchase a life estate in another person's home, but without intending to ever reside in that home. This type of life estate transaction is really just an attempt to transfer assets for less than fair market value to someone else. To prevent this, the DRA requires that the purchase of a life estate interest in another person's home be treated as a transfer of assets for less than FMV unless the purchaser actually lives in the home for at least one year after the date of purchase. Additionally, even if the individual lives in the home for at least one year, if the purchase amount of the life estate is greater than the computed value of the life estate's interest, the difference is considered a transfer for less than fair market value that may be subject to penalty.

Note and Loans

The DRA requires that States now consider the purchase of a promissory note, loan or mortgage as a transfer of assets for less than fair market value, and thus subject to penalty, unless the following conditions are met: (1) the repayment terms are actuarially sound; (2) payments are made in equal amounts with no balloon payments; and, (3) the note, loan or mortgage prohibits cancellation of the debt upon the death of the lender.

Waiver of Imposition of Transfers of Assets Penalties in Cases of Undue Hardship

The DRA established a hardship waiver that permits States to make an exception to a transfer of assets penalty in cases where imposition of a penalty would threaten the health or life of an individual, or when the application of a penalty would deprive the individual of food, clothing, shelter or other necessities of life. The DRA also allows a long-term care facility to apply for an undue hardship waiver on behalf of a resident, provided the facility has the resident's consent. Finally, the DRA provides an option under which States can elect to pay for a person's nursing home care for up to 30 days pending the outcome of a request for an undue hardship waiver.

Mandatory "Income First" Rule

The "income first rule" applies when determining whether to allocate additional resources to the community spouse to bring that spouse's income up to the minimum monthly maintenance needs allowance under the Medicaid spousal impoverishment provisions. The DRA requires States to first assume that all income that could be allocated from the institutionalized spouse to the community spouse has been allocated to that spouse before allocating any additional resources. More than half of the States already applied this rule before enactment of the DRA.

Excluded Coverage for Substantial Home Equity

The DRA requires States not to pay for Medicaid long-term care services for an individual whose equity interest in his or her home exceeds a certain level. The home equity cut-off is $500,000, but States can elect to increase that amount up to $750,000. There is an exception to this requirement for individuals with a spouse or a minor or blind or disabled child residing in the home. Also, States can elect not to apply this provision in cases of documented hardship.

Deposits with Continuing Care Retirement Communities

Continuing Care Retirement Communities, or CCRCs, typically provide a continuum of care ranging from independent residential living to nursing home care. Often CCRCs require an entrance deposit, which can be substantial. These entrance deposits typically are placed in an escrow account. Previously, these funds or deposits were excluded from a person's countable resources when determining Medicaid eligibility because they could not be accessed by the applicant. The DRA requires States to consider these funds as countable resources when determining eligibility for Medicaid, provided (1) the funds can be used to pay for care under the terms of the individual's contract with the facility should other resources of the individual be insufficient; (2) the entrance fee (or remaining portion) is refundable when the individual dies or elects to leave the CCRC; and (3) the entrance fee confers no ownership interest in the community.

State Action

In order to comply with the updated and new provisions relating to the transfer of asset review prior to the determination of an individual's eligibility to receiving Medicaid long-term care service, States must make the necessary changes to their existing Medicaid State Plan.

Important Links

State Medicaid Directors Letter and Enclosure on DRA § 6011 - 6016
http://www.cms.hhs.gov/smdl/downloads/SMD072706b.pdf
http://www.cms.hhs.gov/smdl/downloads/TOAEnclosure.pdf