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# legal update



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## Medicaid Planning Alert

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On February 8, 2006, President Bush signed the Deficit Reduction Act of 2005 (the DRA) into law. The DRA makes several changes to the Medicaid rules which will significantly affect estate and long-term care planning in the future.

The DRA extends the "look-back period" to 60 months for all transfers of assets (both outright transfers and transfers of assets to trusts). The look-back period is analogous to a rearview mirror. It is the period of time within which Medicaid is permitted to review financial transactions of the Medicaid applicant to determine whether any of those transactions would result in Medicaid disqualification or ineligibility. It begins with the date of the Medicaid application and goes backwards in time. Financial transactions further back in time (that is, outside of the look-back period) are not part of the application process and cannot be used as a basis for Medicaid disqualification. The old Medicaid laws provided for a two-tiered look-back period. For outright transfers of assets, the look-back period was 36 months. For transfers of assets to a trust, the look-back period was 60 months. The DRA creates a single-tier look-back period. Under the DRA, all transfers, regardless of whether they are outright or to a trust, are subject to a 60-month look-back period.

As a practical matter, the 36 month look-back period will continue to be in effect until February 8, 2009, which is three years from the date on which the DRA was enacted. This is because transfers made before February 8, 2006 will continue to be evaluated under the old Medicaid laws. Beginning in February 2009, the look-back period will start being extended by one extra month as each month passes for the following two years, so that by February 2011, the look-back period will have been fully extended to five years.

Because Medicaid applicants are required to provide Medicaid with detailed financial records covering the entire look-back period, the new five-year look-back period will create additional burdens for applicants. Those people who anticipate the possibility of requiring Medicaid assistance to cover the costs of their long-term care should now begin developing a system for saving bank statements and other financial records to cover the entire new five-year look-back period.

The DRA also changes the beginning date of the Medicaid period of ineligibility which a Medicaid applicant may be subject to as a result of transfers of assets made during the look-back period. Under both the old and new Medicaid laws, transfers of assets made during the look-back period will create a period of time during which a Medicaid applicant will be ineligible for Medicaid. And, under both the old and new Medicaid laws, the period of ineligibility is measured by dividing the total value of all gifts

made during the look-back period by the average monthly cost of a nursing home in the region within New York State in which the Medicaid applicant resides (this is the so-called "regional rate").

For 2006, the regional rate in Monroe County is \$7,375. So, for example, if Jean transfers \$73,750 to her son in January 2006, she would incur a 10-month period of ineligibility as a result of the gift (\$73,750 divided by \$7,375). Under the old Medicaid rules, the 10-month period of ineligibility would begin running on February 1, 2006 (that is, the first day of the month following the month during which the gift was made) and would end on November 30, 2006. Once the 10-month period of eligibility had expired, and assuming that Jean otherwise qualified for Medicaid, she could not be denied Medicaid assistance even if, at the time that she filed her Medicaid application, the \$73,750 gift to her son was still within the 36-month look-back period.

Under the new Medicaid laws, the period of ineligibility does not begin running until the Medicaid applicant is otherwise qualified for Medicaid (but for the period of ineligibility). This means that the Medicaid applicant is in a nursing home, has spent down her resources to the Medicaid resource allowance (currently \$4,150 for a single individual), and has actually filed a Medicaid application. Under the new laws, only then does the period of ineligibility begin to run.

Using the example above, suppose that Jean's gift of \$73,750 to her son is made after February 8, 2006 (the date on which the new Medicaid laws were enacted). Jean's gift would still create a 10-month period of ineligibility. However, under the new Medicaid laws, that period of ineligibility would not begin running until Jean was in a nursing home, had spent down her other resources to the Medicaid resource allowance, and had filed a Medicaid application. Under these circumstances, Jean's Medicaid application would be denied and she would be ineligible for Medicaid for the following 10 months. Although Jean's son might be willing and able to return the \$73,750 to her to meet the costs of her long-term care during the period of ineligibility, this money would probably not be enough to cover Jean's costs during the full 10-month period of ineligibility, since the actual monthly cost of Jean's nursing home care is very likely to be higher than the \$7,375 regional rate. If this was the case, Jean's son (or some other family member) would have to pay out of pocket in order to get Jean through the period of ineligibility before she could qualify for Medicaid.

In general, the change in the beginning date of the period of ineligibility under the new Medicaid laws effectively prevents the use of transfers or gifts of assets to protect those assets from being spent down to pay for nursing home care before the nursing home resident will qualify for Medicaid. Under the old rules, upon admission to a nursing home, the nursing home resident had the ability to transfer a certain portion of her assets to family members (usually children), while reserving other assets sufficient to enable her to privately pay for her nursing home care during the period of ineligibility. If the planning was done correctly, upon expiration of the period ineligibility, the nursing home resident would have spent down her assets to the Medicaid resource allowance and would then qualify for Medicaid. And, she would have succeeded in protecting and preserving the gifted assets for her family.

Using the example above again, assume that Jean makes her \$73,750 gift to her son in January 2006, immediately after being admitted to a nursing home. Also assume that the actual cost of Jean's nursing home care is \$9,000 per month and that, after making the gift to her son, Jean still has a reserve of other assets in the amount of \$90,000. Jean's reserve of assets would allow her to privately pay for her nursing home care during the 10-month period of ineligibility beginning February 1 and ending November 30, 2006. Upon expiration of the 10-month period of ineligibility, Jean would have no money left and would therefore qualify for Medicaid. Even though Jean's gift to her son would be within the 36-month look-back period at the time that her Medicaid application was filed, Medicaid

could not deny Jean's application, since the period of ineligibility created by the gift would have then expired.

Unfortunately, under the new Medicaid rules, this type of planning will only work for individuals who have enough wealth to be able to make gifts and reserve enough assets to allow them to privately pay for nursing home care during the new 60-month look-back period (remember that gifts made outside the look-back period – that is, further back in time – cannot be made a part of the Medicaid application process). Assuming that the actual cost of a nursing home in Monroe County is \$9,000 per month, the reserve in this case would have to be \$540,000.

All of that being said, even under the new Medicaid rules, there may still be opportunities for many clients to utilize certain strategies to protect and preserve assets, rather than being forced to spend them down before qualifying for Medicaid. And, despite the recent changes to the Medicaid laws, people will continue to rely on Medicaid to meet the costs of their long-term care. The attorneys at Underberg & Kessler are prepared to not only help you plan to preserve assets before qualifying for Medicaid - we can also help you or a relative with the Medicaid application process itself. If you are interested in learning more about Medicaid planning under the new laws or you need help with the Medicaid application process, please contact your attorney at Underberg & Kessler.