"Medical Assistance Planning for A Nursing Home Resident Over Age Sixty-Five"

By Lesley M. Mehalick, Esquire

A Self-Funded Special Needs Trust cannot be created for a person over the age sixty-five, and thus, the options for Medicaid planning for such an individual are more limited. When the person already resides in a nursing home that is paid for by Medical Assistance, the problem is particularly nettlesome. Nonetheless, with careful planning and creative thinking, there are various solutions that can serve to both enrich the recipient's life while protecting his entitlement to public benefits.

The most immediate, tangible, and accepted alternative to protect public benefits is a "rapid spend-down" of the monies in question. Under this process, the recipient must spend his liquid resources down to the Medicaid allowable amount by the last day of the calendar month in which he receives the recovery. Consequently, it is in all parties' best interest for the net recovery to be distributed on the first of the month so that the recipient will have the most time possible to expend the recovery by the last day of that calendar month.

In a rapid spend-down, the recovery may be used to purchase resources for the benefit of the disabled individual for full fair market value. The Medicaid recipient cannot gift the monies away, or use the monies to purchase liquid assets (i.e., cds or bonds). The recipient, together with his family or attorney, must take great care to maintain all receipts as well as a complete and accurate record of all expenditures in order to fully document the spend-down.

Examples of permitted expenditures include: an irrevocable burial reserve or prepayment to a funeral home; housing (so long as the person has an intent to return to the home); vehicle (which a family member may use to transport the disabled individual); furniture; clothing; television; computer; prepayment of a vacation for the recipient and one caretaker to accompany him; prepayment of therapies; wheelchair; prepayment of beauty parlor costs; or other items that will increase the quality of life of the recipient. It is permissible to pay any outstanding, documented, and bona fide debts, such as a credit card debt; however, the recipient should be aware that the Department of Public Welfare will closely scrutinize the payment of undocumented debts to family members or close friends.

McAndrews Law Offices, P.C.
30 Cassatt Avenue
Berwyn, PA 19312
Phone: (610) 648-9300
FAX: (610) 648-0433

Wyomissing, PA ● Phone: (610) 374-9900
Harrisburg, PA ● Phone: (717) 221-1422
Scranton, PA ● Phone: (570) 969-1817

A second highly beneficial option is a personal care contract between the Medicaid recipient and his personal caretaker. This option works especially well in a situation where a close friend or family member is already making substantial and uncompensated efforts to care for the recipient, because a personal care contract can provide reasonable payment to the caretaker for those services. One cannot be compensated for past work, however, and the contract must speak only to future care.

The most accepted way to prepare such a contract is to have the recipient pay for services as they are provided, however, this is only possible in cases where the recipient of the settlement is not already receiving Medical Assistance. In cases where the person is already Medicaid eligible or residing in a nursing home, the contract must provide for a lump sum payment to the caretaker in return for the caretaker's agreement to provide care for the recipient for the remainder of the recipient's lifetime.

The Department of Public Welfare and the Social Security Administration view personal care contracts with caution, particularly so where a lump sum payment is involved, and thus careful steps must be taken to structure the personal care contract in a manner that provides the greatest likelihood that these agencies will view the contract with approval. A lifecare planner should be retained to meet with and evaluate the family. The lifecare planner should then prepare a report, which will identify the needs of the Medicaid recipient as well as the fair market value of the services to be provided by the caretaker. This report will justify the amount of the contract.

In our experience, the Department of Public Welfare will additionally require the contract to contain a term whereby DPW may be re-paid in the event that the settlement recipient were to pass away before the all of the monies are paid to the caretaker. Thus, the settlement monies may be placed in trust and can be paid to the care-taker as he or she provides care, pursuant to statements that the caretaker should regularly submit to the Trustee. This ensures that the monies will be available to repay DPW if necessary. It is also recommended that the Department of Public Welfare review the contract before it is executed to ensure its acceptance. Of course, the caretaker must declare the amount paid to her as income for purposes of state and federal taxes.

A third option is available when the Medicaid recipient has a disabled family member or close friend for whom he wishes to provide. Although the Medicaid recipient may not transfer his settlement monies to a Special Needs Trust for his own benefit, he may transfer his monies into a Special Needs Trust for the benefit of a disabled beneficiary who is under age sixty-five. Thus, if the recipient has a disabled child or grandchild, he may wish to further explore this possibility. This option could be used in combination with a spend-down and a personal caregiver agreement.

When the above avenues are exhausted, the parties may wish to consider a Medicaid compliant annuity. One should take extreme caution when exploring these annuities as the law in this area is in a state of flux, and recent developments suggest that DPW does not favor these annuities when the annuitant is unmarried and resides in a nursing home. If such an annuity is used, however, it must be irrevocable and non-assignable, it must be actuarially sound, and it

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Scranton, PA ● Phone: (570) 969-1817

must involve immediate and equal payments for the recipient's life expectancy (no deferred payments, balloon payments, or lump sums). The Department of Public Welfare must also be named as the death beneficiary to the extent necessary to satisfy any DPW lien.

When a disabled beneficiary over the age of sixty-five receives a settlement, care should be taken to carefully evaluate the individual's needs, family situation and personal goals. Then the above tools can and should be employed in a manner that will better the individual's life while also maintaining his eligibility for public benefits.

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