55th SEMI-ANNUAL TAX & ESTATE PLANNING FORUM

DRASTIC NEW RESTRICTIONS OF MEDICAID TRANSFERS

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[1] *Analysis of Changes to Federal Medicaid Laws Under the Deficit Reduction Act of 2005* prepared by National Academy of Elderlaw Attorneys (NAELA) Medicaid Strategies Task Force Section April l7, 2006 Editors: Gene V. Coffey, Bernard A. Krooks, CELA, Howard S. Krooks, CELA, Brian W. Lindberg; Vincent J. Russo, CELA, Contributing Authors: Gene V. Coffey, Jason A. Frank, Gregory S. French, CELA, Michael Gilfix, Howard S. Krooks, CELA, Susan H. Levin, Vincent J. Russo, CELA, Charles P. Sabatino, Timothy L. Takacs, CELA, I A.S. Wiesner, CELA. This document prepared by the experts aforementioned was used widely in the preparation of this lecture.

President Bush signed the **Deficit Reduction Act of 2005** Pub. L. No. 109-171 **(DRA)** on February 8, 2006. The Medicaid program is one of the primary targets of this legislation. One of the most controversial cost-cutting provisions contained in the law relates to the changes made to the eligibility rules for long term coverage. Congress made drastic changes to the asset transfer rules, under which aged individuals and persons with disabilities in need of long-term care will be denied Medicaid coverage on the basis of gifts they have made to their children and grandchildren, or donations made to charities, in the five years preceding their application for Medicaid. It should be noted that Medicaid is the single largest purchaser of long term care services in the nation, paying more than $86 billion annually for the coverage of more than four million individuals[2]

A. LOOKBACK PERIOD EXTENDED TO FIVE YEARS

Under Section 6011(a) the lookback period which was previously 36 months (3 years) for individuals and 60 months (5 years for certain trust related transfers) has been changed under the new Law. The lookback period is now 5 years whether pertaining to an individual or a trust.

NEW LANGUAGE OF THE DRA

42 USC 1396(c)(1)(B)

[2]1. *Analysis of Changes to Federal Medicaid Laws Under the Deficit Reduction Act of 2005* prepared by National Academy of Elder Law Attorneys (NAELA) Medicaid Strategies Task Force Section April l7, 2006 Howard S. Krooks, CELA referencing Ellen O'Brien, Georgetown University Health Policy Institute for the Kaiser Commission on Medicaid and the Uninsured , Long Term Care: Understanding Medicaid's Role for the Elderly and Disabled, pgs. 6-7, November 2005.

(i) The lookback date specified in this subparagraph is a date that is 36 months (or, in the case of payments from a trust or portions of a trust that are treated as assets disposed of by the individual pursuant to paragraph(3)(A)(iii) or (3)(B)(ii) of subsection (d) of this section, or in the case of any other disposal of assets made on or after the date of the enactment of the Deficit Reduction act of 2005, 60 months) before the date specified in clause (ii).

(ii) The date specified in this clause with respect to –

(I) an institutionalized individual is the first date as of which the individual both is an institutionalized individual and has applied for medical assistance under the State plan, or

(II) a noninstitutionalized individual is the date on which the individual applies for medical assistance under the State plan or, if later, the date on which the individual disposes of assets for less than fair market value.

The increase in the lookback period for all transfers suggests that the elderly person or couple, can predict their medical and financial circumstances five years into the future. The applicant has the burden to provide Medicaid with all financial documents, tax returns, bank account statements, CD's , annuities, and more for a five year period. The new law punishes unwitting elders who have helped their families with commonly made gifts and then experience medical events such as a stroke or Alzheimer's disease.

The increased lookback period of 2 additional years of private pay will result in the necessity for record keeping and documentation that is far beyond the scope of that which a poor or chronically ill elderly person can handle. In the case of the individuals with dementia or Alzheimer's, making application for Medicaid benefit's, they will have little or no information regarding deposits and expenditures made over that five year period.

The new planning approach mandated by the DRA 5 year waiting period before an individual will qualify for Medicaid will require the individual to set aside enough

money to pay for a full five years in the nursing home in order to protect any remaining assets.

An increased use of financial planners will become necessary to maximize returns on investments and to make existing estates last as long as possible.

The purchasing of Long term care insurance policies will increase greatly under the DRA while the elderly individual seeks protection to sustain the 5 year lookback period. They will have to consider if they are insurable and whether or not they can make the premium payments for five years.[3]

B. BEGINNING DATE FOR PENALTY PERIOD SEC. 6011(b)

The commencement date of a penalty period has also been changed by the DRA. Under the old law, the penalty period began on the date of the transfer or the month following the date of transfer at the discretion of the State.

The DRA mandates that the penalty period shall begin on the later to occur of the first day of the month in which the transfer was made or the date on which an individual is eligible for Medicaid benefits and would otherwise be receiving institutional level care base on an approved application for such care but for the imposition of a penalty period

NEW LANGUAGE OF THE DRA

42 USC Section 1396p(c)(1)(D)

(i) In the case of a transfer of an asset made before the date of the enactment of the Deficit Reduction Act of 2005, the date specified in this subparagraph is the first day of the first month during or after which assets have been transferred for less than fair market value and which does not occur in any other periods of ineligibility under this subsection.

[3] National Academy of Elderlaw Attorneys *Analysis of Changes to Federal Medicaid Laws Under the Deficit Reduction Act of 2005* prepared by Medicaid Strategies Task Force Section; *Lookback Period Extended to Five Years and Commencement Date of PenaltyPeriod* Authored by Howard S. Krooks, CELA, Boca Raton, Florida

(ii) In the case of a transfer of an asset made on or after the date of enactment of the Deficit Reduction Act of 2005, the date specified in this subparagraph is the first day of a month during or after which assets have been transferred for less than fair market value, or the date on which the individual is eligible for medical assistance under the State plan and would otherwise be receiving institutional level care described in subparagraph (C) based on an approved application for such care but for the application of the penalty period, whichever is later, and which does not occur during any other period of ineligibility under this subsection.

This new section drastically changing the penalty period to the date that the individual enters into the nursing home has a chilling effect upon the elderly with disabilities both physical and mental and the poor. They will not have the means to pay (such as private insurance or Medicare) but they will require a Medicaid nursing home or home and community based care.

Families will be prohibited from providing necessary financial assistance to young family members for medical expenses, school tuition, mortgages or any other assistance for fear that they may not qualify for Medicaid when they need it.

The penalties mandated will apply to all individuals who are unable to recover the funds of value transferred within the penalty period. The recipients of the gifts do not have a legal obligation to refund the transfer and others will be financially unable to do so.

An example would be a senior with Alzheimer's who made withdrawals totaling $10,000 from her savings account forty (40) months prior to the Medicaid application. She will be ineligible for Medicaid long term care benefits for two or more months following the month in which she applies. A woman who helped her granddaughter by paying $l5,000 for her college tuition a year before applying for Medicaid, a farmer in the Midwest who passed on the family farm to his son four years before he applied for

Medicaid, a man who sold his home for $l50,000.0 and donated 10% of the proceeds to his local church four years before he applied for Medicaid all will be impacted by this new rule. [4]

The new rules will have a chilling effect on donations to charities, religious and political organizations, providing financial assistance to a younger family member. It will affect hospitals and nursing homes which will necessarily be required to provide care during the penalty periods for which they will not be compensated.

The result here is that many seniors will find themselves ineligible for Medicaid Nursing Home Services due to a previous transfer, alternative ways to secure eligibility will have to be considered.

A great number of nursing homes and hospitals will be impacted by this rule as individuals are routinely denied admission for lack of finances and eligibility for Medicaid.

The rule will also cause a dramatic shift in the landscape of those individuals who engage in planning to become eligible for Medicaid benefits. While those with a home and a relatively small amount of assets could engage in planning to qualify for Medicaid benefits under pre-DRA law, such individuals lack the resources to sustain themselves in a nursing home during a five year penalty period commencing on the date on which the person enters a facility and becomes in need of long term services.[5]

[4] National Academy of Elderlaw Attorneys *Analysis of Changes to Federal Medicaid Laws Under the Deficit Reduction Act of 2005* prepared by Medicaid Strategies Task Force Section Authored by Howard S. Krooks, CELA, Boca Raton, Florida

[5] According to the Kaiser Commission on Medicaid and the Uninsured, most elderly living in the community who are at high risk for nursing home admission do not have sufficient assets, excluding home equity, to finance a nursing home stay of one year or more. See *Deficit Reduction Act of 2005, Implications for Medicaid*, February 2006, page 4. National Academy of Elderlaw Attorneys *Analysis of Changes to Federal Medicaid Laws under the Deficit Reduction Act* prepared by the Medicaid Strategies Task Force Section and authored by Howard S. Krooks, CELA, Boca Raton, Florida at Page 9.

C. **UNDUE HARDSHIP** Section 6011(d)[6]

The new transfer rules will force many individuals to necessarily seek hardship waivers. The process is used when application of the transfer of assets for less than fair market value results in a penalty which deprives the individual of medical care and the necessities of life.

Prior to the DRA, the undue hardship provision of the statute merely provided that a penalty would not be applied where "the State determines, under procedures established by the State (in accordance with standards specified by the Secretary), that the denial of eligibility would work an under hardship as determined on the basis of criteria established by the Secretary." 42 U.S.C. '1396p(c)(2)(D).

There has essentially been no change to the hardship provisions Post DRA.

The new U.S.C. 1396(c)(2)(D), reads as follows:

An individual shall not be ineligible for medical assistance by reason of paragraph (l) to the extent that….

> (D) the State determines, under procedures established by the State (in accordance with standards specified by the Secretary), that the denial of eligibility would work an undue hardship as determined on the basis of criteria established by the Secretary
>
> The procedures established under subparagraph (D) shall permit the facility in which the institutionalized individual is residing to file an undue hardship waiver application on behalf of the individual with the consent of the individual or the personal representative of the individual. While an application for an undue hardship waiver is pending under subparagraph (D) in the case of an individual who is a resident of a nursing facility, if the application meets such criteria as the Secretary specifies, the State may

[6] National Academy of Elderlaw Attorneys *Analysis of Changes to Federal Medicaid Laws under the Deficit Reduction Act* prepared by the Medicaid Strategies Task Force Section; *Undue Hardship Section* authored by Gene V. Coffey, Washington, D.C. at Page l2.

provide for payments for nursing facility services in order to hold the bed for the individual at the facility, but not in excess of payments for 30 days.

Further, S.1932, '6011(d) Availability of Hardship Waivers provides – Each State shall provide for a hardship waiver process in accordance with Section 1917(c)(2)(D) of the Social Security Act (42 U.S.C. 1396(c) (2)(D)-

(1) under which an undue hardship exists when application of the transfer transfer of assets provision would deprive the individual

(A) of medical care such that the individual's health or life would be endangered; or
(B) of food, clothing, shelter, or other necessities of life; and

(2) which provides for --

(A) notice to recipients that an undue hardship exists;

(B) a timely process for determining whether an undue hardship waiver will be granted; and

(C) a process under which an adverse determination can be appealed.

Therefore, the undue hardship standard continues to exist when it can be proven and accepted that if it is applied the result would deprive the individual of food, clothing and shelter and other necessities of life , or that the deprivation of medical assistance would endanger the life of the applicant. The decision is still at the discretion of the State The State must provide a notice to the recipients that an undue hardship does exist and follow a timely process to determine whether the hardship will be granted. In addition, the process must allow for an appeal of an adverse determination. **The Facility may apply for the hardship waiver and while the application is pending the State is authorized to pay for the nursing facility for at least 30 days.**[7]

D. DISCLOSURE AND TREATMENT OF ANNUITIES, Sec. 6012

[7] Emphasis added on language representing a substantive change in the Undue Hardship Provision.

1. Pre-DRA Law

Section 3258.9(B) of the State Medicaid Manual states:

> "Annuities although usually purchased in order to provide a source of income for retirement, are occasionally used to shelter assets so that individuals purchasing them can become eligible for Medicaid. In order to avoid penalizing annuities validly purchased as part of a retirement plan but to capture those annuities which abusively shelter assets, a determination must be made with regard to the ultimate purpose of the annuity (i.e. whether the purchase of the annuity constitutes a transfer of assets for less than fair market value). If the expected return on the annuity is commensurate with a reasonable estimate of life expectancy of the beneficiary, the annuity can be deemed actuarially sound…
>
> The average number of years of expected life remaining for the individual must coincide with the life of the annuity. Therefore, if the individual is not reasonably expected to live longer than the guarantee period of the annuity, the individual will not receive fair market value for the annuity based on the projected return. In this case, the annuity is not actuarially sound and a transfer of assets for less than fair market value has taken place, subjecting the individual to a penalty."

Two examples in the State Medicaid Manual are: If a 65 year old man with a life expectancy of nearly l5 years purchases a $l0,000 annuity with a l0-year term, the transfer of assets is actuarially sound. However, if an 80 year old man with life expectancy of nearly seven years purchases the same annuity, "a payout of the annuity for approximately 3 years is considered a transfer of assets for less than fair market value and that amount is subject to a penalty." This is the only test authorized by this section of the State Medicaid Manual to assess an annuity.[8]

2**. Post-DRA Law Section 6012(a)**

Section 1917 of the Social Security Act (42 U.S.C. '1396p) is amended by redesignating subsection (e) as subsection (f) and adding a new subsection (e). For purposes of being eligible for long term care services under Medicaid, the applicant or his or her spouse must disclose any interest in an annuity (or similar financial instrument that may be specified by the Secretary).

[8] National Academy of Elderlaw Attorneys *Analysis of Changes to Federal Medicaid Laws under the Deficit Reduction Act* prepared by the Medicaid Strategies Task Force Section , Disclosure and Treatment of Annuities Section Authored by Gregory S. French, CELA, Cincinnati, Ohio, Page 18.

Such application or recertification form shall include a statement that the State becomes a remainder beneficiary under such annuity or similar financial instrument. Also, the State shall notify the issuer of the annuity of the right of the State to be a preferred remainder beneficiary in the annuity.

The State may require the issuer to notify the State when there is a change in the amount of income or principal being withdrawn from the amount that was being withdrawn at the time of the most recent disclosure. A State shall take such information into account in determining the amount of the State's obligations for medical assistance or the individual's eligibility for such assistance.

The Secretary may provide guidance to States on categories of transactions that may be treated as a transfer of asset for less than fair market value.

State Named as Remainder Beneficiary (Section 6012(b)

The purchase of an annuity shall be treated as the disposal of an asset for less than fair market value unless-

(i) the State is named as the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the annuitant under this title or

(ii) the State is named as such a beneficiary in the second position after the community spouse or minor or disabled child and is named in the first position if such spouse or a representative of such child disposes of any such remainder for less than fair market value.

Inclusion of Transfers to Purchase Balloon Annuities

This change includes in the definition of "asset transfers the purchase of balloon annuities by or on behalf of the annuitant who has applied for medical assistance for nursing facility services or other long term care services, UNLESS

(i) it is an annuity meeting the requirements of certain Sections of 408 and 408A of the IRC, or

(ii) it is an annuity that is irrevocable, non assignable, actuarially sound (based on Social Security tables) and pays out in equal installments during the term of the annuity with no deferral or balloon payments made.

Effective Date

The change in the Annuity rules shall apply to transactions (including the purchase of annuity) occurring on or after the date of the enactment of the Act (Sec.6012(d). This Section may be subject to the general provisions of Section 6016 as well as the provisions regarding State implementation.

The DRA applies only as to how the purchase of an annuity "shall be treated as the disposal of an asset for less than fair market value." The annuity provisions do not govern Medicaid's treatment of annuities for other purposes, such as their treatment as a resource.

Unless there is a community spouse or minor or disabled child, the DRA requires that for annuities not described by Paragraph (G) of Sec.. 1396p(c)(1) "the State is named as the remainder beneficiary in the first position for at least the total amount of Medicaid assistance paid on behalf of the annuitant." A State may not require that it be named the remainder beneficiary for the entire amount of the annuity. However, the owner could name the State as the remainder beneficiary for the total amount of the annuity. The DRA is silent as to naming the State a remainder beneficiary for more than the total amount of Medicaid paid.

Since the State requires that if there is a community spouse or minor disabled child who disposes of their remainder for less than fair market value then the State must be placed in the first position regarding annuities not under Paragraph (G) as identified above. Specific language will have to be included in the Annuity. In addition, the DRA authorizes the State to require the issuer to notify the State when there is such a change.

The DRA states that the term "assets" includes an annuity purchased by or on behalf of an annuitant who has applied for Medicaid with respect to nursing facility services or other long-term care services" unless certain requirements are met.

The DRA provisions do not apply to annuities purchased by or on behalf of a community spouse as long as the community spouse is the annuitant and has not applied for medical assistance. However, a non DRA compliant annuity purchased by the community spouse is not excluded from assets pursuant to paragraph (G) of Sec. 1396p(c)(1) and appears to otherwise impact the Medicaid eligibility of the Medicaid applicant/spouse. The DRA requirements also do not apply to an annuity purchased by a third party with funds that never belonged to the applicant/beneficiary or community spouse. Since such funds never belonged to the applicant/beneficiary or community spouse, they are not assets of the community spouse or the applicant and, hence, are not assets for purposes of DRA's transfer of asset provisions.

A transfer of assets or non retirement annuity must be "actuarially sound (as determined in accordance with actuarial publications of the Office of the Chief Actuary of the Social Security Administration)." The tables can be found at: http://www.ssa.gov/OACT/STATS/table4c6.html.

Again, it appears that for an asset with regard to a transfer of assets, non retirement annuities not to be included as an asset, they must be paid either every other month, quarterly or annually.

Retirement annuities included in subparagraph (G) (ii) are not included as assets with respect to a transfer of assets. Does that mean that assets in excess of the community spouse resource allowance may be used to purchase an annuity for the

community spouse without incurring transfer of asset consequences? The DRA is silent with regard to how annuities not considered "assets" regarding a transfer of assets are treated in this regard.

E. INCOME FIRST Sec. 6013[9]

1. Pre-DRA Law

[9] National Academy of Elderlaw Attorneys (NAELA) *Analysis of Changes to Federal Medicaid Laws under the Deficit Reduction Act* prepared by the Medicaid Strategies Task Force Section; *Income First Section* authored by Susan Levin, Newton, Massachusetts

In the Medicare Catastrophic Coverage Act (MCCA) of l988[10] Congress provided certain protections to couples in which one spouse has been institutionalized and the other spouse (the "community spouse") continues to reside at home. The provisions protect a minimum level of the couple's resources and income to provide the community spouse with the ability to meet basic living expenses.

The State takes a "snapshot" of the couple's countable resources on the date that the ill spouse is institutionalized. The community spouse is entitled to retain a portion of these resources, known as the "community spouse resource allowance" (CSRA), which is equal to one-half of the couple's total countable resources, but not less than $l9,908 or more than $99,540.[11] In some States, the community spouse is permitted to retain the maximum resource allowance even if it exceeds one half of the couple's resources.

In addition to CSRA, the community spouse may be entitled to a share of the institutionalized spouse's income if the community spouse's income falls below certain federally mandated levels. This is known as the community spouse "minimum monthly maintenance needs allowance" (MMMNA).[12] This is calculated according to a certain formula. Also, the community spouse may receive income in excess of the MMMNA cap if it is demonstrated at a fair

[10]. Pub. L.No. 100-360, Stat. 683 (l988);and subsequent technical amendments founding the Family Support Act of l988, Pub.L.No. 100-485, l02 Stat. 2243; miscellaneous Medicaid Technical Amendments, Pub. L. No. 101-239, 103 Stat. 2106, 6411(OBRA 1989), codified at 42 U.S.C. Sec.1396p(c); and amendments
contained in Pub. L. No. 101-509, 4714, 104 Stat. 1388 (OBRA 1990), codified at 42 U.S.C. Sec. 1396r-5.

[11] These figures reflect adjustments as of January 2006 and are revised annually. See 42 U.S.C. Sec. l396r-5(f)(2)(A) as cited and by Susan Levin , Author.
[12] 42 U.S.C. Sec. 1396r-5(d)

hearing that "due to exceptional circumstances resulting in significant financial duress" the additional income is required.

When the MMNA is determined, if the community spouse's own income frm all sources is insufficient to meet the MMMNA, there are two options to satisfy the shortfall which require a Fair Hearing. The first option is that after the institutionalized spouse qualifies for Medicaid, the state will deduct from his or her income an amount sufficient to satisfy the community spouse's MMMNA. This is done automatically without a hearing.

The second option involves either spouse requesting a fair hearing to permit the community spouse to retain resources in excess of the CSRA to generate sufficient income to meet the MMNA. Federal law provides that

> if either spouse establishes that the community spouse resource allowance is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f)(2), an amount adequate to provide such a minimum monthly maintenance needs allowance (emphasis added).[13]

From l988 until the passage of the DRA states have differed in interpreting this language. Certain States interpret it to mean that the community spouse is entitled to an increased CSRA regardless of the amount of income of the institutionalized spouse. They are called "resource-first" states. Other states took the position that the community spouse is only entitled to an increased CSRA in the institutionalized spouse's income is insufficient to meet his or her MMNA. These states are referred to as "income-first" States. New Jersey is an "income-first" state.

[13] 42 U.S.C. Sec. 1396r-5(e)(2)(C)

2. Post DRA Law

The DRA mandates all states to adopt the income-first methodology. Section 6013. of the DRA requires State Medicaid Agency to consider "all income of the institutionalized spouse that could be made available to a community spouse" in accordance with the calculation of the community spouse monthly income allowance, has been made available before the State allocates to the community spouse an amount of resources adequate to provide the difference between the minimum monthly maintenance needs allowance and all income available to the community spouse.[14]

The requirement to use income-first applies to "transfers and allocations made on or after the date of enactment of this Act by individuals who become institutionalized spouses on or after such date." [15]

Since the language of the DRA regarding income first requires the State Medicaid Agency to consider "all income of the institutionalized spouse that could be made available to a community spouse" are government benefits such as Social Security and VA benefits which "could be made available" given the prohibition against assignment of benefit checks included?

In *Robbins v DeBuono*, 218 F.3d 197 (2nd Cir. 2000) the Second Circuit Appeals court concluded that deeming Social Security benefits of an institutionalized spouse to a community spouse in an income- first effectively

[14] 42 U.S.C. 1396r-5(d)(6).
[15] Section 6013(b) of the DRA.

alienates that income in violation of the anti-alienation provisions of the Social Security Act. [16]

Other States have dealt with this issue and the holdings have varied. Therefore, the income first rule and the treatment of social security income is subject to varying interpretations on a state by state basis.

DRA LANGUAGE

42 U.S.C. Sec. 1396r-5(d) is amended by adding at the end the following new subparagraph:

> (6) APPLICATION 'INCOME FIRST' RULE TO REVISION OF COMMUNITY SPOUSE RESOURCE OF ALLOWANCE.- For purposes of this subsection and Sections (c) and (e), a State must consider that all income of the institutionalized spouse that could be made available to a community spouse, in accordance with the calculation of the community spouse monthly income allowance under this subsection, has been made available before the State allocates to the community spouse an amount of resources adequate to provide the difference between the minimum monthly maintenance needs allowance and all income available to the community spouse.

In conclusion, with regard to the income first rule, these changes will still be possible where both members of a couple have low social security or pension income and rely mostly on investment income for support. This type of case will still allow a hearing. At that point, the community spouse should be able to retain additional resources to generate the necessary income after presenting the income and resource figures at a hearing.

The majority of CSRA hearings will occur when the community spouse resides in an assisted living facility or at home with full time home health care. In this situation, the community spouse is likely to claim "exceptional circumstances resulting in financial

[16] 42 U.S.C. Sec.407(a)

duress" pursuant to 42 USC 1396r-5 (e)(2) (B) as grounds to substitute an increased MMNA beyond the statutory cap.

F. INCLUSIONS OF TRANSFER TO PURCHASE OF LIFE ESTATES[17]

Pre-DRA Law

Under the pre DRA law, the purchase of a life estate interest in another individual's home was not a transfer of assets if the purchase was for full consideration, whether or not the purchaser resided in the home.

Post DRA Law

Under the DRA, the purchase of a life estate interest in another individual's home will be treated as a transfer of assets if the purchaser does not reside in the home for a period of at least one year after the date of the purchase, even if the purchase was for full consideration.

DRA Language

42 U.S.C. 1396p(c)(1)(J)

For purposes of this paragraph with respect to a transfer of assets, the term assets' includes the purchase of a life estate interest in another individual's home unless the purchaser resides in the home for a period of at least l year after the date of the purchase.

For a long period of time, It was questionable whether a purchase of a life interest in another person's home for full consideration would be considered a transfer by the local Medicaid Agency. Now there is a safe harbor rule for the purchase of a life interest in another's home as long as the purchaser resides in the home for at least l year after the purchase for full consideration. It will not be considered a transfer for purposes of Medicaid eligibility.

[17] National Academy of Elderlaw Attorneys *Analysis of Changes to Federal Medicaid Laws Under the Deficit Reduction Act of 2005* prepared by Medicaid Strategies Task Force Section; *Inclusions of Transfers to Purchase of Life Estates*; Authored by Ira Weisner, CELA, Sarasota Florida; Vincent J. Russo, CELA Westbury, New York.

CMS has not presently confirmed that a purchaser will qualify for the safe harbor rule if the one year test is met by residing in the home for 365 days regardless of whether the residency is consecutive or not.

For example if a parent purchases a life estate in a child's home for full consideration and moves into the child's home and six months later, the parent is hospitalized and then sent to a rehab facility for three months. The parent returns to the child's home for six additional months. There is a break in the one year period. At that point, has the parent met the one year residency requirement.

Of course, there are tax consequences on the seller/child who would be subject to the capital gains tax rules. If the seller meets the qualifications of Section l2l of the IRC, then the gain on the sale would be offset by using the $250,000 capital gains exclusion.

For example, if the gain on the sale of the life estate interest was $200,000 and the life estate interest was 50% of the value of the property, then $l00,000 of the capital gain can be offset by the $250,000 capital gain exclusion.

G. HOME EQUITY CAP UNDER THE DRA SEC. 6014 [18]

Prior to the DRA there was no limit on the value of property used as a principal residence. The Medicaid applicant's principle residence was exempt as a resource regardless of value. A person could use cash which was non exempt to make improvements in the home or pay off a mortgage or maintain the home.

The DRA imposes a $500,000 cap on the value of the exempt home and gives the States the option to raise the level of protection to $750,000.00. The home equity limit of $500,000 will remain until 20ll when it will increase annually pursuant to the Consumer Price Index.

The exceptions of individual's spouse, minor, blind, or disabled child living in the home continue so that the cap does not apply. In addition a "demonstrated hardship" may apply.

When the residence is sold and converted into cash, it becomes a non- exempt resource. The entire estate is exposed and will be lost. A reverse mortgage is not available to an individual already in a nursing home and almost every reverse mortgage contains and acceleration clause requiring satisfaction of the debt when the individual ceases to reside in the home.

Home equity loans also have large drawbacks since the proceeds will be exhausted yet the monthly payments will remain resulting in possible foreclosures.

[18]National Academy of Elderlaw Attorneys *Analysis of Changes to Federal Medicaid Laws Under the Deficit Reduction Act of 2005* prepared by Medicaid Strategies Task Force Section *Home Equity Cap Under the DRA* Authored by Michael Gilfix, Palo Alto, California.

A

G. CCRC PROVISIONS OF DRA Sec. 6015[19]

Continuing Care Retirement Communities (CCRC) will be allowed to require residents to spend down their declared resources, including a resident's entrance fee, before applying for Medicaid.

The Federal law under the DRA has been amended with regard to countable assets to include entrance fees. Also, CCRC's may require residents to spend down "all resources declared for the purpose of admission before applying for medical assistance." 42 U.S.C. ' 1396r.

Under the DRA entrance fees are available if they meet the following criteria: (l) " the individual has the ability to use the entrance fee, or the contract provides that the entrance fee may be used, to pay for care should other resources or income of the individual be insufficient to pay for such care,' (2) "the individual is eligible for a refund of any remaining entrance fee when the individual dies or terminates the [CCRC]…and leaves the community; and (3)"the entrance fee does not confer an ownership inters in the [CCRC]." [20]

CCRC entrance contracts fails the first requirement. The fee is usually only accessible by the applicant only after all other funds have been exhausted and then only to pay the CCRC's fees.

The fee is not refundable until a qualified new resident has signed an agreement for the vacating tenant's exact unit, and paid his entrance fee in full. If a couple enters the CCRC and one spouse remains while the other has left, the fee is often deemed paid on behalf of the remaining spouse.

[19] National Academy of Elderlaw Attorneys *Analysis of Changes to Federal Medicaid Laws Under the Deficit Reduction Act of 2005* prepared by Medicaid Strategies Task Force Section; *Implications of the CCRC Provisions of the DRA* Section Authored by Jason Frank, Lultherville, Maryland.

[20] Deficit Reduction Act, S. 1932, Title VI, Subtitle A, Sec. 6015(b).

When an individual sells their home and uses the proceeds for the entrance fee, the treatment of the money changes from exempt to non-exempt and the CCRC does not notify the residents of this fact.

U.S. Constitutional Issues are as follows: 5th and 14th Amendment Due Process and Equal Protections violations in the legislation. [21] One cannot be required to waive Medicaid rights to control one's own assets unless she lives in a CCRC where she will be required to give all money to the CCRC. If one lives elsewhere, she is not required to waive such rights. This is a denial of due process and equal protection. [22]

[21]" [N]or be deprived of life, liberty, or property, without due process of law." U.S. CONST.AMEND.V. '[N]or shall any State deprive any prson of life, liberty, or property, without due process of law." U.S. CONST. AMEND. XIV.

[22] "[N]or shall any State "deprive any person within its jurisdiction the equal protection of the laws." U.S. CONS. AMEND. XIV

H. PARTIAL MONTHS OF INELIGIBILITY, SEC. 6016(a)[23]

Prior to the DRA, when calculating the penalty period for assets transferred for less than fair market value, states were allowed to "round down" or not to include quotient amounts (resulting form the division of the value of the transferred asset by the average monthly private pay rate in a nursing home) that are less than a month. For example, in a state with an average private stay in a nursing home of $4,l00, an ineligibility period for an improper transfer of $53,000 could be l2.92 months (i.e. $53,000/$4,100=12.92). Although some states would impose an ineligibility period of l2 months and 28 days (of a 3l day month), other states permitted the rounding down of the quotient to an ineligibility period of l2 months**.**

This is no longer permitted. Instead, there shall be a penalty period for the fractional portion of that period. Therefore, in the above example above the penalty period would be l2.92 months.

I. ACCUMULATION OF MULTIPLE TRANSFERS, SEC. 6016(b

[23] National Academy of Elderlaw Attorneys *Analysis of Changes to Federal Medicaid Laws Under the Deficit Reduction Act of 2005* prepared by Medicaid Strategies Task Force Section; *Requirement to Impose Partial Months of Ineligibility and Accumulation of Multiple Transfers* Authored by Ira Wiesner, CELA,Sarasota, Florida; Vincent J. Russo, CELA, Westbury, New York

The DRA permits States to treat multiple transfers of assets as a single transfer and begin any penalty period on the earliest date that would apply to such transfers.

In the past, when a number of assets were transferred for less than fair market value on or after the look-back date during the same month, the penalty period was calculated using the total cumulative uncompensated value of all assets transferred during that month by the individual (or individual' spouse) divided by the average monthly cost to a private patient of a nursing facility in the state (or, at the option of the state, in the community in which the individual is institutionalized) at the time of application. If a penalty period for each transfer overlapped with the beginning of a new penalty period, then states either added together the value of the transferred assets and calculated a single penalty period or imposed each penalty period sequentially. If the penalty periods did not overlap, then the states had to treat each transfer as a separate event and impose each penalty period starting on the first day of the month in which the transfer was made.

Under the DRA, an individual or an individual's spouse who disposes of multiple assets in more than one month for less than fair market value on or after the applicable look-back date, then the state may determine the penalty period by treating the total, cumulative uncompensated value of all assets transferred by the individual (or individual's spouse) during all months as one transfer. States will be allowed to begin penalty periods on the earliest date that would apply to such transfers.

DRA

42 U.S.C 1396p(c)(1), as amended by subections (b) and (c) of Secton 6012, is amended by adding at the end the following

H Notwithstanding the preceding provisions of this paragraph, in the case of an individual (or individual's spouse)

who makes multiple fractional transfers of assets in more than 1 month for less than fair market value on or after the applicable look-back date specified in subparagraph (B), a State may determine the period of ineligibility applicable to such individual under this paragraph by-

(i) treating the total, cumulative uncompensated value of all assets transferred by the individual (or the individual's spouse) during all months on or after the look-back date specified in subparagraph (B) as 1 transfer for the purposes of clause (i) or (ii) (as the case may be) of subparagraph (E); and

(ii) beginning such period on the earliest date which would apply under Subparagraph (D) to any of such transfers. _____

J. PROMISSORY NOTES, MORTGAGES

The DRA mandates that the funds loaned in exchange for a promissory note or mortgage must be included among assets unless:

1. Terms are actuarially sound.
2. Provides for equal repayment terms.
3. There cannot be a balloon payment.
4. Prohibits the cancellation of the balance upon the death of the Lender.

K. TRUSTS

Income Only Trusts

The transfer of the Income Only Trust is still subject to the five year lookback and normal transfer penalties .

Disability Annuity Trusts

This is established for a disabled child or any disabled individuals and is for the sole benefit of a disabled person and an exempt transfer. In New Jersey a payback provision is required for a Disability Annuity Trust in order that the State Medicaid Agency is repaid upon the death of the disabled beneficiary.

Disability Annuity Special Needs Trust

The main purpose of a Disability Annuity Special Needs Trust is to qualify the grantor for Medicaid immediately while preserving the public benefits of the beneficiary. Since the transfer is for the sole benefit of the disabled person, there is no transfer penalty.

Irrevocable Grantor Trust

This will remain viable but only for individuals who possess sufficient resources to pay for a full five years. Example, Nursing home costs $5,000 per month, an individual with $500,000 (including a home worth $200,00) funds an irrevocable trust with the home. The funding causes a 40 month penalty beginning upon the individual's admissison to a nursing home and applying for Medicaid Benefits. The remaining $300,000 can be spent down on the cost of his care or additional planning could be done in the future. [24]

[24] National Academy of Elderlaw Attorneys *Analysis of Changes to Federal Medicaid Laws Under the Deficit Reduction Act of 2005* prepared by Medicaid Strategies Task Force Section ; *Commencement Date of Penalty Period* authored by Howard S. Krooks, CELA, Boca Raton, Florida