

# THE B&B ALERT

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No. 2 Vol. 1

February 3, 2006

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## *Medicaid Planning After Reform*

By Thomas D. Begley, Jr.

Congress has passed the *Deficit Reduction Act of 2005* which seriously curtails Medicaid Asset Transfers and makes it much more difficult for people to become eligible for Medicaid. The Bill was backed by the Insurance Industry and the Pharmaceutical Industry with AARP opposing the bill on the side of consumers. The vote was 216 to 214 in the House of Representatives and Dick Cheney had to break a tie in the Senate.

1. **NEW LAW.** The new law is known as the *Deficit Reduction Act of 2005*

**1.1. § 6011 - Lengthening Lookback Period; Change in Beginning Date for Period of Ineligibility.**

**1.1.1. Lookback.** The lookback period is extended to 5 years.

**1.1.2. Beginning Date.** The beginning date of the period of ineligibility has changed from the date the transfer was made to the later of the date of the transfer was made or the date the individual:

- would be eligible for medical assistance; and
- would otherwise be receiving institutional level care 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.

**1.1.3. Commentary.** The effect of these provisions will be to make it much more difficult to transfer assets and to obtain Medicaid eligibility.

2. **§ 6012 Disclosure & Treatment of Annuities.**

**2.1. Disclosure of Annuities.**

**2.1.1. Disclosure.** At the time of a Medicaid application or re-certification of eligibility the applicant must disclose a description of any interest the individual or community spouse has in an 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The state may require the issuer to notify the state when there is a change in the amount of income or principal being withdrawn.

## 2.2. Treatment of Annuities.

**2.2.1. State Named as Beneficiary.** Transfer of an annuity shall be treated as a transfers of assets for less than fair market value unless:

- *Remainder Beneficiary.* The state is named as remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the annuitant; or
- *Second Position.* The state is named as a beneficiary in the second position after the community spouse or minor or disabled child and is named in first position if such spouse or a representative of such child disposes of any remainder for less than fair market value.

**2.2.1.1. Design of Annuity.** Annuities are not subject to the transfer of assets provisions if:

- it is owned by IRA or purchased with the proceeds from an IRA, an SEP, or a Roth IRA; or
- the annuity is:
  - irrevocable
  - non-assignable
  - actuarially sound as determined in accordance with the actuarial publications of the Office of Chief Actuary of the Social Security Administration; *and*
- provides for payments in equal amounts during the term of the annuity with no deferral and no balloon payment.

**Commentary.** This means only that the purchase of an annuity is not subject to the transfer of asset penalties. The issue as to whether the annuity is a countable asset is not addressed.

**3. § 6013 Income First.** States must follow the income first rule when calculating an expansion of the Community Spouse Resource Allowance.

**Commentary.** New Jersey has always followed the Income First Rule.

**4. § 6014 Home Equity.**

**4.1. Limits.** A person is ineligible for Medicaid if he has equity in the home in excess of \$500,000 or at state option \$750,000. This number is indexed for inflation.

**EXCEPTION:** The maximum amount does not apply if the home is occupied by:

- spouse
- child under age 21
- child who is blind or permanently and totally disabled

**4.1.2. Loan.** The applicant is encouraged by the Act to obtain a reverse mortgage or home equity loan to reduce equity.

**Commentary:** This restriction is not as severe as it may first appear and may actually present some planning opportunities

**5. § 6015 CCRC Contracts.** This section clarifies the treatment of CCRC Contracts and entrance fees.

**5.1. Transfer Provisions.** Provisions in CCRC contracts restricting transfers of assets are enforceable.

**Commentary:** Many lawyers simply ignored provisions in CCRC contracts restricting transfers. These are now clearly enforceable under the new law.

**6. § 6016 Additional Reforms of Medicaid Asset Transfer Rules.**

**6.1. Partial Month Penalties.** Partial month penalties are mandated.

**6.2. Accumulation of Multiple Transfers.**

- Fractional transfers of assets in more than one month are accumulated.
- Transfers during all months are treated as one transfer.

**Commentary:** This makes small gifts impossible in many situations.

**6.3. Notes and Other Loan Assets.** For transfer of assets purposes promissory notes, loans and mortgages are included unless:

- they include an actuarially-sound repayment term as calculated by the Office of the Chief Actuary of the Social Security Administration; and
- payments are made in equal amounts with no deferral or balloon payment; and
- the document prohibits the cancellation of the balance upon the death of the lender.

**6.4. Purchase of Life Estates.** The purchase of a life estate is not considered to be a transfer of assets if the purchaser resides in the home for a period of at least one year.

**Commentary:** There may be situations where this portion of the statute presents additional planning opportunities. There are some serious risks involving the “due on sale” clause in mortgages and capital gains tax considerations for the parent and child that need to be considered, but in the right situation this will present a planning opportunity.

**7. PLANNING OPPORTUNITIES ELIMINATED.** Opportunities that have been eliminated include the following:

- Transfer Assets/Wait Three Years
- Half-a-Loaf Transfer
- Monthly Transfers
- Lookback Period
- Transfers from Retirement Plans within a Lookback Period
- SCIN - By definition a SCIN is a loan that cancels on the death of the lender.

**8. CONCLUSION.** There are a number of planning opportunities that remain under the new law, but many of them will not have been tested. Clients may be required to apply for Medicaid, be rejected, apply for a Fair Hearing and in some instances appeal to the New Jersey Appellate Division and possibly even the New Jersey Supreme Court before these strategies are validated. Medicaid Planning is no longer for the faint of heart. Elder Law will become much more of a litigation practice than a transactional practice. Clients should consult an experienced Elder Law attorney who is not easily intimidated.



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