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ELDER LAW

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Connecticut 1115 Medicaid Waiver Proposal

THERE WILL soon be reports that the "Connecticut 1115 Waiver Request" either has been granted or denied. That request is now pending before the Secretary of the United States Department of Health and Human Services.

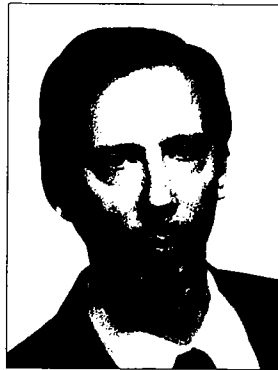
This article is to give background information so that when the outcome is announced, it can be understood in perspective.

One of the most common tasks of an elder law attorney is to calculate the date upon which an individual will be eligible for Medicaid nursing home benefits. Two numbers will affect the date of eligibility. First, is the value of any uncompensated gifts made within the past three years. Second, is the average cost of one month in a nursing home in the state. This analysis is a core concept in the advice given to clients.

The Connecticut Department of Social Services is seeking to dramatically change the way that calculation is made. Specifically, it is seeking permission to delay the date that a penalty period begins to run and to increase the look-back period for transfers of real property. Both proposals would deny eligibility for conduct that is currently permitted under federal law.

Why Should New York Be Concerned About a Connecticut Proposal? If

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approved, the changes will radically alter the elder law practice in Connecticut. Those changes would undoubtedly have an effect upon the elder law practice in New York state as well. The Connecticut proposal is being closely watched by several other states. If it is implemented in Connecticut, it is likely that other states will make the same proposal. There is also the possibility that individuals residing in Connecticut who are adversely impacted by the change might apply for nursing home benefits in New York state.

An appreciation of the magnitude of the proposal requires an understanding of the current methodology of determining the date of eligibility. That calculation is interplay between the look-back period and the penalty period.

Look-Back Period

Eligibility for Medicaid is needs-based, and is contingent upon a demonstration of very low savings and income. At the time that an application is filed, Medicaid will review all financial transactions of the applicant in the past three years to see

if uncompensated transfers were made. This is called the look-back period. There is only one exception, if the applicant has established an irrevocable trust. Medicaid may review those transactions within the five-year period preceding the filing of the application.

The penalty period is like a rear-view mirror on an automobile. Uncompensated transfers made within three years of application (five years for certain trusts) could result in a denial of Medicaid benefits. There are some uncompensated transfers that are protected under the current federal law and do not result in a denial of Medicaid eligibility. Examples of such protected uncompensated transfers are: transfers made more than three years ago (five years for certain trusts); transfers to a spouse, a minor, blind or disabled child; a transfer of a home to a caretaker child; or a transfer of a home to a sibling with an equity interest. These protected transfers would remain so and are not affected by the proposed change.

Penalty Period

A penalty period is a number of months during which Medicaid will not pay for nursing home benefits. If uncompensated transfers have been made within the look-back period, Medicaid must perform a mathematical calculation to determine the number of months of the penalty period. If an applicant has transferred assets within 36 month of application, eligibility can be delayed according to a formula. The amount of money trans-

ferred is divided by the average cost of one month in a nursing home. In other words, if the money had not been transferred how many months of nursing home care could it have purchased? That number of months is called the penalty period.

For example: if the average cost of one month in a nursing home is \$8,000 and the applicant transferred \$96,000, the penalty period is 12 months.

Once the number of months in the penalty period is calculated, the next step is to determine which month the penalty period began to run. The penalty period begins to run with the month after the month in which the transfer was made. The penalty period begins to run whether or not the individual is in a nursing home.

For example, if \$96,000 were transferred in January 2000, the 12-month penalty period would begin the run in February of the year 2000 and would end on Feb. 1, 2001. If a Medicaid nursing home application were filed in February 2001, the penalty period would have expired. Medicaid eligibility could not be denied on the basis of the January 2000 transfer.

Change Date Penalty Period Starts to Run. Under the Connecticut proposal the penalty period would not begin until the person was "otherwise eligible for Medicaid." In practical terms this means when the individual is in a nursing home and has assets of no more than approximately \$4,000.

For example, if a transfer of \$96,000 were made in January 2000 and the applicant did not enter the nursing home in February 2001, under the Connecticut proposal, the penalty period would not start to run until February 2001. This would be the date that the applicant was "otherwise eligible." From that point, the individual would be ineligible for a 12-month period, until February 2002.

Lengthen the Look-Back Period for Real Property Transfers From 36 to

60 Months. The Connecticut proposal would create a five-year look-back period for transfers of real property. At the present time, the transfer of real property is subject to a three-year look-back period. The only transfer subject to a five-year look-back period is the use of an irrevocable trust. The justification given by Connecticut for the request to add two additional years to the look-back period is the ease of tracing real property transfers and the greater value of real property transfers. This would allow Medicaid to look further back in time for real property transfers in the hope of detecting and penalizing a transfer.

Waiver Required

Section 1115 of the Social Security Act permits the Secretary of the Department of Health and Human Services to waive statutory requirements, for a demonstration project likely to promote the objectives of the Medicaid law. Connecticut is required to seek a waiver because the changes it proposes are to provisions embedded in the federal statute.

The authority is not unlimited. A waiver may only be granted for requirements found in §1902 of the act. The requirements that Connecticut is seeking to have waived (when the penalty begins to run and the look-back period) are located in §1917(c). This raises a threshold question about the legality of the Connecticut request for a waiver.

There is a further question about the propriety of the request since it does not

further the objectives of the Medicaid program, but simply restricts eligibility. *Beno v. Shalala*, 30 F3d 1057 (9th Cir. 1994) makes the point that a cut in benefits will by definition save costs and is not an experimental, pilot or demonstration project. Delaying the start of the running of the Medicaid penalty period will save the state of Connecticut expenses on its face. The conclusion is self-evident and does not need research to prove it.

Connecticut in a pejorative tone calls the current eligibility rules a "loophole" and characterizes the uncompensated transfers as "improper." The text of its proposal can be found at www.dss.state.ct.us/pubs/TOAproposal.pdf.

Judge Lawrence J. Bracken's equally impassioned defense of such planning is found in *Matter of Shah*, 694 NYS2d 82 "... no agency of the government has any right to complain about the fact that middle class people confronted with desperate circumstances choose voluntarily to inflict poverty upon themselves" Regardless of one's view on the ethical appropriateness of transfers of assets, this waiver proposal is a shortcut, using administrative means to rewrite a federal statute. The resolution of this issue is better left to the Legislature.

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