



Current Issues in Elder Law

Courtesy of **FREEDMAN FISH & GRIMALDI LLP**
Elder Law Attorneys

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The Impact of the Deficit Reduction Act on Medicaid

The Deficit Reduction Act of 2005 (known as the "DRA"), which was signed into law on February 8, 2006 by President Bush, imposes drastic changes in the rules regarding Medicaid – making it more difficult for people to use Medicaid benefits to cover the cost of long-term care in a nursing home.

The provisions of the DRA will be implemented in New York for all applications submitted on or after August 1, 2006.

One of the central changes involves the rules on the transfer of assets. The new law increases the "look back period" for nursing home institutional Medicaid from 36 months to 60 months for all transfer of assets. This will affect transfers made after February 8, 2006. Transferring assets will affect future eligibility for Medicaid nursing home care. Even small transfers may limit eligibility for Medicaid benefits.

The new law also changes the beginning date for determining the period of ineligibility from the month after the transfer to the first month when the applicant is receiving institutional-based services and would otherwise be eligible for Medicaid, but for the transfer of assets. This effectively limits the old "rule of halves" planning.

The DRA does not affect eligibility transfers to spouses, disabled children, trusts for the sole benefit of a disabled individual or transfers of homes to a spouse, a minor or disabled child, a caretaker child, or a sibling with an equity interest in the home. The DRA does not affect eligibility for homecare. New York state did not impose restrictions on the transfer of assets in order to qualify for Medicaid in the community.

Under the old law, the homestead was exempt from consideration when applying for Medicaid. The new law makes homeowners with equity of \$750,000 or more, ineligible. The cap does not apply if the home is occupied by the spouse of the Medicaid applicant, a child under the age of 21, or an individual who is blind or disabled. All transfer of residences will require careful consideration due to the tax consequences of such transfers.

Using annuities as a Medicaid planning tool was becoming an increasingly viable option. However, under the DRA, annuities will be considered to be uncompensated transfers of assets unless they meet the following criteria:

- The annuity must be irrevocable and non-assignable.
- The fixed payments must be actuarially sound. In other words, the payments are expected to be made during the life expectancy of the annuitant, pursuant to accepted life expectancy tables. (The tables can be found on the Social Security Administration website at: <http://www.ssa.gov/OACT/STATS/table4c6.html>.)
- Payments under the annuity must be immediate and level, with no deferrals or balloon payments.
- The annuity must name the Department of Social Services as the remainder beneficiary – to be reimbursed for the amount of Medicaid money spent.

Therefore, if there is any money left upon death, the Department of Social Services is paid first, unless the annuitant has a community spouse, a minor or a disabled child. Currently, there are no commercial annuities sold which meet these requirements.

**FREEDMAN
FISH &
GRIMALDI LLP**

521 Fifth Avenue, 25th Floor
New York, NY 10175
Tel: 212.953.1172
Fax: 212.953.5323

9201 Fourth Avenue, 5th Floor
Brooklyn, NY 11209
Tel: 718.238.6960
Fax: 718.238.3091

www.ffglaw.com

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Our Partners



Robert M. Freedman practices in the areas of Elder Law and Trusts and Estates. He is a founder and Fellow of the National Academy of Elder Law Attorneys (NAELA). He regularly speaks and publishes articles concerning planning for disabled children.

rfreedman@ffglaw.com



Daniel G. Fish is a certified Elder Law attorney* and a founding member of NAELA. He is the past Chair of the Elder Law Section of the NYSBA. A noted authority on Elder Law, he is widely published and has been quoted in *The New York Times*, *BusinessWeek*, and *Fortune*.

dfish@ffglaw.com



Judith D. Grimaldi focuses on Medicare, Medicaid, and Health Law. She is a certified Elder Law attorney*, a certified social worker, and former professor of Gerontology and lectures frequently on the subject of elder law and long-term planning.

jgrimaldi@ffglaw.com



Barry I. Lutzky practices in the areas of Trusts and Estates, Estate Administration, and Estate Planning and Taxation and Elder Law. He is experienced in estate planning for the disabled and for the parents of handicapped children.

blutzky@ffglaw.com

This newsletter is intended to provide general information about Freedman Fish & Grimaldi LLP and its areas of practice in Elder Law which may be of interest to our current and potential clientele. Our firm practices in New York, therefore none of the information contained herein should be deemed to apply in other states.

The newsletter content is not intended to give legal advice to anyone on any subject. Legal advice may only be rendered by attending a complete consultation with one of our Elder Law attorneys. Information obtained through the newsletter does not create an attorney-client relationship and the reader should not rely on same.

*Certified as an Elder Law Attorney by the National Elder Law Foundation. The National Elder Law Foundation is not affiliated with any governmental authority. Certification is not a requirement for the practice of law in the State of New York and does not necessarily indicate greater competence than other attorneys experienced in this field of law.

Welcome to the latest issue of our Elder Law newsletter. The month of May is officially Older Americans Month. Our firm is proud to honor the elderly for their achievements and contributions to our communities as they continue to live longer, more active lives.

It is becoming a challenging and complicated environment for the aging population, and especially for baby-boomers as they enter their retirement years.

These issues and concerns, however, can be overcome with the proper planning and tools. As always, we are here to offer our expertise to protect you and your family during this phase of your lives.

Sincerely

*The partners and staff of
Freedman Fish & Grimaldi LLP*

The Impact of the Deficit Reduction Act on Medicaid

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The DRA does not affect treatment of IRAs and other retirement accounts. Such accounts are not countable resources provided the person is receiving periodic payments which meet certain criteria.

Similar to annuities, any loans, notes and mortgages are subject to scrutiny to determine whether they less than fair market value transfers. Otherwise, they will be considered a gift, and presumably, if upon death are not cancelled, would be considered a Right of Recovery and would be an asset of the estate.

New York is one of four states that is granted waivers from the Federal government to offer Medicaid protections for individuals who purchased certain long-term care insurance policies.

These policies are commonly known as "Partnership Policies" and may provide an affordable alternative for individuals with high

income but moderate resources. An individual who purchases a Partnership long-term care insurance policy will be eligible for Medicaid without consideration of their resources after the benefits of the policy have been exhausted.

Planning during this transition period will require a delicate analysis of the possibilities. If you have been contemplating asset protection or applying for Medicaid, it is critical that you initiate a plan immediately. An experienced Elder Law attorney will assist you in providing not only the best care for you or your relative, but the maximum support from government entitlement programs such as Medicaid.

Note: As of this writing, the Deficit Reduction Act is being challenged in court for its validity. The procedure used in passing this law was flawed, resulting in two different versions being approved by each House.

Your Elder Law Attorney... Now More Than Ever

As baby-boomers enter their retirement years in record numbers, the demand for services will place a strain on an already over-taxed system for long-term care.

People reaching the age of 60 this year will most likely live into their 90s. With this extension of the life cycle, planning becomes even more crucial. In light of the projected strictness with which government benefits will be provided to individuals who need long-term care (such as those detailed in the Deficit Reduction Act described in this newsletter), getting expert advice from an Elder Law attorney is now more important than ever.

The average retiree reaching their 80s will need to determine early on how to finance their possible care needs. Planning options concerning long-term care are varied and complex. Does one choose a trust? Long-term care insurance? An asset protection plan? Assisted living? Home care? A reverse mortgage? An annuity?

Or does one just transfer assets to family members and apply for Medicaid? Each option has its pros and cons.

An Elder Law attorney can analyze your assets and needs and help you select the right option for you and your family. If you are thinking of doing Medicaid planning or are worried how the new Deficit Reduction Act restrictions affect you, please call our office in Manhattan or Brooklyn to get comprehensive answers.

Attorneys from our firm are also available to provide training to civic, social service or faith-oriented organizations or agencies. We have prepared a special 30-minute presentation on the new Medicaid rules. To schedule a presentation for your group, please call Julian Stanisc at 212-953-1172 ext. 249 or e-mail at info@ffglaw.com.

Tax Deductibility of Long-Term Care Expenses

While everyone is aware that medical expenses are deductible under section 213 of the Internal Revenue Code, many do not realize that long-term care expenses are also deductible. Tax treatment for long-term care had been uncertain prior to the enactment of the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

While charges for professional services such as care by registered and licensed practical nurses had always been deductible, HIPAA eliminated the uncertainty of the deductibility of long-term care expenses and allowed for the deductibility of such services as a personal attendant in a private residence and monthly charges at a long-term care facility.

In order to be able to deduct qualified long-term care services, the following must apply:

- The taxpayer must be certified as a "chronically ill individual" by a licensed health care practitioner. A chronically ill individual is defined as a person with "either severe functional or a severe cognitive impairment," a determination which must be made by a licensed health care practitioner and updated annually. The condition must last for more than ninety (90) days. The individual must be unable to perform at least two activities of daily living (ADL's) such as eating, toileting, transferring, dressing and bathing.
- If the client is certified as a chronically ill individual, the following expenses become qualified long-term care services under: diagnostic, preventative, therapeutic, curing, treating, mitigating and rehabilitative services assuming that they are provided pursuant to a plan of care prescribed by a licensed health care practitioner.

Home Care

To the extent that home care services meet the definition of qualified long-term care services, the care is deductible. Expenses related to a personal attendant assisting with dressing, grooming and bathing for a person unable to do these functions, are often deductible, as well as time spent on operating medical devices.

Home care services that constitute housekeeping rather than personal services, are not deductible. The services of a spouse or other relative who is not a licensed professional are also not deductible.

Obtaining a deduction for the services of a personal attendant in a patient's private residence may be difficult as aides are often hired informally and the taxpayer is more likely not to have the required documentation. Extensive record-keeping by the taxpayer or his/her family is essential, as is the preparation of a "plan of care" and formal certification that the person is a "chronically ill individual." The attendant should keep records showing time spent on personal care. If the care is qualified, the taxpayer can deduct: wages, withholding, in-home meals, and added costs of overnight stay.

In determining whether withholding is required, the key issue is whether the person coming into the home to provide care is an "independent contractor" or an "employee." If an employee, withholding is required unless the taxpayer can establish that someone else is the employer. The IRS has classified a personal attendant as an employee.

Assisted Living

Assisted living refers to the types of facilities that offer older adults housing as well as other personal services which may or may not be coordinated by the same agency. Because there is no across-the-board definition as to what constitutes "assisted living," the taxpayer will need to evaluate his/her own living situation to compute a possible tax deduction.

The analysis as to the deductibility of expenses for assisted living focuses on the individual taxpayer's health and long-term care needs. Thus, assisted living facilities are usually deductible expenses. In order to deduct a portion of assisted living care, there must be ADL deficiency or cognitive impairment and the plan of care must be prescribed by a licensed health care practitioner.

Continuing Care Retirement Communities

Continuing Care Retirement Communities (CCRC's) are housing and care complexes restricted to seniors that provide independent living units as well as social activities, meals, supportive assistance and care.

Nursing home care is also included and may be provided on or off campus. In order to "get in," the resident pays a large lump sum fee to the cooperative. As the person ages, he/she can utilize the various levels of services located within the community.

A lifetime care fee or lump sum under an agreement with a retirement community is at least partially deductible. In order to be deductible, the agreement must require a lump-sum payment or advance payment as a condition for the home's promise to provide lifetime care that includes medical care. The amount claimed for the deduction may not exceed the portion of the fee properly allocable to medical expenses. This portion may be estimated based on the community's past experience with the use of these services.

The taxpayer has the burden of proving that the deduction is valid; thus, if the amount being deducted comes from information provided by the CCRC, the taxpayer may want to determine whether the CCRC has calculated the medical expense allocation of their fees properly.

Negative consequences may occur if the CCRC is obliged to refund some or all of the entrance fee when a resident vacates or dies. The refundable portion of the fee may be treated as a below-market-rate loan in which case residents may have to report imputed interest income, and the CCRC on the refundable portion of the entrance fee. Residents may also have taxable income on the refund if they took a medical expense deduction on the entire original fee.

Who Should Take the Deduction?

In general, the medical expenses of older adults will on average increase while their incomes will stabilize or decline. This means that many older taxpayers will satisfy the 7.5 % adjusted gross income threshold required to take a deduction. In order to get the deduction, the taxpayer must itemize deductions. Distributions from retirement plans and IRAs create taxable income.

Payment of qualified long-term care expenses creates a tax deduction. Good planning should maximize the medical tax deductions for long term care to offset income created by distributions from IRAs and retirement plans.

What is a Personal Service Caregiver Contract?

It is estimated that more than 20 million Americans currently care for ill parents, other relatives or friends. There is often little, or no, compensation for this care and terms of these arrangements are not spelled out.

A formal Caregiver Contract can outline the responsibilities of a caregiver and specify the payment one will receive for services rendered and expenses incurred. It ensures that the cost of care is paid at the time it is received or contracted and is not left for family members to struggle with as part of a later division of assets.

Having a care contract in place also ensures Medicaid will not impose penalties on the money received by the caregiver. Sometimes an elderly person will randomly give sums of money to their caregiver as payment for the care they provide. Without a contract

in place, Medicaid will assume the money transferred is a "gift" or a "transfer of assets" and will impose penalties resulting in ineligibility for Medicaid benefits. A good Caregiver Contract should:

- Be drafted by an Elder Law attorney who can customize the terms to the client's situation.
- Fix the caregiver's compensation at a reasonable rate—comparable to what a professional would receive for the same services.
- Establish expectations for services to be provided by the caretaker and on what terms—as opposed to leaving it as a verbal agreement.
- Be signed as soon as the care need is developed—when the care-receiver is able to consent and approve the contract.

- Show that compensation is appropriate and the care provided is medically necessary.

Once the contract is in place, both parties should live up to its terms. The care-receiver should treat the caretaker as an employee—paying the specified wage plus any expected taxes such as social security, Medicare and income tax withholding. Failure to pay taxes can complicate any later dealings with Medicaid, should the ailing person apply for assistance.

While most family caregiver situations involve adult children helping their aging parents, Caregiver Contracts can also help clarify arrangements for a disabled child, a sibling or any type of family member.

Freedman Fish & Grimaldi LLP News

As we enter our 21st year of service, Freedman Fish & Grimaldi LLP is dedicated to serving the needs of the elderly and persons with disabilities.

Our partners and associates have been giving presentations on the impact of the DRA changes to audiences of clients and professionals throughout the city. Partner, **Robert M. Freedman** presented on the topic of "Future Care Planning" at this year's 27th Annual International Conference on Developmental and Learning Disabilities. Partner, **Daniel G. Fish** presented at the *Financing*

Longer Lives Conference at Baruch College on the impact of federal Medicaid law changes. Partner, **Judith D. Grimaldi** was appointed to the Board of Friends and Relatives of the Institutionalized Aged (FRIA) and serves on their policy committee—working on changing the care culture in nursing homes. Associate **Marcie Roth** has been conducting a series of elder law workshops at Families First in Brooklyn. Associate, **Donna C. Curcio** presented on the topic of "Planning for Disabled Children" for the New York Trust Company's ongoing series of educational seminars.

Associate, **Pauline Yeung** assisted in forming the Chinese American Alzheimer's Coalition. Associate, **Thomas Sciacca** has been named to the Board of Directors of the New York Center for Law and the Deaf.

In order to provide in-depth service to our clients, we have added **Lisa M. DeKenipp** as an associate in our Manhattan office. **Amanda Spadaccini** and **Suzann Giacalone** have both been promoted to Medicaid Legal Assistant.



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521 Fifth Avenue
New York, NY 10175