FREEDMAN FISH & GRIMALDI LLP

Thursday December 16, 2004
NEW YORK LAW JOURNAL

Pooled Income Trust: Decision Allows Seniors to Remain at Home

BY DANIEL G. FISH

Medicaid home care eligibility rules set the amount of monthly income a recipient can keep at the poverty level.[1] Many seniors with monthly expenses that exceeded this level, who were physically capable of remaining at home, were forced into nursing homes.

A favorable fair hearing decision has solved this most puzzling Medicaid riddle. It is now possible for Medicaid recipients to transfer their excess income each month to a “pooled income trust” and authorize the trust to use the excess income to pay their ordinary living expenses.

The way that Medicaid income eligibility rules forced nursing home placement is best understood by looking at the Medicaid rules and the facts of the fair hearing decision that solved the problem.

Medicaid Rules

Medicaid is a joint federal/state program that pays the medical costs of the indigent. Each state has established its own Medicaid program, within parameters established by federal law. Some services, such as nursing home, doctor or hospital coverage, are mandatory and must be a part of the state’s Medicaid plan. Some services, such as home care, are optional. A state may set different eligibility rules for mandatory and optional services.

New York is one of the few states to offer home care services. Thus, New York has two Medicaid programs, a nursing home program and a home care program. The programs have different eligibility rules, the home care rules being less stringent. Basically, the home care applicant must prove that he or she meets eligibility in three categories: (1) savings, (2) medical necessity and (3) income.

The savings requirement is easy to satisfy. An applicant may have no more than $3,950 (2004) in savings. Transfers are not penalized for applicants for the Medicaid home care program.[3] For this reason, the Medicaid home care program does not require the production of financial records for the three-year period preceding the application. There is no need for Medicaid to peruse those records because even if a transfer were detected, it could not result in the denial of home care benefits.

The medical necessity requirement is needed to determine whether the applicant needs home care services and if so, of what frequency and duration. It is satisfied by a report from a physician documenting the number of hours of care required. In New York City, this form is called the M11-q.

It is the income requirement that has posed the most serious problem. The applicant was permitted to retain only $679 of income each month and was required to contribute the excess toward the cost of medical care each month. Many New Yorkers were unable to pay their ordinary monthly living expenses on $679 a month. This forced seniors who favored home care into nursing homes. A Medicaid recipient in a nursing home is only permitted to keep $50 per month of income. Medicaid takes all of the income above $50, but the patient has no monthly expenses for rent, heat or food.

The solution in the home care context is for the excess income to be transferred each month to a supplemental needs trust. The Medicaid home care program imposes no penalty for the transfers, and therefore, the transfer will not affect eligibility.

The Omnibus Budget Reconciliation Act of 1993 authorized the creation of Supplemental Needs Trusts, intended to pay for items not covered by Medicaid, without interfering with Medicaid eligibility. There are different Supplemental Needs Trusts. A “Pooled Income Trust” is one type of Supplemental Needs Trust, and it is available to disabled individuals of any age.[4] This is the vehicle for protecting the excess income.

Pooled Income Trust

The pooled income trust (called a “master trust”) is created by a non-profit organization. A disabled person does not create his or her own trust agreement; enrollment is accomplished by signing a joinder agreement to the master trust. A sub-trust account is then created under the master trust, for each disabled individual. The disabled person sends the excess income each month to their own separately maintained sub-trust account. For investment and management purposes, the non-profit agency is permitted to pool the various sub-trust accounts.

Since transfers are not penalized under the Medicaid home care rules, the disabled person has no excess income. The individual must send a copy of the executed joinder agreement and proof that the excess income has been deposited with the sub-trust account to Medicaid and request that the excess monthly income be eliminated.

Continued

The disabled individual then submits invoices to the trust for ordinary living expenses such as rent, telephone, electricity, heat, food or clothing. The trust is permitted to expend funds for the benefit of the disabled person from the sub-trust account for that specific person. The trust will make payments directly to the third parties identified on the invoices. This works best with regular recurring expenses that can be set up on an automatic payment basis. The trust will only make payments up to the amount held in the sub-trust account for that specific individual. The expectation is that the invoices will consume the entire amount of excess income deposited into the sub-trust account each month.

The master trust typically charges the disabled individual an annual enrollment fee and a monthly fee to cover the administrative cost of paying the monthly bills.

At the death of the disabled individual, if there were any funds remaining in the sub-trust account, they would be retained by the non-profit organization for the benefit of other clients or paid over to Medicaid to the extent of the amounts paid by Medicaid on behalf of the individual. It is unlikely that there would be any funds left in the pooled income trust because the funds are generally spent in full each month.

'Matter of M.O.'

The fair hearing decision that established the authority of the pooled income trust, is Matter of M.O. It involved a 67 year old who applied for Medicaid home care coverage. The only issue in his case related to his income.

Medicaid home care accepted his application, but informed him that his income was too high, that he had $358 in excess of the Medicaid income level. Medicaid told him that he had to incur or spend $358 on medical expenses each month before Medicaid would provide home care services. Only medical expenses would qualify. Ordinary living expenses such as rent, food, utilities or clothing, would not qualify.

Mr. M.O.'s problem was that he needed his entire income each month to pay for his regular living expenses. If he were required to spend the $358 on medical expenses only, he could not remain at home. He would be forced into a nursing home.

To resolve this dilemma, Mr. M. O. entered into a joinder agreement with a non-profit agency called NYSARC. The agency had created a master trust. M.O. transferred his excess income of $358 each month to his own sub-trust. NYSARC agreed to use the $358 it received from M.O. each month to pay his ordinary living expenses by making payments to the third-party vendors directly.

The fair hearing decision concluded that the transfer of the income to the pooled income trust made the excess income uncountable by Medicaid. The decision instructed Medicaid to calculate that M.O. had no excess income each month and therefore to provide him with the home care services he needed and to allow him to have his excess income spent on ordinary living expenses.

After the fair hearing decision in the Matter of M.O, there was a concern that the ruling would be followed in that case only, and would not have precedential value. However, New York City Medicaid has issued a "NYC MEDICAID FACTS ALERT", dated May 2004 instructing its staff how to deal with pooled income trusts. The alert, in an article entitled "Supplemental Needs Trusts Excluded from MA Eligibility Budgeting" states: "As a result of a recent Fair Hearing decision, all income deposited into a 'pooled income trust,' without restriction to dollar amount or frequency of deposit, is to be exempted when determining Medicaid eligibility."

Conclusion

Consideration should be given to the pooled income trust in appropriate cases. Practitioners should review files of past cases to determine if there were clients with high income who did not apply for Medicaid community benefits who might now be eligible.

One of the greatest fears of old age is being forced to leave ones home for a nursing home. Most seniors wish to remain in familiar surroundings and are intensely afraid of institutionalization. This leads many of them to implore their children to make a pledge: "Promise that you will never put me in a nursing home". This was a promise that many children made but could not honor.

The practical effect of the Matter of M.O.decision will be to allow children to honor that pledge.

1. $679 in 2004.
2. Fair hearing decision: Matter of M.O. Decision No. 3945750N dated February 25, 2004. (Copy available at www.wnylc.net.)
3. A penalty is imposed for transfers against applicants for the Medicaid nursing home program
4. The pooled income trust, with no age restriction, is authorized by 42 U.S.C. §1396p(d)(4)(C). Many elder law practitioners are familiar with Trusts created out of personal injury settlements pursuant to 42 U.S.C. §1396p(d)(4)(A). They are available only to disabled individuals under age 65. They cannot be created by the disabled person, but only by the parent, grandparent, legal guardian or court.
5. Non-profit agencies that currently offer pooled trusts include: NYSARC 393 Delaware Avenue, Delmar, New York 12054 (518-439-8311); Community Living Corporation 600 Bedford Road, Mt. Kisco, New York 10549 (914-241-2076); Lifetime Care Foundation for the Jewish Disabled 4510 26th Avenue, Brooklyn, New York 11204 (718-851-8906)