

The Polner Abrahams Report

The Source For Intelligent Estate and Elder Law Planning

Courtesy of The Law Office of Beth Polner Abrahams

Volume 2 Issue 3

Focus On...

Home Care Intact Under NYS Law

In late June, New York Governor George Pataki and the New York State Legislature reached a compromise on the state budget, which leaves intact much of the Medicaid home care program for seniors and the disabled. Threatened, but not enacted or vetoed into law, were changes that would have prevented many otherwise eligible applicants from receiving care through Medicaid while remaining in their homes.

Following is a summary of the home care and community Medicaid program.

Spousal Refusal

New York State (NYS) offers a limited spousal refusal program under its Medicaid home care/community assistance program. This state-funded program provides personal care aides, home health aides and nursing for frail elderly and disabled persons who can safely remain at home. Like Medicaid's nursing home program, a married applicant for home care may have their spouse refuse to contribute income and resources toward the cost of care. Unlike the Medicaid nursing home program, this does *not* trigger protection for a specific amount of resources and income for the non-applying spouse. Instead, under NYS law, spousal refusal merely permits a couple with income greater than \$900 monthly and resources greater than \$5,400 to receive Medicaid home care assistance.

If the governor had made good on his threat to eliminate spousal refusal, advocates believed this

would have forced hundreds, if not thousands, of seniors and disabled into nursing homes and prompted divorces to protect the nonapplying spouse.

The new NYS budget and the law leave in place spousal refusal for the home care program.

Transfer of Assets and Penalty Periods

Another difference between the state's home care program and the Medicaid nursing home program is transfer penalties. Under the nursing home program and Federal changes effective February 6, 2006, transfers by the applying or nonapplying (community) spouse create a penalty period—a period of ineligibility—for care for five years. In a future article, we will address the exceptions and variations on how the penalty is calculated.

Historically, there have never been penalties for transfers of resources from an applicant to another individual, including a spouse, under the home

Welcome to the third issue of my quarterly newsletter. Each



edition addresses concerns of the elderly and disabled, their families and guardians. Please email your comments to Info@bpaElderLaw.com.

Attention Special Education PTAs! At no charge, I will gladly visit schools and non-profit organizations to provide an introduction to 17A Guardianship proceedings and the value of Special Needs Trusts. Please call the office to schedule a convenient presentation date for the upcoming 2006-07 school year.

Our office is now located at 300 Garden City Plaza, Suite 404, Garden City, adjacent to the Roosevelt Field Mall. For directions, please visit our website or telephone our office.

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care program. The idea behind this was that care at home was less costly, and was usually needed quickly to address serious personal care needs, but not serious enough to warrant hospitalization or nursing home placement. An applicant transferring \$50,000 to an adult child, sibling or other person in August would be eligible in September to apply for the state's home care program. (Special rules apply if the individual receives SSI.) It is my experience that most families used these transferred funds to supplement care for their loved one and to pay expenses not covered under the income budgeting rules for the home care program.

Governor Pataki dropped his threat of transfer penalty periods for home care after other aspects of the budget were compromised.

Look Back Period for Home Care Applications

The look back period generally means the quantity of background documentation required when an application for Medicaid is submitted. While the Governor had threatened to increase the look back period for home care from 3 months to 36 or 60 months (as with the new Federal requirements for nursing home care), a compromise was reached that retains the 3-month look back for simplified services, i.e., personal care aide services under our state home care program. In order to receive skilled nursing at home or long-term nursing care, those programs' requirements for an increasing look back period will apply.

The state's Medicaid agency has created a new notice when an application for care is accepted. The notice informs the home care applicant that while the services will be provided at home, if there has been a transfer of assets, there is no eligibility for services in a nursing home nor for skilled nursing at home (called the 'waivered

services'). The revised notice also calculates the penalty period for the transfer of assets, and home care services will now be called 'limited coverage.'

Pooled Trusts for Excess Income

With the threat of penalty periods for transfers eliminated in the home care program, many seniors and disabled who require home care services are unable to accept services because of strict income budget rules. Those *income spend down* or *excess income spend down* rules limit income to about \$712/month (adjusted annually). For example, if the applicant's social security and pension or disability income totals \$1232/month, the spend down would be \$520/month before Medicaid-paid services begin.

Left intact was the state's newer procedure which permits seniors and the disabled to transfer their income to a *pooled pay back special needs trust* managed by a nonprofit organization. However, instead of Medicaid receiving the balance of funds in the trust, the nonprofit organization retains the funds in the trust to continue its work for other pooled trust participants.

The most widely used pooled trust is administered by NYSARC, Inc. Information is available on the Internet at www.nysarc.org.

Future articles in this newsletter will address the procedures developed by Medicaid for using the pooled trust.

The value of the home care and community Medicaid program for seniors and the disabled and their families cannot be underestimated. The program's preservation has been a priority for all elder law attorneys, including my office. Care in the community is less costly and often prolongs quality of life in familiar surroundings.

Special Needs Trusts: Back To Basics

One of the most important tools in estate planning for families or other loved ones with a disabled family member is the supplemental or special needs trusts (SNT). The ranges of “disabling” medical and/or psychiatric conditions are as varied as the disabled individuals themselves. The cost of health care and supplies to facilitate a comfortable lifestyle for a loved one with a disability could easily eliminate or reduce any inheritance, gift or litigation settlement for the person. Usually, these gifts, inheritances and settlements are intended to last the disabled person’s lifetime.

The supplemental needs trust has its roots in a New York Surrogate’s Court case. Until the late 1970’s, many NY court decisions had permitted the invasion of testamentary (inherited) trust funds created for disabled family members under a provision in the New York Estates, Powers and Trust Law that allows a court to use its discretion to invade a trust and direct the income and/or principal to the trust beneficiary for support or education. Perhaps more critical for families with disabled loved ones, even if a will stated that this section of the law could *not* be used, the question remained as to whether trustees, who were given discretion or the choice as to when to spend principal and income, could be required to invade the trust under a “reasonableness standard,” i.e., because the trustee must act in the way contemplated by the creator of the trust or Will. This put at risk the funds available to the disabled person, because the trustee might be compelled to invade the trust principal to pay creditors for the disabled person’s medical bills, maintenance and support.

In 1978, the Bronx Surrogate Court issued its decision in *Matter of Escher*. In that case, which involved an accounting proceeding, the NYS Department of Mental Hygiene had sought

reimbursement for the cost of care provided to a now deceased individual’s disabled daughter while she was a resident of a NYS psychiatric facility. When Mr. Escher executed his Last Will and Testament 30 years before, he had directed that the income from a testamentary trust for his daughter be paid for her benefit. However, his Will gave the trustees discretion to pay from principal for other items necessary for her maintenance and support “by reason of illness or accident or other emergency.” The Escher trustees refused to pay Mental Hygiene’s claim.

Agreeing with the trustees, the Surrogate’s Court determined that Mr. Escher had known about his daughter’s psychiatric disability and, through the testamentary trust in his Will, had intended to provide for her support throughout her lifetime with the proceeds of the trust.

Significantly, the Surrogate’s Court acknowledged the “economic reality,” or effect, that payment for his daughter’s medical and other bills incurred over the years would have on the trust. Paying the claim for reimbursement would have depleted the trust, leaving the disabled daughter without income or principal should she have left the mental institution, or if entitlement programs, such as Medicaid and SSI, didn’t meet her needs.

The Escher trust, now called the *testamentary special needs trust* (or an SNT in your Last Will and Testament) was solidified in NYS law.

In 1993, Congress modeled its own special needs trust (also called a supplemental needs trust) on NY’s law, and the Pay Back SNT was enacted.

My office uses several types of SNTs to achieve our clients’ goals for disabled loved ones.

In the next issue of this newsletter, I will discuss these types in detail: testamentary SNT in your will, gifting SNT or third party SNT created during lifetime, and pay back SNT.

Checklist for Your Estate Planning Needs

This handy list is provided to help you organize your thoughts and documents as you prepare for first-time estate planning or for reviewing or updating your existing estate plan to meet current needs:

- Do you (and your spouse or companion) have a Will?
- Have you selected guardians for your minor child or children in a Will?
- Have you created a trust for children in your Will so that inherited funds can be managed, invested and used for your child or children until specified ages?
- Have you created a special needs trust for a disabled child or other loved one?
- Is life insurance part of your estate plan and have you decided how these monies will be managed and by whom?
- Do you need to implement strategies for minimizing or avoiding estate tax?
- Who will manage your affairs if you, your spouse or companion become disabled? Do you have a legally sufficient Power of Attorney? Is a revocable living trust a legally safer way to manage your affairs if you become incapacitated?
- Who will make health care decisions for you if you cannot? Have you signed a health care proxy and living will?

Contact our office if we can assist you with these and other strategies for your estate planning needs.

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Dedicated to providing quality, caring
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