

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 1

Focus On...

Congress Passes Harsh Medicaid Changes

In an effort to rein in the rising costs of the federal and state Medicaid programs, Congress passed legislation that dramatically overhauls the eligibility criteria for seniors and the disabled requiring long-term care at home ("waivered programs") and for nursing home care. Signed into law on February 8, 2006 by President Bush, most changes apply to Medicaid applications and transfers made after that date.

The legislative changes that New York State must implement are:

Transfer of Resources and Look-back Periods

Under prior law, look-back periods were either 36 months or 60 months, if transfers were made to an irrevocable Medicaid trust. That is, the amount of documentation required to be provided to Medicaid upon application for benefits would either cover a 36-month period prior to application or a 60-month period.

Under **current law**, all applications for Medicaid (except the NY State program called Community Medicaid or Home Care) will have a 60-month look-back period for documentation.

Prior law also allowed seniors and the disabled to give away or make gifts of their assets – to family members or to trusts – to preserve a lifetime of earnings and investments. The consequence of transfers was a penalty period during which the individual could not apply for or receive Medicaid to pay for waived services (such as services through a traumatic brain injured program or for skilled nursing services at home) or for institutional nursing home care. The

penalty period began one month following the month of the gift. If a transfer of \$50,000 was made in March, Medicaid 'charged' a penalty of \$5,000 per month and the individual could not apply for Medicaid for 10 months ($\$50,000 \div \$5,000 = 10$).

Current law now requires the penalty to begin on the date of institutionalization and an application for Medicaid. That is, advance planning to protect assets becomes more difficult unless the individual can remain off of Medicaid for an entire look-back period of 60 months.

Prior law also had an emergency 'theory' of gifting called the rule of halves, which is virtually impossible to use under the new federal law because of the date when the penalty period begins. There are limited instances requiring legal documents prepared by an attorney under which a form of the rule of halves may be used.

Welcome to the second 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.



For over 23 years, I have provided quality legal representation to seniors and the disabled, plus customized estate planning to meet the personal needs of families, their children and other loved ones. My broad legal background includes federal and state litigation and appeals in the New York State Appellate Division and Court of Appeals, advocacy for equal housing opportunity under federal and New York State law and banking law.

Our office has moved! We are now located at 300 Garden City Plaza, Suite 404, Garden City, adjacent to the Roosevelt Field Mall on the Macy's side of the mall complex. For travel directions, please visit our website or telephone the office.

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Permissible Transfers of Assets

The **new law** continues to permit transfers between spouses, to minor children (under age 21) and to disabled adult children (or to a supplemental needs trust for their benefit). A home may still be transferred without any penalty to a caretaker child who has lived with the parent for at least two years before the parent goes into a nursing home, or to a sibling with a pre-existing equity interest in the home and who has resided in the home with the Medicaid applicant for at least one year.

Equity in Your Home

Under **prior law**, a home used as the primary residence was fully exempt (not counted) to determine eligibility for Medicaid.

Under **current law**, the equity in a home (including a cooperative or condominium apartment) which exceeds \$750,000 will be counted as a resource in determining eligibility for certain Medicaid programs called Nursing Home Without Walls or Lombardi.

The law permits a spouse or the disabled child residing in the home to bypass the equity rule. However, this change will significantly impact single adults who wish to remain in their homes without spending down the equity in their homes to the permissible maximum of \$750,000.

Annuities

Under **prior law**, the use of immediate single premium annuities to generate additional income for a Medicaid recipient or their spouse was permitted by Medicaid. As long as the annuity was paying back to its owner a sufficient income and principal commensurate with the annuitant's age, the annuity was not counted as a resource for determining eligibility. Under prior Medicaid laws, the income was counted for the annuitant and the owner of the annuity was permitted to select a beneficiary and thereby leave some

inheritance to family members or charitable organizations.

Under **current law**, the State Medicaid department must be designated as the beneficiary of the annuity; only a spouse may be selected as a priority beneficiary.

Life Estate Deed Transfers

Transfers, including those made by deed with a retained life estate, are subject to the transfer penalties described earlier in this article. But the **new law** also imposes an additional requirement. If a senior uses their funds to purchase (at fair market value) a life estate in their adult child's home, the senior must live in the home for at least one year from purchase, or the entire transaction will be considered a 'sham' and subject to a Medicaid transfer penalty.

Under **prior law**, there was no minimum residency period in the home with the purchased life estate.

Solutions for the Future

What about planning for your future and the financial security of your loved ones?

If you have completed your advance planning before February 8, 2006 – establishing an irrevocable trust, transferring the deed to property while retaining a life estate – and gifting, you are in good shape, legally!

The best plan is to not need Medicaid...ever. For some, this is only possible because of the purchase of long-term care insurance to pay for home care, assisted living and nursing home care. While New York State law has only required a policy that provides three years of nursing home care financial coverage, it may now be wiser to purchase a policy covering five years of services.

If you cannot afford long term care insurance, it is important to revisit your estate planning to determine if transfers to a trust or life estate deed are legally advisable. For

New York State Law Now Permits End-Of-Life Decision-Making for Guardians

In March 2003, the Health Care Decisions Act was signed into law by New York Governor Pataki. The Act allowed 17-A Surrogate Court guardians to make end-of-life decisions for their mentally retarded wards under a new section of the law, 1750-b. When first passed, the law did not apply to guardians of developmentally disabled loved ones. However, on October 18, 2005, legislation was passed to permit guardians for developmentally disabled persons to make the same end-of-life health care decisions under the strict procedures outlined in the Surrogate's Court Procedures Act section 1750-b as for guardians of mentally retarded persons.

Of equal significance is the recent Court of Appeals decision, the highest court in New York State, on March 23, 2006, which settled whether the Health Care Decisions Act applied to persons appointed as guardians before March 2003. In *Matter of M.B.*, a Richmond County (Staten Island) Supreme Court judge had held that the sister and guardian of her mentally retarded brother had the authority under the Health Care Decisions Act to remove life support even though she had been appointed guardian long before the new statute became law. On appeal, the Appellate Division reversed the Supreme Court and reached a decision that barred the retroactive application of the Health Care Decisions Act to guardians who received their appointments before March 2003. The decision held that there was no legislative basis for retroactively permitting guardians for mentally retarded persons to make end-of-life decisions despite the safeguards and procedures in the law.

In a thirty page decision, the Court of Appeals has settled the issue and held that the New York State Legislature intended to authorize guardians appointed before the law's effective date to make all end-of-life decisions in accordance with

1750-b and its strict procedures. The Court specifically stated that guardians appointed prior to the law's effective date in March 2003 would not have to bring a separate legal proceeding to determine whether they could or could not make end-of-life decisions, stating that "...the Legislature did not view the prior appointment procedure as flawed...". Importantly, guardians should not have to file updated medical forms and seek amended Letters of Guardianship to specifically authorize end-of-life health care decision-making, a procedure created in many courts – including Nassau and Suffolk Surrogate's Courts – to enable guardians to access the procedures under 1750-b.

For families asking to be appointed as guardians for their mentally retarded or developmentally disabled loved ones, a revised 17-A form is available on the Internet at <http://www.courts.state.ny.us/forms/surrogates>.

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some, the five-year waiting period may be possible by using the equity in your home to obtain a reverse mortgage to pay for care, if needed.

The legal field of elder law is complex, but there are solutions if you have not yet begun planning. Plan ahead to secure your health and financial future.

The Law Office of Beth Polner Abrahams concentrates in the areas of:

- ✓ Elder Law
- ✓ Estate and Tax Planning
- ✓ Guardianship and Supplemental Needs Trusts
- ✓ Probate and Administration of Estates

Community and Professional Seminars

- On **April 29, 2006**, Beth Polner Abrahams will present a seminar to parents and advocates of disabled children and adult children at a conference sponsored by **East End Disability Associates at the Southampton Campus of Long Island University**. She will review the forms required to be appointed as a 17A guardian, the timing of the guardianship and the rights of the guardian once appointed. She also will discuss supplemental needs trusts. For more information about attending the conference, contact East End Disability Associates at (631) 369-7345.
- In **October 2006**, Ms. Polner Abrahams will facilitate the annual fall conference for the **Elder Law Section of the New York State Bar Association**, where over 200 attorneys will meet to hear experts discuss important topics and changes in the field of elder law.
- Ms. Polner Abrahams serves on the planning committee for the **Health Care Decision-Making: Dying In New York** conference on **November 16, 2006** (12:30-4:30 p.m.) sponsored by the Center on Aging at Long Island University's C.W. Post College Campus, Greenvale, New York.

She will act as moderator for a panel of experts discussing the legalities and ethics involved in end-of-life decision-making, from competency to incapacity.

The conference is expected to attract hundreds of professionals in the medical, nursing home, hospital administration, social work and geriatric fields. CEU and CLE continuing education credits are available for professionals. Further details and contact information will be available this summer.

- Also in **November**, Ms. Polner Abrahams will facilitate seminars for the **Suffolk County Bar Association's Academy of Law** on drafting legal documents. The seminars are for attorneys in the practice of elder law and estate planning law.

At no charge, Ms. Polner Abrahams will gladly address nonprofits, support groups and professional associations on the subjects of Elder Law, Estate Planning and Special Needs Trust Planning. Please contact her office for details.

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Dedicated to providing quality, caring and personalized legal representation.

Handling all aspects of estate and tax planning, elder law and representation of incapacitated and disabled adults in guardianship proceedings.

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