

# **ELDER LAW ESSENTIALS FOR THE TRUSTS & ESTATES PRACTITIONER:**

## **What You Need to Know About Medicaid**

**Robert Clofine, Esquire  
York, PA**

**Certified as an Elder Law Attorney  
by the National Elder Law Foundation**

# Non-Medicaid Residential & Long-Term Care Housing Options

- Home Care Options

- Department of Aging Options Program
- Pennsylvania & National Family Caregiver Support Programs
- Medicare Home Health Care Benefit

- Community Care Options

- Adult Day Care

# Non-Medicaid Residential & Long-Term Care Housing Options

- Residential Options
  - Dom Care
  - Personal Care Homes
  - Assisted Living Residences
  - Continuing Care Retirement Communities

# Non-Medicaid Residential & Long-Term Care Housing Options

- Nursing Care Facilities
  - Nursing Home Reform Act
    - Plan of Care
    - Medicaid Discrimination
    - Transfer & Discharge Rights
    - Rights to privacy & other rights
    - Long-Term Care Ombudsman

# Medicare Coverage for Skilled Nursing Facility Care

## ■ Eligibility

- Patient must be eligible for Medicare Part A and SNF must be Medicare certified
- SNF admission must be within 30 days of discharge from hospital and hospital stay must have been at least 3 days
- Patient must need skilled nursing or skilled rehabilitative services

- **Maximum coverage is 100 days per spell of illness**

# The Medicaid Framework

- Federal
  - Statute, Regulations, CMS State Medicaid Manual & State Medicaid Director Letters
- Pennsylvania
  - The Public Welfare Code, Regulations, Statements of Policy, Handbooks, Operations Memoranda and Policy Clarifications

# Medicaid for Long-Term Care Community Options

- PA Department of Aging Waiver Program
  - Nursing Facility Clinically Eligible (NFCE)
  - Age 60 or older
  - Income Limit of \$2,022 per month (2009 & 2010)
  - Countable resources cannot exceed \$8,000
  - Spousal Impoverishment and Estate Recovery
- PA Department of Public Welfare LIFE program
  - Managed care program built around adult day care
  - Age 55 & older
  - Same financial eligibility as Waiver & private pay

# The Medicaid Application Process

- **Medical Eligibility**
  - Physician to complete Form MA-51
  - Area Agency of Aging then determines level of care
  - Patient must be “nursing facility clinically eligible”
- **Financial Eligibility**
  - Application Form PA-600L filed with county assistance office
  - Coverage can be retroactive to first day of third month prior to month of application

# Medicaid Resource Eligibility

- **Resource Limit**

- If income is less than \$2,022/month, countable resources cannot exceed \$8,000; otherwise they cannot exceed \$2,400

- **Exempt Resources**

- The Home, subject to a \$500,000 equity limit if no spouse, minor or disabled child is residing in the home
- One Automobile
- Business Property
- Burial Spaces & Irrevocable Funeral Reserve
- Small Life Insurance Policies
- Certain Supplemental Trusts
- Community Spouse's IRA or Qualified Plan

# Community Spouse Resource Protections

- **Who is a Community Spouse**
  - One spouse is in a medical institution for 30 days and the other isn't
- **Community Spouse Resource Allowance (CSRA)**
  - CS keeps all exempt resources plus the CSRA
  - CSRA based on all countable resources owned by the couple on first day of NH admission
  - File Resource Assessment Form to establish CSRA
  - CSRA is  $\frac{1}{2}$  of the resources with a maximum of \$109,560 and minimum of \$21,912 (2009 & 2010)

# Community Spouse Income Protections

- Once IS is eligible for MA, CS retains all of his or her income
- CS is entitled to a portion of the IS' income if the CS' income is below a monthly maintenance needs allowance (MMNA)
- The MMNA is at least \$1,822/mo and can be as high as \$2,739/mo based on the CS' shelter expenses
  - If the couple's combined income is less than the CS' MMNA, then CS can appeal the CSRA to preserve additional resources

# Community Spouse Income Protections

- **DRA Compliant Annuities**
  - DRA requires annuity to be irrevocable, non-assignable, actuarially sound, equal payments with no balloon, and DPW must be named as beneficiary
  - DPW Ops Memo limits CS use of an annuity
  - *Weatherbee v. Richman*, affirmed by 3<sup>rd</sup> Circuit on 11/12/2009, says there is no limit on the CS' ability to use an annuity to convert resources to income

# Gifts and Medicaid

- 60-month look-back
- Applies to gifts made after 2/7/2006
- Penalty starts only when applicant is otherwise eligible but for the gift
- Gifts totaling \$500 per month or less are not penalized
- No cap on the period of ineligibility

# Exempt Transfers

- All transfers to a spouse
- House to a caregiver child or sibling with equity
- All transfers to a minor or disabled child
- Transfers exclusively for a purpose other than to qualify for Medicaid
- Penalties can be cured by returning the gift

# Medicaid Planning Strategies

- Applicant must participate in the plan or an agent under Power of Attorney must be vested with proper authority
- POA signed after 12/12/1999 must specifically confer authority to make gifts
- Without authority to make gifts, even intra-spousal transfers may not be possible

# Community Spouse Planning

- Maximizing the CSRA
  - Increase resources on snapshot date
- Properly time purchase of exempt resources
- Analyze CS' income need / annuity purchase
- Transfer assets to CS
- Change CS' Will and Beneficiary Designations
  - Deal with elective share issue

# Family Caregiver Agreements

- Care by family members is presumed to be gratuitous
- Fees paid must be reasonable for services to be performed
- There is no penalty for amounts paid under caregiver agreement as amounts paid should be deemed transfers for fair consideration

# Planning with a Residence

- Assume an unmarried NH resident with \$100,000 in cash and a \$100,000 house
- Gift cash and apply for Medicaid to start penalty; penalty starts because house is exempt and applicant is otherwise eligible for Medicaid
- Once Medicaid application is denied and penalty starts to run, the house is sold and proceeds are used to pay NH through penalty period

# Avoid Estate Recovery

- The current PA Estate Recovery Claim only reaches probate assets
- Make sure remaining assets are owned with rights of survivorship and that beneficiaries are named on any exempt life insurance policies
- Assets that may be claimed under PEF Code § 3101 are subject to DPW's claim

# Irrevocable Income Only Trusts

- The IOT is a pre-crisis planning tool and is an alternative to an outright gift
  - The IOT protects assets from the kids' problems
- Grantor and spouse can retain right to income, but must relinquish all rights to principal
- Subject to five-year look-back

# ILOTs Continued

- Make sure trustee does not have unlimited power to allocate between principal and income and prohibit conversion to a unitrust
- Grantor can retain *inter vivos* and testamentary limited powers of appointment
- Can be structured as a grantor trust so residence sold in trust can qualify for § 121 exclusion
- Subject to PA inheritance tax, but preserves a stepped-up basis

# Long-Term Care Insurance Partnership

- Standard Tax-Qualified LTCI providing coverage for all levels of care
- Inflation protection required for those under age 76
- Resource disregard for Medicaid qualification and Estate Recovery equal to the amount of LTCI benefits
- Costs the same as a non-partnership policy