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“HARDSHIP HEARINGS” AND THE NEW MEDICAID RULES (Or, Why Relying on the “Hardship Exemption” When an Application is Denied May Turn Out to Be a Risky and Expensive Course of Action)

As we have indicated in previous issues of this newsletter, the new “transfer penalty” rules for Medicaid eligibility included in the Deficit Reduction Act of 2005 (“DRA05”) are expected and intended to result in a dramatic increase in the denial of applications for Medicaid long-term care benefits. That is so because ineligibility caused by transfers will not start until a nursing home resident applies and would otherwise be eligible for benefits. Moreover, even small gifts and donations will cause temporary ineligibility.

The fact that many people who are already essentially “broke” (they need to be, in order to apply successfully for Medicaid) will be determined ineligible for benefits, in many cases for several months or even years, clearly raises the issue of hardship. If a nursing home resident has no means of paying for his or her care, that person faces the possibility of being discharged from the facility for non-payment. For someone in need of nursing home care, that could result in great hardship. At the same time, it will impose a financial hardship on the facility to provide care to a resident who is neither able to pay for care nor eligible for Medicaid.

A “hardship exception,” under which transfer penalties that would otherwise delay eligibility can be waived and benefits awarded immediately, existed even prior to the enactment of DRA05. What has changed under the new law – in response to nursing home industry complaints that it will cause great financial hardship for many nursing

homes – is that, if the resident consents, the nursing home itself can initiate and handle the request for the necessary hearing.

If you read the standard for establishing hardship set forth in the federal statute (see the sidebar) as meaning what it says, it sounds like a god-send.

Sidebar: What the Federal “Hardship Exemption” Statute States

“Undue hardship exists when application of the transfer of assets provisions would deprive the individual of medical care such that his/her life would be endangered. Undue hardship also exists when application of the transfer of assets provisions would deprive the individual of food, clothing, shelter or other necessities of life.”

The definition of hardship would seem to apply in virtually any situation in which a nursing home resident would be denied Medicaid benefits and thus face potential discharge for non-payment. Perhaps it will turn out that way. However, elder law attorneys are uniformly doubtful that it

will. In the past, hardship exceptions have seldom been granted, especially when the circumstance causing the “hardship” is that the Medicaid applicant gave away money or property which, but for the transfer(s), would have been available toward paying nursing home expenses.

Even if hardship exceptions will be allowed more frequently under the new law, the idea of nursing homes initiating hardship exception proceedings on behalf of residents raises a number of questions and concerns which the statute fails to address and which, at this point, remain unanswered. For example:

What if a resident (or the resident’s agent under a power of attorney, who may have been the recipient of gift transfers) refuses to consent to the filing of a hardship application? Is that grounds

for discharge for non-payment? Can a nursing home threaten discharge if consent isn't given, or would that make the consent involuntary?

What if the nursing home resident is mentally incompetent and *can't* legally consent? Could a family member who does not have power of attorney consent for that person?

Who will pay the substantial legal fees likely involved in handling the hardship hearing? If the resident consents, does that imply agreement to paying the fees? Or if the nursing home initiates the process, does that automatically mean that it pays?

If a nursing home hires an attorney to handle a hardship hearing, who does that attorney represent: the resident or the facility? What if they have conflicting interests?

Who will control the process once the application is filed? Would the resident have the right to say "drop the case" while the matter is pending? That could be a real concern, since many families might only consent out of fear of the resident being discharged, a fear that would be completely removed if the resident later died, as many will do while hardship hearings are pending.

Will family members want to cooperate with hardship hearing requests, or will they fear that the hearings will provide little more than a forum for the lawyers for "both sides" – the State and the nursing home – to grill them under oath about their role in the transfers that caused the penalties and their ability to pay the resident's bill and thus "eliminate the hardship"?

If the nursing home initiates the process, does that mean that it bears the financial risk of the outcome? In other words, if a hardship application is filed and nine months later it is denied, does that mean that the nursing home has no right to charge the resident for the room cost during that time?

How long will it take to get a hearing and a ruling? There figures to be a substantial increase in the number of "hardship hearings." Unless there is a corresponding substantial increase in the number of hearing officers, the hearing docket figures to get seriously backlogged.

What impact would the nursing home's initiation of hardship proceedings have on its ability to seek to discharge the resident for non-payment if the hardship request is denied? Under the Nursing

Home Reform Act of 1983, a nursing home may only legally discharge a resident if that can be done to a safe place that will reasonably meet the resident's needs. If the nursing home files a hardship application, has it basically admitted that that would not be the case?

At this point, the only answer to those and other important questions is "Stay tuned."



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