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Transfer of Asset Provisions

Background

The cost of long-term care continues to increase, making such services difficult to afford for most individuals, and inaccessible for many. The Medicaid program provides coverage for long-term care services for individuals who are unable to afford this care. **Some individuals**, with assistance from financial planners and attorneys, **have developed methods of arranging assets in such a way that they are preserved for the individual and/or family members, but are not countable when Medicaid eligibility is determined.** Various techniques are used to artificially impoverish Medicaid applicants, **including gifting** of assets to family members, **investing** assets **in financial instruments that are inaccessible**, and executing **financial transactions for which fair market value is not actually received.** The DRA includes several provisions designed to discourage the use of such "Medicaid planning" techniques and to impose penalties on transactions which are intended to protect wealth while enabling access to public benefits.

Summary of the Transfer of Asset Provisions

Extension of Look-back Period and Computation of Penalty Period

In anticipation of application for Medicaid, many individuals carefully time transfers of assets to minimize the penalty period, and **maximize the amount of money that is transferred without penalty. This is done through calculated timing of transfers as well as incremental transfers** throughout the look-back period. Sections 6011 and 6016 of the DRA make a number of changes to the computation of penalty periods based on a transfer of assets for less than fair market value. These include the following:

- The **"look-back period" is lengthened** from the 36 months prior to the month of application **to 60 months** prior to the month of application.
- The **penalty period** no longer begins with the date of transfer, but now **begins** on the later of the date of transfer or the date t**he individual would otherwise be eligible** for Medicaid coverage of long-term care expenses.
- For transfers that are less than the average cost of care for one month, **States must impose partial month penalties.**
- In the case of multiple transfers, States have the option to combine multiple penalties into a single penalty period. This may simplify the process of imposing penalties for States.

Promissory Notes, Loans and Mortgages

The DRA also addresses the treatment of promissory notes, loans, and mortgages. Often, individuals would transfer large sums of money, **claiming that the transfer was not a gift but a loan, when in fact there was no meaningful repayment plan**. The DRA provides that any purchase of a note, or any loan or mortgage, will be treated as a transfer, subject to penalty unless the following conditions are met:

- The repayment terms must be **actuarially sound**;
- **Payments must be made in equal amounts** during the term of the loan with no deferral of payments and no balloon payments; and
- The note, loan or mortgage must **prohibit cancellation of the debt** upon death of the lender.

If all of these conditions are not met, the loan is treated as a transfer of assets valued as the entire outstanding balance due on the loan as of the month of application for Medicaid long-term care services.

Life Estates

At times, individuals pay sums of money to others in exchange for the right to live in that individual's home. The purchaser has no right to sell or take a loan against the property, only the right to use it as a residence. The DRA provides that **the purchase of a life estate (the right to reside in property which belongs to another) is a transfer of assets unless the purchaser actually resides in the property for at least one year after the date of purchase.** Furthermore, the purchase amount must not be greater than the actual value of the life interest, computed using existing methodologies. If the purchase amount is greater than the computed value of the life interest, then the difference is considered a transfer subject to penalty.

Undue Hardship

The DRA does mandate that every State implement undue hardship provisions that allow for the waiver of a penalty period where an individual would be deprived of medical care such that the individual's life or health would be endangered, or that the individual would be deprived of food, clothing, shelter or other necessities of life. States have a great deal of flexibility in developing their undue hardship procedures, but must **include timeliness standards and must notify applicants of the undue hardship provision, the process for requesting an undue hardship determination, and how an adverse decision can be appealed**.

Annuities

Section 6012 of the DRA addresses the use of annuities as a method of sheltering assets. Individuals at times invest large sums of money in **annuities which are expected to pay out an amount that is not commensurate with the investment, or which will pay out beyond the individual's anticipated life span**. Upon death of the beneficiary, the remainder of the investment passes to designated heirs. To discourage the use of annuities to shelter funds for heirs while qualifying for Medicaid, this provision requires the following:

- **Applicants must disclose to the State any interest** the applicant or spouse has in any annuity;
- **The State must be named as the remainder beneficiary**, or as the second remainder beneficiary after a community spouse or minor or disabled child, for an amount at least equal to the amount of Medicaid benefits provided; and
- **Annuities** purchased by or on behalf of the applicant **must be** part of a **bona-fide retirement plan** or must be irrevocable, non-assignable, **actuarially sound**, and provide for equal monthly payments.

An annuity purchased after February 7, 2006 that does not meet the requirements above will be treated as a transfer of assets subject to penalty.

The "Income First Rule"

Section 6013 of the DRA addresses the methodology for calculating the amount of resources that may be preserved for a community spouse. Section 1924 of the Social Security Act provides that the amount of resources to be preserved for a community spouse may increased beyond the statutory maximum if the community spouse's income is less than a minimum amount, also set forth in statute. The same section 1924 of the Act provides that income from the institutionalized spouse may be made available to the community spouse to bring that spouse's income up to minimum level. The "income first rule" requires that the amount of the institutionalized spouse's **income that would be made available to the community spouse be considered to be available to the community spouse before computing the amount of additional resources that would be required to bring the community spouse's income up to the standard**. Some States applied the income first rule prior to enactment of the DRA, however the DRA now requires that all States use this methodology.

Home Equity Provision

Section 6014 of the DRA imposes a **limit of $500,000** on the value of an individual's home equity. **States may increase this figure up to $750,000** by submitting a State Plan amendment. These amounts will be indexed for inflation beginning with 2011. **If home equity exceeds the limit, the individual is not eligible for coverage of long-term care expenses.** This rule prevents individuals from sheltering large sums of money in home property, and encourages use of the home equity to finance long-term care. This rule does not apply if the home is occupied by the community spouse or a minor or disabled child. Undue hardship provisions may also be applied where excess home equity cannot be accessed for legal or financial reasons.

Deposits with Continuing Care Retirement Communities (CCRC)

Section 6015 pertains to deposits individuals make with continuing care retirement communities (CCRC) or life care communities. Such communities require large sums to be deposited upon entrance to the community. These funds are typically reserved to meet the individual's long-term care expenses if other private resources are no longer available. Some States previously excluded these funds from consideration as an available resource, enabling the individual to qualify for Medicaid benefits. The DRA specifies that **these funds are countable**, precluding eligibility until these funds, in addition to any other countable assets, are within the State's Medicaid limits.