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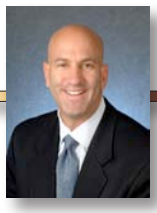
How the DRA Has Affected the Use of Personal Care Contracts



By: Howard S. Krooks, JD, CELA ElderCounsel Principal

Following the February 8, 2006 enactment of the Deficit Reduction Act, the use of personal care contracts has been on the rise. With a tightening of the Medicaid eligibility rules and the rigorous demands placed on family members who care for loved ones, it is no surprise that family members who make great sacrifices in providing needed care would now look to be compensated for providing such care.

How have Medicaid agencies responded to the upswing in the use of personal care contracts? Predictably, Medicaid agencies have increased their scrutiny of a personal care contract transaction, in some cases imposing a penalty period on what should otherwise be considered a fair market value transaction not subject to one. In other cases, there has been a restriction on the circumstances where a personal care contract can be utilized. I can share with you my New York and Florida experiences with personal care contracts since the adoption of the DRA rules in each state.

New York implemented the DRA with an issuance of interpretive rules effective August 1, 2006 (probably the first state to implement the DRA). While no mention was made of personal care contracts in the rules implementing the DRA, on September 24, 2007, the New York State Department of Health issued a Memorandum delineating new rules pertaining to care contracts. The Memorandum noted that "since the enactment of the Deficit Reduction Act of 2005, which lengthened the look-back period for asset transfers and changed the penalty period start date, districts have seen an increase in the number of Medicaid applications involving personal service contracts." Pursuant to the Memorandum, they are treated in the following manner in New York:

1. A personal care contract that does not provide for the return of any prepaid monies if the caregiver becomes unable to fulfill his/her duties, or if the Medicaid applicant dies before his/her calculated life expectancy, will be treated as a transfer of assets for less than fair market value. This is not mandated by federal Medicaid law, and fails to account for the contractual consideration being exchanged by the caregiver; specifically, the contractual obligation to provide care for the life of the Medicaid applicant, even if the individual lives longer than the period set forth in the life expectancy tables. Under those circumstances, the caregiver receives no greater compensation for providing the needed care.

2. If a personal care contract stipulates that services will be provided on an "as-needed" basis, a determination cannot be made that fair market value will be received, according to the Memorandum, and a penalty period will be imposed. First, Federal Medicaid law supports the notion that services may be contracted for on an as-needed basis, provided that an average estimate of the number of hours is stated in the contract. Second, since the care being provided is by definition a fluid concept, there really is no way to contract for a stated number of hours as this amount will varies over time.

3. No credit is allowed for services that are provided as part of the Medicaid nursing home rate. This effectively eliminates the viability of using personal care contracts in the nursing home context in New York. What is so surprising about this requirement is that regardless of what services are included in the Medicaid rate at a nursing home, these services in many cases are not provided on a timely basis and in some cases not at all. In fact, this issue was litigated in a fair hearing where two daughters/caregivers found that mom's oxygen tank was empty and their discovery of the empty tank saved mom's life. Nevertheless, a penalty period was imposed on the compensation paid to the daughters under the personal care contract because mom was in a nursing home and this service was deemed duplicative of what should have been provided under the nursing home's basic Medicaid rate.

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In Florida, the news is a little brighter (no pun intended), but not much. While personal care contracts have been utilized in Florida in greater frequency than other parts of the country both before and after the DRA, there has been higher scrutiny of these contracts by Medicaid. Although Florida has not issued any formal rules regarding personal care contracts, the issues facing the Florida practitioner are as follows:

1. In at least one district, Medicaid has taken the position that all contracts with compensation arrangements exceeding $100,000 are to be denied. This position is being espoused by one rogue individual in the legal department at Medicaid.

2. In another case, the personal care contract was deemed a transfer of assets for less than fair market value since the contract was entered into between the caregiver, individually, and as the power of attorney for the Medicaid applicant, without specific language in the power of attorney authorizing this type of transaction (update your powers of attorney!).

Contracts which provide for care while an individual is residing in a nursing home have been and continue to be honored in Florida.

Mr. Krooks is certified as an Elder Law Attorney by the National Elder Law Foundation and is a member of the National Academy of Elder Law Attorneys (NAELA) Board of Directors. He serves on the Executive Council of the Elder Law Section of the The Florida Bar as the NAELA Liaison. He is a Past Chair of the Elder Law Section of the New York State Bar Association (NYSBA). He was chosen as a 2007 and 2008 Florida Super Lawyer, named to Florida Trend magazine's Florida Legal Elite in 2007, and has an AV Peer Review Rating, the highest rating afforded an attorney, from Martindale-Hubbell.
Mr. Krooks is also a Founding Principal of ElderCounsel, a sister company of WealthCounsel. ElderCounsel invites you to learn more about membership and the features and benefits of the ElderDocs document drafting system; visit them online at www.eldercounsel.com