

LEGAL ISSUES FOR CAREGIVERS – SPOTTING THE ISSUES

The Caregiver's Little Crib Sheet

Updated: September 11, 2007

By

Robert A. Mason, JD, CELA

Asheboro, North Carolina

- I. Overview of Common Caregiver Legal Issues – This outline is intended to be a general overview of several of the more common legal issues caregivers may encounter. This is not an exhaustive review – and **PLEASE** – do not rely on this for definitive legal advice!

I will be very happy if you come away with a few helpful hints.

II. Medicare Overview

- A. Program overview – Coverage for medical services and supplies that are “reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member”
1. Part A – Hospital benefits
 2. Part B – Physician and other provider
 3. Part C – Medicare + Choice Plans (now called Medicare Advantage)
 4. Part D – Commenced 1/1/06 drug benefit
- B. Eligibility
1. 65 years and SS eligibility
 2. ALS (Lou Gehrig's disease)
 3. 2 years SSDI
- C. Coverage
1. Part A
 - (a) Hospital
 - (i) \$992 deductible
 - (ii) Days 1 – 60: \$0
 - (iii) Days 61 – 90: \$248/day
 - (iv) Days 91 – 150: \$496
 - (v) Actually only 90 days “per spell of illness” – 60 days “lifetime reserve”
 - (b) SNF
 - (i) Stringent conditions
 - (ii) Days 1 – 20: \$0
 - (iii) Days 21 – 100: \$124
 - (iv) Days 101+ NO COVERAGE
 2. Part B – Premium \$93.50/month
 - (a) Mds and other providers

- (i) \$100 deductible
 - (ii) 80% of “reasonable charge” (subject to 115% limiting charge)
 - (iii) 20% coinsurance
 - (b) Home care – limited
 - 100 visits “per spell of illness” if homebound and provided per MD plan of care
 - (c) Hospice benefits
- D. Importance of Medigap or Supplemental Insurance
1. Base level of benefits all policies provide:
 - (a) Medicare hospital deductible/coinsurance
 - days 61 – 90: (save \$8,432)
 - days 90 – 150: (save \$39,184)
 - an extra 365 reserve days with NO deductible (priceless)
 - (b) Part B co-insurance (save 20% at the MD’s office)
 - (c) 3 pints of blood
 2. Types
 - (a) 10 standardized supp plans allow for comparison shopping
 - (b) All but the 2 “cheapest” plans cover SNF deductible for days 21-100 (an \$9,920 savings)
- E. Long term care benefits – skilled nursing facility & home care
1. Discussed above
 2. Importance of considering LTC insurance
 - (a) Premiums often a “bargain” compared to local LTC costs of up to \$6,000/month
 - (b) Can be difference between staying at home longer or going to SNF
 3. Insurability issues – not always an option – Medicaid the draconian alternative
- F. Common misconception in nursing home context: “failed to progress” or has “plateaued” and “no longer qualifies for Medicare.”

This is incorrect and is subject to challenge. From 42 USC § 1395i-3(b)(1)(A) (Social security Act § 1819(b)(1)(A)) (“Nursing Home Reform Act”):

To the extent needed to fulfill all plans of care described in paragraph (2), a skilled nursing facility must provide, . . .

- i. nursing services and specialized rehabilitative services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident;*
- ii. medically-related social services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident*

....

See also 42 CFR § 409.32(c) (“The restoration potential of a patient is not the deciding factor in determining whether skilled services are needed”) and 42 CFR § 409.33(c)(5) (“maintenance therapy . . . under a rehabilitation regimen may require the services of a qualified therapist . . . to maintenance of his present level of functioning”)

III. Medicaid Overview

- A. A state/federal partnership, needs based, through federally-approved state plan
- B. Eligibility criteria – Must be “poor” - Assets
 1. No more than \$2,000 countable assets as of application date
 2. What is countable? Anything that is not exempt – examples of exempt property include:
 - (a) Residence and contiguous property
 - (b) Life estates and tenancies-in-common
 - (c) Auto
 - (d) Certain types of “actuarially sound” annuities (effective 11/1/07 will need to name DMA as beneficiary – either first or second behind spouse)
 - (e) Personal property (clothing, furniture)
 - (f) Limited income producing property
 - (g) Business property
 - (h) “Unavailable” property – but beware transfer sanctions below
 3. Sanctionable transfers - DMA currently assigns \$5,000 as average monthly cost of SNF bed in NC – gratuitous transfers could have been used to “buy” a SNF bed from time of transfer (current rule).
 4. Sanctionable transfers - Deficit reduction Act (“DRA”) barely enacted (House 216-214; Senate 51-50). Drastic changes in transfer rules. **Scheduled to take effect in NC on 11/1/2007**
 5. **Old** Pre-DRA (current) transfer rules:
 - (a) Examine all transfers made within 36 months to determine if sanction applies (60 months if to trust)
 - (b) Transfers of any otherwise countable asset, and some exempt assets (any real property interest including home place)
 - (c) Example: Transfer \$50,000 - 10 month sanction (period of ineligibility) *from 1st day of month of transfer*
 6. **New** Post-DRA (probably 11/1/2007) transfer rules:
 - (a) Examine all transfers made within 36 months to determine if sanction applies (60 months if transfer made either to trust or *after* 11/1/2007)

- (b) Transfers of any otherwise countable asset, and most exempt assets (any real property interest including home place)
- (c) Example: Transfer \$50,000 - 10 month sanction (period of ineligibility) *from LATER of*
 - (i) *date of Medicaid application OR*
 - (ii) *date applicant is otherwise financially eligible for Medicaid (but for the transfer penalty) and in a skilled nursing facility*
- 7. Spousal impoverishment rules – Theory: Community spouse needs to avoid absolute poverty
 - (a) Assess married couple’s assets as of the first moment of the *first* CPI (continuous period of institutionalization – a period of 30 days in hospital or SNF) – Note: First CPI may have been quite some time ago
 - (b) Allow community spouse to keep ½ of all *countable* assets (but no more than \$101,640 nor less than 20,328)
 - (c) Compare to assets at date of *application* (not assessment) and devise strategy for “spending down” excess assets
- C. Eligibility criteria – Must be “poor” – Income
 - 1. “Name on the check” rule
 - 2. Count only institutionalized spouse’s income
 - 3. Generally income cannot exceed facility’s reimbursement rate (usually around \$3,500 - \$4,000/month)
 - 4. Institutionalized Spouse Income applied to SNF bill – BUT
 - 5. Community Spouse may be awarded a share to insure her/his income (after some adjustments) is at least \$1,650/month
- D. Estate Recovery
 - 1. Upon death of Medicaid LTC beneficiary DMA Third Party Recovery Unit will file claim against the estate as a fifth class creditor
 - 2. Currently applies to probate assets only
 - 3. What are probate assets? Items that pass according to terms of a Will or Intestate Succession
What are non probate assets? Everything else – Items that pass according to the terms of an instrument such as a deed or life insurance policy
 - 4. Exceptions:
 - (a) Surviving spouse/disabled adult child resides in property included in estate
 - (b) Adult child resides in residence and cared for parent 2 years before parent moved to SNF
 - (c) Hardship on remaining family members (severe hardship)
 - (d) Estate less than \$5,000
 - (e) Less than \$8,000 recovery claim

- E. Planning strategies – Getting eligible
 - 1. Convert countable assets to exempt assets
 - (a) Create life estates or tenancies-in-common (however creating can be a transfer if gifting remainder or tenancy)
 - (b) Buy a qualified annuity (remember: this will be added to income for eligibility purposes)
 - (c) New car
 - 2. Spenddown countable assets
 - (a) Home improvements
 - (b) Pay debts
 - (c) Transfer assets to a Special/Supplemental Needs Trust (see below)
 - 3. CAUTION: Married couple should not spenddown before consulting counsel or getting DSS Assessment (reason: may inadvertently spenddown below \$203,280 (2 x \$101,640 - - - see III.B.7.(b), above) and decrease the CSRA that would otherwise be awarded)
 - 4. Maximize CSRA by insuring countable resources are at least \$203,280 (borrow money, then “spenddown” by paying back)

- F. Planning Strategies – Avoiding Estate Recovery
 - 1. Recall: estate recovery applies to probate assets only
 - 2. Create nonprobate assets – especially life estates in real property
Common strategy: Convey remainder interest in homeplace; retain life estate

- G. Coverage
 - 1. Limited home care (similar to Medicare) – up to 80 hours/month
 - 2. “Basic” LTC (no single room, some particulars not covered, many MDs won’t treat – but can keep Medicare if can afford premiums)

IV. Trusts

- A. What are they?
 - 1. Grantor/Settlor/Trustor
 - 2. Trustee
 - 3. Beneficiary
 - 4. Legal title/beneficial interest
 - 5. Difference between testamentary trusts and inter vivos trusts
 - 6. Difference between self-settled and third party trusts

- B. Trusts and the Medicaid Rules
 - 1. Available assets vs. unavailable assets - Trustee discretion to distribute?
 - (a) If “unavailable” then 60 month lookback and possible sanction
 - (b) If “available” then no sanction, but considered a countable asset

- (c) Caution: Many trusts restrict trustee to distributions for “health, education, maintenance” - likely considered available because trustee would have fiduciary duty to distribute
 - (d) If to be “unavailable” then either income or principal must truly be “unavailable”
- C. Revocable Trusts/Living Trusts
- 1. Often oversold/hyped
 - (a) Probate not often “that terrible” in NC
 - (b) Confidentiality not usually a big concern
 - (c) No tax advantages or testamentary advantages over a Will
 - (d) Often the expense of establishing and ongoing admin more than any savings
 - 2. Good planning tool for certain people:
 - (a) Older individual at or over projected applicable exclusion levels, who
 - (b) May be concerned about incapacity, who
 - (c) Wants to give a trustee some limited planning authority in the event of estate/gift tax changes or repeal while incapacitated
- D. Types of common planning trusts (and type – 3d party or self-settled?)
- 1. Classic life insurance trust - 3d party
 - 2. “Income Only” trusts – irrevocable, no access to principal, triggers possible sanction – self-settled
 - 3. Support trust - commonly established for wife or child, discretionary distributions for health, education, maintenance - as discussed, real problems from public benefits law - 3d party
- E. Special/Supplemental Needs Trusts - Can be either self-settled or third party
- 1. A type of trust, if satisfies regulatory requirements, that minimizes impact on public benefits, maximizes quality of life and conserves cash for beneficiary
 - 2. Self-settled using “Pooled Trust”
 - (a) Disabled individual may fund with own assets
 - (b) Trustee must be nonprofit entity
 - (c) Distributions to beneficiary as long as does not disqualify beneficiary
 - (d) State DMA gets “first crack” at recovery upon death, although a portion may be retained in trust to assist other beneficiaries of trust
 - 3. “Sort of” self-settled using a non-pooled trust
 - (a) A disabled individual under age 65 may have his/her assets put in a trust “established by” by a “guardian, parent or grandparent, court”
 - (b) Distributions restricted so as not to disqualify beneficiary

- (c) State DMA gets “first crack” upon death - remainder may go wherever designated by trust or will
 - 4. Third party Special/Supplemental Needs Trust
 - (a) A parent can establish trust, either inter vivos or testamentary, that qualifies as trusts above
 - (i) with NO pay back provision - remainder could go to others at death of beneficiary
 - (ii) CAUTION: Administrative headaches - make sure trustee has access to qualified estate planning/benefits counsel!
 - (b) A parent can fund an account, either inter vivos or testamentary, to a Pooled Trust (nonprofit entity trustee/management)
 - (i) Upon death of beneficiary usually a split between state and nonprofit entity
 - (ii) Pooled Trusts often community based/money stays in community
 - (iii) Very attractive to older parents with disabled only child who want to insure access to qualified management, care planning, advocacy services, etc.
- V. Wills - “Will” not dwell on this topic - But don’t be fooled: They’re important!
- A. Simpler (and somewhat less expensive) than Revocable Trusts - maybe not as flexible for future planning
 - 1. Any tax provision that could be put in a revocable trust could be put in a will
 - 2. Once testator becomes incapacitated - stuck with what you have
 - B. CAUTION: In Medicaid planning context - couples commonly leave “all to my loving spouse” - Wills must be updated after Medicaid planning
- VI. Powers of Attorney
- A. What they are
 - 1. Principal
 - 2. Agent/Attorney-in-fact
 - 3. Based on law of agency
 - 4. Fiduciary standards apply to agent
 - B. Incredibly important documents
 - 1. Get little respect
 - 2. Easy for knowledgeable practitioner to draft
 - 3. Easy to “mess up” - **and they commonly are!**

- C. Properly drafted a good POA can accomplish same management goals after incapacity as much touted revocable trust

- D. **New law: Effective 10/1/05 Financial institutions MUST accept an otherwise valid POA. Law contains procedures for verifying . . . and financial penalties for failure to comply**

- E. After incapacity of principal, only alternative to properly drafted POA is Guardianship proceeding
 - 1. POA: \$50-\$100 and no court supervision
 - 2. Guardianship: \$2,000 minimum and extensive court supervision

- F. After incapacity proper estate planning often involves “gifting”
 - 1. Not Christmas
 - 2. But gratuitous transfers
 - 3. Gifting powers can be:
 - (a) Totally unrestricted
 - (b) Restricted as to class of donees
 - (c) Restricted as to amounts, or
 - (d) Unrestricted but subject the agent to some sort of permission/authorization (many of my nervous clients have a clause that provides that agent must have written opinion of counsel that such transfer necessary for planning purposes)
 - 4. **North Carolina law:**
 - (a) **No authority to gift unless specifically stated - a “broad” grant of power alone will not do**
 - (b) **No authority to gift to agent (often an adult child) unless specific permission**
 - 5. **More scary North Carolina law:**
 - (a) **Statutory short form has “check box” allowing gifting to others and to agent - Many folks think this is fine and they’re “covered”**
 - (b) **The section of the NC Statutes that follows the provision for the “short form” explains what the check boxes mean**
 - (i) **That statute explains that the “gifting” checkboxes allow the agent to continue a pattern of gifting previously established by the principal**
 - (ii) **QUESTION: How many people establish a pattern of transferring their homes as gifts?**
 - 6. Go home and look at your Powers of Attorney
 - (a) A statutory check-the-box form? Do **not** rely on it
 - (b) A lengthier, detailed document? Check for:
 - (i) Gifting powers?
 - (ii) Restrictions on powers? (if too restricted will not be useful - e.g., limiting to federal annual gift exclusion will limit agent to

\$12,000 per year per donee, which can be worthless in many situations)
(iii) Allowed to agent?

VII. Gift Tax Overview

- A. Annual gift exclusion (both federal and state): \$12,000
 - 1. Must be a present interest
 - 2. Crummey powers and minors' trusts
- B. Applicable *federal* lifetime gift tax exclusion amount: \$1,000,000
- C. North Carolina scheme
 - 1. 3 classes of donees
 - 2. \$100,000 lifetime exemption to Class A Donees

VIII. Advance Directives

- A. 2007 Session of General Assembly “reworked” Advance Directives laws
New laws **EFFECTIVE OCTOBER 1, 2007**
- B. New form Health Care Power of Attorney
 - 1. Very Broad
 - 2. May limit breadth
 - 3. Automatically nominates Agent as Guardian (Must take steps to override if don't want that)
 - 4. Providers may rely on other states “if it appears to have been executed” in accordance with other state's laws or NC law
- C. New form *Advance Directive for a Natural Death* (“*Living Will*”)
 - 1. For first time in history North Carolina law uses term “*Living Will*” – replaces old “*Declaration of a Desire for a Natural Death*”
 - 2. Applies if:
 - (a) Incurable or irreversible condition which will result in death in “a relatively short period of time”
 - (b) Unconscious and a determination made that “to a high degree of certainty” will not regain consciousness
 - (c) Advanced dementia “or any other condition which results in the substantial loss of [...] cognitive ability”
- D. Formalities for both
 - 1. Principal must be 18 (actually that isn't specified for *Living Will*)
 - 2. 2 Witnesses
MAY be volunteers of health care provider (used to prohibit any employee of provider)

3. 1 Notary
MAY be an employee (even paid) of Provider



Mason Law, PC
350 N. Cox Street #9
Asheboro, NC 27203
336-610-6000
www.masonlawpc.com
ram@masonlawpc.com

Bob Mason, certified elder law attorney by the National Elder Law Foundation, practices in Asheboro, North Carolina and Savannah, Georgia.

SIGN UP FOR THE MASON LAW, PC ELDER LAW UPDATE – A MONTHLY ELECTRONIC NEWSLETTER CONTAINING INTERESTING INFORMATION FOR CAREGIVERS

SIMPLY GO TO WWW.MASONLAWPC.COM AND “CLICK” ON ANY “JOIN OUR EMAIL MAILING LIST” ICON