

DRA Implementation Update

James A. Jaeger
Hill, Glowacki, Jaeger & Hughes, LLP
© Hill, Glowacki, Jaeger & Hughes, LLP (2007)

October 26, 2007

As of the date of writing this article (October 26, 2007), the Budget Bill was passed by the Legislature and is to be signed by the Governor today. The Budget Bill included implementation of the DRA provisions—pretty much as set forth in the federal statute. We do not anticipate any DRA related vetoes.

The effective date will be the first day of the fourth month following “publication.” Assuming that the Budget is signed today (October 26), it will probably be “published” on Monday, October 29. That means that the effective date for state purposes will be February 1, 2008.

Actual implementation is still up in the air. As I have previously written, there has been a “working group” at the DHFS which includes representatives of the Bureau of Eligibility Management, the Nursing Homes Association, the Assisted Living Association and several lawyers including Betsy Abramson, Barbara Becker, Sarah Orr, Roy Froemming and myself, as well as Sandy Lonergan from the State Bar. We worked on a number of issues relating to implementation:

- (1) **Intent to Divest.** The question here is how to deal with asset transfers that were made for purposes other than getting Medicaid. Current state policy appears overly restrictive. We have argued for guidance on the kinds of transfers that will not be penalized.
- (2) **Penalty Period Begin Date.** The question here is whether to continue the policy of having the penalty period begin at the first day of the first month of the penalty period or some later date in the month.
- (3) **Partial Month Penalty Period Calculation.** Since the DRA requires the state to count partial months of ineligibility, the question is how to implement this. One possible solution would be to use a number of days of ineligibility rather than months and partial months. This is related to b. above.
- (4) **Penalty Period Begin Dates for Community Waivers.** The issue here is when to begin the penalty in a community waivers situation. The problem is whether or not one has to be at the top of the waiting list before the period starts to run (which disadvantages people in counties that have COP waiting lists). We are advocating for a more liberal rule.

- (5) **Recalculation of Penalty Periods.** This involves the question of whether or not to revise the current rule that permits partial cures of divestments and require that all of the money be given back in order to cure divestments. This is designed to attack the so-called “reverse half a loaf” strategy.
- (6) **Annuities.** No real decisions here. The state appears to concur with the CMS position that all annuities (including spousal annuities and retirement annuities) must designate the state as the remainder beneficiary. There is a school of thought which argues that satisfaction of either the payback rule or the “actuarial soundness” rules should suffice. This argument is rejected by the State (and CMS). The state retains the “three letter” rule.
- (7) **CCRC Entrance Fees.** Under the new rules, if an individual in a CCRC can use the entrance fee to pay for care and can get a refund of remaining fees at death and the entrance fee does not confer “an ownership interest” the fee is a countable asset for Medicaid purposes. This seems to indicate that the possibility of getting it back or using it for your care, even if you can only do so by running out of money, moving out or dying will cause the fee to be available (including presumably in spousal cases). Also, the CCRC can insist that you not transfer assets, even where the transfer of asset penalty provisions would permit transfers (with the appropriate penalty) even for Medicaid certified facilities that are part of the CCRC.
- (8) **Purchase of Life Estates.** Takes the position that the purchaser of the life estate must live in the property for 12 consecutive months before he/she will be eligible for Medicaid. This means that one could not apply for community waivers until the 12 months expired. Absence for more than 30 days for vacations or trips would cause the period to start to run again (but not absences for illness or hospitalization or rehab stay in a nursing home).
- (9) **“Purchase” of Note or Loan.** This pretty much tracks the federal statute. If the note transaction does not satisfy DRA requirements, the divested amount is the balance as of the date of application. Also says that county can’t look at security or the creditworthiness of borrower.
- (10) **Hardship Waivers.** This provision simply develops processes for handling hardship waiver cases and how the bedhold policies will work.

- (11) **Home Equity.** Reaffirms adoption of \$750,000 home equity limit. Notes that home equity issue only affects long term care Medicaid and not card services.

For each issue, the State prepared a working paper with a number of alternatives. These were discussed among the group. The state then prepared a final paper with the various alternatives and the participants were given the opportunity to comment. The lawyer representatives did not limit their comments to the options presented, but rather we gave our own opinions on the topic. It is anticipated that the DHFS paper, along with our comments, will be forwarded to the Secretary (or further) for decision. As a group we have advised the Department that it is our position that the changes will need to be implemented either through legislation or Ch. 227 rulemaking before they are incorporated in the MEH. The Department's position on this issue is unclear.

The major issue that appears not to have been finally resolved is the treatment of divestments on or after February 8, 2006. Divestments before February 8, 2006 will be treated under the old rules (both lookback and start date). Here are the issues:

- (1) **Divestment after 2/8/2006 with eligibility before February 1, 2008.** So far these cases have been treated under the old rules. Based on correspondence between DHFS and the Joint Finance Committee, it does not appear that the Department will reopen these cases under the new rules. However, based on a recent memo from DHFS this is not yet certain.
- (2) **Divestment after 2/8/2006 but before February 1, 2008, penalty period expires before February 1, 2008 (using old rules) but no application before February 1, 2008.** We do not know how this will be treated.
- (3) **Divestment after 2/8/2006 but before February 1, 2008, penalty period does not expire before February 1, 2008 (using old rules).** We do not know how this will be treated.
- (4) **Divestment after February 1, 2008.** One must assume that the new rules will fully apply to these transfers.

The only additional federal implementation activity involves a CMS Chicago Regional Letter (No. 07-04) issued in August, 2007 which takes the position that annuitized annuity contracts can be treated as assets under a "secondary market" rule. This would seem to give federal sanction to our "three letter" rule for annuities.

For now, we still don't have a lot of certainty to advise our clients. Since the Budget Bill has been passed, I am assuming that state implementation activity will accelerate and we should have

more certainty in the near future. I suggest that you continue to monitor the Elder Law Section Listserv for further developments.