

New Federal Law Restricts Asset Protection

by Attorney Michael Hooker

On February 8, 2006 the US Congress passed a law which radically restricts an elder's ability to protect their assets in the event that he/she needs long term care (nursing home) placement. Those of you who have read past columns of mine, know a good estate plan needs to consider the possibility that you may become incapacitated late in life, thus necessitating long term care. In other words, any estate plan worth its salt needs to address the issue of asset protection/nursing home placement.

Medicare (federal health insurance), does not pay for long term care. Medicaid, a joint federal/state program, is essentially welfare. Medicaid will only provide coverage if an elder is indigent. What if the elder has savings? Generally, they must be spent on care before the elder is eligible. Are there legal ways to protect assets/savings? Yes. But the federal government has just made it harder.

Previously an elder could transfer assets and if he/she stayed healthy for a period of time (to a maximum of three years), the assets would be protected. Congress has changed that. Now, the so-called "look back" period is five years. Any transfer made during the five years prior to any nursing home/Medicaid application will potentially disqualify an elder from Medicaid coverage.

I cannot overstate the significance of this change. Congress is sending a clear message to you that if you need long term care you are either going to have to get long term care insurance, spend you savings, or transfer your assets sooner rather than later. Many of my clients do not want to transfer sooner, because it restricts their ability to manage the asset (s) or provide for that "rainy day".

The house is generally the largest asset that an elder owns. Many want to transfer the house to one or more of their children because they have heard that it can avoid probate court upon death, and to avoid "the nursing home/state getting it". Is it still a good idea to transfer the house retaining a life estate (the ability to live there for the balance of your life) in light of this new legislation? The answer depends on several factors: 1) client's age 2) client's health 3) whether or not the children (recipients) are trustworthy 4) other assets the elder may have 5) elder's receptivity to relinquishing control.

My practice will continue to involve asset protection. It will be more difficult and may involve more risk. But what is the alternative? To be stuck "holding the bag" should you need nursing home care? That is generally an unacceptable option. Massachusetts has yet to implement these new federal changes through regulations, but such regulations appear imminent.