

### OAST & HOOK

Offices in  
Portsmouth, Virginia  
and  
Virginia Beach, Virginia  
Tel: 757-399-7506  
Fax: 757-397-1267  
E-mail: [eln@oasthook.com](mailto:eln@oasthook.com)



Member, National Academy  
of Elder Law Attorneys

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Editor  
Sandra L. Smith  
Attorney at Law

## DRA OF 2005 IMPACT ON MEDICAID PART II

In the last edition of the *Elder Law News*, we discussed two provisions of the Deficit Reduction Act of 2005 (DRA) that will impact Medicaid eligibility for long-term care services. We will discuss additional provisions in this edition.

The DRA changes the beginning date for penalty periods for transfers of assets. For transfers prior to February 8, 2006, the penalty period began on the date of the transfer. In many cases, when a small amount was transferred, the penalty period expired before the individual ever entered a nursing home and applied for Medicaid. For transfers occurring on or after February 8, 2006, the penalty period will begin when the applicant is otherwise eligible for Medicaid, but for the penalty period. This would normally occur when an applicant is in a nursing home and meets the income requirement and the \$2,000 maximum resource requirement, but is ineligible for Medicaid because of the penalty period for the transfer. For example, if the applicant in Portsmouth paid \$16,000 for a grandchild's college tuition, and made a \$250 donation to the applicant's church in the same month, with the \$4,060 divisor, the person would be ineligible for Medicaid for four months. Under the old law, the four month penalty period would begin on the date of the transfer. Under the new law, the penalty period begins on the first day of the month during or after which assets have been transferred for less than fair market value, or the date on which the individual is eligible for Medicaid assistance but for the application of the penalty period, whichever is later, and which does not occur during any other period of ineligibility. This means that now the penalty period will not start until the applicant is in a nursing home and meets the income requirement and the \$2,000 maximum resource requirement, but is ineligible for Medicaid because of the penalty period for the transfer. In this example, the four month period of ineligibility would not begin until the applicant is in the nursing home, with no funds to pay for the applicant's care. What could the applicant or the nursing home do in this situation?

The applicant or the nursing home in this example could file for a hardship waiver. The hardship waiver rules have been revised under the DRA. The new law states that undue hardship exists when application of the transfer of assets provision would deprive the individual of medical care such that the individual's life or health would be endangered, or would deprive the individual of food, clothing, shelter, or other necessities of life. The hardship applies to the individual, not to the facility, so a nursing home could not apply for a hardship waiver on the basis that the nursing home would suffer a hardship if the fees are not paid. It is unknown how many hardship waivers will actually be granted under the new law; very few waivers were granted under the prior law. Applicants and nursing homes are likely to apply for hardship waivers not only for cases like the preceding example, but also for cases in which applicants are unable to provide sufficient documentation for transfers, as described in the last edition of the *Elder Law News*.

Oast & Hook is ready to assist individuals and nursing homes with the hardship waiver process, as well as long-term care planning under the new law. Prior planning continues to be critical to the process of paying for long-term care.

### **Oast & Hook**

Oast & Hook is an elder law firm. We represent older persons, disabled persons, their families, and their advocates. The practice of elder law includes estate planning, investment and insurance advice, estate and trust administration, powers of attorney, advance medical directives, titling of assets and designations of beneficiaries, guardianships, conservatorships, and public entitlements such as Medicaid, Medicare, Social Security, and SSI, disability planning, income tax planning and preparation, bill paying and account management and reporting, care management, and fiduciary services. We also handle litigation involving these issues, such as will contests and estate administration disputes. For more information about Oast & Hook, please visit our website at [www.oasthook.com](http://www.oasthook.com).

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