

## *The Estate Planning Advisor*

### **Developments in Elder Law**

**By Richard J. Shapiro, J.D.**

As we pass the mid-point of 2007, it seems a good time to evaluate developments in legal issues affecting seniors, especially since Congress's enactment of the Deficit Reduction Act ("DRA") in February 2006. The intent of the DRA was to reduce the amounts paid by the government towards long-term care expenses. New York enacted enabling regulations in July 2006 that have provided a road map for New Yorkers in meeting the requirements for Medicaid qualification for long-term care. New York's regulations, by and large, are consistent with the provisions set forth in the DRA.

In contrast to the approach taken by New York State, Connecticut recently implemented regulations that, on their face, seemingly violate the terms of the DRA. For example, the DRA provides specific rules for the treatment of "immediate pay" annuities. Under New York's regulations, monthly annuity payments from these immediate pay annuities are treated as income in the month received. Connecticut's new regulations would treat the annuity payment as a "resource" in the month received, effectively eliminating the immediate pay annuity as a planning tool in that state. It is almost certain that elder law attorneys in Connecticut will bring legal action challenging the validity of Connecticut's regulations.

In addition to the immediate pay annuity, other "crisis planning" strategies that have proven largely effective in New York since the implementation of the DRA include personal service contracts and the use of promissory notes. With all of these strategies, the goal is to allow a person in need of long-term care to preserve a greater amount of their assets while qualifying for Medicaid coverage.

Notwithstanding the continued availability of crises planning strategies, the best results are derived from proactive planning techniques. Foremost among these is long-term care insurance, which provides the policyholder with a reserve of money to cover their long-term care costs, usually at home or in a long-term care facility. Another technique is the irrevocable income only trust. Such trusts will protect all assets transferred to the trust – as well as all appreciation of assets placed into the trust – so long as the creator of the trust does not apply for Medicaid long-term care benefits for at least five years after funding the trust.

**Estate tax update:** With the 2008 presidential election looming and a myriad of foreign and domestic challenges (e.g., Iraq, immigration, etc.), there is currently no movement in Congress to amend the widely assailed federal estate tax law. As it presently stands, the existing \$2 million per person federal estate tax exemption will increase to \$3.5 million in 2009. In 2010, the federal estate tax exemption will become unlimited (i.e., there will be no Federal estate tax for estates of persons dying in that one

year only); however the federal estate tax will return with a vengeance in 2011, as estates in excess of \$1,000,000 will be subject to federal estate tax at a rate of 50%. New York State presently retains a state estate tax for estates in excess of \$1,000,000, with no planned increase in the New York exemption. Stay tuned for future developments.

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