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## Proposed Change in New York State's Medicaid Program

The New York State Health Budget, enacted in late March 2011, cuts funding for programs that assist the elderly and disabled. As a result, there will be significant changes in New York's Medicaid program and Medicaid planning undertaken on behalf of our clients will be affected. The Budget Bill calls for the adoption of regulations to implement the changes. However, as of the writing of this article, regulations have been proposed but not yet adopted. It is likely that the proposed changes will be adopted. This article will address the anticipated changes.

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## Considering Early Retirement? Social Security Primer - Part 2



In our last issue we addressed the importance of the decisions we must make about when to start taking Social Security benefits and introduced certain strategies available to married couples. While many people wish to retire as soon as they can, and the number of Americans who begin receiving Social Security benefits early has increased since 2008, good planning should involve an analysis of the earning and investment power we relinquish when we stop working at age 62.

In this article, we review the principal reasons to delay the onset of Social Security benefits until "full retirement age" (FRA) and discuss how to maximize benefits for the surviving spouse.

First, it is important to refer to the charts provided by the Social Security Administration. These charts help you identify your individual FRA, which is based on your year of birth. The longer you refrain from accessing benefits, the greater your monthly benefit will be. If you begin receiving Social Security benefits before FRA, you forfeit the additional

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You can check our website at [www.berwitz-ditata.com](http://www.berwitz-ditata.com) for more information concerning the new rules and regulations as it develops.

The good news is that the proposed changes do not place new restrictions on eligibility. The "Spousal Refusal" strategy has not been eliminated. The transfer-of-asset rules remain unchanged.

What will change if the proposed rules are implemented is the manner and extent to which the State is entitled to seek recovery of Medicaid benefits paid after the death of a Medicaid recipient or his or her surviving spouse. Estate recovery is currently limited to the Medicaid recipient's estate - that is, assets passing under the terms of a Will. Under the proposed changes, the definition of the term "estate" is expanded to include property in which the person has legal title or interest at the time of death. This will include joint accounts, jointly held property, retained life estates and interests in trusts. Certain exemptions still apply. As before, recovery is limited to Medicaid payments that were paid after the Medicaid recipient reached 55 and only for a maximum period of 10 years. Also, the proposal does not authorize recovery of benefits paid to a surviving spouse against



trusts created under the terms of a Will of a predeceased spouse.

As a practical matter, these changes impact Medicaid planning options. For example, joint bank accounts, with rights of survivorship, are not part of a probate estate. They are automatically paid to the surviving joint account owner. Under the proposed rules, these accounts are no longer protected. The survivor can only protect that portion of the account which they contributed. If the account was funded solely with the Medicaid recipient's funds, the entire account may be used to reimburse the state for paid benefits. Without maintaining all of those records, even the portion legitimately contributed by the survivor will be subject to recovery.

Where a Medicaid recipient has retained a life estate in real property, he or she has all the rights and obligations of an owner during lifetime but, at death, the

title to the property passes to the remainder persons. Under the old rules, because the value of the life estate became zero at the death of the Medicaid recipient, and the remainder person owned 100% of the value, there could be no Medicaid recovery against the property. Under the proposed changes, the value of the life estate will be calculated as of the date of the Medicaid recipient's death, based upon his or her actuarial life expectancy. Upon the sale of the property, the percentage of the value based upon this calculation would be subject to Medicaid recovery.

If a Medicaid recipient has an interest in a trust, it is potentially at risk. That includes not only trust principal but also income which the recipient was entitled to receive but was not paid before his or her death. Generally, since the "income only" trusts used for Medicaid planning purposes customarily preclude the use of trust principal for the beneficiary, the recovery against such a trust should be limited to any undistributed income.

Under the principles of Debtor and Creditor Law, a creditor could claim that assets transferred by a debtor to avoid a judgment were "fraudulently conveyed" and obtain a return of the transferred assets. Previously, the State was not entitled to claim fraudulent conveyance in its efforts to recover for Medicaid benefits paid. Under the proposed rules, this strategy would now be available to the State.

While there are additional proposed changes, most will affect a smaller number of Medicaid recipients or those planning for Medicaid eligibility. Space precludes our review of all of the issues. The full proposal can be found on our website. Also, please look forward to our future issues of *A Step Ahead* for updates once the final regulations are implemented.

If you have engaged in Medicaid planning, it is advisable to have your plan reviewed in light of the new law. Who is affected? Those who have done Medicaid planning for asset protection purposes, those whose loved ones are already receiving Medicaid benefits after having transferred assets or engaged in Medicaid planning and those who are interested in this type of planning. We encourage

you to arrange to meet with us to discuss how these changes will impact the results you hope to achieve. While there will be a nominal fee charged for this service, it is important to ascertain what impact the proposed changes will have on your plan and what, if any, techniques are available to you.

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monthly income that you would have received had you waited until your FRA to begin receiving benefits. For instance, if you forego taking your benefit until FRA, the benefit will be as much as 33% higher and, if you delay taking benefits until age seventy, your benefits will increase another 32%. Your annual cost-of-living adjustment is also based on your benefit. Your adjustment will be permanently lower if you take benefits early.

If you are contemplating retirement, you must consider a variety of factors: leaving a job with good pay at age 62 means that you are not likely to replace that income if you later need to return to the work force; you will not qualify for Medicare until age 65; you will have to pay for private health insurance in the interim. It is interesting to note that the cost of private health insurance is

rising faster than inflation or Social Security cost-of-living increases. Thus, by taking your Social Security benefit early you essentially reduce your benefit and then use it to pay for health insurance until you qualify for Medicare.

On the other hand, if you keep working past age 62, you can build your retirement savings by taking advantage of “catch-up contributions” to tax-advantaged savings plans. These “catch-up contributions” allow you to exceed the normal limit on pretax contributions to 401(k) plans, bolstering your retirement savings. Also, because the Social Security Administration calculates your benefit on your 35 highest years of pay, if you are earning at the top of your employment history, the benefit amount for which you are eligible is still increasing and delaying retirement can boost your final benefit amount.

What about taking early retirement benefits based on your surviving spouse’s work record? When you claim benefits at age 62 based on your spouse’s work record, your benefit is reduced by 30% of what it would be at your FRA. The sophisticated strategies, “claim and suspend” and “claim now, claim later,” discussed in our last issue are not available until at least one spouse reaches FRA. Moreover, upon your death, your spouse is eligible to receive your monthly Social Security payment as a survivor benefit if it is higher than his or her own. When you take Social Security before your FRA, you are permanently decreasing your spouse’s survivor benefits. Delaying your claim provides extra security for your spouse.

The rules for surviving spouses are complicated and it is worth consulting with the Social

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Security Administration to help frame your options, especially if you plan on marrying again. In a nutshell, if you are widowed, you are entitled to receive the higher of your own benefit, based on your work history, or your deceased spouse's benefit. If you wait until your FRA, you can claim 100% of your deceased spouse's benefit. There are two strategies to consider here too. If you are under 70, you can claim a survivor's benefit and let your own benefits increase to their maximum, at age

70, and then claim under your own work history. The other strategy, which requires that the marriage was at least 10 years of duration, is to claim your own benefit now, as a widower, and switch to a survivor's benefit later. Survivor benefits continue to increase, after a spouse dies, until the survivor reaches FRA.

Retirement planning takes time and energy but it is an investment that will help you maximize your Social Security benefits and have a more secure retirement.

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