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Major Changes Implemented in New York State's Medicaid Program

In our last issue of *A Step Ahead*, we reported that the New York State Health Budget had cut funding for programs that assist the elderly and disabled and, in particular, the Medicaid program. Regulations to implement the changes had been proposed but not adopted. On September 8, 2011, the changes went into effect. They will significantly affect Medicaid planning, past, present and future.

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

However, the manner and extent to which the State is entitled to seek recovery, *after the death of a Medicaid recipient or his or her surviving spouse*, of Medicaid benefits paid has been significantly altered. Under the prior rules, post-death recovery was limited to the Medicaid recipient's

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Changes in Medicaid Estate Recovery Rules May Affect Your Existing Estate Plan

Many people have incorporated Medicaid planning as part of their overall estate plans. Because the planning strategies are frequently tailored to the individual or couple, they vary greatly, making a general description of how the recent changes in Medicaid's estate recovery rules will affect the anticipated outcome impossible. That said, we would like to provide an example of how your plan may be affected.

A frequently used planning technique includes the transfer of a home to another person or to an irrevocable trust. As part of this plan, or sometimes as a separate planning strategy, an owner might transfer their home but retain a life estate. Under the new Medicaid recovery rules, Medicaid may be able to recover the benefits paid on behalf of a Medicaid recipient from assets that were previously insulated from such recovery, such as the value of the life estate or assets owned in trust.

We encourage our friends, family, clients and former clients to review their estate plans periodically. We hope that, in light of the new rules, they will take advantage of this opportunity. It is imperative that any-

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estate - that is, assets passing under the terms of his or her Will. The new rules permit recovery against property in which the person has a legal title or interest at the time of death. This will include, among other things, joint accounts, jointly held property, retained life estates and interests in trusts.

Certain exemptions apply. As before, recovery is limited to Medicaid payments made after the Medicaid recipient reached 55 and only for a maximum period of 10 years. Also, the new rules do not authorize recovery of Medicaid benefits paid for one member of a couple against a trust created under the terms of the Will of his or her predeceased spouse.

Of note is that the changes that have now been implemented will impact Medicaid planning options. For example, under the prior rules, Medicaid could not recover against bank accounts that were owned jointly "with right of survivorship" because, at the death of one account owner, the remaining balance was automatically paid to the surviving account owner. The new rules create a presumption that all of the assets in a joint account belong to the Medicaid recipient and are subject to recovery. The survivor can only protect that portion of the joint account which he or she contributed. If the account was funded solely with the Medicaid recipient's funds, the entire account will be available to reimburse the State for paid benefits. Unless complete and proper

records have been maintained, even the portion of a joint account that was legitimately contributed by the survivor will be subject to recovery.

Life estates have also been affected. Where a Medicaid recipient has retained a life estate in real property, he or she possesses the rights and obligations of an owner during lifetime but, at death, title to the property passes to the remainder persons. Under the old rules, and because the life estate of the Medicaid recipient is extinguished at death so that 100% of the value of the property is then owned by the remainder persons, there could be no Medicaid recovery against the property. Under the new rules, the Medicaid recipient's estate will be deemed to own an interest in the property that will be the equivalent of the value of his or her life estate as of the moment before death. The calculation of this value is based, in part, on an interest rate which is adjusted monthly. The greater the interest rate, the higher the value of the life estate.

Additionally, when real property is transferred subject to a life estate, the value of the transfer is calculated the same way, utilizing the interest rate in effect at the time of the transfer. Currently, the interest rate is at an historical low. As the rate increases, the value of the life estate will increase, as well. This could result in a higher valuation of the life estate immediately before the Medicaid recipient's death, resulting in a higher potential recovery by Medicaid.

If a Medicaid recipient has an interest in a trust, it is also potentially at risk. That includes not only trust principal but also income which the Medicaid recipient was entitled to receive during his or her life but was not paid before 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 the undistributed income.

Finally, 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 did not assert fraudulent conveyance in its efforts to recover for Medicaid benefits paid. Under the new regulations, this strategy is now available to the State.

There are still good and valid reasons for maintaining joint accounts, creating asset-protection trusts and retaining a life estate in real property, even in the face of the new estate recovery rules. There are also circumstances in which one might decide against implementing one or more of these strategies. The benefits of these techniques, and whether they outweigh the risks involved, is something that should only be determined on a case by case basis. The decision as to how to best plan for the future, or revisit and "improve" existing plans, must be consistent with the needs, wishes and goals of each individual or couple. It is important to discuss this with an attorney. If you have already undertaken asset-protection or Medicaid planning, we urge you to have it reviewed. Contact us immediately to schedule an appointment to identify and consider how the new rules affect you, if at all. Even if you were initially assisted by another attorney, we are available to review your plans with you. With tens of thousands of dollars potentially at risk, it is well worth the nominal fee that we charge to determine how these changes have affected YOU. Please contact us without delay.

Guardians Have A Duty To Account

Sometimes Property Management Guardians, appointed in an Article 81 proceeding, do not realize until after they have been appointed that it is their obligation to manage all of the assets and income of their ward and prepare an annual report, for the Court, detailing their activities during the year, including the income and receipts collected on behalf of their ward and expenses and disbursements incurred during the year.

As we approach year end, we like to remind Property Management Guardians to organize the financial records and begin compiling the information that must be included in their annual report. The following is a checklist that will help a Guardian prepare for the task of managing the finances for their ward and compile the information needed for the yearly accounting:

- Identify all of the assets that your ward owns, including bank and brokerage accounts, retirement accounts, insurance policies and annuities
- The IRS can help you find bank accounts that belong to your ward, use IRS form 4506T (Request for Transcript of a Tax Return)
- If you are married to your ward, divide joint accounts
- If your ward has joint account(s) with others, ascertain that portion of each account that belongs to your ward and segregate it
- Retitle all accounts in accordance with the Court's direction and request that all correspondence concerning the accounts be delivered to you
- Make sure to open and fund a Guardianship checking account
- Ask that copies of all checks be included with the monthly statements for the Guardianship checking account and close all other accounts
- Identify all sources of your ward's monthly income
- Make arrangements to have your ward's income deposited directly into the Guardianship checking account
- Determine your ward's monthly expenses
- Arrange to have invoices forwarded to you, as Guardian
- Pay expenses by check only, with funds from the Guardianship account
- If there are debts, arrange for their payment
- If there are insufficient assets to pay creditors, notify the Court
- Search for other unclaimed property, like unclaimed tax returns and insurance reimbursements
- Locate safe deposit boxes owned by your ward and, if jointly held, separate your ward's belongings and rent a separate box
- You will also have to identify valuable personal property, documents and real property

Once you begin receiving statements, review them monthly. Keep them in a binder for easy reference. Keep receipts for purchases and services. Separate them into categories such as food, clothing, utilities, household expenses, medical expenses.

In your annual report, you must account for all income received, monies earned, expenses paid and previous and current balances of the estate. Under your stewardship, you will be able to provide a safe harbor for your ward and safeguard his or her resources.

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one who has done asset-protection planning, to protect against the possibility that they may one day need long-term care, meet with an attorney who is familiar with the most recent regulations. Moreover, if a loved one is currently receiving Medicaid benefits after having transferred assets or engaged in Medicaid planning, or has received Medicaid benefits and is now deceased, or if you are interested in this type of planning, we encourage you to make an appointment. Meet with us and discuss how these changes will impact you, your loved one, the plan or the results you hope to achieve. While there will be a nominal fee charged for this service, it is important to review, reflect, evaluate and consider the impact of these changes and what, if any, techniques are available to you.

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B&D Welcomes Marissa

-Berwitz & DiTata LLP welcomes associate attorney **Marissa A. Felix** to the firm. After earning a bachelor's degree in Political Science and Sociology from Bucknell University, Marissa obtained her law degree from Pace University School of Law. During law school, Marissa was selected as a Federal Income Taxation Dean's Scholar, a teaching assistant and mentor-type position, due in part to her performance in the class. She also had the opportunities to work in-house in the legal department of a nonprofit organization, intern at the Westchester County Attorney's office, and participate in the State Judicial

Externship Program, interning with Justice Robert A. Spolzino of New York's Appellate Division, Second Judicial Department. Marissa is a member of the Nassau County, New York State, and American Bar Associations and is admitted to practice law in the State of New York. In her spare time, Marissa enjoys crafting projects and decorating her home, as well as spending time with her new husband and their families. Marissa looks forward to meeting and speaking with you.



Marissa A. Felix, Esq.

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