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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 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 redeceased 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.