ELDERLAW NEWS
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STOP GUESSING!!

Questions about protecting your assets against catastrophic illness and nursing home costs?
Social Security, Medicare?
Medicaid Planning?
Nursing Home issues?
Estate Planning?
Guardianships?
Probate?

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Answers in upcoming editions of the Elderlaw News.

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CAREFUL PLANNING MAKES A DIFFERENCE

Medicaid Planning: CONGRESS CRIMINALIZES ASSET TRANSFERS MADE TO ESTABLISH MEDICAID ELIGIBILITY.

As part of the Kennedy-Kassebaum Health Reform Bill signed into law by President Clinton on August 20, 1996, Congress has criminalized certain transfers of assets for purposes of achieving Medicaid eligibility. Section 217 of the Health Insurance Portability and Accountability Act of 1996 adds the following new paragraph to 42 U.S.C. §1320 a-7b(a):

> [Anyone who] knowingly and willfully disposes of assets (including by any transfer in trust) in order for an individual to become eligible for medical assistance under a State plan under Title XIX, if disposing of the asset results in the imposition of a period of ineligibility for such assistance under section [42 U.S.C. 396p(c)].

This new provision is added to a section of the law that imposes criminal penalties for making false statements or representations in regard to Medicare or Medicaid. For those people not providing medical services, violations of the law constitute a misdemeanor punishable by a fine of up to $10,000.00 and up to a year of imprisonment. In addition, the new law gives the states the right to deny Medicaid benefits for up to a year after conviction for violation of the statute. The new amendment is effective as of January 1, 1997.

The law is fraught with difficulties because its meaning is unclear. The major problem of interpretation centers on the meaning of the provision stating that a criminal act has occurred only in the event that a transfer "results in the imposition of ineligibility." When is a period of ineligibility *imposed*? There are three possible answers to this question: (1) upon transfer, regardless of whether the transferor or his or her spouse ever applies for Medicaid; (2) if the transferor or his or her spouse applies for Medicaid within the look-back period - within three (3) years after the transfer or within five (5) years if the transfer was to a trust; or (3) only if the transferor or his or her spouse applies for Medicaid during the period of ineligibility caused by the transfer.

The first interpretation of when the period of ineligibility is imposed is the most severe since any transfer that may have as a purpose eventuality eligible for Medicaid may be criminal. Under the second interpretation, the senior will only have performed a criminal act if he or she applies for Medicaid within the three (3) year period following the transfer. If this interpretation is correct, it penalizes only the less affluent. If you can make a transfer and then can afford to pay for your care for the following three (3) years (or five (5) in the case of a transfer to a trust), then you have not committed a criminal act. But if you transfer a smaller amount, wait out the penalty period and then apply for Medicaid, you will have performed a criminal act under this interpretation.

The third interpretation, that a transfer is criminal only if the transferor applies for Medicaid during a period of ineligibility, is the most lenient. Under this approach, a senior can transfer assets, wait out the resulting period of eligibility and then apply for Medicaid without having acted criminally.

The effective date of January 1, 1997 raises another question. Does the law apply only to transfers made after that date, or to penalty periods imposed after that date no matter what the date of the transfer? There is no way to answer this question at the present time.

While this law turns nursing home residents into criminals, it is their children and spouses (and attorneys) who assist in the planning who will probably be the persons who are prosecuted. Attorneys cannot recommend to clients that they perform a criminal act. However, this is problematic given that the law is not clear about what a criminal act precisely is.

Tax Law: *HEALTH BILL PERMITS DEDUCTIBILITY OF LONG-TERM CARE COSTS AND INSURANCE PREMIUMS.*

In addition to criminalizing asset certain transfers and guaranteeing the portability of health insurance, the Kennedy-Kassebaum bill also amends the Internal Revenue Code to clarify that the cost of "qualified long-term care services", including home care services, may be deducted as medical expenses. These services will be deducted to the extent that, when combined with the taxpayer's medical expenses, they exceed 7.5 percent of his or her adjusted gross income. The provision is effective for taxable years beginning after December 31, 1996.

The legislation also allows premiums paid for a "qualified long-term care insurance contract" to be deducted as medical expenses. The premiums are deductible up to specified limits: $200.00 for those aged 40 or less, $375.00 for those between ages 40 and 50, $750.00 for those between ages 50 and 60, $2,000.00 for those between ages 60 and 70, and $2,500.00 for those over age 70. These deductible will be indexed for health care inflation after 1997. Proceeds from long-term care policies are not includable as income, up to the equivalent of $175.00 per day.

Medicaid Planning: *TREATMENT OF TRUSTS UNDER OBRA-93.*

The Omnibus Budget Reconciliation Act of 1993 ("OBRA-93") made dramatic changes in the treatment of trusts for Medicaid eligibility purposes. OBRA-93 generally tightened eligibility rules governing the use of trusts by Medicaid applicants and recipients to discourage the transfer or sheltering of income and resources. Many consider the law to be "anti-trust" legislation because numerous restrictions were placed on the use of trusts. The thrust of the OBRA-93 changes to the Medicaid rules is to classify trusts either as an available asset or as an asset subject to the transfer of asset rules.

Only certain types of trust are considered asset of the individual and their spouse. These are trusts in which the corpus was formed, in whole or in part, from assets of the individual (or spouse) and which were established other than by Will by any of the following persons: (1) the individual; (2) the individual's spouse; (3) a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual's spouse; or (4) a person, including any court or administrative body, acting upon the direction or upon the direction of the individual or the individual's spouse. The provision thus includes trust created by a guardian, conservator or attorney-in-fact. It also applies to trusts created by a court out of the proceeds of a judgment or a settlement award whether on the courts initiative or a petition by a representative of the individual.

Under OBRA-93, only three (3) kinds of trusts are not treated as available to the Medicaid recipient: (1) trusts for disabled persons under age 65; (2) trusts consisting of income; and (3) trusts for a disabled person managed by a non-profit association. In order for the above trusts to be excluded from the assets of the individual, the trust must designed so that the State will receive all amounts remaining in the trust upon the death of the Medicaid recipient up to the amount of the Medicaid assistance provided to the person by the State.

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