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FOR ASSET PROTECTION PLANNING, FAMILIES MUST ACT NOW OR BE LEFT BEHIND

By Dana E. Bookbinder, Esquire

When President Bush called for a \$10 billion cut from the federal Medicaid budget in early 2005, he placed the welfare of our elderly in jeopardy and poised the government to potentially place family values under a great stress test. Although reports circulated that Congress would not alter the Medicaid eligibility laws for some time while stories of Hurricane Katrina victims, many of whom receive Medicaid, are still front page news, Congress has begun the process of doing just that -- and changes may be coming soon. A committee comprising members of both the House and Senate has been appointed to review a number of ideas to save billions in Medicaid expenditures. In making changes to the law, the federal government is riding a tide already prevalent throughout the states. During the past few years, several states have passed laws targeting Medicaid transfers to impede families from engaging in Medicaid planning. Unfortunately, such restrictions on individuals' rights to maximize their savings on long term care costs can yield unintended, and sometimes costly, consequences.

Changes now being considered by the federal government include extending the lookback period for Medicaid transfers, which is generally three years. Under current law, when an individual applies for Medicaid, he or she must typically produce 36 months of bank statements to the Medicaid caseworker. If the caseworker determines that the applicant or his spouse has gifted away assets, he imposes a period of ineligibility for benefits upon the applicant. The length of the period of ineligibility is determined by a state specific mathematical formula. The beginning of the period of ineligibility is based upon when the transfer itself occurred. In addition to changing the length of the lookback period, Congress is also considering moving the beginning of the penalty period from the month in which the gift is made to a later date, such as when the individual has depleted all of his assets or applies for Medicaid. The result of these possible changes would be that those who engage in asset protection planning would have to retain a greater amount of assets to pay through these extended penalty periods. Under this scheme, those with fewer assets would be deterred from planning while those with greater assets who could afford to wait out a longer period of ineligibility would still have asset protection planning as a legal option.

A major policy shift also being considered is having adult children contribute toward the care of an unhealthy parent. This summer, Pennsylvania enacted a statute embracing this policy, establishing that a child of an indigent person has a responsibility to care for and maintain or financially assist that indigent person. In cases where a child refuses to comply with a court order to support his parent, courts may impose imprisonment for up to six months. It is questionable whether the law is enforceable against a child who lives in another state.

Such a policy would seem to create situations where children who may not have the means or desire to support their parents (especially in a nursing home at a rate approaching \$8,000 per month) feel forced to

care for their parents. This situation is obviously less helpful to an elderly individual than being monitored by trained professional medical staff, and it could also be dangerous.

Adverse and unnecessarily costly consequences of current policies can also easily be seen in the law regarding home care benefits. New Jersey and Pennsylvania, for example, tightened eligibility requirements for home care Medicaid benefits in 2001 and 2005, respectively. Aside from the recent changes, attaining home care benefits is generally more difficult than nursing home benefits. For instance, many who would seek such benefits are often faced with a waiting list since the number of individuals who can receive home care benefits is often limited. Some home care and assisted living Medicaid benefits have income eligibility limits well below nursing home benefit income limits. These factors all encourage individuals who might have been able to stay at home with care (and save the State substantial sums in facility payments) sometimes are forced to enter nursing homes because of the unavailability of benefits. This problem also leads those who might otherwise have entered an assisted living facility to enter a nursing home (at a higher bill for the State) instead.

Many of our Medicaid eligibility rules promote a policy of protecting the current standard of living for the community, or healthy spouse. If these safeguards for the spouse of the Medicaid applicant are dismantled, more individuals are placed at greater risk of losing their residences and facing impoverishment, possibly at the government's expense.

Unfortunately, rumors persist that Medicaid planning is generally practiced by the rich. Since families of significant means typically own highly appreciated stock and substantial retirement assets, the tax laws work to create a strong disincentive to engage in Medicaid planning. A June 2005 study by the Kaiser Family Foundation concluded that the majority of potential nursing home residents do not have substantial assets and therefore, making asset protection planning more difficult would not save substantial sums for the government. Our firm's experience also supports the fact that it is not the rich who engage in asset protection planning.

If parents lose their ability to preserve savings and still obtain health care, they will face additional losses of independence and dignity. They will lose the ability to pass their life savings to their children at death. Moreover, their children who will bear greater responsibility for their parents' health and financial situation will have to deal with new family stresses. Parents may be more reluctant to enter facilities for care. Those with inadequate care at home will become an increasing burden on their children, straining family relations.

Because of the changes we foresee, those who are concerned about preserving assets for long term care expenses, must act now. Those who anticipate seeking benefits, as well as the rest of us, must contact our representatives in government, by e-mail or letter to inform them as to the unintended consequences of the legal proposals now under discussion. If they pass, family friction is likely to increase, the fiscal success is questionable, and families will be left behind.

For your convenience, following is a list of website and e-mail addresses you may wish to contact to make your opinion known. Because of the anticipated legal changes, those with concerns about financing long term care are urged to contact our office for an appointment immediately.

rob.andrews@mail.house.gov

<http://lautenberg.senate.gov>

<http://corzine.senate.gov/contact.cfm>

jim.saxton@mail.house.gov



Begley & Bookbinder, P.C. is a law firm that specializes in Elder & Disabilities Law. We are based in Moorestown, NJ, with offices in Stone Harbor & Lawrenceville.

If you have any comments, e-mail us at ccaruso@begleylawyer.com

Our web site contains a library of firm newsletters, articles, on-line forms for Medicaid, Estate Planning and Guardianship, as well as our upcoming speaking engagements, our products, and other relevant information.

If you are interested in having an Elder & Disabilities Law Attorney from Begley & Bookbinder speak at an event, please contact Colleen Caruso at (856) 787-4237.

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