

Texas Elder Law FaxLetter

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A FREE BUSINESS AND LEGAL UPDATE OF CURRENT EVENTS AFFECTING THE ELDERLY ♦ JULY 2005 EDITION

MEDI-MINUTES

Proposed New Transfer Penalty Rule Published

The June 17, 2005 issue of the Texas Register has included a proposed rule submitted by the Texas Health and Human Service Commission to change the calculation of the transfer penalty for those who make gifts or transfers for less than fair market value prior to applying for Medicaid.

The purpose of the amendment to the existing rule is to implement the option available under federal law that permits the penalty period for an uncompensated transfer of assets to be calculated in terms of months and days, rather than whole months. The proposed amendment would change the current policy of disregarding fractional remainders in calculating the length of a period of ineligibility caused by a transfer of assets without compensation by an individual who applies or receives Medicaid or by that individual's spouse.

When an individual applies for Medicaid and the individual or the individual's spouse has transferred an asset without adequate compensation during the applicable "look back" period before the date of the Medicaid application (36 or 60 months), such a transfer can result in a period of ineligibility. The length of the ineligibility period is determined by dividing the amount of the uncompensated transfer by the monthly average private pay rates for nursing facility care in the state (presently \$2,908 but scheduled to increase to around \$3,600 in October).

Under current policy, fractional remainders that result from this calculation are disregarded, resulting in whole month periods of ineligibility. As a result of the proposed rule change (which is anticipated to take effect as of October 1, 2005), fractional remainders would be considered, so that the resulting period of ineligibility may be days, or months and days. As a result of the new rule, the strategy of aggressive monthly gifting to take advantage of the "round down" will be eliminated.

Member of the Board of Directors of the Texas Chapter of the National Academy of Elder Law Attorneys, Inc.

TRUST TALK

Strategy of Using Living Trusts to Avoid Estate Recovery May Not Work

Although the Health and Human Services Commission (HHSC) has previously indicated that the use of living trusts is presently an acceptable method in avoiding estate recovery (i.e. claims against a Medicaid recipient's non-countable resources such as a homestead) since it avoids probate and there is not a transfer penalty for transferring an asset into to a revocable trust, the federal government is apparently attempting to close this planning option. It has been reported that HHSC is presently trying to get clarification from the federal government. Stay tuned.

OF INTEREST

Personal Needs Allowance to Increase

As a result of recent legislation, the present personal needs allowance of \$45 for long-term care Medicaid recipients (haircuts, etc.) is scheduled to increase to \$60 around September 1, 2005.

NATIONAL NOTES

States Turning to Estate Recovery to Recoup Medicaid Costs

According to an article published recently in *The Wall Street Journal*, surges in Medicaid spending have prompted states to take aggressive steps to recover lost Medicaid dollars. Many state officials are promoting the use of estate recovery, going after the heirs of Medicaid recipients in order to recover Medicaid costs incurred by their deceased loved ones. Critics say it unfairly targets heirs, who can be rendered destitute by colossal nursing home bills accumulated over the years before their loved one's death. Proponents claim the Medicaid system was designed to help the poor, not

individuals who can afford to leave an inheritance behind.

One example is a 72-year-old Virginia woman who was forced to sell the farmhouse where she was born. Not long after her mother's death, the state sent her a bill for \$89,000. The auction of her house and all its contents just covered the bill. The bitter irony is that living Medicaid recipients are allowed to keep their homes.

Another matter is how shocked many heirs are when the bill arrives in the mail. States are required to warn Medicaid applicants their estates may be subject to recovery, but no such warning is required for their grieving families.

The prime issue in the debate is this: Should Medicaid serve only the destitute, or should it also help relieve the crippling burden of nursing home care that threatens to obliterate people's lifetimes of saving and planning in order to leave something to their children?

Proponents of estate recovery claim there is an entire industry geared toward helping people shift the burden to the American tax payer. Critics call estate recovery a form of discrimination against elderly people with long-term illnesses requiring nursing home care. For example, expensive surgeries such as heart bypass can often cost as much as a year in a nursing home, but Medicaid will cover most of that cost. The care needed by Alzheimer's patients can easily leave them penniless and take the inheritance from their children after they're gone.

With Medicaid spending through the roof, easy answers are nowhere to be seen, and the divisive political debate is far from over.

Source: *Wall Street Journal*, 6-24-05

OUT & ABOUT

Michael B. Cohen recently spoke to the Dallas Volunteer Program Guardianship Training on "Medicaid: Maneuvering Guardians through the Minefield".

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