

Texas Elder Law FaxLetter

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

ESTATE TALK

Family Farms at Risk Under Proposed Estate Recovery Bill



As many of you know from the December issue of the Texas Elder Law Faxletter, the Texas Health and Human Services Commission (HHSC) published proposed rules in December relative to Medicaid estate recovery. The proposed rules would give the state the right to make a claim against the probate estates of long-term care Medicaid recipients (i.e., those who are in a nursing home and on Medicaid, etc.) who apply for long-term care Medicaid after the new rules are effective (which will be no earlier than March 1, 2005). The public comment period on the proposed rules ended January 3, 2005. In the event HHSC decides any comments are worthy to change the proposed rules, there will be a delay in the effective date of the proposed rules since any changes would need federal government approval. There would be a new notice and an additional comment period prior to the rules becoming effective.

Although numerous suggested changes have been submitted, this article will only address a couple of the changes to the proposed rules the Texas Chapter of the National Academy of Elder Law Attorneys submitted last week.

First, there is serious risk of loss of the family farm or ranch, although the proposed rules allow an undue hardship waiver for family farms or ranches as a result of the conditions placed on obtaining the hardship waiver. The proposed undue hardship waiver applies, "if the estate property subject to recovery has been the site of the operation of a family business, farm or ranch at that location for at least 12 months prior to the death of the decedent; is the primary income producing asset of heirs and legatees and produces 50% or more of their livelihood; and recovery by the State would affect the property and result in the heirs or legatees losing their primary source of income."

A family farm or ranch is generally not a cash producing asset. It provides food and shelter while, often, one or more members of the household work a second job to produce working cash. The Texas Farm Bureau has reported that 68% of Texas farm

household earnings are from off-farm resources. By requiring the farm or ranch to produce 50% of the legatees' or heirs' livelihood essentially negates this undue hardship waiver. Virtually all farms or ranches would be subjected to estate recovery. It is likely there will be quite an uproar from those who lose the family farm or ranch (which seemed to be something sacred under the Texas constitution) which had previously been passed from generation to generation. The Texas chapter of the National Academy of Elder Law Attorneys has suggested the requirement that the farm or ranch produce 50% or more of the heirs' or legatees' livelihood be changed to show that the heirs or legatees participate in the working farm or ranch. In other words, the farm or ranch is not the primary income producing asset of the heirs or legatees.

Another example of the proposed estate recovery rules being inequitable is that value of real property (i.e., homestead) is treated the same whether or not there is an outstanding mortgage lien, outstanding taxes or other exemptions extended by the taxing authority. So, if the heirs' income is less than 300% of the poverty level, the value of the home was \$60,000, and there were no liens, etc., the property might not be subject to estate recovery. However, if the value of the home was \$120,000 and there was a \$60,000 lien on the property, the real property would be subjected to estate recovery.

There are several other sections of the proposed rules on which comments have been made, and hopefully the HHSC will make some additional changes before the proposed estate recovery rules become final (presently scheduled for no earlier than March 1, 2005).

OF INTEREST

Odor Test Predicts Alzheimer's

Scientists from the New York State Psychiatric Institute have developed an odor test to find out whether a person is likely to develop Alzheimer's disease.

Research has shown the inability to smell certain odors can determine which patients

with minimal or mild cognitive impairment will progress into dementia. The top ten smells identified as disease predictors are: strawberry, smoke, soap, menthol, clove, pineapple, natural gas, lilac, lemon, and leather.

Some 4.5 million Americans currently suffer from Alzheimer's. Doctors say the smell test could assist with early diagnosis, when treatment and medications are most beneficial.

Source: www.medicalnewstoday.com, 12-15-04

MEDI-MINUTES

Low-Income Beneficiaries To Gain Most From Prescription Drug Law

Some 8.7 million low-income Medicare beneficiaries can expect substantial help from the new Part D drug plan in 2006, a new report from the Kaiser Family Foundation has found.

Low income participants are projected to pay 83% less for prescription drugs in 2006 than they would have spent without the program. Another 20.3 million older Americans who enroll in the program but do not receive the low-income subsidies will pay an average of 28% less for their prescription drugs, the data found.

Analysts concluded the prescription drug law will provide the most help to seniors with low incomes and very high drug bills, as Congress intended.



Source: Kaiser Family Foundation, 11-22-04

OUT & ABOUT

Michael B. Cohen will be speaking on February 9, 2005 on how public benefits intersect with Special Needs Trusts at a conference on Special Needs Trusts sponsored by The University of Texas School of Law at the Eidman Courtroom (at the law school) in Austin, Texas.