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THE CHANGING LANDSCAPE OF MEDICAID PLANNING

The Deficit Reduction Act of 2005 brings changes in…..

- ***Gifting/asset transfer rules***
- ***Ineligibility period***
- ***Consideration of equity in primary residence***
- ***Rules relating to annuities***
- ***Refundable Entrance Fees will be considered a resource***

As many of you are aware, the House of Representatives passed the voluminous Deficit Reduction Act of 2005 (DRA 2005) on February 1, 2006. The DRA 2005 was subsequently signed into law on February 8, 2006 by President Bush. The DRA 2005 includes, among many other provisions, Medicaid eligibility modifications.

The extent of the impact that will result from this legislative change is yet to be fully determined. Our attorneys will be addressing this law change and scrutinizing its effect. As the effects of the law are analyzed and as they develop, Unruh, Turner, Burke & Frees and Elderlaw Solutions will be in communication with you through newsletter articles, e-mail updates, telephone conferences and through other means to keep you informed. In the meantime, We would like to examine this update with some of the more significant changes to the law and the expected implications.

1. The Medicaid gifting/asset transfer rules have been changed so that the maximum ineligibility period for <u>all</u> gifts will be five (5) years. Technically, this will include any and all transfers made on or after February 6, 2006. Previously gifts to individuals carried a maximum ineligibility period of three (3) years and gifts to trusts had maximum five (5) year ineligibility periods. Now, all gifts will carry the <u>same maximum ineligibility period</u>. 2. Under the prior law, the ineligibility period began in the month during which a gift was made. The new law states that an ineligibility period will not begin until sometime in the future when a person would otherwise qualify for Medical Assistance/Medicaid. In other words, when an applicant runs out of money to privately pay for nursing home care the ineligibility period would begin.

This modification could have tremendous impact on you, your clients and your loved ones. This change could, in effect, cause an <u>automatic ineligibility period of five (5) years for all gifts</u>. It also makes advanced planning all that more important for anyone considering the protection of assets.

We are presently working on various planning techniques to assist our clients in protecting their assets while taking this section of the law change into account. It is important to note that this provision <u>does not</u> eliminate planning but makes planning and advanced planning imperative.

One option practitioners are considering is the gifting of <u>all</u> assets followed by an immediate application for Medicaid. This would, in effect, cause the ineligibility period to begin because "the applicant would have qualified for Medicaid absent the transfer." The person or people to whom the gift was made

would then be required to return a portion of the gift to reduce the effective ineligibility period. This may sound complex but it is really turning what used to take one step into a two-step process. Of course, this strategy has not been proven successful yet. As with all law changes, we will be waiting to find out what is ultimately successful.

3. The "community spouse" or non-nursing home spouse may continue to reside in the marital primary residence. However, the DRA 2005 states that the primary residence may have no more than $500,000 in equity. That being said, individual states are given the ability to raise the equity limit to $750,000. Therefore, should the community spouse own a primary residence with equity that exceeds $500,000 to $750,000, his or her spouse could be considered ineligible for medical assistance. This provision could have a significant effect on the rapidly appreciating real estate market. It is quite possible that a husband or wife could be forced to move from his or her primary residence, absent proper planning, if their spouse needs long-term care and their primary residence exceeds $500,000 to $750,000 in value.

4. The DRA 2005 also serves to modify the rules relating to purchase of annuities and ownership and income distribution structure. Additionally, where Medicaid and nursing home qualification issues are involved, states will require that the state be named as the remainder beneficiary on all annuities owned by a nursing home resident.

For Medicaid planning purposes, annuities are most frequently used to increase and insure the income flow of the community spouse. Typically, we suggest that annuities purchased for this reason be owned by the community spouse and not the nursing home resident. This should eliminate the need to name the state as a beneficiary unless that spouse ultimately requires nursing care as well.

5. States will be required to use the "income first" rule when assigning income to the community spouse. This may serve to reduce the overall income and asset base retained by the spouse who remains at home.

This will effectively eliminate the vestiges of what was known as the "Hurley Appeal" which often served to allow a community spouse to retain a larger portion of the marital assets in order to maintain a greater flow of income through investment. The spend-
down rules will be enforced without appeal.

6. Refundable entrance fees for long-term care or retirement communities will be considered a resource for Medicaid eligibility purposes and will be a part of the spend down process. This makes planning upon the entrance to a retirement community requiring such an entrance fee of paramount importance.

Has the Law Really Gone Into Effect?

Although the DRA 2005 has been signed into law by President Bush, the Medicaid provisions have not been adopted by Pennsylvania as of the writing of this article. The wheels of change are slow to move on the state level. This presents both an opportunity and uncertainty. The opportunity still exists to plan and apply under the old laws. However, we do this with caution because the new rules could become effective today, next month, next year or the year after. No one knows for sure. For now, clients are applying for Medicaid based upon the "old rules" and still others are planning for the long term based upon the "new rules."

Please note that the constitutionality of this law is presently being challenged which could force a re-vote and possibly prevent it from being passed in its present form. Apparently, President Bush signed into law a version of the Bill that was slightly different than what was passed by the House and Senate. The Constitution states that the President can only sign into law that which is "identical" to the Bill voted on by the House and Senate. We will continue to monitor this as it develops.

There is no question that when this law change is adopted by the state and assimilated into the state's Medicaid application procedure, the qualification process will be much more complicated and difficult. However, the law change still allows for many planning opportunities. It also brings to light the need to do planning well in advance of an individual needing long-term care. It is our expectation that we will continue to work closely with clients in structuring a comprehensive plan to help protect themselves and their families from the ever-increasing costs of long-term nursing care. This planning will continue to include purchase of long-

term care insurance, gifting of assets, the creating of irrevocable trusts, proper will planning, execution of comprehensive durable powers-of-attorney, caregiver
agreements and use of the various asset protection exemptions provided by law.

We will be forwarding newsletters in the future, documenting the specific ramifications of each of these Medicaid law changes and discussing various options available to you, your clients and family members. In the meantime, we suggest that you forward any questions that may arise by email or arrange for a consultation to review specific cases.

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The information provided in this article relates only to Federal and Pennsylvania laws presently in effect as of the writing of the materials. Please keep in mind the possibility of future law changes and also differing laws in other states. The article is only intended to be informational and each case should be reviewed with a practicing professional.

Exceptions to the Transfer Penalty

Transferring assets to certain recipients will not trigger a period of Medicaid ineligibility. These exempt recipients include:

- A spouse (or a transfer to anyone else as long as it is for the spouse's benefit);
- A blind or disabled child;
- A trust for the benefit of a blind or disabled child;
- A trust for the sole benefit of a disabled individual under age 65 (even if the trust is for the benefit of the Medicaid applicant, under certain circumstances);

In addition, special exceptions apply to the transfer of a home. The Medicaid applicant may freely transfer his or her home to the following individuals without incurring a transfer penalty:

- The applicant's spouse
- A child who is under age 21 or who is blind or disabled;
- Into a trust for the sole benefit of a disabled individual under age 65 (even if the trust is for the benefit of the Medicaid applicant, under certain circumstances).
- A sibling who has lived in the home during the year preceding he applicant's institutionalization and who already holds an equity interest in the home.
- A "caretaker child," who is defined as a child of the applicant who lived in the house for at least two years prior to the applicant's institutionalization and who during that period provided care that allowed the applicant to avoid a nursing home stay.

Congress has created a very important escape hatch from the transfer penalty: the penalty will be "cured" if the transferred asset is returned in its entirety, or it will be reduced if the transferred asset is partially returned.

NEED A SPEAKER FOR A CLIENT OR ORGANIZATION EVENT?

David M. Frees, III and Douglas L. Kaune are experienced presenters on many estate planning and estate administration topics, including:

Basic Estate Planning: What is it? Who Needs It? Why Do It?
Planning To Prevent Your Heirs From Paying Federal Estate Taxes
Protecting Your Assets from Nursing Care Spending
The Executor and Trustee Workshop: Learning Your Responsibilities and Avoiding Personal Risk
Keeping Your Children's Inheritance Safe From Their Creditors

To have David and Doug present a program for a group of your employees or clients on these or any related practice topics, call 610-933-8069 or contact them by e-mail at dfrees@utbf.com or dkaune@utbf.com

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