

# **BERWITZ & DiTATA LLP**

Attorneys and Counselors at Law  
224 Seventh Street  
Garden City, New York 11530  
Telephone (516) 747-3200 • Facsimile (516) 747-3727

Lawrence N. Berwitz

Maureen Rothschild DiTata

## **Proposed Change in New York State's Medicaid Program**

The New York State Health Budget, enacted in late March 2011, cuts funding for programs that assist the elderly and disabled. As a result, there will be significant changes in New York's Medicaid program and Medicaid planning undertaken on behalf of our clients will be affected. The Budget Bill calls for the adoption of regulations to implement the changes. However, as of the writing of this article, regulations have been proposed but not yet adopted. It is likely that the proposed changes will be adopted. This article will address the anticipated changes. You can check our website for more information concerning the new rules and regulations as it develops.

The good news is that the proposed changes do not place new restrictions on eligibility. The "Spousal Refusal" strategy has not been eliminated. The transfer-of-asset rules remain unchanged.

What will change if the proposed rules are implemented is the manner and extent to which the State is entitled to seek recovery of Medicaid benefits paid after the death of a Medicaid recipient or his or her surviving spouse. Estate recovery is currently limited to the Medicaid recipient's estate - that is, assets passing under the terms of a Will. Under the proposed changes, the definition of the term "estate" is expanded to include property in which the person has legal title or interest at the time of death. This will include joint accounts, jointly held property, retained life estates and interests in trusts. Certain exemptions still apply. As before, recovery is limited to Medicaid payments that were paid after the Medicaid recipient reached 55 and only for a maximum period of 10 years. Also, the proposal does not authorize recovery of benefits paid to a surviving spouse against trusts created under the terms of Will of a predeceased spouse.

As a practical matter, these changes impact Medicaid planning options. For example, joint bank accounts, with rights of survivorship, are not part of a probate estate. They are automatically paid to the surviving joint account owner. Under the proposed rules, these accounts are no longer protected. The survivor can only protect that portion of the account which they contributed. If the account was funded solely with the Medicaid recipient's funds, the entire account may be used to reimburse the state for paid benefits. Without maintaining all of those records, even the portion legitimately contributed by the survivor will be subject to recovery.

Where a Medicaid recipient has retained a life estate in real property, he or she has all the rights and obligations of an owner during lifetime but, at death, the title to the property passes to the remainder persons. Under the old rules, because the value of the life estate became zero at the death of the Medicaid recipient, and the remainder person owned 100% of the value, there could be no Medicaid recovery against the property. Under the proposed changes, the value of the life estate will be calculated as of the date of the Medicaid recipient's death, based upon his or her actuarial life

expectancy. Upon the sale of the property, the percentage of the value based upon this calculation would be subject to Medicaid recovery.

If a Medicaid recipient has an interest in a trust, it is potentially at risk. That includes not only trust principal but also income which the recipient was entitled to receive but was not paid before his or her death. Generally, since the “income only” trusts used for Medicaid planning purposes customarily preclude the use of trust principal for the beneficiary, the recovery against such a trust should be limited to any undistributed income.

Under the principles of Debtor and Creditor Law, a creditor could claim that assets transferred by a debtor to avoid a judgment were “fraudulently conveyed” and obtain a return of the transferred assets. Previously, the State was not entitled to claim fraudulent conveyance in its efforts to recover for Medicaid benefits paid. Under the proposed rules, this strategy would now be available to the State.

While there are additional proposed changes, most will affect a smaller number of Medicaid recipients or those planning for Medicaid eligibility. Space precludes our review of all of the issues. The full proposal can be found on our website. Also, please look forward to our future issues of A Step Ahead for updates once the final regulations are implemented.

If you have engaged in Medicaid planning, it is advisable to have your plan reviewed in light of the new law. Who is affected? Those who have done Medicaid planning for asset protection purposes, those whose loved ones are already receiving Medicaid benefits after have transferred assets or engaged in Medicaid planning and those who are interested in this type of planning. We encourage you to arrange to meet with us to discuss how these changes will impact the results you hope to achieve. planning you have implemented. While there will be a nominal fee charged for this service, it is important to ascertain what impact the proposed changes will have on your plan and what, if any, techniques are available to you.