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PRINCE LAW FIRM

ATTORNEYS AND COUNSELORS AT LAW

THE BEST LAID PLANS OF MICE AND MEN

So, you might be thinking: "What's with the new, slick logo?" Or at least we hope you noticed it. Anyway, instead of TV or radio advertising, we decided to try "branding" our services with a new logo. We could go on to say that we're "new and improved," but that would imply that we lacked something before - which we don't think is true. Anyway, we're still the same down-to-earth lawyers who are committed to helping our clients, only we have a new haircut.

THE PRINCE LAW FIRM
31300 NORTHWESTERN HIGHWAY
FARMINGTON HILLS, MI 48334-2523
TELEPHONE: 248.865.8810
FACSIMILE: 248.865.0640
TOLL FREE: 888.368.8810
WEB SITE: www.probateprince.com

PATRICIA GORMELY PRINCE
probateprince@aol.com

SHAHEEN I. IMAMI
sii@probateprince.com

CARINE J. HAILS
cjh@probateprince.com

BERYL J. LEVIN, LEGAL ASSISTANT
bjl@probateprince.com

Imagine this scenario: Your family has gathered for dinner to celebrate Grandma's retirement. Grandma, who just finished showing you brochures for her upcoming cruise, falls from her seat. Unfortunately, she has had a stroke and doctors say she is paralyzed and has lost some of her cognitive ability. She will need long-term skilled nursing care assistance. What do you do?

What certainly wasn't Grandma's plan is now her reality and her unexpected illness has created an emotional and financial emergency for the family. Given the choice, most people would want to keep Grandma at home and arrange for a private duty nurse to stay by her side around the clock. But that's very expensive. The alternative is to put Grandma in a nursing home which, on average, costs over $5,500 a month in Michigan. All her life Grandma saved to enjoy her retirement. Instead, will she have to spend her life's savings on a nursing home?

THE GOOD OLD DAYS

Most people would tell Grandma to apply for Medicaid, a government assistance program that provides medical benefits to people who are low-income and over 65, blind, or disabled. If she qualifies, Medicaid will pay for the nursing home. Sounds good, but in order to qualify for Medicaid an applicant must meet certain income and asset criteria. Generally, your income should be less than the cost of your care and you can't have more than $2,000.00 in "countable" assets. Excluded assets, such as your primary residence, are not "countable" and, therefore, not included in determining your eligibility for Medicaid or the amount you can afford to contribute to your own care.

Generally, less fortunate people don't have a problem qualifying for benefits. But those who fall above the income and asset guidelines will only qualify after "spending down" the amount of income necessary to meet a "patient pay" amount or liquidating their "countable assets" and applying the proceeds towards the cost of their nursing home stay until the value of their assets fell within acceptable limits.

It used to be that Medicaid only looked at your income and assets as of the date you applied for benefits. Then the people at Medicaid got smart and started looking back three to five years prior to the date of application, depending on the circumstances, to include any assets owned during that time in determining an applicant's eligibility. To avoid disqualification, people resorted to "Medicaid Planning" by arranging their assets in a manner that would allow them to qualify to receive benefits. Such practices included:

1. ***Giving away assets and waiting out the penalty period before applying for Medicaid.*** If you gave away property within three to five years before applying for benefits, Medicaid would have penalized you, but the penalty period would have started on the date of the gift. So long as you applied for benefits after the end of the penalty period, you could qualify. Example: Mr. Smith gave his son $25,000 in 2004 to use as a down payment on a new home. The way that the penalty period was calculated, if Mr. Smith applied for Medicaid in 2006, the penalty

THE BEST LAID PLANS OF MICE AND MEN *continued*

period would have already expired and Mr. Smith could be eligible as of the date he applied for benefits.

2. ***Liquidating countable assets and using the proceeds to purchase an annuity that paid very little monthly income and a balloon payment after a number of years.*** Example: Mr. Jones has $100,000 in the bank. Medicaid says he's over the asset limit and has to pay for his care until all he has left is $2,000. Instead of using the money to pay for care, he uses it to buy an annuity that pays him $25 a month for five years and then $98,000 at the end of the fifth year. If he applies for benefits right after buying the annuity, depending on his total monthly income, including the annuity payment, he could qualify for benefits. If he dies before receiving all the annuity payments, the payments will go to his beneficiaries.

3. ***Liquidating countable assets, and applying the proceeds towards excluded assets.*** Example: Mr. Jones has $100,000 in the bank and instead of paying for care, he uses it to pay off the mortgage on his home, which is an excluded asset and is not used to calculate his eligibility for Medicaid.

WHAT'S YOURS IS MINE, SORT OF

When a married person applies for Medicaid, the program looks at the assets of both spouses to determine eligibility. If both spouses need nursing home care, Medicaid allows the couple to keep $3,000 in countable assets. If only one spouse is in a nursing home, then the other spouse, known as the community spouse, is allowed to keep up to $99,540 in countable assets. This amount is known as the community spouse resource allowance and is meant to prevent the community spouse from going broke so that the other spouse can qualify for Medicaid.

Medicaid doesn't make the community spouse use his or her income to pay for the nursing home. However, if the community spouse has low or no income, then some of the nursing home spouse's income can be allocated the community spouse for living expenses. This is another way that Medicaid prevents the community spouse from going broke.

THERE'S A NEW SHERIFF IN TOWN

Through the years, there's been a lot of debate over whether people should be allowed to engage in Medicaid planning and let the burden of paying for the nursing home fall on the government. Certainly, while the process of getting Medicaid to pay for long-term care wasn't perfect, it was of great assistance to those who could not otherwise afford to pay for it. But as the Federal government was feeling the pinch, along came the Deficit Reduction Act of 2006 (the "DRA"), signed into law by President George W. Bush on February 8, 2006, and it appears that what some people saw as a good thing may be coming to an end.

Under the DRA, if you give away property within five years before you apply for Medicaid, the penalty period starts on the date you apply, not the date you made the gift. Remember the example of Mr. Smith above? If he has a stroke in 2006 and applies for Medicaid, the penalty period for the $25,000 he gave to his son in 2004 begins on the date of his application and Medicaid will not pick up the cost of his nursing home care until the penalty period expired some months later. If Mr. Smith has no other means to pay for his care, what is he to do? Because this is such a recent change in the law, the answer is uncertain but rest assured that the question is one that will come up often under the new rules.

There have been several changes with regard to annuities, too. In 2005, Michigan state law banned the use of balloon annuities to qualify for Medicaid and required that qualifying annuity payments be evenly distributed over the annuitant's life expectancy. In addition, the DRA makes the State of Michigan a beneficiary of any annuity in which the applicant has an interest, meaning that if an annuitant who receives Medicaid dies before all of the annuity payments are made, the state is reimbursed first for the cost of the care provided to the annuitant and then the balance of the remaining payments can be made to the annuitant's beneficiaries.

A Medicaid applicant may still use countable assets to pay off a mortgage or even purchase a home, which continues to be an excluded asset. However, the DRA now requires that Medicaid be denied if the applicant's equity in a home exceeds $500,000.

Before the DRA, if the use of the nursing home spouse's income to pay for the nursing home left the other spouse with little or no income, then the state would have either allowed the community spouse to keep more income producing assets or to receive part of the nursing home spouse's income to make up the deficiency in income for living expenses. However, the DRA requires that the nursing home spouse's income be allocated to the community spouse before the community spouse is allowed to keep any additional assets. Known as the income first rule, this arrangement may work while the nursing home spouse is alive, but when he or she dies, so does the income stream that was going to the community spouse, who may then not have the resources or assets to make up the deficiency.

Under the DRA, the community spouse must also disclose to Medicaid any interest he or she has in any annuities, even if the annuity is irrevocable or treated as an asset and even though the community spouse is not the Medicaid applicant. This also puts an additional burden on the community spouse.

Because of these and other changes imposed by the DRA, Medicaid planning has a new face. While it's too early to tell the impact of these changes, we do know that it will be more difficult for some people to qualify. In the meantime, there are some things that you can do to prepare for the possibility that you may have to apply for benefits. You should keep detailed receipts and documentation of your financial affairs for at least five years. You should also consult with an attorney before transferring any assets for less than fair market value or making any substantial gifts that could result in unintended consequences.

Stay tuned. There are sure to be more changes. When they come, we will let you know.