

# ELDER & DISABILITY LAW NEWS

LEGAL INFORMATION FOR OLDER AND DISABLED MAINERS AND THEIR ADVISORS



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## NEW LAWYER AT SKELTON LAW OFFICES

Skelton Law Offices is pleased to welcome Virginia Kozak Putnam, Esq., to the firm. Virginia will concentrate her practice on the legal needs of individuals with disabilities with a special focus on special needs trusts. You can reach Virginia at vkputnam@maineelderlaw.com.

Virginia is a native of Bar Harbor and a graduate of the University of Notre Dame and of the University of Maine School of Law. Virginia served as a Law Clerk to the Honorable Thomas J. Lydon, Senior Judge of the United States Court of Claims in Washington, DC, in 1991 and 1992. She then spent several years working in the Civil Division of the U.S. Department of Justice defending vaccine injury claims brought against the United States. Many of the claims brought on behalf of individuals with disabilities were resolved with negotiated structured settlements funded with annuities and special needs trusts.

Virginia has practiced law in Bangor since 1997. She has served on Boards for Pine Tree Legal Service (1998-2001) and the Warren Center for Communication and Learning (2001-2004). Virginia is a member of the American Bar Association (ABA), the Maine State Bar Association (MSBA), and the National Academy of Elder Law Attorneys (NAELA). Virginia lives in Bangor with her husband and their three bright, beautiful children, ages 6, 3 and 1.



*Virginia Kozak Putnam, Esq.*

WINTER  
2005

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### MISSION

The mission of Skelton Law Offices, LLC, is to provide legal services of the highest quality, professionally, efficiently and compassionately, with the goal of preserving the independence, the dignity, and the emotional and financial security of older and disabled Mainers.

## Proposed 2006-2007 MAINE BUDGET Would Affect:

- the Reach of Estate Recovery
- the Authority of Probate Court
- the Rules for Financial Eligibility for MaineCare Nursing Home and Assisted Living Benefits

On January 7, 2005, Governor Baldacci released his proposed budget for Fiscal Years 2006-2007. If adopted, there will be significant changes for individuals who apply for MaineCare nursing home or assisted living benefits and for the estates of decedents who received MaineCare benefits. The limited purpose of this article is to summarize the most significant subsections of Section DDD of the budget bill. To view the proposed language, please see the link at the end of this article.

It is important to remember that these proposed changes have not yet been adopted by the Legislature. And even if the changes are enacted by the Legislature, some of them will not go into effect until converted to rules and regulations by the Department of Health and Human Services (DHHS). Please note that Skelton Law Offices is not yet advising its clients to revise current Asset Preservation Plans.

### EXPANSION OF ESTATE RECOVERY PROVISIONS

The first several subsections of Section DDD of the budget act involve the process called "estate recovery" by which the State of Maine brings a claim against the estate of a decedent for reimbursement of MaineCare benefits.

First, the proposed budget would revise the Probate Code to impose a duty on a person seeking to probate the estate of a decedent to "investigate with due diligence whether the decedent received MaineCare benefits" and, if so, to give notice to DHHS.

Second, the proposed budget would establish that the estate recovery claim is automatically perfected and attaches as of the MaineCare recipient's date of death. Once asserted, the claim would be secured by any and all assets of the decedent up to the value of the benefits received. The estate recovery claim would have priority over any claims other than a claim of the IRS or the Maine Revenue Service or a claim of a creditor whose security interest arose prior to the MaineCare recipient's first receipt of MaineCare benefits.

Third, the proposed budget considers the MaineCare recipient who is survived by a spouse or by a dependent or disabled child. Under current law the State may not pursue a claim until the recipient has no surviving spouse, no surviving child under age 21, and no blind or disabled child. That is not changed, but the amendment to the statute would clarify

what assets would be considered as of the death of a survivor and how the claim would be calculated.

Apparently, there are those at DHHS who interpret the proposed language to allow the State to reach joint tenancy in real estate despite contrary provisions in estate recovery law and regulations.

The budget act includes funding for four additional positions to pursue estate recovery, including one attorney in the Attorney General's office and one investigator and two staff for DHHS.

If adopted in whole, these revisions to estate recovery law and procedure would apply to the estate of a decedent who died on or after January 1, 2005, regardless of when the decedent had received MaineCare benefits.

### PROHIBITION ON TRANSFERS OF A PROTECTED PERSON'S ASSETS

The budget act proposes revisions to the Probate Code that raise significant individual liberty concerns. The act would prohibit the Probate Court from authorizing gifts or transfers from the estate of an individual for whom a Conservator has been appointed (a "protected person") to anyone other than the protected person's spouse unless the Court finds that the estate is (a) "sufficient for the protected person's care and maintenance for the present and foreseeable future, including due provision for the protected person's established standard of living and for the support of any persons the protected person is legally obligated to support;" and (b) "that any purpose of the gift or other transfer is not to diminish the protected person's estate in order to qualify the protected person for federal or state aid or benefits."

Note: Transfers of assets to special needs trusts established under 42 U.S.C. §1396p(d)(4) would be specifically excepted from this prohibition.

The proposed language would deny to a now-incapacitated person the right to have decisions made about his assets that he could have made for himself or could have had made for him by an agent under a power of attorney for finances.

This type of discrimination has been addressed by several states' courts. For example, in the Matter of Shah, 95 N.Y.2d 148, 711 N.Y.S.2d 824 (N.Y. 2000), New York's highest court affirmed the Appellate Court and adopted the lower court's reasoning that since "it is, or should be, clear that [the incapacitated person] had the unrestricted right to give his assets to his wife, or to his children, or to anyone else for that matter, at all times up to the moment of his terrible injury, [he] did not, on account of that injury, lose that fundamental right merely because he is now incapacitated and financial decisions on his behalf must necessarily be made by a surrogate."

Maine's Probate Code is designed to permit an incapacitated person to do, by way of a conservator or guardian, those essential things that he could have done for himself but for his incapacity. It is a slippery slope with the potential for unjust results for the Maine Legislature to infringe on the authority of the Probate Court to make decisions and confer decision-making authority about the well-being of individuals in need of protection.

## REVISION TO THE CALCULATION OF THE TRANSFER PENALTY

Under the MaineCare rules, a “penalty” is imposed when an individual or his spouse transfers assets and receives less than fair market value (FMV) in return. (Some transfers are exempt from the penalty, including transfers to spouses, to disabled children and to certain special needs trusts.) The penalty is a period of ineligibility for MaineCare nursing home and assisted living benefits. The ineligibility period starts running in the month the transfer was made.

At present, the calculation is made by dividing the value of the asset that was transferred for less than FMV by \$3,917. The period of ineligibility starts running in the month the transfer was made. Therefore, if an individual gifts \$40,000, he will cause himself to be ineligible for MaineCare benefits for 10 months ( $\$40,000 \div \$3,917 = 10$ ). If the gift was made in February of 2005, the individual would be ineligible for benefits until December 1, 2005.

Currently, the MaineCare rules call for “rounding down.” This means that when the transfer penalty is calculated, any fractional amount is disregarded. Example: When an individual gifts a total of no more than \$7,800 in 1 month, he causes himself to be ineligible for MaineCare benefits for only 1 month, specifically the month in which the transfer occurred. The gift of \$7,800 divided by \$3,917 is 1.99, and the fractional amount above 1 is disregarded.

The proposed budget for 2006-2007 would call for “rounding up.” If adopted, the Legislature would direct DHHS to revise the calculation so that if an individual transfers assets valued at more than the “average monthly cost of care” by less than the cost of care for two months, the individual would be ineligible for benefits for two months.

Note: The divisor of \$3,917 is allegedly the average private per month cost for a Maine nursing home. This divisor has not been adjusted since 1994. The average cost of private pay nursing home in Maine is now close to \$6,000 per month. If Maine revises the method for calculating the transfer penalty, it should update the divisor as contemplated by federal law.

## CONVERSION FROM AN INCOME-FIRST TO A RESOURCE-FIRST STATE

In Maine, when an ailing spouse is eligible for MaineCare nursing home or assisted living benefits, the healthy spouse (called the community spouse) may retain up to \$95,100 (as of 01/01/05) of the couple’s countable assets. This is in addition to \$10,000 for the institutionalized spouse. The community spouse retains her own income, and – generally – the income of the institutionalized spouse is paid towards his cost of care.

In many of these cases, the community spouse has very little income of her own because most of the household income is in the name of the institutionalized spouse. To protect against the impoverishment of the community spouse, Congress established the minimum monthly maintenance needs allowance (MMMNA). If a community spouse’s

income is below her MMMNA, the shortfall can be made up in one of two ways: by transferring income from the institutionalized spouse (called the “income-first” approach) or by allowing the community spouse to keep resources above the \$95,100 level so that the additional funds can be invested to generate more income (the “resource-first” approach).

To date, Maine has allowed the resource-first approach. The budget bill would require the use of an income-first approach (MMMNA). If adopted, there would be no ability to increase the community spouse’s resource allowance unless the institutionalized spouse’s income was insufficient to fully provide the MMMNA.

The stakes are actually quite high for some community spouses. If the income-first approach is used, the community spouse is relying on income from the institutionalized spouse to live on. If the institutionalized spouse dies, the community spouse may suddenly lose that income and as a result may quickly fall into poverty. If the resource-first approach is employed, the community spouse has enough investment income to maintain her standard of living even if the institutionalized spouse passes away.

## MODIFICATION OF THE ANNUITY RULES

Another opportunity in Maine for preserving assets for a married couple has been the purchase of an annuity. The community spouse would purchase the annuity with liquid assets in her name and the income generated by the asset would be payable to her. To date, this strategy permits – through complex calculations – the ability to preserve assets for the next generation.

The budget bill would make the irrevocable insurance annuity purchased by the MaineCare applicant a countable asset unless the contract names the MaineCare applicant or recipient or his spouse as the only beneficiary. The proposed legislation would prohibit a residual beneficiary in the event the community spouse dies before the payout period ends and would prohibit any benefit to the community spouse other than a regular stream of income in equal payments over a period no longer than the spouse’s life expectancy determined at the time of purchase.

## CONCLUSION

The Elder Law Section of the Maine State Bar Association is one of several groups expected to provide comment to the Appropriations Committee before the budget goes before the Legislature. To view the Language section of the budget in its entirety, go to [http://mainegovimages.informe.org/budget/files/2006\\_gf\\_pt\\_II\\_language.pdf](http://mainegovimages.informe.org/budget/files/2006_gf_pt_II_language.pdf). The relevant portion of the budget is in Section DDD at pages 115-122.

To reiterate, these are only proposed changes. If you are currently a client of Skelton Law Offices and we are actively working with you on the implementation of an Asset Preservation Plan, we will contact you if and when any change is adopted that is relevant to your Plan.

## APPEALING THE DENIAL OF THE MEDICARE SKILLED NURSING BENEFIT

Many people are surprised to learn that Medicare pays for only a small amount of the nursing home care provided in the United States. In general, Medicare covers the full cost of the first 20 days in a skilled nursing facility (SNF) if the individual is admitted following at least a 3-day hospital stay and is receiving skilled care as opposed to custodial care. Medicare will cover a portion of the cost for up to 80 more days. The deductible for 2005 is \$114.00 per day. When the Medicare coverage ceases, the patient must pay out-of-pocket unless he or she has private long-term care insurance or qualifies for government benefits under the Medicaid program.

The Medicare SNF benefit covers the following: skilled care provided on a daily basis by or under the supervision of a registered professional nurse; rehabilitative therapies including physical therapy, occupational therapy, and speech therapy; bed and board associated with the skilled nursing services; prescription drugs, lab work, supplies, appliances, and equipment.

As implied above, the Medicare coverage does not always continue for the full 100 days. If the SNF determines that ongoing care would not be covered by Medicare, the facility will issue a notice that the SNF believes that Medicare will not pay for the care but that the patient can request that the SNF submit a bill or claim to the fiscal intermediary. This is the insurance company that contracts with the Medicare agency to review Medicare Part A claims. Typical Medicare denials by a SNF include the SNF's assertion that the skilled services were provided on a less than daily basis; a SNF determination that skilled care is not medically reasonable and necessary; a SNF determination that the care could have been provided in another setting, such as a custodial care facility or at home.

In his article "15 Falsehoods Told by Nursing Home Facilities," Eric Carlson of the National Senior Citizens Law Center highlights some of the misconceptions about the type of care that the Medicare skilled nursing benefits is intended to cover. Listen for these red flags when talking with nursing homes about a loved one's continuing eligibility for the Medicare skilled nursing benefit:

- "Your mother is no longer covered by Medicare because we have decided that she only needs custodial care. Sign here."
- "Your grandfather cannot receive therapy because he isn't making progress."
- "Your aunt must leave the Medicare-certified bed because she is no longer eligible for Medicare."
- "Your father will not receive further therapy because his 100 days of Medicare has expired."

Mr. Carlson's article is at [http://www.nsclc.org/publications/15falsehoods\\_04.pdf](http://www.nsclc.org/publications/15falsehoods_04.pdf).

It is very important to recognize that nursing homes sometimes make mistakes when issuing the notice of non-coverage. If you are asked to pay for care that you believe should be covered by the Medicare SNF benefits, you should take action. You have nothing to lose. This process is referred to as no-payment or demand billing.

The SNF must submit a bill to the fiscal intermediary upon the patient's request. Specifically, the patient is asking the SNF to submit a demand bill on her behalf. While the request for a review is pending, the SNF cannot bill for services until the intermediary issues its formal determination. If the determination is not in favor of the patient, the fiscal intermediary should explain the reason for the denial and the patient's right to an appeal to an Administrative Law Judge. The SNF may then bill retroactively for the cost of care.

It may be helpful to have legal representation in this process, particularly at a hearing, because laws regarding Medicare coverage are complex.