SKELTON LAW OFFICES, LLC
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CHANGES TO ASSET PRESERVATION PLANNING EFFECTIVE JULY 1, 2005

Late in the evening of March 30, 2005, the Maine Legislature gave final approval to L.D. 468 (H.P. 343), and the budget bill was signed into law on March 31st. The effective date of Public Law 12 is July 1, 2005.

The new law expands Maine's estate recovery provisions; it limits the authority of the Probate Court; and it directs changes to the MaineCare rules regarding eligibility for MaineCare long-term care benefits. These are the most sweeping changes to long-term care planning and opportunities for preserving assets since 1993.

DECEDENTS' ESTATES

When an application is filed to probate the estate of a decedent or to appoint a personal representative, the Probate Code requires that notice be provided to certain interested parties, including heirs and devisees. The law is amended to require that if the decedent was 55 years of age or older, notice must be given to the Department of Health and Human Services (DHHS).

The purpose of the amendment is to enhance Maine's estate recovery efforts. Federal law requires that states pursue reimbursement of medical assistance, and Maine does so by means of a claim against the decedent's estate as described in 22 M.R.S.A. §14(2-I).

Keep in mind that for the purpose of estate recovery the term "estate" is very broad and reaches beyond the probate estate to "[a]ny …real and personal property and other assets in which the recipient had any legal interest at the time of death, to the extent of that interest, including assets conveyed to a survivor, heir or assign of the deceased recipient through tenancy in common, survivorship, life estate, living trust, joint tenancy in personal property or other arrangement." 22 M.R.S.A. §14(2-I)(F)(2).

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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.

DELAYED ESTATE RECOVERY

The recent legislation also addresses "delayed" estate recovery. Section 22 M.R.S.A. §14(2-I)(C) has provided and continues to provide that an estate recovery claim will not be pursued "until" the decedent has no surviving spouse or child under age 21 or child who is permanently and totally disabled. The law was broad enough for DHHS to reach the assets after the death of the spouse or child, but I know of no instance of such action being taken.

Subsection C-1 is added to 22 M.R.S.A. §14(2-I) and describes how delayed estate recovery will be pursued. The new language is troubling. In essence, the claim now operates as a "super lien" that follows the property and affects the ability of the spouse or child to benefit from the value of the asset.

These amendments to 22 M.R.S.A. §14(2-I) only apply to assets received by the MaineCare recipient's spouse or child on or after July 1, 2005.

CONSERVATORSHIP AND SINGLE TRANSACTION PROCEEDINGS

The legislative changes also limit the authority of the Probate Court in conservatorship proceedings and petitions for single transaction authority. Pursuant to amendments to Part 4 of Article V of the Probate Code ("Protection of Property of Persons Under Disability and Minors"), the Probate Court may authorize transfers from the estate of a person for whom a conservator has been appointed only if the Court finds that "the gift or other transfer will not, directly or indirectly, diminish the protected person's estate in order to qualify for federal or state aid or benefits" and

(a) That the remaining estate assets of the protected person are sufficient for the protected person's care and maintenance for the next 36 months, 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 any dependents of the protected person; and

(b) That the gift or other transfer will not hasten the date of eligibility for MaineCare coverage of the protected person's long-term care expenses during the next 36 months.

This language is added to Sections 5-408, 5-409, and 5-425 of Title 18-A.

The proscriptions do not affect transfers to a protected person's spouse, to his or her dependent, blind or disabled child, or to a special needs trust established under 42 U.S.C. §1396(d)(4).

INCOME-PRODUCING PROPERTY EXEMPTION

The MaineCare rules outline categories of assets that are exempt (or non-countable) for the purpose of determining whether an applicant qualifies financially for MaineCare long-term care benefits. Currently, Section 3330.16 of the MaineCare Eligibility Manual provides that "[a]ll property and equipment which is used to produce income is exempt." The new legislation directs DHHS to adopt rules which only exempt property that "produces an annual rate of return that equals or exceeds the average annual rate of return available from banking or savings institutions within the State for deposits of similar value in readily available government-insured instruments."

INCOME-FIRST

The most disappointing aspect of the new law is its impact on the choices available to a community spouse whose standard of living is adversely affected when her spouse accesses MaineCare benefits.

In Maine, when an ailing spouse is financially eligible for MaineCare nursing home benefits, the community spouse retains her own income. The general rule is that the income of the institutionalized spouse (minus certain deductions) is paid towards his cost of care.

Until now, if a community spouse's income fell short of the "minimum monthly maintenance needs allowance" (MMMNA), the shortfall could 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 countable assets limit so that the additional funds could be invested to generate more income (the "resource-first" approach).

The new legislation eliminates the resource-first approach. This is a shame. With the income-first approach, the community spouse relies on the income redirected to her from the institutionalized spouse, but when he dies, the community spouse may suddenly lose that income and as a result may quickly fall into poverty. If the resource-first approach had been available, the community spouse could have retained assets that would have remained available to her even after her spouse's death to maintain her standard of living.

IRREVOCABLE ANNUITIES

To date, MaineCare rules have allowed the use of annuities to preserve assets. The community spouse converts existing deferred annuities or purchases an annuity with liquid assets. The annuity contract owned by the community spouse produces income payable to the community spouse. Until now, this strategy permitted – through complex calcula-

tions – the ability to create a stream of income for the community spouse and preserve assets for the next generation.

As of July 1, 2005, an irrevocable annuity will be countable for the purposes of eligibility for benefits unless:

(1) the recipient or applicant or that person's community spouse or dependent, blind or disabled child is the only beneficiary;
(2) it prohibits a residual beneficiary, other than a dependent or disabled child, in the event the spouse dies before the payout period ends; and
(3) it provides no benefit other than a regular stream of income in equal payments over a period no longer than the spouse's life expectancy.

TRANSFER PENALTY CHANGES

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. The penalty is a period of ineligibility for MaineCare nursing home and assisted living benefits. Certain transfers are exempt from the transfer penalty, including transfers to spouses, transfers to dependent, blind or disabled children and transfers to some special needs trusts.

Since 1994, the period of ineligibility has been calculated by dividing the value of the asset that was transferred for less than FMV by a "transfer penalty divisor" of $3,917. Under current rules, the resulting quotient is then rounded down to arrive at the number of months of ineligibility for MaineCare benefits.

The new law directs the Department of Health and Human Services (DHHS) to adopt a rounding up method. As adopted, Section DDD-13 of the enacted budget requires: "[W]hen the value of the asset is less than or equal to the average monthly cost to a private patient in a nursing facility, the penalty must be in the form of a one-month disqualification… The rules must provide for penalties for more than one month calculated by comparison of the value of the asset transferred to the cost per month of private patient care, using a rounding up method for the value of a partial month."

Fortunately, the law also anticipates de minimus transfers and bars penalties for "irregular and infrequent gifts, provided the cumulative amount of the gifts does not exceed $500 per calendar quarter."

Another fortunate aspect of the new law is a result of the efforts of the Elder Law Section of the Maine State Bar Association. Under federal law, the penalty divisor is supposed to reflect the average cost of nursing home care to a private-pay patient in the particular state. Maine's current divisor of $3,917 has not been updated since August 1, 1994. Through letters and testimony to the Appropriations Committee, the Elder Law Section demonstrated that the $3,917 figure is out of date. According to a state-to-state survey conducted by Genworth Financial in 2004, the average daily rate for a nursing home in Maine is $195.32. The average annual cost is $71,292, and the average monthly rate is $5,941.

The law directs DHHS to update the transfer penalty divisor by January 1, 2006, and to annually survey nursing home costs for the purpose of updating the divisor.

EXEMPTION FROM TRANSFER PENALTY FOR PURCHASE OF LONG-TERM CARE INSURANCE POLICY

The new legislation includes an exemption from the transfer penalty for purchasers of long-term care insurance. The money used to purchase the long-term care insurance will be deemed to be "transferred for fair market value or for a purpose other than to qualify for MaineCare if, in exchange for the transfer, the transferee purchased a policy of long-term care insurance … that was sufficient, alone or in combination with private resources, to provide fully for the care of the transferor at the nursing facility level for at least 36 months without resort to MaineCare coverage."

DHHS is directed to adopt rules to effect this provision "contingent upon federal Medicaid participation."

LONG-TERM CARE INSURANCE

The Legislature also adopted enabling legislation for a Maine Long-Term Care Partnership Program to provide "incentives for persons to insure the costs of their own long-term care and to alleviate some of the costs of long-term care being paid by MaineCare."

At this time, only the residents of New York, Indiana, Connecticut and California may access Medicaid benefits after the benefits from long-term care policies run out, regardless of the amount of remaining assets. Those states adopted the concept prior to the enactment of the federal Omnibus Reconciliation Act of 1993 (OBRA 93) which prohibited additional states from enacting such programs. That prohibition remains in effect.

Maine's enabling legislation is broadly written. An individual will be eligible for the program if he or she purchased an "approved" long-term care policy and then used that policy along with other private resources to pay for nursing home costs for a "period of time specified by the program" without accessing MaineCare benefits. The benefits to the insured include (1) MaineCare coverage after exhaustion of coverage under the long-term care insurance policy and (2) disregard of the eligible person's otherwise countable assets for the purposes of estate recovery.

When and if OBRA 93 is amended to allow new state partnership programs, DHHS is directed to coordinate with Maine's Department of Professional and Financial Regulation to adopt rules to implement the program.

ADVANCE PLANNING: A GIFT TO YOUR FAMILY

On March 31, 2005, Terri Schiavo, a 41-one-year-old brain-damaged Florida woman, died 14 days after removal of a feeding tube that had kept her alive for years. If any good has come from her tragic circumstances, it is the nationwide message of the importance of advance planning for health care. If you have been prompted to "get your affairs in order" consider these important issues:

1: PLAN FOR DISABILITY

What plans do you have in place for management of your financial and medical affairs in the event of incapacity? Every individual – age 18 to 108 – should consider preparing a durable power of attorney for finances and an advance health care medical directive. Under certain cases, the person should also consider a revocable living trust.

2: UPDATE WILLS AND BENEFICIARY DESIGNATIONS

How recently have you reviewed your estate plan? Many of us have outdated wills and outdated designations of beneficiaries on our life insurance policies, annuities, and retirement plan accounts. Consider reviewing your estate plan whenever there is a significant change in your assets or your family and at least every two to three years.

3: REVIEW NOMINATIONS OF FIDUCIARIES

Your plans are only as good as the people you choose to carry out your wishes, people like the agent under a power of attorney or an advance medical directive, the trustee of a revocable trust, or the personal representative of the estate. Many people nominate their fiduciaries for the wrong reasons. For example, they simply choose their oldest child or the child who lives closest. Instead, pick a person who has the respect of other family members and has the time, the ability, and the willingness to serve. Consider whether it would be helpful to appoint co-agents, co-trustees or personal representatives. When members of the family are dysfunctional or scattered geographically, it may be wise to appoint a professional to serve.

4: ORGANIZE YOUR RECORDS

Will your fiduciary be able to locate important papers in the event of your death or incapacity? Be sure that people who will be administering your affairs are able to locate deeds to real estate, bank account statements, insurance policies, income tax returns, and other vital records.

5: PLAN FOR LONG-TERM CARE

The average cost of nursing home care in Maine is currently $70,000 per year. Everyone over age 50 should at least consider long-term care insurance and investigate the appropriateness of the product with an honest, reputable insurance specialist. One rule of thumb is that if you have to dip into savings to afford the premium, you are not a suitable candidate for long term care insurance and should plan for long-term care expenses in other ways.

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