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NEW YORK STATE MEDICAID RECOVERY LAW - **Here we go again!**

As reported in our July-August Newsletter (lead article) the New York State legislature, as part of the governor's budget bill for 2011-2012, passed a law allowing for expanded estate recovery of Medicaid benefits provided to recipients. The law provides that the Commissioner of Health is to create regulations detailing the specific items subject to recovery and the procedures to implement such recovery. This means that until regulations were adopted, nothing would change in the Medicaid recovery area.

After much waiting and anticipation, emergency regulations were created, effective September 6, 2011. These regulations created an immediate stir in the elder community, while we all were busy dissecting them to see what the State's intention was. A problem with the regulations was that they were "emergency" regulations, which meant that they could only be in force for 90 days before they had to be either extended or made permanent. As December 7th was approaching, we in the Elder Law practice anticipated word about an extension of the regulations, only to discover that the expiration date came and went without any extension. The Commissioner of Health did not extend the regulations, nor did he make them permanent. So, by the very nature of the process, the regulations expired and we are now operating under the rules that existed prior to December 7, 2011.

We are advised by the Department of Health that it is working on permanent regulations and the Commissioner will issue them some time this year, probably before summer. Until that happens, individuals receiving nursing home Medicaid that die prior to the adoption of the regulations will fall under the old law and the limited Medicaid Recovery Rules. As we are made aware of the progress of the new regulations and their effective date, we will pass it on to you through a future newsletter.

Free Workshops

February 23, 2012

Old Library, Olean
6:30 to 8:30 p.m.

February 29, 2012

Hampton Inn, Jamestown
with Thomas Stafford,
Allegheny Financial
Services
6:30 to 8:30 p.m.

NOTE: For our clients with trusts, it is time to check year end statements and 1099's to be sure investment and bank accounts are titled correctly. If you have a revocable trust, check to be sure the account titles are in the name of the trust, or the trustee of the trust. For our many clients with asset protection trusts, accounts intended to be held by the trust should have the name of the trust itself, or the name of the trustee of the trust. If any account is not titled properly, now will be a good time to make the necessary change to be sure the asset is correctly transferred to the right ownership.

Estate Death Tax Update

The attorneys of our firm have recently returned from the 46th Annual Heckerling Institute on Estate Planning, held in Florida. This is the Country's largest and arguably best planning institute on the topics of general estate planning, asset protection planning, income and estate tax planning. Although there have not been any changes in the estate tax law in the past year, there are some items to take note of.

First, most all of us know that the federal death tax exclusion amount for this year is still \$5,000,000/person. This is very good news and for most people, this will be more than enough to exempt their estates from any federal death tax. The problem is (and it is becoming typical with Congress and the President) if Congress and the President do not act by the end of this year, the current law sunsets and the law as it existed in 2001 will automatically apply starting on January 1, 2013. This means that the equivalent exemption amount could very possibly drop from \$5,000,000/person to \$1,000,000/person. If this should happen, there are far more people would be subject to federal death tax than have been for many years.

Portability - for heterosexual married couples only, under current federal law any unused death tax exclusion amount by the first spouse to pass on may be used by the second spouse. This provision was intended to help married couples who did not properly plan their estates and whose exclusion might be lost. For married couples who have less than \$5,000,000 to begin with, this would not be a concern in any event. A more pressing problem though is the fact that portability will end this year,

unless extended by Congress into 2013 and beyond. A further problem with portability is the fact that it does not apply to State Death Tax Laws, such as New York's. We have to remember that New York's death tax only excludes \$1,000,000 and taxes everything above that amount.

More on Portability - Anyone relying upon portability to exclude a total of \$10,000,000 in the second spouse's estate must realize that the fiduciary of the first spouse's estate must file a federal estate tax return in order to make an election to have portability apply to the surviving spouse. This rule leads to more questions. For instance, how does a surviving spouse know if he or she should file the estate tax return in his/her deceased spouse's estate? How can we know just what the value of the surviving spouse's estate will at the time of his/her death? How much will it cost to file a complete federal estate tax return - several thousands of dollars? If a surviving spouse chooses not to file the tax return in the first spouse's estate and the surviving spouse's estate is over \$5,000,000 on his/her death, the current tax rate would be 35%, plus New York's death tax of approximately 12%, or a total of almost 50%.

The By-Pass Trust - for years we have recommended the use of the "By-Pass Trust" (sometimes called "Credit Shelter Trust") for married couples with over \$1,000,000 of combined assets. The By-Pass Trust will give you the same benefits of portability, but in a much more predictable manner and will very likely shield even more value from tax than what mere portability can do. A By-Pass trust will give the surviving spouse access to all of the marital assets and direct control over them.

For more information on the benefits and uses of a By-Pass Trust, please feel free to give us a call.