CHANGES AND TRENDS IN OREGON MEDICAID RULES & POLICIES

CHANGES TO THE "CARE-GIVING CHILD EXCEPTION"

Individuals applying for Medicaid assistance for long-term care through Oregon's OSIPM program are subject to transfer-of-asset penalties if, during the sixty months preceding application, they have transferred assets for less than fair-market value. OAR 461-140-0210. (For an excellent discussion of transfer of asset penalties and their operation in the post-Deficit Reduction Act environment, see Sam Friedenberg's materials: "DRA Changes on Transfer Rules; Loans According to DRA" from the October 2006 CLE, "The Elder Law Experience").

OAR 461-140-0242 provides a list of exceptions to these transfer-of-asset penalties. Historically, one of the most useful provisions contained in this rule, from a Medicaid planning standpoint, has been the so-called "care-giving child exception." This provision exempts from penalty the uncompensated transfer of a Medicaid applicant's primary residence to an adult child in certain cases where the adult child has provided live-in care for the applicant.

On July 1, 2007, a new version of OAR 461-140-0242 took effect. The revised rule imposes significant new requirements for application of the care-giving child exception. Under the old version of the rule, an applicant was required to demonstrate that his or her adult child had: a) lived with the applicant, in the applicant's home, for a period of two years immediately preceding the application for Medicaid; and 2) provided care that permitted the applicant to reside at home rather than a long-term care facility. The rule contained a list of nine general categories of assistance and required an applicant's adult son or daughter to provide assistance in "most" of these categories "on a regular basis." (Both the old and new versions of the rule are attached in Appendix ___).

Under 42 USC 1396p(c)(2)(A)(iv), the federal statute on which Oregon's care-giving child exception is based, the Oregon Department of Human Services has authority to determine the level of care necessary to qualify for the exception:

> An individual shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that…the assets transferred were a home and title to the home was transferred to…a son or daughter of such individual…who was residing in such individual's home for a period of at least two years immediately before the date the individual becomes an institutionalized individual, and who (*as determined by the State*) provided care to such individual which permitted such individual to reside at home rather than in such an institution or facility. (Emphasis added).

Early in 2007, Oregon's Department of Human Services determined that the requirements of the old rule were insufficiently specific. The Department was concerned that the rule was susceptible to abuse by adult children of Medicaid applicants who had not, in fact, provided services that kept the applicant out of long-term care, or by individuals who provided some care without truly meeting the residence requirement. Accordingly, the new version of OAR 461-140-0242 contains much more detailed criteria for application of the care-giving child exception.

The new version of the rule specifies that, in order for a transfer of a Medicaid applicant's home to qualify for the exception, the son or daughter must reside with the Medicaid applicant "continuously for at least two years immediately prior to the client's admission to long-term care other than an absence from the home that is not intended to, and does not, exceed 30 days." This new provision is intended to exclude those cases in which the adult son or daughter did not actually reside with his or her parent, or resided with the parent only intermittently.

In addition, the new rule contains a more detailed list of services that the adult son or daughter must provide "on a daily basis" and "for a total of at least 20 hours per week." This new provision was intended to exclude those cases in which the adult son or daughter did not actually provide a level of care that allowed the applicant to avoid placement in a long-term care facility.

In addition to the new, more specific service requirements, application of the care-giving child exception now requires that the adult son or daughter provide "convincing evidence" that the services were, in fact, provided. In order to facilitate the documentation of services provided (and to help meet the "convincing evidence" standard), the Department has created a new form entitled "**Statement of Services Provided to Medicaid Applicant**" for use by adult children hoping to avail themselves of the exception. The new form can be downloaded from the Department of Human Services' website at:
https://apps.state.or.us/Forms/Served/se3308.pdf?CFGRIDKEY=SDS%25203308,3308,Statement%2520of%2520Services%2520Provided%2520to%2520Medicaid%2520Applicants,SE3308.doc,SE3308.pdf,,,,,,https://apps.state.or.us/cf1/DHSforms/Forms/Served/-,,https://apps.state.or.us/cf1/DHSforms/Forms/Served/-,
The Department has indicated that completion of the new form will be required for all cases in which a care-giving child exception is requested after July 1, 2007.

PETITIONS FOR SUPPORT

Under federal and state law governing eligibility for Medicaid, community spouses of Medicaid recipients are entitled to keep a portion of the couple's joint assets after the ill spouse becomes eligible for assistance (this portion of assets is known as the Community Spouse Resource Allowance or "CSRA"). 42 USC 1396r-5(c). OAR 461-160-0580. In addition, in cases where a community spouse's gross monthly income is less than a certain amount known as the "Minimum Monthly Maintenance Needs Allowance" or "MMMNA"), the community spouse is entitled to a portion of the Medicaid recipient's monthly income (this is known as the Community Spouse Income Allowance or "CSIA"). 42 USC 1396r-5(d)(2). OAR 461-160-0620.

Historically, Oregon elder law attorneys have used ORS 108.110 to increase the CSRA and/or CSIA of certain community spouses whose living expenses or life situations justified the increase. Often, these were cases in which the default CSRA was insufficient because: a) the community spouse was significantly younger than the Medicaid recipient, and was likely to need more than the default CSRA to support him or herself for years to come; or b) the CSIA to which the community spouse was entitled would be reduced or eliminated upon the death of the Medicaid recipient (this reduction or elimination occurs frequently in cases where pension or other retirement income of the Medicaid recipient spouse terminates at death).

Income First Rule

In February of 2005, Congress passed the Deficit Reduction Act (DRA), which made sweeping changes to the federal law governing Medicaid. Among those changes was a requirement that state Medicaid agencies apply the so-called "income first rule." Prior to passage of the DRA, community spouses whose living expenses exceeded the MMMNA had the option of choosing between an increased CSRA and receipt of additional income from the Medicaid recipient. In essence, the income-first rule eliminated that choice; the rule requires that before a community spouse can obtain an increase in the CSRA to make up a shortfall between his or her living expenses and income, he or she must first use the available income of the institutionalized spouse. In other words, before being allowed to keep additional resources to generate interest income to meet support needs, a community spouse must first exhaust the regular monthly income of his or her spouse. (For an excellent discussion of the income-first rule and its operation in the post-Deficit

Reduction Act environment, see Cinda Conroyd's materials: "DRA Changes on Home Ownership and Income First" from the October 2006 CLE, "The Elder Law Experience").

Scope of Application Disputed

Currently, elder law attorneys nationwide are engaged in a discussion with state Medicaid agencies regarding the scope of the income-first rule. Most elder law attorneys agree that, while the DRA made the rule mandatory for agency determinations (i.e., state Medicaid agencies may no longer grant increases in CSRA of their own accord), *court-ordered* increases in the CSRA are still permissible. This interpretation is supported by federal law, as the provisions in 42 USC 1396r-5 (referring to court-ordered increases in the CSRA) were not changed by the DRA.

However, Oregon's Department of Human Services has interpreted the DRA as requiring that the income-first rule apply not only to agency determinations of the CSRA, but also to court orders of support. OAR 461-160-0580. Accordingly, the Department has indicated its intention to object to petitions for spousal support under ORS 108.110 that do not, in its view, comport with the income-first rule. The practical effect of the Department's interpretation has been a dramatic decline in the number of support petitions filed, as few clients in a Medicaid situation have the resources and/or the inclination to engage in litigation disputing the Department's interpretation.

Possible Compromise

Previously, petitions for support under ORS 108.110 were one of the most useful tools at the Oregon elder law attorney's disposal. While such petitions can still be used to increase the CSIA in certain situations, their usefulness has been greatly diminished by the Department's interpretation of the DRA. The Agency and Professional Relations Subcommittee of the Elder Law Section has been advocating for a change in Department policy in this regard, as the Subcommittee feels strongly that such petitions are a critical tool for many couples—especially those with significant age disparities, or those who will face a loss of income upon the death of the Medicaid recipient.

To date, the Department has not implemented any changes in its policy vis-à-vis petitions for support. However, Department representatives have begun a discussion with the APR subcommittee, and have indicated a willingness to consider a compromise on the issue. While the Department is not prepared to reverse its interpretation of the DRA, it has agreed to take under advisement proposed changes to OAR 461-160-0580 that would allow petitions for support (and the resulting increases in CSRA) in limited circumstances. The Department has expressed its understanding of the financial hardship that could result if such petitions are not allowed for couples with significant age disparities and/or those who will face a loss of income upon the death of the Medicaid recipient. The APR subcommittee is hopeful that a compromise rule will be forthcoming in the next year. Because of the usefulness of petitions for support, Oregon elder law attorneys should pay close attention to developments and rule changes in the coming months and years in order to take advantage of any positive developments.

ESTATE RECOVERY: CURRENT MEDICAID-RELATED ESTATE PLANNING & ESTATE ADMINISTRATION ISSUES

Oregon's Department of Human Services is required by both federal and state law to seek "estate recovery" of Medicaid assistance provided through the OSIPM program. 42 USC 1396p(b)(1); ORS 414.105. In many cases, such recovery does not happen upon the death of the Medicaid recipient, but rather upon the death of the recipient's spouse. In other cases, the state does not recover at all. This is because both federal and state law place limits on the enforceability of estate recovery claims. 42 USC 1396p(b)(2); ORS 411.795; OAR 461-135-0835.

The limitations on the enforceability of estate recovery claims have been the subject of some confusion and controversy in recent years. These materials are not intended as an exhaustive explanation of estate recovery claims and the limits applicable to them. Rather, they are intended to highlight and provide guidance on a few specific issues currently presenting themselves in the Medicaid environment in Oregon. (For a general discussion of estate recovery and the limitations on same, see Richard Mills' materials: "Navigating Alligator Infested Waters: Financial Recovery of Public Assistance" from the October 2005 CLE, "Tools of the Trade for the Elder Law Practitioner").

OAR 461-135-0835 Judicially Construed

OAR 461-135-0835 implements the federal and state statutory limitations on estate recovery claims. That rule provides, in subsection (2), that such claims are not enforceable "…until after the death of the surviving spouse [of the recipient] (if any) and

only when there is no surviving child under age 21, no surviving blind child of any age, and no surviving disabled child." One recent Oregon case involving this rule raised an issue that Oregon elder law attorneys should be aware of—namely, that close attention must be paid to the meaning of the phrase "surviving child under age 21."

The case in question involved the probate estates of a husband and wife who died within six months of each other, both having received Medicaid assistance. At the time of their deaths (and for over one year after the second death), their son was under the age of 21. Accordingly, the Department's claim for estate recovery was unenforceable at the time of their deaths. However, the process of probating the decedents' estates took longer than usual, and the decedents' son attained the age or 21 before the probate proceedings were closed.

Within the four-month period allowed for presentation of creditor claims set forth in ORS 115.005(2)(a), the Department filed claims in both estates for the amount of Medicaid assistance provided to the decedents. At the time the claims were filed, the decedents' son was still under the age of 21. The personal representative timely disallowed both claims, contending that under OAR 461-135-0835(2), the claims were unenforceable. After the decedents' son turned 21, the Department filed a petition for summary determination of the claims. The Department argued that for purposes of determining whether limitations apply to estate recovery claims, the operative point in time is not the date of death of a decedent, but rather the date that a decedent's probate estate distributes its assets.

In an informal letter opinion, the circuit court agreed with the Department, and allowed the estate recovery claims. Although the court indicated that both sides had presented plausible arguments, it focused on the phrase "at a time," which appears in both the federal and state statutes that describe the limitations on estate recovery claims (but which does not appear in the Oregon Administrative Rule implementing those statutes). The federal and state statutes read, respectively, as follows:

> Any adjustment or recovery under paragraph (1) may be made only after the death of the individual's surviving spouse, if any, and only *at a time*—(A) when he has no surviving child under age 21, or (with respect to States eligible to participate in the State program established under subchapter XVI of this chapter) is blind or permanently and totally disabled, or (with respect to States which are not eligible to participate in such program) is blind or disabled as defined in section 1382c of this title;

42 USC1396p(b)(2). (Emphasis added).

> Claim for such medical assistance correctly paid to the individual may be established against the estate, but there shall be no adjustment or recovery thereof until after the death of the surviving spouse, if any, and only *at a time* when the individual has no surviving child who is under 21 years of age or who is blind or permanently and totally disabled.

ORS 414.105(2). (Emphasis added). The court indicated that, while OAR 461-135-0835 does not contain the "at a time" language from the federal and state statutes, the rule must be read in the context of those statutes, and that therefore, the most reasonable construction of the phrase "at a time" is that it refers to the moment of recovery.

Although the above-described circuit-court decision is not officially controlling precedent, elder law attorneys probating estates in Oregon should be mindful of its holding. Even though certain estate recovery claims are unenforceable when filed, ORS

115.085 permits the filing of "contingent" claims. If such "contingent" claims become "absolute" while a probate remains open (because, as here, a surviving child who was under age 21 at the decedent's death turns 21 before the probate is closed), it is payable under this holding. Had the probate cases described here been closed before the decedents' son turned 21, the Department would not have been able to collect its claim. Accordingly, in order to avoid potential liability to estate beneficiaries, close attention should be paid to efficient estate administration in cases involving similar estate recovery claims.

When "Healthy" Spouses Die First

In addition to the above-described limitations on *enforceability* of estate recovery claims, there are limits on the *amounts* the Department can recover. In cases involving surviving spouses of Medicaid recipients, the Department has a claim "…only to the extent that the surviving spouse received property or other assets from the deceased [Medicaid recipient] through probate or through operation of law." Id. Some clients who engage in Medicaid planning structure their assets so that the "community spouse"—the spouse commonly expected to be the "surviving spouse"—does not receive any property upon the death of the Medicaid recipient (most frequently, this situation arises where the family home has been re-titled in the sole name of the community spouse before the Medicaid recipient's death). If, as is often expected, the Medicaid recipient dies before his or her spouse, the Department usually has no estate recovery claim.

Not uncommonly, however, the community spouse predeceases the Medicaid recipient. In these cases, the issue often turns from estate recovery to denial of benefits and/or involuntary assertion of the spousal elective share. For example, if a community spouse dies intestate, the Medicaid recipient often inherits the community spouse's assets and, as a result, exceeds the $2000 resource limitation for Medicaid eligibility. These situations result in the Medicaid recipient losing his or her benefits, at least until the inherited assets are spent-down to eligibility levels. Likewise, in situations where a community spouse has created a Will, Trust or other non-probate mechanism (such as a beneficiary designation or POD account naming the Medicaid recipient), the Medicaid recipient's eligibility for Medicaid can be terminated if his or her inheritance exceeds the $2000 resource limitation.

Because of these possible outcomes, some community spouses choose to revise their estate plans after their spouses become eligible for Medicaid. Often, the goal of revising the estate plan is to avoid jeopardizing the Medicaid recipient's continued eligibility for assistance. Clients and their lawyers in Oregon have taken a variety of approaches to these situations over the years, including outright disinheritance of a Medicaid spouse; limiting the inheritance of a Medicaid spouse; and/or providing an inheritance for the Medicaid spouse in the form of a testamentary Special Needs Trust.

Spousal Elective Share: Elected or Not, Here It Comes

Each of the above-described options has potential consequences that should be carefully considered. One such potential consequence—for any or all of these options—is an involuntary assertion of the spousal elective share. A full discussion of spousal elective share rights is beyond the scope of these materials. For purposes of this discussion, however, it should be noted that ORS 114.105 gives a surviving spouse in Oregon the right to "one-fourth of the value of the net estate of the decedent" (subject to certain reductions for property devised to the surviving spouse) regardless of what the Will of the decedent provides.

In 2001, the Department's Estate Administration Unit issued guidance to agency employees, instructing them on how to handle a variety of situations in which a community spouse predeceases a Medicaid recipient spouse without devising the Medicaid recipient at least 25% of his or her estate. This guidance took the form of an "Executive Letter," a copy of which is attached to these materials. In essence, the letter lays out procedures for: a) seeking a Medicaid recipient's cooperation in asserting spousal elective share rights, in cases where the recipient has capacity; or b) nominating an attorney to petition for conservatorship over the Medicaid recipient in order to assert the spousal elective share, in cases where the recipient lacks capacity.

The Department takes the position that OAR 461-120-0330, which requires Medicaid recipients to "make a good faith effort to obtain any asset…to which they have a legal right or claim…," applies to pursuit of spousal elective share rights. Accordingly, if a

Medicaid recipient has capacity, the Department may require that he or she pursue assets by asserting the spousal elective share. If the recipient is willing to cooperate in this regard, the Department will assist the recipient in asserting his or her rights. If the recipient is not willing to cooperate, the Department may terminate the recipient's eligibility on the theory that failure to assert elective share rights constitutes a disqualifying transfer.

In cases where the recipient lacks capacity, the Executive Letter indicates that the Department's Estate Administration Unit may nominate an attorney to petition for conservatorship over the Medicaid recipient in order to assert spousal elective share rights. The decision whether to petition for conservatorship is made on a case-by-case basis, and depends in part on whether the Department determines that such efforts are cost effective and/or legally practical. From a planning standpoint, however, the safest course is to assume that, if a community spouse predeceases his or her Medicaid recipient spouse and leaves that spouse less than 25% of the estate, an involuntary assertion of spousal elective share rights by a conservator is likely.

Testamentary Special Needs Trusts: Not So Special Sometimes

The guidance described above, and the procedures it details, have been in place for several years. However, in recent years, the Department has begun applying these procedures not only to those cases involving disinherited Medicaid recipients, but also to those recipients who inherit portions of their community spouses' estates as beneficiaries of testamentary Special Needs Trusts. (For an excellent discussion of testamentary

Special Needs Trusts, see Donna Meyer's materials: "Testamentary Trusts for People with Disabilities" and Cynthia Barrett's materials: "Special Issues—Testamentary Trusts" from the July 2003 CLE, "Special Needs Trusts").

Historically, Oregon elder law attorneys have advised clients who want to benefit their Medicaid recipient spouses of the option to leave a share of their estate in a testamentary Special Needs Trust. Under 42 USC 1396p(d)(4)(A), assets devised to Medicaid recipients as beneficiaries of Special Needs Trusts are not considered "available," and thus do not affect a recipient's continued eligibility for assistance. In the past, some elder law attorneys have advised clients that, although there was no guarantee, they might achieve two objectives by leaving 25% or more of their estate to their Medicaid recipient spouse in a testamentary Special Needs Trust: 1) provide a fund to enhance their spouse's quality of life without affecting his or her entitlement to Medicaid assistance; and 2) avoid an involuntary assertion of the spousal elective share, since their spouse would be receiving at least 25% of the estate as a beneficiary of the trust. Until recently, this advice proved sound; many estates of community spouses who predeceased their Medicaid recipient spouses were probated without an involuntary assertion of the spousal elective share.

However, in the last couple of years, numerous Oregon elder law attorneys have reported a trend suggesting otherwise. In many cases where a community spouse has predeceased his or her Medicaid recipient spouse, leaving a testamentary special needs trust funded with 25% (or more) of the estate, the Estate Administration Unit has nonetheless

initiated conservatorship proceedings for the purpose of involuntary assertion of the spousal elective share. Thus, the 25% testamentary special needs trust may no longer be viable as a means of avoiding involuntary assertion of the spousal elective share.

To Elect or Not to Elect

During the last year, the Agency and Professional Relations Subcommittee of the Elder Law Section has sought clarification from the Department regarding its position vis-à-vis testamentary Special Needs Trusts. Specifically, the Subcommittee has sought to establish whether the Department officially takes the position that testamentary Special Needs Trusts comprising 25% (or more) of an estate fail to satisfy the spousal elective share. (The Executive Letter described above does not address Special Needs Trusts, and the Oregon Administrative Rules do not address this specific issue).

In response to the request for clarification, Department representatives have orally indicated the following to the Agency and Professional Relations Subcommittee:

- Under current law, the only way to ensure against an involuntary assertion of the spousal elective share in the probate of a community spouse's estate is an outright bequest of at least 25% to the Medicaid recipient spouse; and
- Although the Department generally does not view testamentary Special Needs Trusts as satisfying the spousal elective share rights of Medicaid recipients, there may be cases in which the Department opts not to pursue an involuntary election via conservatorship.

These determinations will be made on a case-by-case basis, and will be informed by the following factors:

1. The value of the estate and of the elective share amount;
2. The cost of pursuing an involuntary assertion of spousal elective share in relation to the value of the estate; and
3. The identity of the trustee, and whether the trustee is also named as remainder beneficiary of the Special Needs Trust.

The Department has expressed concern that, in cases where the trustee of a testamentary Special Needs Trust is also the remainder beneficiary, self-interest could operate as a disincentive to making distributions and that, as a result, the Medicaid recipient might not realize any actual benefit from the trust. However, even in cases where the trustee and the remainder beneficiary are not the same person and the amounts at issue are small, the Department may pursue an involuntary assertion of the spousal elective share. Accordingly, post-Medicaid estate planning decisions should take into consideration this possibility.

Under current law, use of a Revocable Living Trust (in lieu of a Will) may still be an effective approach for avoiding involuntary assertion of the spousal elective share, as the rights defined in ORS 114.105 apply only to Wills. However, clients who choose this avenue should be advised in writing that there is no guarantee spousal elective share rights will still be limited to Wills at that time of their death.

Understanding the Department's position should assist Oregon elder law attorneys in advising clients with respect to future post-Medicaid estate planning. Although the only way to ensure against an involuntary assertion of the spousal elective share (in the context of Wills) is for a community spouse to leave an outright bequest of 25% or more, testamentary Special Needs Trusts likely will remain an important component of many clients' estate plans. Since a primary objective of testamentary Special Needs Trusts is to enhance a Medicaid recipient's quality of life, and because an outright bequest of 25% will, in most cases, quickly be spent-down on long-term care, they remain viable tools for achieving that objective. However, elder law attorneys should be aware of their limited usefulness in satisfying spousal elective share rights.

Procedure For Existing Wills

The Department has indicated that the decision whether to pursue conservatorship and involuntary assertion of spousal elective share is typically made by local offices (as opposed to the Estate Administration Unit in Salem). This has led to a lack of uniformity in procedure. In the past, some local offices have contacted the attorney probating the estate to discuss conservatorship/involuntary assertion of spousal elective share, while other offices have simply filed for conservatorship and sent the probate attorney the statutorily required notice. This has led to unnecessary expense and complication in cases where the personal representative and estate beneficiaries would have agreed to pay the spousal elective share amount from the estate (in order to avoid having an unknown lawyer appointed as conservator for the decedent) had they been given the opportunity to negotiate.

The Agency and Professional Relations Subcommittee has raised this concern with the Estate Administration Unit, whose representatives have indicated they will urge local offices to contact attorneys to discuss elective share issues before filing petitions for conservatorship. In order to facilitate this communication, the Estate Administration Unit has requested that attorneys update their forms and carefully confirm that the required Information to Heirs and Devisees is sent to the appropriate address (EAU asserts that some of the miscommunication issues in the past have resulted from misdirected mailings). The correct address is:

Estate Administration Unit
Office of Payment Accuracy and Recovery
Department of Human Services
P.O. Box 14021
Salem, OR 97309-5024