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## Minnesota Waiver Program Update

In our January newsletter, we reported anticipated changes to Minnesota's waiver programs based on a mandate from the Centers for Medicare and Medicaid Services (CMS) requiring that available assets of both spouses be considered when determining eligibility for under age 65 Medical Assistance waivers. These programs allow Medical Assistance recipients who qualify for an institutional level of care to receive necessary services while living in the community with their spouses and families or in alternative housing. Historically, the financial requirements for the waiver programs under age 65 only considered the available assets of the Medical Assistance applicant and did not include the available assets of the non-recipient spouse (referred to as the "community" or "well" spouse). The law changed on June 1st, and the available assets of both spouses will now be considered in determining financial eligibility for the waiver programs.

This alert only affects certain MARRIED persons with disabilities of any age enrolled (or planning to enroll) in the following Medical Assistance waiver programs:

- Community Alternative Care (CAC) waiver;
- Community Alternatives for Disabled Individuals (CADI) waiver;
- Brain Injury (BI) waiver; or
- Developmental Disability (DD) waiver.

Effective June 1, 2016, spousal impoverishment rules are now being applied to NEW waiver applicants.

Recipients already on a waived program prior to June 1st must nonetheless come into compliance with spousal impoverishment by March 1, 2017, with some limited exemptions (see below).

Thanks in part to the extensive advocacy by Cathryn Reher of our firm, the legislation passed lessens the blow of the application of the spousal impoverishment laws to home- and community-based waiver programs as follows:

1. Increased Asset Allowance for a Community Spouse: For both nursing home and waived programs, there will no longer be a minimum and maximum community spouse asset allowance. All couples will benefit now from the maximum asset allowance. As of June 1, 2016, for a married person applying for Medical Assistance in a nursing home or for a waived program, the community spouse asset allowance will be determined as of the first day of the month of application as follows:
  - a. \$119,220 (subject to annual adjustment commencing on January 1, 2017 and in each year thereafter);\*
  - b. An alternative allowance by court order; or
  - c. An amount of available assets in excess of \$119,220 sufficient for a community spouse to meet the community spouse's minimum monthly income allowance.

\*If a couple's available assets are less than \$119,220, then the community spouse will be able to retain all of the couple's available assets towards the allowance.

2. Expanded Undue Hardship to Exempt Retirement Funds and 529 Plans. New legislation provides a possible safe harbor for both nursing home and waived programs through an expansion of the undue hardship exceptions. A community spouse with available assets in excess of the asset allowance (described above) may be able to keep retirement funds and/or a 529 plan for a child if the couple can show that the loss of these assets would cause an undue hardship. This legislation does not change the rule that retirement funds and 529 plans of either spouse, if they can be converted to cash and without regard to whether a penalty would be incurred, count towards the asset allowance. The undue hardship exception for retirement funds is not available if the community spouse is over 59 ½ years of age or for a 529 plan if a child is over age 25.
3. Possible Exemption for Certain Married Waiver Participants. As of July 20, 2016, it appears a deal has been reached with CMS that the spousal impoverishment laws will apply only to waiver recipients (other than Elderly Waiver) who were approved for waiver benefits on or after January 1, 2014. There is a possibility that the married waiver recipients who entered their program prior to this date would have eligibility determined under the no spousal deeming rules as long as there is no break in coverage. As of publication, we are awaiting written confirmation of this exemption.

The application of the spousal impoverishment rules to waiver programs (other than Elderly Waiver) will terminate if CMS allows the State to resume its more favorable deeming rules. Our Congressional and State representatives continue to seek a federal solution to exempt Minnesota from the ACA spousal impoverishment rules for all waiver participants. Senator Franken has introduced federal legislation to this end. In the meantime, the State must comply with the ACA spousal impoverishment laws. To add insult to injury, the ACA provisions requiring this change in state law will expire at the end of 2018. We do not know what laws will be adopted thereafter.

The spousal impoverishment rules are complicated and there is a great deal of misinformation about how they work. These rules were never intended to apply to younger families with children in their earning years, and the eligibility requirements are particularly harsh because there are no safe harbors to protect working spouses and their children. In addition, each person's individual

circumstances will affect financial eligibility. There is no one-size fits all or cookie cutter solution to establishing, or maintaining financial eligibility.

Some couples anticipated to be affected by this change will continue to qualify without a break in benefit coverage. Others may be able to complete some simple restructuring of their resources to maintain program eligibility. Unfortunately, other couples will need time to undertake more drastic steps such as annuitization of excess resources, restructuring of assets, divorce, or creation of a special needs trust in order to protect their resources. These couples may need anywhere from several months to a year to restructure their estates in order for the applicant/recipient to qualify for benefits under the anticipated changes. For these couples, TIME IS OF THE ESSENCE!

We would encourage married persons of any age on the CAC, CADI, BI, and DD waivers (and MAEPD/waiver recipients who may not be able to continue working) to contact us immediately for further guidance.

## Maximum Community Spouse Asset Allowance Now Applies to All

In addition to the bi-annual numbers reported below, the maximum community spouse asset allowance of \$119,220 will now apply to all married couples preparing for Medical Assistance eligibility for long-term care services either in a skilled nursing facility or home or community setting. Previously, couples were required to document their assets on an asset assessment date (typically the first date of a continuous period of institutionalization) in order to calculate the community spouse asset allowance, which was subject to both a minimum (\$33,851) and a maximum (\$119,220). For more information, please review the lead article on changes to Minnesota's Waiver Programs, or contact your attorney.

## Medical Assistance Numbers That Change in July 2016

Below are the basic Medical Assistance figures that change annually in July.

- The remedial care expense deduction was reduced to \$196.
- The minimum income allowance for a community

spouse increased to \$2,005 with a cap of \$2,980.50, depending on the community spouse's shelter costs.

- The basic shelter allowance increased to \$602 per month.
- The monthly home maintenance allowance increased to \$990.
- If you are receiving Elderly Waiver services and your gross monthly income (not including your spouse's income) does not exceed \$2,199, your monthly maintenance needs allowance (including room, board, and personal needs) will be \$988, otherwise it will be \$97.
- The statewide average payment for skilled nursing facility care amount increased to \$6,280 per month.

## Minnesota's ABLE Plan Will Be Operational in 2016

The ABLE Act of 2014 allows individuals to create tax-preferred savings and investment accounts for persons who become disabled at age 26 or younger. The model for the ABLE account is the 529 college savings accounts that many parents and grandparents establish to help pay educational costs. The critical difference between section 529 accounts and ABLE accounts is that the latter must contain a pay-back provision; that is, funds remaining when the beneficiary dies are paid to the state to the extent of any Medicaid payments that have been made on the beneficiary's behalf.

In 2015, the Minnesota legislature enacted the Minnesota ABLE Act which established the Minnesota ABLE Plan. Minnesota's plan will be part of an eleven-state consortium, which should be operational sometime in the fall of 2016. An ABLE account allows the individual with a disability, and their loved ones, to set aside money for use by the individual — currently, as much as \$14,000 annually per beneficiary — up to a total savings of \$350,000 (\$100,000 if the person with a disability is receiving SSI) and pay no taxes on that money's growth as long as it is used for qualified expenses. Qualified ABLE expenditures include expenses related to the individual's blindness or disability, including education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, funeral and burial expenses, and others.

For an adult living with a disability, one of the primary advantages of establishing an ABLE account is the ability to control the fund directly, as compared to a first party special needs trust which is controlled by a trustee. The ABLE account is the only asset protection vehicle through which a person with a disability can achieve some degree of financial autonomy. If you have questions about whether an ABLE account would be advantageous in your situation, please contact your attorney.

## State Law Increases the Size of Estates That Can Be Administered Outside of Probate

In an effort to account for inflation, the Minnesota legislature significantly increased the dollar amounts used for small estates affidavits in the Uniform Probate Code. The change reflects a \$25,000 increase in the size of an estate that can be administered using a small estates affidavit, also known as an affidavit of collection for personal property (affidavit). Beginning August 1, 2016, an affidavit can be used to collect assets in a decedent's name alone valued at or below \$75,000. This includes, but is not limited to, the collection of stocks, bank accounts, investment accounts, and savings bonds. This change in law is a good reminder to revisit your probate avoidance plan by confirming title and beneficiary designations are in place consistent with your intentions.

## Special Needs Trust Distributions Are Not Income for Housing Benefits

The 1st Circuit Court of Appeals recently overturned a federal court's determination that distributions from a special needs trust (SNT) count as income in determining Section 8 eligibility. Kimberley DeCambre received distributions from her SNT to pay for utilities and other expenses. The housing authority used those amounts when calculating her rent obligation for Section 8. The Court of Appeals concluded that a SNT, which is intended to prevent beneficiaries from losing Medicaid and Supplemental Security Income eligibility should also protect beneficiaries from losing income-based federal housing assistance. *DeCambre v. Brookline Housing Authority*.

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**2016 Super Lawyers**

## REVIEW OF YOUR SITUATION

If you have questions or concerns about any of the information presented in this newsletter or would like to consult with us about how the changes might affect your own circumstances, please call our office to set up an appointment with Cathryn Reher, Laurie Hanson, Laura Zdychnec or Mary Frances Price. We will be happy to meet with you to answer any questions you may have and to help you re-evaluate your particular circumstances.

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# Super Lawyers®

## 2016 Super Lawyers Announced

We are delighted to announce that three of our attorneys have been recognized as 2016 Minnesota Super Lawyers: Laurie Hanson, Cathryn Reher and Laura Zdychnec. Published July 5, the Super Lawyers list builds upon a history in which our attorneys are consistently recognized. Super Lawyer selections are made using a rigorous multi-phased process that includes a statewide survey of lawyers, an independent research evaluation of candidates, and peer reviews by practice area. Only the top 5 percent of attorneys in Minnesota are included in the annual Super Lawyers list. We are honored to receive this recognition from our peers.



**Our lawyers continue to make presentations on elder law topics to the public through charitable organizations, support groups, veterans' groups, church groups, and other entities. If you know of a group that you think would benefit from one of our presentations, please call Tracie Fenske at (952) 929-0622.**