Report From Counsel — *Winter, 2010*

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MassHealth Update on Elder Law

By Bryan S. MacCormack, Esq.

Long term care refers to the services and support needed when the ability to care for oneself has been reduced by disability, chronic illness, or aging. An estimated 44% of people reaching age 65 are expected to enter a nursing home at least once in their lifetime. And 53% of them will stay for one year or more. In Massachusetts the average cost of a nursing home is about $10,000 a month.

Bryan MacCormack

Most people pay out of their own pockets until they become eligible for Medicaid. Each state operates its own Medicaid (MassHealth in Massachusetts) system which must conform to the federal guidelines. This article will summarize the Medicaid laws and will discuss opportunities that exist to preserve and protect your assets against the costs of long term care.

The Medicaid rules are different for single and married people. The basic rule of Medicaid eligibility is that you can own no more than $2,000 in "countable assets". For married couples the healthy spouse can keep $109,560. The Deficit Reduction Act of 2005 changed the laws regarding the treatment of asset transfers. The

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Litigation over Noncompete Agreements

Agreements between employers and their employees prohibiting or restricting competition by a departing employee are nothing new, but their use is growing—and not just for the highest levels of management. This trend makes it all the more important to understand the limits that courts have placed on such agreements, with a view toward balancing employers' interests with policies favoring competition and unfettered opportunities for individuals to pursue their livelihoods. While courts have sometimes struck down noncompete agreements in their entirety, occasionally they effectively have rewritten parts of an agreement, a practice known as "blue penciling," so as to fix offending parts while retaining acceptable provisions.

In employment contracts, restrictive covenants, as they are sometimes called, are from the outset suspect as restraints of trade that are disfavored at law, and they must withstand close scrutiny as to their reasonableness. For the same reason, they generally are not to be construed to extend beyond their proper import, or farther than the contract language absolutely requires. In cases of ambiguous language, to borrow a term

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Elder Law

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old law utilized a 36 month look-back period (or up to 60 months for transfers to certain trusts). For transfers made on or after February 8, 2006, the look-back period for all transfers is 60 months. The transfer rules are used to determine whether certain transfers will cause an ineligibility period for Medicaid. Certain transfers are exempt from this penalty, including transfers between spouses, transfers to children with disabilities, transfers to caretaker children, transfers to a trust for the benefit of a disabled person under the age of 65, and transfers to a sibling who has an equity interest in the house, or who has lived there for at least one year before you moved to a nursing home.

One way to protect your savings is to spend them on "non-countable" assets. These expenditures include paying off a mortgage, making repairs to a home, paying off credit card balances, prepaying funeral expenses, or even updating home furnishings.

The simplest way to protect your home is to sign a deed conveying the remainder interest to another while retaining a life estate. The main advantages of retaining a life estate is that your home will not be part of your probate estate, the beneficiaries would obtain the property with a "step up" in cost basis; and Massachusetts cannot recover against life estates for Medicaid expenses that may have incurred. A disadvantage of reserving a life estate is that the life tenant is not entitled to apply his capital gain tax exclusion to the full proceeds of the sale. This may result in significant capital gain taxes if the property is sold prior to the death of the holder of the life estate.

Medicaid does consider the assets of revocable or "living" trusts to be countable in determining Medicaid eligibility. Irrevocable trusts (or "Medicaid Trusts") have proven to be a powerful way to protect your assets. These trusts can be drafted so that the income would be payable to you for your lifetime, but the principal cannot be paid to you or your spouse. Medicaid Trusts are typically funded with your primary residence and also investment accounts.

The Medicaid Trust would be drafted as a "Grantor Trust", which means that you would be considered the owner for income tax purposes. The real estate taxes and income from investment accounts would be reported on your personal income tax returns. The Grantor Trust status will enable you to utilize the capital gain tax exclusion if you sell the property. There would be a 5 year look back period for transfers to a Medicaid trust. If you are relatively healthy and are not expected to go into a nursing home within the next 5 years you should consider using a Medicaid Trust as part of your planning strategy.

Planning in advance is always the best approach. For those who have not planned in advance, there are many Medicaid planning techniques that still exist to protect your assets from the costs of long term care and general creditors.

Tax Breaks for College Costs

Persistently increasing college costs may have joined death and taxes as inevitable facts of life. Still, it is usually possible to soften the blow of escalating costs of higher education by taking advantage of an assortment of income tax breaks provided by the federal government. The options and their ramifications for your tax bill are not as simple as they might be, so it may be prudent to get some professional advice. Given the large sums of money at stake, you do not want to leave any smart moves unmade for lack of information and timely advice.

American Opportunity Tax Credit

This year, the American Opportunity Tax Credit effectively replaces the Hope Scholarship Credit. Taxpayers spending at least $2,000 for tuition, fees, books, and materials for higher education can save $2,000 in taxes with a dollar-for-dollar credit. Expenses over $2,000 bring an additional tax credit of 25 cents on the dollar, and, if expenses reach $4,000, there is a maximum

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Noncompete Agreements

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from baseball, the "tie" goes to the former employee.

The requirements for enforcing a noncompete agreement may vary some from state to state, but a typical set of conditions requires that the agreement (1) be necessary for the protection of the employer that is, the employer must have a protectable interest justifying the restriction imposed on the activity of the former employee; (2) provide a reasonable time limit; (3) provide a reasonable territorial limit; (4) not be harsh or oppressive as to the former employee; and (5) not be contrary to public policy. In keeping with the law's predisposition against such agreements, generally the employer has the burden of proving the reasonableness of a noncompete clause.

In a recent case involving a company that distributed novelty items to convenience stores and similar businesses, a noncompete clause that prohibited a route salesperson from interfering with or attempting to entice away customers—who were customers of the employer during a one-year period before the employee's termination, and whom the employee had serviced, dealt with, or obtained special knowledge about during his employment—was found by a court to be reasonably necessary and enforceable to protect the employer's business. The employer had a legitimate interest in prohibiting solicitation of its recent past customers and in winning back their business, and, as to such customers, the former employee would be in a far better position than an ordinary competitor, with a distinct advantage were it not for the noncompete restriction.

The case of the novelty items business resulted in a split decision for the employer. A separate clause in the agreement, referred to as the "business" clause, prohibited a former employee, for 24 months following his or her termination, from engaging "in any business which is substantially similar to" the employer's business. The court concluded that this provision went too far. It did not protect a legitimate business interest and was thus unenforceable. The engagement of a former employee in a similar, but noncompetitive, enterprise posed little, if any, additional danger to the employer.

When a tax return preparation firm sued a former employee for breach of a noncompete agreement, the court used a standard providing that an agreement of that kind will be enforced only if the business interests the employer seeks to protect and the effect the covenants have are reasonable as to (1) duration; (2) the capacity in which the former employee is prohibited from competing against his or her former employer; and (3) the geographic territory in which the former employee is restricted from working. The court held that the noncompetition clause in the tax preparer's employment contract was overbroad for failing to properly limit the territory to which it applied, making the entire covenant unenforceable. The clause purported to limit the former employee from working for any employer whose business included the preparation and electronic filing of income tax returns, if that employer was located, conducted business, or solicited business in the geographic district where the former employee had previously worked or within 10 miles of the district's borders, even if the former employee did not propose to work in or near that district. Such a clause cannot stand, because, as the court put it, it "overprotects" the employer at the expense of a former employee's right to earn a living.

Tax Breaks for College

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credit of $2,500. The credit is available per student, so that a family with more than one college student can achieve even larger total benefits. Up to 40% of the American Opportunity Tax Credit is refundable, so that some of the tax credit may be received as a tax refund if the credit for which the taxpayer qualifies exceeds his or her income tax liability. This credit phases out for taxpayers with a modified adjusted gross income between $80,000 and $90,000 ($160,000 and $180,000 for married couples filing jointly).

Lifetime Learning Credit

While the American Opportunity Tax Credit is limited to the first four years of education after high school, the Lifetime Learning Credit, as the

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name suggests, may be claimed for any year of higher education, such as years spent in graduate or professional schools. Another distinction between the two credits is that the Lifetime Learning Credit is available for any course of study relating to job skills at an accredited school, whereas the American Opportunity Tax Credit requires that the student be enrolled at least on a half-time basis. The phaseout income ranges are lower than for the American Opportunity Tax Credit, by margins of $30,000 for individuals and $60,000 for married couples filing jointly.

Calculated at 20 cents on the dollar, the Lifetime Learning Credit maxes out at $2,000, for $10,000 in tuition and related expenses. It is not refundable. Unlike the American Opportunity Tax Credit, which is determined per student, the Lifetime Learning Credit is calculated per taxpayer, so any one taxpayer has the above maximum no matter how many individuals in a family are studying at the postsecondary level. A taxpayer may not use both credits for the same student in the same year, but different credits may be used for different students' expenses in the same year.

Tuition and Fees Deduction

A tax credit, by shaving off the actual tax bill, does more for a taxpayer's bottom line than a deduction, which only reduces the income on which the tax will be imposed. Still, there is a third option in the form of a tax deduction for tuition and related fees, although it cannot be used in the same year for the same student as either of the tax credits previously described. This deduction, which is available even for taxpayers who do not itemize deductions, can be as large as $4,000 for modified adjusted gross incomes up to $65,000 ($130,000 for married couples filing jointly). The deduction is cut in half for even one dollar above those incomes, and disappears altogether when the income levels top $80,000 ($160,000 for married couples filing jointly). Another limitation on this deduction is that it cannot be claimed for expenses paid with money from a Section 529 plan or withdrawals from a Coverdell Education Savings Account.

Firm News

Jim Singer

Jim Singer and Zachary Tuck recently won an important victory in the Middlesex Superior Court. Jim and Zack represent a construction subcontractor who is suing a general contractor for damages incurred due to the poor coordination of various sub-trades at a construction site. In successfully defending against the defendant's motion for summary judgment, Jim and Zack helped establish precedent in Massachusetts that a subcontractor's damages caused by hindrance and interference with the performance of its work are recoverable under a "no damage for delay" provision in a construction contract.

Zack Tuck

Richard Mucci recently joined the firm as a litigation associate. Rich formerly worked for an insurance defense firm after a three year stint with the Middlesex District Attorneys' Office. While he was an assistant DA he tried numerous cases. He is a successful trial attorney. Rich is a graduate of College of the Holy Cross and Suffolk University Law School. He and his wife live in Winchester, MA.

Rich Mucci

Kim Harnett joined our law firm working as an assistant in the Litigation Department. She graduated from Northeastern University with a Certificate in Paralegal Studies. Kim spends her time with her two children and enjoys attending various sporting events and writing.

Kim Harnett