

## **UPDATE ON CRIMINALIZATION OF MEDICAID TRANSFERS**

(From materials for Maine Continuing Legal Education seminar held on October 1997 entitled Long Term Care Planning)

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### Background

Anyone whose practice involves counseling clients prior to their entering nursing facilities will be familiar with the rather complex regulations which control Medicaid eligibility for this purpose. These regulations are state-specific, but follow strict mandates set out under federal law. U.S.C.A., Title 42, Chapter 7, Subchapter XIX, Grants to States for Medical Assistance Programs. Within this federal statute are provisions which criminalize a laundry list of activities relative to dishonestly applying for Medicaid benefits or reimbursements, which includes fraudulent misrepresentation, conversion and concealment of assets. 42 U.S.C.A.'1320a (West Supp.1996).

### Enactment of the Kassebaum-Kennedy Criminal Provision

In October of 1996, as part of the Health Insurance Portability and Accountability Act of 1996, (HIPAA) the criminal provisions referred to above were amended with the addition of a new proscribed activity - transferring assets in order to become eligible for Medicaid for long-term care, Section 217 of HIPAA. Although the federal law already carried a very strong disincentive for transferring assets in order to qualify for Medicaid - a period of ineligibility for Medicaid (transfer penalty period), 42 U.S.C.A. 1396(p), - criminal consequences could now inure.

This provision, which came to be known as the KK Bill and Granny Goes to Jail Law and Section 217", set out that a criminal offense would be committed by anyone who,

knowingly and willfully disposes of assets (including by any transfer in trust) in order for an individual to become eligible for medical assistance under a State

plan under title XIX, if disposing of the assets results in the imposition of a period of ineligibility for such assistance under section 1917(c).

42 U.S.C.A. ' 1320a-7. The penalty was presumably outlined in the penalty provision for all of the proscribed activities, and included up to one year imprisonment and a \$10,000 fine. 42 U.S.C.A, '1320a-7b(a)(ii). The law became effective on January 1, 1997.

### Granny Goes to Jail Becomes Granny's Counsel Goes to Jail

The KK Bill proved to be immensely unpopular, and public outcry against resulted in the lobbying efforts of a multitude of groups for its repeal. Consequently, the original Granny Goes to Jail Law was repealed, but it was replaced with an even more problematic provision. The new version, which passed as part of the Balanced Budget Act of 1997 went into effect in

August of 1997. The new provision, found in Sec. 4734 of the Act, and entitled APenalty for Fraudulent Eligibility sets out that criminal charges may be brought against anyone who,

for a fee knowingly and willfully counsels or assists an individual to dispose of assets (including by any transfer in trust) in order for the individual to become eligible for medical assistance under a State plan under title XIX, if disposing of the assets results in the imposition of a period of ineligibility for such assistance under section 1917(c).

In this version, one of the major flaws in the earlier provision was corrected. This time, the penalty section was also amended to include the act of A provision of counsel or assistance by any other person.

Some points of interpretation of the earlier version still remain. Much debate centered on the meaning of the clause A if disposing of the assets results in the imposition of a period of ineligibility for such assistance. Did this mean that a penalty period actually had to be imposed by the State, implying that one would have had to have applied for Medical Assistance prior to the tolling of a penalty period. Initial analyses of this issue resulted in three possible interpretations. The first and most conservative was that anyone who transferred assets in order to become eligible for Medicaid, and later applied for benefits would be liable, regardless of how much time had elapsed from the time of the transfer until the time of application. The next and middle ground interpretation was that only those who applied for benefits within 36 months of the transfer (the look-back period) would be subject to prosecution. And, the least restrictive interpretation was that criminal liability would be triggered only if one applied for benefits prior to the tolling of the penalty period. Elder Law Report, Vol. VIII, No. 2, Sept. 1996, p. 2.

### Peebler vs. Reno

Although this question has not been answered definitively, some solid guidance was rendered in the only case to have found its way into a federal court under the original Section 217. Peebler vs. Reno, 965 F.Supp. 28 (D.Or. 1997). Mrs. Peebler, upon the advice of her attorney had transferred assets, and immediately sought declaratory relief, anticipating that she would be applying for Medicaid immediately after the tolling of the penalty period. The case challenged the middle-ground theory of liability; namely, that one is liable under the law if one transfers assets in order to become eligible for Medicaid even if they wait to apply for benefits until after the criminal penalty period has expired. This is premised on the theory that although a penalty period would not be imposed *de jure* in such case it would be imposed *de*

*facto* by virtue of the applicant having rendered himself ineligible during the penalty period.

Although the case was dismissed on jurisdictional grounds, and an opinion on the merits of the case was never rendered, both the interpretation of the U.S. Attorney General and the judge's dicta lend considerable support to the premise that no criminal consequences would inure if the application for benefits was made after tolling of the penalty period. The Attorney General stated in her motion to dismiss,

The Attorney General agrees that the most reasonable interpretation of the provision is that Section 217 only applies if the transfer of assets actually results in the imposition of a period of ineligibility for Medicaid benefits. Put another way, if Ms. Peebler disposes of assets, waits out the period during which she otherwise would have been ineligible, then applies for prospective benefits such that a period of ineligibility is not imposed upon her by the Oregon Medicaid authority, she will not be subject to prosecution under Section 217.

Judge Haggerty reiterated this language in his order, dismissing the action for lack of subject matter jurisdiction:

[T]he government has represented in its motion to dismiss that, if Mrs. Peebler waits until May 13, 1997 to apply for Medicaid benefits, no period of ineligibility for such benefits will be imposed. Defendant's Memorandum, p. 4. If no period of ineligibility is imposed, neither of the Plaintiffs can be prosecuted under section 217.

Peebler, 965 F. Supp. At 31. Thus, although not binding authority, Peebler, at least supports the common sense interpretation that there will be no criminal consequences in cases where an application for benefits is not made until after the tolling of the transfer penalty period. This interpretation also applies to the new criminalization provision.

### Advising Clients Under the New Criminal Provision

With the repeal of *Granny Goes to Jail* and enactment of *Granny's Counsel Goes to Jail* the stakes have shifted. Under the old provision, the advising attorney was already subject to criminal prosecution under the generic federal aiding and abetting statute. Under the new provision, it is no longer criminal to make a transfer in order to become eligible for benefits, but it remains a crime to advise a person, for a fee, that they may legally make such transfers. This material does not attempt to explore the constitutional ramifications of this statute, other than to raise the issue that there are most probably serious First Amendment issues inherent in a law which attempts to prohibit the dissemination of advice pertaining to legal activities. There is also a serious issue of ethics and professional responsibility. How can one fully and properly advise one's client of their rights under the Medicaid laws when doing so will

subject the advisor to the possibility of criminal prosecution? Should one tell their client about Medicaid transfers, but then punctuate it with, ABut I don't advise you to do this because I might go to jail?

The earlier version, although draconian, at least left the advising the attorney with fairly clear prerogatives. It was imperative to advise the client contemplating Medicaid transfers of the criminal consequences. Now there are no criminal consequences to the client - only to the attorney who counsels the client . Thus, the law acts as an effective gag rule limiting the scope of advice an attorney may safely render to a client seeking legitimate Medicaid planning advice.

The National Academy of Elder Law Attorneys (NAELA) issued a legislative update on August 7, 1997 in which possible interpretations of the new provision were set out. One view is that liability would attach only if one advised a client to transfer funds to qualify for Medicaid and also advised the client to apply for benefits before the penalty period had run. The broader, and more likely interpretation is that one would be subject to criminal prosecution even if one advised the client to wait out the penalty period before applying for benefits, if the client ignored this advice and applied prematurely. Until the law is either repealed or successfully challenged in court, attorneys advising transfers of assets in order to qualify for Medicaid will be subject to criminal prosecution.