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BUDGET AGREEMENT LIKELY TO DISCOURAGE CHARITABLE GIVING BY SENIORS

By Judith Solomon

The conference agreement on the budget reconciliation bill approved by the Senate on December 21 includes changes in Medicaid policy that are likely to have a significant impact on charitable giving by seniors. These changes, in the rules regarding the transfer of assets by individuals who subsequently apply for Medicaid long-term care coverage, would penalize seniors who make charitable donations up to five years before they turn out to need long-term care. Such rules are likely to discourage many seniors from making charitable donations.

Supporters of these changes argue that existing exceptions to Medicaid's asset-transfer policies would protect individuals who make a charitable donation from having to do without long-term care coverage as a result. Such claims do not withstand scrutiny, however, because these exceptions apply only *after* an individual has already been denied long-term care coverage. Moreover, individuals would have to convince the state that the denial of coverage should be reversed because they qualify for one of the exceptions, a process that could take months and require legal assistance.

Current Law Does Not Discourage Charitable Donations

For many years, Medicaid has included a provision intended to penalize seniors who give away their assets in order to qualify for Medicaid long-term care services. The provision applies to "transfers for less than fair market value" that are made up to three years before an individual applies for Medicaid. A charitable donation is regarded as a transfer for less than fair market value, but charitable donations do *not* usually result in a penalty when seniors need Medicaid coverage for long-term care. As a result, there currently is no disincentive for seniors to make such donations.

Under current law, when a senior applies for Medicaid and it is determined that he or she made a significant charitable donation within the past three years, a "penalty period" is determined. The penalty period lasts as long as the transferred asset would have paid for long-term care; during this period, the person is ineligible for Medicaid long-term care coverage.

However, the penalty period begins at the time of the donation, which usually took place months or years before the individual needed Medicaid long-term care coverage. As a result, the penalty period for charitable donations is nearly always *over* by the time the senior's health has deteriorated to the point that he or she needs long-term care.

Budget Bill Would Make Major Changes in Asset Transfer Rules

The conference agreement would change these rules in two key ways:

- The "look-back" period, or the period examined to determine whether wrongful transfers have occurred, would be lengthened from three to five years.

- More important, the penalty period no longer would begin at the time that the transfer was made; instead, it would start at the time the individual applied for long-term care coverage. *As a result, individuals would be disqualified from coverage at the very time they needed it.*

For example, suppose a senior has made a charitable donation of $10,000, and turns out three years later to need long-term care. If the average cost of long-term care is $5,000 a month, a two-month penalty would result ($10,000 divided by $5,000). Under current law, the penalty period would begin at the time the transfer was made, so the penalty would be over — and would have no impact — when the individual subsequently needed long-term-care coverage. Under the conference agreement, by contrast, the penalty period would begin at the very time the senior needed long-term care and would make him or her ineligible for care for two months.

Once this change is understood, it is likely that financial advisors and other trusted individuals will advise many seniors — especially those nearing an age when their health could begin to deteriorate — to refrain from making significant charitable donations, in order to avoid being left without the means to take care of their future health care needs. Ultimately, charitable contributions could decline significantly.

Exceptions to These Rules Would Not Protect Seniors Who Make Charitable Donations

Some proponents of the changes argue that the changes would not discourage seniors from making charitable donations, because seniors who transferred assets for a purpose other than qualifying for Medicaid would not be penalized. They also argue that seniors would be protected if they could show they would suffer an "undue hardship" if they could not receive Medicaid coverage for long-term care services, regardless of the purpose of the transfer. These claims, however, are based on a misunderstanding of the current asset-transfer provisions.

Current law does allow for an exception if individuals can show either that the transfer was exclusively for a non-Medicaid purpose or that they would suffer undue hardship if they could not receive Medicaid long-term care coverage. However, neither exception would overcome the deterrent to charitable giving raised by the new changes in asset-transfer policies, because the exceptions would come into play only *after* long-term care coverage had already been denied.

Even then, an individual would need to protest that denial and succeed in getting the denial reversed on the basis of one of these exceptions. In many instances, deteriorating physical or mental health could make it difficult for individuals to participate in this process and demonstrate to the state the purpose of an asset transfer they made several years earlier. (After all, deteriorating health is the reason someone needs long-term care in the first place.) Elder law attorneys confirm that they would not advise seniors who are considering any transfer of assets, including charitable donations, to assume that they would succeed in obtaining an exemption.

Furthermore, overturning a denial of long-term-care coverage often requires filing a formal appeal. That can be difficult for a senior who is in frail health and needs long-term care. In many cases, an appeal would require assistance from an attorney as well. It is well known that many individuals who are denied services under Medicaid and other means-tested programs do not file appeals because of the time and expense involved. For those who do appeal, the process can take months to complete, during which the individual would receive no Medicaid long-term care coverage and could be left without the means to cover his or her long-term care needs.

Finally, the Congressional Budget Office has stated that the asset-transfer provision in the House reconciliation bill (which is virtually identical to the provision in the final bill) not only would penalize some transfers that have occurred, but also would deter some individuals from making certain transfers in the first place. Charitable donations would almost certainly be among the transfers that some individuals would decide not to make. Anyone who understands the asset-transfer rules would likely advise seniors against making transfers, given the risks of relying on an after-the-fact determination of intent or undue hardship that could be difficult or impossible to obtain.