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Fox Valley Estate Planning Council
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COVID Policies Impacting Elder Law

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Federal Medicare/Medicaid Changes

On March 13, 2020, there was a federal declaration of a Public Health Emergency (PHE) due to the COVID-19 outbreak. This was actually preceded by Wisconsin's Executive Order #72 Declaring a Public Health Emergency on March 12, 2020.

As a result of the PHE, the Centers for Medicare and Medicaid instituted "blanket" nationwide waivers, including:

- a. Waiving the 3 day prior hospitalization required for Medicare Skilled Nursing Facility (SNF) coverage for those affected by COVID 19;
- b. Several waivers allowed the use of non-approved facilities, such as non-approved SNF facilities outside of the SNF, rooms within the SNF not typically used as patient rooms, and additional beds in hospitals;
- c. In-person physician visits were modified to allow tele-health;
- d. In-person assessment requirements were waived for home health agencies (HHAs);
- e. On-site supervisor evaluation for HHAs was waived;
- f. Certain training requirements for home health aides were waived;
- g. Numerous hospice requirements were waived, including: the requirement for hospices to use volunteers; non-core services; onsite supervision and other training requirements for hospice agencies; and
- h. Several Intermediate care Facility (ICF) policies were waived, including community outings and mandatory training.

State of Wisconsin Changes for Health Care Providers

On April 3, 2020, Wisconsin issued Emergency Order #21 related to health care providers. As a result, the following changes were implemented within the state:

- a. The ability of nursing homes to discharge residents for non-payment was suspended;
- b. The staff at a Community Based Residential Facility (CBRF) or Assisted Living Facility (ALF) was allowed, for the first time, to be 16 or 17 years old (as opposed to 18); and
- c. Nurses' Aide training was reduced from 120 hours to 16 hours and the requirement for supervision by registered nurse or LPN was suspended.

State of Wisconsin Medicaid Changes

On May 4, 2020, Wisconsin issued Emergency Order #35 which suspended several Administrative Rules regarding Medicaid eligibility, including:

- a. Loosening of requirements regarding the verification of assets to determine eligibility;
- b. Medicaid renewals were suspended; and
- c. Formerly in-person meeting requirements were suspended.

Further Statutory Changes in Wisconsin

The Coronavirus Relief Act (2020 Wis. Act. 185), became effective on April 17, 2020, and provided:

- a. The Department of Human Services was allowed to create waivers for previous requirements
- b. Health care providers were provided with immunity during this emergency period:

New Section 895.4801(2) of the statutes was created to read:

Immunity. Subject to sub. (3), any health care professional, health care provider, or employee, agent, or contractor of a health care professional or health care provider is immune from civil liability for the death of or injury to any individual or any damages caused by actions or omissions that satisfy all of the following:

(a) The action or omission is committed while the professional, provider, employee, agent, or contractor is providing services during the state of emergency declared under s. 323.10 on March 12, 2020, by executive order 72, or the 60 days following the date that the state of emergency terminates;

(b) The actions or omissions relate to health services provided or not provided in good faith or are substantially consistent with any of the following:

1. Any direction, guidance, recommendation, or other statement made by a federal, state, or local official to address or in response to the emergency or disaster declared as described under par. (a).

2. Any guidance published by the department of health services, the federal department of health and human services, or any divisions or agencies of the federal department of health and human services relied upon in good faith.

3. The actions or omissions do not involve reckless or wanton conduct or intentional misconduct.

Additional Changes Made by the Wisconsin Department of Health Services

Stimulus Payments: COVID stimulus payments were not counted as assets for eligibility purposes

Medical Assistance Purchase Plan (MAPP):

- The work requirement for the Medicaid Purchase Plan was temporarily removed. Recipients would not lose Medical Assistance Purchase Plan benefits because they are unable to work as a result of the COVID-19 pandemic
- Starting in April 2020, Medicaid Purchase Plan members would not be charged monthly premiums. They received a refund if they already paid their April premium and did not owe outstanding premiums

Badger Care+:

- BadgerCare Plus recipients would not be charged for monthly premiums starting in February of 2020. They would also be refunded all the BadgerCare Plus adult premiums they have paid since February of 2020.

Institutional Medicaid:

- *Patient Liability Changes.* Under normal Medicaid rules, certain members must pay a monthly patient liability to their nursing home for their long-term care. In response to the COVID-19 pandemic, DHS temporarily changed Medicaid program rules to:
 - suspend patient liability increases from April 2020 through January 2021; and
 - many recipients did not have any patient liability from April 2020 through January 2021
- *Asset Limits.* For Medicaid, income is considered an asset if members have not spent the income by the month after they received it. To be eligible for Medicaid, members must have assets within the Medicaid asset limit. However, Medicaid rules were temporarily changed so members would not lose eligibility during the federal public health emergency *unless* they move out of state or ask to be disenrolled. Since patient liabilities either did not increase or were suspended entirely from April of 2020 through January of 2021, members may have accumulated additional monthly income that would have been paid toward their monthly patient liability. This may cause some members to go over the Medicaid asset limit.
- *Divestments.* If members used their excess income or assets in a way that was considered to be divestment, they would be subject to a divestment penalty period *after* the public health emergency ends.
- *Nursing Home Obligation.* Under the new provisions, nursing homes must:
 - Proactively address potential eligibility impacts with residents or their representatives, orally and in writing, in a language that the resident or resident representative understands
 - Assist residents in staying under the Medicaid asset limit by purchasing items that the member needs