ELDER LAW

The Surprise of a Claim by Medicaid Against the Estate

The receipt of Medicaid benefits creates an implied contract to pay back the cost of care under certain circumstances. Medicaid allows recipients to have limited assets and therefore, little thought is usually given to the possibility of Medicaid making an estate claim after their death.

This overlooks the fact that there are exempt assets at the time of application that may have significant value. Exempt assets include $33,038 in non-retirement funds; retirement accounts in payout status; a homestead with an equity of $1,130,000 or less, one motor vehicle; essential personal property; jewelry with sentimental value, such as wedding or engagement rings; tools and equipment necessary for a trade; and term life insurance.

These assets, which were exempt during lifetime, may lose their exempt characteristic upon the death of the Medicaid recipient and be subject to an estate claim. The estate claim is subject to restrictions.

Restrictions on Estate Claim

Recovery may only be sought for Medicaid benefits received after the recipient reached the age of 55 or was permanently institutionalized, regardless of age.

Medicaid estate recovery is not allowed where the recipient received 36 months of benefits (or its equivalent) under a long-term care insurance policy approved by the New York State Partnership for Long Term Care.

Medicaid can only make a claim against the probate estate of the deceased recipient.

Probate Estate Or Expanded Estate

Federal Medicaid law requires each state to pursue recovery against the "estate" of a deceased Medicaid recipient. Each state is given the option to define the word "estate." It may be defined narrowly and limited to the probate estate or an expanded definition may be used to include the probate estate and also non-probate assets.

By **Daniel G. Fish**



Probate assets pass through the Surrogate's Court by will or intestacy and include assets that were held in the deceased Medicaid recipient's name alone, with no named beneficiary.

Non-probate assets pass outside of the Surrogate's Court and go directly to an heir or beneficiary.

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New York State has adopted the narrow definition of "estate" in Social Services Law §369.

"For the purposes of this section, the term "estate" means all real and personal property and other assets included within the individual's estate and passing under the terms of a valid will or by intestacy."

Medicaid's estate claim in New York is therefore limited to the probate estate. (New York State chose expanded recovery in 2011 but repealed it in 2012). Assets that are not subject to probate are not subject to a New York Medicaid estate claim.

Title

The manner in which title to an asset is held will have a determinative effect upon whether or not the assets is subject to an estate claim.

A bank account in the name of the deceased Medicaid recipient alone, with no named beneficiary, will be subject to probate and an estate claim. Joint accounts, transfer-on death (TOD) accounts, pay-on death (POD) accounts, or in-trust for (ITF) accounts pass directly to the named beneficiary and are outside of probate and are not subject to an estate claim.

A retirement account in the name of the Medicaid recipient alone, with no named beneficiary, will be subject to probate and an estate claim. A retirement account with a named beneficiary will pass directly to the named beneficiary outside of probate and will not be subject to an estate claim.

An investment account held in the name of the deceased Medicaid recipient alone, with no named beneficiary, will be subject to probate and an estate claim. An investment account held in a trust with a named beneficiary will pass outside of probate and will not be subject to an estate claim.

The stock and lease to a cooperative apartment corporation in the name of the deceased Medicaid recipient alone will be subject to probate and an estate claim. The stock and lease held jointly or in the name of a trust will pass outside of probate and will not be subject to an estate claim .

The deed to a homestead in the name of the deceased Medicaid recipient alone will be subject to probate and an estate claim. A deed held jointly or in the name of a trust will pass outside of probate and will not be subject to an estate claim.

Deferral

Even if an asset is subject to probate, there are cir- » Page 7

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Medicaid

« Continued from page 3

cumstances when the Medicaid estate claim is deferred and cannot be pursued until the prohibited period ends. If the deceased Medicaid recipient is survived by a spouse, recovery can only be made after the death of the spouse.

Medicaid recovery is deferred if the deceased Medicaid recipient is survived by a child under the age of 21. Recovery can only be made when the child reaches the age of 21.

Medicaid recovery is deferred if the deceased Medicaid recipient is survived by a child who is certified blind or disabled, of any age. Recovery can only be made after the death of the blind or disabled child.

Homestead of Institutionalized Person in Probate Estate

Medicaid can put a lien on the homestead of an institutionalized person who is not expected to return home, during their lifetime,. Medicaid may not put a lien on the homestead of an institutionalized person where there is a spouse, child under 21, blind child, disabled child or sibling with and equity interest residing there.

The recovery against a homestead which is inside of the probate estate is deferred if a sibling resided in home at least one year before institutionalization or a child resided in home at least two years before institutionalization and provided care which delayed institutionalization.

Undue Hardship

An heir, survivor or beneficiary may request a waiver if the estate recovery would result in an undue hardship. The claim must be filed within 30 days of notification of the estate claim. Undue hardship may be sought for real property of modest value, no higher than 50% of the average selling price in the county where the home is located and is the primary residence of the party seeking the waiver.

Conclusion

The time to consider Medicaid estate recovery rules is before the application is filed and not after the death of the Medicaid recipient. Assisting a client in filing a Medicaid application is only the first step in the process of representation.

It is incumbent upon the attorney advising a client about Medicaid eligibility to carefully distinguish between the probate and non-probate assets and advise the client of the estate recovery rules. This would include a review of the beneficiaries on accounts and successor beneficiaries.

A retirement account in the name of the Medicaid recipient alone, with no named beneficiary, will be subject to probate and an estate claim. A retirement account with a named beneficiary will pass directly to the named beneficiary outside of probate and will not be subject to an estate claim.