MEDICAID RECOVERIES FROM ESTATES

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In the Medicaid context, one of the estate planner's primary goals is to minimize the assets which are recoverable from the estate of the Medicaid recipient or the estate of a legally responsible relative of such a recipient. The starting point for a New York State estate practitioner in determining the extent to which The Department of Social Services may have a right of recovery against a particular estate should be the Administrative Directive from the New York State Department of Health known as Transmittal 02 OMM/ADM-3.

Since the adoption of OBRA 93, the Federal Government has required all states to implement estate recovery actions against the estates of individuals who were 55 years of age or older when Medicaid assistance was received.[1] In general, Medicaid benefits paid out before a recipient turns 55 can not be recovered.[2]

The law only permits recovery of benefits paid within ten years of the individual's death.[3] Thus, if a person begins receiving Medicaid at age 55 and continues to receive benefits until death at age 80, then the Department of Social Services would be limited to recovering the benefits paid during the recipients last ten years of life. In this case from the point in time at age 70 which is exactly ten years prior to the recipients date of death at age 80.

Medicaid benefits which were *correctly paid* cannot be recovered during the life of the Medicaid Recipient, rather they may only be recovered from the recipient's estate after death.[4] Further, correctly paid medicaid benefits may not be recovered from the estate of the recipient until after the death of the surviving spouse, if any, and only when there is no surviving child who is under twenty one, blind or totally disabled.[5] In contrast, the Department of Social Services is entitled to recover *all incorrectly paid* benefits and may do so during the life of the recipient, upon proper notice to the recipient, regardless of whether the recipient was over 55 years of age at the time benefits were received or the status of other family members.[6]

I. RECOVERIES FROM THE ESTATE OF THE MEDICAID RECIPIENT:

Only the probate estate of the Medicaid recipient is subject to a Department of Social Services Medicaid lien in the State of NY.[7] (Though under federal law states may now elect to expand the definition of estate for recovery purposes.)

However, Federal law mandates the waiver of recovery where recovery would result in undue hardship.[8] This exception is applied in the following circumstances:

- $ Sole income producing asset
- $ Homestead of Modest Value

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1 42 USC §1396p(b)(1)
2 NY Social Services Law §369(2)(b)(i)(B)
3 NY Social Services Law § 104
4 18 N.Y.C.R.R. §360-7.11(a)
5 NY Social Services Law §369(2)(b)(ii)
6 18 N.Y.C.R.R. §§ 348.4, 352.31(d)(5)
7 42 USCA 1396p(b)(4)(B); NY Social Services Law §369(b)
8 42 U.S.C. §1396p(b)(3)

$ Other Compelling Circumstances

Under §1802 of the New York Surrogate's Court Procedure Act an executor or administrator will be relieved of personal liability on a claim which is not filed within 7 months of appointment, if he or she acts in good faith when distributing estate assets.[9] The expiration of the 7-month creditor's period does not however invalidate a claim by the Department of Social Services for recovery of Medicaid benefits paid, it merely releases the executor from personal liability if acting in good faith.

Medicaid Liens:

As noted above, Medicaid liens are unenforceable against the following classes of people:

$ Surviving spouse
$ Blind child
$ Minor child
$ Disabled child[10]

The disabled child exception is good even where there is no financial dependence. Liens on real property are also unenforceable against a child who lived in the home of a recipient and served as the Medicaid recipient's care giver for at least 2 years prior to institutionalization.[11]

In general the home is considered an exempt asset. However, the home may become an available resource for the Medicaid recipient who becomes institutionalized.[12] A Medicaid lien may not attach to real property if any of the following classes of people reside in the home:

$ Spouse
$ Minor child
$ Disabled or blind child
$ Sibling with equity interest who has resided there at least 1 year[13]

A Medicaid lien is unenforceable against a child who lived in the home and served as a care giver for at least two (2) years prior to institutionalization.[14] As long as a home maintains its exempt status, the Department of Social Services will not be able to recover anything from the proceeds of its sale during the recipient's lifetime. Only benefits paid after the home loses its exempt status can be recovered upon sale. However, once the home is sold the proceeds will be treated as an available resource and the recipient will become ineligible for benefits until the proceeds are spent down and or transferred and the appropriate penalty period has expired. Of course the down side to holding onto the residence in the sole name of the recipient until death is that upon death, the house would be a probate asset from which recovery for Medicaid benefits paid can be had.

Irrevocable Trusts: Should the Department of Social Services be permitted to recover from assets transferred to an irrevocable trust by a Medicaid recipient? No. In the absence of a showing of fraud or collusion, the Department of Social Services should not be able to recover from the assets of an irrevocable trust established by the Medicaid recipient, provided that the appropriate penalty period had expired prior to

9 NY Surrogate's Court Procedure Act §1802
10 NY Social Services Law §369(2)(b)(ii)
11 See also In Re Estate of Samuelson, 493 N.Y.S.2d 784; Estate of Burstein, 611 N.Y.S.2d 739 (disabled child exception good even where there is no financial dependence)
12 NY Social Services Law §369(2)(a)(ii)
13 NY Social Services Law §369 (2)(a)(ii); 42 U.S.C. § 1396p(a)(2)
14 NY Social Services Law §369 (2)(b)(iii)(B)

application for benefits and provided that the trustee had no power to make distributions of trust principal to the grantor/Medicaid recipient. Further the fact that the grantor retained a limited or special power to appoint the trust principal to a certain class of persons, other than the grantor, the grantor's estate, or the creditors of the grantor's estate should not result in a different outcome. Nor should that fact that even an irrevocable trust can be revoked upon consent of all of the beneficiaries under NY EPTL § 7-1.9.[15]

II. RECOVERIES FROM THE ESTATE OF THE COMMUNITY SPOUSE:

Disclaimers: Under NY law any person may disclaim or renounce an inheritance within nine months of a decedent's death.[16] The effect of the disclaimer on the disclaimed property is that the property will pass as if the disclaiming party predeceased the decedent. For this reason disclaimers are sometimes used in connection with Medicaid planning. However, the use of a disclaimer is considered a transfer for Medicaid eligibility purposes.[17] The disclaiming party creates a penalty period the duration of which is dependent upon the value of the disclaimed property. The Department of Social Services has argued that the penalty period created as a result of a disclaimer begins to run when the disclaimer is made, rather than from the date of death.

The Elective Share: Under NY law a spouse can not be disinherited involuntarily. If a spouse is disinherited, he or she may claim a right of election against the estate, which would entitle the claimant to approximately one third of the net estate after certain adjustments.[18] Failure to claim the elective share may create a period of ineligibility for the surviving spouse who fails to make the election in NYS. In fact in NYS the Department of Social Services has successfully argued that the Guardian of an incapacitated Medicaid recipient is deemed to make a right of election claim on behalf of the ward.[19] Though the result might be even worse if the recipient does not make a timely election, and the recipient is deemed to make a transfer as a result of the forfeited election. At least if the right of election is exercised voluntarily, the recipient can in turn transfer out a portion of the elective share property, perhaps as much as one half, while using the balance of the elective share funds to private pay during the resulting period of Medicaid ineligibility.

As is the case with many other statutory rights, the potential beneficiary of the elective share may enter into
an agreement to waive his or her statutory right of election.[20] However, waivers of the elective share by pre or post-nuptial agreements are not always effective for Medicaid eligibility purposes. The waivers that are most likely to succeed are waivers that were not executed to obtain Medicaid eligibility and for which consideration was received by the waiving party. Even a failed waiver may be preferable to a disclaimer, as the penalty period for a waiver of elective share rights, which is found to be a deemed transfer by the Department of Social Services, should be measured from the date of death of the 1 spouse, as opposed to the period for a disclaimer which will not run until the disclaimer is made, which under NY law, can be up to nine months after the date of death.

When are assets of a deceased community spouse considered available to an institutionalized spouse, who exercises or is compelled to exercise the elective share right? Some have successfully argued before the Commissioner that the date the election is made should be the date the resources are considered available. It has been held that Department of Social Services should only consider "available" income and resources when

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15 Spetz v. New York State Dep't of Health, 737 N.Y.S.2d 524 (Sup. Ct. Chautauqua County 2002); Verdow v. Sutkowy, 209 F.R.D. 309 (N.D.N.Y. 2002)

16 NY EPTL §2-1.11

17 Molloy v. Bane, 631 N.Y.S.2d 910 (2d Dept. 1995)

18 NY EPTL § 5-1.1-A

19 Matter of Mattei, 647 N.Y.S.2d 415 (Sup. Ct. Nassau County 1996)

20[20] NY EPTL § 5-1.1-A
Dionisio v. Westchester County DSS, 665 N.Y.S 2d 904 (2d Dept. 1997)

determining eligibility for Medicaid benefits.[st] "Available resources" are defined as all resources in control of the applicant.[21] Assets in control of an executor or administrator should not be considered available until the estate assets are marshaled, evaluated and administered.

The Community Spouse's Implied Contract

Recovery from the estate of a community spouse who elected to refuse to provide financial support to a Medicaid recipient can be had during lifetime of the recipient spouse, but only if the community spouse had sufficient means to pay at the time the services were provided.[22] The burden of proving that the community spouse had sufficient means to pay at the time benefits were paid is on the Department of Social Services.[23]

If a community spouse is found to have excess resources, and if said community spouse files a spousal refusal, refusing to contribute to the support of the institutionalized spouse, then the DSS may successfully argue that an implied contract exists between the county and the refusing community spouse.[24] Excess resources are defined as non-exempt assets in excess of the community spouse resource allowance (CSRA), which is currently $74,820 in New York State. However, it is important to note that the CSRA is not fixed in stone. A community spouse whose income is below the minimum monthly maintenance needs allowance may request a fair hearing for the purpose of obtaining an increased CSRA.[25] If an implied contract is found to exist and the community spouse dies with excess resources then the Court may hold that Medicaid benefits paid out on behalf of the institutionalized spouse may be recovered from the estate of the community spouse.

In general, recovery can be had against the estate of the Medicaid recipient only to the extent that there are probate assets against which a recovery can be made. It is unclear whether or not the same rule would apply to the estate of the community spouse. However, past experience indicates that the Department of Social Services is likely to take the position that it may recover against both the probate and non-probate assets of a community spouse against whom it has an implied contract.

In order to recover against the non-probate assets, the Department of Social Services will have to find some legal ground in support of its position. The most likely legal ground would be that the community spouse made a fraudulent conveyance to the detriment of Department of Social Services as a known creditor. This argument has been successfully used by the Department of Social Services against the estate of the Medicaid recipient.[26] It is not however clear whether or not this same theory could be successfully applied against the estate of the community spouse. Such an application would appear to run contrary to the Social Services Law, which indicates that transfers by the applicant spouse after Medicaid eligibility has been determined will have no impact on the Medicaid eligibility of the beneficiary spouse.[27] If the Department of Social Services is successful in connection with the claim for implied contract against the community spouse then they may be to entitled pre-decision interest on such a claim.[28]

As noted above, the assets of a deceased community spouse are not considered available to an

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st In Re Estate of Little, 684 N.Y.S.2d 424 (4th Dept. 1998)
21 18 N.Y.C.R.R. 360-2.3(c)(1)
22 Matter of Estate of Craig, 82 N.Y.2d 388 (1993)
23 Matter of Dabney, 479 N.Y.S.2d 596 (3d Dept. 1984); Matter of Craig, 82 NY 2d 388 (1993)
24 See Commissioners of the Department of Social Services City of NY v. Fishman, 722 N.Y.S.2d 226 (1st Dept. 2001); Commissioner of the Department of Social Services v. Spellman, 672 N.Y.S.2d 298 (1st Dept. 1998); NY SSL § 366(3)(a)
25 NY SSL §366-C(8)(c); 18 N.Y.C.R.R. §360-4.10(c)(7)
26 Bandas v. Emperior, 471 N.Y.S.2d 195 (Sup. Ct., Cayuga County 1983)
27 NY Social Services Law §366-C(5)(c)
28 Estate of Klink, 278 N.Y.S.2d 883 (4th Dept. 2000)

institutionalized but disinherited spouse until the right of election is exercised. Assets passing to a spouse through a will or intestacy, which are disclaimed will not be considered available until the disclaimer is made. Also as noted above assets passing under a will or through intestacy, which are not disclaimed should not be considered available until the assets have been marshaled, evaluated and administered by the fiduciary.

If equipped with a proper estate plan and a clear understanding of certain post mortem planning techniques such as disclaimers and the right of election, the impact of federally mandated estate recoveries on the estates of Medicaid recipients and their spouses can be minimized.

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