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MEDICAID UPDATE 2015

MEDICAID ESTATE RECOVERY

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DEFINITION OF "ESTATE" FOR PURPOSES OF MEDICAID RECOVERY

Pursuant to Federal law at 42 USC §1396p(b)(4),

> the term "estate", with respect to a deceased individual —
>
> (A) shall include all real and personal property and other assets included within the individual's estate, as defined for purposes of State probate law; and
>
> (B) may include, at the option of the State (and shall include, in the case of an individual to whom paragraph (1)(C)(i) applies), any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.

Therefore, each state has the discretion to define estate either broadly or narrowly for purposes of Medicaid recovery. New York has chosen a narrow definition found at Social Services Law ("SSL") §369(6) which states "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." This definition does not include property that passes by operation of law such as joint accounts, trusts, life insurance, retirement accounts and TOD accounts. However, in Matter of Albasi, 196 Misc. 2d 314, 765 NYS2d 213 (Sur. Ct. Bronx County 2003), the Court held that irrevocable trust property is subject to Medicaid recovery when the grantor exercised a general power of appointment over the trust assets in accordance with his Will. Careful drafting can avoid this result.

Since trust assets are not included in the definition of estate, placing assets, including the residence, in a trust, irrevocable or revocable, will avoid estate recovery upon death. Additionally, transferring these assets into a revocable trust does not trigger a penalty period for purposes of calculating the period of ineligibility because such a transfer is merely a change in form of ownership. Transfers to a revocable trust do not

change the character of these assets and these assets will still be considered an available resource.

There was an attempt by New York to expand its definition of estate. In 2011, as part of the changes advocated by the Medicaid Review Team appointed by Governor Andrew Cuomo, the definition of estate was expanded to include recoveries of non probate assets from Medicaid recipients. However, in 2012, in the budget legislation in Section 56 of Part D of Chapter 56 of the Laws of 2012, the newly expanded definition of estate for purposes of Medicaid recovery was repealed. The original language of SSL §369(6) was reinstituted and governs today.

WHAT TYPES OF EXPENSES AND WHAT AMOUNT CAN BE RECOVERED?

SSL §369(2)(b) and 42 U.S.C. §1396p(b)(1) provides that the state can recover medical assistance properly paid in the following instances:

A) Recovery from estate or upon the sale of real property which has a TEFRA lien; or

B) If recipient is 55 years or older when received medical assistance, the amount which may be recovered is the actual cost of the institutional services, home and community based services, related hospital and prescription drug services and other items provided by the state. 42 U.S.C. §1396p(b)(1)(B)(i), (ii).

In the case of non-institutionalized individuals, the state can place a lien on personal injury claims, estate of recipient 65 years or older, and property based on court judgment for medical assistance incorrectly paid. 92 ADM-53, at page 14.

In 2012, SSL §369(7) was amended to require New York State "to recover the cost of medical assistance." New York will now institute accident lien recoveries (SSL § 104-b), third party liability recoveries, spousal refusal and responsible relative recoveries to recover "the cost of medical assistance not correctly paid." See SSL §366(3). Even when there is a surviving spouse, minor or disabled child, New York can collect personal injury proceeds. SSL §369(2)(c).

TEFRA "PRE-DEATH" LIENS

TEFRA is an acronym for the Tax Equity and Fiscal Responsibility Act of 1982 (Public Law 97-248). See Section 1917(a) of the Social Security Act and Sections 3810.A.1. and F. of the State Medicaid Manual HCFA Pub. 45-3. Under TEFRA, only two types of liens may be placed on the property of the Medicaid recipient prior to death:

1) Lien pursuant to a judgment resulting from benefits incorrectly paid; and

2) Lien against real property of a Medicaid recipient in a nursing home whom after notice and the opportunity for a hearing is determined, cannot be expected to return home.

A TEFRA lien is the only type of lien that may be placed on a Medicaid recipient's home prior to death. Such a lien can be for medical assistance correctly paid. See 92 ADM-53, at Section III. D.2.b. In order to do so, the beneficiary must be "permanently institutionalized" and not reasonably expected to be discharged from the facility. SSL §369(2)(a)(ii); 18 N.Y.C.R.R. §360-7.11(a)(3)(ii). These liens do not apply to recipients receiving home based community care. DSS must provide adequate notice and this finding of permanent institutionalization can be refuted at a fair hearing. The state must have a specified process for making this determination. 42 U.S.C. §1396p(a)(2); 42 C.F.R. §433.36(d).

Even if there is no reasonable expectation that the recipient will ever return home from the nursing home, a recipient's intent to return home is effective for determining that the home is not an available resource upon applying for Medicaid. However, a subjective intent to return home will not impede the imposition of the TEFRA lien. If the beneficiary actually returns home from the nursing home, the lien must be released by the state. 18 N.Y.C.R.R. §360-7.11(a)(3)(i); SSL §369 (2)(a)(ii).

Under SSL §369(2)(a)(ii); 18 N.Y.C.R.R. §360-7.11(a)(3)(ii), no Medicaid lien may be placed on the residence if any of the following relatives lives in the home:

- A spouse;
- A child under 21;
- A blind or permanently disabled child of any age; or

- A sibling with an equity interest in the home who has resided in the home for at least 1 year prior to the beneficiary's admission to the medical institution. An equity interest in the home can be broadly interpreted to include payments for home improvements, mortgage, utilities, and similar expenditures.

Medicaid cannot recover on a TEFRA lien which has been placed on a home if any one of the following criteria is met:

- A child of any age who resides in the home and meets the criteria of a caretaker child because such child resided in the home with the recipient for at least two years before such recipient became institutionalized and such child provided the care that enabled such recipient to stay at home. See 18 NYCRR §360-7.11(b)(3); SSL §369 (2)(b)(iii)(B). If such child lived with the recipient while the recipient had a chronic illness, the presumption is that such child was a caretaker child.
- A dependant relative residing in the home to whom the recipient provided more than 50% of the relative's support prior to the recipient's death. See 92 ADM-53, at Section IV. E.4.c.
- The property produces income and is used in the course of a business. See 92 ADM-53, at Section IV.E.4.d.
- DSS failed to comply with the required procedures for filing and serving the notice of the claim. See SSL §104-b(2).

However, while DSS cannot collect on the lien in the above circumstances, DSS still has a right of recovery against an estate when such sibling who has an equity interest, dependent relative or a caretaker child resides in the home. Once they are no longer in the home, DSS can enforce the lien. In order to protect against this possibility, the recipient may wish to transfer the residence to a caretaker child prior to applying for Medicaid. By not doing so, the recipient is at risk for the residence becoming an available resource for eligibility purposes, and becoming subject to a lien (if there is no spouse or sibling who meets the statutory requirements) and if the caretaker child is not a minor, blind, or disabled child. Transfer prior to eligibility avoids both the possibility of a lien being imposed and the residence being subject to estate recovery.

If the residence is transferred with a TEFRA lien in place, New York can require the recipient to use the equity in the residence to repay the Medicaid benefits paid. If the recipient dies with a TEFRA lien in place and the residence is transferred as part of the estate administration process, then the estate beneficiary must pay off the lien in order to clear title to the property. If the beneficiary has no ability to pay then the beneficiary must either obtain a loan/mortgage or sell the residence. Inability to pay will not release the lien. If the resident dies with a TEFRA lien in place, then DSS may institute a right of recovery upon the sale of the property if it is sold instead of distributed to a beneficiary. 02 OMM/ADM-3 at 7. The right of recovery is limited to the amount of Medicaid paid once the finding that the recipient was permanently institutionalized.

No lien can be imposed on the residence for medical assistance properly paid if the recipient is receiving Medicaid extended coverage under the Partnership for Long-Term Care Program if the recipient has exhausted the coverage and benefits under an approved long-term care insurance policy. SSL §367-f . Additionally, no lien can be placed on the recipient's life estate interest in a residence. 96 ADM-8 at page 21. For example, if the residence is transferred to a caretaker child and the applicant retains a life estate, DSS cannot place a lien on the life estate interest of the recipient even if the recipient becomes institutionalized. Nor can DSS impose a lien against the caretaker child's remainder interest since a child is not legally responsible for the cost of a parent's medical expenses. In this example, no estate recovery is possible against the recipient's life estate interest in the residence as it is extinguished upon the death of the recipient and the residence passes by operation of law to the caretaker child remainderman. No estate recovery is allowed against the caretaker child's remainder interest in the residence because a child is not legally responsible for the cost of a parent's medical expenses.

Finally, DSS cannot impose liens on reparations received by special populations, such as Holocaust survivors. 02 OMM/ADM-3, at page 10.

EXCEPTIONS TO POST-DEATH LIENS

If the recipient is survived by a spouse then the state may not institute recovery proceedings against the recipient's estate or on a lien until the surviving spouse dies and there is no surviving minor, blind, or disabled child. See SSL §369(2)(b)(ii); 18 NYCRR §360-7.11(b)(2). The amount which can be recovered is the support rendered until the recipient's death (see Richardson v. Bryant, 19 Misc 3d 1129A, 866 NYS2d 95 (Sup. Court Monroe County 2008), aff'd., 66 AD3d 1411, 885 NYS2d 848 (4th Dept. 2009); and Matter of Schneider, 15 Misc. 3d 1146A, 841 NYS2d 823 (Sur. Court Nassau County 2007)). The spouse's liability to the nursing home falls under the Debtor and Creditor Law.

At the time of the recovery proceedings against the surviving spouse's estate, DSS must prove that the surviving spouse was a "responsible relative" who could support the recipient while the recipient was receiving Medicaid benefits. See SSL §366(3); Matter of Craig, 82 NY2d 388, 604 NYS2d 908, 624 NE2d 1003 (1993) (holding surviving spouse was not a legally responsible relative where surviving spouse did not sufficient resources to pay for spouse's medical needs at time spouse was receiving Medicaid, therefore, no recovery could be made against surviving spouse); Matter of Conroy, 201 AD2d 855, 608 NYS2d 333 (3rd Dept 1994) (holding that where surviving spouse was not financially responsible at the time Medicaid was received, no recovery is possible). Where a surviving spouse transferred assets into a joint account with a third party, the Court found that such spouse was a legally responsible party and permitted recovery (Matter of Klink, 278 AD2d 883, 718 NYS2d 758 (4th Dept 2000), appeal dismissed, 96 NY2d 851, 729 NYS2d 666, 754 NE2d 768 (2001)). In order to recover against the surviving spouse, DSS must prove that the surviving spouse had assets in excess of the community spouse resource allowance during the time Medicaid was provided to the recipient. In 2014, the Minimum Community Spouse Resource Allowance (CRSA) was $117,240.00. Even if the surviving spouse had signed a spousal refusal, DSS still can file a lien against the community spouse's estate. The maximum DSS can collect from the surviving spouse's estate is equal to the benefits actually paid

out on behalf of the recipient. However, if the surviving spouse survives by at least ten years, then DSS cannot recover anything since recovery is limited to what has been paid out during the past ten years. DSS can even impose a lien against the community spouse's estate if the community spouse predeceases the recipient spouse if DSS can show that the community spouse had assets in excess of the community spouse resource allowance.

In addition, the recovery can only be made if the recipient had no surviving children under the age of 21 years or surviving children of any age who are blind or permanently and totally disabled (SSL §369(2)(b)(ii)); 18 NYCRR §360-7.11(b)(2)). Matter of Andrews, 234 AD2d 692, 650 NYS2d 470 (3d Dept. 1996), clarified that in the case where the recipient was survived by one disabled child and one non-disabled child, DSS could not institute recovery proceedings against the non-disabled child's share of the recipient's estate because she was not a responsible relative. Matter of Burstein, 160 Misc2d 900, 611 NYS2d 739 (Sur. Court New York County 1994), also held that the same analysis applies where the other beneficiaries are not children and that no recovery is allowed so long as the recipient is survived by a disabled child. Regardless, DSS may still institute recovery proceedings and attempt to recover. In such a case, one should demonstrate that the disabled child, even if financially independent and not a beneficiary of the estate, will be hurt by the recovery. The logic being that the recipient's estate is an informal means of support and any reduction to it will injure the recipient's disabled child. However, where surviving spouse had excess resources at the time the recipient applied, DSS could institute recovery proceedings even where there was a disabled child. In that case, the responsible relative standard governs recovery and in effect trumps the disabled child standard. See Matter of Schneider, 70 AD3d 842, 894 NYS2d 162 (2d Dept. 2010). Disability is proven by the child either receiving Social Security Disability (SSD) or Supplemental Security Income (SSI). Additionally, medical evidence of a disability can be provided.

THE PROCESS AND PROCEDURE OF RECOVERY

Under the Omnibus Budget Reconciliation Act of 1993 (OBRA '93) Pub L 103-66, §13611[b], 107 US Stat 624, 525. 42 U.S.C. §1396p et seq., and SSL §366, the states must seek recovery from Medicaid beneficiaries who:

- Were age 55 or older when they received Medicaid;
- Had been determined to be permanently institutionalized, regardless of age; and
- Were not survived by a spouse or certain other dependents deemed to have a deserving claim on the estate.

At Section 3810G. of the State Medicaid Manual, federal law requires all states to incorporate the following procedures in their estate recovery program:

1) The State should notify recipients about the estate recovery program during their initial application and annual re-determination.

2) The State must notify survivors about the initiation of estate recovery and give them an opportunity to claim a hardship exemption.

3) The State must establish procedures and criteria to waive recovery if it would cause undue hardship.

The attorney should send a letter to DSS to notify of the recipient's death. Previously the letter was sent to the Bureau of Resources. However, such entity no longer exists as of 2013 and its functions have been outsourced to Health Management Services based out of Texas. There is an office in Albany which handles the local issues. In Westchester County, the notice should be sent to the DSS nursing home unit to the attention of Pat Sims.

At the time of this notification, the attorney should also request a Medicaid Statement of Benefits which will show all of the benefits paid to the recipient. A HIPAA release may be needed to receive this information. Once the Statement is received, a careful review of it should be made to look for errors such as dates of service, i.e., were they before recipient went to the nursing home, after recipient died, etc. A careful review of the recipient's resources should be made since refunds and additional accounts can surface post death. If the recipient had a first party Supplemental Needs Trust, there will

be a payback provision in this Trust. The surviving spouse's resources must be examined as well.

At times, DSS will reach out before the attorney can send notification of the recipient's death, as DSS monitors Surrogate Court filings. Additionally, the nursing home may advise DSS before the recipient's attorney or family members. DSS will send a notice of claim regarding the right of recovery to the fiduciary of the estate. It will also send a questionnaire to be completed by the fiduciary or the family. See Exhibit A. The attorney should respond to the notice in order to refute the claim or to acknowledge that the claim has merits and that the fiduciary or family members will make payments to DSS. The issue will be to examine Medicaid properly paid versus improperly paid.

DSS can assert the recipient's right of election against the community spouse's estate. Under EPTL §5-1.1-A the elective share is equal to the greater of $50,000 or one-third (1/3) of the decedent's net estate which includes all assets and not just probate assets. A waiver of elective share if done in advance of qualifying for Medicaid, will offer some protection.

In the case where the spouse has signed a spousal refusal, DSS may institute a lawsuit to recover the befits paid from the surviving spouse. Despite this risk of a lawsuit, the practice of signing the spousal refusal should be continued. DSS does not always institute the lawsuit. Even if DSS does instate the lawsuit, DSS is often willing to settle for significantly less than the cost of care provided and the payment to DSS can often be delayed until the community spouse passes away. For example, the spouse may be using all of her money on her own care to avoid a nursing home. If DSS successfully recovers against her for husband's medical assistance paid, then the surviving spouse will become institutionalized due to lack of funds to maintain living at home. This institutionalization will ultimately cause the state to pay out more money than if DSS had not pursued the original claim. In such an instance, the state may be willing to negotiate the amount of the recovery. Since DSS can only recover costs at the Medicaid reimbursement rate and not the private pay rate, even if DSS will not settle, the surviving spouse still has saved several thousand dollars because of the difference between these two rates. For example,

if the private pay rate is $12,000/month and the Medicaid rate at the same facility is $8,000/month, the surviving spouse will save at least $4,000/month. If DSS is willing to settle, the surviving spouse can save even more. Depending on how long the state paid for the recipient's care, that monthly saving can be enormous.

DSS may waive recovery when the recovery effort itself would be costly because asset ownership is complicated or legally ambiguous. Other times, DSS chooses not to pursue if the asset is hard to reach. For example, if a recipient's family chooses not to probate the Will because the sole asset will pass to DSS, then DSS will need to choose between fronting the legal fees associated with probating the recipient's Will and collecting the asset, since the family will not assist in the process. Depending on the size of the asset recoverable and the amount of Medicaid spent on the recipient, DSS will have to do a cost benefit analysis to determine whether to pursue or not to do so. DSS may chose to appoint a voluntary administrator under SCPA §1303 since DSS can only receive estate property from a fiduciary. See 92 ADM-53, Section III.F.

SURVIVORS' CLAIM FOR EXEMPTION BASED ON HARDSHIP

Under 42 U.S.C. §1396p(b)(3), SSL §369(5); 02 OMM/ADM-3 at 8, DSS can waive recovery against an estate if there is "undue hardship." The fiduciary or beneficiary of an estate asserts the hardship claim. New York follows the federal State Medicaid Manual's interpretation of "undue hardship" which provides that a finding of undue hardship exists where the estate is the sole income producing asset of the beneficiaries, a homestead of modest value is the primary residence of the beneficiary or there are other compelling circumstances. See, 02 OMM/ADM-3 at 8, State Medicaid Manual §3810. An example of sole income producing asset would be a business with a limited income or a family farm. In re Cox, 687 N.Y.S.2d 594, 595 (Sur. Ct. Cattaraugus County 1999). Modest value of a home is defined as the no greater than 50% of the average price of homes in the county where the home is located. However, if estate planning was used to avoid recovery or the hardship is claimed to support the beneficiary in a pre-existing lifestyle, then a finding of no undue hardship is made.

In addition, a TEFRA lien may be waived "[i]n cases of undue hardship, as determined pursuant to the regulations of the department in accordance with criteria established by the secretary of the federal department of health and human services." SSL §369(5).

PRIORITY OF MEDICAID LIENS IN ESTATE ADMINISTRATION

A Medicaid lien must be satisfied prior to any other distributions to creditors or beneficiaries because the state is a preferred creditor (SSL §104(1)). However, since DSS only has a claim against the recipient's probate or intestate estate, its scope of claim is limited which distinguishes it from other creditors who may have a legal claim against the recipient. See Cattaraugus County v. Keller, 1997 US Dist, LEXIS 20193 (WDNY 1997) holding that the Medicaid Act does not preempt the Debtor and Creditor Law for purposes of recovery when Medicaid was incorrectly paid and recipient had transferred property to his spouse during his lifetime.

There is a six year statute of limitations for claims against an estate based on the implied contract between the recipient and DSS. SSL §104, CPLR §213. The statute of limitations begins when a fiduciary is appointed for the estate. See Matter of Bustamante, 256 AD2d 463, 682 NYS2d 102 (2d Dept 1998), Matter of Bricker, 183 Misc2d 149, 702 NYS2d 535 (Sur Court Bronx County 1999), and Matter of Holmes, 77 Misc2d 382, 353 NYS2d 676 (Sur Court Nassau County 1974). DSS may claim the actual cost of services provided within ten years of the recipient's death even though the right of recovery begins to accrue at age 55. See Bustamante, Matter of Colon, 83 Misc2d 344, 372 NYS2d 812 (Sur Court Kings County 1975). For example, a 30 year old qualifies for Medicaid. He dies at the age of 70. The claim is limited to expenses provided between ages 60-70 only.

DSS assets the claim in Surrogate's Court if there is no waiver and if the fiduciary rejects the claim. 02 OMM/ADM-3, at pages 10-13 and SCPA Article 18. The claim must be in writing, describe the basis of the claim, explain that the fiduciary or beneficiary can request an undue hardship waiver and be delivered personally to the

fiduciary or by certified mail, return receipt requested. SCPA §1803 and 02 OMM/ADM-3, at page 10.

A creditor has seven months to file a claim after the issuance of letters testamentary or letters of administration. SCPA §1802. After this period the fiduciary is protected from liability if such fiduciary distributes the estate's assets and had no knowledge or no reason to know about any claims. There is a presumption that a fiduciary knows that a recipient had received Medicaid during such recipient's lifetime and therefore, a Medicaid claim may exist upon the death of the recipient. If a creditor fails to file a claim within the seven months, the creditor may still enforce the claim against the beneficiaries of the estate. EPTL §12-2.1.

If the recipient resided in a nursing home and is not survived by a spouse or minor children, and no fiduciary is appointed within six months of death, then DSS may seek recovery against the recipient's account at the nursing home up to $5,000. SCPA §1310(4) and 02 OMM/ADM-3, at pages 12-13. This right does not apply to a recipient who died at a Veterans Administration facility or died in a private nursing home which was paid for by the VA. 02 OMM/ADM-3 at 13.

EXHIBIT A

This presentation is for informational purposes only and is not intended as a substitute for legal, accounting or financial counsel with respect to your individual circumstances.

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