



NEW YORK
CITY BAR

Contact: Maria Cilenti - Director of Legislative Affairs - mcilenti@nycbar.org - (212) 382-6655

**REPORT BY THE COMMITTEE ON LEGAL PROBLEMS OF THE AGING
OPPOSING THE EXPANSION OF MEDICAID ESTATE RECOVERY
AS PROPOSED IN THE 2010 EXECUTIVE BUDGET**

The mission of the Legal Problems of the Aging Committee of the Association of the Bar of the City of New York has for many years been devoted to enhancing the lives of New York's senior citizens, in general and, more particularly, to the most vulnerable of the elderly due to reduced financial means or severe disabilities. The committee primarily fulfills this mission by focusing on substantive law that affects New York's elderly through educating the public and working with elected officials to comment on proposed legislation and/or suggest enhancements.

The Committee respectfully submits this report to express its concerns regarding a proposed Executive Budget change to Medicaid estate recovery, which we believe would have an adverse impact on some of New York's most vulnerable citizens and, in certain instances, would appear to conflict with existing law. The Committee is concerned that enactment of this proposal would cause seniors to make outright transfers of their two most valuable assets, their homes and their retirement accounts. This flies in the face of long-settled public policy. These prized assets were made exempt for Medicaid eligibility purposes under federal law for the very reason that they should not be subject to state claims after the recipient's death: it serves the public good to encourage individuals to remain in their homes and to save for their retirement.

EXPANSION OF MEDICAID ESTATE RECOVERY

The Governor's Article VII Budget Bill contains provisions at Part B, Sections 25 and 25-a to expand Medicaid estate recovery in Section 369 of the Social Services Law (the "Budget Provision").

"Medicaid estate recovery" describes when the State is legally entitled to recoup, from a Medicaid recipient's estate, the cost of services provided to a Medicaid recipient during lifetime. The Budget Provision would (i) expand Medicaid estate recovery to include recovery from the *recipient* of a decedent's property by distribution or survival, and (ii) expand the definition of "estate" for the purposes of recovery to include "any other property in which the individual had any legal title or interest at the time of death, including jointly held property, retained life estates, and interests in trusts, to the extent of such interests." Although the Budget Provision is meant to become effective April 1, 2010, Section 73(c) provides, "this act shall not be construed to alter, change, affect, impair or defeat any rights, obligations, duties or interests accrued, incurred or conferred prior to the effective date of this act...."

Currently, the state can recover Medicaid expenses made for an individual only from that individual's probate estate, i.e., property included within the individual's estate that passes under the terms of a valid will or by intestacy. The State *cannot* recover property passing to a beneficiary outside of estate administration such as through a beneficiary designation or by operation of law. The Budget Provision would change that, by allowing Medicaid estate recovery efforts to reach beneficiaries after the Medicaid recipient has died (such as a beneficiary surviving spouse on a joint account, a beneficiary of a

retirement account, or a beneficiary surviving spouse/child who jointly owned a home with the Medicaid recipient).

The Budget Provision's Impact on Seniors' Homes

Currently, the state has a right to recover from a Medicaid recipient's estate, but the estate will naturally be limited due to the Medicaid eligibility rules that existed during the Medicaid recipient's life. For purposes of determining whether an individual is eligible for Medicaid, the recipient may only have assets valued at \$13,800 plus limited exempt resources. In New York, those exempt resources are likely to be a personal needs account with a maximum of \$13,800, a homestead valued under \$750,000, and/or a retirement plan. Under current law, then, a senior couple can jointly own a home worth under \$750,000, and when one of them dies, the surviving spouse retains title to the home and the home is not subject to Medicaid estate recovery.

Despite the fact that Medicaid eligibility rules encourage and allow for seniors to keep an interest in their homes, the Budget Provision's proposed recovery expansion may well mean that many seniors will lose control of their homes prematurely. That is, seniors will not want to retain any interest in the home for fear that, following death, the home will be subject to Medicaid estate recovery. Outright transfers tend to deprive the elderly and disabled of dignity and put them at the mercy of the transferee, usually a child or other relative.

In addition, less income will be available to help pay for health services during the recipient's lifetime because the home will no longer be available to generate rental income on the recipient's behalf in those situations when the recipient has moved into a nursing home.¹ Encouraging outright transfers rather than retained life interests in the homestead by the Medicaid recipient will reduce income that that would be available to reduce or offset the amount that would be spent on the person's behalf by Medicaid. During the lifetime of the life tenant, the benefits of the life estate are enjoyed by the life tenant. These benefits include income from property rented by the life tenant. If the life tenant is receiving Medicaid benefits, this income is included as part of such person's net available monthly income and, to the extent that such person's net available monthly income exceeds the Medicaid allowable amount, it is used to pay towards the cost of such person's medical care. Accordingly, encouraging Medicaid applicants to transfer property to avoid the new estate recovery without reserving a life estate will reduce the applicant's net available monthly income and increase the cost to Medicaid.

The Budget Provision's Impact on Senior's Retirement Assets

Similarly, expanding estate recovery to cover the other most significant exempt asset, retirement benefits, will encourage persons to cash in and transfer the proceeds from their exempt retirement accounts. The required distributions of a retirement plan are income which becomes part of a recipient's Medicaid must "spend down" before s/he is eligible for Medicaid funding, and would be part of the estate which inures to the benefit of Medicaid. Therefore, encouraging Medicaid applicants to cash in retirement plans and then transfer those proceeds will reduce the applicant's net available monthly income and increase the cost of his/her care to Medicaid. Under current law, the retirement assets can freely pass to the beneficiary at the recipient's death without fear of Medicaid estate recovery against the retirement monies.

¹ If the Medicaid recipient was not living at the home, but was receiving institutional care, the State's interest can already be protected by a lien. Therefore, the Budget Provision will most likely be used for estate recovery against a homestead of a recipient receiving community based services, such as home care.

Potential Conflict of Laws

The proposed expansion to the definition of estate appears to conflict with existing law and will result in competing claims to property of a deceased Medicaid recipient.

First, Medicaid recovery claims against retirement plans may conflict with the anti-alienation provisions of the Employee Retirement Income Security Act of 1974 (ERISA) and CPLR 5205 (c) (2). It is a fundamental precept of these provisions that retirement accounts are protected from creditors. The public policy for this protection is the desire that individuals save and maintain funds for retirement. In general, a plan subject to ERISA allows for the transfer of retirement accounts to beneficiaries at the death of the retiree, at which time the beneficiary becomes fully vested and is not subject to a claim against those monies except in the case of fraud. The Budget Provision allows for just the opposite. It calls into question the vesting of the beneficiary's interest free and clear of claims.

Second, the Budget Provision may conflict with New York's Estates Powers and Trusts Law as well. By way of example, life estates terminate upon the death of the life tenant and, upon the life tenant's death, the remainder interest passes to the remainderman. If the remainder beneficiaries are ascertainable at the time the life estate is created, the remainderman has a future estate which is indefeasibly vested. EPTL § 6-4.7 defines a future estate indefeasibly vested as "...an estate created in favor of one or more ascertained persons in being which is certain when created to become an estate in possession whenever and however the preceding estates end and which can in no way be defeated or abridged." This is the case with most transfers of real property with a retained life estate. The same legal principles that apply to a life estate are also applicable to interests in trusts. As such, attempts to recover against a subject property that has already legally passed to a beneficiary will engender litigation and may very well fail.²

CONCLUSION

We are concerned that the expansion of Medicaid estate recovery would encourage a public policy that would deprive the elderly and disabled of home ownership and control over their own lives. It would reduce the available income that a Medicaid recipient has to offset the costs that would be incurred by Medicaid. It would conflict with other Federal and New York statutes dealing with the legal interests of beneficiaries of such assets, including life interests, trust interests, and retirement assets, leading to costly litigation, meaning that the expansion of estate recovery will likely not be successful in any event.

For these reasons, we urge that the budget proposal to expand Medicaid estate recovery beyond the current estate definition be eliminated.

Respectfully Submitted,

Legal Problems of the Aging Committee
Russell N. Adler, Chair

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² By way of example, the States of Massachusetts and Minnesota recently back-tracked from efforts to expand Medicaid recovery beyond the probate estate because of these very problems.