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

COMMITTEE ON LEGAL PROBLEMS OF THE AGING

**COMMENTS ON PROPOSED REGULATIONS REGARDING
EXPANDED MEDICAID ESTATE RECOVERY**

As part of the New York State 2011 budget legislation, Chapter 59 of the Laws of 2011, Medicaid estate recovery was expanded to include non-probate assets. Prior to its amendment, Social Services Law Section 369, subdivision 6, limited Medicaid estate recovery to an individual's property included within the individual's estate passing under the terms of a valid will or by intestacy. It did not include property passing to a beneficiary outside of estate administration such as through a beneficiary designation or by operation of law.

The expanded definition of estate in Social Services Law §369 subdivision 6, now provides that "an individual's estate also includes any other real and personal property and other assets in which the individual has 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 to the extent of the decedent's interest in the property immediately prior to death. The Regulations at 18 NYCRR 360-7.11 have been amended, and are effective September 8, 2011, to implement this change in the Social Services Law. The Committee's primary objection to the implementation of Chapter 59 of the Laws of 2011 in the proposed regulations centers on the retroactive application of these emergency regulations. The regulations allow the Medicaid program to recover against the expanded estates held by any Medicaid recipients who die after September 8, 2011. The regulations do not consider when the property was transferred if the Medicaid recipient retained an interest until death.

This retroactivity contradicts the enabling language of the statute and expands Medicaid's estate recovery beyond the intent of the legislature. Section 111(u) of 2011 NY Laws Ch. 59 Part H provides that:

"This act shall not be constructed 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."

To comply with this statute the definition of "estate" in the proposed regulations cannot impair interests in property that vested before April 1, 2011. The legislature has thus directed the Department of Health not to impair interests in property that vested before April 1, 2011 in drafting the regulations and in establishing the definition of recovery against an expanded estate. These

vested interests include property transferred subject to a life estate pursuant to Sections 6-4.7 and 6-5.10 of the Estates, Powers and Trusts Law (“EPTL”). Under those sections, where the remainder beneficiary is ascertainable at the time the life estate is created, he is deemed to have acquired a future estate which is indefeasibly vested. EPTL 6-4.7 defines an indefeasibly vested future estate 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 of most transfer 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. *Matter of Hobert*, 7 Misc.3d 447 (Surrogate’s Court, Westchester Co. 2004).

Under New York Law, at least since the early part of the last century, remainder interests have been deemed the present property of the remainder beneficiary, fully alienable and transferable. “The nature of a remainder interest in property is such that it is descendible, devisable, and alienable in the same manner as an estate in possession.” *Ray v. Jaeger*, 131 A.D. 294 (2nd Dept. 1909). Thus, even before the life tenant dies, New York law provides that the remainderman is free to dispose of his share during his lifetime, and that, if he predeceases the life tenant, his share becomes part of his gross estate. *Matter of Kimber*, 208 Misc. 581 (Surrogate’s Court, Kings Co. 1955).

The remainderman’s interest is a property interest, and the state may not arbitrarily deprive him of it. *Consumers’ Union of U.S., Inc. v. State*, 5 N.Y.3d 327 (2005). In *Consumers’ Union*, the Court of Appeals ruled that a state is deemed to have created a property interest whenever it creates, through its rules, a legitimate claim of entitlement to the thing or benefit at issue. *Id.* at 352. EPTL Sections 6-4.7 and 6-5.10, as well as the long settled precedent that buttresses them, have with little doubt created just such a ‘legitimate claim of entitlement’ of which the remainderman may not be arbitrarily stripped.

Thus, as matters presently stand, even applied prospectively, the recent amendments to Social Services Law section 369 (6) arguably are in conflict with firmly established law and are likely to generate litigation.¹ It stands to reason, therefore, that if these amendments are made to apply retroactively to transfers made earlier and in reliance on long settled law, grave issues of fundamental fairness would arise. Specifically, attempts to recover against a subject property that has already legally passed to a beneficiary is likely to result in litigation to determine if the vested interest can be lawfully taken.

Moreover, if the expanded definition of Medicaid estate recovery is permanently adopted, dispositions to remainder beneficiaries made by individuals who submitted Medicaid applications in compliance with the then applicable laws, rules, regulations and guidelines will be null and void. The regulation retroactively imposes a condition upon the receipt of benefits without notice and without an opportunity to plan accordingly. Seniors who relied in good faith on approval of their Medicaid benefit plans will be forced to burden future generations with a legacy of confusion created by this regulation.

¹ The Committee opposed the amendments to Social Services Law section 369(6) when initially proposed, on this and other grounds, see: <http://www.nycbar.org/pdf/report/uploads/20071896-ReportonOpposingtheExpansionofMedicaid.pdf>; and <http://www.nycbar.org/pdf/report/uploads/20072085-ReportonPositionoftheCommitteeonProposedNYS2011ExecutiveBudget.pdf> (Part II).

It is our Committee's position that the final regulations and the administrative directives issued by the Department of Health must incorporate the language in section 111(u) and the new expanded estate definition of "estate" should not apply to transactions such as retention of life estates and creation of interests in trusts that were completed prior to April 1, 2011. Please note these comments address solely the issue of retroactivity and do not address other provisions of the regulations.

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