

Medicaid Estate Recovery

Answers to Frequently Asked Questions



Q. If federal law requires Medicaid estate recovery, why has a program not been adopted in Michigan, and why is it being considered now?

- A. Since the federal law was passed ten years ago, forty-eight states have adopted estate recovery programs. Texas, the other holdout state, has passed legislation and may implement estate recovery in the near future. Although for years Michigan has had regulations poised to implement estate recovery, the state legislature has declined to adopt such a program because it is so strongly opposed by seniors and other groups.

State lawmakers are now considering Medicaid estate recovery because this year Medicaid will spend \$1.1 billion to care for about 44,000 people in Michigan nursing homes. That cost represents a 35% increase in the past four years and accounts for 70% of all bills for the state's 450 nursing homes.

Q. What is Estate Recovery?

- A. Medicaid law requires that following the death of a Medicaid recipient, a state must attempt to recover from his or her estate whatever benefits it paid for the recipient's care in a skilled nursing facility or other medical institution. Recovery does not apply to Medicaid benefits paid for home and community-based services, or related hospital and prescription drug services. Recovery cannot begin until after the death of the recipient and his or her spouse, or as long as there is a child of the deceased who is under 21 years old or who is blind or disabled.

States are required to recover funds from the Medicaid recipient's *probate* estate (property held in the beneficiary's name only). Each state can define by law what is included in a probate estate. States have the option of also seeking recovery against property in which the recipient had an interest but which passes outside of probate. This could include jointly held assets, assets in a living trust and life estates. Given the rules for Medicaid eligibility, the only probate property of substantial value that a Medicaid recipient is likely to own at death is his or her home. States that have not opted to broaden their estate recovery to include non-probate assets may not make a claim against the Medicaid recipient's home if it is not in his or her probate estate.

In addition to the right to recover from the estate of a Medicaid beneficiary, state Medicaid agencies would be able to place a lien on real estate owned by a Medicaid recipient during her life unless certain dependent relatives are living in the property. If the property is sold while the Medicaid beneficiary is living, not only will she cease to be eligible for Medicaid due to the cash she would net from the sale, she would also have to satisfy the lien by paying back the state for its coverage of her care to date. Exceptions to this rule are cases where a spouse, a disabled or blind child, a child under age 21 or a sibling with equity interest in the home is living in the home. Medicaid estate recovery only allows for recovery of the marital home after the death of the at-home spouse.

Medicaid Estate Recovery Frequently Asked Questions, continued

Q. When would estate recovery go into effect if it is adopted in Michigan, and to whom will it apply?

- A. The Michigan legislature is currently considering the program; however, given that our state is one of only two states that have not yet adopted a Medicaid estate recovery program, it is likely that some version of estate recovery will be adopted in Michigan. Once the program goes into effect, it will probably apply to all current and future recipients of Medicaid. Because the program will allow for recovery of assets only after the death of both the Medicaid recipient and his or her spouse, the state will argue that no harm is being done to either partner.

Q. Is the state considering any alternatives to an estate recovery program?

- A. The legislature is currently exploring an alternative approach that would establish an estate preservation program in lieu of estate recovery. Such a program would establish a fee of approximately \$0.45 on each monthly mortgage payment in exchange for a guarantee that if the property owner ever needed Medicaid, the federal government and the state Medicaid program would never take their home. Basically, this would be an inexpensive insurance program. An additional fee for re-mortgages or refinances could help to ensure the adequacy of funds for projected federal recovery needs. It could be coupled with the promotion of incentives for purchasing long-term care insurance.

Q. What other possible changes to Medicaid rules should we be aware of?

- A. In addition to recovery of Medicaid costs by placing a lien on an applicant's home, there are two significant changes that could be made if Michigan adopts a Medicaid estate recovery program:
- 1.) Extending the "Look-Back" Period – Families who are familiar with current Medicaid rules know that the Family Independence Agency, in reviewing an applicant's Medicaid eligibility, "looks back" at the applicant's financial transactions during the prior three years. Proposed changes include the increase of the look-back period to five or seven years.
 - 2.) Divestment Penalty – Currently, Medicaid regulations provide for the sheltering of an applicant's assets through a planned gifting program. A "divestment penalty" is a waiting period for eligibility imposed for gifts made based on the total amount of gifts made in a given month. Under current regulations, the penalty period begins on the first day of the month during which a gift was made and typically expires that same month, resulting in no effective waiting time for eligibility. If Michigan adopts a Medicaid recovery program, that program is likely to include the provision that the penalty period begins at the date of application, thereby eliminating the benefit of planned gifting. For example, consider the resulting divestment penalty when Mrs. Jones gifts \$15,000; the first scenario under the current program, the second under a program that delays the beginning of the penalty period until the date of application:

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	<u>Date of Gift</u>	<u>Penalty Duration</u>	<u>Application Date</u>	<u>Penalty Period Assessed</u>	<u>Eligibility Date</u>
Current Program	Oct. 15, 2003	2 mos.	June 15, 2004	Oct. 1, 2003 – Nov. 30	June 1, 2004
Possible Change	Oct. 15, 2003	2 mos.	June 15, 2004	June 1, 2003 – July 31	Aug. 1, 2004

Q. What options are available to help minimize the effects of estate recovery on the assets of a Medicaid recipient?

A. There are certain steps that may be taken to help shield a Medicaid recipient's estate from recovery; however, please keep in mind that the purpose of the estate recovery program is for the state to recoup at least some of the expenses it has paid on behalf of a Medicaid recipient. Therefore, opportunities to shield assets from recovery may not be available to every recipient. The following is a summary of some strategic options that are available to help keep a Medicaid recipient's assets within the family if estate recovery is implemented in Michigan. It is highly recommended that you seek the advice of a qualified Elder Law attorney regarding the applicability of any of these options to your family's situation.

- 1) **Transfer to Blind or Disabled Child**– If a couple has a child who is blind or disabled, the house may be placed on the child's name or in a trust that will be held for the benefit of the disabled child for the child's lifetime. The house will be exempt from Medicaid estate recovery for the lifetime of the child provided the trust complies with the Omnibus Reconciliation Act of 1993 (OBRA '93),
- 2) **Caregiving contracts** – When a child provides caregiving services to a parent, the parent may pay funds to the caregiver child for those services, provided a contract exists between the caregiver child and the parent and payment was made at the time services were rendered.

These types of contracts will be carefully scrutinized by the Family Independence Agency, so it is crucial that any contract entered into for such caregiving services be reviewed by a qualified Elder Law attorney to ensure the contract meets the criteria for exemption of the house from a Medicaid estate recovery program.
- 3) **Transfer house to child caregiver after two years of nursing care in the parent's home** – When an adult child provides caregiving services to the parent in the parent's home for two years or more, the house in some circumstances may be transferred to the caregiving child. Such services must be verified by a doctor that had that care not been provided, the parent would have required long-term care.
- 4) **Transfer house to brother or sister** – When a brother or sister is part owner of the house and lived in the residence at least one year before the patient's admission to long term care, the house title may be transferred to the brother or sister without divestment penalty.

Please note, it should not be assumed that a house may automatically; the family should consult with an experienced Elder Law attorney before any legal transfers are made.

For more information contact Elder Law and Estate Planning Attorney, James P. Lampertius, at (248) 538-5480