

## **New York Expands Medicaid Estate Recovery: The Noose is Tightening**

The Medicaid field is a volatile area of New York law. In general, if Medicaid pays for nursing home care, it will seek recovery for amounts paid from the deceased recipient's estate. However, significant changes have been made to the definition of what can be recovered, and how far back Medicaid can reach (currently 5 years). In fact, the only constant in Medicaid law has been change, and the past year has been no exception.

2011 witnessed a heightened level of turmoil with the enactment of a law that directed the publication of state regulations broadening the class of assets against which Medicaid can seek recovery. In the space of a few months, those "emergency" regulations were promulgated and then lapsed as of December 6, 2011 amid public outcry that the rules were a draconian and retroactive expansion of Medicaid's powers.

For now, local Medicaid offices have been advised not to seek expanded estate recovery, so there is a brief respite, but we must stay tuned for future developments. What happens next is anyone's guess, as New York State must face the difficult task of balancing two key objectives: reconciling New York's budget shortfall with the need to provide New York State residents with planning clarity. We have outlined below the issues highlighted in the regulations, because although they lapsed, they will likely reemerge in substantially similar form.

When new regulations are finally published, it is expected that the changes will be far from clear, and the new regulations may even cause multi-year litigation to ensue. What is clear, however, is that careful planning is more important than ever. There are a few viable planning options remaining, but most require prudent advance planning. Community Medicaid (*i.e.*, home care) is, as of the moment, not subject to a look-back period. For institutional Medicaid planning (*i.e.*, nursing home), trusts need to be implemented before the five-year "look back" period described above. Promissory note and other types of plans may be useful if there is no time for advance planning, *e.g.*, when someone is suddenly institutionalized.

### **History**

Until recently, New York defined estate recovery narrowly, seeking only to recover from those assets of a Medicaid recipient that passed through the Surrogate's Court "estate" of a decedent. However, the new law significantly expanded the definition of "estate" to include "any other property in which the individual has 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."

### **Effective date**

Confusion abounds regarding the effective date and the breadth of the expanded definition. Regarding effective date, while the law has an effective date of April 1, 2011, the law is only effective when regulations are issued. The regulations that were issued have lapsed and it is unclear when and in what form they will be renewed.

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## Definitions

The law does not define what is *excluded* from expanded recovery. IRAs and 401(k)s have traditionally been excluded from Medicaid recovery and are not listed as included assets in the regulations. While many assume that this remains the case, under a broad reading of the statute, IRAs and 401(k)s could be considered property in which an individual had an interest at the “time of death.”

The definition of recoverable assets was further confused because the statutory definition, which refers to property held at death, clashed with the definition of the regulation, which referred to property interests held immediately prior to death.

Perhaps the biggest source of confusion caused by the new law concerned the inclusion of a “life estate” as a recoverable resource. This inclusion of life estates posed issues for anyone who may have retained the right to reside in a residence for the rest of his or her life, while giving the ownership of the residence to their children. Under the regulations as proposed, Medicaid could have sought to recover from the children after the parent died. This particular part of the regulations may have been unconstitutional. We continue to advise clients to avoid life estates for this and other reasons.

Another significant area of change under the regulations concerned irrevocable “income only” trusts, a useful tool in advance Medicaid planning for assets that are transferred at least 5 years before an individual seeks Medicaid (the 5 year “lookback”). Under the regulations, Medicaid could recover against the accrued and undistributed income as of the moment of the creator’s death. For this reason, careful drafting of these trusts is essential.

Finally, the regulations, if enacted, would have made permissible exempt transfers under prior law into mere deferrals of recovery. Medicaid allowed an individual to transfer a home with equity up to \$758,000 (at the current time) to certain individuals such as a surviving spouse, a sibling with an interest who lived in the home at least 1 year prior to institutionalization, or an adult caretaker child who resided in the home for at least 2 years prior to institutionalization, and such home would remain exempt from Medicaid recovery. Under the regulations, once the spouse dies, the minor child reaches age 21, or the sibling or adult child no longer resides in the home, recovery can be pursued against them. Once new regulations are promulgated, we will have greater clarity on whether this useful technique will remain an exemption or will be only a deferral of Medicaid recovery.

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If you have any questions about these new rules or require any legal assistance in evaluating your estate plan, please contact Eve G. Koopersmith at (516) 393-2282 or Doris L. Martin at (516) 393-2205.

## About Garfunkel Wild, P.C.

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