

Preserving Homeownership Series

Part 3: Medicaid Estate Recovery

Eric Carlson, Justice in Aging

Lauren Marinaro, Fink Rosner Ershow-Levenberg Marinaro, LLC

Victoria Pulos, Massachusetts Law Reform Institute

December 6, 2022

Housekeeping

- All on mute. Use Questions function for substantive questions and for technical concerns.
- Problems getting on the webinar? Send an e-mail to NCLER@acl.hhs.gov.
- Written materials and a recording will be available at NCLER.acl.gov. See also the chat box for this web address.

About NCLER

The National Center on Law and Elder Rights (NCLER) provides the legal services and aging and disability communities with the tools and resources they need to serve older adults with the greatest economic and social needs. A centralized, one-stop shop for legal assistance, NCLER provides Legal Training, Case Consultations, and Technical Assistance on Legal Systems Development. Justice in Aging administers the NCLER through a contract with the Administration for Community Living's Administration on Aging.

About Justice in Aging

Justice in Aging is a national organization that uses the power of law to fight senior poverty by securing access to affordable health care, economic security, and the courts for older adults with limited resources.

Since 1972 we've focused our efforts primarily on populations that have traditionally lacked legal protection such as women, people of color, LGBT individuals, and people with limited English proficiency.

Introduction & Overview

Potential Clients

- Pre-death:
 - Estate planning client; wills, trusts, etc.
 - Interested in applying for Medicaid
 - Needing nursing facility care or HCBS
- Post-death:
 - Executor of estate
 - Trustee
 - Heirs, trust beneficiaries, etc

Federal Law

- Estate claims authorized when Medicaid beneficiary is at least 55 years old.
- State "shall seek ... recovery" for expenses of
 - Nursing facility services;
 - Home and community-based services; and
 - Related hospital and prescription drug services."
- Optional for other Medicaid services.
 - 42 U.S.C. § 1396p(b)(1)(B).

Protecting Heirs: Children

- No recovery when deceased has
 - Minor child; or
 - Disabled child (based on standards used by Social Security Administration).
- Defers claims against all heirs, even if only one heir is minor or disabled child.
 - 42 U.S.C. § 1396p(b)(2).

Protecting Heirs: “Surviving Spouse”

- No recovery during lifetime of any surviving spouse.
 - Eventual claim against spouse only for amount of property received by surviving spouse from Medicaid recipient.
 - 42 U.S.C. § 1396p(b)(2).

Hardship Waivers

- States must establish procedures to waive recovery in case of hardship.
 - 42 U.S.C. § 1396p(b)(3)(A).
- Guidance suggests (but doesn't require) exclusion of:
 - Sole income-producing asset of heirs, e.g., farm or other business. **36 states now.**
 - Homestead of modest value. **8 states now.**
 - “Modest” suggested as value of 50% or less of average home price in area.
 - State Medicaid Manual § 3810(C)(1).

State Can't Opt Out Entirely

- Prior to 1993, estate recovery was optional.
- The 1993 Budget Reconciliation Act amended Medicaid law to make estate recovery mandatory.
 - West Virginia unsuccessfully argued that requirement was unconstitutionally coercive under Tenth Amendment.
 - West Virginia v. United States HHS, 289 F.3d 281 (2002).

State Retains Some Discretion

- State does not have to pursue collection if recovery would not be cost effective.
- State can devise its own definition of cost-effectiveness, which must be documented in Medicaid State Plan.
 - CMS State Medicaid Manual § 3810(E).

The “Estate”

- Federal law originally included only assets passing through probate estate.
- But under 1993 Budget Reconciliation Act, estate is
 - Probate estate; and
 - At state’s option, virtually anything else passing from deceased.
 - E.g., trusts;
 - Life estates;
 - Joint tenancy, etc.
 - 42 U.S.C. § 1396p(b)(4).

Strategies to Limit Estate Claims

- E.g., Limit property in “estate” at time of death.
- Transfers should be done only with legal advice.
- Issues frequently litigated across country.

Counsel and Advice

- There is significant amount of money involved; worthwhile to get legal counsel.
- Some possible mistakes by clients:
 - Unaware of estate claims
 - Making counterproductive transfers of assets
 - Refusing needed health care

MACPAC

- Medicaid and CHIP Payment and Access Commission (MACPAC)
 - Medicaid Estate Recovery: Improving Policy and Promoting Equity
 - Chapter 3 of March 2021 Report to Congress on Medicaid and CHIP

Limited Resources of Medicaid Recipients

- Net Wealth Average:
\$44,393
- Home Equity Average:
\$27,364
- By quartile:
 - Minus \$14,236
 - + \$304
 - \$17,709
 - \$173,436
- By quartile:
 - Minus \$6,954
 - +\$8
 - \$12,880
 - \$98,694

MACPAC Recommendation

Re: State Option

- Amend federal law so that estate claims would be optional with states.

Recommendation Re: Hardship Waivers

- Recommends no recovery against:
 - Sole income-producing asset of heirs
 - Homes of “modest value”
 - Estates under a specified threshold

Stop Unfair Medicaid Recoveries Act

- H.R. 6698 (Jan Schakowsky, Dem. Ill.)
- Would eliminate Medicaid liens and estate claims
- 18 co-sponsors currently

Legal Strategies and Practice Tips

Techniques and Considerations for Avoiding Medicaid Estate Recovery

- What have we learned so far?
 - States must recover, at a minimum, LTSS costs from the probate estates of Medicaid recipients over 55 after death of recipient
 - States must delay recovery until the death (or aging out) of any surviving spouse, child under 21, or disabled child
 - States must have a hardship procedure with some administrative due process for people to argue that recovery should be reduced or eliminated

Above and Beyond.....

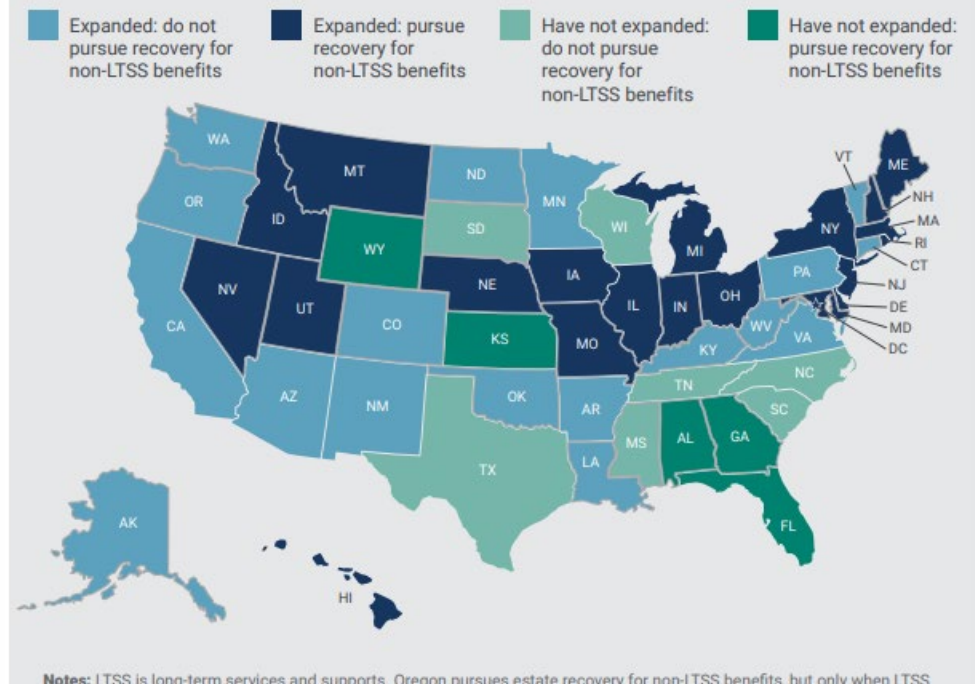
- States may recover from more than the probate estate, known as “expanded estate recovery” —e.g. joint assets, beneficiary designated assets, including retirement accounts, and some trusts, if such a plan is in their law and the Medicaid state plan
- States may recover non-LTSS Medicaid benefits from beneficiaries over 55
- States may choose, via TEFRA, to put liens on properties before death under certain specific circumstances

Which State are You?

- The ACA Medicaid expansion has increased the amount of people who need to think about Medicaid estate recovery.
- Competent local legal assistance on the issue of estate recovery is even more important!

APPENDIX 3D: Medicaid Expansion and Pursuit of Benefits Other Than Long-Term Services and Supports

FIGURE 3D-1. States That Have Expanded Medicaid and Pursue Estate Recovery for Benefits Other Than LTSS, January 2021



What Can People Do?

- Strategic transfers of assets during lifetime:
 - To well spouse
 - Caregiver Child exception
 - Sibling equity exception
 - Trusts for benefit of disabled individual
 - Look into use of “life estate” transfers—state specific
- Examine beneficiary designations on life insurance and other assets to avoid Medicaid recipient from acquiring new assets!
- Estate planning documents that direct assets away from Medicaid recipients
- In some states (i.e. CA), moving assets to revocable living trusts (out of probate) is sufficient

What Can't People do?

- Transfers to non-disabled children/individuals within five years of Medicaid eligibility creates a transfer penalty period
- BUT if a person is on ACA Medicaid and is concerned about estate recovery, and doesn't think they will need LTSS in next five years, transfers could help avoid recovery (there is no five-year lookback for ACA Medicaid)
- Transfers by both spouses are treated the same by Medicaid regardless of whether it's a second marriage, non-commingled assets, etc.; and Medicaid will be entitled to a full five year lookback for both spouses regardless of how assets are titled.

An Example from New Jersey

- New Jersey has ACA Medicaid, expanded estate recovery, and will seek recovery for all expenditures for a recipient over 55
- A couple with modest assets comes to me, has a house they own jointly without debt, some cash, some life insurance, and one spouse needs LTSS
- I will want to transfer the house to the well spouse solely, transfer all assets to the well spouse (separate analysis for spending down to eligibility levels and their five-year lookback), make sure that no assets of family members list the ill spouse as beneficiary, and execute a new Will for the well spouse limiting the share of the estate going to the ill spouse to the spousal elective share (approx. 1/3 of a NJ statutory estate amount)

Options for Single/Widowed Recipients and their Families

Can a child meet your state's definition of a "caregiver child"? Do the analysis, and if yes, make sure to do the transfer before death of the Medicaid recipient to avoid estate recovery.

Is there an option for five-year planning? Are there enough informal supports/income/finances for the person to not need LTSS Medicaid for five years? If so, use strategic transfers before death.

Can a plan be made to accept a penalty period on a transfer and use techniques like annuities and promissory notes to finance that penalty period?

Practice Tips

- Keep in mind, Medicaid rates are probably the cheapest rates for LTSS in any jurisdiction, so even if there is estate recovery, Medicaid may be less expensive than selling an illiquid asset and paying for care privately
- Many states will allow family members to live in properties that are subject to recovery (homelessness would probably be a hardship). But if there are other mortgages on the property that are not kept up, those mortgage companies will likely move to foreclose, and remaining equity will be subject to estate recovery immediately at close.
- Hardship procedures vary widely from state to state, it is important to get a copy of your state's statute laying out the standard for hardship. In NJ, you must show that the property is the SOLE source of income for the requestor, a very high standard!

Medicaid Estate Recovery Massachusetts

Amounts Recovered

2019 Estate Recovery (in 000s)			
	LTSS Spending	Estate Recovery	Est.Rec./LTSS
US	\$133,124,413	\$733,440	0.55%
CA	\$17,090,003	\$28,987	0.17%
MA	\$4,887,628	\$83,071	1.70%
IL	\$3,143,948	\$25,949	0.83%
NY	\$16,017,895	\$59,760	0.37%
<u>Source: MACPAC Table 3E-1 (Mar 2021)</u>			

Recoveries From Sale of Family Home

Recoveries From Real Property			
	No. of Estates w Recovery fr Real Prop	% of Real Prop Recovery fr Enrollees' Homes	Total Amt Recov fr Real Prop (% of Total Estate Recov)
MA	703	90%	\$26,000,000 (93%)
Average	328	96%	\$4,946,195 (74%)
Median	178	100%	\$2,276,000 (82%)

Source: Table 7 AARP (2005) (20 states responding)

Estate Recovery MA Policy Choices

- Recovery is limited to state-defined “Probate Estate”
- Recovery is expanded beyond spending on nursing facilities, HCBS, & certain related services to include:
 - Recovery for ALL Medicaid spending for individuals age 55 or older
 - Recovery for ALL Medicaid managed care premiums for individuals age 55 or older
- State-defined Cost-effectiveness thresholds & Hardship waivers—Reformed in 2021
- Notice of estate recovery—Reformed in 2021

Recommendations of MACPAC on Recovery of Managed Care Premiums

- Recommendation 3.2 Congress should amend Section 1917 of Title XIX of the Social Security Act to allow states providing long-term services and supports under managed care arrangements to pursue estate recovery based on the cost of care when the cost of services used by a beneficiary was less than the capitation payment made to a managed care plan

Recovery for Managed Care Premiums

The decedent in EOHHS v Trocki:

- At age 77 his Medicare Advantage carrier persuades him to apply for Medicaid and enroll in the carrier's integrated Medicare + Medicaid plan to reduce his Medicare out of pocket costs
- He heard Medicaid can take your house, but is told that is only if he goes into a nursing home
- Five years later, at age 82 he dies at home having never been in a nursing home or used in-home LTSS
- He leaves his \$136K house, \$800 truck & \$360 cash to his daughter
- MassHealth files a claim for \$180,000 consisting entirely of capitated monthly payments it paid to the managed care plan of \$3000 per month

Notice of Estate Recovery

- From p. 10 of Decedent's Application Form in 2013

~~I understand that in some cases, MassHealth may place a lien against my real estate that I have a legal interest in. If MassHealth puts a lien against my property and I sell it, I may need to use money I get from the sale of that property to repay MassHealth for medical services that I get.~~

Rich took N/A to getting help.
I understand that if I am aged 55 or older, or I am any age and MassHealth helps pay for my care in a nursing home, MassHealth may be able to get back money from my estate after I die. Under current practice, this does not apply to Commonwealth Care. *Just nursing home care.*

I understand that annuity transactions, including purchases and

EOHHS v. Trocki, 100 Mass. App. Ct. 117 (2021)

- We conclude that consistent with the revisions to the State Medicaid Manual ... in order for EOHHS to recover capitation payments from an estate, it must provide separate notice in advance of enrollment that the payments made will be recovered against the estate. MassHealth failed to provide such separate notice. Therefore, we conclude that the Superior Court judge erred in awarding EOHHS summary judgment on its estate recovery claim. We reverse.

MassHealth 2021 Reforms

- Post-Trocki- Medicaid agency ceased collection for managed care premium payments incurred prior to decedent's receipt of individual notice
- Agency now sends individualized notices at age 55 explaining estate recovery including recovery of managed care premiums
- Other reforms
 - Legislation reduced interest on unpaid claims from 12% TO 3.25%
 - Agency ceased collection of claims against gross estates of \$25,000 or less as not cost effective
 - Agency expanded available waivers based on hardship to survivors
 - [MassHealth Estate Recovery webpage](#)
 - Proposed legislation to make further reforms introduced in 2021-22 session

Need for Legal Assistance

- Unintended consequences of notice
 - Fear & confusion: Should I drop my Medicaid?
 - Complexity explaining concepts & determining who is at risk
 - For those at risk whose only asset is their home, limited free legal services for estate planning
 - [MA Advocates' webinar for enrollment assisters](#)
- Representing low income heirs & devisees disputing estate claims
 - Who is the eligible client? The low income individual may not be the representative of the estate
 - Many unsettled legal issues
 - Probate & estates not a common legal aid priority area

Estate Recovery in the News

- Medicaid's Dark Secret
 - For many participants, the program that provides health care to millions of low-income Americans isn't free.
 - It's a loan. And the government expects to be repaid.
 - By Rachel Corbett, Atlantic Monthly, [OCTOBER 2019 ISSUE](#)
- Debt After Death: The Painful Blow of Medicaid Estate Recovery
 - A congressionally mandated system designed to recoup the costs of long-term care can hit people with the crushing
 - Prospect of losing a home, posing a particularly insidious threat for low-income families and people of color.
 - By Sarah True, [U.S. News and World Reports, Oct. 14, 2021](#),
- Did your loved one die? MassHealth may bill their estate
 - By Lisa Mullins and Lynn Jolicoeur, [WBUR July 27, 2022](#)
- State lawmakers push to limit MassHealth's ability to recoup funds after members die
 - By Lynn Jolicoeur and Steve Brown, [WBUR Aug 5, 2022](#)

Questions

Visit Our Website: ncler.acl.gov

NATIONAL
CENTER ON
**LAW &
ELDER
RIGHTS**

Search for resources

Read practice tips

Sign up for the email list

Request a case consultation

Learn about upcoming trainings

ncler.acl.gov



Case Consultations

Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at ConsultNCLER@acl.hhs.gov.