# Michigan Has Medicaid Estate Recovery

## Government Set To Grab Seniors Homes? Tips To Avoid Estate Recovery

by Jim Schuster Certified Elder Law Attorney

Anybody with any experience around long term care nursing home issues has heard that Michigan was the only state that did not have a Medicaid "estate recovery program." Estate recovery means that after the death of the Medicaid recipient the state looks for repayment of the cost of long term care out of the assets of the recipient. Since typically the only property a Medicaid nursing home resident has is $2,000 plus a home and a car, that means the state would present its claim against the home. Thus, the government grabs elders' homes.

Michigan is no longer the lone exception. The legislature passed a bill and the governor signed estate recovery into law. The Medicaid department, the Department of Human Services, now has to put a plan together that complies with the law and present that plan to the federal agency, CMS, for approval. Only on approval will any plan become effective.

While there are many questions, such as: Will recovery apply to current recipients or only recipients entering the program after the passage date? There is an additional question of whether applicants must be advised of estate recovery before the receipt of benefits? We do not know the answers at this time.

The good news in all of this mean spirited bit of legislation is that estate recovery may be avoided if the recipient has taken steps to avoid probate. Under the law, the state's estate recovery claim will only be presented in probate estate administration. There will be no liens prior to death on homes.

In the face of these developments there are two lessons: first, get advice on the best way to avoid probate; and second if a family is subjected to estate recovery an elder law attorney will be mandatory to be sure all exemptions are used.

The law provides for a number of exemptions that will have to be proven. Farms, businesses and other income producing property are exempt if they are the "primary" source of income to the survivors. The homestead will be completely exempt if it is occupied by the spouse, disabled or minor child or a relative who for two years or more provided care sufficient to postpone entry into the nursing home. It will be exempt if a sibling co-owner lives in it. The law is silent about what happens if the person sells and moves out of the homestead or upon death. Finally where recovery is not exempted by the foregoing, it will apply only to that portion of the value that is above 50% of the average price of a home in the county. How that 50% value is established is unidentified. An elder law attorney will be needed to guide the probate personal representative in dealing with the state's claim.

These developments make smart probate avoidance planning mandatory – less the cure be worse than the disease. Probate can be avoided by many ways, some smart and some risky.

We should first observe that a Will does not avoid probate. Wills are only effective in probate and their role is to state the deceased's "will" or intention regarding distribution of property in the probate proceeding. The Will allows contingency planning should an heir predecease.

Estate recovery can be avoided. But be careful, the cure can be worse than the disease.

Jointly owned property is a common way and a risky way to avoid probate. Not all joint property avoids probate, only that which provides for ownership by the survivor will avoid probate. Joint property may be in the form of bank accounts, investments or property. A point that is often overlooked is that joint owners have joint control. A joint owner may remove as much money as he or she wants from a bank account. There have been reports of the joint owner's creditors taking money from the account. In one case the bank itself removed $56,000 from an elder's account. Why? Her daughter, who was a joint owner on the account, defaulted on a bank loan. It did not matter that none of her money was in the account. Control is emphatically lost if a joint owner of investment accounts or real estate exercises veto power. For example the co-owner may nix a sale, a reverse mortgage or major improvements to a property. Finally, jointly owned property is a crude form of avoidance in that it transfers property no matter how foolish or unintended. What if a co-owner later develops an addiction and steals from the elder? What if a son dies and his children should receive his share? Jointly owned property has no solution for these contingencies.

A safer but still incomplete way to avoid probate is beneficiary designations on accounts. The advantage is that the named beneficiaries have no right or access to the accounts during the owner's lifetime. They only get property at death. The problem is that the beneficiary designation forms make no allowance for a pre-deceased beneficiary. In that case the share will either go through probate or will completely bypass the family of the beneficiary. That is not the preferred result of most parents when a child predeceases. Real estate may be held in this fashion. It is called holding a life estate and it has the same problems. Some IRA account custodians allow detailed beneficiary designations and those can provide contingency planning in the case of a pre-deceased beneficiary.

The living trust is the safest way to avoid probate. It allows the owner of the property to be the "settlor" of the trust and reserve all privileges of ownership during life. Beneficiaries are not co-owners and their rights to the property only mature on death of the settlor. In addition the trust, like the Will, allows for in-depth contingency planning. A child may predecease, become estranged, develop an addiction, become disabled and reliant on government benefits. Grandchildren may take their deceased parent's share held in trust if they are not mature enough to handle money and so on. The trust can provide for these and other contingencies of life.

We will report further when the state plan is published. Once again, the government acts and citizens need to consult their attorneys.

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