

MEDICAID ISSUES IN PROBATE COURT

**HOW MEDICAID RULES IMPACT
CONSERVATORSHIPS AND DECEDENTS' ESTATES**

Medicaid benefits are important for incapacitated persons

- Most persons who are subject to conservatorships are either over age 65 years or are persons with disabilities.
- Eligibility for all Medicaid benefits is subject to income limits.
- Eligibility for some Medicaid benefits are subject to complicated asset limitations.
- The assets of the conservatorship estate are considered assets of the incapacitated person in determining eligibility for Medicaid benefits that are subject to asset limitations.
- Placing conservatorship assets in a special needs trust may allow the incapacitated person to become or to remain eligible for Medicaid benefits.

Categorical Eligibility for Medicaid

- To be eligible for Medicaid in Alabama, an individual must be either over age 65, under age 18, or disabled.
- The Affordable Care Act provides for Medicaid benefits for persons ages 18 through 64 years, but the United States Supreme Court ruled that these benefits could only be made optional for the States.
- Alabama chose not to accept federal funding for the expansion of Medicaid for persons ages 18 to 64 who are not disabled.
- Persons who are eligible for SSI are automatically eligible for Medicaid in Alabama.

Income Eligibility for Medicaid

- Eligibility for automatic eligibility for Medicaid through SSI is limited to persons who are either over 65 years, disabled, or blind and who have incomes below \$1145 monthly if married and residing with a spouse or \$770 monthly for other individuals.
- Persons who are also eligible for Medicare are eligible for Medicaid payment of their Medicare Part B premium (usually \$134 monthly) under SLMB or QI if their incomes are below \$1,872 if married and residing with a spouse or \$1386 monthly for other individuals. Married persons residing with a spouse are also eligible for Medicaid payment of their Medicare Part A and B deductibles and co-payments under QMB if their incomes are below \$1,392 monthly or \$1,032 monthly for other individuals. Interest and dividends are not countable income for these Medicare-related Medicaid benefits in Alabama.

Income Eligibility for Medicaid

- Medicaid nursing home benefits are subject to an individual income limit of \$2,250 monthly regardless of marital status.
- Medicaid nursing home benefits for individuals whose incomes exceed \$2,250 monthly require that income be placed in a Medicaid Qualifying Income Trust.
- Medicaid waiver benefits are subject to an absolute individual income limit of \$2,250 monthly that cannot be overcome with the use of a Medicaid Qualifying Income Trust.
- Conservators are not automatically authorized to establish a Medicaid Qualifying Income Trust, which must therefore be specifically authorized by the Probate Court.

Resources Eligibility for Medicaid

- The countable resources limits for non-long-term care Medicaid benefits that are not related to Medicare are \$3,000 for married individuals who reside with a spouse and \$2,000 for other individuals.
- There are no resources limits for the Medicare-related Medicaid benefits provided under the QMB, SLMB, and QI programs.
- The countable resource limit for long-term care Medicaid benefits (nursing home and Medicaid waiver) is \$2,000. Eligibility is further limited for married persons, including those who are separated, to require that the spouse's countable resources also be below \$25,000. Persons whose countable resources exceed these limits must spend part or all of the excess resources or place them in a special needs trust to obtain eligibility for these Medicaid benefits. For those over age 65, only a pooled special needs trust, such as the Alabama Family Trust, can be used.

Other Health Insurance Coverage for Incapacitated Persons

- Determining what health insurance other than Medicaid is best for each incapacitated individual is complicated.
- Failure to obtain cost-effective health insurance coverage can lead to the premature exhaustion of the assets of a conservatorship estate.
- Individuals who are not eligible for Medicare or Medicaid can obtain health insurances under the Affordable Care Act. Discounts on premiums are available for individuals whose household incomes are below 400% of the federal poverty guidelines, and very significant reductions in deductibles and co-payments are also available for households below 250% of the poverty guidelines. There are no asset limits for these ACA benefits.

Other Health Insurance for Incapacitated Persons

- Medicare is often the most important source of health insurance coverage for persons who are subject to a conservatorship because cause most such persons are either over age 65 or are disabled.
- Medicare benefits have no income or resources limitations, but are instead based on eligibility for Social Security, Railroad Retirement, or federal Civil Service retirement, survivors, or disability benefits or on having end-stage renal disease or ALS.
- Original Medicare Part A, which covers inpatient medical services, and Part B, which covers outpatient medical services, are administered by CMS. Medicare Part D covers prescription drug benefits through a choice of private insurance plans. Medicare Part C combines Parts A, B, and D benefits through a choice of private HMO's, PPO's, and other managed care private insurance plans and replaces original Medicare.

Other Health Insurance for Incapacitated Persons

- Medicare beneficiaries who do not qualify for full Medicaid or QMB face significant deductibles and co-payments for Part A and B services.
- Private Medicare supplement (Medigap) insurance is available to cover most or all of these costs, but requires payment of significant monthly premiums. Federal law standardizes Medigap coverage (standard plans A through N), so the choice among various companies offering the same standard plan should be made strictly based on premium cost.
- Because of the high cost of Medigap plans, many Medicare beneficiaries elect to enroll in private Medicare Part C plans that have lower or no monthly premiums and that reduce the deductibles and co-payments for medical services.

Other Health Insurance for Incapacitated Persons

- Making good choices among the vast array of options available to Medicare beneficiaries is difficult even for well-educated persons.
- 25 stand-alone Part D prescription drug plans are available statewide in Alabama, each with different premiums, co-payments, deductibles, drug formularies, and pharmacy networks.
- 6 Medicare Part C Medicare Advantage plans are available statewide in Alabama, and as many as 19 additional such plans are available in particular counties, each with different premiums, co-payments, deductibles, drug formularies, and provider networks, and some of which cover dental, hearing, and vision services that are not covered by original Medicare.

Other Health Insurance for Incapacitated Persons

- Free health insurance counseling assistance in making choices among the various plans available to Medicare beneficiaries is available statewide through State Health Insurance Assistance Program (SHIP).
- SHIP counselors also provide free assistance with enrolling in QMB, SLMB, and QI through Medicaid, and with applying for assistance with prescription costs through the low-income subsidy (LIS) program through the Social Security Administration.
- Because all the Part D stand-alone plans and Part C Medicare Advantage plans change the costs and coverage provisions of their plans every year, Medicare beneficiaries should reevaluate coverage options each year during open enrollment October 15 to December 7. Your local SHIP can assist with plan comparisons and enrollment.

Other Assistance for Long-term Care Expenses

- War-time veterans and their surviving spouse may be eligible for significant monthly cash payments if they have medical and other care expenses that are greater than their incomes.
- Resources limitations for VA Aid and Attendance benefits are significantly higher than those for long-term care Medicaid.
- These benefits can be an important source partly to fund the cost of a nursing home or assisted living facility, or to assist in paying for home care provided by family or other caregivers.
- A small minority of older persons in Alabama has private long-term care insurance.
- These policies are not entirely standardized and have widely varying provisions concerning what level of care will be provided, for what period of time, and up to what daily cost.

Medicaid as a Creditor in Decedents' Estates

- Federal law allows, but does not require, States to accept liens on the property of a Medicaid beneficiary, but only as part of the eligibility process and only if certain relatives do not reside in the home.
- Alabama Medicaid requires that the applicant execute a lien in favor of the Agency against otherwise countable real property in nursing home Medicaid applications. The property must also be offered for sale unless the applicant intends to return home.
- Because of the high cost of nursing home care, the value of the houses of most Medicaid nursing home beneficiaries will be exceeded by the Medicaid lien within one year of admission.

Medicaid as a Creditor in Decedents' Estates

- Because Medicaid does not allow the applicant to keep enough income to maintain the property while it is on the market and because funds remaining at closing that are not payable to satisfy the Medicaid lien can be used for the benefit of the applicant, such as to prepay for funeral and burial expenses, the property should be sold as soon as possible and especially prior to death to avoid the cost of probating the decedent's estate.
- Liens that remain unsatisfied at the death of the applicant often exceed the value of the property, which is almost always the only asset of the estate.

Medicaid as a Creditor in Decedents' Estates

- Personal representatives of decedents' estates are unlikely to file for probate when they are aware that Medicaid will take the entire estate and that the heirs or beneficiaries will inherit nothing. A large but unknown number of houses in Alabama have been abandoned in these circumstances.
- The personal representative should seek the agreement of Medicaid to allow payment of the costs of probate out of the proceeds if the proceeds will not equal the lien.
- Because the lien is against the property and not merely a claim against the estate, the law does not require that the Agency allow payment of the costs of probate out of the proceeds if the lien exceeds the proceeds.

Medicaid as a Creditor in Decedents' Estates

- Federal law requires that states seek to recover Medicaid long-term care benefits paid on behalf of persons after age 55 years.
- Unless there is also a Medicaid lien on the property, very few estates of nursing home Medicaid beneficiaries would have any assets from which Medicaid could obtain estate recovery.
- Because the home is excluded when the applicant remains in the home, many Medicaid waiver beneficiaries die owning houses and even hundreds of acres of land adjoining the home from which Medicaid could obtain estate recovery.

Medicaid as a Creditor in Decedents' Estates

- Despite being mandatory since 1993, Alabama Medicaid did not pursue estate recovery against the estates of Medicaid waiver beneficiaries until the publication of a pamphlet in 2014 announced these claims would be pursued.
- Applicants prior to that time were never informed that their homes could be claimed by Medicaid at their death if they received Medicaid waiver benefits.
- The Agency finally published actual state regulations in January 2016 that clearly allow for estate recovery against these estates, and applicants applying after that time are informed that Medicaid estate recovery exists.

Medicaid as a Creditor in Decedents' Estates

- Federal law allows the States to opt to seek Medicaid estate recovery for benefits paid after age 55 for Medicaid beneficiaries who did not receive long-term care benefits.
- Alabama did not elect this option until 2014 with the publication of the pamphlet, and actual state regulations were not published that included this option until January 2016.
- The federal law was amended effective with 2010 that prohibit Medicaid estate recovery of benefits paid under QMB, SLMB, and QI, so the amount of the Medicaid estate recovery claims in the cases of beneficiaries who died without having received long-term care benefits are general very small, if any, because nearly all of them are also eligible for Medicare.

Medicaid as a Creditor in Decedents' Estates

- The Agency's January 2016 regulations exempt benefits paid under QMB, SLMB, and QI without mentioning any limitation to those benefits that were paid beginning in 2010.
- Despite this omission, the Agency is filing estate claims against the estates of QMB, SLMB, and QI beneficiaries for costs paid under these programs between 1989 and 2009.
- In addition, the Agency's regulations purport to apply retroactively to the advent of Medicaid in July 1966.
- One common example of non-exempt estate claims are those for SSI disability beneficiaries ages 55 to 64 who do not also have Medicare, which does not begin until 29 months after disability onset.

Medicaid as a Creditor in Decedents' Estates

- Because these regulations were not adopted until 2016, Medicaid beneficiaries were not informed that their estates would be subject to estate recovery, and beneficiaries who apply for SSI through the Social Security Administration are not informed even now concerning estate recovery.
- Personal representatives and their attorneys will seldom be aware that the decedent received Medicaid benefits in the distant past or will be unaware that some heirs and beneficiaries qualify for exemptions or delays in estate recovery.
- Most attorneys are unaware that Medicaid may be a creditor in cases that do not involve long-term care benefits or liens.
- There is some question whether the Agency is bound by the passage of the statute of non-claim if the Agency does not receive notice of the filing of the estate.

Medicaid as a Creditor in Decedents' Estates

- Legislation that would have required that Medicaid be given a special creditor's notice in every Alabama decedents' estate filed in probate court failed to pass the 2017 and 2018 legislative sessions.
- The legislation would have required strict compliance with the notice requirements to be effective, so incorrect dates of birth or Social Security numbers could mean that Medicaid would never be foreclosed from asserting a claim even many years after the closure of the estate.
- One should expect that legislation of this sort will continue to be filed on behalf of the Agency.

Definition of Estate for Purposes of Medicaid Estate Recovery

- Federal law require that the States include all assets of the probate asset as being subject to Medicaid estate recovery.
- Federal law allows the States to opt to include assets that pass at death outside of probate in the assets that are subject to Medicaid estate recovery.
- Alabama has not adopted this option.
- Adoption of this option would require legislation.

Heirs and Beneficiaries Who Are Medicaid Beneficiaries

- Receipt of income or assets from a decedents' estate may result in the disqualification of heirs and beneficiaries who are eligible for Medicaid benefits other than QMB, SLMB, and QI.
- The establishment of a first-party special needs trust, such as the Alabama Family Trust, may be advisable in such cases.
- Even when the receipt of the assets does not disqualify the heir or beneficiary currently, such as when the estate asset is a home in which the heir or beneficiary will reside, the home will later be subject to estate recovery as part of the estate of the heir or beneficiary at the time of his or death. Common examples would be SSI and Medicaid waiver beneficiaries.