

MEDICAID ESTATE RECOVERIES IN MASSACHUSETTS:

How to Increase Non-Tax Revenue and Program Fairness

Submitted

by

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I. The Problem

Massachusetts has exceptionally generous Medicaid nursing home eligibility rules. Although Medicaid is a means-tested, public assistance program, i.e. welfare, middle class and well-to-do citizens often qualify quickly and easily. Knowledgeable applicants or their representatives can circumvent or minimize statutory asset "spend down" and estate recovery requirements. They do this by taking advantage of technicalities in federal and state law which are analogous to tax shelters.

Many lawyers market Medicaid income and asset shelters aggressively to people who want to obtain publicly financed nursing home care. Some of the leading national experts in "Medicaid planning" work in Massachusetts. State eligibility workers report that attorneys call "all day" looking for "loopholes" and that 30 to 50 per cent of cases from prosperous towns like Newton, Brookline, Wellesley, Westin, Dover and Sherban involve shelters. Books and seminars advising people how to "hide money...juggle assets...transfer a home...get a divorce" to qualify for public assistance are readily available throughout the state.

Consequently, state and federal tax dollars ear-marked for the poor often go to people who could have insured privately or

paid for their own care. Legal techniques to avoid estate recovery allow non-contributing heirs of Medicaid recipients to "reap the windfall of Medicaid subsidies" at tax payers' expense. (Inspector General, 1988, pps. 47-48) Program units intended to combat abusive shelters and recover from estates in Massachusetts are vastly under-staffed compared to some other states.

In today's fiscal climate, taxing the poor and middle class to provide welfare for the affluent is a difficult position to maintain politically. Soon, Boston's WGBH Frontline show will direct the spotlight of national television on this issue with Massachusetts as the principal case in point. It behooves the Department to formulate a position and initiate corrective action as soon as possible.

II. **Current Status -- Eligibility**

Income or assets divested or sheltered before or during Medicaid eligibility constitute a conversion of private costs to public expenditures. State Medicaid workers report a hemorrhage of resources from applicants' and recipients' estates before they die. Common techniques include:

- Transfer of income
- Transfer of assets
- Trusts
- Joint tenancy with right of survivorship
- Purchase of exempt assets of unlimited value (homes, repairs, antiques and furnishings, automobiles, rings)

- Unlimited prepaid burial trusts

Concrete examples, based on the previous week's cases, were brought to our attention by local eligibility staff. Some of the following cases are being challenged by the state. Others were challenged and lost. Most income and asset shelters raise no legal or policy questions, however, and are routinely approved.

- An applicant with \$83,000 cash and a home in Watertown paid only \$15,000 to the nursing home and protected the remainder by investing in home repairs while qualifying for Medicaid.
- A couple with \$205,000 in assets, bought a condo from their children for \$165,000 and purchased two burial funds to qualify the ill spouse for Medicaid nursing home benefits.
- An elderly woman holds \$30,000 in joint stock certificates with her adult grandchildren. As they refuse to sell their interest, the asset is inaccessible, and the woman is eligible for Medicaid.
- A couple transferred their primary residence to their adult children while retaining a life estate. The ill spouse qualifies for Medicaid nursing home care on the grounds that the life estate is unsalable, while the community spouse pays repairs on the home now owned by the children as an income shelter against Medicaid's mandatory contribution to cost of care.
- An attorney is protecting \$62,500 for his client with an annuity. The client received full value in the form of annuitized income, so transfer of assets restrictions do not apply. The income is insufficient in itself to interfere with Medicaid eligibility.
- \$605,000 held in trust for a spouse in the community is "untouchable."
- \$1785 was spent for a diamond sapphire ring to clinch eligibility.
- "Spousal impoverishment" cases routinely spend the ill spouse's \$62,580 share on exempt assets despite the clear intent of Congress to protect only half of a couple's joint assets from nursing home spend down.

- Term life insurance benefits of any size pass unencumbered to beneficiaries. People can purchase a term policy with anyone as beneficiary in order to shelter assets.
- One family spent \$40,000 of the applicant's liquid assets on a red Mercedes Benz two-seater. (Their attorney had previously been an appeal referee for the Medicaid program.) Normally, this tactic would be acceptable, but the Department was able to demonstrate that the applicant never rode in the car.
- An adult son withdrew all but \$1962 from a joint account with his mother in order to qualify the mother for Medicaid. He took \$40,000 and left her with \$38 less than the Medicaid asset limit. Some of this may be recovered through litigation in Superior Court at considerable expense to the state.

Several state practices contribute to the effectiveness of these and many other sheltering techniques. Some social service offices and some Medicaid eligibility workers encourage people to seek out and use shelters to qualify for assistance instead of purchasing nursing home care privately. Eligibility staff often spend hours responding to questions from attorneys and helping them find ways around income and asset restrictions.

Massachusetts does not require person-to-person interviews with applicants or representatives. This system of "mail order welfare" leaves ample room for misunderstanding or fraud. Nor is the veracity of statements made on applications routinely checked by verifying unreported property or transfers with county assessors and recorders.

Finally, and very importantly, the eligibility system has inadequate legal back-up. State attorneys are "very good but buried." Legal questions bearing on Medicaid nursing home

eligibility have low priority. At any given time, a single "Medicaid attorney of the day" is on duty. This is the workers' only recourse against the entire corps of privately and publicly funded elder law attorneys in the Commonwealth. State attorneys can prevent or reverse some of the more egregious cases if they see them. What comes to their attention now, however, is only the tip of the iceberg.

Various state staff supplied these quotes: "long-term care units are barraged by 'Bove' attorneys...it goes on all day...the system leaks all over the place...the laws and policy set us up for failure...the workers feel intimidated...it gets outrageous...it is morally terrible."

III. Current Status -- Estate Recoveries

Relatively little value is left in relatively few probate estates after the eligibility process runs its course. But a tiny estate recovery program in Massachusetts does a superlative job of recouping what does remain. These recoveries reimburse the Medicaid program for benefits paid to recipients who sheltered assets. Of course, divested assets are lost forever from recoupment.

A three-person unit recovers about \$6 million per year with a return to the state of \$51 for every \$1 spent on the cost of recovery. The average of \$17,000 recovered per case is extremely high. This little unit single-handedly recoups over one-quarter

of a percent of the entire state Medicaid budget. That is the good news.

Here is the better news. Proportionate to its size, if Massachusetts recovered from estates as effectively as the leading state in the country, the Commonwealth would

- recover \$35 million per year or 1.7% of the Medicaid budget,
- with a staff of 50 people,
- a recovery ratio of \$14 to \$1, and
- an average recovery per case of \$2,000.

Look at it this way: if you were running a business with a 51 to 1 profit margin, wouldn't you expand to increase your revenue six-fold even if your margin dropped to 14 to 1? Most businesses are content, after all, with a 5 percent profit, i.e. 1 to 20. In this analogy, state and federal tax payers are Medicaid's "stockholders" and program administrators owe them the same fiduciary responsibilities as a private company's management owes its owners.

IV. **Recommendations**

To optimize estate recoveries within one year, Massachusetts should take the following steps:

- (1) Use every opportunity available to articulate the moral high ground of estate recoveries, which is:

We have very limited dollars available for welfare; we must take care of the poor and disadvantaged first; the middle class and well-to-do should

pay privately for nursing home care or purchase insurance; prosperous people who choose to rely on public assistance should reimburse the tax payers before giving away their wealth to heirs.

- (2) Study the problem more thoroughly, but only for a few weeks. Prioritize corrective actions and implement those first which have the greatest recovery potential.
- (3) Staff up gradually beginning with an additional estate recovery para-legal and a full-time attorney dedicated to Medicaid eligibility and estate recovery issues. Give the estate recoveries unit an additional position for every increase of \$250,000 in annual collections.
- (4) Train all Medicaid eligibility workers to identify assets, discourage shelters, warn applicants and recipients about estate recovery, and recommend private pay nursing home care and long-term care insurance.
- (5) Initiate a public relations campaign to educate pundits, politicians, PACs, policy-makers and the public on the drawbacks of Medicaid including estate recoveries and the benefits of private nursing home care and insurance.
- (6) Prepare and present a strong, comprehensive legislative proposal to obtain state statutory authority whenever necessary for the best practices described in the Appendix.

By retaining a contractor on contingency to implement this program, Massachusetts could generate large non-tax revenues and

divert prosperous recipients to private care and insurance with little or no up-front costs.

APPENDIX: BEST PRACTICES

The following ideas have been culled from successful Medicaid estate recovery practices in other states. Some of them would require statutory or policy changes to implement in Massachusetts.

- (1) Reconsider your "no compromise--go for the jugular" policy. Negotiate for what you can realistically expect to get and then move on to the next case. Go for volume.
- (2) Use graphs and charts to measure and display recoveries. Encourage competition among collectors.
- (3) Give incentive awards to outstanding recovery specialists. After all, they are saving jobs, helping the poor, and diverting the well-to-do toward preferred private options.
- (4) Improve the A-2 eligibility notification of death form (900 received per month) so that it contains useful information.
- (5) Prioritize all cases. Work the biggest, most promising cases first.
- (6) Track real estate on the Medicaid computer system even when it is exempt for eligibility purposes. The home is 70 percent of the net worth of the median elderly household and supplies most of the recoverable value in estates.
- (7) Check assessors and recorders routinely in all cases for property ownership and transfers. Refer all leads to the estate recovery unit for investigation and follow-up.
- (8) Require attorneys to supply the inventory of property when available for all probated estates involving welfare.
- (9) Cap living trusts for burial funds. Verify that funds sheltered for burial are either used for burial or refunded to the state.
- (10) Petition courts to appoint conservators in cases of suspected financial abuse. Conservators can relitigate expropriative divorce decrees, reverse abusive transfers, invade trusts, divide undivided property, maintain and sell properties, et cetera. By using private attorneys on contingency, this can be done at no cost to the state while

generating considerable revenue.

- (11) Allow people who receive lump sums to pay back past assistance or put money in escrow against future assistance.
- (12) Do face-to-face interviews for all nursing home eligibility cases with the applicant or representatives. Put an end to "mail order welfare" cases that end up costing the program hundreds of thousands of dollars.
- (13) Tighten up state policy on personal representatives. Watch out for relatives, neighbors, friends, hospital discharge planners, social workers, or anyone else who might have a conflict of interest. Financial abuse is "commonplace" and "rife" according to the Inspector General.
- (14) Put a limit on the value of a car, home furnishings, and other exempt assets if there is no community spouse.
- (15) Use accounts receivable so recipients or their heirs can pay back the state over time. Explore "open-ended" mortgages as a way to help people keep the family home by paying back Medicaid benefits over time.
- (16) Collect personal property as well as real estate and have a fiduciary maintain and auction the proceeds, e.g. jewelry, paintings, Persian rugs, cars, etc.
- (17) Extend recovery to benefits received before age 65 for institutionalized recipients.
- (18) Add spousal recoveries.
- (19) Close the joint tenancy with right of survivorship loophole. It allows anyone with an attorney to avoid estate recovery.
- (20) Close the loophole that treats lump sums as income in the month of receipt thereby exempting them from the transfer of assets restrictions.
- (21) Apply proceeds from reverse annuity mortgages toward the contribution to cost of care in a nursing home.
- (22) Require the ill spouse's share of the "snapshot" split to go toward cost of care as intended by Congress.
- (23) Establish mandatory, automatic payment of "personal needs" or "nursing home" accounts to the state by all financial institutions at the death of a Medicaid recipient to eliminate having to file as "voluntary administrator."

(23) Use the TEFRA authority to place liens during recipients' lifetime to encumber property for later recovery.