

The Indiana General Assembly made sweeping changes to Medicaid law affecting Indiana's senior citizens, particularly those requiring nursing home care. The changes raise serious legal and administrative issues, and have consequences for seniors that were undoubtedly unintended. Since the amendments were inserted into the massive, 211 page budget bill in the final days of the General Assembly, they received no public comment or debate. The Elder Law Bar does not oppose the concept of estate recovery as a means to "replenish the coffers" of the Medicaid program. However, the provisions that were passed may have onerous consequences for the citizens of Indiana, particularly its older adult population as the examples below illustrate. It is imperative that Indiana's citizens be encouraged to seek legal counsel in estate planning, particularly if they anticipate a need for long-term care in their futures.

Current law: Allows Medicaid to seek estate recovery from the estate of a Medicaid recipient.

New law: Allows Medicaid to seek estate recovery from the estate of a Medicaid recipient and the estate of the recipient's spouse. Because the change is not prospective, recovery can be made against the estate of a non-recipient spouse even if the Medicaid-recipient spouse died years ago.

SECTION 108.

IC 12-15-9-1 IS AMENDED TO READ AS FOLLOWS

[EFFECTIVE July 1, 2005]:

IC 12-15-9-1. Priority of claim for Medicaid paid after recipient became fifty-five years of age.

(a) Subject to subsection (b), upon the death of a Medicaid recipient or upon the death of a deceased Medicaid recipient's spouse, the total amount of Medicaid paid on behalf of the recipient after the recipient became fifty-five (55) years of age must be allowed as a preferred claim against the estate of the recipient or the recipient's spouse in favor of the state. The affidavit of a person designated by the secretary to administer this section is evidence of the amount of the claim and is payable after the payment of the following in accordance with IC 29-1-14-9:

- (1) Funeral expenses for the recipient and the recipient's spouse, not to exceed in each individual case three hundred fifty dollars (\$350).
- (2) The expenses of the last illness of the recipient and the recipient's spouse that are authorized or paid by the office.
- (3) The expenses of administering the estate, including the attorney's fees approved by the court.

(b) If a recipient's spouse remarries, the part of the estate of the recipient's spouse that is attributable to the subsequent spouse is not subject to a claim for Medicaid paid on behalf of the recipient.

- **The law is retroactive in nature .**
- **The law is devastating to Indiana farm families.**
- **The law would seriously affect the estate plans of Indiana homeowners and farmers.**
- **The law would result in substantial litigation between the State and survivors of nursing home residents.**
- **The law conflicts with federal law in allowing Indiana to seek recovery against the non-recipient spouse's estate.**
- **The law encourages divorce of nursing home residents.**
- **The law encourages older adults to live with their partners, foregoing the benefits of a second marriage.**
- **The law encourages widows and widowers of Medicaid recipients to flee from Indiana to avoid the harsh consequences of this new law.**
- **The law will be extremely difficult to administer adding to the inconsistency in enforcement that is already a problem for Medicaid estate recovery.**
- **The law violates well-established principles of probate, family, and contract law.**

Example #1:

Farmer John's wife lived three years in a nursing home receiving Medicaid benefits. She died in 1995. The new law says that when Farmer John dies, the State can file a claim against the family farm John works with his three sons to satisfy its \$90,000 "preferred claim" when he dies. Under the current law, John's farm is protected as it is in *his* estate, not the estate of the now deceased Medicaid recipient spouse.

Example #2:

Widow Mary moves in with her daughter, Sue, after the death of her husband in the early 1990s. Sue provides home care for her mother, a victim of Alzheimer's disease, in Sue's home, keeping her mother at home till she dies in 2006. Mary never receives Medicaid . Mary had \$25,000 in a small savings account, and she added her daughter to the account in 1998 as a joint owner. This small token of Mary's appreciation for her daughter doesn't even compare to the cost savings to the State as a result of Sue's home care for her mother. But because Mary's deceased husband received Medicaid for a nursing home stay in the 1990's, the State claims all the funds in Mary's joint account when Mary dies.

Example #3:

Widower Thomas who has \$100,000 in assets remarries. Some of those assets were acquired after the death of his first wife. His second wife, Thelma, brings no assets into the marriage. Thomas changes his will to provide for Thelma upon his death. Thomas and Thelma are married for fifteen years when Thomas becomes terribly ill. For the next five years, Thelma struggles to care for her husband , a stroke victim, at home. Thomas then dies at home. He never received Medicaid, but because his first wife received Medicaid for years in a nursing home, the State makes claim against his estate when he dies, leaving Thelma penniless.

Current law: Annuities fall under the general estate recovery provisions which track the non-probate recovery provisions proposed by the probate bar and passed by the General Assembly in 2002. Annuities owned by the non-recipient spouse are protected.

New law: Allows Medicaid to seek estate recovery from any beneficiary for annuities purchased after May 1, 2005 from the Medicaid recipient or his/her non-recipient spouse.

SECTION 107.

IC 12-15-9-0.5 IS AMENDED TO READ AS FOLLOWS

[EFFECTIVE July 1, 2005]:

IC 12-15-9-0.5. "Estate" defined

(a) As used in this chapter, "estate" includes:

- (1) all real and personal property and other assets included within an individual's probate estate;
- (2) any interest in real property owned by the individual at the time of death that was conveyed to the individual's survivor through joint tenancy with right of survivorship, if the joint tenancy was created after June 30, 2002; ~~and~~
- (3) any real or personal property conveyed through a nonprobate transfer; **and**
- (4) **any sum due after June 30, 2005, to a person after the death of a Medicaid recipient that is under the terms of an annuity contract purchased after May 1, 2005, with the assets of:**

(A) the Medicaid recipient; or

(B) the Medicaid recipient's spouse.

AND

SECTION 110.

IC 12-15-9-7 IS ADDED TO THE INDIANA CODE
AS A NEW SECTION TO READ AS FOLLOWS

[EFFECTIVE July 1, 2005]:

IC 12-15-9-7

A person receiving beneficiary payments from an annuity contract of a deceased Medicaid recipient is liable to the state for reimbursement of Medicaid benefits:

(1) paid to; or

(2) on behalf of;

the deceased Medicaid recipient to the extent of any payments that are received by the person under a annuity contract purchased after May 1, 2005.

- **The new law seems to allow Medicaid to recover annuity payments to a community spouse after the institutionalized spouse dies.**
- **Indiana residents are likely to end the long established practice of purchasing annuities as a way to provide for future financial security with a guaranteed stream of income payments.**

- **The Medicaid system end up paying more as it will lose the stream of income from annuities owned by Medicaid recipients and used to defray the costs of their medical care.**
- **Estate and financial planners and attorneys are likely to counsel clients against purchasing annuities.**

Example #1:

When Fred went into a nursing home and on Medicaid in August of 2005, Ethel was allowed to keep approximately \$50,000 in resources. Her banker advised her to invest her funds in an annuity with monthly payments to her for the rest of her life. Fred died two years later, and Medicaid advised Ethel that the remaining annuity income payments would have to go to Medicaid to repay Fred's Medicaid bills.

Example #2:

Edna invests in a charitable gift annuity in August of 2005 with the benefits to be paid to the Indiana Alzheimer's Association upon her death. Edna later goes into a nursing home and after exhausting all her assets, she applies for Medicaid. Edna later dies, and the State claims the sums due to the Alzheimer's Association after her death.

Other provisions of the legislation deal with small estates affidavits, the right of the state Medicaid office to make a spousal election on behalf of a Medicaid recipient. There are sections of the act that allow Medicaid to set standards for court awards of spousal support (e.g., in a guardianship). These are not discussed in this memorandum.