A Quick Primer on Medicaid Estate Recovery in Virginia

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I. **Introduction.** Created in 1965, Medicaid is a system funded and administered through a state and federal partnership. It pays the medical costs, including long-term nursing home care and community-based nursing care, for individuals who are deemed to be financially and medically needy. States have broad discretion with the administration of the program, and the eligibility and benefit rules vary significantly.

Medicaid recipients must have limited income and resources. Through various means, however, recipients occasionally die with financial resources or assets. It can occur as a result of an inheritance, personal injury settlement or award, ownership of the recipient's residence, or another unplanned economic windfall.

In 1993, the federal government mandated that states establish individual plans to recover Medicaid payments from recipients after they die[1] for nursing facility services, home and community based services and prescription drug services, or, at the option of the state, any items or services under the state plan.[2]

States have various levels of estate recovery programs in place. New Jersey aggressively attempts to recover against estates.[3] In comparison, West Virginia implemented Medicaid estate recovery programs only after threats from the federal government and court action.[4]

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[1] 42 U.S.C. 1396 p (b).

[2] 42 U.S.C. 1396 p (b)(I)(B).

[3] N.J. Admin. Code Title 10 § 49-14.1.

[4] *West Virginia v. U.S. Dep't of Health & Human Serv.*, 289 F.3d 281 (4th Cir. 2002).

II. **Billions and Billions.** The late Senator Everett Dirksen reportedly said, "A billion here and a billion there and pretty soon we're talking real money." For fiscal year 2020, the Commonwealth's entire projected expenditures are approximately $62 billion. Of this amount, approximately $15 billion is appropriated for the Department of Medical Assistance Services ("DMAS"), the administrator of Medicaid. It is the Commonwealth's largest single line item and more than 24% of the budget! Of DMAS' budget, in calendar year 2018, approximately $2.9 billion was spent on long term health care in nursing facilities and provided by Medicaid certified caregivers in the recipient's home (this sum includes Medicaid waivers such as DD Waivers). Therefore, 19.3% of the DMAS budget is set to be spent on nursing care. Obviously, there is a financial incentive to recoup some of those funds. In 2019, there were 24,236 individuals on Medicaid in nursing facilities in Virginia and 50,690 on community-based care provided through Medicaid.

The Commonwealth has recovered and collected significant funds from estates and trusts. In fiscal year 2017, it collected $2.6 million; in fiscal year 2018, it collected $3.7 million; for the current fiscal year, to date, it has collected $2.9 million. The administrative budget for the agency staff that handles the estate recovery program is approximately $200,000 annually. However, the overall dollar amount recovered is scant and negligible when compared to the cost; the recovery is approximately 0.08% of the expenditures. The meager amount recovered is due to the fact that most Medicaid recipients die with little or no assets. The countable resource limit for a single individual receiving Medicaid nursing home benefits is $2,000.00. For a married couple with both in a nursing home, the countable resource limit is $3,000.00.[5] For many Medicaid recipients, however, the potential to have available assets at death is possible because they have engaged in sophisticated financial and long-term care planning. The amount collected

[5] Medicaid Manual § M1110.003 B 2.

may be inconsequential when compared to the expenditures; however, DMAS is hoping there is growth on the upside.

For example, when an individual receives community-based health care paid for by Medicaid and resides in his or her own home, the residence is not considered a resource that must be sold; however, when the recipient dies, the home *may* be an asset that is subject to a DMAS claim.

For the personal representative in the proper administration of a decedent's estate, the issue is potentially critical because the Commonwealth may be a creditor. The personal representative can have personal, and often unlimited liability if he or she does not administer the estate appropriately.

III. **Non-Fraud Recovery: We're Here For The Money.** DMAS is charged with administering Virginia's Medicaid program, and has incorporated an estate recovery program in the Virginia Medicaid Manual ("Manual"). The Manual is the handbook for Medicaid eligibility workers; it is approximately 1,300 pages and can be accessed at dmasva.dmas.virginia.gov/#/assistance. The Chapter M17 specifically addressing recovery is "Medicaid Fraud and *Non-Fraud* Recovery;" it is attached and marked as Schedule A.

To comply with the federal guidelines, the Virginia Code (the "Code"), and the Virginia Administrative Code ("VAC"), DMAS formed a "Third Party Liability / Estates" ("TPL") unit that falls under the Recipient Audit Unit. It investigates fraudulent and non-fraudulent receipt of Medicaid monies. DMAS can recover correctly and incorrectly paid benefits. DMAS "shall operate a program of estate recovery for all persons who receive payments or on whose behalf payments are made for Medicaid-financed nursing facility care."

DMAS may make a claim against the estate of an indigent person for any medical assistance payments made. Fortunately, the amount recovered

cannot exceed the amount of total Medicaid payments.[6] Even though, your author could find no cases brought in the Commonwealth's Courts regarding Medicaid estate recovery by DMAS, TPL has become increasingly aggressive in pursuing collection against estates.

IV. **The Letter: Inquiring Minds Want To Know.** Notwithstanding that the statute grants TPL discretion in deciding whether to make a claim, in every estate of a deceased Medicaid recipient with which your author has dealt in the last 2-3 years, the "heirs," "the estate," or family members receive a form letter and "Deceased Member Information Form" from TPL. A copy of the form is attached and marked as Schedule B.

The letter usually is not addressed to a specific person who qualified as the personal representative of the estate; in fact, most times, no one has yet qualified – nor should they. The heir or family member should be particularly careful in completing this form. The letter is not, obviously, a "claim," nonetheless, DMAS (vis-à-vis TPL) is searching for estates in which to file a claim. Are the heirs or family members obligated to respond to TPL's investigation undertaken with the hope of discovering information? Your author is unaware of any such duty on the heirs or family members.

V. **The Personal Representative: To Qualify Or Not.** If an individual nominated as executor under the Last Will and Testament or an individual authorized[7] to be granted Letters of Administration of an intestate recipient, should request to be qualified as the personal representative is a many faceted consideration. The amount of time necessary to complete the project and the complexity of the legal issues are just two factors. In the realm of

[6] Va. Code § § 32.1-326.1 and 32.1-327.

[7] Va. Code § 64.2-502.

this discussion, a major concern is DMAS' legal authority to hold the fiduciary liable for a claim against the estate.

As set out in the Code, in any action required to be prosecuted or defended by or in the name of a personal representative, the style of the case shall be substantially in the following form: "(Name of fiduciary), (type of fiduciary relationship), (Name of the subject of the fiduciary relationship)."[8] In other words, if there is no qualification and there is no probate administration, then the creditor does not have an easy target.

VI. <u>Estate Administration: What to do?</u> What should the personal representative do?

a. **<u>What is this "Estate" of which you speak?</u>** Once qualified, the personal representative of a decedent's estate has the duty to "administer, well and truly, the whole personal estate of his decedent."[9] Which raises the question: what assets are in the "personal estate of his decedent?"

The Manual does not limit the "estate" of the deceased recipient to the individual's "probate estate." Federal law directs the Commonwealth to "recover funds in satisfaction of the claim against the individual's estate or real property"[10] Further, the term "property" includes "the homestead and all other personal and real property in which the beneficiary has a legal interest."[11]

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[8] Va. Code § 8.01-6.3.

[9] Va. Code § 64.2-514.

[10] 42 CFR § 433.36.

[11] *Ibid.*

Some states are fairly conservative about the collection efforts. They recover costs from real estate, personal property, and other assets only if included within the "probate estate." A probate estate includes only assets that were owned solely by the individual at the time of death, where there is no beneficiary or joint owner designated. A joint account, an account with a payable on death designation, life insurance proceeds, a deed with life estate reservation, TOD deed, or a contract with a named or designated beneficiary are not included in the probate estate.

Other states use a broader definition of the term “estate” that includes any assets an individual had legal title to or an interest in at the time of death, including property that bypasses probate. In these states, the estate includes assets that the individual attempted to convey to a survivor, heir, or assign through an arrangement such as a joint tenancy, tenancy in common, survivorship, deed with life estate reservation, TOD deed, or living trust.

To recover expenses paid under the probate definition of estate, the Commonwealth may file a claim in the probate estate of the decedent just as would any creditor. TPL filed a claim against an estate recently in which your author represents the executor. See the attached Schedule C. The first time your author has seen such an action; an unscientific poll of other Virginia elder law attorneys found this effort by DMAS to be novel.

Under the more expansive definition of estate, the state can enforce its rights by pursuing the heirs or beneficiaries directly. The VAC defines estate as “(i) all real and personal property and other assets held by the individual at the time of death and (ii) any other real and personal property and other assets in which the individual had any legal title or interest (to the extent of such interest) at the time of his

death."[12] TPL seems to be pursuing the former strategy; however, the expansive and amorphous definition of the terminology opens the door to additional collection efforts under the latter approach.

In 2013, Virginia adopted the Uniform Real Property Transfer on Death Act.[13] It established "Transfer Upon Death Deeds" ("TOD Deed") in Virginia. The statute provides that at the death of the transferor, the property transferred at death by a TOD deed is subject to claims of the deceased transferor's creditors, costs of administration of the transferor's estate, the expenses of the transferor's funeral and disposal of remains, and statutory allowances to a surviving spouse and children of the transferor including the family allowance, the right to exempt property, and the homestead allowance to the extent the probate estate is inadequate to satisfy those claims, costs, expenses, and allowances.[14] A traditional creditor has one year from the death of the transferor to file suit to enforce liability; see the discussion below on Statute of Limitations. In other words, the TOD deed passes real estate outside of probate but can be brought back into the probate estate to satisfy creditors - just like a specific devise of real estate found in a Last Will and Testament.[15] Since the TOD deed property is "subject to the claims of the deceased," it seems reasonable to assume this statute created an *in rem* cause of action for the creditors to collect from the property.

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[12] 12 Va. Admin. Code § 30-20-141

[13] Va. Code § 64.2-621 *et seq.*

[14] Va. Code § 64.2-634.

[15] Va. Code § 64.2-106.

The VAC specifically singles out annuities as part of the estate and subject to claim for recovery. It provides that TPL "may seek recovery from individuals' estates that may include such annuities."[16] Many annuities have beneficiary designations (that pass outside of probate); however, some (as required for Medicaid qualification) must name the Commonwealth as a beneficiary.

When making an application for Medicaid, an individual may protect resources by use of certain qualified long-term care insurance policies.[17] If the policy is not qualified, then TPL will seek recovery against the individual's estate if the estate receives funds from the policy; however, it will not seek recovery to the extent that assets were protected (when the Medicaid application was made) by use of qualified long-term care partnership insurance policy.[18]

b. **Mo' money or no money?** It is commonplace that the estate of the deceased recipient is insolvent, as the known debts may exceed the assets available to pay the debts. In this instance, the executor or administrator must pay the debts in a particular order.[19] To the extent there are assets, they must be used to pay the debts as follows:

i. Costs and expenses of the administration of the estate (including administrative court costs, probate taxes, attorney's fees, Commissioner of Account's fees, surety bond premium, and fiduciary commission);
ii. The homestead, exempt property, and family allowances;[20]

[16] 12 Va. Admin. Code § 30-20-141 C 8.

[17] Medicaid Manual § 1460.160.

[18] 12 Va. Admin. Code § 30-20-141 C 3.

[19] Va. Code § 64.2-528.

[20] Va. Code § 64.2-309 *et seq.*

iii. Funeral expenses not to exceed $4,000;
iv. Federal debts and taxes;
v. Medical and hospital expenses of the decedent's last illness plus compensation of persons attending the decedent not to exceed $2,150 for each hospital and nursing home and $425 for each person furnishing services or goods;
vi. Debts and taxes due to Virginia;
vii. Debts due as trustee for persons under disabilities; as receiver or commissioner under Court Order; as personal representative, guardian, conservator, or committee; and for moneys collected by anyone to the credit of another and not paid over, regardless of whether or not a bond has been executed for the faithful performance of the duties of the party so collecting such funds;
viii. Child support arrearages;
ix. Debts and taxes due to localities and municipal corporations; and,
x. Any and all other claims.

No preference can be given in the payment of any claim over any other claim of the same class.

As a possible class 4 (or class 6[21]) creditor, DMAS could have priority over all other claims except for the costs of administration of the estate, the family, homestead, and exempt property allowances (these allowances apply only to decedents leaving a surviving spouse or minor children), and maximum funeral expenses of $4,000.

It seems possible that DMAS could assert a claim in the eleventh month of the estate administration and wipe out all other creditors

[21] During your author's recent telephone discussion with a TPL supervisor, she stated that a DMAS' claim is a Class 6 claim. However, your author can find no authority on this subject.

and beneficiaries. The estate of a recipient receiving nursing home benefits for two years could easily be responsible to satisfy a claim of more than $100,000. In 2018, the average monthly private pay rate in Virginia was $7,452. Even though DMAS pays much less (based on the resource utilization groups), the cost is still significant.

c. **Procedurally protect the personal representative?** There is no formal procedure requiring the personal representative to notify every *suspected* creditor. Some could interpret this informality to mean that a personal representative is not necessarily required to notify DMAS of a potential estate recovery. As discussed above, DMAS is now sending entreaties to the "heirs of [deceased Medicaid recipient]" and "estate of [deceased Medicaid recipient]" in the days and weeks after death and long before fiduciaries are qualifying.

In addition to the general lack of knowledge about this possible claim against a decedent's estate, DMAS' claim can be optional[22] or can be required.[23] If DMAS' claim is optional, then it is not fixed until details are provided. However, the VAC states that TPL "shall" seek recovery and "shall recover." Just because an investigatory letter is received by a personal representative (possibly through an heir or family member of the deceased), does the fiduciary have an obligation to complete the form and send it in?

Unless a personal representative delves into the VAC, the personal representative could infer that a recovery claim is something not to be concerned with because DMAS' claim is not certain. During a typical estate administration, the personal representative does not seek

[22] Va. Code § 32.1-327.

[23] 12 Va. Admin. Code § 30-20-141 C 1.

questionable and potential creditors, much less notify all potential creditors in writing. If the personal representative were required to notify every potential creditor in writing, the personal representative's duties would be so extensive that few individuals would likely serve. The personal representative typically pays taxes, credit card debts, house and car debts, utility bills, medical bills, funeral expenses, and other typical debts of a decedent, but the personal representative rarely goes on a fishing expedition looking for possible creditors.

A decedent's unknown or disputed creditor generally has one (1) year to make a claim against the personal representative for sums due.[24] If a cause of action against a decedent accrues subsequent to death, an action may be brought against the personal representative before the expiration of the applicable limitation period or within two years after the qualification of the decedent's personal representative, whichever occurs later.[25]

Moreover, a creditor may sue an heir or beneficiary for any distribution from an estate within five years of receipt thereof. The heir or beneficiary can be ordered to refund his or her proportion of any claims enforceable against the decedent or his estate that have been finally allowed by the commissioner of accounts or the court, or that were not presented to the commissioner of accounts. Additionally, the creditor may be awarded the costs of the recovery.[26]

d. **Debts and Demands: Prove It.** Even though a personal representative of a decedent's estate is generally not required to

[24] Va. Code § 64.2-550.

[25] Va. Code § 8.01-229(B)(4).

[26] Va. Code § 64.2-556.

specifically notify the decedent's creditors, in order to avoid personal liability, the personal representative may utilize a voluntary Debts and Demands hearing before the Commissioner of Accounts.[27]

Notification of the hearing is only required for contested claimants known to the fiduciary. Unknown creditors are notified through publication in a local newspaper.[28] Any personal representative who has in "good faith complied [with the Debts and Demands statute] or, as subsequently approved by, the order of the court, paid and delivered the money or other estate in his possession to any party that the court has adjudged entitled thereto shall not be liable for any demands of creditors and all other persons."[29]

The issue of estate recovery should not be completely ignored; if DMAS asserts a claim against a decedent's estate, not only could it affect distributions to the decedent's beneficiaries, but it could also dramatically affect the standing of the decedent's other creditors, much to the detriment of the personal representative, especially if the personal representative had already paid some other creditors.

The personal representative's duties regarding creditors in Virginia are not carved in stone, but generally, the onus is on the creditor to pursue claims against a decedent. The probate procedures

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[27] *Ibid*.

[28] The Code requires a publication of the debts and demands hearing in "some newspaper of general circulation in the county or city in which the fiduciary qualified…". *See* Va. Code § 64.2-550. The fiduciary must give written notice to "any claimant of a disputed claim." This bare requirement hardly suffices to provide actual notice to creditors, such as DMAS.

[29] Va. Code § 64.2-556.

require a creditor to pursue a debtor, possibly even long after the death of the debtor. While the personal representative must acknowledge known debts of a decedent, a creditor could have a difficult time proving that the personal representative knew of a particular debt.

e. **Shall the Executor Sell Black Acre?** A very good discussion of an executor's responsibilities with regard to the sale of real estate is found in an opinion of John H. Rust, Jr., Commissioner of Accounts for Fairfax County for many years which is attached as Schedule D. Briefly, in that insolvent estate, the Commissioner ruled that the Executor had only a "naked" power to sell the real estate and was not required to sell black acre to satisfy the claims against the estate.

The executor cannot be compelled to exercise a discretionary naked power to sell; that is the perfunctory grant of fiduciary powers (or the incorporation of Virginia Code § 64.2-105) found in most Last Wills and Testaments. If the executor is directed to sell the real estate, then the proceeds from the sale are included in the probate estate and subject to the claims of creditor, *i.e.* "the *nature* [emphasis added] of the power to sell delineates the titleholder of the decedent's real estate, as well as determines whether the real estate is within the decedent's probate estate and available for the payment of debts."

Further, when "the decedent's will directs that his 'just debts and funeral expenses be paid by my executor….as soon as is practical,' but does not direct any sale of real estate for the payment of such debts. Such standard provisions in most wills have uniformly been held not to charge the real estate for the satisfaction of debts."[30]

[30] See 31 *See* Broaddus v. Broaddus, 144 Va. 727, 742-43, 130 S.E. 794, 799 (1925); In re Estate of Trent, 58 Va. Cir. 83, 83-84 (City of Richmond, 2001).

f. **<u>Notice: What is the claim of which you speak</u>?** Every personal representative should be aware of DMAS' potential claim. The possibility of a potential claim can result from simply making inquiries about whether the decedent ever received Medicaid benefits.

For incapacitated persons dying in Virginia, the guardian or conservator or an agent under a power of attorney should be aware of this information.

If the personal representative is not a beneficiary, prudence dictates that DMAS be notified, in writing, of the right to make a claim against the decedent's estate. The proper party to notify is the Virginia Attorney General.[31] The Manual specifies that TPL is the proper party

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See also, e.g. Estate of Achilli v. Bradley, 71 Ill.App.3d 474, 389 N.E.2d 644 (1979); Forster v. First American Bank of Duluth, 212 Minn. 407, 4 N.W.2d 353 (1942); Schwertley v. Schwertley, 228 Iowa 1209, 293 N.W. 445 (1940). *Accord*, 12B M.J. *Marshalling Assets and Securities* § 24 ("The mere statement in a will of the desire of the testator that his debts be paid is not sufficient to charge his real estate with his indebtedness. In order to so charge, the intention must be clearly expressed. Because the common law afforded little protection to the creditor in his effort to subject the land of his deceased debtor to the payment of his claim, courts were quick to seize on any words in the will which even by implication might be construed as an intention on the part of the testator to charge his real estate. However, with the enactment of statutes making the real estate liable for debts, the necessity of strained construction ended, and courts now require that the intention to so charge debts be clearly expressed.")

[31] Va. Code § 8.01-195.4.

for the eligibility worker to notify when the eligibility worker suspects an estate recovery situation exists.[32]

g. **DMAS: Some Rules Just Don't Apply.** Even if TPL files a claim after one year, the statute of limitations which typically bar a traditional creditor does not apply to DMAS. In essence, DMAS is a "super creditor" without a time limit on its actions, to-wit: "No statute of limitation…shall be deemed a bar to any proceeding by or on behalf of" the Commonwealth.[33] With a nearly infinite amount of time for DMAS to attempt recovery against an estate, TPL could theoretically pursue the personal representative or heirs after final distribution or if there is no administration.

VII. In God We Trust All Others Must Pay Cash. Note that when sending funds to TPL, it will only accept a cashier's check. Personal checks are not accepted.

VIII. No Qualification. No estate administration. No problem?

DMAS has until infinity and beyond to make its claim against the personal representative; however, if there is no probated estate, are the heirs free of potential liability? What if the only "asset" in the "estate" of the deceased recipient is a life estate in the primary residence?

During the recipient's life, the life estate is not a resource that precludes Medicaid eligibility.[34] In many instances, individuals will gift real estate to their heirs and reserve a life estate in the property. If the 60 month

[32] Medicaid Manual § M1700.300 C 3.

[33] Va. Code § 8.01-231.

[34] Medicaid Manual §§ M1140.1106 A.6.b and M1140.1006 A 6 d.

look back period (from the date of the Medicaid application) is satisfied[35], the gift is ignored and no penalty period is imposed. Except for a life estate created between August 28, 2008 and February 24, 2009,[36] a life estate is an exempt asset.[37]

Whether a life estate is an asset in the estate of the deceased recipient is yet to be determined. Now doesn't that sound counterintuitive? There is no Virginia case law on point. Clearly, if the property had been sold during the recipient's life, the life tenant would receive value for the ownership interest as determined by the Code[38] or the Manual.[39] Nevertheless, a partition suit cannot be brought by or against the life tenant.[40]

In trying to determine what may be in the estate for recovery purposes, it is prudent to determine what DMAS defines as the assets and resources of the applicant/recipient. "Not everything a person owns (*i.e.*, not every asset) is a resource and not all resources count against the resource limit. The Social Security Act and other Federal statutes require the exclusion of certain types and amounts of resources. Any assets that are resources but not specifically excluded are 'countable.'"[41]

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[35] Medicaid Manual §§ M1450.000 I and M1450.000 J.

[36] Medicaid Manual §§ M1110.515 B 1 a. and M1140.1106 A 6 c.

[37] Medicaid Manual §§ M1140.1106 A 6 b and M1140.1006 A 6 d.

[38] Va. Code § 55-269.1 *et seq*.

[39] Medicaid Manual § S1140.120.

[40] Va. Code § 8.01-81.

[41] Medicaid Manual § M1110.001 B 2.

"[A]n asset that is not a resource may become one at a later date or vice versa. For example, the recipient's home is not a resource for the first six months of institutionalization in a nursing facility and then becomes a resource thereafter unless listed for sale at its fair market value and the listing agent states in writing that the property is unlikely to sell within 90 days.[42]

Further, the Manual provides that an asset is any "property…not a resource even though it may be an asset (*e.g.*, an individual who has an ownership interest in property but is not legally able to transfer that interest to anyone else does not have a resource.)"[43]

It defines resources as cash and any other personal or real property that an individual owns; has the right, authority, or power to convert to cash (if not already cash); and is not legally restricted from using for his or her support and maintenance.[44]

Keep in mind that the VAC states that for estate recovery purposes "estate" means *all* property [assets and resources] *held* by the recipient at death and *any* property in which the recipient had *any* interest at death.[45]

It is important to note that other states have been very aggressive in collection efforts. The power to reach a decedent's assets has been extended

[42] Medicaid Manual § 1130.140.

[43] Medicaid Manual § S1110.100 B 3.

[44] Medicaid Manual § S1110.100 B 1.

[45] 12 Va. Admin. Code § 30-20-141.

to include the surviving spouse's real property,[46] transfers into living trusts,[47] any assets that could be traced to the deceased recipient,[48] and the proceeds of a personal injury action, without any deduction for attorney's fees.[49] Your author could not find that any of these types of cases have appeared before a Virginia court.

Moreover, the Code allows a creditor to sue the heirs. The creditor may pursue the asset even after it has landed in the hands of an heir or devisee. The creditor must record a notice of *lis pendens* when filing the suit.[50] The creditor must prove there are not sufficient personal assets to satisfy all claims against the estate.[51] It seems reasonable that if there are insufficient assets to necessitate the personal representative's qualification, then there is

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[46] *In re Estate of Gullberg*, 652 N.W.2d 709 (Minn. Ct. App. 2002). In Gullberg, the estate recovery in the recipient's real property passing to the surviving spouse was limited to the recipient's interest at the time of his death.

[47] *Belshe v. Hope*, 39 Cal. Rptr. 2d 917 (Cal. Ct. App. 1995).

[48] *In re Estate of Wirtz*, 607 N.W.2d 882 (N.D. 2000).

[49] *Florida v. Estate of Wilson*, 782 So.2d 977 (Fl. Dist. Ct. App. 2001). In Wilson, the estate did not object to the recovery, but simply wanted to pro-rate the attorney's fees to the state's distributive share. The estate successfully sued a third party for malpractice, thereby benefitting the creditors as well as the beneficiaries of the estate. The Florida court denied proration to the state's share and required the state's recovery share to be paid in full, notwithstanding the fact that the state benefitted primarily from the malpractice action.

[50] Va. Code § 8.01-268.

[51] Va. Code § 64.2-536.

no personal estate to satisfy the creditor. Adding to the potential misery, DMAS' claim against the heir or devisee is possible without the burden of limitation of the matter being time-barred.

IX. From Beyond The Grave: Recovery From Preneed Funeral Arrangements?

A Medicaid applicant may set aside funds to pay for his or her burial and funeral in an irrevocable burial trust. A brief explanation of the regulations is set out on Medicaid Fact Sheet #42 which was prepared by DMAS. A copy is attached and marked as Schedule E.

Recently, the Department of Health Professions ("DHP") sent a "NOTICE" to Virginia licensed funeral directors regarding Medicaid burial set aside plans. It states:

> The Department of Health Professions is requesting that Funeral Service Licensees include notification to the contract buyer that if preneed arrangements for Medicaid burial set aside are reduced from the original contract amount, that the Department of Medical Assistance Services (DMAS) is entitled to receive the remainder of the funds. Likewise, if the contract is modified or terminated to reduce the original set aside amount, DMAS is entitled to receive any remaining funds resulting from the termination or modification of the contract.

Virginia Code § 64.2-108.2F provides that funds remaining in an irrevocable burial trust after the Medicaid recipient passes away shall remunerate the Commonwealth up to the total medical assistance paid.

X. Waiver of Estate Recovery.

In accordance with the Code, TPL "may" assert a claim for payments made on behalf of recipients for payments for nursing facility services, home and

community-based services, and related hospital and prescription drug services. The VAC states that TPL "shall" assert a claim. However, recovery is prohibited in certain instances when federal law deems the needs of certain relatives or heirs of the estate take priority over Medicaid reimbursement.[52] States are required to waive estate recoveries when undue hardship would result, but they have considerable discretion in their definition of "hardship" and its impact on their estate recovery activities.

a. **Too Young.** Although not cited in the Code, the VAC and Manual limit estate recovery in non-fraudulent cases to those over 55 years old.[53] Therefore, if the recipient dies younger than 55, there is no claim.[54]

b. **Medicaid recipient.** If an heir is a current Medicaid recipient, then DMAS will waive the claim.[55] It has been your author's experience, if a single heir or beneficiary of an estate is a current Medicaid recipient, TPL will release the entire claim against the estate – *not* just a prorated release.

c. **Keep It All In The Family.** TPL will not recover property from an estate in which the deceased recipient was survived by one or more

[52] See § 1917(b)(2) of the Social Security Act (42 USC 1396).

[53] Medicaid Manual § M1700.300 E 1.

[54] Note if the individual's assets are held in a special needs trust, created in accordance with 42 USC 1396, which is known as a "first party special needs trust" in common parlance, this provision is inapplicable.

[55] VAC 30-20-141.D states, "recovery…shall be waived when the heirs themselves are Medicaid eligible."

of the following: a spouse, a child under 21 years old, or, a blind or disabled child.

d. **Other disabled heirs.** A personal representative should ask if any of the heirs or beneficiaries of the estate have *ever* received Social Security disability income. The individual should obtain a copy of the disability adjudication letter from Social Security and provide it to TPL and ask for a waiver. Your author has successfully requested TPL to waive its claim in an estate when a sibling heir had been determined "disabled" by the Social Security Administration several years (and then began receiving Social Security retirement benefits) before the death of the recipient.[56]

e. **Too Unfair.** Other than the above, there needs to be a specific prima facie case that the claim will work a substantial hardship to heirs or dependents "against whom the estate claim exists".[57] TPL states that it is looking for "threatened foreclosure," "low assets," "low income," "necessitous circumstances," "threatened loss of income," or an heir is a recipient of Social Security Disability.[58] If an individual receives Supplemental Security Income, they are usually eligible for Medicaid - see above. After the hardship is established, then they look to additional factors such as:

i. **A Humble Abode.** A "[h]omestead of modest value" means a home that is worth 50% or less of the average or median

[56] However, note that once an individual attains full retirement age, in accordance with POMS DI 10105.0101, he is no longer "disabled."

[57] Virginia Code § 32.1-327.

[58] This information is from your author's telephone call with a TPL supervisor; there is no written guidance.

price, as contained in the most recent U.S. Census data or any other such source of home value information as published in the agency's guidance documents, of homes in the county or city, as appropriate, where the homestead is located as of the date of the individual's death.[59] The census data for your locality can be found online.[60]

ii. **The Family Farm.** The VAC does not define "income-producing property" except to provide the following guidance: "[s]pecial consideration shall be shown in cases in which the estate subject to recovery is: (i) the sole income-producing asset of survivors (where such income is limited), such as a family farm or other family business." Note that, in the Manual, certain assets in the application process are exempt "regardless of value or rate of return" if used for "self-support."[61] Therefore, they seem to retain their protection in the estate recovery process.

iii. **Are they ABLE?** A Medicaid recipient may hold funds in an ABLE account which are exempt in determining resource eligibility. ABLE means Achieving a Better Life Experience. The accounts are tax-advantaged savings accounts (like IRAs) for individuals with disabilities. The account cannot exceed $100,000.00. In 2020, the Commonwealth waived Medicaid reimbursement at the owner's death.[62]

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[59] 12 Va. Admin. Code 30-20-141.

[60] https://www.census.gov/quickfacts/fact/table/US/PST045219

[61] Medicaid Manual § S1130.500.

[62] Virginia Code § 23.1-707 G 2.

iv. **Am I My Sibling's Keeper?** TPL will not pursue real property of deceased recipient's property if the recipient is survived by a sibling with an equity interest in the deceased recipient's primary residence and the surviving sibling resided with the recipient for one year prior to the deceased recipient's entry into a nursing facility. Likewise, the transfer of an equity interest to a sibling who resides in the home is an exempt uncompensated transfer during the recipient's life.[63]

XI. **No Pyrrhic Victories.** If recovery is not cost effective, TPL will not pursue it. Your author has not seen TPL attempt recovery if a personal representative has not qualified, although the Code and VAC seem to indicate it does have the authority.

TPL has the discretion to waive recovery in cases in which it is determined that it would not be cost effective to recover from a deceased recipient's estate. The personal representative does not need to assert undue hardship in such situations. "Cost effective" means that both the dollar amount of the claim and the value of the estate at least exceed the administrative costs of recovery.

Factors used to determine if recovery is effective include: staff time, litigation costs, expert witness fees, deposition expenses, travel expenses, office supplies, postage, advertising, and publishing costs.[64]

XII. Off Topic: Recovery of Uncompensated *Inter Vivos* Transfers. This issue is not estate administration related, but is important.

[63] Medicaid Manual § 1450.000 C 2.

[64] 12 Va. Admin. Code § 30-20-141 F.

a. DMAS may file suit to recover from the recipients *inter vivos* gifts made in anticipation of Medicaid eligibility.[65]

b. The look back period is 30 months (prior to the date on which any person receives benefits from any program of public assistance). If a donor transfers property or resources resulting in uncompensated value, the donee is liable to repay the DMAS for benefits paid on behalf of the donor.

c. There are several exceptions:

i. The gift did not exceed $25,000;

ii. If the donor transferred his or her residence to a spouse, a child under 21 years old, a disabled child[66] or a blind child who resides in the home; or

iii. The transferee is without financial means or that such payment would work a hardship on the transferee or his family.

Take note that there is neither case law citing nor annotations to this statute since enacted in 1992.

XIII. **Conclusion.** The duties of a personal representative generally do not require a personal representative to notify the DMAS of a claim that is uncertain. A good conservative approach, however, is for the personal representative to notify DMAS, in writing, of the decedent's death or at a minimum to respond to the information request letter which TPL sends soon after the recipient's death.

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[65] Va. Code § 20-88.02.

[66] A person under 65 and disabled as defined in 42 U.S.C. § 1382c(a)(3)(A).

For the attorney representing a personal representative, a letter to the client outlining TPL's right to pursue past Medicaid payments, the infinite period during which the Commonwealth can recover against the estate and beneficiaries, and the risks involved with not notifying the Commonwealth, will at least serve to protect the attorney against a malpractice claim if TPL does try to recover against the assets of the estate or beneficiaries.

For the attorney consulting with an heir or family member, in the absence of qualification, who receives a TPL information inquiry, what shall counsel advise the client? Your author will explain the Commonwealth's rights and the potential or possibility of collection efforts. As the heir or family member has no obligation to search for a creditor. The burden is on TPL to find assets. Your author believes the client can ignore the information request and wait for the creditor to make pursuit.

With Medicaid appropriations consuming an increasingly substantial portion of Virginia's budget, DMAS (with the tools discussed above) is likely to continue and accelerate more aggressive Medicaid estate recovery procedures.