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ELDER LAW MINUTE

What do you do if you are a single homeowner, you are on Medicaid in a nursing home, and you don't want your children's inheritance to be taken away by Estate Recovery? Several of you responded to this question that I posed last week and I very much appreciate keeping in touch with you.

One attorney in Brunswick pointed out that O.C.G.A. § 49-4-147.1 states that the first \$100,000.00 of every estate is exempt from Estate Recovery. However, I informed him that paragraph (d) of that statute conditions the \$100,000 exemption on approval by the federal government, and no approval was ever granted. Following that discussion, I contacted the Department of Community Health (DCH) and suggested that the Code be revised to eliminate this confusion. They responded that they saw no need to amend the Code. So beware!

So what can a Medicaid recipient with an estate over \$25,000 do to avoid Estate Recovery? How about gifting the homeplace to the heirs within 10 days prior to the A/R's death?

The Estate Recovery Regulations address gifts. Gifts made within the look-back period are avoidable and may be set aside by an action in court. DCH Rules Chapter 111-3-8.04(14). Furthermore, if a transfer penalty period was not completed due to the A/R's death, the value of the remaining penalty period may be recovered. MEDICAID MANUAL § 2398-1.

Gifts by the A/R need to be reported to DFCS within 10 days of the gift. MEDICAID MANUAL § 2708-1. So a gift made within 10 days of death does not need to be reported to DFCS and will not result in a transfer penalty. Estate Recovery is administered by Health Management Systems (HMS) a contractor for DCH. At the current time HMS does not seem to be privy to the information gathered by DFCS over the A/R's lifetime. When a death is reported to HMS, they ask whether the estate is worth less than \$25,000 but do not ask any questions about gifts. Therefore, a gift which does not have to be reported to DFCS since it is made within 10 days of death will not knock the A/R off of Medicaid but will reduce the size of his estate for Estate Recovery purposes. Until HMS starts asking about gifts or investigating the DFCS files, a death bed gift seems to be a way to avoid Estate Recovery.

Next week I will continue on this theme by discussing the mechanics and tax consequences of the death bed gift.

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