

ELDERLAW

NEWS

New Jersey

Legal News for the Aging and Disabled

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RECENT CASE LAW DEVELOPMENT: STATE MAY PLACE MEDICAID LIEN ON TESTAMENTARY TRUST ASSETS

Any estate or asset protection plan must be based on current federal and state law. However, public benefits laws, particularly Medicaid, are in a constant state of flux. Changes in the law may effect your estate or asset protection plan. It is vital that your elder law attorney keep abreast of changes in the law, and revise your estate/Medicaid plan to address those changes.

One recent example of a change in the law is the New Jersey Appellate Division case of *Estate of DeMartino v. Division of Medical Assistance and Health Services*, 373 N.J. Super 210 (App. Div. Nov. 10, 2004). As discussed below, the appellate court in *DeMartino*, for the first time, permitted the Division of Medical Assistance and Health Services ("DMAHS") to assert a lien for the recovery of Medicaid benefits against the assets of a testamentary trust established for the benefit of a Medicaid recipient by his late wife. You should discuss this important decision with your elder law attorney when formulating your estate/asset protection plan; if you already

have an estate/asset protection plan in place, you should be aware that, if it includes a testamentary trust, the *DeMartino* case might affect your plan.

Estate Recovery:

States such as New Jersey that participate in the Medicaid program are re-

IF YOU HAVE AN EXISTING ESTATE/ASSET PROTECTION PLAN IN PLACE THAT INCLUDES A TESTAMENTARY TRUST, YOU SHOULD SEE YOUR ELDER LAW ATTORNEY PROMPTLY TO DISCUSS POSSIBLE RAMIFICATIONS OF THE RECENT DeMARTINO CASE ON YOUR PLAN.

quired to enact provisions in order to recover from the estate of a deceased Medicaid recipient all monies expended on behalf of that recipient during the recipient's lifetime. According to 42 U.S.C. §1396p (b)(1)(B), "In the case of an individual who was 55 years of age or older when the individual received such medical as-

sistance, the State shall seek adjustment or recovery from the individual's **estate**." Although the regulations that govern Medicaid recovery are complex, the basic estate recovery rule is that, if an individual has been a recipient of Medicaid benefits on or after age 55 which were correctly paid, those benefits may be recoverable from the recipient's estate, upon that recipient's death, if he leaves no surviving spouse, child under age 21, or blind or disabled child. N.J.A.C. 10:49-14.1(a).

If a family member of the deceased Medicaid recipient resided in the recipient's home at the time of the recipient's death, a Medicaid lien may still be recorded, but will not be enforced until the property is sold or the family member dies or leaves the home. N.J.A.C. 10:49-14.1(g).

It is because of the Medicaid estate recovery provisions that every effort should be made to ensure that a Medicaid recipient will not have any assets in his or her name at death, other than a

(Continued on Page 2)

(Continued from page 1)

small personal needs account. If the Medicaid recipient has assets in his "estate" at the time of death, those assets may be subject to Medicaid recovery. Because of this, the definition of "estate" becomes critical. As set forth below, the *DeMartino* case illustrates how broadly a Medicaid recipient's "estate" may be defined.

What comprises an "estate":

For purposes of Medicaid estate recovery, federal law permits states to define "estate" more expansively than the definition set forth in a state's probate law. Pursuant to federal law, a Medicaid beneficiary's "estate for purposes of the Medicaid recovery provisions may include not only the real and personal property and assets within the individual's probate estate, but also "any other real and personal property and other assets in which the Medicaid beneficiary had **any legal title or interest at the time of death** (to the extent of that interest), **including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust or other arrangement**, as well as any proceeds from the sale of any such property which remain in the estate of the survivor, heir or assign of the beneficiary, to the extent of the beneficiary's

interest." 42 U.S.C. §1396p(b)(4)(B). New Jersey has adopted this more expansive definition of an "estate." N.J.A.C. 10:49-14.1(l)(2).

"Other arrangement," in turn, is defined to include, but is not limited to, "any trust or annuity in which the beneficiary had an interest at the time of death, including a trust or annuity established by a third party," subject to exclusions. N.J.A.C. 10:49-14.1(l)(2)(ii). Notably, one such exclusion is that the term "**estate**" shall **not include ... "a testamentary trust established by a third party (including the spouse of the now-deceased Medicaid beneficiary) for the benefit of the now-deceased Medicaid beneficiary**, provided that ... the trust is a discretionary trust, constructed in such a way that the Medicaid beneficiary could not compel distributions ... [and] the trust contains no assets in which the Medicaid beneficiary held any interest within either five years prior to applying for Medicaid ... or five years prior to the beneficiary's death." N.J.A.C. 10:49-14.1(n)(3).

Because of the exclusion of such testamentary trusts from the definition of a Medicaid beneficiary's estate (and thus from the Medicaid recovery provisions), elder law attorneys have, until now, recommended the use of testamentary trusts in certain situations. For example, because a Medicaid recipient is entitled

to a statutory "elective share" upon the death of his spouse (called the "community spouse"), and those assets could ultimately be claimed by the Medicaid authorities to reimburse the state for the cost of the care provided to the institutionalized spouse, a Medicaid plan may have included the creation of a testamentary trust through the Last Will and Testament of a community spouse, whereby the amount required to satisfy the Medicaid recipient spouse's elective share is held by the trustee for the Medicaid recipient's special needs during his lifetime, with the amount remaining at his death distributed to the couple's children. Until the *DeMartino* case, the thinking had been that, because the assets would be in a testamentary trust, it would not be considered part of the institutionalized spouse's "estate," for purposes of Medicaid estate recovery.

That practice was challenged by DMAHS in the *DeMartino* case, and DMAHS ultimately succeeded in its position that assets of a testamentary trust established by a community spouse could be claimed by DMAHS to recover Medicaid benefits paid to the institutionalized spouse.

The *DeMartino* Case:

In *DeMartino*, the husband, Michael DeMartino,

(Continued from Page 2)

(Continued on page 3)

gifted his interest in the couple's home to his wife Anne (the community spouse) in September 1999. He entered a nursing home on April 1, 2000 and began receiving Medicaid benefits. His wife died on October 29, 2000. In her will, she created a testamentary trust for the husband. Under the testamentary trust, that portion of her residuary estate equaling the husband's elective share was placed in the trust. The husband received the income from the trust in installments, and the trustee was given sole and absolute discretion to distribute principal for the husband's "special nonsupport needs." The will provided that, upon the husband's death, the remainder of the trust would be distributed to the couple's children.

When the husband died on May 6, 2001, the aforementioned testamentary trust had not yet been funded. Thereafter, the DMAHS sought to assert a claim against the husband's estate, including against the assets in the testamentary trust. The husband's estate, in turn, claimed that the DMAHS could not assert a lien on the property because the husband had no legal interest in the trust assets at the time of his death. The estate also claimed that provisions of *N.J.A.C.* 10:49-14.1(n), which defines the term "estate" to include assets in certain testamentary trusts (in particular, those trust as-

sets in which the Medicaid recipient had an interest within a five-year "look-back" period), to be invalid.

The Appellate Division rejected the husband's estate's challenge to *N.J.A.C.* 10:49-14.1(n), finding that federal law permits states to adopt broadened definitions of "estate," which may include "assets conveyed to a survivor ... of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement." 42 U.S.C. §1396p(b)(4)(B) (emphasis supplied).

The *DeMartino* court concluded that the assets of the testamentary trust were part of the husband's "estate" upon his death:

Rather than make an outright bequest to Michael of the [elective share] monies, Anne placed Michael's elective share in a trust.... But for the trust arrangement, Michael's elective share would have been part of his own estate.... By establishing a trust, ... Michael's assets were transferred to his heirs upon his death. In our view, a testamentary trust of the sort employed here qualifies as an "arrangement" for

the conveyance of the assets of a Medicaid beneficiary within the meaning and intent of 42 U.S.C. §1396p(b)(4)(B).

The court found that, although the trust was created by a third party, as opposed to the Medicaid recipient, "a testamentary trust that effects the transfer of the recipient's assets to his survivors, heirs or assigns, is similar in purpose and effect to the forms of conveyance mentioned in 42 U.S.C. §1396(b)(4)(B)." It concluded that, "When assets of a Medicaid recipient are conveyed to a survivor, heir or assign by such an arrangement," the assets remain part of the recipient's "estate" pursuant to 42 U.S.C. §1396p(b)(4)(A) and *N.J.S.A.* 30:4D-7.2(a)(3)."

Conclusion:

Those formulating an estate/asset protection plan should be mindful of the *DeMartino* case, which permitted the DMAHS to assert a lien for the recovery of Medicaid benefits against the assets of a testamentary trust established by a Medicaid recipient's spouse. Those who have already developed an estate/asset protection plan should be aware that, if it includes a testamentary trust, the *DeMartino* case might affect that plan. This is a complicated case that warrants a discussion with your attorney. ☒ ☒

Law Offices of Donald D. Vanarelli
ELDER LAW SEMINAR SERIES

- 1. How to Protect your HOME from the Catastrophic Costs of Nursing Home Care.** If you or your spouse need more care than you can afford, how can you avoid losing your home due to the long-term care costs?
- 2. NEW Rules for Medicaid Eligibility.** How do the new rules actually give you greater options to protect your life savings when your spouse or parent is in an assisted living facility or nursing home?
- 3. Special Needs Planning: Estate Planning for Persons with Disabilities and their Families.** Who will care for your disabled child when you no longer can? Will your child continue to receive public benefits?
- 4. Asset Protection Planning.** What Medicaid programs are available for NJ residents? What are the planning techniques available which will protect your life savings for your loved ones?
- 5. Long-Term Care Insurance: What You Must Know.** Will Medicare pay for the cost of long-term care? Is long-term care insurance available? How do I determine the best policy for my needs?

Winter – Spring 2005 Seminar Dates and Locations

<u>Protecting Your Home</u>	March 23 and April 21	6:30-8:00 p.m.	Westfield, NJ
<u>New Medicaid Rules</u>	April 19 and May 25	6:30-8:00 p.m.	Westfield, NJ
<u>Special Needs Planning</u>	April 12 and May 26	6:30-8:00 p.m.	Westfield, NJ
<u>Long-Term Care Insurance</u>	March 10 and 24; April 13	7:00-8:30 p.m.	Westfield, NJ
<u>Asset Protection Planning</u>	February 24	1 p.m.; 7 p.m.	Woodbridge Library
	March 9	12:00-1:30 p.m.	Muhlenberg Hospital
	March 16	1 p.m.; 7 p.m.	Springfield Library
	April 14	1 p.m.; 7 p.m.	Scotch Plains Library
	May 17	1 p.m.; 7 p.m.	North Edison Library



RSVP, by calling: 908-232-7400, or by email: dvanarelli@dvanarelli.com

Parking available

Refreshments Provided

Have your questions answered by one of New Jersey's leading elder law attorneys, Donald D. Vanarelli, Board-Certified as an Elder Law Attorney by the National Elder Law Foundation, Accredited by the ABA.

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 Seminars: Upcoming Elderlaw Seminar Series Announced**