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ESTATE RECOVERY UPDATE

The Court of Appeals of Tennessee recently heard a case regarding estate recovery from the estate of a surviving spouse. Although the decision is not binding in Virginia, similarities between Tennessee law and Virginia law in the area of estate recovery make this an instructive case.

In the case *In Re: The Estate of James Clifford Smith* (M2005-01410-COA-R3-CV, November 1, 2006), the decedent was the surviving spouse of a Medicaid recipient. The Medicaid recipient wife had been admitted to a nursing home in 2001, and a Medicaid resource assessment was done in April 2002. The wife was approved for Medicaid. All assets that were jointly owned by the couple were transferred to the husband within one year of the Medicaid approval; the transfers met the Medicaid regulations. The benefit approval and transfers were not disputed, and all parties agreed that the Medicaid benefits were properly paid for the wife's care until her death in September 2003.

The state Medicaid agency did not pursue estate recovery against the wife's estate at her death because she was survived by her husband. Further, the wife had no assets at the time of her death. Three months after the wife's death, the husband died. The state filed a claim against the husband's estate for approximately \$32,000 to recover the Medicaid benefits properly paid for the wife's care. The local probate court allowed the state to recover, and the husband's estate appealed.

The court analyzed the Federal law that pertains to estate recovery, 42 U.S.C. § 1396p(b), which prohibits recovery of correctly Medicaid benefits with three narrow exceptions. The court focused on one exception, which permits recovery "[i]n the case of an individual who was 55 years of age or older when the individual received such medical assistance, the State shall seek adjustment or recovery from the individual's estate." Such adjustment or recovery may be made only after the death of the individual's surviving spouse, if any. The Federal law goes on to state that the term "estate" includes "all real and personal property and other assets included within the

individual's estate, as defined for the purposes of State probate law." The term "estate" "may include, at the option of the State . . . any other real and personal property and other assets in which the individual had legal title or interest at the time of death (to the extent of such 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."

In this case, the state argued that Federal law permits them to recover under the optional estate recovery definition, and that "estate" includes assets once held jointly with the Medicaid recipient. The state did not argue that the Medicaid recipient left an estate under Tennessee probate law. The state argued that the expanded definition of "estate" permitted them to trace the funds that had been transferred from the Medicaid recipient to her husband during her lifetime, and recover from the husband's estate.

The court held that under the express terms of the definition of "estate" argued by the state, in order to be a part of the wife's "estate" under the expanded estate recovery section, she had to have legal title or interest in the property "at the time of her death." The court held that because the transfers to the husband took place during the wife's lifetime, she had no interest in the property when she died, and therefore there was no estate against which the state could recover.

The court reviewed decisions in other states on whether the state can trace a Medicaid recipient's estate through to the surviving spouse's estate. The court noted that when the state has been allowed to trace the Medicaid recipient's estate to the surviving spouse's estate, it appears that the Medicaid recipient had an interest in property at the time of the recipient's death, and that this property then passed to the surviving spouse. Because the court determined that the Medicaid recipient in Tennessee had no estate at the time of her death, as the term is defined in Federal law, the court declined to resolve the issue of tracing assets from the Medicaid recipient's estate to the surviving spouse's estate. The court, however, specifically cited a North Dakota case, *In Re Wirtz* (607 N.W.2d 882, N.D. 2000), in which the North Dakota Supreme Court did conclude that such tracing was permissible. The Tennessee court respectfully disagreed with this conclusion, because under the applicable Federal law, in order for an asset to be potentially recoverable, it must be an asset in which the Medicaid recipient had a "legal title or interest at the time of death."

Virginia Administrative Code 12VAC30-10-560 (D) defines "estate" for estate recovery purposes as follows:

"Estate" means with respect to a deceased individual, (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 death.

Thus, Virginia has adopted the same definitions of "estate" as provided in the Federal law that was analyzed by the Court of Appeals of Tennessee. Although the Tennessee decision is not binding on Virginia courts, the analysis used by the Tennessee court should be helpful in analyzing estate recovery cases in Virginia.

Oast & Hook can assist clients with integrated long-term care, estate, financial, and insurance planning. Oast & Hook can also assist clients with potential estate recovery issues.

Ask the Expert

Mark your calendar to listen to the "Ask the Expert" show on WTAR radio (850 AM) from 5:00 p.m. to 6:00 p.m., Tuesday, November 14th. The guest speakers will be Oast & Hook attorney William Oast III and William West Jr., a reverse mortgage specialist with Enterprise Mortgage Corporation.

Oast & Hook

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