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Medicaid's Right to Reimbursement and SNTs

2024 National Conference on Special Needs Planning and Special Needs Trusts

LTSS Boot Camp

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Introduction

- Distinction between a 1st party SNT and 3rd party SNT
- Brief 101 on needs-based public benefits
- Requirements to establish a 1st party SNT
- Begin with the end: Medicaid payback requirement

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Agenda

- Federal Law and regulations
- 1st party SNT termination provisions
- Nuances of Medicaid's right to reimbursement

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OBRA '93

“The State will receive all amounts remaining in the trust upon the death of the individual up to an amount equal to the total medical assistance paid on behalf of the individual.”

- Subsection (A) – Disabled Under Age 65 Trust: Most likely of the 3 trusts to have “amounts remaining” on termination
- Subsection (B) - Income-Only or Miller Trust: Unique to income-cap trusts and least likely to have “amounts remaining” on termination
- Subsection (C) – Pooled Trust: Only to extent amounts are not retained on termination

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Other Federal Law and Regulations

- HCFA Transmittal No. 64 parrots OBRA '93
- Foster Care Independence Act of 1999 adopts and mirrors OBRA '93 trust exceptions for SSI program
- SI POMS, latest and greatest update in 2009, contemplates reimbursement to Medicaid at time of termination during lifetime and death

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Early Termination Provisions

- Federal Medicaid law and regulation limit payback to time of death
- Some states, e.g., Arizona, require reimbursement on termination during lifetime
- SSA expressly provides for Medicaid payback also upon termination during lifetime
 - Beneficiary no longer disabled or otherwise becomes ineligible
 - Trust has insufficient assets to justify continued administration
- SSA takes it a step further and imposes limits on payment of administrative expenses

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Termination at Death

Provisions: Limitations

- Limitations on payment of administrative expenses prior to reimbursement to Medicaid
 - Only taxes due related to trust
 - Admin fees related to trust
 - No debts
- Expenses of last illness, funeral and burial AFTER reimbursement to Medicaid
 - *Note:* Important to pre-arrange funeral and burial!

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Termination at Death

Provisions: Residual Beneficiary

- Medicaid as creditor v. beneficiary
- Laws of intestacy may render trust revocable, i.e., countable for SSI purposes
- Medicaid as creditor v. beneficiary

Drafting tip: Name residual beneficiary of nominal interest mimicking laws of intestacy!

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Power to Amend... Just in Case

The SNT that passes muster today, will not tomorrow.

- Limited not broad or general power to amend
- Give power to amend to someone other than beneficiary ≠ countable for SSI
- Limit power to amend so trust assets not considered available for maintenance and support ≠ countable for SSI

Drafting tip: Provide for amendments that ensure the SNT complies with the provisions of 42 U.S.C. § 1396p(d)(4), the POMS, and applicable state laws and regulations.

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Third Party SNT – Short ‘n’ Sweet

Unless charitably inclined, do NOT provide for reimbursement as it is NOT required!

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Paying the Piper: Medicaid Estate Recovery

- OBRA '93 mandated states institute estate recovery program
 - Limited to estates of Medicaid enrollees aged 55 or older
 - No recovery if Medicaid enrollee survived by spouse, child < 21, blind or disabled child
 - Undue hardship waiver

None of the above limitations or waiver apply to SNTs!

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Paying the Piper: Pre and Post Establishment of the SNT


- Medicaid's right to reimbursement from SNT not limited in duration- goes back to when beneficiary first eligible for medical assistance
 - POMS states that "Medicaid payback . . . cannot be limited to any particular period of time; for example, payback cannot be limited to the period after establishment of the trust."
 - Case law finds 42 U.S.C. § 1396p(d)(4) does not limit the payback to a particular period of time.

Practice tip: Consider whether a Medicaid lien was paid prior to funding SNT with a third party recovery and make the case to deduct the total amount of the lien from Medicaid's claim for reimbursement.

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Paying the Piper: “Medical Assistance”


- In fee-for-service states, confirm Medicaid’s claim for reimbursement only includes the 21 enumerated services under 42 U.S.C. § 1396d(a)
- Transmittal 75 (2001) requires Medicaid to see to recover premium or capitated payments from the estate of Medicaid beneficiary enrolled in managed care organization
- Transmittal 75 requires Medicaid to provide special notice to Medicaid beneficiary re: inclusion of premium/capitated payments in estate recovery claim

Practice tip: Make sure Medicaid’s claim is only for the specific services enumerated and to reimbursement of premium payments is sought, argue not permissible against SNT and confirm whether separate notice given.




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Conclusion: Counsel your Client!

- Medicaid has a right to reimbursement when the trust is terminated during lifetime as well as at time of death
- Medicaid’s right to reimbursement dates back to when the individual was first eligible not to when the SNT was established
- Consider what is included in “medical assistance”
- Consider which expenses are disallowed until after Medicaid is reimbursed



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