



Elder Law Update: Medicaid Estate Recovery in Tennessee

With advancing age comes the worry that some day, we may need care that our families are unable to provide physically, emotionally and financially. However, for many elders concerns about needing nursing home care are overshadowed by fears of losing the family home to pay for that care.

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Urban myths abound about accessing Medicaid. For example, many people believe that in order to access Medicaid, they have to sign over the home to the state or to the nursing home. They are under the impression that the state will file a lien against their home.¹ They also believe that the state will take the home as soon as Mom draws her last breath. Often misunderstood, the actual process is called “estate recovery.”

So, what is this “estate recovery” all about? Medicaid is a joint state and federal program that, among other things, pays for nursing home care, if the patient meets all the medical, income, and asset eligibility criteria. In order for the federal government to help fund the states’ Medicaid programs, federal law requires each state to institute an estate recovery program. Under federal law, the states are allowed to define “estate.” The states may choose whether to utilize “limited” or “expanded” estate recovery.

“Limited” estate recovery is limited to the probate estate of the Medicaid recipient. “Expanded” estate recovery may include the probate estate, property held jointly with right of survivorship, property held as a life estate/remainder interest, or property held in a revocable living trust. Usually, the only asset left in the Medicaid recipient’s “estate” is the home.

Under Tennessee Medicaid regulations, the home is an exempt asset for the lifetime of the patient (as long as he

intends to return home). Even after the patient dies, the state may not recover against the patient’s estate as long as there is a surviving spouse, a minor child, a blind child, a totally and permanently disabled child, a caregiver child, or a sibling with an equity interest.²

Presently, the Bureau of TennCare must file a claim in the probate estate in order to recover the Medicaid funds paid out for the patient’s care. The probate code, *Tenn. Code Ann.* § 30-2-310, provides that in order for creditors to be paid, the creditor must file a claim within one year of the decedent’s date of death. There is an exception for the payment of taxes, which are still due and payable even past the one year.

Does the one-year statute of limitations apply to the Bureau of TennCare for decedents who died prior to Jan. 1, 2007? No. In 2009 in the case of *In Re Estate of Tanner* the Tennessee Supreme Court held that although *Tenn. Code Ann.* § 30-2-310(b) creates a general one-year statute of limitations on state claims (except for taxes), the personal representative has a duty, under *Tenn. Code Ann.* § 71-5-116(c) to “actively seek a release or waiver of any medical assistance correctly paid.” Therefore, because the personal representative did not actively seek a TennCare release and no waiver or release was issued, the “Bureau was empowered under the terms of the applicable statute, as then written, to file the claim beyond

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the one-year period of limitation.” The supreme court added: “At least until the first day of Jan. 2007, when the most recent amendment took effect, claims by the Bureau were not subject to the one year statute of limitations.”³

On Jan. 1, 2007, the amendment to the “welfare” (i.e., Medicaid) statute, *Tenn. Code Ann.* §71-5-116(d)(1)(D), became effective. That statute provides: “Personal representatives of decedents shall provide the notice to creditors specified in § 30-2-306 to the bureau ... if the decedent was a TennCare recipient. If a notice to creditors is provided to the bureau, the bureau shall file a claim for recovery in *accordance with the requirements of title 30, chapter 2, part 3*” (emphasis added).

Following *Tanner*, most courts and attorneys believed that for post Jan. 1, 2007 decedents, the Bureau of TennCare was barred from recovering unless the claim was filed within one year after the date of death. This meant that many attorneys advised families to wait one year after the date of death to open probate if the Medicaid recipient died after Jan. 1, 2007. That way any claim filed by the Bureau of TennCare would be barred. The probate judges tended to agree.

Does the one-year statute of limitations apply to the Bureau of TennCare if the Medicaid recipient died after Jan. 1, 2007? No.⁴ In the case of *In Re Estate of Gregory*, Mrs. Gregory passed away on Feb. 26, 2009. The executor waited one year before submitting her will to probate. On Aug. 26, 2010, the Bureau filed a claim in the estate. The executor filed an “Exception to Claim” on the grounds that the claim was barred by the one-year statute of limitations.⁵

The trial court held that the Bureau of TennCare was entitled to recover against the estate of a Medicaid recipient who died after Jan. 1, 2007, even though the Bureau filed its claim more than one year beyond the date of death.

The Tennessee Court of Appeals affirmed *In Re Estate of Gregory*.⁶ The Court of Appeals relied on the Supreme Court’s reasoning and holding in *Tanner*. The *Gregory* court opined that even though the *Tanner* court was careful to distinguish *Tanner* from post-Jan. 1, 2007, cases, “the Court in *Tanner* did not indicate in its opinion that its limiting language was the result of anything other than avoiding an advisory opinion.”⁷

Following the *Tanner* court’s reasoning, the *Gregory* court stated that the estate recovery statute, *Tenn. Code Ann.* §71-5-116, which requires the executor to obtain a waiver or release of claim from the Bureau of TennCare overrides the probate statute of limitations because:

- An interpretation that favors the Bureau’s ability to recover medical benefits more faithfully advances the serious policy considerations that motivated the General Assembly to enact the waiver and release provisions of *Tenn. Code Ann.* §71-5-116.
- When there is an ambiguity as to whether a claim by the state has been made subject to a statute of limitations, the relevant statutes must be construed in a manner to favor recovery.
- The legislative history and context of the statute support the interpretation that the waiver and release provisions were intended to assure recovery in the event the Bureau did not actively pursue the claim.⁸

The *Gregory* court held that the Jan. 1, 2007, amendment to the probate code did not change the applicability of the Tennessee Supreme Court’s reasoning or holding in *Tanner*. Therefore, the Court of Appeals held that for decedents who died after Jan. 1, 2007, the Bureau of TennCare *may* recover even if the claim is filed more than one year beyond the date of death. The *Gregory* decision was not appealed.

May the Bureau of TennCare recover against assets held in a revocable living trust? Yes. In the case of *In Re Estate of Omer Stidham*,⁹ the Bureau of TennCare opened the estate and requested that the court appoint an administrator. The probate estate was insolvent; therefore, the Bureau wanted to recover against the real property held in the revocable living trust. The trial court held that the revocable trust was subject to claims against the estate. The Court of Appeals affirmed.

On appeal, the heirs acknowledged that in most instances, a creditor may recover against assets held in a revocable living trust.¹⁰ However, since the General Assembly has not expanded the term “estate” to include assets held in a revocable living trust, the Bureau was barred from recovering.

The Court of Appeals explained that the term *estate* “may include at the option of the state, 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.”¹¹ The court held that “any property than can be reached by the Personal Representative, pursuant to *Tenn. Code Ann.* §35-15-505 for the payment of debts of an insolvent estate may be reached by the probate court for the purpose of reimbursing the Bureau.”¹² The court also held that the burden to obtain a TennCare release is on the Personal Representative and not the Trustee.

May the Bureau of TennCare recover if the decedent owned property jointly with right of survivorship at the date of death? No ... for now. This question has not been addressed on appeal. Under the present statutory scheme, the Bureau of TennCare may only recover against probate assets. The General Assembly has not expanded estate recovery to include property held jointly with right of survivorship. However, Justice Koch made an inter-

esting comment in the case of *In re Estate of Trigg*.¹³ In footnote 62, Justice Koch stated:

By enacting 42 U.S.C. § 1396p(b)(4)(B), Congress determined that the states may obtain reimbursement for Medicaid benefits from any jointly-held survivorship interests in property that the deceased recipient held at the time of death. Ms. Trigg's estate argues that TennCare cannot recover such interests because the General Assembly has not enacted an "expanded" definition of "estate" that would permit TennCare to take advantage of the "expanded recovery option" permitted by 42 U.S.C. § 1396p(b)(4)(B). We need not address this question here because the property at issue in this case is not a jointly held interest in property with right of survivorship. [] *The question of whether the General Assembly must enact an expanded definition of "estate" before TennCare may seek reimbursement from a deceased recipient's jointly held property with survivorship rights must await another case.*" (emphasis added).

This *dicta* indicates that the courts may not wait on the General Assembly to expand estate recovery to assets held jointly with right of survivorship.

May a court expand estate recovery? Good question! In 2007, the AARP Public Policy Institute funded a study by the ABA Commission on Law and Aging,¹⁴ which lists for each state the statutory and regulatory authority for estate recovery. It appears, based on the research, that as of 2007, "estate" has been defined by the states' legislatures. Whether other state courts have interpreted "estate" to reach beyond probate assets, as mentioned in *Trigg*, is a subject for further study.


In addition, in 2005 the Tennessee General Assembly entertained the idea of amending *Tenn. Code Ann.* §71-5-116 to expand estate recovery beyond the probate estate.¹⁵ The House Bill was deferred to the Judiciary Committee,

and the Senate Bill was deferred to the General Health and Welfare subcommittee. The fact that our legislature considered and rejected expanding estate recovery is a strong argument against the Bureau of TennCare's authority to reach beyond the probate estate through a court decision.

May the Bureau of TennCare recover from the estate of a surviving spouse for benefits paid for the nursing home spouse? If the nursing home spouse did not hold an interest in the real property at death, the Bureau may not recover from her spouse's estate. The Tennessee Court of Appeals considered this issue in *In Re Estate of James Clifford Smith*.¹⁶ In that case, Mrs. Smith transferred her interest in all the couple's assets, including the real property, to Mr. Smith. (There is no Medicaid penalty for transfers between spouses.) Mrs. Smith received Medicaid benefits to pay for her nursing home care. Mrs. Smith died. Subsequently, Mr. Smith died. The Bureau of TennCare filed a claim in Mr. Smith's estate for benefits paid for Mrs. Smith's care.

The Court of Appeals held that estate recovery is not allowed from the deceased spouse's estate for benefits paid for the predeceased spouse because the predeceased spouse did not own an interest in the property at the time of her death.¹⁷

The laws pertaining to estate recovery are presently in flux. The courts' move to interpret these statutes in light of the very real fiscal public policy concerns is understandable. However, the expansion of estate recovery may have unforeseen negative consequences for elders. Families may attempt to "save Momma's home" by transferring their homes to the children. In addition to this causing the possible denial of Medicaid benefits, such "voluntary" impoverishment may also result in a higher incidence of neglect and exploitation by the children. As attorneys, we must be very thoughtful as we advise clients about

the increasingly limited options to preserve the home equity for future generations. Assuring the client's access to care, whether paid privately or through the Medicaid program, must be our first priority. 

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Notes

1. No lien may be imposed against the real property of any recipient prior to the individual's death, on account of medical assistance paid or to be paid on the recipient's behalf pursuant to this part, except pursuant to a court judgment for recovery of benefits incorrectly paid on behalf of the recipient. *Tenn. Code Ann.* §71-5-116.

2. See 42 U.S.C. §1396p.

3. *In re: Estate of Tanner*, 295 S.W. 3d 610, 57-58 (Tenn. 2009).

4. *In re Estate of Gregory*, 2012 Tenn. App. LEXIS 438 (Tenn. Ct. App. June 29, 2012).

5. *Tenn. Code Ann.* §30-2-310.

6. *In re Estate of Gregory*, 2012 Tenn. App. LEXIS 438 (Tenn. Ct. App. June 29, 2012).

7. *Id.* at 6.

8. *In re Estate of Gregory*, 2012 Tenn. App. LEXIS 438, 7-8 (Tenn. Ct. App. June 29, 2012) (citing *In re Estate of Tanner*, 295 S.W.3d 610 (Tenn. 2009)).

9. *In Re Estate of Omer Stidham*, No. E2011-02507-COA-R3-CV (August 23, 2012).

10. *Tenn. Code Ann.* §35-15-505(a)(5).

11. 42 USC §1396p(b)(4)(B).

12. *Id.* at 11.

13. *In re Estate of Trigg*, 2012 Tenn. LEXIS 379, 47-48 (Tenn. May 30, 2012).

14. Wood and Kline, *Protections in Medicaid Estate Recovery: Findings, Promising Practices, and Model Notices*. Appendix B "Table of Statutory and Regulatory Authorities for Estate Recovery."

15. House Bill 2323 and Senate Bill 2307.

16. *In Re Estate of James Clifford Smith*, 2006 Tenn. App. LEXIS 715 (Tenn. Ct. App. Nov. 1, 2006).

17. 42 U.S.C. §1396p(b)(1)(B).