

**KASSOFF, ROBERT & LERNER, LLP**

*ATTORNEYS AT LAW*

100 Merrick Road

West Building • Suite 508

Rockville Centre, New York 11570

(516) 766-7700

Fax (516) 766-0738

Joan Lensky Robert, Esq.  
joanlenrob@krllaw.com

**PROTECTING PERSONAL INJURY RECOVERIES FOR PLAINTIFFS  
WHO RECEIVE PUBLIC BENEFITS**

**NEW YORK STATE BAR ASSOCIATION  
MARCH 15, 2019**

**NURSING HOME TORTS  
REDUCING ESTATE RECOVERY**

Joan Lensky Robert, Esq.

**MEET NANCY AND THE NURSING HOME TORT**

**A. NANCY'S Situation:**

NANCY is 82. She has been in a skilled nursing facility for 4 years. Two years ago she developed a bed sore. It caused permanent damage, and she is wheelchair bound. Prior to entering the nursing home, she had lived in an adult home. She has battled mental illness during her adult life.

Her case has settled for \$300,000.00. The Department of Social Services did not file a lien against the lawsuit. SAM is NANCY's son. He is also her legal guardian, as NANCY suffers from dementia and was not able to prosecute the action on her own.

You meet with SAM and PAUL to present a plan to the Guardianship Part that will allow NANCY to benefit from the lawsuit and will also avoid estate recovery. SAM doesn't want anything done that will jeopardize his mother's ongoing eligibility for Medicaid. He heard that an

SNT is a proper planning tool but heard that the government gets paid back when she passes away if any funds remain in the trust.

## **B. PUBLIC HEALTH LAW 2901-d: Lawsuits Against Nursing Homes**

In order to encourage patients in a nursing home to bring actions that hold facilities accountable for negligent actions that they commit, New York law provides that when a patient brings a lawsuit against a residential health care facility, that no liens will be filed against the lawsuit for Medicaid expended. 02 ADM-3. The funds recovered will not be considered an available resource when computing Medicaid eligibility. 18 NYCRR §360-4.9(a)(5)(i). However, when the plaintiff passes away, the estate recovery rules for Medicaid provided after age 55 will apply. See 02 ADM-3 and N.Y. Soc. Serv. L. 369.

## **C. Medicaid Estate Recovery Rules**

**ISSUE:** The protection given the assets subject to a nursing home tort avoid a lien placed against the lawsuit proceeds but do not avoid estate recovery rules. In general, a Medicaid recipient can own only limited assets and remain eligible for Medicaid – a home, a luxury fund, a funeral account. Proceeds of a nursing home tort are exempt assets during lifetime. However, these assets are subject to the estate recovery rules.

So what are the Medicaid estate recovery rules?

### **1. ASSETS REMAINING IN THE NAME OF THE MEDICAID RECIPIENT AT THE TIME OF DEATH**

If a Medicaid recipient passes away owning assets in his/her sole name, Medicaid will recoup from the estate of the Medicaid beneficiary the cost of Medicaid provided after the age of 55, unless he or she is survived by a spouse or a child with a disability. This estate recovery is limited to the probate estate or assets passing by intestacy. N.Y. Soc. Serv. L. 369.

If a Medicaid recipient owns assets jointly with right of survivorship or names a beneficiary of the asset, there is no estate recovery for Medicaid under current law. N.Y. Soc. Serv. L. 369.

## 2. ASSETS IN A SPECIAL NEEDS TRUST

OBRA 1993 authorized a person with a disability under the age of 65 to transfer his/her assets into a trust for his/her benefit without incurring any ineligibility for any Medicaid or SSI programs. Prior to the enactment of this statute, only the income could be accessed from a trust for a Medicaid recipient and applicable transfer penalties applied for SSI or chronic care Medicaid. . Now the income and principal may be accessed. However, upon the death of the beneficiary, there is a payback to the State for all Medicaid provided to the beneficiary, regardless of whether or not it is causally related to the lawsuit. 42 U.S.C. 1396p(d)(4)(A); N.Y. Soc. Serv. L. 366(2)(b)(2)(iii)(A).

## 3. POOLED TRUST

If assets are placed in a pooled trust, remaining assets will be retained by the trust for the benefit of other people in their organization with disabilities. If the individual chooses to reimburse the State, Medicaid will be reimbursed, with any remaining funds paid to the Pooled Trust. 42 U.S.C. 1396p(d)(4)(C); N.Y. Soc. Serv. L. 366(2)(b)(2)(iii)(B).

## 3. GIFTED ASSETS

If assets have been gifted, they escape estate recovery.

## 4. LIFE ESTATE

Under current law, a life estate extinguishes upon the death of the Medicaid recipient and avoids estate recovery. New York had proposed legislation that would have enabled the state to

recoup the cost of Medicaid expended from the life estate. This legislation was not enacted. See 11 ADM-8.

## 5. TRUSTS

Under current law, assets in trusts, either irrevocable or revocable, other than Special Needs Trusts or Pooled Trusts, escape estate recovery for the Medicaid program, as they avoid probate or intestacy. N.Y. Soc. Serv. L. 369..

### **D. Plan Presented to the Guardianship Part**

SAM is NANCY's son and only child. He visits her once a week. NANCY is a widow. SAM is employed as a taxi driver, eeking out a living. He lives in a rent controlled apartment. He is 52. He has an adult daughter who is a teacher. She visits her grandmother several times a year.

You prepare a Petition in which SAM asks the court to :

1. Make a gift of \$50,000.00 to SAM. Because the proceeds from the lawsuit are exempt assets for Medicaid purposes, there is no transfer penalty imposed for NANCY's Medicaid by this gift.

2. Create a family trust for NANCY and SAM, with a bank serving as Trustee, subject to the jurisdiction of the Guardianship Part. This trust allows that \$700/month may be given to SAM and that the funds may provide NANCY with whatever she needs.

3. Upon the death of NANCY, the trust provides that any remaining trust assets will be distributed to SAM, outright. If SAM has predeceased NANCY, remaining funds will be distributed to SAM's daughter, NANCY's granddaughter.

4. SAM's petition relies upon N.Y. Mental Hyg. L. 81.21(a), (b) and the doctrine of substituted judgment.

5. This plan allows NANCY to maintain her Medicaid eligibility, use funds during her lifetime and for her son to inherit funds when she passes away, as the trust will escape probate.