

# Medicaid Estate Recovery 2003

By Wesley E. Wright and Molly Dear Abshire, as published in the Houston Chronicle Senior Living Section on May 28, 2003.

There has been considerable negative publicity lately about state budget cuts and their impact on human services. Despite all of this, it is safe to say that the Medicaid program is not going away. Medicaid is firmly entrenched in the American social fabric, and it will likely be around unless replaced by a viable health insurance program that meets the needs of many persons currently served by Medicaid.

One aspect of Medicaid which is of particular concern to elderly persons in declining health is "estate recovery." This term refers to the state recovering the cost of Medicaid-funded services from the estates of Medicaid recipients. Will Medicaid take my home? Will my survivors receive none of the fruits of my labors? Can anything be done to protect assets for my heirs? These and similar questions are raised by older Texans who are facing nursing home placement.

The good news is that Texas is one of a small minority of states that has not implemented Medicaid estate recovery. It may be, however, that this situation will not continue indefinitely. Federal law actually requires estate recovery for certain deceased Medicaid recipients, and although Medicaid is state-administered, it uses mostly federal funds. These facts, coupled with the budget crunch currently facing state government, may eventually conspire to enforce Medicaid estate recovery nationwide. Whether or not estate recovery becomes a reality in Texas, there are techniques used by elder law attorneys which can minimize its impact on the elderly and preserve as many assets as possible for the survivors.

A 1993 federal statute requires states to recover the cost of nursing home services, home and community-based services, and related hospital and prescription drug services paid by Medicaid for persons who were 55 or older at the time they received such services. These costs are recovered from the individual's probate estate, which includes the home. This is accomplished by filing a claim with the probate court when the individual dies, or by placing a post-death lien on the individual's home.

While Medicaid estate recovery is mandatory, the use of property liens as an instrument of recovery is left to state discretion. States may (at their option) place a pre-death lien on the homestead of a Medicaid recipient in a nursing home, if the state has made a reasonable determination that the individual will not return home. The lien dissolves should the individual actually return home. Some states use such a lien to recover the costs of care provided when the individual dies, or when the home is sold, whichever comes first. Texas does not currently impose such liens.

The law does place certain restrictions on when estate recovery may be pursued. A state may not pursue recovery if the Medicaid recipient is survived by a spouse or a minor or disabled child. The state also may not pursue recovery if it would result in undue hardship, such as an estate consisting of a family farm which is the sole income-producing asset of the survivors, or if estate recovery would not be cost-effective for the state. Also, the state need not recover from a homestead of "modest" value, generally considered to be one valued at 50 percent or less of the average cost of homes in the county.

Should Texas implement a Medicaid estate-recovery program in the future, this need not mean that your heirs will receive nothing if Medicaid paid for your care in a nursing home. With careful, long-range planning, most of your assets can pass to your heirs in full accord with your intentions.