

IOWA MEDICAID ESTATE RECOVERY

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Iowa Medicaid Estate Recovery

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I. History of Medicaid Estate Recovery in Iowa

Congress passed the first estate recovery law for Title XIX medical assistance in 1982 that encouraged voluntary compliance by the states. Several states had similar programs in place prior to 1982 for the recovery of long-term care expenses and readily adopted estate recovery, but others refused to implement these regulations. The federal Budget Reconciliation Acts of 1993 and 1994 then mandated that states recoup Medicaid payments from the estates of recipients. See 42 U.S.C. 1396p(b).

Iowa complied with the federal mandate effective July 1, 1994. All states now have an estate recovery program, but they vary greatly in their policies, procedures, and efforts. The Iowa Department of Human Services (“IDHS”) has contracted with Health Management Systems, Inc., to administer the program since 1994, which subcontracts with SUMO Group, Inc., an Iowa corporation, based in Des Moines.

Prior to July 1, 1994, only medical assistance that was incorrectly paid was recoverable as a debt due the State, and it was classified as a claim with taxes, as then provided in 249A.5(1). The legislature retained the language of this section, but also added the words, “except as provided in subsection 2”. Estate Recovery was then established by statute in 249A.5(2), with medical assistance debts being due to the IDHS. References in all of the cases on the previous page are therefore to 249A.5(2). However, in 2013, as recommended by the Iowa Code Editor, the Estate Recovery provisions were moved to 249A.53(2), with no changes to the text of the statute.

II. Estate Recovery -- Iowa Code Section 249A.53(2)

A. Establishment of the debt.

1. Provision of services

A debt is due for medical assistance upon the recipient's death 1) when the recipient was age 55 or older; or 2) when the recipient was under 55 and a resident of a nursing facility, intermediate care facility for persons with an intellectual disability, or mental health institute, who cannot reasonably be expected to return to the individual's home. Title XIX medical assistance is often known as Medicaid, and provides funding for several programs such as Medically Needy, the Iowa Health and Wellness Plan, and Elderly Waiver.

Medicaid is generally for persons who cannot afford to pay their own medical bills and who meet certain criteria for assets and income. Eligibility for Medicaid is obtained through IDHS. Any funds expended on behalf of a recipient who meets the above qualifications are treated very similarly to a loan or a line of credit that must be repaid at the time of death from any assets the recipient had at that time. However, the medical assistance debt is not based upon a contract like a loan or line of credit. The debt is created by statute in Section 249A.53(2) based on the provision of medical assistance to an individual.

2. Medicare Buy-in and other capitation fees

Title XIX medical assistance, or Medicaid, is often confused with Medicare, which is similar to an insurance program for the elderly. Unlike Medicare, Medicaid is intended for indigent individuals who qualify by having less than the required amounts of income. Assets are also a factor in determining

eligibility under most Medicaid programs. As Medicaid members often do not have resources to pay their Medicare premiums, part of the medical assistance provided may be for the payment of the Medicare premiums.

Medicaid also pays for health insurance premiums for the Iowa Health and Wellness Plan, which was adopted to comply with the Affordable Care Act. This Act is for those persons of working age population, ages 21 to 65, who are not in long-term care. Under the Iowa Health and Wellness Plan, Medicaid recipients whose income is less than 100% of the poverty level are enrolled in a Health Maintenance Organization. Those whose income is between 100% and 133% of the poverty level have their premiums paid by Medicaid to a private insurance company. (Those whose incomes are over 133% of the poverty level are not part of the Medicaid program, but may receive subsidized payments through the federal health insurance exchange.) Assets are not considered as part of the eligibility determination for those who receive Medicaid benefits pursuant to the Iowa Health and Wellness Plan. However, as other Medicaid programs, the estates of those persons over 55 years of age are subject to estate recovery.

The medical assistance program also pays other capitation rates which are defined in 441 IAC 88.61 as “the fee the department pays monthly to the contractor for each enrolled Medicaid member for the provision of covered, required, and optional services, whether or not the enrollee received services during the month for which the fee is paid.” In accordance with 441 IAC 88.63(2), Medicaid members “shall be subject to mandatory enrollment in the Iowa Plan for

Behavioral Health, established as the managed care plan to provide mental health and substance abuse treatment.”

3. Medicare Improvement for Patients and Providers Act

Congress passed the Medicare Improvements for Patients and Providers Act (MIPPA) in July 2008 that was effective January 1, 2010. This Act limits the recovery of medical assistance, by excluding those who are enrolled pursuant to the Medicare Cost Sharing (“MCS”) Program. The Estate Recovery Program excludes these amounts incurred after January 1, 2010 when obtaining debt information for those who receive benefits pursuant to the MCS program.

Medicaid payments made on and after January 1, 2010 for Medicare cost-sharing benefits are excluded for estate recovery for members who are:

- ◆ Eligible for QMB
- ◆ Eligible for SLMB
- ◆ Eligible for E-SLMB
- ◆ Eligible for Qualified Disabled Working People (QDWP)
- ◆ Dually eligible for a full Medicaid coverage group and QMB
- ◆ Dually eligible for a full Medicaid coverage group and SLMB

B. Waiver (or deferral) of the debt

Waivers for estate recovery are, in effect, a deferral of the collection of a debt. Spouse and child waivers are described in 249A.53(2)(a)(1), (b)(1), and (b)(2), and waivers for undue hardship are described in 249A.53(2)(a)(2) and (b)(3). See also 441 IAC 75.28(7)(g-h). The collection of the debt is not waived as to assets received by persons who do not qualify for the waivers. Upon the

death of the waiver recipient, the debt is again collectible to the extent of the assets received by the waiver recipient or to the extent of the debt, whichever is less.

1. *Waiver for spouse or child -- 249A.53(2)(a)(1), 249A.53(2)(b)(1) and (2)*

If the deceased Medicaid member had a surviving spouse, a minor child, or a blind or disabled child at the time of the recipient's death, the collection of the debt is waived. The collection of the debt is only waived 1) to the extent that collection of the debt would result in a reduction of the amount received by the spouse or child and 2) only until the death of the surviving spouse, or the blind or disabled child, or until the minor child reaches the age of 21. Upon the death of the spouse or disabled child or the minor child reaching the age of 21, the debt is then collectible to the extent that the spouse or child received assets from the deceased medical assistance recipient.

Often, inquiries are received as to whether the medical assistance "lien" will affect the transfer of real estate. Other states routinely provide for liens to be placed on real estate, but Iowa has not adopted this approach. Heirs may consent to a lien against the property to confirm and clarify the IDHS's position as to the heirs in the future, but ordinarily, there is no real estate lien for a medical assistance debt. The real estate may be sold during this period when the collection of the debt is waived. In fact, real estate is often sold to pay for the care of the spouse or disabled child. There is no estate recovery during the lifetime of the surviving spouse or disabled child provided all of the decedent's assets went to those persons.

2. Waiver for undue hardship – 249A.53(2)(a)(2)

To be eligible for an undue hardship waiver, the heir or beneficiary must receive assets from the estate, and have 1) an income level of less than 200% of the poverty level; 2) less than \$10,000 in resources, not including the house; and 3) the application of estate recovery would deprive the person of food, shelter, clothing, or medical care such that life or health would be endangered. See 441 IAC 75.28(7)(g)(2). The most frequent application of this section is when the sale of a house passing solely to a son or daughter of a deceased medical assistance recipient will deny that person of a place to live. The undue hardship waiver applies when the above-described waivers for a spouse or child do not apply. Collection of the debt returns at the time of the waiver recipient's death (just as in the waiver for a spouse or disabled child) or when the waiver recipient no longer meets the undue hardship criteria.

If a waiver is approved by IDHS, the files are placed in a separate location until the death of the surviving spouse, disabled or blind child, or hardship waiver recipient, or if the hardship waiver recipient no longer meets the hardship waiver guidelines. Information regarding the assets received by a waiver recipient may reduce the amount of the debt collected when the waiver expires, so it is important to provide that information at the time of the waiver.

There is no interest on waived debts during the time of the waiver period as interest commences six months after the debt comes due. See 249A.53(2)(e).

C. Probate Assets

Medical assistance recipients generally must have less than a certain amount of assets to be eligible for assistance. These assets are then determined to be exempt for eligibility purposes, but at death these exemptions are no longer available, and so they become subject to recovery. The most common types of assets are the funds in bank accounts, excess burial trust funds, and real estate. If there is no real estate, there is usually no probate estate opened.

The Estate Recovery Program must analyze the assets of the decedent as if a snapshot was taken of net worth at the time of death. There is no five-year look back for estate recovery. However, if the Estate Recovery Program identifies an *inter vivos* transfer that appears to be improper, a referral can be made to the Economic Divestiture Unit of the Iowa Department of Inspections and Appeals, which is part of a federally mandated Medicaid Fraud Control Unit (MFCU).

1. *Bank Accounts* – Most medical assistance recipients are allowed to have a bank account of no more than \$2,000. This is often the only remaining asset of the recipient. For example, if a burial fund is used to pay for funeral and burial expenses, and there are no other higher priority expenses, the remaining amounts in the bank account are then paid to IDHS through the Estate Recovery Program by one of the following: a joint account holder whose name is on the account for convenience; an affidavit pursuant to 633.356(3) or 633.356(8)(b); or through a probate of the estate along with other assets. A bank account with a pay-on-death clause may transfer to another person as a joint bank account

does, but the funds remain subject to the medical assistance debt as these funds were an asset of the recipient at the time of death pursuant to 249A.53(2)(c).

Occasionally, memorial money will be placed in a bank account. Heirs of a decedent may receive money as a memorial to pay for the funeral, luncheon expenses, or other items in memoriam of the decedent. Since these funds are not an asset of the decedent at the time of death, but rather given to the family after death, the estate does not have an interest in these funds at the time of death. There is no obligation to pay memorial funds to reimburse the debt. The family may pay expenses out of the decedent's bank account until no further funds remain for the Estate Recovery Program, and then use memorial money if necessary. The family may keep memorial money, as it is not a recoverable asset for estate recovery.

2. *Excess burial funds* -- Often a recipient will have a non-guaranteed irrevocable burial trust fund at the time of death. This includes burial trusts funded by annuities or insurance. Pursuant to 523A.303, the "Seller," which is generally the funeral home, must provide notice to the Director of IDHS if funds remain in the trust account after payment of reasonable funeral expenses. Since IDHS automatically forwards these notices to the Estate Recovery Program, it is preferable to forward these notices directly to the Estate Recovery Program. This can be done online at the website indicated on the cover sheet to this Outline. If a probate estate is not opened, the seller must remit the excess funds to the Estate Recovery Program up to the amount of the claim of medical assistance.

The seller may retain up to \$50.00 for administering these funds, and should forward the remaining funds to the Estate Recovery Program after receiving confirmation that a debt is due. This confirmation must be made within 60 days of the notice to the Estate Recovery Program, or the seller may disburse the funds to the next of kin. Section 523A.303 protects the seller from liability if the funds are disbursed to the next of kin pursuant to this Section. However, the funds are still an asset of the estate and may be recovered from next of kin pursuant to 249A.53(2).

3. *Real estate* -- All assets of the estate of a medical assistance recipient are subject to probate in accordance with 249A.53(2)(d), but the amount of remaining assets often do not justify opening an estate. A probate estate is generally opened to transfer real estate when the deceased medical assistance recipient has title to, or an interest in, real estate at the time of death, and there are no other surviving owners. Most probate cases in which there is an estate recovery claim can be probated pursuant to the Small Estate Chapter, which is Iowa Code Chapter 635, as estate assets are generally less than \$100,000. This chapter provides slightly better fee provisions for executors and attorneys than Iowa Code 633. See 635.8(3).

4. *Household goods and personal effects* – All personal property is recoverable pursuant to 249A.53(2)(c). However, the value of the remaining items often does not justify the costs of the sale of this property. While the value of these items is recoverable, the personal representative is responsible to value

these items just as if a probate estate was opened and there was no medical assistance debt.

5. *Litigation* – Most litigation involving a Medicaid recipient's claims against third parties is within the provisions of 249A.54 for living recipients, and not 249A.53(2). The proceeds of any settlement or judgment are distributed pursuant to 249A.54(5) and not in accordance with normal subrogation rules. The term "subrogation" was deleted from this 249A.54 apparently in response to Hill v. State, Department of Human Services, 493 N.W. 2nd 803 (Iowa 1992), and replaced with the word "lien" for pre-death recoveries.

If, however, the Medicaid recipient dies, the estate recovery provisions of 249A.53(2) and 633.425(7) will apply if the estate of the recipient has an interest in recovering in the litigation. The deceased recipient's interest in the litigation then becomes an asset of the estate and must be distributed in accordance with 633.425, as any other asset. This includes when a decedent has a pending action for personal injuries pursuant to 147.136 for medical negligence, to the extent that the collection of the damages must be paid to the estate. Then these assets, like other litigation assets, are recoverable for payment of the medical assistance debt pursuant to 633.425(7) before payment to heirs or beneficiaries.

If the wrongful death statute as found in 633.336 is applicable and there is a surviving spouse, child, or parent, the recoverable medical assistance from the litigation is reduced to the amount of medical assistance provided between the time of the injury and the date of death. However, if there is no surviving spouse, parent, or child, the assets are distributed as personal property of the estate. See

633.336. In Estate of Clark, Filed October 5, 2011, Unreported Decision, (Iowa Court App.), the Court held that the case was not ripe for review where the Plaintiff had not yet proven any damages or liability against the long term care facility, that was the alleged wrongdoer. A wrongful death action under 633.336 does not limit recovery to only those Medicaid recipients subject to estate recovery (249A.53(2)). So, a wrongful death action is subject to recovery for all Medicaid provided, notwithstanding the person may not qualify for estate recovery by being over 55 or residing in long term care.

D. Expanded Probate Assets

Assets of the estate for purposes of estate recovery are defined as “any real property, personal property, or other asset in which the recipient, spouse, or child had any legal title or interest at the time of the recipient’s, spouse’s, or child’s death.” See 249A.53(2)(c), which was adopted in Iowa to implement 42 U.S.C. 1396p(b)(4)(B). These expanded probate assets are subject to probate pursuant to 249A.53(2)(d). The reference to the spouse or child in this section pertains to the collection of debts that have returned after a waiver.

1. *Jointly held property* – Section 249A.53(2)(c) specifically includes jointly held property as an asset of an estate for the purposes of the recovery of the medical assistance debt. In Estate of Serovy 711 N.W. 2nd 290 (Iowa 2006), the Court held that a deceased recipient’s one-third jointly held interest in a home was subject to probate and could be sold to pay the medical assistance debt. The Court required a partition action or a buyout figure to settle the claim, rather than allowing the sale of the entire house within the estate proceedings.

In Estate of Kirk, 591 N.W. 2nd 630 (Iowa 1999), the Court held that as to the jointly held property in the case, the executor could not disclaim the recipient's proportional interest, which must become part of the decedent's estate. The only interest available for the recipient to disclaim was the accretive interest that would have passed to her upon the predeceased spouse's death. The Court held that a disclaimer only applies to property that passes upon death to the disclaimant, not to property owned by the disclaimant prior to the death.

The court further held in Kirk that the Iowa Code disclaimer provisions in 633.704 (now in Chapter 633E) can be used to frustrate the collection of Medicaid claims, since a disclaimer is merely viewed as a refusal to accept property from another. The Kirk case and disclaimers do not apply to eligibility issues as the Iowa Code was amended subsequent to Kirk, which limited the case's potential applicability. See 633E.15, and 249A.3(11)(c).

In Estate of Lovan, Filed 2/23/2011, Unreported Decision (Iowa App 2011), the Court upheld the District Court's conclusion that there was not clear and convincing evidence to overcome the presumption that the medical assistance recipient and her son held equal interests in property, which was held as tenants in common.

2. *Life Estates* – Another real estate issue is a decedent's interest in a life estate. A life estate interest owned by a person at the time of death is recoverable pursuant to both 249A.53(2)(c) and 42 U.S.C. Section 1396p(b)(4)(B). Congress intended the definition of "estate" to be broader under

42 U.S.C. Section 1396p than common law definitions and therefore non-probate transfers of assets on death are subject to estate recovery.

Section 249A.53(2)(c) was amended on April 5, 2002, to include “retained life estates” as a specific type of asset that is recoverable, and a definition is provided for retained life estates in 249A.2(11) that includes property that was previously owned by a spouse of the recipient. If the life estate interest is not “retained” as defined in 249A.2(11), then there is no recovery from that interest.

In Estate of Laughead, 696 N.W.2d 312 (Iowa 2005), the Court held that a life estate may be included in the probate estate of a deceased medical assistance recipient, and that the estate is therefore liable for the payment of the medical assistance debt from the value of the life estate. The Court also found that “the phrase ‘at the time of death’ means the time immediately before the Medicaid recipient’s death”.

IDHS allows the Estate Recovery Program to use the Iowa Department of Revenue life estate remainder mortality table to determine the value of the life estate for deaths after April 5, 2002, and this table was revised effective July 1, 2004. However, IDHS uses the federal life estate remainder tables for eligibility considerations. All three tables can be found on the Estate Recovery website: www.iowa-estates.com.

Often, if the recipient has a “retained life estate” at the time of death, the real estate must be sold or the remaindermen must pay the value of the life estate before they can obtain clear title to the property. Also, depending on the date and circumstances surrounding the transfer, the entire value of the real

estate may be recoverable if the transfer was within five years prior to eligibility for medical assistance. See 249F.2(2).

If, for example, the recipient owns the real estate at the time of death, but the will grants the spouse a life estate with a remainder interest to their children, the entire value of the property is a recoverable asset. The life estate portion is waived from the collection of the medical assistance pursuant to 249A.53(2)(a)(1) for the lifetime of the spouse. The remainder interest is recoverable from the estate of the recipient at the time of the recipient's death, and the waiver of collection only defers the time for payment. The property may be sold and apportioned according to the table, or the spouse may reside in the premises, as long as the interest of IDHS is protected so that when the spouse passes away, then the entire property can be used to repay the debt.

In Estate of Jones, Filed 8/6/2009, WL 2424579 (Iowa App. 2009) the estate did not dispute that a life estate interest was subject to the medical assistance debt pursuant to Section 249A.53(2)(c), but the attorney requested fees based on a percentage of the entire real estate value instead of the life estate interest. The Court of Appeals held that it was proper to use the entire real estate value as the maximum amount of fees, but that the burden of showing the services rendered and value thereof rested upon the persons claiming those fees. Subsequently, the attorney provided an itemized statement of fees.

In Estate of Escher, Filed 4/8/2010, Unreported Decision (Iowa App 2010), the deceased medical assistance recipient had entered into a real estate contract within a year of her death to sell her home to her sister-in-law and retain a life

estate. She also left the home in her will to her sister-in-law, who also filed a claim alleging that she had provided care to the decedent. The sister-in-law argued that either by virtue of the contract, the will, or the care she provided, she should have a priority over the medical assistance claim. The Court rejected these arguments and upheld the priority of the medical assistance claim.

3. *Trusts* – Interests in trusts are specifically included as an asset for Estate Recovery in 249A.53(2)(c). Generally, a pure discretionary trust in which the recipient has no interest at the time of death will not be subject to Estate Recovery. Also, a trust that provides for only the net income to be paid to the recipient will only be recoverable to the extent of the net income to which the recipient was entitled. However, a trust that provides for the support of a recipient, as well as any other “interests in trusts” of the Medicaid recipient will be subject to repayment of the medical assistance debt.

In certain trusts, there is an element of discretion drafted into the terms of the support trust. In In re Barkema Trust, 690 N.W. 2d 50 (Iowa 2004), the Court held that if the recipient had an interest in a trust, pursuant to 249A.53(2)(c), then there is recovery to the extent of the recipient's interest in the trust. See also Estate of Gist, 763 N.W. 2d 561 (Iowa 2009), where the Court held that the funds in a spendthrift trust can be recovered for the reimbursement of the medical assistance debt as medical assistance is a necessary expense. This principle has been codified in 633A.2302(3)(a). See also Trust of Kinse], Filed 2/10/2010, WL 446551, (Iowa App. 2010) addressing the potential impact of 633A.4702 on a trust that has both support and discretion. Also, in Estate of Roth, Filed

12/22/2010, Unreported Decision (Iowa App 2010), the Court held that the funds set aside for the care of a spouse must be used to reimburse a medical assistance claim despite there also being discretion in the trustee to make distributions. Further, in Estate of Melby, 841 N.W. 2d 867 (Iowa 2014) the Court held that the intent of the trustors to pay their indebtedness must include the medical assistance debt owed to IDHS.

4. *Annuities, POD's, TOD's, IRA's, IPERS, etc.*— An annuity is not life insurance but is rather an investment to create income by payments over fixed intervals of time. Although there may be a “beneficiary” designation, the “beneficiary” is not entitled to the funds if there is an outstanding medical assistance debt and the deceased recipient had an interest in the funds at the moment before death. An annuity may be assigned to IDHS and received by the Estate Recovery Program or a commuted value may be used for reimbursement of medical assistance. The funds in an annuity are subject to the medical assistance debt just as a bank account or other investment. Medicaid compliant annuities should have IDHS named as the beneficiary, or in the second position after a spouse, pursuant to the Deficit Reduction Act of 2005, codified at 42 USC 1396p(c)(1)(F) and (G) and 42 USC 1396p(e).

A pay-on-death clause does not alter the status of these funds since an investment is an asset of the recipient at the time of death pursuant to 249A.53(2)(c) and subject to probate pursuant to 249A.53(2)(d). These same principles apply to other accounts with a beneficiary designation such as pay-on-death accounts, transfer on death accounts, individual retirement accounts and

IPERS death benefits. To the extent that the recipient had an interest in these funds at the moment before death, they are subject to reimbursement of the medical assistance debt.

5. *Life insurance* – Life insurance policies are typically not property of the estate of a decedent pursuant to 633.5. Life insurance benefits payable to a named beneficiary and are neither property of the estate nor recoverable in most circumstances. Life insurance is generally not recoverable because it is a contract based on risk and there is little or no cash value at the moment before death. However, the funds are recoverable if the policy is assigned or made payable to a funeral home pursuant to 523A.303; if the deceased recipient was the beneficiary (not the insured); or if the policy was not reported to IDHS when obtaining eligibility, and would have made the person ineligible.

E. Expenses

1. *Higher priority expenses* -- Regardless of whether a probate estate is opened, the Estate Recovery Program must use 633.425 to determine the distribution of the assets, as this section is incorporated by reference in Section 249A.53(2)(f)(2). In Vandewalker v. Lau, 581 N.W. 2d 644, (Iowa 1998), the Iowa Supreme Court held that the property of an estate must be distributed in accordance with 633.425. If the claim does not have a higher priority, it cannot be paid before the medical assistance debt.

a. Court costs and costs of administration fees have top priority, see 633.425(1) and 633.425(2). Costs of administration include attorney's fees and executor's fees, as in Iowa Code 633.197 et.seq. and 635.8. These may also

include the expenses of preparing and selling real estate or other property, including property taxes.

b. Funeral and burial expenses have the next priority at 633.425(3) and typically include all services provided by the funeral home and the costs of burial as long as the costs are reasonable. Higher priority funeral expenses may include a luncheon; phone calls or postage for notification of death; honorariums for the priest or pastor, organist, or other music; and a burial marker. See the definitions of “Cemetery merchandise” “Funeral merchandise” and “Funeral services” in 523A.102. Travel expenses for family members are not allowed as a higher priority expense, nor are donations to charities.

c. Federal debts and taxes have the next priority at 633.425(4) and state taxes are at 633.425(6). Federal debts may include a loan backed by a federal agency for improvements to a property; a Medicare subrogation claim; or the federal income taxes on the proceeds of an annuity if they were inadvertently paid to a beneficiary prior to the payment of the medical assistance debt.

d. Reasonable and necessary medical and hospital expenses of the last illness are at 633.425(5). Only expenses of the last illness are allowed by statute, and the personal representative has the duty to determine whether the medical expenses are of last illness. Caregiving by relatives is not a medical or hospital expense and should not be paid before the medical assistance debt. See Long v Northup 279 NW 104 (Iowa 1938).

The medical assistance debt is at 633.425(7), ahead of labor claims at 633.425(8), child support at 633.425(9) and other allowed claims at 633.425(10).

2. *Bankruptcy Issues* – Occasionally, the executor, heirs, or beneficiaries of a deceased medical assistance recipient will claim that the filing of a bankruptcy petition will cut off the claims of a decedent prior to the time the bankruptcy was filed. In other words, the bankrupt debtor's heirs claim that the bankruptcy will discharge the medical assistance debt. However, bankruptcy courts have held that since the medical assistance debt does not come due until the death of the decedent, the debt is necessarily a post-petition debt, so the bankruptcy filing does not discharge a medical assistance debt.

F. Other Provisions

1. *Interest* -- Interest on a medical assistance debt accrues from six months after the date of death at the same rate as interest on judgments pursuant to 249A.53(2)(e), which incorporates by reference 535.3. The rate is variable at the State Court Administrator's published rates plus two percent. This rate is set six months after the date of death or after a waiver expires. This is the same rate as if a judgment was entered in a personal injury case. See 668.13(3).

2. *Reporting and referrals* – Personal representatives and long-term care facilities are responsible for reporting deaths to IDHS within ten days of the date of death in accordance with 249A.53(2)(f)(1), which will then forward this information to the Estate Recovery Program.

3. *Liability* – In accordance with 249A.53(2)(f)(2), if a distribution is made prior to the payment of obligations pursuant to 633.425 from the estate of the decedent, whether that estate is probated or not, the personal representative or executor may be held personally liable. Liability is for the amount of medical

assistance paid on behalf of the recipient to the full value of any property belonging to the estate that was under the control of the personal representative or executor. "Executor" is defined as in 633.3 and "personal representative" is defined as a person who filed a medical assistance application on behalf of the recipient or who manages the financial affairs of the recipient. See 249A.53(2)(f)(3).

III. Estate Recovery Procedure

A. Referral process

There are consistently over 800 Title XIX recipients or former recipients that die every month in Iowa that are subject to estate recovery. Many of the referrals of these deceased persons are received by letter, fax, phone, or email. Some are received through the estate recovery website: www.iowa-estates.com. A list of deceased recipients is also received monthly from IDHS after the deaths are reported to the Central Office from the county offices. Data is also used from state and national vital statistics records and matched against Medicaid eligibility files. Notification to the personal representatives may be six to eight weeks after death under the automated processes. Direct referrals from attorneys, family members, funeral homes, and other entities are encouraged to expedite the estate recovery process.

When writing or calling, the Estate Recovery Program should be advised of the name of the decedent, the date of death, the date of birth, and the social security number. Information regarding the spouse must be provided to verify

whether there is any debt for a predeceased spouse, or if there is a surviving spouse, or if the decedent was divorced or never married at the time of death.

Often discovering the name of the person who is winding up the affairs of the recipient is more difficult than identifying a deceased recipient. Sometimes, this information can only be found in the will. The computer generated lists from the IDHS and from Vital Statistics do not always have the proper contact person. Consequently, letters are occasionally sent to nursing homes, disinterested heirs, or payees that have no further responsibilities in the matter. Direct referrals from attorneys or personal representatives can be very helpful to prevent delays in processing these cases. When inherited funds are spent and then must be repaid, the heirs often become upset that they received the funds in the first place. So, notifying the Estate Recovery Program directly of the death will move the process along more efficiently.

B. History process and Initial Contact to Representative

When a name, birth date, date of death, and social security number are referred to the estate recovery office, the balance due for medical assistance is obtained. Due to the volume of cases, requests for history reports are made once per week. The history report generally shows a complete list of all medical assistance payments for services that were paid on the recipient's behalf since July 1, 1994. If the recipient turned 55 years of age after July 1, 1994, and they were not in a long-term care facility before they turned 55, the report should include all medical assistance provided on and after their 55th birthday. If the recipient entered a facility before age 55 and could not reasonably have been

expected to return home, the report should show medical assistance provided from that date forward. An additional separate report, known as the buy-in report, is obtained if the medical assistance program paid Medicare premiums on behalf of the recipient.

Letters to attorneys and representatives include general information on estate recovery and a response form, but generally do not contain the history report. These are provided upon request. If a Probate Notice is received, which is now required in all probate estates pursuant to 633.231, 633.304A, and 635.13, a claim will be filed rather than sending a letter and a form.

Medical assistance providers may submit claims up to one year after the provision of medical assistance. Payment to the providers may be made within 30 days after submission of the claim. Full, final medical assistance history reports and the final amounts due therefore may not be available for thirteen months after the date of death. However, since there is a strong desire by families, funeral homes, attorneys, and others to wind up the affairs of a decedent, an initial amount is sent typically within a few weeks of the referral. If assets exceed the amount of the claim, a final amount is provided when the assets are ready to be distributed. IDHS allows the Estate Recovery Program to obtain a report and consider it final, provided the report is run at least four months after death.

C. Probate Notice and Probate Process

In accordance with Iowa Code 633.231 and 633.304A, effective July 1, 2010, the attorney probating the estate “shall” send a Notice of Probate by

electronic transmission on a form approved by the Iowa Department of Human Services to the Estate Recovery Program. The small estate chapter also requires a notice pursuant to these sections in Iowa Code 635.13. Iowa Code 633.410 provides that the medical assistance debt may be time barred after six months of sending notice by electronic transmission on the designated forms to the Estate Recovery Program, if a claim has not been filed and the proper notice was given. In Estate of Scrimsher, 728 N.W. 2d 852 (Iowa Ct. App. 2007), the Court held that under the previous statute, notice was required by both publication and service of notice by ordinary mail before a claim could be barred as untimely.

Claims are generally filed as soon as practicable after a probate notice is received. However, as explained above, since medical providers often submit claims after death to be paid by the medical assistance program, the Estate Recovery Program must wait at least four months after the date of death to obtain an amount that it can consider as a final amount. Generally, a final amount is not necessary if the debt is much larger than the remaining assets. However, if there are sufficient assets to pay the debt, attorneys and executors should only make payment after they have received a final payoff amount.

If a notice of disallowance is filed, a hearing will be requested on the claim if assets remain to pay the claim. A disallowance of the claim is unnecessary if there are no assets, or insufficient assets, to pay the claim in full.

D. Deposit Process

After the initial letter, cases are reviewed periodically and follow-up efforts are made if the Estate Recovery office receives inadequate information or no

response. Checks should be made payable to “Iowa Department of Human Services”. Checks are deposited in an Iowa bank account upon receipt and proof that there is a claim due for the recipient. All payments are acknowledged with a letter. All of the deposited funds are placed in an account of the Iowa Medicaid Enterprise for payment of future medical assistance benefits.

IV. Special Needs Trusts and Miller Trusts

Medical Assistance Special Needs Trusts and Medical Assistance Income Trusts (also known as MAIT’s or Miller Trusts) are trusts to provide medical care and obtain Medicaid eligibility for a person who would not be eligible if the funds in the special needs trust or the individual’s income were considered in the eligibility determination. The funds remaining in these types of trusts are paid to IDHS at the time of death, after certain other medical and administrative expenses, pursuant to 633C.2 and 633C.3, as IDHS is the residual beneficiary of the trusts. For this reason, these types of trusts are often called “payback trusts.”

Medical Assistance Special Needs Trusts are defined in 42 USC 1396p(d)(4)(A). Also included in the definition of Special Needs Trusts in Iowa Code 633C.1(7) is a type of medical assistance special needs trust where the trustee is a non-profit corporation as defined in 42 USC 1396p(d)(4)(C), and known as a “pooled trust”.

The term Miller Trust was derived the federal case of Miller v. Ibarra, 746 F. Supp. 19 (Co. 1990). The holding has since been codified in 42 USC 1396p(d)(4)(B). If a person has too much income to qualify for Medicaid, but has

less income than necessary to pay for long term care, then a medical assistance income trust can be set up for that person. The creation of the trust keeps the trust funds from being counted for Medicaid eligibility.

The Estate Recovery Program is under contract with IDHS, to recover the residual amount in these trusts upon termination of the trusts although the debt may not fall within the definition of estate recovery pursuant to 249A.5(2). The Estate Recovery Program recovers these funds because the trusts are terminated typically at the time of the death of a medical assistance recipient, and IDHS is the beneficiary.

The primary difference between the assets from MAIT or Special Needs Trust and other recoverable assets is that since IDHS is the residual beneficiary of these trusts, the funds are not subject to any waivers or higher priority debts. The funds are payable in accordance with the terms of the trust and not in accordance with the probate code or the estate recovery statute. Occasionally, a trust is terminated before death, and the Estate Recovery Program will also collect the funds for IDHS as residual beneficiary in those cases.

IDHS established the Medicaid Trust Program in 2012 to approve and monitor Medicaid payback trusts. Annual reports are required from these trusts to confirm that they are being administered pursuant to Iowa Code 633C. The Medicaid Trust Program has a website: www.iowa-MedicaidTrusts.com . This program is operated with the same personnel as the Estate Recovery Program and from the same office, and uses a PO Box of 36565, Des Moines IA 50315.

Conclusion

The Estate Recovery Program engages in public awareness programs by distributing brochures, speaking to organizations regarding the program, and through a web site. Questions or comments are always welcome regarding the administration of the program.

