New Strategies for Estate Recovery in California

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Biography: James Watson

- Partner in GVM and Certified Specialist in Estate Planning, Probate and Trust Law designated by the State Bar of California Board of Legal Specialization
- Member of Napa County Bar Association & National Association of Elder Law Attorneys, Vice-President Northern California Chapter
- B.A. in International Business, cum laude, Linfield College and graduated with distinction from McGeorge School of Law
- Serves on the board of the Napa Valley Community Foundation, PACE Solano, and PSI Napa Valley
- Frequent speaker in seminars and private lectures regarding Medi-Cal Planning, Veteran’s Benefits, Special Needs Trusts, and advanced estate planning throughout California

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Biography: Jason Penrod

- Board Certified Expert in Elder Law and the founder of Family Elder Law with offices in Lake Wales, Sebring, and Lakeland, Florida
- Professional Memberships: President of the Lake Wales Rotary Club and the Lake Wales Chamber of Commerce; Board of Director Member of the Gulf Coast Chapter of the Alzheimer's Association; Academy of Florida Elder Law Attorneys; Elder Law Section of the Florida Bar
- Authors a newspaper article in Central Florida, entitled "From the Attorney's Desk"
- Frequent National Business Institute speaker
- B.A., Niagara University; Juris Doctrine from Vanderbilt University Law School
- Originally from Buffalo, NY area; believes Buffalo Bills will win Super Bowl (Pretty Please & Finally!)

Agenda

- Current Law Regarding Medi-Cal Recovery
- Current Planning Strategies
- SB-833 a Paradigm Shift
- Revised Planning Strategies

Current Law Regarding Medi-Cal Recovery

Current Medi-Cal Recovery Rules

- Federal law sets the minimum standard for estate recovery
- States have the option of instituting “expanded” recovery
- California has elected “expanded” recovery and as a result has had one of the most aggressive recovery programs in the country

Current Medi-Cal Recovery Rules

- At the death of the Medi-Cal beneficiary the State is entitled to recovery the value of benefits paid from the estate or the beneficiaries of the estate
  - Welf & I C § 14009.5; 22 Cal Code Regs § § 50961–50964

Current Medi-Cal Recovery Rules

- Definition of Estate
  - Prior to OBRA 93’ the definition of estate was limited to the probate estate as required under federal law → SB - 833 essentially reverts to this
  - Under OBRA 93’ states had the option of instituting expanded recovery
    - CA did so with Welf & I C § 14009.5

Current Medi-Cal Recovery Rules

- Definition of Estate:
  - *Must* include all real and personal property in the individual's probate estate, as defined under state law; and
  - *May* include, at the option of the state, any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of the interest), including assets conveyed to a survivor, heir, or assign "through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement."

Current Medi-Cal Recovery Rules

- Recovery limited in several ways
  - Lesser of FMV of estate (less debt) or the amount of the benefits paid
  - Claims are limited to benefits received for on or after 55th birthday or for LTC
    - DOES NOT INCLUDE IHSS BENEIFTS
  - Barred from making claims when certain exceptions apply
    - Claims barred during life of surviving spouse but after death state must make claim
    - May not make a claim if there is surviving child of the deceased beneficiary who is under 21 **or** who is blind or permanently and totally disabled
    - Hardship waiver if the applicant can prove substantial hardship based on a showing of one of six factors listed in 22 Cal Code Regs § 50963(a)(1)–(6)

Current Medi-Cal Recovery Planning

Current Planning

- MAPT is the cornerstone of planning
  - Irrevocable Trust
  - Typically Grantor Trust
  - Out of estate for recovery
  - Use of Section 121
  - Step-up in basis for assets
  - Elder abuse protection

Current Planning (cont.)

- Other Techniques
  - 3100 petition to increase CSRA
    - Transmute to Well Spouse and redo basic ESP with pour back SNT
  - Incremental gifting with creation of SNT for Medi-Cal beneficiary
  - Deed with Occupancy Agreement
  - Irrevocable Life Estate

Current Planning (cont.)

- Options to reduce recovery when no preplanning:
  - Remember amount of claim
    - **Lesser of** FMV of estate reduced by debt and admin expenses **OR** amount of claim
  - Review itemized billings from Medi-Cal
  - Bars to claim → surviving spouse, disabled child, hardship
  - Statute of limitations three years from notice under Prob Code 215
  - Interest will begin to accrue on the date of the notice of claim or the date of distribution, whichever is later

SB – 833

- Signed by Governor Brown on June 27, 2016
- SB – 833 incorporated the modified recovery provisions of SB – 33 authored by Senator Ed Hernandez
- Greatly reduces the scope of current CA Medi-Cal estate recovery
- For Medi-Cal beneficiaries who die on or after January 1, 2017 recovery will be limited to the minimum required under federal law i.e. “probate estate”

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SB – 833 Key Changes

- Limits recovery to the Medi-Cal recipients “probate estate”
- No recovery against the following:
  - Joint Tenancy
  - Life Estates
  - Revocable Living Trusts
  - Transfer on Death Accounts
  - Transfer on Death Deeds

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SB – 833 Key Changes (cont.)

- No recovery on the estate of the surviving spouse
  - Current law provides that the claim is tolled until the death of the surviving spouse SB – 833 eliminates
- Waiver of claim for "homestead of modest value"
  - Fair market value is 50 percent or less of the average price of homes in the county where the homestead is located, as of the date of the decedent's death
- Individuals potentially subject to recovery can receive an itemized billing once per year for a $5 fee
- Open questions
  - 13100 petitions i.e. small estate affidavits (under $150k)
  - Estate of Heggsted petitions Probate Code 850
  - Medi-Cal recipient dies prior to 2017 but spouse is living in 2017

Post SB – 833 Planning

- SB – 833 allows clients to use previously unavailable strategies to avoid recovery
  - Revocable Living Trust
  - Irrevocable Life Estate
  - Joint Tenancy
  - TOD deeds and account

Post SB – 833 Planning

- Disadvantages of New Strategies
  - Revocable Living Trust
    - Unless this holds only exempt assets or assets under CSRA amount potentially jeopardizes qualification
    - Doesn't protect eligibility on sale of primary residence
  - Irrevocable Life Estate
    - Limits standard planning e.g. trust for life and no Section 121
  - Joint Tenancy
    - Limits standard planning, lose ½ step-up and limited 121
  - TOD deeds and accounts
    - Limits standard planning e.g. trust for life

Post SB – 833 Planning

- MAPT should remain the cornerstone of planning
  - Irrevocable Trust
  - Typically Grantor Trust
  - Out of estate for recovery
  - Use of Section 121 and capital gains
  - Step-up in basis for assets
  - Elder abuse protection

Florida Estate Recovery

- State Recovers Via Probate
- How to Avoid Estate Recovery
- Considerations & Advanced Planning

Recovery Via Probate

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Medicaid Estate Recovery Act

- § 409.9101, FL Statutes
- Chapter 733, Part VII, FL Statutes
- Basically, if assets are probated—subject to Estate Recovery
- Exceptions—(i.e. Home to Blood Heirs)

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Recovery Avoidance Tips

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Tips to Avoid Recovery

- Traditional methods of avoiding probate
- Survivorship Registration of assets
- Payable On Death (POD), Transfer On Death (TOD), Beneficiary Naming
- Life Estate & Enhanced Life Estate Deeds
- Revocable & Irrevocable Trusts

Revocable Living Trusts

- Assets in Such Trusts are safe right?
- § 736.0505, FL Statutes (Trust Code)
- Creditors' Claims Against Settlor

MAPTs & VAPTs Still Vital

- Irrevocable Trusts are still often best tool
- Protect Future Home Sale Proceeds
- Not Revocable
- Thus, another step in right direction away from Recovery reach

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Upcoming Education Events

- August 18 – Avoid a Malpractice Claim – What Every Elder Law Attorney Must Know (Member Benefit Webinar)
- August 19 – Final Friday Update: 30 Days in 30 Minutes
- August 22-24 – Elder Law Immersion & Practice-Building Camp (Chicago, IL)
- August 23 – The Reason Why You're Not on Google's First Page (PEP Talk)
- August 25 & 26 – Elder Law Masters Course (Chicago, IL)
- August 30 – The Medicaid Payback Run Amok in a d4a Trust Case
- September 13 – 3 Steps to Get Found Faster on the Internet (PEP Talk)
- September 14-16 – Special Needs Planning & Veterans Pension Planning Immersion Camps (Dallas, TX)

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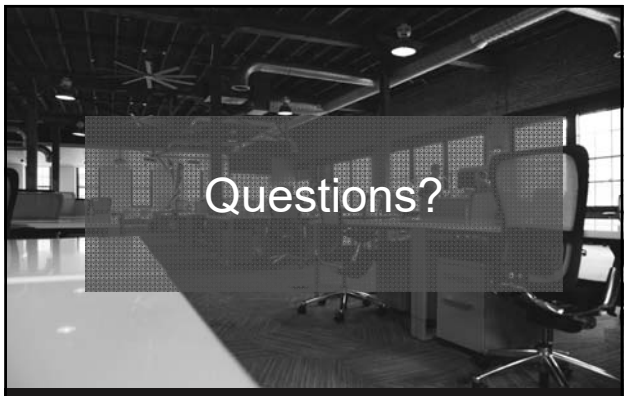

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Thank You!

Should you have any questions, please don't hesitate to reach out to our team.
We want you to be successful and have the information you need to do so.

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34