

**AN ABRIDGED VERSION  
OF THIS ARTICLE WAS TRANSLATED  
TO GERMAN FOR PUBLICATION  
IN THE AUFBAU 12/12/02**

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## MEDICAID PLANNING UPDATE

### THE EFFECT OF NY MEDICAID'S NEW ESTATE RECOVERY PROVISIONS ON VICTIMS OF NAZI PERSECUTION COMPENSATION TRUSTS <sup>SM</sup>

Confusion exists about the most effective way to protect the assets of survivors of the Holocaust who have received reparations. This confusion has been compounded by a recent legislative directive concerning Medicaid estate recovery in New York State. The following will dispel the confusion on this issue and clarifies our position, based on years of research and experience, that a separate, revocable Trust provides the greatest benefits, both financial and emotional, to eligible survivors and their families.

Periodically, New York State issues policy revisions to its interpretation of its own Medicaid guidelines. In April of this year the New York State Department of Health revised its Medicaid estate recovery provisions to specifically exclude "government reparations payments to special populations."

This new directive is a decisive step in the campaign to ensure that reparation payments from Germany or Austria, if properly preserved, maintain their exempt status upon the death of the initial recipient and that such exemption can be passed on to a surviving spouse, children and future generations. Reparation recipients should view this as a call to action and plan as necessary to ensure that their hard earned savings are not jeopardized by the skyrocketing costs of long term care.

The passing of this Administrative directive ("ADM") has caused many elder law attorneys to drop their guard and return to the simplistic approach of keeping reparation funds "separate and identifiable" in accounts merely designated as "Reparation Accounts". However, this approach, while sufficient in a limited number of cases (e.g., those with *de minimis* assets or whose testamentary intent can be satisfied with a single joint account) is not advisable for the population as a whole, who generally require more detailed planning.

Reparation recipients who simply establish a reparations account may be courting disaster, for a major mistake in estate planning for such persons is the failure to utilize the benefits of revocable trusts. A properly drafted revocable trust, such as the Victims of Nazi Persecution Compensation Trusts <sup>SM</sup>, can be an important and powerful tool in protecting reparation payments.

With careful planning a reparation recipient may maintain financial independence as well as:

- 1) avoid financial devastation resulting from the high cost of long term health care at home or in a Nursing facility;
- 2) bypass a Medicaid claim against their estate; and
- 3) provide protection to a spouse, children and heirs by maintaining reparation exemptions on inherited reparation funds.

**1) Avoid financial devastation resulting from the high cost of long term health care.**

It is well documented that persons who receive compensation as a result of Nazi persecution are entitled to receive U.S. Governmental assistance for medical benefits, **without** “spending down” all of their assets to poverty levels normally required as a prerequisite to receiving Medicaid benefits.

Through legislation enacted by Congress in 1994, American citizens who were both victims of Nazi persecution and reparation recipients can receive Medicaid benefits while remaining in possession and control of their funds. This category includes even those whose assets would otherwise be considered too great to receive such governmental assistance without spending down or divesting themselves of their assets. Most importantly, during the lifetime of the recipient, these protected assets may be used at his or her discretion for supplemental care or whatever purposes he or she desires.

As a result, many Reparation recipients are, unknowingly, financially eligible for Medicaid despite the fact that their entire savings remain intact. Therefore, all necessary steps should be taken to ensure that assets are not needlessly wasted on nursing care which would otherwise be provided to them at no expense. This being said, there is a series of very detailed steps which must be taken to produce the type of proof and history required by Medicaid to create such an exemption. Researching a recipient’s reparation history, making the proper calculation of said accumulated reparation and the segregation of these funds into the proper form of account is essential to insuring that funds are not wasted or lost. This is neither a brief nor minor undertaking. The research, correspondence, review and interpretation of up to 50 years worth of materials, and the calculation of receipts in a foreign currency, the value of which has fluctuated greatly during this time period, is an extremely complex task. Those who attempt to garner such evidence without expert assistance will likely face insurmountable difficulties.

## 2. Bypassing a Medicaid Claim Against The Estate.

The new ADM and the advent of specialized Medicaid planning for reparation recipients has made the issue estate recovery of reparations payments much more relevant and compelling. ADM "02 OMM/ADM-3" (release date 4/17/02) states as follows:

Reparation payments. No Medicaid recovery of government reparations payments to special populations **should** be pursued."

Prior to this new directive, reparation funds were not exempt from Medicaid estate recovery. Although reparation funds could be exempted during a person's life, such exemption did not preclude Medicaid from taking these funds upon the recipient's death. In fact, with the exception of those who established Reparations Trusts, this was often the case. The survivors of those who followed the advice of simply establishing a "reparation account", learned that this simplified approach had disastrous results.

It should be emphasized that, despite the favorable tenor of this New York Administrative directive, at the present time Medicaid continues to make claims against the estates of **all** Medicaid recipients whose estates are administered within the Surrogate's Court. Thus, the heirs and beneficiaries of those reparation recipients who choose to exempt their assets in a manner **which does not avoid probate or Surrogate's Court administration** (such as a simple "reparation account") will not be free to distribute their estate until Medicaid's estate recovery division has investigated, been satisfied and has given their approval that the funds then remaining are in fact reparation. Once again, those advocating a simplified approach are courting disaster.

What is not yet known are the criteria which Medicaid will use to determine which funds will be subject to estate recovery. It should be noted that the directive dictates that no estate recovery "**should**" be pursued. This creates a great amount of uncertainty. Thus, leaving to the discretion of bureaucrats within the New York State Department of Health the decision of whether or not your estate will be subject to Medicaid estate recovery is foolhardy.

The uncertainty of this process and the delays it will cause in the settlement of a reparation recipient's estate, not to mention the increased legal fees of the attorney handling the estate, who must prove, argue and/or litigate the issue of the recoverability of these funds should be actively avoided. Reparation trusts continue to provide the most comprehensive method of planning for and safeguarding the assets of reparation recipients. It provides certainty not otherwise available through other planning methods. The advantage to establishing such a trust is that it will allow the recipient to diversify his accounts while remaining under the exemption umbrella created by the trust. In addition, it provides a means of fulfilling the Grantor's testamentary wishes and **passing a Medicaid exempt legacy to his or her heirs.**

### **3) Providing Protection to Children and Heirs by Maintaining a Reparation Exemption on Inherited Reparation Funds.**

By exempting reparation funds from Medicaid estate recovery, the new legislation clearly opens the door for a much anticipated opportunity; ***the passing of Medicaid exempt reparation from generation to generation.***

The concept that the exemption of these assets can survive the death of the recipient demonstrates that if properly structured, reparation assets, passed into the hands of a surviving spouse, "Second Generation Survivors" or more remote heirs, can also be exempt resources for the purpose of their own Medicaid eligibility. Thus, reparation funds should be specifically set aside by the recipient/survivor for the dual purpose of establishing his or her own eligibility and ensuring that such assets maintain their exemption in the hands of the heirs. The best means of achieving this goal remains the establishment of a Reparation Trust, which can, by its terms make these provisions. A properly drafted Reparations Trust extends the exemption of these reparation funds so that, at a later date, these assets will be protected from Medicaid even though vested in an individual other than the original recipient.

### **4) Separate Reparation Accounts**

Reparation recipients should be encouraged to exempt the maximum amount of their current assets by identifying them as accumulated, co-mingled reparation payments. Once identified these reparation funds need to be segregated from the reparation recipients other funds. The type of account created is a critical and greatly misunderstood issue.

Reparation Accounts:

Simply titling ones account a "reparations account" is a grave error. As previously detailed herein, reliance on the generosity of the Department of Health in their interpretation and administration of the provisions of "02 OMM/ADM-3" is an unnecessary risk.

***This should never be done.***

#### **Joint accounts:**

While joint accounts (sometimes known as the "poor man's trust") can be useful in limited situations, they fail to adequately protect against the multiple contingencies that may occur. The following reasons may illustrate further why the Elder law community believes that joint accounts are not a sufficient form of estate planning:

1. Creditor protection: Joint accounts are subject to creditor claims. If one joint tenant is a judgment debtor, a creditor claim can be made against at least half of this account because each tenant is presumed to be

possessed of the whole. The claim can, in some cases, extend to the whole account.

2. Disability of beneficiaries: The subsequent disability of a joint account holder can lead to court interference with the management of the property, which could further result in the use of such account for the benefit of the now disabled joint tenant. Court interference could incur increases in attorneys' fees relating to the transmission, use and management of the joint property.
3. Death of the joint beneficiary: Should the beneficiary of a joint account predecease the account holder, the account holder's testamentary intent could be thwarted due to the account holder's not being allowed to name a successor beneficiary on the account; the account holder's failure to subsequently name a new beneficiary; or the account holder's lack of capacity to do so on the death of the joint beneficiary. Similarly, situations may arise where the account holder may wish to benefit more than one party on an account. However, if one of the parties predeceases, the survivor obtains the whole account and none is preserved for the family of the predeceased beneficiary.

## Reparation Trusts

Unlike outright transfers, the funding of reparation trusts provide reparation recipients with the ability to maintain control over their assets. When assets are placed in a reparations trust which protects the Grantor from the cost of long term care expenses, such assets remain in the Grantor's control, whereas assets transferred via outright gifts to children or to joint accounts may be seen by the Grantor as those over which he or she has lost control.

Some of the benefits which a Reparation Trust provides include:

- **Providing** Medicaid exemption for multiple assets.
- **Unifying** assets under one entity.
- **Allowing** Grantor to maintain control of disposition of assets.
- **Allowing** client to retain assets in his or her individual name.
- **Providing** flexibility due to its Revocability.
- **Providing** directions for asset management in the event of incapacity without the necessity of a guardianship proceeding.
- **Eliminating** burden on spouse or next-of- kin to guess Grantor's intent in the event of incapacity.
- **Empowering** family members to take action on behalf of the Grantor, since assets remain under Grantor's control.
- **Simplifying** distribution of such assets to multiple beneficiaries.

#### **4) Conclusion.**

On the whole the *Victims of Nazi Persecution Compensation Trusts*<sup>SM</sup> continue to be the most comprehensive means of ensuring that reparation recipients are able to take advantage of the unique regulatory assistance that has been made available to them. It provides them with the greatest measure of security, independence, and certainty as concerns their financial future and that of their heirs.

The creation of a Reparation Trust enables recipients of reparation and/or pension payments from Germany or Austria to receive Medicaid benefits while retaining the use and control of their own assets. It also protects the Grantor's assets for him or herself during their lifetime; and will likely protect the balance of these assets for the Grantor's heirs after his or her death thanks to 02 OMM/ADM-3".

Over the past several years our firm has been instrumental in establishing the standard for reparation exemption in the realm of Medicaid eligibility. While such work in this area has taken place largely in New York, it has also extended to numerous jurisdictions throughout the country.

**In our experience, a simple plan is inadequate, for this is not a simple issue.**

#### **FLORIDA SPECIAL ALERT**

With Medicaid applications on the rise, local Medicaid jurisdictions are looking for ways to avoid granting the restitution exemption. The establishment of *Victims of Nazi Persecution Compensation Trusts*<sup>SM</sup> prevents them from doing this. Recent Florida cases have demonstrated that joining the applicant's accounts under the umbrella of the Restitution Trust provides a sufficient link between the applicant's savings and their restitution receipts to justify the restitution exemption. In cases where the Trust is not established, Medicaid authorities have been able to eliminate accounts from consideration as exempt resources. It is important to remember Medicaid's goal is to have individuals privately pay for their care to the greatest extent possible. Therefore, notwithstanding the exemption, Medicaid will look for every opportunity to deny coverage.