

ONE HUNDRED FIFTH LEGISLATURE - FIRST SESSION - 2017
COMMITTEE STATEMENT
LB268

Hearing Date: Wednesday February 01, 2017
Committee On: Judiciary
Introducer: Schumacher
One Liner: Change court and other provisions relating to medical assistance reimbursement

Roll Call Vote - Final Committee Action:
Advanced to General File with amendment(s)

Vote Results:

Aye:	7	Senators Baker, Chambers, Ebke, Hansen, Krist, Morfeld, Pansing Brooks
Nay:		
Absent:		
Present Not Voting:	1	Senator Halloran

Verbal Testimony:

Proponents:

Senator Paul Schumacher
Mark Richardson

Representing:

Introducer
Nebraska Association of Trial Attorneys

Opponents:

Christin Lovegrove

Representing:

self

Neutral:

Calder Lynch
Robert Hallstrom

Representing:

Department of Health and Human Services
Nebraska Bankers Association

Summary of purpose and/or changes:

LB 268 makes changes to provisions of Nebraska statute that allow for reimbursement of Medicaid payments made by the Department of Health and Human Services.

Section 1 of the bill tweaks jurisdictional statute applicable to Nebraska courts and provides that the county court shall have concurrent original jurisdiction with the district court to determine contribution rights under Neb. Rev. Stat. Sec. 68-919, which is the statute that establishes that a debt is created for reimbursement of medical assistance paid by the Department and allows the Department to make a claim for such debt.

Sections 2, 3, 4, 5, and 6 of the bill provide adjustments to notices that must be given to the Department and allows for delivery of such required notices in a manner and at an address to be designated by the Department, which may include by email. The bill would require the Department to post the acceptable manner on its website. It further notes that failure to conform to the manner provided results in the notice being void. The bill makes these notice changes to multiple provisions in statute dealing with decedents' estates and the Uniform Trust Code.

Section 7 of LB 268 cleans up language and provides that a portion of the fees for filing records with the clerk be used for preserving and maintaining records of a register of deeds office that has been consolidated with another county office. The Section further removes language creating a fee for certain filings with the county clerk and register of deeds.

Finally, the Section provides that no fees shall be received for recording instruments for the Department.

Section 8 strikes language that would allow the Secretary of State's office to collect certain fees under the Uniform Federal Lien Registration Act for filings on and after January 1, 2018.

Sections 10 to 13 of the bill outline additions to the Medical Assistance Act related to the process for Medicaid reimbursement recovery by the Department.

Section 11 first requires disclosure by an applicant for medical assistance of the applicant's interests in real estate, trusts, corporations, LLCs, or other entities, as well as any income derived therefrom. The willful failure to disclose any such information will result in any medical assistance received being declared unlawfully obtained and will be subject to recovery. If any income reported is derived from a related party pursuant to the bill, the Department must determine whether the terms of the arrangement giving rise to the income are commercially reasonable and consistent with income or lease terms derived in the relevant market area and negotiated at arms length between parties who are not related. If the Department determines this not to be the case, the income shall be considered a transfer of assets for less than full consideration, which will impact eligibility for medical assistance. The burden of proof of commercially reasonable terms is on the applicant for assistance.

An action to recover unlawfully obtained medical assistance would be available to the Department if brought against the applicant or the estate of the recipient if brought within 5 years after the death of both the applicant and the applicant's spouse.

Section 12 of LB 268 would create provisions to secure the state's interest in certain assets to recover reimbursements for medical assistance provided. The section begins by establishing a definition of a "related transferee." Under the bill, a "related transferee" is an individual related to the transferor, an entity controlled by one or more individuals to whom the transferor is related, or an irrevocable trust which a related individual is a beneficiary. The definition expressly excludes the recipient's spouse, or a child who is under the age of 21 or who is blind or totally and permanently disabled.

The Section further provides that it applies to transfers of real estate made on or after the effective date of the Act. It then provides that if an interest in real estate is irrevocably transferred during the transferor's lifetime for less than full consideration to a related transferee and the real estate is subject to rights, actual or constructive possession, or powers retained by the transferor, the interest in the real estate when acquired by the related transferee is subject to a lien in favor of the State of Nebraska for medical assistance reimbursement. The lien does not attach to any interest retained by the transferor. The lien would apply to medical assistance paid before, at the same time as, or after the filing of the notice of lien pursuant to the Act.

The register of deeds would notify the Department that a real estate transfer was subject to the Act within 15 days of receipt of a statement from the transferor pursuant to Neb. Rev. Stat. Sec. 76-214.

A lien becomes effective upon the filing of a notice of lien with the register of deeds in the county in which the real estate is located, and may only be filed after the Department has received an application for medical assistance. The lien is not valid against the owner of an interest in real estate received by a grantee who is not a related transferee if such deed is filed prior to the notice of lien. The lien is valid against any subsequent creditor only if notice was properly filed by the Department.

The lien is limited to the lesser of the amount necessary to satisfy the reimbursement obligations left unpaid after application of any assets from the probate estate, or the actual value of the real estate at the time the lien is enforced minus the consideration adjustment and minus the cost of the improvements made to the real estate by or on behalf of a related transferee.

The bill also allows a grantor to acknowledge in a transferring deed that the person to whom the real estate is being transferred is not a related transferee. Doing so would mean that the property is not subject to a pre-death or post-death lien. However, if a related transferee takes possession knowing such a recital is false, the related transferee would

become personally liable for Medicaid reimbursement.

The bill further for release or subordination of a lien if the related transferee agrees to indemnify the department for reimbursement or upon a satisfactory showing of undue hardship or that the interest subject to the lien is not one from which reimbursement may be had.

Section 13 provides a medical provider the authority to apply for medical assistance on behalf of a person being treated if they are unconscious or otherwise unable to apply and does not have an existing power of attorney or a court-appointed individual to apply on their behalf.

Section 14 provides that the Department may not foreclose on a lien on the home of a recipient if a sibling with an equity interest in the home has been residing there for one year or while the home is lived in by a child who has lived in the home for two years immediately before the medical assistance recipient was institutionalized and who provided care that delayed institutionalization.

The bill then adjusts the definition of the estate of the recipient for purposes of determining the assets which may be made available to the Department to repay the debt. The bill maintains that the debt may be recovered from the estate of the recipient, but provides a clear definition of what constitutes the "estate." Under LB 268, the estate of the recipient is defined as "any real estate, personal property, or other asset in which the recipient had any legal title or interest at or immediately prior to the time of the recipient's death," and adds that said estate includes certain categories of "assets." Specifically, LB 268 would include in the estate "assets to be transferred to a beneficiary in relation to the recipient through a revocable trust or other similar arrangement which has become irrevocable by reason of the recipient's death," and "assets conveyed or otherwise transferred to" someone through a means "by which value or possession is transferred to or realized by the beneficiary of the conveyance or transfer at or as a result of the recipient's death." The definition would also include insurance policies or annuities in which the recipient of benefits had an interest.

Excluded from the estate subject to recovery by the Department under LB 268 are insurance policies paid by someone other than the recipient of medical assistance or the recipient's spouse, insurance proceeds and accounts in institutions under federal supervision to the extent they are subject to a security interest where the secured party is not a related transferee, insurance proceeds or a trust account meant for funeral and burial expenses, and any pension rights or completed retirement places to the extent they are exempt from claims or reimbursement of medical assistance under federal law.

LB 268 also provides that with respect to "any interest in property created on or after" passage of the bill, the death of the recipient of medical assistance "shall not trigger a change in the rights to possession, enjoyment, access, income, or otherwise that the recipient had at or immediately prior to the time of death and the personal representative is empowered do and shall exercise or enjoy such rights for the purpose of paying such debt."

LB 268 further provides protection of assets transferred to a "related transferee" as that term was defined earlier in the bill. Under the bill, unless the asset would have been included in the estate of the recipient prior to passage of LB 268, an interest in real estate transferred to a related transferee and vested is not considered part of the "estate" unless such real estate is not disclosed at the time of application for medical assistance or at the time of any review of eligibility by the Department.

LB 268 makes clear that the Department shall release the property of a decedent from the provisions of the Act for purposes of recovery if the Department determines that there is no Medicaid reimbursement due and no application for medical assistance pending or that there will be sufficient assets of the probate estate of the decedent to satisfy all claims for Medicaid reimbursement. The Department must certify to an applicant that such property is released no later than 60 days after the receipt of the application. A failure by the Department to provide such notice gives rise to a mandamus action by the applicant that can be filed in Lancaster County court of the county in which the probate action or inheritance tax proceeding is pending. Failure to provide notice on the part of the Department results in a discharge of the debt created under the Act.

Under the bill, if the Department fails to seek to recover reimbursement for a period of 18 months after it is entitled to do so, the county attorney may seek the consent of the Department to enforce the rights of the Department. If the Department fails to respond within 60 days, permission is deemed to have been granted. Such consent may not be unreasonably withheld. The county shall be entitled to reasonable attorney fees for pursuit of reimbursement.

LB 268 would further provide that the Department may bring an action for recovery of the debt within four years pursuant to Neb. Rev. Stat. Sec. 25-206.

Section 14 of LB 268 also provides that if an action to recover for injury to the recipient of Medicaid benefits is necessary because the injury causing the need for assistance was the result of the wrongful act or negligence of a third party, the Department may reduce its claim by 25% of the full amount for purposes of paying costs and attorney's fees incurred in recovering so long as consent is given prior to pursuit of the action to recover. The Department may not unreasonably withhold consent, and must respond within 30 days of any such request.

Section 15 of LB 268 adds to provisions in Nebraska statute regarding death certificates. It provides that within 10 days after the filing of the certificate of death, the Department shall search records and determine whether the deceased had applied for or received medical assistance under the Act. If the Department determines that such was the case, it shall file a demand for notice of an estate proceeding with the county court. The Department must report the number of instances in which this occurs each year to the Legislature.

Section 16 adjusts certain notice provisions provided to the Department.

Section 17 strikes language related to a fee collected by the Secretary of State under the Uniform State Tax Lien Registration and Enforcement Act.

Explanation of amendments:

AM 618 adds language that clarifies the types of assets that might be considered for purposes of recovery. Specifically, it adds a reference to securities, bank accounts, intellectual property rights, and contractual or lease rights, and other similar types of assets.

The amendment would further provide an appeal mechanism from a decision of the Department with regard to a determination that the terms of a lease or income are "commercially reasonable." Such an appeal must be brought in accordance with the process and procedures outlined in the Nebraska Administrative Procedures Act.

Finally, the amendment provides clarifying language for when a cause of action for recovery accrues for purposes of calculating the 5-year statute of limitations.

Laura Ebke, Chairperson