MEDICAID ESTATE RECOVERY

For What? From What? When? How?

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I. Brief History and Overview of Medicaid Estate Recovery

Congress passed the Tax Equity and Fiscal Responsibility Act (TEFRA) in 1982, as the first federal estate recovery law for Title XIX medical assistance, also known as Medicaid. Some states had already been recovering medical assistance through state laws for decades. Since TEFRA was not mandatory, others refused to implement estate recovery. The 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) at the end of this outline. States who failed to implement an estate recovery program were to lose federal funds. This mandate was upheld in West Virginia v. United States 289 F. 3rd 281 (4th Cir. 2002). All states now have estate recovery programs, except Michigan. Despite the presence of an estate recovery program in nearly all states, these programs nationwide have extreme variances in efforts and results, as evidenced by the four tables, shown on the last page of this outline.

For each individual obtaining Medicaid, estate recovery can be summarized with four basic questions:

A. Is there a Medicaid debt due?
B. Is the debt waived (or deferred)?
C. What assets can be recovered?
D. What expenses have a higher priority?

Depending on the responses to these questions, there may be no recovery, or recovery may be delayed or limited. Although state laws vary considerably, generalizations made based on these four questions can assist in determining whether each state will have a successful program, and whether recoveries will be made against certain Medicaid recipients.

II. Estate Recovery Law -- 42 U.S.C 1396p(b)

A. The Medicaid debt

1. What is Medicaid?

Medicaid is a federal-state cooperative arrangement for paying medical expenses for those who cannot afford to pay them. Each state has a State Plan approved by the federal government agency known as the Center for Medicare and Medicaid Services (CMS). Medicaid is often referred to as Title XIX or medical assistance. Some states also have other names for their Medicaid programs, e.g. "MaineCare", "MediCal", "TennCare". Medicaid includes several programs such as Medically Needy, SLIMB, QUIMB, and Elderly Waiver. To be eligible for Medicaid, a

person must apply; meet certain limitations as to his or her assets and income; and be approved. Approximately two-thirds of the persons who qualify for Medicaid do not qualify for estate recovery, because they do not meet the requirements for either 1) age or 2) residency in long term care. For example, young indigent parents and their small minor children all living at home are not subject to estate recovery.

Medicaid expenditures nationwide are over $300 billion annually, including both the federal and state share. States typically participate in 35-50% of the expenditures with the federal government paying the rest. Even paying less than half of the Medicaid expenditures, Medicaid is still the largest expense of state governments nationwide and is growing at 7-8% per year. Medicaid's payments cover the care of more than half of all elderly, nursing-home residents. Although only about one-third of *recipients* of Medicaid qualify for estate recovery, two-thirds of Medicaid *funds* are for persons over 55 years of age, which are recoverable.

An estate recovery debt is due upon the recipient's death 1) when the recipient was age 55 (in some states, 65) or older; or 2) when the recipient was under 55 and a resident of a "long term care facility" (as defined by state law and as approved in the State Plan), who cannot reasonably be expected to be discharged and returned to the individual's home. Some states do not recover Medicaid debts at all if the person is under the age of 55. Funds spent on behalf of a recipient who qualifies for estate recovery are analogous to a loan or line of credit. These funds must then be repaid at the time of death, but only to the extent that the recipient has an interest in assets at that time. The set of assets that a person can claim exempt while eligible for Medicaid are similar to "collateral" for a loan that comes due at death. The evolution of Medicaid from an entitlement program to an advancement of funds against estate assets has not been well received in many states, but in others, programs are very successful, as shown on the last page of this outline. Millions of dollars are being reimbursed to the Medicaid fund to enable further needy persons to receive medical payments on their behalf.

Some states limit the type of Medicaid that can be recovered to certain categories of expenses, such as only those expenses related to long term or home and community based care pursuant to 42 USC 1396p(b)(1)(B)(i). Others recover all Medicaid that has been paid out by the Medicaid program pursuant to 42 USC 1396p(b)(1)(B)(ii).

Medicaid is often confused with Medicare, which is similar to an insurance program for the elderly. Unlike Medicare, Medicaid is only intended for individuals who qualify by having less than the requisite amount of assets and income. Many individuals qualify for both Medicare and Medicaid.

2. Liens

In establishing estate recovery, Congress also provided for real estate liens to secure Medicaid debts in certain circumstances and at the option of the states. These liens, known as TEFRA liens in accordance with the Tax Equity and

Financial Responsibility Act of 1982 that authorized them, are placed on real estate when neither the recipient nor the recipient's spouse are residing in the house. These liens prevent an improper transfer of property owned by the recipient while he or she is alive, and are authorized by 42 USC 1396p(a).

Real estate liens have also been placed on a home after the death of a recipient, but while the spouse continues to live there, as evidenced by State, Dept Human Resources v. Estate of Ullmer, 120 Nev. Adv. Op. No.16 (2004), in which the Nevada Supreme Court upheld the placement of liens on homes of surviving spouses, subject to proper notices and certain limitations including that the lien be removed if the surviving spouse sells or encumbers the home in a bona fide transaction.

In at least one state (Oregon), liens are not used, but "Request for Notices" are placed in real estate records. This statutory provision requires title companies to notify the Medicaid agency when there is any transaction that involves the subject property. Although not a lien, the Medicaid agency receives notice and has the opportunity to take action at the time of a real estate transfer.

3. Notice of debt

Notice of estate recovery may surprise the heirs or beneficiaries of a deceased medical assistance recipient. Oftentimes, the recipient managed his or her own financial affairs, and the heirs expected an inheritance. Many states have acknowledgements of estate recovery on their Medicaid applications. Notice may also be given at annual reviews of Medicaid eligibility. The recipient may advise other interested persons at the time of eligibility or annual review of the required reimbursement through estate recovery. Other states merely provide in their statutes authorizing estate recovery that the provision of the assistance creates a debt. Medicaid records are confidential for those who receive benefits, so other family members may not be aware of estate recovery until after death. Many times, those persons receiving Medicaid do not choose or are unable to advise their family members that they are receiving assistance, so notice before death can be problematic for those persons who may become interested after the death.

4. Payments before death

Estate recovery is only one of several processes used to reimburse Medicaid paid on behalf of recipients. Other recovery processes occur before death in distinct circumstances, such as:

- To recover fraudulent transfers -- when the recipient transfers assets for less than fair market value while receiving Medicaid or within a specified time period of receiving Medicaid
- Overpayment recovery -- when the recipient received Medicaid even though not within designated income and asset guidelines

- Casualty recovery -- when a lien is placed on a personal injury cause of action
- Third party liability -- when an insurance company does not pay prior to Medicaid, as Medicaid is the "payer of last resort".
- Voluntary payments -- Some states accept voluntary payments to repay a Medicaid debt as a practical way to discharge a person from future liability, as some recipients, or spouses or heirs, want to avoid estate recovery.

The primary difference between the above processes to recover Medicaid and estate recovery is that they target reimbursement in certain circumstances and generally occur before the death of the recipient. On the other hand, in many states, estate recovery collects <u>all</u> Medicaid that comes due at death, and is recovered from <u>all</u> assets allowed under each states' statutes.

5. Cost Avoidance

Cost avoidance – Some states have adopted procedures to require the sale of a house when a recipient can no longer return home. See 209(b) of Pub. Law 92-603. These funds are then placed in a "spend down" account, to cost avoid future Medicaid payments, and upon death may be used to reimburse Medicaid through the estate recovery laws.

In these states and others, for whatever reasons, some people do not want estate recovery claims in their estates. Avoiding Medicaid to avoid repayment reduces public expenditures. However, depending on the needs and resources of the recipient, this type of cost avoidance may not be desirable public policy.

6. Interest

Interest on medical assistance debts may accrue on the debt if authorized by the State, and in some States, starts six months after the date of death at a specified rate, e.g., 9%- Oregon, variable statutory judgment rate – Iowa).

7. Liability

Some state laws impose liability on persons winding up the affairs of the estate if an improper distribution is made from the estate of the deceased recipient without paying the Medicaid debt. Whether the estate is probated or not, liability can be imposed for the amount of Medicaid paid on behalf of the recipient up to the full value of any asset in which the recipient had an interest that was under the control of the person handling the deceased recipient's affairs.

B. Waivers, deferrals and exemptions

1. Spouse.

Federal law provides protection for surviving spouses. See 42 USC 1396p(b)(2) that states:

> **(2)** Any adjustment or recovery under paragraph (1) may be made only after the death of the individual's surviving spouse...

The extent to which assets are protected for the spouse varies greatly across the states, but can be summarized as follows:

1) States that waive the debt completely and forever if there is a surviving spouse. In some states, there are statutes, and in others court opinions, that specifically do not allow recovery if there is a surviving spouse. See Estate of Tutinas, Ill, No. 100841, May 18, 2006.

2) States that waive the debt only to the time of the surviving spouse's death, when the debt comes due to the extent that assets pass from the predeceased recipient spouse to the surviving spouse, generally upholding the state's statute. See Estate of Gullberg, 652 N.W.2d 709 (Minn Ct App. 2002), Ohio Dept. of Job and Family Services v. Tultz, 152 Ohio App.3d 405 (2003).

3) States that recover at the surviving spouse's death, but only to the amount that can be traced to the ownership of the recipient spouse, including those assets that may have been transferred before his or her death. See Estate of Wirtz, 607 N.W. 2d 882 (N.D. 2000).

Protecting against spousal impoverishment is a key legislative policy imperative in estate recovery laws, but these protections should not be used as a loophole to enrich other parties. Whether a spouse's assets (or estate after death) should be liable for the care of the recipient spouse, and to what extent, remains an unsettled public policy question for estate recovery that has been litigated extensively in several states.

2. *Disabled, blind, or minor child.*

Federal law provides protection for certain children of recipients. See 42 USC 1396p(b)(2)(A) that states:

> **(2)** Any adjustment or recovery under paragraph (1) may be made only after the death of the individual's surviving spouse, if any, and only at a time—
>
> **(A)** when he has no surviving child who is under age 21, or (with respect to States eligible to participate in the State program established under subchapter XVI of this chapter) is blind or permanently and totally disabled, or (with respect to States which are not eligible to participate in such program) is blind or disabled as defined in section 1382c of this title

Waivers for certain children of recipients are analogous to those for spouses. The extent to which assets are protected is also subject to a wide variation across the states, which can be summarized similarly as follows:

1) States that waive the debt completely and forever if there is a blind or disabled child.

2) States that waive the debt completely but only to the time of the blind or disabled child's death, when the debt comes due.

3) States that waive the debt to the extent assets pass from the recipient to the blind or disabled child, which is then collectible to the extent assets passed from the recipient to the blind or disabled child.

In any of the above states, the real estate may be sold during the period when collection of the debt is waived for a disabled child. In fact, real estate is often sold to pay for the care of the disabled child. Some states have provisions that the debt may be compromised, settled, or waived, and not just that the debt is automatically waived or deferred.

For states that treat a waived debt as deferred, a minor child who receives assets of an estate may be liable for repaying a debt to the extent the child received assets of the estate when the minor child turns 21.

These waivers protect dependent children that are blind, disabled, or minors. However, if only one of several children is blind, disabled, or a minor, states are split on whether a sibling can receive assets merely because a brother or sister is disabled. This can create an unwarranted loss to the Medicaid system and a windfall to an otherwise uninvolved and self-sufficient heir.

3. Waiver for undue hardship and exemptions

Federal law provides protection for persons who would suffer an undue hardship if the medical assistance debt was collected. See 42 USC 1396p(b)(3) that states:

> **(3)** The State agency shall establish procedures (in accordance with standards specified by the Secretary) under which the agency shall waive the application of this subsection (other than paragraph (1)(C)) if such application would work an undue hardship as determined on the basis of criteria established by the Secretary.

The most common type of undue hardship waivers are when a non-disabled son or daughter has lived in the house and cared for the recipient. (Generally, if the son or daughter was disabled, he or she could receive a disability waiver as described above). In some states, an undue hardship waiver specifically includes children who have cared for their parents. In other states, these types of cases would not be referred to as hardship waivers, but rather as

a homestead exemption. Still other states include this scenario as an undue hardship waiver only if the son or daughter meets certain income and asset guidelines and if collection of the debt would deprive the person of the basic necessities of food, shelter, clothing, or medical care.

Undue hardship waivers are not limited to children of the decedent, but can also be granted to any person who receives assets of the estate, as long as the estate or the person requesting the waiver meets the criteria for a waiver in that state. Undue hardship waivers are not generally granted to spouses or disabled children in most states because the debts are waived automatically based on their status without regard to possible circumstances of a hardship.

Undue hardship waivers in some states do not depend on the assets or income of the person requesting the hardship, but rather on the assets of the decedent's estate. For example, some states allow an undue hardship when a farm or small business will be passed to children. Occasionally, this type of waiver is identified as an exemption from estate recovery rather than a waiver, but the results are generally the same. Some states allow waivers and exemptions to last forever, others limit waivers and defer the debt only until the death of the person who receives the waiver. In those states, 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 hardship no longer exists.

C. Assets

The definition of estate pursuant to 42 U.S.C. 1396p(b)(4)(B) is:

> **(4)** For purposes of this subsection, the term "estate", with respect to a deceased individual—
> **(A)** shall include all real and personal property and other assets included within the individual's estate, as defined for purposes of State probate law; and
> **(B)** may include, at the option of the State (and shall include, in the case of an individual to whom paragraph (1)(C)(i) applies), 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 such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement

Congress has given states the option of collecting only probate assets under their respective probate laws, or using an expanded probate definition to collect typically non-probate assets. Typical probate assets include real estate, bank accounts, causes of action, and personal property. Typical non-probate assets include annuities, life estates, jointly held interests, and interests in trusts.

To be eligible for Medicaid, a person's assets cannot be more than a specified amount. These assets, which are exempt for eligibility during the person's lifetime, become the set of assets that are possibly available for estate recovery at death, depending on each state's laws. Estate recovery programs must analyze the assets of the decedent as if a snapshot was taken at the time of death to establish the "collateral" that can be used to recover the Medicaid "loan". Some states place a threshold on the amount of assets in an effort to focus on cost effective cases, or they limit collectibility to only probate assets. These types of limitations often deny the recovery of easily identifiable and collectible assets. Also, attorneys often use estate planning techniques to exploit these loopholes. Artificial restrictions as to cost effectiveness and limiting the recovery of assets to only "probate" assets, can strain the credibility of the program as to whether it can be enforced effectively and comprehensively.

1. *Probate assets*

a. Bank Accounts - Medicaid recipients are generally limited to a bank account of no more than $2,000, which is often the only remaining asset of the recipient. Many times these small amounts are used to pay the funeral and burial expenses and no funds remain to repay the Medicaid debt. If higher priority expenses have been paid, and funds remain in a bank account, then:

- In those states that have adopted the expanded probate definition, a joint account holder may remit the funds to reimburse Medicaid, if the funds were actually the property of the recipient;
- a small estates affidavit may be executed by an heir or beneficiary of the decedent, or in some states by the estate recovery program;
- a probate of the estate along with other assets may be necessary;
- In those bank accounts titled as "pay-on-death", those states that have adopted an expanded probate definition can recover, because the decedent had an interest in the funds at death;
- Although the bank may pay funds to the P.O.D. survivor or a survivor of property held jointly, the funds may be claimed from the survivor to repay the debt in those states with the expanded probate definition.

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 neither an asset of the decedent at the time of death, nor is there any obligation to pay these funds, the estate does not have an interest in these funds at the time of death. Memorial money is not recoverable for estate recovery.

b. Real estate -- The amount of remaining assets often do not justify opening a probate estate, but when the deceased recipient owned title to real estate, and there are no other surviving owners, in most circumstances, a probate estate will be opened. According to West Virginia v. United States, 70-80% of funds collected for estate recovery are from the sale of the deceased recipients' homes.

Many states have homestead exemptions that allow homesteads to pass to heirs. Some have made an exception for Medicaid, but others have not. In those states where the homestead may be sold, waivers are available if an heir meets the hardship criteria, and are required for a spouse or disabled child.

Many policy makers suggest that financing long term care through reverse mortgages is better than a government funded Medicaid program. After all, repayment in either scenario generally comes from the house of the deceased recipient. Reverse mortgages are seldom used because the Medicaid program is simply a better deal. No mortgage company would dare offer an unlimited line of credit repayable only after death (or after the death of a surviving spouse or disabled child), and even negotiate a fixed schedule for payment of medical bills.

c. Personal property -- Personal property of the decedent are probate assets, such as household goods, vehicles, shares of stock, interests in cooperatives, mineral rights, and cash. Therefore, they are recoverable from the estate pursuant to probate laws. However, the value of these items may not justify the costs of probate and liquidation. In these cases, the personal representative or the estate recovery program can acquire and distribute the funds by using either small estates affidavits, in some states, or opening probate estates. Depending on the procedure necessary to obtain these funds in each particular state, proceeding to recover funds on these items of personal property may not be cost effective, unless there are other recoverable assets in the estate.

d. Litigation -- Most litigation regarding Medicaid recipient's claims against third parties is for living recipients. If, however, the Medicaid recipient dies, then the estate of the recipient has an interest in recovering in the litigation, and the proceeds of the litigation are collectible. In these cases, the deceased recipient's interest in the litigation is an asset of the estate and must be distributed in accordance with applicable probate laws as any other asset. Occasionally, the wrongful death statute applies, and these laws may limit recovery.

When a decedent has a pending action for personal injuries suffered as a result of medical negligence, courts in at least two states have held that the Medicaid debt must still be repaid regardless of the collateral source rule. These courts held that, in substance, the Medicaid debt is a loan to be repaid from the assets of the decedent to the extent such assets exist, and Medicaid is not insurance or governmental benefits that replace or indemnify a loss.

Cases that begin as casualty lien cases can become estate recovery cases if the recipient dies. In Arkansas Department of Health and Human Services v. Ahlborn, 164 L. Ed. 2d 459,126 S. Ct. 1752 (May 1, 2006), the U.S. Supreme Court

held that Medicaid agencies can only recover those portions of personal injury settlements allocated to medical payments. If personal injury settlements are allocated to pain and suffering, loss of wages, or other types of damages payable to the recipient, then Medicaid can not recover from these portions of the settlement proceeds prior to death. However, after death, the medical assistance debt comes due against the estate assets, which includes all litigation proceeds paid to the estate of the recipient. This does not include any allocation to a loss of consortium, which would not be property of the recipient or the estate.

e. Government held funds – Many government agencies have their own rules regulating the distribution of a decedent's funds. For example, if a person dies on the second day of the month, a direct-deposited social security payment in a bank account becomes part of the decedent's assets. Under Medicaid laws, these funds become part of the estate, but under social security laws, this payment could be returned by the financial institution and redistributed to heirs by the Social Security Administration pursuant to underpayment regulations. The Bureau of Public Debt that holds U.S. Savings Bonds, and the unclaimed property units of state governments also hold and distribute funds pursuant to their own regulations. Recovery of these types of assets often requires a probate estate or compliance with small estate regulations of these government entities.

2. Non-Probate assets

a. Life estates -- A life estate interest owned by a person at the time of death is recoverable pursuant 42 U.S.C. Section 1396p(b)(4)(B), if a state has adopted the expanded probate definition. Two states' Supreme Courts have confirmed the recovery of life estate interests. See Estate of Laughead, 696 N.W.2d 312 (Iowa 2005), Oregon v. Willingham, 0308-08747; A126258 (Decided May 31, 2006). In Bonta v. Burke C037609 (Cal Sup Ct. 2002), a recipient with a life estate also had the power to revoke, and the court held the entire property was subject to recovery. The court further said that Congress intended the term "estate" to have a broad meaning and therefore non-probate transfers of assets on death are subject to estate recovery. Some Courts have interpreted the phrase 'at the time of death' to mean at "the time immediately before the Medicaid recipient's death". See Gullberg and Laughead. Often a life estate owned by the recipient at the time of death will cause the real estate to be sold or the remaindermen to 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 Medicaid eligibility.

b. Jointly held property – As a recipient owns property at the moment before death and this is the point at which many states with the expanded probate definition use to determine what assets are recoverable, jointly held interests may

be used to repay the medical assistance debt pursuant to 42 USC 1396p. See Estate of Serovy, 711 N.W. 2d 290 (Iowa 2006).

c. Beneficiary deeds – Estate planners have generated tools to avoid repayment of creditors including Medicaid debts. One such tool is the beneficiary deed. This type of deed is similar to a life estate interest or a pay-on-death account as the deed specifically allows the life tenant to 100% of the value of the property until death, then the property passes automatically to a beneficiary. Similarly, some deeds (known as "Lady Bird deeds" in some states) transfer the property on death, but allow the life tenant to sell, lease or mortgage the property during the life tenant's lifetime. These types of deeds would generally not be recoverable in states allowing recovery only from probate estates, but those states with an expanded probate definition for estate recovery could likely recover these non-probate assets.

d. Annuities – An annuity is not life insurance but rather is an investment to create income by payments over fixed intervals of time. Although a "beneficiary" designation may be found in an annuity policy, the "beneficiary" is not entitled to the funds as in an insurance policy, when the state has adopted the expanded probate definition. With few exceptions, the funds in an annuity are subject to the medical assistance debt just as a bank account or other investment. A pay-on-death clause does not alter the status of these funds since an investment is an asset of the recipient at the moment before death. In accordance with the Deficit Reduction Act of 2005, Medicaid agencies are now required to have beneficiary designations for annuities irrevocably assigned to the Medicaid agencies. A commuted value may be used for reimbursement of the Medicaid debt or the estate recovery program may receive payments over time.

IRA's, 401k's, pension funds, and other retirement plans are similar to annuities, except each type of plan may be subject to its own set of rules and regulations. If a State has adopted the expanded probate definition, these assets may be subject to recovery depending on the terms of the contract and the regulations governing these types of investments.

e. Trusts – Interests in trusts are collectible in those states that have adopted the expanded definition if the trust assets were "available" to the recipient. A trust that provides for the support of a recipient, also known as a support trust, is collectible to the extent of the recipient's interest in the trust. In certain trusts, there is an element of discretion drafted into the terms of a support trust, but depending on the terms of the trust, these funds may be recoverable. See Estate of DeMartino v. Div. of Med. Assistance & Human Services, 861 A.2d 138 (N.J. Super. Ct. App. Div. 2004) and In re Barkema Trust, 690 N.W. 2d 50 (Iowa 2004). On the other hand, a pure discretionary trust in which the recipient had no interest at the time of death is not be subject to recovery. Some trusts provide income for the recipient. In these cases, the remaining income at death is recoverable.

f. Burial trusts and burial life insurance -- Often recipients have irrevocable burial trust funds or insurance policies assigned to a funeral home for funeral and burial expenses. If funds remain in the trust account or insurance proceeds after payment of reasonable funeral expenses, some states require the funeral home director to notify the Medicaid agency and remit excess funds up to the amount of the Medicaid claim, if no probate estate is opened. This protects the decedent's wishes in the type of funeral and burial, and the funeral home director's promise to provide selected services to the decedent. It also prevents heirs from cremating the body or using other less expensive services to get more funds back from the trust.

g. Miller Trusts and Special Needs Trusts – A Miller Trust takes its name from the federal case of Miller v. Ibarra, 746 F. Supp. 19 (Co. 1990). The holding has since been codified in 42 U.S.C. 1396p(d)(4)(B). Miller Trusts are also known as medical assistance income trusts, income assignment trusts or "(d)(4)(B)" trusts. These trusts are most often concluded at death when estate recovery is also involved, so estate recovery programs in some states recover the funds from these type of trusts, in which the Department is a residual beneficiary.

Special needs trusts or supplemental needs trusts, also known as a (d)(4)(a) trusts are similar to Miller Trusts in that the residual beneficiary is the Medicaid agency. However, the trust funds in a Miller Trust are generated from income, and the trust funds in a special needs trust are often generated from a lump sum of funds such as a lawsuit settlement. From the perspective of estate recovery programs, the primary difference between the funds in a Miller Trust or Special Needs Trust and other assets is that since the residual beneficiary of the trust is the Medicaid agency, these funds are not subject to any waivers or higher priority debts. These funds are payable in accordance with the terms of the trust and not in accordance with the estate recovery statute.

3. Life insurance

Life insurance policies are typically not property of the estate of a decedent. Life insurance benefits are payable to a named beneficiary and are neither property of the estate nor recoverable in most circumstances. However, life insurance proceeds may be recoverable if the beneficiary is the estate; if no beneficiaries survive the recipient; if the policy is assigned to a funeral home; or if the policy had not been reported to the Medicaid agency while the recipient was living.

D. Expenses

In most states, the Probate Code sets forth the debts and charges against the estate that have priority over ordinary claims and the heirs and beneficiaries. Typically, higher priority expenses are classified as follows:

- Court costs and costs of administration are paid as a top priority. Costs of administration include attorney's fees and executor's fees, and may also include the expenses for preparing real estate or other property for sale.
- Funeral and burial expenses are usually next and typically include all services provided by the funeral home and the costs of burial as long as the costs are reasonable.
- Federal taxes and state taxes also generally have a very high priority and may be paid before the medical assistance debt.
- Reasonable and necessary medical and hospital expenses of last illness in some states have a higher priority, in some states lower, and in still others may be pro-rated with the medical assistance debt.

The order of priority in the probate code varies somewhat state by state, but generally provides that the above expenses have a priority over the medical assistance debt. Since a probate estate can be opened for administering any person's estate, the priority identified in the probate code should be followed regardless of whether an estate is actually opened.

III. Estate Recovery Programs and Procedures

A. Referral process

State Medicaid agencies designate their records with a recipient death, and if the State has a method to aggregate those records, then the estate recovery program can then proceed on those cases. Another method to initiate estate recovery cases is to match lists received from vital statistics death records against Medicaid eligibility files. Referrals may also be received in the form of probate notices, letter, fax, phone, email, lists from probate courts, or links on estate recovery websites. Although data matches may be the most comprehensive, referrals from attorneys, family members, funeral homes, nursing homes, and others often initiate the process more quickly. In some states, funeral homes are responsible for reporting when there are excess funds in a burial trust fund, and nursing homes may be required to report deaths to Medicaid agencies within certain time periods. Attorneys are responsible for sending notices of probate to all known or reasonable ascertainable creditors. All of these types of referrals generate cases for the estate recovery program to open.

Often discovering the name of the person who will be winding up the affairs of the recipient is more difficult than identifying a deceased recipient. Sometimes, this information can only be found in a will, and oftentimes there is no will. For this reason, contact from attorneys or personal representatives can be very helpful to move matters forward. If attorneys and personal representatives do not notify estate recovery, then funds that are due may be spent improperly. Heirs can become upset that they received the funds in the first place, when they must pay it

back. So, notifying estate recovery programs of a death moves the process along more efficiently.

Most states operate their programs from a central location in the state capital, but others use a decentralized approach, with policy directive from the state. In these states, county attorneys may receive the referrals directly from the caseworkers when legal work is required, and proceed accordingly.

B. Claim information and Initial Contact to Representative

When a referral is received, the first step is to identify if there is a debt due. A copy of the report may then be sent to the personal representative or attorney along with information explaining the estate recovery process, and a response form. The report may include both claims paid by Medicaid, and Medicare or other premiums paid by Medicaid. If a probate estate is opened, a claim should be filed rather than sending correspondence.

Medical assistance providers may submit claims to Medicaid after death, so full medical assistance history reports and the final amounts due may not be available for some time after death. Since there is usually a preference by families, funeral homes, attorneys, and others to conclude the affairs of a decedent, an initial claim amount should be sent as soon as a report can be obtained. This should be within a few weeks of the referral. If assets exceed the amount of the claim, a final amount may be provided at a later time.

Estate Recovery staff must be sensitive to the grieving process. Many of those who contact, or receive contact from, estate recovery programs may not understand that the estate must repay a “loan” after a relative’s death, particularly if they are not familiar with this aspect of Medicaid.

C. Follow-up, Deposit Process and other matters

After the initial letter or filing of a probate claim, cases must be reviewed periodically and follow-up efforts made if the Estate Recovery office receives no response. All payments should be acknowledged with a letter, and a release of a claim if the case was in probate. The deposited funds are used for payment of future Medicaid for other needy persons.

If a waiver is granted and the state treats waivers as deferrals of the debt, the files are in a deferral status until the death of the surviving spouse, disabled or blind child, or hardship waiver recipient. In those states that do not defer the debts, files can be closed when there is a waiver established.

When no response is received from relatives or attorneys, an estate recovery program can proceed in accordance with its state’s laws to 1) open a probate estate, or 2) file a small estates affidavit if authorized under the laws of that state, or 3) seek liability against any person who has taken the assets of the decedent without paying the Medicaid debt.

Estate recovery programs should engage in public awareness programs by distributing brochures, speaking to organizations regarding the program, placing notices in law journals, funeral home and nursing home publications, and through a web site and toll-free number. Estate Recovery Programs should also conduct regular training sessions with Medicaid eligibility caseworkers because recipients and their relatives obtain most of their information about estate recovery through caseworkers that monitor the cases before death.

IV. Conclusion

The success of estate recovery programs nationwide depends upon public awareness, dedicated staff, efficient procedures and appropriate legislation. If the programs are viewed as a tax or an attack against needy persons, then their success may suffer. On the other hand, a Medicaid program that is viewed as a revolving loan fund and a source of assistance for the indigent who then, in turn, must reimburse the program to help others, stands a better chance of success. Health care financing is a difficult and complicated issue in the United States, and estate recovery is merely a small part of a financing mechanism to help those who are in need of assistance.

---(cut or tear here)---

For purposes of improving communication between estate recovery programs and attorneys (20 states are already part of a communication network), please provide the following information:

Estate Recovery Contact Information:

State: ____
Contact person (Please print): ________________________________
Contact person email address: ________________________________
Estate Recovery phone number: ______________________________
Mailing Address: ____________________________________
____
____

Please include me on your email list for future communications regarding estate recovery.

Please mail to:
Ben Chatman
Estate Recovery Program
P.O. Box 36445
Des Moines IA 50315

Or, email this information to bchatma@dhs.state.ia.us

Estate Recovery law 42 USC 1396p(b)

(b) Adjustment or recovery of medical assistance correctly paid under a State plan

(1) No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except that the State shall seek adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan in the case of the following individuals:

(A) In the case of an individual described in subsection (a)(1)(B) of this section, the State shall seek adjustment or recovery from the individual's estate or upon sale of the property subject to a lien imposed on account of medical assistance paid on behalf of the individual.

(B) In the case of an individual who was 55 years of age or older when the individual received such medical assistance, the State shall seek adjustment or recovery from the individual's estate, but only for medical assistance consisting of—

(i) nursing facility services, home and community-based services, and related hospital and prescription drug services, or

(ii) at the option of the State, any items or services under the State plan.

(C)

(i) In the case of an individual who has received (or is entitled to receive) benefits under a long-term care insurance policy in connection with which assets or resources are disregarded in the manner described in clause (ii), except as provided in such clause, the State shall seek adjustment or recovery from the individual's estate on account of medical assistance paid on behalf of the individual for nursing facility and other long-term care services.

(ii) Clause (i) shall not apply in the case of an individual who received medical assistance under a State plan of a State which had a State plan amendment approved as of May 14, 1993, which provided for the disregard of any assets or resources—

(I) to the extent that payments are made under a long-term care insurance policy; or

(II) because an individual has received (or is entitled to receive) benefits under a long-term care insurance policy.

(2) Any adjustment or recovery under paragraph (1) may be made only after the death of the individual's surviving spouse, if any, and only at a time—

(A) when he has no surviving child who is under age 21, or (with respect to States eligible to participate in the State program established under subchapter XVI of this chapter) is blind or permanently and totally disabled, or (with respect to States which are not eligible to participate in such program) is blind or disabled as defined in section 1382c of this title; and

(B) in the case of a lien on an individual's home under subsection (a)(1)(B) of this section, when—

(i) no sibling of the individual (who was residing in the individual's home for a period of at least one year immediately before the date of the individual's admission to the medical institution), and

(ii) no son or daughter of the individual (who was residing in the individual's home for a period of at least two years immediately before the date of the individual's admission to the medical institution, and who establishes to the satisfaction of the State that he or she provided care to such individual which permitted such individual to reside at home rather than in an institution),

is lawfully residing in such home who has lawfully resided in such home on a continuous basis since the date of the individual's admission to the medical institution.

(3) The State agency shall establish procedures (in accordance with standards specified by the Secretary) under which the agency shall waive the application of this subsection (other than paragraph (1)(C)) if such application would work an undue hardship as determined on the basis of criteria established by the Secretary.

(4) For purposes of this subsection, the term "estate", with respect to a deceased individual—

(A) shall include all real and personal property and other assets included within the individual's estate, as defined for purposes of State probate law; and

(B) may include, at the option of the State (and shall include, in the case of an individual to whom paragraph (1)(C)(i) applies), 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 such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.

State	Revenue (2004)	$ Per Capita
MA	32,577,301	$5.13
MN	24,998,595	$5.08
ME	6,178,845	$4.85
ID	5,695,851	$4.40
IA	12,194,616	$4.17
OR	13,843,592	$4.05
NH	4,362,641	$3.53
WY	1,632,368	$3.31
DC	1,789,570	$3.13
WI	16,772,729	$3.13
ND	2,000,766	$3.12
RI	2,792,488	$2.66
MT	2,363,322	$2.62
CT	8,204,283	$2.41
WA	10,770,875	$1.83
KS	4,866,505	$1.81
IL	21,254,742	$1.71
SD	1,222,693	$1.62
NY	29,953,334	$1.58
TN	8,895,934	$1.56
SC	6,206,820	$1.55
MO	8,597,322	$1.54
CO	6,241,993	$1.45
AL	6,204,836	$1.40
HI	1,684,280	$1.39
KY	5,391,045	$1.33
CA	44,668,847	$1.32
IN	7,649,409	$1.26
OH	13,987,964	$1.23
US	**340,510,654**	**$1.21**
MD	5,456,547	$1.03
NJ	8,329,882	$.99
FL	13,478,207	$.84
AR	2,104,052	$.79
NC	5,529,652	$.69
VT	402,156	$.66
NE	1,125,970	$.66
DE	436,370	$.56
PA	5,888,558	$.48
AZ	2,403,306	$.47
OK	1,573,913	$.46
NV	420,429	$.21
MS	391,933	$.14
WV	214,656	$.12
VA	776,866	$.11
NM	78,037	$.04
UT	47,443	$.02
LA	103,853	$.02
AK	0	$0
MI	0	$0
GA	0	$0
TX	0	$0

Source of data: CMS

State	$ Per Medicaid Population
ID	$36.95
NH	$36.59
OR	$35.65
IA	$34.25
ND	$28.63
WI	$28.43
MN	$27.81
WY	$25.79
CT	$25.77
MA	$25.36
ME	$23.36
KS	$21.51
MT	$20.87
CO	$16.51
RI	$15.34
PA	$13.80
IL	$13.42
WA	$12.65
HI	$12.51
SD	$12.12
UT	$11.17
IN	$9.91
OH	$9.76
NY	$8.81
MO	$8.68
NV	$7.43
US	**$7.19**
MD	$6.93
CA	$6.69
VT	$6.65
NJ	$6.50
SC	$6.35
NE	$5.04
FL	$4.16
NC	$4.07
DE	$4.04
KY	$3.57
AR	$3.09
OK	$2.99
MS	$2.89
AZ	$2.35
TN	$2.02
VA	$1.28
WV	$1.11
AL	$.50
NM	$.20
LA	$.10
AK	$0
GA	$0
TX	$0
MI	$0

Source of data: CMS

State	% of Medicaid LTC Spending
AZ*	5.78%
OR	2.22%
ID	1.83%
CA	1.30%
NH	1.26%
HI	1.18%
IA	1.08%
MA	1.02%
ME	.91%
WY	.83%
MT	.82%
UT	.82%
RI	.82%
WI	.80%
WA	.75%
KS	.75%
MN	.70%
US	**.69%**
ND	.64%
IL	.62%
NV	.59%
DC	.57%
CT	.57%
SC	.56%
SD	.54%
IN	.52%
VT	.51%
PA	.43%
AL	.37%
MD	.34%
OH	.31%
FL	.28%
KY	.25%
TN	.23%
NC	.23%
MS	.22%
AR	.21%
OK	.21%
NE	.21%
DE	.20%
NY	.17%
NJ	.17%
VA	.08%
WV	.06%
LA	.01%
AK	0%
GA	0%
NM	0%
TX	0%
MI	0%

Source: ABA/AARP 2004 Survey of State Programs

State	% of Total NH Spending
AZ*	10.40%
OR	5.80%
ID	4.50%
IA	2.90%
MN	2.80%
WY	2.70%
ME	2.50%
MA	2.00%
WI	1.80%
WA	1.80%
NH	1.60%
CA	1.50%
MT	1.40%
KS	1.40%
SC	1.30%
IL	1.30%
ND	1.20%
SD	1.00%
RI	1.00%
DC	1.00%
HI	0.90%
TN	0.90%
KY	0.90%
AL	0.80%
US	**0.80%**
CT	0.80%
IN	0.80%
MD	0.60%
FL	0.60%
NJ	0.60%
OH	0.50%
NC	0.50%
NY	0.50%
AR	0.40%
VT	0.40%
OK	0.30%
NE	0.30%
NV	0.30%
DE	0.30%
PA	0.10%
VA	0.10%
MS	0.10%
WV	0.10%
UT	0.00%
NM	0.00%
LA	0.00%
AK	0.00%
GA	0.00%
TX	0.00%

Source: http://aspe.hhs.gov/daltcp/reports/estreccol.htm

* Arizona's estate recovery collections, as a percentage of nursing home spending, are not comparable to any other state because comprehensive prepaid managed care contracts dominate the state's Medicaid program, and nursing home care provided under these contracts is not identified separately for reporting purposes