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## Medicaid Estate Recovery in Georgia

**By: David L. McGuffey, CELA**

### Introduction

*Note: The Medicaid Act is one of the most complicated legal structures within the American legal system. This memo cannot replace competent legal advice provided by a qualified attorney who has reviewed the facts of your situation. Do not rely on this memo as a replacement for legal advice.*

Medicaid is a means-tested entitlement program.<sup>1</sup> Medicaid, as opposed to Medicare,<sup>2</sup> is a health insurance program, jointly funded by the state and federal governments that pays for health care for America's poor. See Medicaid Act (Title XIX of the Social Security Act), 42 U.S.C. § 1396 et seq. Individuals qualify for Medicaid if they are aged, blind, disabled or the parent of a minor child, and their income and resources are insufficient to meet the cost of necessary care and services as measured by statutory criteria. 42 U.S.C. § 1396a. Not everyone is eligible for medical assistance; only those persons who fall within a defined “class of assistance” (COA) receive Medicaid. For certain COAs, primarily nursing home care and related long-term care, medical assistance is treated as a loan.<sup>3</sup> Following the death of a Medicaid recipient on such a COA, Medicaid seeks reimbursement of funds it paid. The collection process is called estate recovery.

Since 1993, federal law has required that States pursue Medicaid estate recovery. In mandating estate recovery, Congress sought a way “to stymie the growth in state Medicaid expenditures without depriving eligible recipients of much-needed care.” *West Virginia v. United States* HHS 132 F.Supp.2d 437, 440 (S.D. WV 2001). The general public, however, is typically confused and incensed when the State makes an estate

<sup>1</sup> <http://www.cms.hhs.gov/MedicaidGenInfo/>.

<sup>2</sup> Medicare, structured as health insurance, primarily covers acute care. It provides little coverage for long-term care expenses. In contrasting the two programs, “[w]hen an older person enters a hospital for medical reasons, the government (through Medicare) pays almost all of the bills without inquiry into the beneficiary’s financial resources or marital status. But when that same person goes into a nursing home for medical reasons, the government (through Medicaid) demands impoverishment as the price for covering that person’s expenditures. R. Kaplan, *Cracking the Conundrum: Toward a Rational Financing of Long-Term Care*, 2004 U. Ill. L. Rev. 47, 72 (2004). Further, Medicare does not recover its payments from residual assets in a beneficiary’s estate, while Medicaid does.

<sup>3</sup> This is far from an insignificant limitation. Eighty-percent of Georgia nursing home residents are on Medicaid. See Georgia Health Care Association, <http://www.gnha.org/index.php/choose/#whopays>.

recovery claim.<sup>4</sup> Recently, a *pro se* Plaintiff, proceeding *in forma pauperis*, described estate recovery as “nothing more than a vast, unlawful conspiracy to deprive the Plaintiff, an American who is Black, of his property, his dignity and his constitutional rights, simply because they could.” *Drake v. Miller*, 2009 U.S. Dist. LEXIS 45052 (W. D. KY May 29, 2009). Adding to the confusion, it has become commonplace for States to overreach when pursuing estate recovery, making claims that go beyond the permissible limits of federal law.

One might ask, if estate recovery is so distasteful, why not reject Medicaid. Some people do exactly that.<sup>5</sup> The Medicaid Act does not “forcibly expose citizens to estate recovery. Persons subject to estate recovery receive notice of the estate recovery requirement before they decide whether to accept or reject Medicaid benefits.” *California Advocates for Nursing Home Reform v. Bonta*, 106 Cal. App. 4<sup>th</sup> 498, 511 (Cal. App. 1<sup>st</sup> 2003). Even so, Medicaid applicants often feel little choice when the question is to accept the potential of estate recovery and receive necessary care, or reject estate recovery and die.<sup>6</sup>

This memo provides a brief overview of Georgia’s Medicaid Estate Recovery Program. It is not meant as an exhaustive survey of the law. Further, the law in Georgia continues to develop since implementation of the program as of May 3, 2006. Every attempt has been made to include all relevant materials through the date of this memo, which is August 19, 2009. Developments occurring after that date would require further research.

## Contents

Introduction .....	1
Medicaid’s Basic Structure.....	4
Basic Guidelines .....	5
Locating Medicaid Law.....	5

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<sup>4</sup> Confusion regarding the Medicaid program is understandable. “The Medicaid Act is an enormously complicated program. The system is a web; a tug at one strand pulls on every other. [Cit.] Given this complexity, there are untold ways in which a state plan might fail to comply with the Act and the governing regulations.” *West Virginia v. United States HHS*, 289 F.3d 281, 294 (4<sup>th</sup> Cir. 2002). The program has been called Byzantine. At least one judge has stated that the program is so complex that a draftsman who has gotten himself into a position such as this should make a fresh start. *Id.*

<sup>5</sup> Advocates fear that potential Medicaid recipients will decline necessary care out of fear that estate recovery would deplete their estate. They report that estate recovery tends to reach individuals of very modest means and has a chilling effect on low income people seeking benefits to which they are entitled. R. Rein, *Misinformation and Self-Deception in Recent Long-Term Care Policy Trends*, 12 J.L. & Politics 195, 225 (1996). They argue this “chill” will ultimately increase Medicaid costs by deterring low-income seniors from seeking care that might prevent more serious illness later on. *Id.*

<sup>6</sup> “No one chooses to be afflicted with illness or disabilities requiring long-term care. Many elders who face the need for long-term care, and their loved ones, suffer an involuntary triple catastrophe. First, there is the emotional pain of contemplating one’s own or one’s loved one’s long-term disability. Next comes the shock of discovering the enormity of long-term care costs and contemplating the possibility of having all or most of what the family has struggled for a lifetime to acquire and save wiped out within a few months or years of the onset of the disability. The third, and not necessarily final, shock occurs when individuals and their families learn that some of their fellow Americans will view their efforts to preserve some financial cushion for themselves and their loved ones against financial ruin (and the vulnerability and helplessness that come with it) as manifestations of selfishness, greed, and downright fraud.” R. Rein, *supra*, at 206.

Federal Estate Recovery Law and Rules .....	6
Law Prior to 1993.....	6
The Current Statute: Section 1396p(b) .....	7
Legislative History.....	8
Policy reasons for the law .....	12
Estate Recovery is required.....	13
Elements of the federal rule .....	14
Limited Exception.....	14
Limited Classes of Assistance .....	15
Limited Where Certain Persons Survive the Applicant .....	15
Limited to the Estate of the Medicaid Applicant.....	17
Undue Hardship .....	22
Other sources pay first.....	24
Georgia Estate Recovery Law and Rules.....	24
Background.....	24
State Legislation .....	27
The State Plan.....	28
State Regulations.....	31
State Manual.....	34
The Estate Recovery Notice.....	35
Georgia Case Law.....	36
Georgia Probate Procedure .....	37
Jurisdiction.....	38
Venue .....	38
Objections and Hearings .....	39
Court Rules .....	39
Discovery .....	39
Interested Parties .....	40
Administrators.....	40
Executors .....	41
Estate Administration .....	41
Year's Support.....	42
Creditors; Priority of Claims .....	43
Claims.....	43
What is a property interest? .....	44
Property subject to claims .....	48
Appeals.....	50
Collections .....	50
Specific Non-Probate Property Interests.....	52
Retroactive Effect .....	52
Revocable Transfers .....	52
Joint Tenancy .....	53
Beneficiary Deeds .....	54
Life Estates.....	54
Spouse's estate .....	55
Trusts .....	62
Planning Considerations.....	64

Conclusion.....	64
Attachment A: Summary of Georgia’s State Plan (Recovery Provisions) .....	65
Attachment B: Georgia Estate Recovery Regulations .....	70
111-3-8-.01 Legal Authority. ....	70
111-3-8-.02 Definitions.....	70
111-3-8-.03 Notification to Member or Their Heirs.....	71
111-3-8-.04 Recovery for Payments Made on Behalf of Medicaid-Eligible Persons. ....	72
111-3-8-.05 Recovery of Assistance; Probate. ....	74
111-3-8-.06 Recovery of Assistance; No Estate.....	74
111-3-8-.07 Imposition of Liens. ....	75
111-3-8-.08 Hardship Waiver.....	76

## Medicaid’s Basic Structure

Medicaid is a state administered program and each state sets its own guidelines regarding eligibility and services. “Each participating State develops a plan containing reasonable standards . . . for determining eligibility for and the extent of medical assistance” within boundaries set by the Medicaid statute and the Secretary of Health and Human Services.” *Wis. Dep’t of Health & Family Servs v. Blumer*, 534 U.S. 473 (2002) (quoting *Schweiker v. Gray Panthers*, 453 U.S. 34, 36-37 (1981)); see also *ABC Home Health Servs. v. Ga. Dep’t of Medical Assistance*, 211 Ga. App. 461, 462 (1993); 42 U.S.C. § 1396a. Although States must comply with federal law,<sup>7</sup> each State has significant power to customize its Medicaid program within those parameters. Where federal law is silent, State law can generally fill the interstices so long as States do not violate federal statutes, regulations or rules. See *Blumer, supra*, at 496 (“we have not been reluctant to leave a range of permissible choices to the States, at least where the superintending federal agency has concluded that such latitude is consistent with the statute’s aims”). Nonetheless, the case law makes it clear that States frequently go beyond filling the gaps, ignoring federal law, in their efforts to expand collections.

Each State participating in the Medicaid program must develop a State Plan which conforms to federal law. See 42 U.S.C. § 1396a. Among other requirements, the State plan must:

1. Be effective throughout the State; Section 1396a(a)(1);
2. Provide for fair hearings when eligibility is denied or not acted upon with reasonable promptness; Section 1396a(a)(3);
3. Be administered by a single State agency; Section 1396a(a)(5); and
4. Comply with the provisions of Section 1396p with respect to liens, adjustments and recoveries of medical assistance correctly paid, transfers of assets and treatment of certain trusts. Section 1396a(a)(18).

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<sup>7</sup> “Article VI of the United States Constitution provides that laws made under the authority of the United States shall be the supreme law of the land, and that judges in every state are bound thereby.” *Tunnelite, Inc. v. Estate of Sims*, 266 Ga. App. 476 (2004).

## ***Basic Guidelines***

In addition, for each COA, the State Plan must meet four basic guidelines:

**Amount, duration, and scope** --Each covered service must be sufficient in amount, duration, and scope to reasonably achieve its purpose. The State may not arbitrarily deny or reduce the amount, duration, or scope of services solely because of the type of illness or condition. The State may place appropriate limits on a service based on such criteria as medical necessity.

**Comparability**--With certain exceptions defined in regulations, services available to any categorically needy beneficiary in a State must be equal in amount, duration, and scope to those available to any other categorically needy beneficiary in the State. Similarly, services available to any medically needy beneficiary in a State must be equal in amount, duration, and scope to those available to any other medically needy beneficiary in the State.

**Statewideness**--Generally, a State plan must be in effect throughout an entire State; that is, the amount, duration, and scope of coverage must be the same statewide.

**Freedom-of-Choice**--With certain exceptions, a State's Medicaid plan must allow recipients freedom of choice among health care providers participating in Medicaid. States may provide and pay for Medicaid services through various prepayment arrangements, such as a health maintenance organization (HMO).

## ***Locating Medicaid Law***

Federal and state statutes, regulations and case law are available to subscribers of LEXIS and Westlaw.

The federal statute, which is Title XIX of the Social Security Act, is at 42 U.S.C. § 1396 et seq. (the "Medicaid Act"). The federal statutes are online at the Cornell Law School website.<sup>8</sup> Access is free.

The federal regulations governing Medicaid eligibility are generally at 42 C.F.R. Part 435. They are also available at through the Cornell Law School website.<sup>9</sup>

The State Medicaid Manual is online at the Centers for Medicare and Medicaid Services website. [www.cms.hhs.gov](http://www.cms.hhs.gov). The homepage includes a link for "Regulations & Guidance." On the "Regulations & Guidance" page, click on the link for "Manuals." From there, access Publication 45 under the "Paper-Based Manuals" link. Chapter 3, which concerns Medicaid eligibility, is frequently referred to as "HCFA 64."

Most appellate level decisions can be accessed for free at [www.lexisone.com](http://www.lexisone.com). The citation is necessary and a free registration is required.

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<sup>8</sup> <http://www4.law.cornell.edu/uscode/>.

<sup>9</sup> <http://www4.law.cornell.edu/cfr/>.

The specific Georgia rules are discussed *infra* and are either reprinted or summarized in this memorandum.

## Federal Estate Recovery Law and Rules

Although States have flexibility within the Medicaid program, it is not a blank federal check. In order to be reimbursed for a portion of the cost of care, States must maintain state plans for medical assistance that conform to the requirements of the federal law.<sup>10</sup> *West Virginia v. Thompson*, 475 F.3d 204, 207 (4<sup>th</sup> Cir. 2007). Each State must comply with the terms of Section 1396p. *See* 42 U.S.C. 1396a(a)(18).

### *Law Prior to 1993*

States have had the option of pursuing estate recovery since 1982.<sup>11</sup> However, from 1982 through 1993, only about 28 states chose to pursue estate recovery.<sup>12</sup> The estate recovery program prior to 1993 is recounted in *In re Estate of Barg*, 752 N.W.2d 52 (Minn. 2008). There, the court stated:

it is useful to start with the pre-1993 federal law on Medicaid recovery, because it is relied on in the parties' arguments and is the basis for the rationale of several relevant cases. Prior to amendments adopted in the Omnibus Budget Reconciliation Act (OBRA) of 1993, the federal Medicaid statute stated a general principle that there should be no recovery of correctly paid Medicaid benefits, subject to several exceptions, one of which is relevant here:

No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except--

\* \* \*

(B) in the case of any other individual who was 65 years of age or older when he received such assistance, from his estate.

42 U.S.C. § 1396p(b)(1) (1988). Under this pre-1993 law, states were allowed, but not required, to recover Medicaid benefits paid to recipients 65 or older,

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<sup>10</sup> States are not simply bound by the statute. "Perhaps appreciating the complexity of what it had wrought, Congress conferred on the Secretary exceptionally broad authority to prescribe standards for applying certain sections of the Act." *Schweiker v. Gray Panthers*, *supra*, at 43. Thus, regulations bind the State agencies. *ABC Home Health Servs*, *supra*, at 462. Further, in *Wong v. Doar*, 2009 U.S. App. LEXIS 13311 (2<sup>nd</sup> Cir. 2009), the court indicated that the State Medicaid Manual includes instructions which "are official interpretations of the law and regulations and, as such, are binding on Medicaid State agencies." *Id.*, at \*14, fn.6 (quoting from the Foreword of the State Medicaid Manual).

<sup>11</sup> *See* Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 132(b), 96 Stat. 324, 370-73 (1982), codified at 42 U.S.C. § 1396p(a).

<sup>12</sup> M. Wilson, *The Future of Medicaid Planning in Missouri*, 62 J. Mo. B. 62, 66 (2006). *See also* Office of Inspector General, *Medicaid Estate Recoveries: National Program Inspection* (June 1988), reporting that only 23 States and the District of Columbia recovered benefits from deceased Medicaid recipients. Available at: <http://oig.hhs.gov/oei/reports/oai-09-86-00078.pdf>.

and the statute specified the recovery would be from the recipient's estate. The statute also provided that this recovery from the recipient's estate could only be made after the death of the recipient's surviving spouse. *Id.* § 1396p(b)(2) (1988). Despite this prohibition against recovery before the death of a surviving spouse, there was no express mention of recovery from the estate of a surviving spouse. The pre-1993 federal law contained no definition of "estate."

### ***The Current Statute: Section 1396p(b)***

Section 1917(b) of the Social Security Act, codified at 42 U.S.C. § 1396p(b),<sup>13</sup> sets forth the basic federal rule. It changed the existing law in three ways: (1), as previously noted, it makes estate recovery mandatory; (2) it reduced, from 65 to 55, the age of Medicaid recipients subject to the rule; and (3) it authorizes expanded estate recovery for States choosing to implement that option.<sup>14</sup> Because State collections in violation of the federal rule are prohibited, it is critical to understand the scope of the federal rule.<sup>15</sup>

(1) No adjustment or recovery of any medical assistance correctly paid<sup>16</sup> 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.<sup>17</sup>

(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.

[Subsection (C) relating to persons who had long-term care insurance is omitted]

(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—

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<sup>13</sup> The current version became law in Omnibus Budget Reconciliation Act of 1993 ("OBRA"), Pub. L. No. 103-66, § 13612(a), (c), 107 Stat. 312, 627-28.

<sup>14</sup> I. Oppenheim & A. Moschella, *National Perspective on Expanded Estate Recovery: Case Law Analysis, Emerging Legislative Trends and Responsive Strategies for the Elder Law Attorney*, 1 NAELA Journal 7, 9 (2005).

<sup>15</sup> "[T]he federal statute places express limits on the State's power to pursue recovery of funds it paid on a recipient's behalf." *Ark. HHS v. Ahlborn*, 547 U.S. 268, 283 (2006). In *Ahlborn*, a lien case as opposed to an estate recovery case, the Court read Section 1396p as providing that no recovery is permitted except as expressly provided. *Id.*, at 284.

<sup>16</sup> The State can pursue funds incorrectly paid at any time following a court judgment determining that benefits were incorrectly paid. 42 C.F.R. § 433.36(g)(1). However, no money payment under another program can be reduced to collect incorrectly paid benefits. 42 C.F.R. § 433.36(i).

<sup>17</sup> Specific limitations on the use of liens are addressed in 42 C.F.R. § 433.36.

(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.

### ***Legislative History***

When originally permitted in 1982, one purpose underlying the statute was "to assure that all of the resources available to an institutionalized individual, including equity in a home, which are not needed for the support of a spouse or dependent children will be used to defray the cost of supporting the individual in the institution." *See* 1982-2 U.S.C.C.A.N., p. 814 (West 1982).

There is little guidance in the legislative history regarding why Congress changed the law.<sup>18</sup> The Conference Committee Report succinctly describes the changes imposed by OBRA as follows:

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<sup>18</sup> OBRA's estate recovery amendments passed with virtually no debate in congress. *See* J. Rein, *Misinformation and Self-Deception in Recent Long-Term Care Policy Trends*, 12 J. L. & Politics 195, 225 (1996), *citing* P. Nemore, *Medicaid Estate Recovery: History, Current Law & Advocacy Issues*, 8 NAELA

Requires States to recover the costs of nursing facility and other long-term care services furnished to Medicaid beneficiaries from the estate of such beneficiaries. Further requires States to establish hardship procedures for waiver of recovery in cases where undue hardship would result. At the option of the State, the estate against such recovery is sought may include any real or personal property or other assets in which the beneficiary had any legal title or interest at the time of death, including the home. Different estate recovery provisions apply to certain individuals who purchase specified long-term care insurance policies in designated States. Effective October 1, 1993.

Conference Report on H.R. 2264, Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 103 Cong. Rec. H 5792, H. Rept. 103-213, Section 13612 (August 4, 1993), available on LEXIS.

The House Report, which predates the Conference Committee, describes an expanded version of estate recovery that is not in the statute:

Under current law, a State has the option of seeking recovery of amounts correctly paid on behalf of an individual under its Medicaid program from the individual's estate if the individual was 65 years or older at the time he or she received Medicaid benefits. The State may not seek recovery from the beneficiary's [sic] estate until the death of the surviving spouse, if any, and only if the individual has no surviving minor or disabled child.

Under the Committee bill, States are required to establish an estate recovery program that meets certain requirements. The program must identify and track resources (whether or not excluded for eligibility purposes) of individuals who receive nursing facility, home and community-based services, and other specified long-term care services. The program must promptly ascertain when the individual and the surviving spouse, if any, dies, and must provide for the collection of the amounts correctly paid by Medicaid on behalf of the individual for long-term care services from the estate of the individual or the surviving spouse. The term "estate" is defined as all real and personal property of a deceased individual and all other assets in which the individual had any legally cognizable title or interest at the time of his death, including assets conveyed to a survivor, heir, or assign through joint tenancy, survivorship, life estate, living trust, or other arrangement.

H. Rept. 103-111 on Pub. L. No. 103-66, Omnibus Budget Reconciliation Act of 1993, Section 5112 (May 25, 1993). It is evident from the final language of the statute that a version of estate recovery reaching the estate of surviving spouses was considered and rejected. Further, mandatory expanded estate recovery seems to have been considered

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Q 38 (1995). In point of fact, a review by this author of the Congressional Record on LEXIS disclosed no debate.

and rejected. The ultimate resolution was that estate recovery is limited to the estate of the Medicaid recipient and that States may, but are not required to, expand estate recovery beyond probate, reaching assets in which the decedent held a legal title or interest at the time of death.

In 1994, the year following passage of the current version of Section 1396p(b), the Senate Special Committee on Aging submitted a report describing estate recovery as follows:

OBRA 93 also includes related amendments on estate recovery. Under Medicaid law, States have had the option of seeking recovery of amounts correctly paid on behalf of an individual under its Medicaid program from the individual's estate if the individual was 65 years of age or older at the time he or she received Medicaid benefits.

OBRA 93 mandates that States recover from an individual's estate amounts paid by Medicaid for nursing facility services, home and community-based care, and related hospital and prescription drug services, or, at the option of the State, any item or service covered under the State Medicaid plan. For purposes of these recovery provisions, estates are defined to include all real and personal property and other assets included within an individual's estate, as defined under State laws governing the treatment of inheritance. At the option of the State, recoverable estates can also include any other real and personal property and other assets in which the individual has any legal title or interest at the time of death, including such assets conveyed to a survivor, heir, or assignee of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement. The provisions apply to estates of persons who were 55 years of age or older when they received Medicaid assistance. Special provisions apply to persons who become eligible for Medicaid under a more liberal asset standard used in certain States for those who purchase long-term care insurance. States are required to establish procedures for waiving the application of these rules in cases of undue hardship. These provisions apply to Medicaid payments made for calendar quarters beginning on or after October 1, 1993, with a delay permitted when State legislation is needed

*See Developments in Aging: 1993 Volume 1*, 103 S. Rpt. 403 (October 7, 1994), available on LEXIS.

Subsequent reports from the Special Committee contain similar reports, such as the following:

The estate recovery law requires States to claim a portion of the estates belonging to certain Medicaid recipients in order to recover funds Medicaid paid for the recipient's health care. Beneficiaries are notified of the Medicaid estate recovery program during their initial application for Medicaid eligibility and their annual redetermination process. Individuals in medical facilities (who do not return home) are sent a notice of action by their county Department of Social Services informing them of any intent to place a lien/claim on their real property. The notice also informs them of their appeal rights. Estate recovery procedures are initiated after the beneficiary's death.

In addition, for individuals age 55 or older, States are required to seek recovery of payments from the individual's estate for nursing facility services, home and community-based services, and related hospital and prescription drug services. States have the option of recovering payments for all other Medicaid services provided to these individuals. In addition, States that had State plans approved after May 14, 1993 that disregarded assets or resources of persons with long-term care insurance policies must recover all Medicaid costs for nursing facility and other long-term care services from the estates of persons who had such policies. California,

Connecticut, Indiana, Iowa, and New York are not required to seek adjustment or recovery from the estates of persons who had long-term care insurance policies. These States had State plans approved as of May 14, 1993 and are exempt from seeking recovery from individuals with long-term care insurance policies. For all other individuals, these States are required to comply with the estate recovery provisions as specified above. States are also required to establish procedures, under standards specified by the Secretary for waiving estate recovery when recovery would cause an undue hardship.

The Center for Medicare and Medicaid Services reported in 1999 that states recovered approximately \$200 million through their Medicaid Estate Recovery programs. At the national level, this comprised about one tenth of 1 percent of total Medicaid expenditures for covered benefits.

*See Annual Report of the U.S. Senate Special Committee on Aging, Developments in Aging: 1999 and 2000*, volume 1, 107 S. Rpt. 158 (June 4, 2002), available on LEXIS. A similar description of the program appears in a prior version of the same annual report published on February 7, 2000. *See* 106 S. Rpt. 229.

In 1994, Senator Feingold introduced S.2449, which would have eliminated mandatory estate recovery for home and community based services. *See* 140 Cong. Rec. S. 13095 (September 21, 1994). The legislation was reintroduced in 1995. 141 Cong. Rec. S. 306 (January 4, 1995). It did not pass.

In 2001, Representative Nick J. Rahall, II of West Virginia introduced legislation that would have eliminated mandatory estate recovery. His proposal was rejected. This underscores Congressional intent to require some level of estate recovery. Rep. Rahall's appeal to change the estate recovery rules appears in the Congressional Record.<sup>19</sup>

As part of its consideration of the Deficit Reduction Act of 2005, Congress revisited estate recovery as part of its discussion of annuities and long-term care insurance. Ultimately, Congress elected to deal with annuities as part of the eligibility process, imposing transfer penalties on non-complying annuities, rather than further expanding estate recovery. Congress also provided that persons who purchase certain long-term care insurance policies are exempt from estate recovery to the extent of benefits paid under those policies. The discussion regarding annuities is in House Rep. 109-362, Deficit Reduction Act of 2005 (December 19, 2005), available on LEXIS.

The legislative history, while sparse,<sup>20</sup> makes it clear that Congress intends the following:

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<sup>19</sup> 147 Cong. Rec. E. 345 (March 13, 2001). Senator Feingold supported similar legislation in the Senate which would have eliminated estate recovery. 147 Cong. Rec. S 5185, S5229 (May 21, 2001). There, he describes estate recovery as "the real death tax" for thousands of elderly of modest means. The legislation was introduced an amendment to a tax bill and was objected to as violating section 305(b)(2) of the Congressional Budget Act of 1974. The amendment was defeated.

<sup>20</sup> OBRA's estate recovery amendments passed with virtually no debate in Congress. *See* J. Rein, *Misinformation and Self-Deception in Recent Long-Term Care Policy Trends*, 12 J. L. & Politics 195, 224 (1996), *citing* P. Nemore, *Medicaid Estate Recovery: History, Current Law & Advocacy Issues*, 8 NAELA Q. 38 (1995). Nemore indicated that the main support for the amendments came from the American Health Care Association and the American Association of Homes and Services for the Aged and that State governors did not support mandatory estate recovery.

1. Some level of estate recovery is mandatory;
2. Estate recovery applies after the death of the Medicaid recipient;
3. Estate recovery cannot be pursued during the life of a surviving spouse;
4. Estate recovery applies primarily to persons who received medical assistance for long-term care after age 55;
5. States must pursue estate recovery from the probate estate, as defined by State probate law and may expand the definition of estate recovery to any legal title or interest owned by the Medicaid recipient at the time of death;
6. Congress did not change State property law;
7. Even where estate recovery is expanded, it is limited to the estate of the deceased Medicaid recipient; the 1993 House Report makes it clear that Congress considered expanding estate recovery to the estate of a surviving spouse and chose not to;
8. States are required to consider whether estate recovery creates an undue hardship on heirs of the Medicaid recipient.

### ***Policy reasons for the law***

Opponents of estate recovery generally cite the program's ineffective collections (less than 1% of expenditures) and argue that the program "creates substantial non-financial problems, such as widespread clinical depression in aged and disabled nursing home residents." *West Virginia v. United States HHS, supra*. They also argue that the elderly will decline necessary care, which may ultimately increase the cost of medical assistance.

Courts usually cite collections, replenishing the Medicaid coffers, as the policy reason behind mandatory Medicaid estate recovery. *See e.g., In re Estate of Shuh*, 248 S.W.3d 82, 86 (Mo. App. 2008).<sup>21</sup> Nonetheless, the minimal level of recovery suggests that collections cannot, logically, be the primary motivating factor for estate recovery. In 2005, the U.S. Department of Health and Human Services published a policy brief on Medicaid Estate Recovery.<sup>22</sup> There it was reported that "the much-vaunted savings [from implementing estate recovery] have not become a reality. In 2003, estate recoveries amounted to \$330 million, or 0.13% of total Medicaid spending in all states, with individual state collections ranging from 0.0 - 0.64%."

Some writers suggest that one legislative purpose was to encourage individuals to purchase long-term care insurance. "The long-term care insurance industry was one of the major proponents of OBRA 93's estate recovery mandate. This group argued that the threat of having a Medicaid recipient's estate consumed by Medicaid debts would provide a strong incentive for elders and their families to purchase long-term care insurance before the need for long-term care arises." J. Zieger, *The State Giveth and the State Taketh Away: In Pursuit of a Practical Approach to Medicaid Estate Recovery*, 5 Elder L.J. 359, 375 (1997); *see also* I. Wiesner, *ORBA 93 and Medicaid: Asset*

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<sup>21</sup> "Medicaid also ... permits States to defray the cost of Medicaid assistance paid on behalf of nursing home residents through estate recovery." Conference Report on H.R. 5835, Omnibus Budget Reconciliation Act of 1990, 136 Cong. Rec. H. 12423, 12670 (October 26, 2990). *See also* GAO, *Medicaid: Recoveries from Nursing Home Residents' Estates Could Offset Program Costs* (March 1989), at <http://archive.gao.gov/d15t6/138099.pdf>.

<sup>22</sup> U.S. HHS, *Medicaid Estate Recovery* (April 2005), <http://aspe.hhs.gov/daltcp/reports/estaterec.htm>.

*Transfers, Trust Availability, and Estate Recovery Statutory Analysis in Context*, 19 Nova L. Rev. 679, 688-691 (1995). If true, any such policy is suspect since elders, surviving on limited means, often cannot afford long-term care insurance premiums.

### ***Estate Recovery is required***

At common law there is no obligation to reimburse the government for financial support and services received while impoverished.<sup>23</sup> In 1982, Congress gave States permission to pursue estate recovery and, until 1993, estate recovery remained optional.<sup>24</sup> Since 1993, within the parameters of the federal rule, States must pursue estate recovery (1) against the “estate” of Medicaid recipients; (2) who received Medicaid through specified classes of assistance; (3) and who are not survived by specified persons. States are not, however, required to pursue estate recovery beyond the statutory minimum. When State officials go beyond the federal minimums, they are politically accountable for their actions. *West Virginia v. United States HHS*, 289 F.3d 281, 296 (4<sup>th</sup> Cir. 2002).

In *West Virginia v. United States HHS*, the State of West Virginia challenged the estate recovery provisions, arguing that requiring States to pursue estate recovery is coercive and, therefore, violates the Tenth Amendment to the U.S. Constitution.<sup>25</sup> That argument was rejected, in part because it was a facial challenge launched by the State after CMS had threatened to withhold, but had not actually withheld, federal matching dollars.<sup>26</sup> The court reserved judgment concerning whether the estate recovery provisions might be deemed coercive if CMS actually withheld federal funds for failure to implement an estate recovery program. The court implied that if the State rejected estate recovery, then the federal government could withhold those dollars that should have been recovered through the program, but that additional penalties might be coercive.

Subsequent to the original litigation, in *West Virginia v. Thompson*, 475 F.3d 204 (4<sup>th</sup> Cir. 2007), the State proposed a \$50,000 exemption from estate recovery for all homestead property. West Virginia’s exemption was opposed by the Centers for Medicare and Medicaid Services (CMS) as overly broad. West Virginia then modified its proposal to exempt from recovery homes valued below the statewide arithmetic mean value, which would cause approximately one-half of all West Virginia homes to be exempt from estate recovery. CMS disapproved West Virginia’s proposal, finding that it would negate the intent of the estate recovery program. The State filed suit, arguing that CMS exceeded its authority by rejecting the State proposal. While the Court agreed that

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<sup>23</sup> J. Queener, Note: Finding the Gold to Finance the “Golden Years”: Options for Financing Long-Term Care in Arizona, 45 Ariz. L. Rev. 857 (2003), citing 79 Am. Jur.2d Welfare Laws 93 (2002).

<sup>24</sup> Optional estate recovery was ineffective. See S. Regan, *Medicaid Estate Planning: Congress’s Ersatz Solution for Long-Term Care*, 44 Cath. U.L. Rev. 1217, fn. 190 & 191 (1995) (citing surveys by the American Public Welfare Association, by the Office of Inspector General and by the General Accounting Office). The effective date of mandatory estate recovery is October 1, 1993. State Medicaid Manual, § 3810.I

<sup>25</sup> N. Huberfield, *Clear Notice for Conditions on Spending, Unclear Implications for States in Federal Healthcare Programs*, 86 N.C. L. Rev. 441, 458-462 (2008) (discussing the spending power and coercion).

<sup>26</sup> The federal government pays between 50% and 83% of the costs the States incur. For a summary of how CMS reimburses States with federal matching funds, see: *Qualifying for Federal Matching Funds*, at <http://www.hrsa.gov/medicaidprimer/>.

CMS cannot reject a State Plan for failing to comply with a requirement that has no statutory basis, the waiver proposed was a hardship waiver and Section 1396p(b)(3) grants the Secretary express authority to establish criteria governing such waivers. “An analysis of the Medicaid statute as a whole only bolsters our conclusion that the Secretary and his delegates have been granted at least the usual leeway to develop criteria through adjudication.” The court found that CMS was not arbitrary and capricious in denying approval of the plan because CMS had requested data on the cost that West Virginia incurred for estate recoveries, the market value of homes in West Virginia, and the average value of estates to which exemptions would apply. Such data would, theoretically allow CMS and the State to craft an exemption level that was not so overbroad that it unraveled the estate recovery program.

### ***Elements of the federal rule***

The federal rule has four elements, which are as follows:

1. The rule permitting estate recovery is a limited exception. The general rule under the Medicaid program is that States cannot demand repayment of funds spent on medical assistance. In other words, States cannot expand estate recovery beyond the strict limits of the federal rule.
2. Estate recovery only applies to specific classes of assistance.
3. Estate recovery is prohibited prior to the death of specified individuals.
4. Estate recovery is a claim against the “estate” of the Medicaid applicant.

### **Limited Exception**

Section 1396p(b)(1) states: “No adjustment or recovery of any medical assistance correctly paid ... may be made, except ...” The plain text of this language makes it clear that estate recovery cannot be expanded beyond the four corners of the statute. There are no equitable or public policy grounds for expanding collections. *See In re Estate of Bruce*, 260 S.W.3d 398, 406 (2008) (“The State avers numerous public policy reasons as to why we should interpret Section 1396p(b) as providing for spousal recovery. While these public policy reasons may be valid, we are constrained by the language of Section 1396p(b).”).<sup>27</sup>

Beyond the protection afforded during the eligibility process “[t]he Medicaid Act affords an additional element of financial protection to the families of Medicaid recipients by limiting the circumstances in which a state may seek reimbursement for the payments it made on the recipient's behalf. The Act, as amended by the Omnibus Budget Reconciliation Act of 1993 (OBRA) (Pub. L. No. 103-66, § 13612(a)), expressly provides that “[n]o adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made,” except in three specified circumstances.” *Hines v. Dep’t of Pub. Aid*, 221 Ill. 2d 222 (2006). Further, “it is a basic principle of statutory construction that the enumeration of exceptions in a statute is construed as an exclusion of all other exceptions.” *Id.*, at 230. Thus, there are “three and

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<sup>27</sup> Although the issue before the Court was enforceability of a Medicaid lien, the Supreme Court adopted a similar limited view of Section 1396p in *Ark. HHS v. Ahlborn*, 547 U.S. 268, 282 (2006). There, the Court indicated that Section 1396p “prohibits States (except in circumstances not relevant here) from placing liens against, or seeking recovery of benefits paid from, a Medicaid recipient.”

only three exceptions for when the state may seek reimbursement for costs correctly expended on behalf of a Medicaid recipient.” *Id.* The primacy of federal law makes it clear that a State may seek reimbursement “only to the extent permitted” under Section 1396p(b). *Id.*, at 231.

“By its plain language, 42 U.S.C. § 1396p(b) prohibits recovery of correctly paid Medicaid benefits with three narrowly drawn exceptions. Unless an exception applies, the state may not recover correctly paid benefits.” *In re Estate of Smith*, 2006 Tenn. App. LEXIS 715 (November 1, 2006).

“As amended [in 1993], the federal law retained the general prohibition against states attempting to recover Medicaid payments correctly paid on behalf of an individual, with limited exceptions.” *In re Estate of Barg, supra.*

### **Limited Classes of Assistance**

“In general terms, the estate recovery provisions apply only to individuals who are permanently institutionalized or who began receiving nursing-home or other long-term care services after age 55.” *West Virginia v. United States HHS*, 289 F.3d 281, 285 (4<sup>th</sup> Cir. 2002). See 42 U.S.C. § 1396p(b)(1).

SMM Section 3810.A.2 provides:

You must seek adjustment or recovery from the estate of an individual who was age 55 or older when that person received medical assistance. You must recover up to the total amount spent by Medicaid on the person's behalf, for spending on nursing facility services, (which includes skilled nursing facility and intermediate care facility for the mentally retarded services), home and community based services, as defined in §§1915(c) and (d), 1929, and 1930 of the Act, and related hospital and prescription drug services. Related hospital and prescription drug services are any hospital care or prescription services provided to an individual while receiving nursing facility services and home and community-based services. At your option, you may also recover additional amounts up to the total amount spent on the individual's behalf for medical assistance for any or all other items or services under your State plan. List these other items and services in your State plan. Recovery is limited to medical assistance for services received at age 55 or thereafter.<sup>28</sup>

SMM Section 3810.A.2 makes it clear that recovery is prohibited for most services received before age 55.

### **Limited Where Certain Persons Survive the Applicant**

Claims for recovery of correctly paid benefits are prohibited prior to the recipient's death. Where a Medicaid recipient is survived by a spouse, estate recovery is prohibited

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<sup>28</sup> See Ga. R. & Regs. § 111-3-8-.04(2).

during the spouse's lifetime. Further, estate recovery is prohibited during the lifetime of any surviving child who is blind, disabled or under the age of 21.<sup>29</sup>

Federal law has been construed liberally by federal courts to prevent any recovery from an estate if a spouse, disabled or minor child survives the Medicaid recipient, regardless of the proportion of the estate actually inherited by such person. The District Court for the Northern District of California ruled that the California Medicaid agency was precluded from seeking recovery from an estate where the deceased Medicaid recipient's disabled son survived, even though the disabled son was not a beneficiary of the decedent's estate. *Dalzin v. Belshe*, 993 F. Supp. 732 (N.D. Cal. 1997).

Some practitioners view the proscription on collections as prohibiting any recovery where a disabled child survives the Medicaid recipient.<sup>30</sup> The State of Georgia views the language in Section 1396p(b)(2)(B) as delaying, rather than prohibiting, estate recovery. This question was addressed, in part, in *State Dep't of Human Res. v. Estate of Ullmer*, 120 Nev. 108 (2004), where the State imposed a lien on the Medicaid recipient's property prior to the death of his surviving spouse. There, Harold Ullmer received medical assistance prior to death. His home, held in joint tenancy with his wife, passed to her at his death. The State recovered a notice of *lis pendens* and filed a verified petition to impose a lien in the amount of \$144,475.76. His surviving spouse, Agnes Ullmer, filed a class action counterclaim seeking to permanently enjoin the State from placing liens on the homes of deceased Medicaid recipient's surviving spouses.

In ruling, the Court noted that the Congressional policy favoring estate recovery is counter-balanced against its policy of avoiding spousal impoverishment. *Id.*, at 114-115. "The legislation attempts to strike a balance between these policies by limiting reimbursement efforts to situations where impoverishment is no longer an issue." *Id.*, at 115. In weighing these policies, the court found that "the government must delay executing its interest until the surviving spouse's death or [with respect to qualified dependents,] the end of the dependency." Even though the government is prohibited from executing its interest prior the spouse's death, its interest survives and continues with the property; a person taking the Medicaid recipient's property interest by survival takes that interest subject to the State's claim. Under this reasoning, the court found that the State could impose a lien.

The court took its analysis further, noting Agnes Ullmer's argument that allowing imposition of a lien becomes an impermissible recovery if the property subject to the lien is sold or encumbered by the surviving spouse. The court agreed, holding it was clear that "Congress intended that a surviving spouse be free to utilize the estate property during the spouse's lifetime. This includes a bona fide sale or financing of the property designed to provide the spouse with income from equity. A state's interest would be extinguished in such a transaction." *Id.*, at 118. Thus, the State's ability to impose a lien is not absolute. First, it must correctly identify its limited interest (the

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<sup>29</sup> See Ga. R. & Regs. § 111-3-8-.04(8).

<sup>30</sup> An HHS policy brief suggests that federal law allows the States to choose either option, noting that some States defer recovery and others waive recovery. See U.S. Dep't HHS, *Spouses of Medicaid Long-Term Care Recipients* (April 2005), at <http://aspe.hhs.gov/daltcp/reports/spouses.htm>.

one-half interest Harold transferred by reason of death). Second, the lien must be released upon demand by the surviving spouse for any bona fide transaction, including, but not limited to, selling the property, refinancing the property or obtaining a reverse mortgage. *Id.*, at 119. A lien without these restrictions is overbroad and violates the spirit of federal and state laws designed to prevent spousal impoverishment. *Id.*

*Ullmer*, therefore, seems to support delayed estate recovery rather than its complete waiver when specified individuals survive the Medicaid recipient. It does, however, make it clear that while estate recovery is delayed, the assets potentially subject to recovery may be spent on the surviving spouse or qualified dependent without excessive State interference.

Finally, it is worth noting that non-traditional families are not afforded the same protection given to traditional families. Because they do not fall within the definitions of “spouse” or “child”, the result is “a divestiture of the cruelest sort. For example, if an individual in a nontraditional family dies following Medicaid-funded long-term care, the state can immediately foreclose on the decedent's interest in the home. If the home was titled in the decedent's name, the state can seize the entire home; ... even more significantly, he or she may be forced to leave behind the comfort and familiarity of the family home in a time of profound loss and sorrow.”<sup>31</sup>

### **Limited to the Estate of the Medicaid Applicant**

Estate recovery is limited to the Medicaid recipient's estate. Even so, federal law offers States two very different definitions of “estate.” States must recover medical assistance correctly paid from the probate estate. They have the option of expanding the definition of “estate” to include “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.”

Because Medicaid beneficiaries are required to spend-down income and assets before becoming eligible for medical assistance, the home is typically the only significant asset subject to the estate recovery process. *West Virginia v. United States HHS*, 289 F.3d 281, 284-285 (4<sup>th</sup> Cir. 2002).

### **Definition of Estate**

The default definition of estate is the estate as defined under the State's probate law. Section 1396p(b)(4)(A). States have the option to expand that definition to include additional assets conveyed by reason of death. Section 1396p(b)(4)(B).

Frequently, the disputed issue in estate recovery litigation is whether an asset is, or is not, part of the decedent's estate. The analysis is rather straightforward in states with

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<sup>31</sup> D. Dick, *The Impact of Medicaid Estate Recovery on Nontraditional Families*, 15 U. Fla. J.J. & Pub. Pol'y 525, 530 (2004).

probate-only estate recovery. In States with expanded estate recovery, analysis is frequently result-oriented.

Section 3810.B.2 of the State Medicaid Manual is an additional resource for persons searching for the parameters of expanded estate recovery. It varies the definition slightly as follows:

“In additional to property and assets under the probate definition, you may include 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). This includes assets conveyed to a survivor, heir, or assign of the deceased through joint tenancy, tenancy in common, survivorship, life estate, living trust or other arrangement.”

Use of the words “convey ... through” emphasizes that estate recovery reaches only those assets where death itself results in conveyance as opposed an *inter vivos* transfer.<sup>32</sup> The text of both the statute and the SMM also indicates that the interest conveyed must be a legal interest as opposed to an equitable interest.<sup>33</sup> Further, only the legal interest that would have been conveyed as a result of death is subject to recovery.<sup>34</sup> An exception, which is not explained, relates to annuities. SMM Section 3810.B.4 indicates that “[w]hen using the expanded definition of estate, an annuity is considered an “other arrangement.”<sup>35</sup>

Expanded estate recovery conflicts with property law. It presumes the fictional notion that a survivorship designation transfers something of value. This fiction has the potential to cloud title and otherwise impair property rights and values. A recent author rightly asked “What did the legislators think they were doing when they enacted such a nonsensical attempt to recoup state expenses from this group of landowners? Did those who were lawyers (or their legislative council) simply forget what they had learned in their first year property courses?”<sup>36</sup> He further states:

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<sup>32</sup> In *In re Estate of Barg*, *infra*, the Court parsed the language of Section 1396p(b)(4)(B), finding that an “other arrangement” cannot be a lifetime transfer. “The plain language and the context require that phrase to be limited to conveyances occurring upon the death of the recipient.” *Id.*, at 71.

<sup>33</sup> Under Georgia law, assets are either legal or equitable. Legal assets are such as may be reached by the ordinary process of law. Equitable assets are such as can be reached only through the intervention of equity. Legal assets, when properly before the court, shall be distributed according to legal liens and priorities. Equitable assets shall be distributed according to justice and right in the particular case, the general rule being that equality is equity. Sometimes assets are partly legal and partly equitable. In such cases, while the above rule shall be adhered to as to the legal assets, equity shall so administer the equitable assets to produce general equality. O.C.G.A. § 23-2-90.

<sup>34</sup> Limiting estate recovery to “legal interests” is further supported by 42 C.F.R. § 433.36, which defines “property” as “the homestead and all other personal and real property in which the recipient has a legal interest.”

<sup>35</sup> This distinction may be moot since passage of the Deficit Reduction Act of 2005. DRA mandates that annuities name the State as an annuity beneficiary; otherwise the purchase of an annuity is a transfer of resources.

<sup>36</sup> K. Salzberg, *Zombie Life Estates, Ghost Value Transfers, and Phantom Takings: Confusion of Title and Value in Property Law Legislation*, 22 *Quinn. Prob. Law Jour.* 363, 381 (2009).

Because we know that nothing is transferred from the life tenant's estate to the remainderman, what is driving this mistaken notion that the state can attach some part of the remainderman's interest? Clearly the confusion arises from the fact that the value of what the remainderman owns is higher after the life tenant's death than it was before her death. The error in thinking here is that if the value of what one owns goes up, someone must have transferred that value to the owner. In this case, the legislature is looking at the life tenant and mistakenly thinking that the life tenant has transferred something to the remainderman at death.

Looking to the remainderman to repay the state for the debts of the life tenant is particularly irrational in the case where the original owner of property transferred both the life estate and the remainder many years before the life tenant began to receive state aid. ....

...However, the legislatures seem to think there is something unseemly about transferring a remainder that they do not see in the transfer of a fee simple interest. Again, I think that their confusion arises because they misunderstand, or have forgotten, when the interests transfer. There is no difference between transferring the fee simple years before the owner goes on state aid and transferring the remainder years before going on state aid. If the state wants to recover some of the costs it incurs in the support of the aging life tenant from the value of his life tenancy, the time to do so is during the tenancy. If the state decides that it does not want to deprive the tenant of the fruits of the tenancy during his lifetime, it should realize that there will be nothing left of that value when the tenant dies. To recover anything from the remainderman is clearly a taking in violation of the Fifth Amendment Due Process Clause and Takings Clause. To pay for Medicaid through taxes puts the burden on all of us, as a social program; to assess a particular individual a special fee to compensate the state for support of another individual is unfair and unconstitutional.<sup>37</sup>

The writer goes on to list those States that have expanded estate recovery as:

- California (Cal. Welf. & Inst. Code § 14009.5 (West 2001));
- Connecticut (Conn. Gen. Stat. § 17b-95 (2009));
- Iowa (Iowa Code § 249A.5(2) (2000 & Supp. 2008));
- Kentucky (Ky. Rev. Stat. Ann. § 205.624(2) (LexisNexis 2007));
- Maryland (Md. Code Ann., Health-Gen. § 15-121(1) (LexisNexis 2005));
- Montana (Mont. Code Ann. § 53-6-175 (2007));
- Nevada (Nev. Rev. Stat. § 422.29302 (2007));
- New Jersey (N.J. Stat. Ann. § 30:4D-7.2 (West 1997 & Supp. 2007));
- Oregon (Or. Rev. Stat. § 411.708 (2007));
- Rhode Island (R.I. Gen. Laws Ann. § 40-8-15 (2006));
- South Dakota (S.D. Codified Laws § 29A-3-817 (2004));
- Washington (Wash. Rev. Code Ann. § 43.20B.080 (West 1998 & Supp. 2008));
- Wisconsin (Wis. Stat. Ann. § 49.496 (West 2008)); and
- Minnesota (Minn. Stat. Ann. § 256B.15, subdiv. 1a (West 2007)).<sup>38</sup>

Although DCH would argue that Georgia is among those States with expanded estate recovery, whether that is the case remains to be seen. Thus far, no court has ruled on this issue and the Georgia legislature has not modified probate, contract or property law to prevent life interests and survivorship interests from passing at the death of a

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<sup>37</sup> *Id.*, at 381-383.

<sup>38</sup> See K. Salzberg, *supra*, at n99 (2009).

Medicaid recipient. Until such time as property and contract law are modified, one could legitimately argue that the Department's collection activities are illegal.

Whichever definition of "estate" is ultimately used in Georgia, it is clear that States are prohibited from going beyond the permissible limits of Section 1396p(b)(4). Although some courts have been adept at finding surviving property interests, there is no authority whatsoever for an estate recovery claim against a property interest not owned by the Medicaid recipient at the time of death. With this in mind, there are two inquiries: (1) What property interest did the decedent own; and (2) is that property interest a part of the decedent's estate.

Prior to OBRA, a line of cases examined what Congress intended by the term "estate." Although OBRA largely renders those cases moot, they may be helpful in examining the potential breadth of the term. States with an expanded estate recovery program will press the definition as far as possible. In *Belsh v. Hope*, 33 Cal. App. 4th 161 (Cal. App. 5th 1995), the California Court of Appeals examined the meaning of the term "estate," finding:<sup>39</sup>

The term "estate" is a comprehensive term. One of its common uses is to describe the assets of a deceased individual. (*Estate of Glassford* (1952) 114 Cal. App. 2d 181, 189-190 [249 P.2d 908, 34 A.L.R.2d 1259].) But "estate" is a word of varied meaning, and the meaning of the term depends a great deal on the way in which it is used. (*In re Reynolds' Estate* (1936) 274 Mich. 354 [264 N.W. 399, 401-402].) "The meaning of the word 'estate' is to be ascertained from the circumstances under which it is used. [Citations.] The word has not been limited to property passing under a will or by intestacy. [Citation.] 'It should be construed in a sense which will accomplish and not defeat the purpose of the instrument in which it is used.'" (*In re Sachs' Estate* (1947) 73 N.Y.2d 160, 161.)

The word "estate" is ambiguous and could mean probate estate or taxable estate. (*Estate of Armstrong* (1961) 56 Cal. 2d 796, 801 [17 Cal. Rptr. 138, 366 P.2d 490].) In *Estate of Carley* (1979) 90 Cal. App. 3d 582 [153 Cal. Rptr. 528], the decedent's will stated that estate and inheritance taxes were to be paid from "my estate." The appellate court held that joint tenancy property was part of the gross estate or taxable estate and that it was subject to the estate tax burden. (*Id.* at pp. 586-588.) The term "estate" was thus given its broad meaning so as to more fairly and evenly distribute the taxes to be paid by those who received property from the decedent.

Evidence that Congress intended the term "estate" to be broader than just the portion of the estate which passes by will or intestacy can be found in the Internal Revenue Code. In 26 United States Code, section 2038 provides that revocable transfers shall be included in the value of the gross estate for federal taxes. If Congress had intended to limit recovery from only the probate estate, it could have used such a definite term when it wrote the Medicaid statute. Congress chose to use the broad term "estate."

Giving "estate" its broadest meaning furthers the purpose of the Medicaid Act; it

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<sup>39</sup> It should be noted that California enacted legislation adopting the expanded definition of estate recovery.

does not require one to resort to technical differences in the character of how property is owned by a recipient of Medicaid Act benefits in order to permit recovery.

A more restrictive definition appears in *Citizens Action League v. Kizer*, 887 F.2d 1003 (9<sup>th</sup> Cir. 1989), and in *Bucholtz v. Belshe*, 114 F.3d 923 (9<sup>th</sup> Cir. 1997).

In *Kizer*, the plaintiffs were a class of individuals who received property by right of survivorship. They argued that California's attempt to seize property which by-passed the probate process was illegal. The court agreed.

At the time *Kizer* was decided, no definition of "estate" appeared in Section 1396p. Accordingly, the court looked to common law for its meaning. "At common law, "estate" excluded interests in a decedent's property that were formerly held in joint tenancy." *Kizer*, at 1006, citing *Powell on Real Property*, para. 617(3) (1986). The court found that authority persuasive, holding that because "estate" under common law does not include property formerly held in joint tenancy, the California statute was impermissibly broad.

In *Bucholtz*, the State appealed after the District Court enjoined estate recovery against revocable *inter vivos* trusts and other non-probate assets. The State argued that California Welfare and Institutions Code § 14009.5, allowed for a claim "against the estate of the decedent, or against any recipient of the property of that decedent by distribution or survival." Although this case was decided after OBRA was enacted, it related to rights which vested prior to its effective date. Accordingly, *Kizer* was followed and assets which were not part of the estate could not be recovered. The court did, however, clarify that the probate process is not the determining factor in deciding whether an asset is estate property. Instead, where State property law so provides, assets may by-pass probate and remain estate assets subject to creditor claims.<sup>40</sup>

Where a broad definition of "estate" is allowed, the scope of the definition should be determined under State law. When federal tax law is examined, as the court suggested in *Belshe v. Hope*, *supra*, , State property law determines which interests are taxed. In *Leggett v. United States*, 120 F.3d 592 (5<sup>th</sup> Cir. 1997), the court held that "state law determines whether a taxpayer has a property interest to which a federal lien may attach." Citing *United States v. National Bank of Commerce*, 472 U.S. 713, 719-20 (1985). This reasoning was adopted in *New Mexico Dep't of Human Servs. v. Dep't of Health & Human Services*, 4 F.3d 882 (10<sup>th</sup> Cir. 1993). There, in the context of Medicaid eligibility, the Tenth Circuit relied on *United States v. Mitchell*, 403 U.S. 190 (1971) and *Poe v. Seaborn*, 282 U.S. 101 (1930), which were tax decisions, in holding that Congress "intended to rely on, rather than supplant, state family property law." See also *Washington, Dep't of Social & Health Servs. v. Bowen*, 815 F.2d 549 (9<sup>th</sup> Cir. 1987) (rejecting the Secretary's claim that federal law preempts state community property

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<sup>40</sup> The court examined the intervening decision in *Belshe v. Hope*, 33 Cal. App. 4<sup>th</sup> 161 (1995), finding it unpersuasive.

law); *and see Whitehouse v. Ives*, 736 F. Supp. 368 (D. Maine 1990) (distinguishing *Bowen* because Maine state law adopted the federal definition of income).<sup>41</sup>

### **Undue Hardship**

In addition to the limits described above, States must establish a procedure to consider instances where estate recovery would work an undue hardship on survivors.<sup>42</sup> 1396p(b)(3). “Undue hardship” is not defined in the Medicaid statute. A House Budget Committee Report commented upon the term, however, stating that in establishing criteria for “undue hardship” the Secretary of Health and Human Services “should provide for special consideration of cases in which the estate subject to recovery is (1) the sole income-producing asset of survivors (where such income is limited), such as a family farm or other family business, or (2) a homestead of modest value or (3) other compelling circumstances.” *West Virginia v. Thompson*, *supra* (quoting H.R. Rep. No. 103-111, at 209 (1993), as reprinted in 1993 U.S.C.C.A.N. 378, 536).

The full text from the House Committee Report reads as follows:

The Committee bill requires the State agency to establish procedures (in accordance with standards specified by the Secretary) under which the agency waives recovery if it would work an undue hardship (in accordance with criteria established by the Secretary). The Committee expects that, in developing standards for State recovery procedures, the Secretary will address adequacy of notice to, and representation of, affected parties; the timeliness of the process; and the availability of appeals and other issues. With respect to the establishment of criteria for use by States in determining whether to waive recovery, the Secretary should provide for special consideration of cases in which the estate subject to recovery is (1) the sole income-producing asset of survivors (where such income is limited), such as a family farm or other family business, or (2) a homestead of modest value or (3) other compelling circumstances. The Committee also expects the Secretary to provide guidance to States on how to address situations where recovery is not waived and beneficiaries of the estate from which recovery is sought wish to satisfy the States recovery claim without selling a non-liquid asset subject to recovery.

H. Rept. 103-111 on Pub. L. No. 103-66, Omnibus Budget Reconciliation Act of 1993, Section 5112 (May 25, 1993).

Section 3810.C of the State Medicaid Manual provides as follows:

Undue Hardship.--Where estate recovery would work an undue hardship, adjustment or recovery is waived. Establish procedures and standards for waiving estate recoveries when they would cause undue hardship. You may limit the waiver to the period during which the

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<sup>41</sup> “Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.” *Bd. Of Regents v. Roth*, 408 U.S. 564, 577 (1972).

<sup>42</sup> Ga. R. & Regs. § 111-3-8-.04(12); § 111-3-8-.08.

undue hardship circumstances continue to exist. Describe your policy in your State plan. You have flexibility in implementing an undue hardship provision. ....

1. Undue Hardship Defined.--The legislative history of §1917 of the Act states that the Secretary should provide for special consideration of cases in which the estate subject to recovery is: (1) the sole income-producing asset of survivors (where such income is limited), such as a family farm or other family business; (2) a homestead of modest value; or (3) other compelling circumstances. HCFA suggests that you consider the examples listed above in developing your hardship waiver rules, but does not require you to incorporate these examples once you have considered whether they are appropriate for determining the existence of an undue hardship.

In considering your criteria, you may conclude that an undue hardship does not exist if the individual created the hardship by resorting to estate planning methods under which the individual illegally divested assets in order to avoid estate recovery.

In defining a homestead of modest value, the methodology the State uses to set a threshold level for the market value of a "homestead of modest value" cannot be set so high as to negate the intent of the estate recovery program. For purposes of this provision, a homestead of "modest value" can be defined as fifty percent (50%) or less of the average price of homes in the county where the homestead is located, as of the date of the beneficiary's death. Describe your methodology for determining a home of modest value in your State plan

States are required to adopt a collection procedure that gives notice to affected individuals of their right to apply for a hardship waiver. Section 3810.D of the State Medicaid Manual states:

You must adopt procedures under which individuals who will be affected by recovery of amounts of medical assistance will have the right to apply for an undue hardship waiver. These procedures must, at a minimum, provide for advance notice of any proposed recovery. They must also specify the method for applying for a waiver, the hearing and appeal rights, and the time frames involved. You should specify the procedures for collection, which must be reasonable. In the situation where recovery is not waived because of undue hardship and heirs of the estate from which recovery is sought wish to satisfy your recovery claim without a non-liquid asset subject to recovery, you may establish a reasonable payment schedule subject to reasonable interest. You may also undertake partial recovery to avoid an undue hardship situation.

If an undue hardship waiver is granted, any reduction in the recovery amount inures to the benefit of the person granted the waiver. In *Pratt v. Pratt (In re Estate of Ligon)*, 160 P.3d 361 (Colo. App. 2007), *cert. denied* 2007 Colo. LEXIS 494, *cert. denied* 128 S.Ct. 651 (2007), one of four heirs applied for and was granted a hardship waiver. She alleged that if a waiver was not granted, she would be required to seek public assistance. After the waiver was granted, the State's claim was reduced from \$62,315.98 to \$46,736.99. The executor then divided the remaining funds among all heirs. The heir who was granted the waiver alleged this was error and that she should have received the portion of the claim that was waived. The appellate court agreed, concluding that the purpose of the waiver is to assist persons who would become a burden on the State.

States are permitted to waive estate recovery in cases where it is not cost effective to pursue recovery. SMM Section 3810.E provides:

You may waive adjustment or recovery in cases in which it is not cost effective for you to recover from an individual's estate. The individual does not need to assert undue hardship. You may determine that an undue hardship exists when it would not be cost effective to recover the assistance paid. You may adopt your own reasonable definition of cost effective. However, any methodology you use for determining cost-effectiveness must be included in your State plan. If you made individuals eligible for Medicaid because of a long term care insurance, you are restricted from using this waiver authority unless you had as of May 14, 1993, an approved State plan which provided for long term care insurance-related disregards from income. In that event, you can use the undue hardship exception as a basis for applying a cost effectiveness test to individuals who became eligible based upon long term care insurance-related disregards.

Georgia has indicated that where an estate is valued under \$25,000, it is not cost effective to pursue recovery. In those cases, estate recovery is waived.

### **Other sources pay first**

Medicaid is required to seek reimbursement from all available sources other than the beneficiary. 42 U.S.C. § 1396a(a)(25). Thus, if there is anyone else who is liable for the recipient's medical assistance, the State must look there before levying a beneficiary's estate. *Conn. Dep't of Soc. Servs. v. Leavitt*, 428 F.3d 138, 150 (2<sup>nd</sup> Cir. 2005).<sup>43</sup>

## **Georgia Estate Recovery Law and Rules**

### ***Background***

The Department of Community Health (DCH) is the single State agency administering Georgia's Medicaid program.<sup>44</sup> DCH has contracted with the Department of Family and Children's Services to process applications for Medicaid; accordingly, individuals apply for Medicaid at the county DFCS office.

Prior to May 3, 2006, the estates of Georgia Medicaid recipients were not subject to estate recovery.<sup>45</sup> Although federal law had required estate recovery since 1993, Georgia's policy was that it would not be enforced. On September 18, 1998, Laura Marshall, spokesperson for the Department of Medical Assistance, was quoted as saying

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<sup>43</sup> In *Lopes v. Commonwealth*, 442 Mass. 170 (2004), plaintiffs sought to enjoin the State from seeking estate recovery because the State was previously paid under the tobacco settlement. The Court found that sovereign immunity barred all claims other than setoff in the context of probate. However, because Congress expressly exempted the tobacco settlement from 42 U.S.C. § 1396k(b), allowing States to spend tobacco monies in their sole discretion, the Plaintiffs failed to state a claim.

<sup>44</sup> O.C.G.A. § 49-4-142.

<sup>45</sup> [http://dch.georgia.gov/00/channel\\_title/0,2094,31446711\\_31835571,00.html](http://dch.georgia.gov/00/channel_title/0,2094,31446711_31835571,00.html).

“we are not going to do it. For the emotional impact, it was probably not worth the cost.”<sup>46</sup>

The estate recovery regulations were announced in the midst of a State budget crisis. Initially, DCH converted the nursing home COA from a spend-down COA to one imposing an income cap.<sup>47</sup> This required use of a Miller trust for persons seeking eligibility with income exceeding three times the SSI rate.<sup>48</sup> At the same time the eligibility rules changed, estate recovery was proposed as an additional cost savings measure.<sup>49</sup> Thus, the State reversed course in 2004, publishing proposed regulations that were originally effective August 5, 2004, and retroactive to August 5, 2001. Ultimately retroactive implementation was abandoned and, following an extended comment period, the program was implemented as of May 3, 2006.<sup>50</sup>

The public comments regarding estate recovery were mixed. For example, one voter, William Morris, was quoted as saying “I voted for Governor Perdue and I promise you if he does stuff like this he won’t have my vote again. This is theft. This is just hard-core theft.”<sup>51</sup> At the other extreme, following publication of an Atlanta Journal-Constitution article discussing how estate recovery would result in the seizure of family farms, conservative talk show host Neal Boortz stated:

Oh man ... you should hear the wailing and gnashing of teeth going on over this plan. Ruby's children asked if state officials were "going to bear down this hard on our elderly population and go for the jugular vein?" Hey, kids. The taxpayers have been forking over big bucks for a few years not to take care of your mother. Where were you then? Were you whining about the state using its police power to seize money from people you don't even know to pay for your mother's nursing home care? Does it occur to you that these people had something else they could be spending that money for? Maybe they had medical expenses in their own family that needed to be covered. Maybe they were behind on their mortgage, or needed repairs to their car. Did that bother you? No, you just stood by and watched the state use its police power to seize money from complete strangers to care for your mother. I sure would be interested to find out just how much you two were willing to dip into your savings to pay for your mother's medical care. But hell, why should you? Why even bother when the state will take care of it all for you!

We all know what the deal here is, don't we? Ruby Fair's kids will get those 162 acres once

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<sup>46</sup> See I. Leff, *Georgia Nursing Home Medicare and Medicaid*, in *Elder Law* (ICLE of Georgia 2001).

<sup>47</sup> “Governor Perdue (R) ordered state budget cuts of 2.5% in fiscal 2004 and 5% in fiscal 2005, state health programs *still* faced a \$173 million *state* funds shortfall in 2004 and \$376 million in 2005. So the Governor plans to end spend down eligibility for nursing home care.” T. McCormack, *State Medicaid Eligibility Cutbacks & Exclusions-Proposed & Recently Enacted, 2001-04* (Treatment Access Expansion Project November 17, 2004), at <http://www.tiicann.org/adapcon/medi.doc>.

<sup>48</sup> Qualified Income Trusts, also known as Miller Trusts, are authorized by 42 U.S.C. § 1396p(d)(4)(B).

<sup>49</sup> AARP calls Perdue Medicaid cuts a ‘one-two’ punch for seniors (7/24/2004), at <http://www2.accessnorthga.com/detail.php?n=155187>.

<sup>50</sup> Minutes of the Board of Community Health indicate that public comments were received without elaborating on the nature of those comments. See Minutes of the Board of Community Health (7/14/2004), at [http://www.georgia.gov/vgn/images/portal/cit\\_1210/44/33/3184826007-14-04.pdf](http://www.georgia.gov/vgn/images/portal/cit_1210/44/33/3184826007-14-04.pdf). Written comments submitted by this author are at [http://www.mcguffey.net/estater recovery\\_final.pdf](http://www.mcguffey.net/estater recovery_final.pdf).

<sup>51</sup> T. Crawford, *Estate recovery proposal slammed* (June 24, 2004), at <http://www.avoc.info/info/article.php?article=1350&ENGINEsessID=bf0d496cdfa1f8ad3e4f14ecfa551837>.

she gets tucked in for that eternal celestial dirt nap. Now the state is threatening to take that land, sell it, and reimburse the people who have been taking care of Ruby Fair while her children dreamed of inheritances.<sup>52</sup>

The Georgia legislature did not approve the estate recovery regulations. Legislation was passed that would have raised the exemption level from \$25,000 to \$100,000, subject to CMS approval. CMS rejected the \$100,000 exemption level, calling it “somewhat excessive.”<sup>53</sup>

Notwithstanding the controversy surrounding its adoption, estate recovery is now a fact of life for Georgia Medicaid recipients. In documents available to the general public, the Department of Community Health euphemistically refers Medicaid recipients as “members.” Its website indicates that members who may be affected by estate recovery include:

- Members of any age who reside in a nursing facility, intermediate care facility for the mentally retarded, or other medical institution.
- Members who are age 55 or older and who receive nursing home or home and community-based services.

The following documents are online:

Estate recovery brochure:

[http://dch.georgia.gov/vgn/images/portal/cit\\_1210/28/15/79799862ga\\_estate\\_recovery.pdf](http://dch.georgia.gov/vgn/images/portal/cit_1210/28/15/79799862ga_estate_recovery.pdf).

Estate Recovery Fact Sheet:

[http://dch.georgia.gov/vgn/images/portal/cit\\_1210/34/63/70650161EstateRecovery.1.2009.FINAL.pdf](http://dch.georgia.gov/vgn/images/portal/cit_1210/34/63/70650161EstateRecovery.1.2009.FINAL.pdf)

Frequently Asked Questions:

[http://dch.georgia.gov/vgn/images/portal/cit\\_1210/39/35/53166441Estate\\_Recovery\\_FAQ.pdf](http://dch.georgia.gov/vgn/images/portal/cit_1210/39/35/53166441Estate_Recovery_FAQ.pdf)

Official Notice of Estate Recovery Program:

[http://www.odis.dhr.state.ga.us/3000\\_fam/3480\\_medicaid/MANUALS/FORMS/DMA%20315.doc](http://www.odis.dhr.state.ga.us/3000_fam/3480_medicaid/MANUALS/FORMS/DMA%20315.doc)

Estate Recovery Notification Form:

[http://www.odis.dhr.state.ga.us/3000\\_fam/3480\\_medicaid/MANUALS/FORMS/DMA%20327.doc](http://www.odis.dhr.state.ga.us/3000_fam/3480_medicaid/MANUALS/FORMS/DMA%20327.doc)

The Estate Recovery Unit can be contacted at: 770-916-0328.

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<sup>52</sup> *My, How the freeloaders whine*, <http://boortz.com/nuze/200406/06252004.html#freeloaders>.

<sup>53</sup> *CMS Rejects Georgia Plan to Raise Threshold for Exemptions to Medicaid Estate Recovery Rules* (8/22/2006), at <http://www.medicalnewstoday.com/articles/50065.php>.

At this time, the State has retained a private law firm to assist with estate recovery. That firm is:

THE OLDENBURG LAW FIRM  
Attorneys-At-Law  
2004 Commerce Drive North, Suite 200  
Peachtree City, Georgia 30269  
770-632-9500  
FAX 770-632-0123

### ***State Legislation***

O.C.G.A. § 49-4-59, enacted in 1937,<sup>54</sup> provides:

(a) The total amount of assistance paid under this article shall be allowed as a claim against the estate of a deceased recipient after funeral expenses, not to exceed \$75.00, and the expense of administering the estate have been paid; provided, however, that no claim shall be enforced against any real estate of a recipient while it is occupied by his or her surviving spouse or dependent.

(b) The federal government shall be entitled to a share of any amounts collected under subsection (a) of this Code section from recipients or from their estates, if required as a condition to federal financial participation in assistance under this article, equal to not more than one-half of the amount collected; and this amount shall be specified by the department. The amount due the United States shall be paid promptly to it by the department.

O.C.G.A. § 49-4-147.1 provides:

(a) In accordance with applicable federal law and regulations, including those under Title XIX of the federal Social Security Act, the department may make claim against the estate of a Medicaid recipient for the amount of any medical assistance payments made on such person's behalf by the department.<sup>55</sup> A claim shall be made against the estate of a deceased Medicaid recipient only if at the time of application for medical assistance the applicant received written notice that the medical assistance costs could be recovered from the applicant's estate and the applicant signed a written acknowledgment of receipt of such notice, the estate is otherwise subject to recovery, and if no hardship or other exemption exists. The commissioner shall waive such claim if he or she determines enforcement of the claim would result in substantial and unreasonable hardship to dependents of the individual against whose estate the claim exists.

(b) The estate recovery program established pursuant to this Code section shall not be effective any earlier than May 3, 2006. In no event shall the department make claims against the estate of a Medicaid recipient for the amount of any medical assistance payments made on such person's behalf prior to May 3, 2006.

(c) The commissioner shall delay execution of a claim against the estate where the

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<sup>54</sup> Ga. L. 1937, p. 568, § 18. This statute appears to be limited to public assistance for the blind.

<sup>55</sup> The first sentence of Section 49-4-147.1 remains unchanged from prior law. The original language, showing changes, appears in the SB 572/HCFSA version, at [http://www.legis.ga.gov/legis/2005\\_06/versions/sb572\\_SB\\_572\\_HCSFA\\_8.htm](http://www.legis.ga.gov/legis/2005_06/versions/sb572_SB_572_HCSFA_8.htm).

dependents or heirs agree to pay the full amount of the claim in reasonable installments.

*[Subsection (d) was repealed on its own terms after CMS denied approval of the contemplated estate recovery exemption. It reads as follows:*

*(d) To prevent substantial and unreasonable hardship, the commissioner shall waive any claim against the first \$ 100,000.00 of any estate. The commissioner shall annually adjust this exemption based on changes in the consumer price index. The value of the estate shall not include year's support, funeral expenses not to exceed \$ 5,000.00, necessary expenses of administration, or reasonable expenses of the recipient's last illness. No later than July 1, 2006, the department shall submit an amendment to the state plan with the United States Department of Health and Human Services Centers for Medicare and Medicaid Services reflecting the provisions of this subsection. In the event that such amended state plan is not approved, this subsection shall stand repealed in its entirety.<sup>56</sup>*

O.C.G.A. § 49-4-162(b)(3) and (c) provide that certain assets are exempt from estate recovery on a dollar-for-dollar basis where an individual has purchased a long-term care partnership insurance policy and benefits have been paid under that policy.<sup>57</sup>

### ***The State Plan***

Section 13025 of the State Medicaid Manual describes the State Plan as follows:

The State plan is a comprehensive statement submitted by the State agency describing the nature and scope of its program and giving assurance that it will be administered in conformity with the specific requirements stipulated in the pertinent title of the Act, and other applicable official issuances of the Department of Health and Human Services (HHS). The State plan contains all information necessary for the Department to determine whether the plan can be approved, as a basis for Federal financial participation in the State program.

“Title XIX provides for designation of a single state agency to administer or supervise the Medicaid program. 42 CFR § 431.10. The DMA of Georgia is an administrative agency created in 1977 by O.C.G.A. § 49-4-142 (a) (Ga. L. 1977, p. 384) to meet that requirement and fulfill that function. It is authorized to ‘adopt and administer a state plan for medical assistance in accordance with Title XIX of the federal Social Security Act of 1935, as amended. . . .’ O.C.G.A. § 49-4-142 (a).” *ABC Home Health Servs.*, at 463.

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<sup>56</sup> In 2006, the former section was stricken and the new bill was enacted. See Act 760 (S.B. 572), 2006 Ga. Act 760, § 3, at [http://www.legis.ga.gov/legis/2005\\_06/search/sb572.htm](http://www.legis.ga.gov/legis/2005_06/search/sb572.htm). House Bill 1498, which expressly waived recovery in certain circumstances, was not enacted. It appears at [http://www.legis.state.ga.us/legis/2005\\_06/fulltext/hb1498.htm](http://www.legis.state.ga.us/legis/2005_06/fulltext/hb1498.htm).

<sup>57</sup> This exemption was authorized in the Deficit Reduction Act of 2005, effective February 8, 2006. The Department implemented this policy by adoption of Section 2348 of its Medicaid Manual, issued November, 2008. Section 2348 applies to partnership policies purchased on and after January 1, 2007. From a policy perspective, Section 2348 is suspect since it fails to reward individuals who purchased long-term care insurance prior to January 1, 2007.

O.C.G.A. § 49-4-142(a) authorizes establishment of a State Plan as follows:

The Department of Community Health established under Chapter 2 of Title 31 is authorized to adopt and administer a state plan for medical assistance in accordance with Title XIX of the federal Social Security Act, as amended (Act of July 30, 1965, P.L. 89-97, 79 Stat. 343, as amended), provided such state plan is administered within the appropriations made available to the department. The department is authorized to establish the amount, duration, scope, and terms and conditions of eligibility for and receipt of such medical assistance as it may elect to authorize pursuant to this article. Further, the department is authorized to establish such rules and regulations as may be necessary or desirable in order to execute the state plan and to receive the maximum amount of federal financial participation available in expenditures made pursuant to the state plan; provided, however, the department shall establish reasonable procedures for notice to interested parties and an opportunity to be heard prior to the adoption, amendment, or repeal of any such rule or regulation. The department is authorized to enter into such reciprocal and cooperative arrangements with other states, persons, and institutions, public and private, as it may deem necessary or desirable in order to execute the state plan.

The Georgia State Plan is online at:

[http://dch.georgia.gov/00/channel\\_title/0,2094,31446711\\_80466652,00.html](http://dch.georgia.gov/00/channel_title/0,2094,31446711_80466652,00.html).

The State Plan is prepared based on a template provided by CMS. It is worth review since its terms are mandatory once approved by CMS. 42 U.S.C. § 1396a(a)(1).

Section 4.17 of the State Plan indicates that Georgia:

- Imposes liens on real property on account of benefits incorrectly paid;
- Imposes TEFRA liens on real property of an individual who is an inpatient of a nursing facility, ICF/MR, or other medical institution where the individual is required to contribute toward the cost of institutional care all but a minimal amount of income required for personal needs.<sup>58</sup>
- Imposes liens on both real and personal property of an individual after the individual's death.

The State Plan states that Georgia complies with the requirements of Section 1396p(b) and with 42 C.F.R. § 433.36(h)-(i).

Adjustments or recoveries for Medicaid claims correctly paid are as follows:

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<sup>58</sup> The Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) permits the State, in two instances, to secure its future recovery, following the death of a Medicaid recipient. In the first instance, there must be a hearing, following notice, where it is determined that an institutionalized Medicaid recipient will not return home. In the second instance, TEFRA liens are permitted after a court determines that Medicaid benefits were incorrectly paid. See M. Wilson, *Future of Medicaid Planning in Missouri*, *supra*, at 67. See 42 U.S.C. § 1396p(b)(1).

1. For permanently institutionalized individuals, adjustments or recoveries are made from
  - a. the individual's estate; or
  - b. upon sale of the property subject to a lien.
2. Adjustments or recoveries are made for all other medical assistance paid on behalf of the individual.
3. For any individual who received medical assistance at age 55 or older, adjustments or recoveries of payments are made from the individual's estate for nursing facility services, home and community-based services, and related hospital and prescription drug services.

Estate recovery is limited as follows:

1. Adjustment of medical assistance correctly paid will be made only after the death of the individual's surviving spouse, and only when the individual has no surviving child who is either age 21, blind or disabled.

Regarding specific procedures, the State Plan references Attachment 4.17A, which provides:

1. Specifies the criteria by which a son or daughter can establish that he or she has been providing care, as specified under 42 C.F.R. § 433.36(f).
2. Defines the term:
  - a. **Estate** (at a minimum, estate as defined under State probate law). Except for grandfathered States listed in section 4.17(b)(3), if the State provides a disregard for assets or resources for any individual who received or is entitled to receive benefits under a long term care policy, the definition of estate must include all real property, personal property and assets of an individual (including any property or assets in which the individual had any legal title or interest at the time of death to the extent of the interest and also including the assets conveyed through devices such as joint tenancy, life estate, living trust, or other arrangement);

Attachment 4.17A.2 described the proof necessary to gain deferral for a caregiver child.

Attachment 4.17A.3 defines the following terms:

1. "**Estate**" means all real and personal property under the probate code. Estate also includes real property passing by reason of joint tenancy, right of survivorship, life estate, survivorship, trust annuity, homestead or any other arrangement. The estate also includes a life estate interest and excess funds from a burial trust or contract, promissory notes, cash and personal property.
2. "Individual's home" means true, fixed and permanent home and principal establishment to which whenever absent, the individual has the intention of returning to his domicile.
3. "Equity interest in the home" means value of the property that the individual holds legal interest in to beyond the amount owed on it in mortgages and liens.

A more complete summary of the estate recovery provisions in the State Plan, including hardship and collection procedures, appears in *Attachment A* to this Memorandum.

## *State Regulations*

“As the ‘single state agency’ required by the federal statute and rules to administer or supervise the Medicaid program (42 CFR § 431.10 (a)) the DMA is authorized ‘to establish the amount, duration, scope, and terms and conditions of eligibility for and receipt of such medical assistance as it may elect to authorize pursuant to’ the Georgia Medical Assistance Act of 1977. O.C.G.A. § 49-4-142 (a). It establishes the rules and regulations for executing the state plan, *ibid*, and for receiving ‘the maximum amount of federal financial participation available.’ O.C.G.A. § 49-4-157.” *ABC Home Health Servs.*, at 463.

The regulations indicate that collections occur through the probate process. Ga. R. & Regs. § 111-3-8-.01. “After receipt of notice of the death of an affected Member, the Department will file a claim against the estate for the full value of the Medicaid benefits paid on behalf of the Member.” Section 111-3-8-.05(1). However, the regulations indicate that the “estate” from which DCH seeks collection is defined as follows:

**"Estate"** means all real and personal property under the probate code. Estate also includes real property passing by reason of joint tenancy, right of survivorship, life estate, survivorship, trust, annuity, homestead or any other arrangement. The estate also includes excess funds from a burial trust or contract, promissory notes, cash, and personal property. Estates valued at \$25,000 or less are exempt from estate recovery because it is not cost effective for the state to pursue recovery. Ga. R. & Regs. § 111-3-8-.02(6).

A primary concern, however, among Georgia Elder Law Attorneys is whether the expanded nature of the Department’s Estate Recovery Regulations is *ultra vires*. This is a legitimate inquiry since O.C.G.A. § 49-4-147.1 indicates that collections may only be made from “the estate of a deceased Medicaid recipient.” Administrative agencies do not create law in Georgia; the legislature does.

“A distinction must be drawn between the General Assembly's constitutional authority to enact legislation and [the Board’s] administrative authority to promulgate rules for the enforcement of the General Assembly's enactments. The difference between the power to pass a law and the power to adopt rules and regulations to carry into effect a law already passed, is apparent and strikingly great... [Cit.] *Department of Transp. v. Del-Cook Timber Co., Inc.*, 248 Ga. 734, 738 (3) (a) (285 S.E.2d 913) (1982). [The Board’s] authority can extend only to the performance of the latter administrative function, as it has no constitutional authority to legislate. *See generally Sundberg v. State*, 234 Ga. 482 (216 S.E.2d 332) (1975).”

*HCA Health Servs. v. Roach*, 265 Ga. 501, 502 (1995). In *State Revenue Comm. V. Edgar Bros. Co.*, 185 Ga. 216, 233 (1937), the court noted that state officers have such powers as are necessary for the due and efficient exercise of the powers expressly granted, or as may be fairly implied from the statute granting the express powers. They have only those powers granted to them by law, and take nothing by implication. No rule or regulation may be validly adopted which does not conform to, or conflicts with,

the provisions of the statute. *See also Georgia Public Serv. Comm. V. Charles H. Turner, Inc.*, 200 Ga. App. 144, 145 (1991) (holding that a statute did not give the Commissioner discretionary authority to regulate beyond the terms of the statute).

The primary issue of concern is whether DCH had authority to implement an expanded form of estate recovery. Most elder advocates believe that O.C.G.A. § 49-4-147.1 limits recovery to the probate estate. The reason is because the legislature has taken no action to change probate, contract or property law to prevent non-probate assets from passing by operation of law. For example, although the regulations indicate recovery will be pursued where property passes by survivorship, Georgia property law says otherwise. Ordinarily, “if property is held by two or more individuals as joint tenants with right of survivorship, upon the death of one owner, that owner’s right in the property is extinguished and the property belongs to the surviving owners.” *See* M. Radford, *Redfern, Wills and Administration in Georgia* § 2-7 (6th Ed.). The legislature expressly approved survivorship deeds by restoring that common law doctrine in 1976. Non-probate assets “are typically also not available to satisfy the claims of creditors of the decedent as they are not part of the decedent’s probate estate.” *Redfern*, § 2-8. “Under Georgia law, it is only the “property of the estate” that is subject to the payment of claims against the estate.” *Id.*, at fn. 1, citing O.C.G.A. § 53-7-40.

Accordingly, if the legislature meant “probate” estate, which is the meaning one would normally impute after reading “the estate of a deceased Medicaid recipient,” then Department’s expanded estate recovery regulations are likely *ultra vires* because they purport to change the law rather than effectuate it.<sup>59</sup> Further, expanded estate recovery does nothing to effectuate O.C.G.A. § 49-4-142 because (1) the eligibility process (the amount, duration, scope, terms and conditions of eligibility and receipt of medical assistance) is unrelated to estate recovery; and (2) an estate recovery program limited to the probate estate complies with federal law. Finally, to say that the Medicaid program requires redefinition of State property law is wholly without merit; the Medicaid Act looks to State law in determining ownership of income and assets.<sup>60</sup>

Regardless of how “estate” is ultimately defined, the Georgia legislature has not changed probate law, contract law or property law to create a mechanism for capturing non-probate assets before they are conveyed by survivorship deed, beneficiary arrangement, or otherwise. Clearly the legislature has that power, but thus far has not exercised that power. Further, even assuming it could, there is no clear delegation of power to DCH to change property law.<sup>61</sup> The fact that probate-only estate recovery complies with federal

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<sup>59</sup> Arguably, the estate recovery regulations, themselves, prohibit expanded recovery if State law would not allow a creditor to reach non-probate assets. *See* Ga. R. & Regs. § 111-3-8-.04(11).

<sup>60</sup> *New Mexico Dep’t of Human Servs v. Dep’t of Human & Health Servs.*, 4 F.3d 882(10<sup>th</sup> Cir. 1993) (“We conclude that Congress intended to reply on, rather than supplant, state family property law and that imposition of the Secretary’s name-on-the-check rule on NMDHS contrary to state community property law is therefore inconsistent with the Medicaid statute); *Washington, Dep’t of Social & Health Servs v. Bowen*, 815 F.2d 549 (9<sup>th</sup> Cir. 1987); *Clark v. Iowa Dep’t of Human Servs.*, 513 N.W.2d 710 (Iowa 1994); *Purser v. Rahn*, 702 P.2d 1196 (Wash. 1985).

<sup>61</sup> Even if the legislature attempted to delegate such authority to DMA, the broad authority necessary to re-write probate, contract and property law would likely violate Article I, Section II, Paragraph III of the Georgia Constitution (separation of powers). The delegations of such broad authority to re-write the law

law eliminates any argument that such power was delegated by implication when DCH was given power to submit a State Plan.

With this in mind, one can legitimately ask how the Department intends to enforce its expanded claims since Georgia law includes no way to “mechanically” pull assets conveyed by non-probate means back into the estate. Section 111-3-8-.04(14) indicates that transfers on or after the look-back date are voidable and may be set aside. Ordinarily, a creditor seeking to set aside a conveyance brings an action under the Fraudulent Transfers Act. O.C.G.A. § 18-2-1 *et seq.* Creditors may attack as fraudulent a judgment, conveyance, or any other arrangement interfering with their rights, either at law or equity. O.C.G.A. § 18-2-21. The transferee must be made a party to the action. *Czyz v. Czyz*, 240 Ga. 806 (1978); O.C.G.A. § 18-2-56.<sup>62</sup> However, there seems to be no basis for alleging fraud in the context of a survivorship arrangement and, *arguendo*, if there was, the State would still find no support from the Fraudulent Transfers Act. O.C.G.A. § 18-2-80(b) expressly provides:

The provisions of [the Georgia Uniform Fraudulent Transfers Act] do not create a cause of action for a governmental entity or its agents or assignee with respect to a transaction which may otherwise constitute a fraudulent transfer or obligation under this article if the transaction complies with the applicable state and federal laws concerning transfers of property in the determination of eligibility for public benefits.

An example of the way in which this mechanical difficulty might play out is found in *Mid-State Homes, Inc. v. Johnson*, 218 Ga. 397 (1962). In an equitable proceeding,<sup>63</sup> the holder of a security deed argued that “a provision terminating the grantor’s life estate under certain circumstances is void.” Grantor, who owned a terminable life estate, defaulted on her indebtedness. She had given her lender a security deed on the property and it was sold by the lender under a power of sale. Apparently litigation followed after the event terminating the borrower’s life estate occurred. The court rejected arguments that termination of the life estate was void, noting “it has long been established that life estate subject to termination under particular circumstances may be created. ... Such determinable life estates are recognized in Georgia.” The court held that “Mrs. Alday’s life estate automatically terminated upon the happening of the stipulated event, and simultaneously *all rights under the security deed which she had executed to the plaintiff in error came to an end.* ... Therefore, the plaintiff in error has no claim to the land in dispute by virtue of its security deed from Mrs. Alday, or the purchase of the property upon foreclosure of that deed.” *Id.*, at 401 (emphasis added). This decision, in the context of a creditor’s attempt to seize a life estate, points out two inherent problems with the current regulations: (1) When the life estate terminates nothing remains for the creditor; and (2) if the creditor attempts to convey the life estate, its purchaser takes

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would effectively have DMA assuming the “constitutional field of action of” the legislative branch. See *Ga. Dep’t of Human Res. V. Word*, 265 Ga. 461, 463 (1995) (discussing separation of powers concepts).

<sup>62</sup> A creditor bringing such an action may state a claim to set aside a conveyance fraudulent as to him without first having obtained a judgment establishing the claim. O.C.G.A. § 9-11-18(b).

<sup>63</sup> 42 U.S.C. § 1396p(b) appears to limit claims to legal interest. Whether the State could use equity to collect a legal interest is an open question.

nothing.<sup>64</sup> Thus, at least with respect to realty, the State could not convey marketable title even if it somehow seized property passing outside the probate estate.

The full text of the regulations appears in *Attachment B* to this Memorandum.

### ***State Manual***

Section 2398 of the Economic Support Services Manual of the Georgia Department of Human Resources (“ESSM” or the “Georgia Manual”) describes Georgia’s estate recovery program.<sup>65</sup> Initially, the Georgia Manual indicates that estate recovery is limited to claims for medical care paid on and after May 3, 2006.

The Georgia Manual further indicates that estate recovery is pursued where:

- The recipient’s estate is valued at \$25,000 or more;
- The Medicaid recipient of any age was in a nursing facility, intermediate care facility for the mentally retarded, or other mental institution that have their medical care paid by Medicaid;
- Recipients who are 55 years of age or older and who receive and who receive home and community based services or are enrolled in and receive services through a waiver program;
- Currently active recipients (including SSI recipients) who are not dis-enrolled from institutionalized Medicaid for NH, CCSP/Source, MRWP/CHSS, ICWP, Hospice, Institutionalized Hospice by May 3, 2006

A recipient who dis-enrolls from Medicaid to avoid estate recovery and subsequently reapplies for Medicaid under one of these classes of assistance, will be subject to estate recovery back to the date eligibility was first established, or May 3, 2006, whichever is later.

ESSM § 2398 indicates that the following assets are subject to estate recovery:

- All real estate property, including homeplace property NOTE: A Life Estate does not exempt the estate or home from ER.
  - Page 2398-2 includes a chart indicating the “any other assets including “joint tenancy and life estate” are subject to recovery.
- All personal property, whether held individually or jointly
- If a transfer penalty period was not completed due to the A/R’s death, the value of the remaining penalty period may be recovered.<sup>66</sup>

The Manual indicates that DCH will notify the executor or heirs of the deceased Medicaid recipient before any attempt is made to pursue estate recovery. Upon

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<sup>64</sup> A life estate, by definition, terminates upon the death either of the holder or some other designated person, and no interest passes to the personal representative, the heirs, or devisees. D. Hinkel, *Pindar’s Georgia Real Estate Law and Procedure* § 7-49 (6<sup>th</sup> Ed.). See also § 7-96.

<sup>65</sup> [http://www.odis.dhr.state.ga.us/3000\\_fam/3480\\_medicaid/MANUALS/2398.doc](http://www.odis.dhr.state.ga.us/3000_fam/3480_medicaid/MANUALS/2398.doc).

<sup>66</sup> This provision of the manual is poorly written. If a transfer penalty has been imposed, then an individual is not receiving a nursing home vendor payment; even so, Medicaid’s claim is for the amount of medical assistance paid rather than the value of an imposed penalty.

notification, the heirs of the estate will be given an opportunity to show whether they meet one of the exceptions in the law that delays estate recovery and how to request an undue hardship waiver.

Estate recovery may be delayed if the deceased Medicaid recipient has:

- A surviving spouse;
- child(ren) under 21 years of age (for the delay to continue past age 21, the child must have become disabled prior to reaching age 21),
- child(ren) who are blind or permanently and totally disabled according to Social Security guidelines,
- a sibling of the A/R who was residing in the A/R's home for a least one year immediately prior to the A/R's date of institutionalization, and who was providing such care to the A/R that institutionalization was delayed or
- a child of the A/R who was residing in the A/R's home at least two years immediately prior to the A/R's date of institutionalization, and who was providing such care to the A/R that institutionalization was delayed.

If estate recovery is delayed, the delay continues until one of the following occurs:

- the surviving spouse is deceased or divorced;
- the child(ren) turn 21 years of age or decease, whichever occurs first;
- the blind or totally disabled child(ren) decease;
- the sibling/child deceases or no longer resides in the home.

### ***The Estate Recovery Notice***

There are two required estate recovery notices. The first is given to the applicant at the time of application.<sup>67</sup> The second is given to the applicant's heirs after the applicant is deceased, but prior to any collection action.

The purpose of the post-death notice is to give affected individuals an opportunity to claim an exemption. Section 3810(G)(2) of the State Medicaid Manual specifically provides that notice of the right to apply for a hardship waiver should be served on the representative of the decedent's estate with directions to notify the affected individuals of their right to seek a waiver. Notice must be given in advance. SMM § 3810(D). "Notice that is reasonably calculated to apprise interested parties of the pendency of an action and that provides them an opportunity to participate meets the requirements of due process." *Estate of Schiola v. Colo. Dep't of Health Care Policy & Fin.*, 51 P.3d 1080 (Colo. Appl. 2002.). In light of this notice requirements under federal law, a notice that did not direct the executor to forward information to persons with a right to apply for the waiver was defective and the State's claim was properly dismissed. Delivery of a defective notice, however, does not necessarily preclude the State from pursuing its claim. In *Dep't of Health Care Policy & Fin. V. Kockevar*, 94 P.3d 1253 (Colo. App. 2004), the Court held that a defective notice that was timely filed can be cured if the State later delivers a corrected notice.

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<sup>67</sup> [http://www.odis.dhr.state.ga.us/3000\\_fam/3480\\_medicaid/MANUALS/FORMS/DMA%20315.doc](http://www.odis.dhr.state.ga.us/3000_fam/3480_medicaid/MANUALS/FORMS/DMA%20315.doc).

## ***Georgia Case Law***

To date, the only Georgia appellate case addressing Medicaid estate recovery is *Georgia Dep't of Cmty. Health v. Medders*, 292 Ga. App. 439 (2008). *Medders* originated as a Medicaid eligibility case, not an estate recovery case. The Department alleged that Medders triggered a transfer penalty by disclaiming an inheritance. For reasons unknown, the ALJ's opinion stated that "estate recovery may be pursued." That ruling was erroneous and was reversed because estate recovery cannot be pursued while the Medicaid recipient is alive. Equally erroneous, the Superior Court found that the Department was barred from ever pursuing Medders' estate to recover Medicaid payments. On appeal, the court found that issue was not yet ripe for decision.

Two rules can be gleaned from *Medders*. First, the Department cannot pursue estate recovery prior to the recipient's death. Second, the recipient cannot pre-empt the Department's estate recovery claim by securing a decision on the merits prior to death. Whether estate recovery is, or is not allowed must be determined based on the facts and circumstances existing after the death of the Medicaid recipient.

The only other Georgia case mentioning estate recovery is a guardianship case. In *Cruver v. Mitchell*, 289 Ga. App. 145 (2008), a guardian, who was also a potential beneficiary, opted her ward out of the Medicaid program to avoid estate recovery. No evidence was presented showing that doing so was in the ward's best interests. The probate court removed the guardian from serving after finding that she had a conflict of interest. The court found that the probate court properly exercised its discretion by appointing a neutral, professional conservator who would best serve the ward's interest.

In *Dep't of Medical Assistance v. Hallman*, 203 Ga. App. 615 (1992), footnote reference was made to Section 1396p(b)(1). There, the Department sought to recover funds paid for medical assistance from an injury settlement. Wallace Speed was rendered a quadriplegic in an automobile accident. His treatment was funded by medical assistance. One April 28, 1987, a lien was filed for \$103,561.37 against the tortfeasors. The Department, however, took no action to pursue recovery from the tortfeasors. In 1990, after receipt of settlement checks, Speed filed a declaratory judgment action contending the Department had waived any lien rights by failing to initiate legal action as required by O.C.G.A. § 44-14-473(a). The Department counterclaims, arguing Speed was liable under the theory that he "had and received" funds due the Department. The court found that the Department could not maintain an action for funds had and received, and that its sole remedy was the lien remedy provided in O.C.G.A. § 49-4-149. By footnote, the court indicated that its holding was consistent with Section 1396p(b)(1) which restricts recovery of medical assistance correctly paid to certain situations.

In *Padgett v. Toal*, 261 Ga. App. 154, 155 (2003), the court recognized that no lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan. Unless an express exception applies. In that instance, the State was attempting to recover funds paid by a third party. The Court noted that federal law requires such recoveries and that Georgia had enacted legislation expressly authorizing a lien against monies or other property accruing to a recipient from third parties.

## Georgia Probate Procedure

This section of the memorandum is not designed as an exhaustive review of Georgia Probate law. Instead, because the enabling legislation and the regulations envision collection of estate recovery through the probate process, this section is designed to highlight relevant aspects of probate procedure.<sup>68</sup> Similarly, the regulations provide “Estate recovery shall be accomplished by the Department or its agent filing a statement of claim against the estate of a deceased Medicaid Member.” Section 111-3-8-.04(1).<sup>69</sup>

Just as death is required before a person can be an heir, *Moore v. Segars*, 192 Ga. 190 (1941), death of the Medicaid recipient must also occur before any estate recovery action is initiated. *See Padgett v. Toal, supra*.

As a general matter, estate administration is necessary if the decedent was on Medicaid and died with probate assets. Because collection is through the probate process, the State will contend probate is also necessary when the decedent dies with non-probate assets.<sup>70</sup> When the decedent dies testate, probate in solemn form is preferred since it is conclusive on all parties. O.C.G.A. § 53-5-20.<sup>71</sup> A Petition alleging that no administration is necessary, *see* O.C.G.A. § 53-2-40, is not appropriate where there is an estate recovery claim.<sup>72</sup> Such petitions require an allegation that the estate owes no debts or, if there are debts, that the creditors have consented to the proceeding. O.C.G.A. 53-10-1(b).<sup>73</sup>

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<sup>68</sup> In Tennessee, the enabling legislation permitting estate recovery similarly indicates that claims are filed against the estate of the Medicaid recipient. *See* T.C.A. § 71-5-116. In *In re Estate of Anderson*, 2007 Tenn. App. LEXIS 705 (Nov. 16, 2007), the court held that a general limitations period applicable to government claims in an estate barred recovery. *See also In re Estate of Henkel*, 2007 Tenn. App. LEXIS 704 (No. 16, 2007); In *In re Estate of Roberts*, 2008 Tenn. App. LEXIS 348 (June 11, 2008), the court diverged from the previous line of cases, finding that the statute of limitations did not prevent recovery because the legislature imposed a personal obligation on the personal representative to file evidence with the clerk that the claim was paid or waived before the estate could be closed. Since the personal representative is obligated to show such proof before closing the estate, there is no requirement that a claim be filed. The court did not reach the issue of whether the claim was enforceable, and specifically limited its holding to the limitations period issue. Despite the divergent opinions, all cases agree that the applicable rules are those that apply to probate. *See also N.D. Dep't of Human Servs. v. Brenden*, 2000 N.D. 155 (2000), holding that the Department was not entitled to interest because it had not satisfied the time requirement under the probate code.

<sup>69</sup> Without explanation, the regulations indicate that an estate does not have to be open for the Department to execute its claim after all exception conditions are no longer present. Section 111-3-8-.04(16). No where does the Department adequately explain its legal authority for seizing assets by other means.

<sup>70</sup> Regulation 111-3-5-.06, however, indicates that the State may recover accounts in financial institutions without opening an estate.

<sup>71</sup> Probate in common form is not conclusive for four years. O.C.G.A. § 53-5-19.

<sup>72</sup> O.C.G.A. § 53-2-41(b) directs the court to refuse to grant an order finding that no administration is necessary upon the objection of any creditor. Even if the order is granted, any creditor shall have a right of action on unsatisfied debts against the heirs to the extent of the value of property received by them. O.C.G.A. § 53-2-42.

<sup>73</sup> No administration is necessary where the value of an unrepresented estate does not exceed in value the sum to be set aside for year's support. O.C.G.A. § 53-6-38. In such cases it seems that estate recovery would be defeated without the necessity of administration since claims for year's support have higher priority.

## ***Jurisdiction***

Probate Courts have authority to exercise original, exclusive and general jurisdiction over: (1) the probate of wills; (2) the granting of letters of testamentary and of administration; (3) all controversies in relation to the right of executorship or administration; (4) the ... disposition of property belonging to deceased persons' estates; ... (10) all other matters and things as appertain or relate to estates of deceased persons; and (11) all matters conferred by the Constitution and laws. O.C.G.A. § 15-9-30. *See also* O.C.G.A. § 53-3-1; O.C.G.A. § 53-3-60; O.C.G.A. § 53-5-1. Probate Courts have jurisdiction to determine the identity and interest of any heir. O.C.G.A. § 53-2-20.

Once a county's population reaches 96,000, the Probate Judge must be a lawyer. Thereafter, jurisdiction is expanded. O.C.G.A. § 15-9-4; § 15-9-127. For example, declaratory judgment actions are generally authorized to determine "any question arising in the administration of the estate." O.C.G.A. § 9-4-4(3); § 15-9-127(1). Where the court has expanded jurisdiction, parties may demand jury trials. O.C.G.A. § 15-9-121.

A Probate Court has jurisdiction to vacate its judgment under O.C.G.A. § 9-11-60; O.C.G.A. § 53-5-50. The underlying motion to set a judgment aside must allege fraud, accident, or mistake of facts unmixed with the negligence or fault of the movant.

In some instances, the Superior Court has jurisdiction concurrently with the Probate Court. For example, the Superior Court has current jurisdiction over settlement of accounts of personal representatives. O.C.G.A. § 53-7-60. In other instances, such as with equity claims, the Superior Court may have exclusive jurisdiction. In those cases, a motion suggesting that the Probate Court does not have jurisdiction will be treated as a motion to transfer. Rule 16.1.<sup>74</sup>

If a defendant is within the Court's jurisdiction, then jurisdiction attaches following service of process. O.C.G.A. § 9-11-4. Except as otherwise prescribed by law, or directed by the probate judge, a Georgia resident is entitled to personal service of any petition and citation. O.C.G.A. § 53-11-3(a). Service must be completed at least 10 days before a hearing. O.C.G.A. § 53-11-3(b). Unless otherwise directed by the court, service may be made by registered or certified mail or statutory overnight delivery if requested. O.C.G.A. § 53-11-3(e). For persons outside Georgia, service may be made by publication when their address is unknown, O.C.G.A. § 53-11-4(b), and by certified or registered mail when known. O.C.G.A. § 53-11-4(c). In all cases, service may be waived or acknowledged. O.C.G.A. § 53-11-6.

## ***Venue***

Venue is in the county where the decedent resided and is jurisdictional in nature. O.C.G.A. § 15-9-31; § 53-5-1(a) (testate decedents); § 53-2-21(a) (administration). A nursing home resident is presumed to be a resident of the county where he or she resided immediately before entering the nursing home. O.C.G.A. § 53-5-1(c).

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<sup>74</sup> The Uniform Rules are at: <http://www.georgiacourts.org/councils/probate/URPC.html>.

If venue is challenged, then a motion that venue is improper shall be treated as a motion to transfer. Rule 16.1.

### ***Objections and Hearings***

The date by which objections must be filed shall not be less than ten days after the person entitled to object is personally served. O.C.G.A. § 53-11-10(a). The time is extended to not less than 13 days when service is effected by mail. For persons outside the continental United States, the time is extended.

Hearings are set by the court upon the request of any interested party. Ten days advance notice is required. Rule 9.1; O.C.G.A. § 53-11-10(b).

While the Court “may” require the parties to have proceedings recorded, it is not error if the court fails to do so. *LaFavor v. LaFavor*, 282 Ga. App. 753 (2006). In the absence of a transcript, the appellate court will assume that the court’s actions would be supported by the record. *Id.* In the absence of fraud, findings of fact of the superior court or probate court are binding and conclusive as to every person and as to every issue decided. O.C.G.A. § 53-2-26.

Ga. R. & Regs. § 111-3-8-.05(4) provides “The affidavit of a person designated by the Commissioner to administer this action is prima facie evidence of the amount of the claim.” In *Missouri Dep’t of Social Servs., Div. of Med. Servs. v. Schlotter (In re Estate of Newman)*, 58 S.W.3d 640 (Mo. Ct. App. W.D. 2001), the estate objected to similar testimony. The court allowed it under the business records exception to the hearsay rule.<sup>75</sup> See also *Mo. Dep’t of Soc. Servs. v. Kirkweg (In re Estate of Graham)*, 59 S.W.3d 15 (Mo. Ct. App. W.D. 2001) (Testimony of the record custodian is sufficient even if the documents themselves are excluded); *Estate of Vickers*, 35 S.W.3d 851 (Mo. Ct. App. S.D. 2001); *In re Estate of West v. Moffatt*, 32 S.W.3d 648 (Mo. Ct. App. W.D. 2000) (trial court erred in sustaining objection to claims documentation); *Dep’t of Social Servs. v. Ragsdale*, 934 S.W.2d 322 (Mo. Ct. App. E.D. 1996).

### ***Court Rules***

All Probate Courts are courts of record. Therefore the Georgia Civil Practice Act (O.C.G.A. § 9-11-1 et seq.) applies. See O.C.G.A. § 15-9-122; Redfern, *supra*, § 6-2. In addition, the Rules of the Probate Court are binding unless they conflict with the U.S. or State Constitutions, or with law. O.C.G.A. § 15-1-5.

### ***Discovery***

In order for a party to utilize the court's compulsory process to compel discovery, any desired discovery procedures must first be commenced promptly, pursued diligently and completed without unnecessary delay and within 2 months after the filing of the answer

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<sup>75</sup> In Missouri the statute included language similar to the Georgia regulation. Although DCH has no authority to alter the law of evidence, the records would likely be admitted nonetheless because public records are often admitted under the business records exception. See Report of the Evidence Study Committee of the State Bar of Georgia: Proposed New Rules of Evidence, at 101 (June 6, 2005), at [http://www.gabar.org/public/pdf/news/proposed\\_new\\_evidence\\_rules.pdf](http://www.gabar.org/public/pdf/news/proposed_new_evidence_rules.pdf).

unless for cause shown the time has been extended or shortened by court order. Rule 5, Uniform Rules for the Probate Court.<sup>76</sup> Motions to compel discovery must comply with Rule 6.4.

### ***Interested Parties***

A person named in a Will, persons who would be an heir-at-law, and creditors are potentially interested parties. *See e.g.*, O.C.G.A. § 53-3-6(a) (defining “interested person” in the context of year’s support). The identity of heirs-at-law is governed by the rules of intestate succession. O.C.G.A. § 53-2-1(c). Generally, those rules provide that the closest living relatives take the decedent’s estate; such persons are interested since the circumstances surrounding the execution of any Will may be challenged.

Any personal representative, guardian, conservator, committee, trustee, fiduciary, or other person having a status which by operation of law or written instrument devolves upon such person a duty of distributing property to heirs may file a petition for determination of heirship as provided in Code Section 53-2-20. *See* O.C.G.A. § 53-2-21. Similarly, someone claiming to be an heir may petition either the probate or superior court for a determination concerning heirship. O.C.G.A. § 53-2-22. Any person claiming to be an heir, or claiming to be interested as a distributee may move to intervene. O.C.G.A. § 53-2-25.

Other interested parties include creditors. A personal representative is required to give creditors notice of the pendency of the probate proceeding.

### ***Administrators***

The estate of an intestate decedent is subject to administration. An “Administrator” is “any person appointed and qualified to administer an intestate estate, including an intestate estate already partially administered by an administrator and from any cause unrepresented.” O.C.G.A. § 53-1-2(1). An administrator is selected in order of preference as specified in O.C.G.A. § 53-6-20. If no person with higher priority is selected, then a creditor may serve. O.C.G.A. § 53-6-20(4). Administrators are required to give bond. O.C.G.A. § 53-6-50. Administrators are compensated at the statutory rate. O.C.G.A. § 53-6-60. A personal representative may petition for extra compensation. O.C.G.A. § 53-6-62. Reasonable expenses are reimbursed. O.C.G.A. § 53-6-61.

Following the death of an intestate decedent, title to real property immediately vests in the heirs-at-law. Such title is subject to divestment by the administrator once appointed. O.C.G.A. § 53-2-7(a). After an administrator is appointed, all title is vested in him or her. O.C.G.A. § 53-2-7(b). This is for the benefit of the decedent’s heirs and creditors.

Where estate property is in the possession of another, the administrator may bring an action to recover the property. At trial, the administrator must prove “either that the property which is the subject of the action has been in the administrator’s possession and without the administrator’s consent is held by the defendant at the time of bringing

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<sup>76</sup> Rule 5.1 of the Uniform Rules of Superior Court requires that discovery be completed within six months after the filing of the answer.

the action or that it is necessary for the administrator to have possession for the purpose of paying the debts.” O.C.G.A. § 53-2-7(d). An administrator may bring an action to collect debts. O.C.G.A. § 53-6-31.

Once an order that no administration is necessary is granted, or if the administrator assents to vesting of title in the heirs, the heirs may take possession of the estate property or may sue for its possession. O.C.G.A. § 53-2-7(e). Distributions to heirs are governed by O.C.G.A. § 53-2-30 through 53-2-32.

### ***Executors***

A will takes effect instantly upon the testator’s death regardless of when probated. O.C.G.A. § 53-4-2. A will may nominate an Executor. O.C.G.A. § 53-6-10. If nominated, unless adjudged unfit, the executor has the right to qualify as such. *Id.* An “Executor” is “any person nominated in a will who has qualified to administer a testate estate, including a person nominated as alternative or successor executor.” O.C.G.A. § 53-1-2(7). Either in the Will, or by separate agreement, the decedent may specify the compensation paid to the personal representative. O.C.G.A. § 53-6-60. Otherwise, the statutory rate applies. *Id.* A personal representative may petition for extra compensation. O.C.G.A. § 53-6-62. Reasonable expenses are reimbursed. O.C.G.A. § 53-6-61.

A Will may include specific powers granted to an executor, or may incorporate specified statutory powers by reference. O.C.G.A. § 53-12-232. If a Will omits any of the statutory powers, they may be granted by application, citation, and order using the procedure which applies to administrators in O.C.G.A. § 53-6-26. *See* O.C.G.A. § 53-1-6.

### ***Estate Administration***

A personal representative is entitled to possess and administer the entire estate. O.C.G.A. § 53-7-2. He is allowed six months from the date of qualification to ascertain the condition of the estate. O.C.G.A. § 53-7-41.<sup>77</sup> Within 60 days, the personal representative should publish a notice to creditors to render their demands.<sup>78</sup> Creditors who fail to make demands within 3 months lose all rights to an equal participation with creditors of equal priority and may not hold the personal representative liable for misappropriation of funds. *Id.* However, if assets are distributed to heirs, a creditor may compel heirs to contribute pro rata to the payment of the debt. O.C.G.A. § 53-7-43.<sup>79</sup>

Section 111-3-8-.03(2) indicates the personal representative may be liable if he makes a distribution to heirs without first paying the Department’s claim. This, however, is simply a restatement of probate law and does not create an additional claim. If an action

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<sup>77</sup> During this six month period, the personal representative cannot be required to pay any claims. O.C.G.A. § 53-7-42. *See* Ga. R. & Regs. § 111-3-8-.05(2), providing that no action to recover shall be commenced until six months from the date the personal representative qualifies to serve.

<sup>78</sup> Published notices do not bar claims of known creditors. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983). Since the law requires such notice, Section 111-3-8-.05(6) of the regulations is simply a restatement.

<sup>79</sup> Payment to heirs without first having paid the debts is illegal and contrary to the oath of office. *McIntosh v. Hambleton*, 35 Ga. 94 (1866).

was brought against the personal representative, he could assert defenses including, proper administration or payment of debts with higher priority. O.C.G.A. § 53-7-10. If a defense is unsuccessful, then the personal representative may be liable for both debt and costs. O.C.G.A. § 53-7-21; *see also* O.C.G.A. § 53-7-76.<sup>80</sup>

Any person who acts without legal authority or who wrongfully intermeddles with or converts the personalty of an unrepresented estate is an executor de son tort and is liable to creditors and heirs for double the value of property possessed or converted. O.C.G.A. § 53-6-2.

Unless relieved by will or by court order, the personal representative shall prepare an inventory of all property of the decedent. O.C.G.A. § 53-7-30. When required, failure to return a correct inventory is grounds for removal. O.C.G.A. § 53-7-34.

The personal representative, or any interested party may petition for a settlement of accounts six months after the granting of letters. O.C.G.A. § 53-7-62. The settlement shall be conclusive on the personal representative, all beneficiaries and all creditors if properly cited to appear. *Id.* The probate court may hear evidence on any contested question and make a final settlement when proof of citation has been presented. O.C.G.A. § 53-7-63.

A personal representative who has fully performed his duties is entitled to discharge. O.C.G.A. § 53-7-50. A hearing is held if any interested party objects to the discharge. *Id.* A personal representative who breaches his duties is liable to beneficiaries. O.C.G.A. § 53-7-54.

### ***Year's Support***

Year's support, payable to a surviving spouse or minor child, is a priority claim. In fact, it takes precedence over most tax liens on realty. O.C.G.A. § 53-3-4. When a petition for year's support is filed, notice must be given to all interested persons, including creditors. O.C.G.A. § 53-3-6. If no objection is filed, the probate court is directed to set aside the property applied for in the petition. O.C.G.A. § 53-3-7. However, if an objection is filed, then the court determines by hearing the property to be set aside. *Id.* Criteria to be considered in the hearing are at O.C.G.A. § 53-3-7(c). After property is set aside, it is free of all restrictions as to use, encumbrance or disposition. O.C.G.A. § 53-3-9(b).

The right to year's support overrides the testator's instructions. *Evans v. Evans*, 236 Ga. App. 896 (1999). A claim for year's support is not barred by a prior assent to distribution by an administrator. *Anderson v. Groover*, 242 Ga. 50 (1978).

In most cases where a spouse survives a Medicaid recipient, it would be prudent to file a claim for year's support.

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<sup>80</sup> One defense that could be asserted is failure of the Department to give the notice to heirs required under federal law. It is unclear whether this would operate as a complete defense, or whether it could be cured by giving late notice with additional time to file a request for a hardship waiver.

## ***Creditors; Priority of Claims***

### **Claims**

The regulations indicate that “acceptance of public medical assistance ... shall create a debt to the agency in the amount recoverable under the State Plan.” Ga. R. & Regs. § 111-3-8-.04(4). Debts, including year’s support, are paid first from the residuary estate. O.C.G.A. § 53-4-63. Thereafter, general gifts abate pro rate, followed by demonstrative gifts, followed by specific gifts. *Id.*; see O.C.G.A. § 53-4-59 (defining types of gifts). When an estate is insolvent, claims are paid in order of priority.

Unless otherwise provided by law, O.C.G.A. § 53-7-40 provides that: all property of the estate, both real and personal, shall be liable for payment of claims against the estate in the following order:

1. Year’s support for the family;
2. Funeral expenses, whether or not the decedent leaves a surviving spouse, in an amount which corresponds with the circumstances of the decedent in life. If the estate is insolvent, the personal representative is authorized to provide a suitable protection for the grave;<sup>81</sup>
3. Other necessary expenses of administration;<sup>82</sup>
4. Reasonable expenses of the decedent’s last illness;
5. Unpaid taxes or other debts due the state or the United States;
6. Judgments, secured interests, and other liens created during the lifetime of the decedent, to be paid according to their priority of lien. Secured interests and other liens on specific property shall be preferred only to the extent of such property; and
7. All other claims.<sup>83</sup>

The estate recovery regulations generally follow the claims priority outlined in the Probate Code. See Section 111-3-8-.05(3).<sup>84</sup> They purport to limit payment of funeral expenses without stating any authority for so doing. They indicate that an estate recovery claim is “a debt due the State,” which is a fifth priority claim.

Section 111-3-8-.05(5) indicates that a claim is not barred for lack of timely presentation if it is presented in the probate proceeding within the time specified in the published notice to creditors. This begs the question regarding whether a claim presented beyond

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<sup>81</sup> Funeral and burial expenses are debts of the estate. *Hosley v. Davidson*, 211 Ga. App. 529 (1993).

<sup>82</sup> Fees paid to the personal representative rank third, only behind year’s support and funeral expense. *Sams v. Leskanic*, 220 Ga. App. 202 (1996). Attorney’s fees are “indisputably” an expense of administration and take priority even over tax liens when the death of a landowner intervenes. *State Revenue Commission v. Fleming*, 172 Ga. App. 887 (1984), citing *Herrington v. Tolbert*, 110 Ga. 528 (1900).

<sup>83</sup> One issue that could arise is an elder’s agreement to pay for care from his or her estate. Although such an agreement is supported by adequate consideration, *Avary v. Avary*, 202 Ga. 22 (1947), unless the contract clearly provides that it is a priority four claim for the elder’s “last illness,” then the claim would be a priority seven “other” claim. Similarly, a breached contract to make a Will would likely be a priority seven claim if allowed (contracts to make a Will must be in writing; O.C.G.A. § 53-4-30).

<sup>84</sup> If a claim is not allowed under the applicable probate procedure, then it is disallowed. See *Tvrz v. Tvrz* (*In re Estate of Tvrz*), 260 Neb. 991 (2001) (disallowing an estate recovery claim as untimely).

the time specified in the published notice might be barred. The question is unresolved at this time.

An executor has no power to assign property of the estate to a lower claim in derogation or claims of higher priority. O.C.G.A. § 53-7-40; *In re Estate of Sims*, 259 Ga. App. 786 (2003).

### **What is a property interest?**

Since the estate recovery regulations purport to reach all property interests, this section of the memorandum addresses the nature of various property interests. O.C.G.A. § 44-1-1 defines “property” as: (a) Realty and personalty which is actually owned; (b) The right of ownership of realty or personalty; or (c) That with is subject to being owned or enjoyed. The extent of a person’s interest in property is an estate. An “estate” is the quantity of interest which an owner has in real or personal property. Any estate which can be created in realty may be created in personalty. O.C.G.A. § 44-1-4. The term “title” signifies the means whereby a person’s right to property is established. O.C.G.A. § 44-1-5.

### **Realty**

Estates in property are subject to division. One person may have the right of possession of certain property and another person may have the right to the property itself. A union of those rights constitutes a perfect title. O.C.G.A. § 44-1-12.

### ***Life Estates and Remainders***

The assent of an executor to a legacy to a life tenant inures to the benefit of the remainderman. At the termination of the life estate, the remainderman may take possession immediately unless the will provides for a sale or other act to be done for the purpose of or prior to a division, in which case the executor may recover possession for the purpose of executing the will. O.C.G.A. § 44-6-67.

Georgia property law defines a life estate as an estate “which may extend during the life of a person but which must terminate at his death are deemed life estates during their existence. Estates during widowhood are life estates.” O.C.G.A. § 44-6-80. *See Pendar*, § 7-15 (“A life estate is one terminating upon the death of the tenant or some other person”). No interest in the life estate passes to the personal representative, the heirs or devisees. *Pendar*, § 7-49.

An estate for life may either be for the life of the tenant or for the life of some other person or persons. O.C.G.A. § 44-6-81. An estate for life may be created by deed or will, by express agreement of the parties or by operation of law. A life estate cannot be created in property which will be destroyed on being used. O.C.G.A. § 44-6-82.

The tenant for life shall be entitled to the full use and enjoyment of the property if in such use he exercises the ordinary care of a prudent man for its preservation and protection and commits no acts which would permanently injure the remainder or reversion interest. For the want of such care or the willful commission of such acts, the

tenant for life shall forfeit his interest to the remainderman if the remainderman elects to claim immediate possession. O.C.G.A. § 44-6-83.

No forfeiture shall result when a tenant for life purports to sell the entire estate in lands. In such a case, the purchaser shall acquire only the interest of the life tenant. O.C.G.A. § 44-6-87.

An estate in remainder is one limited to be enjoyed after another estate is terminated or at a time specified in the future. O.C.G.A. § 44-6-60(a). Remainders are either vested or contingent. A vested remainder is a remainder which is limited to a certain person at a certain time or which is dependent upon the happening of a necessary event. O.C.G.A. § 44-6-61. A contingent remainder is a remainder which is limited to an uncertain person or which is dependent upon an event which may or may not happen. O.C.G.A. § 44-6-61.

The law favors the vesting of remainders in all cases of doubt. In construing wills, words of survivorship shall refer to those survivors living at the time of the death of the testator in order to vest remainders unless a manifest intention to the contrary shall appear. O.C.G.A. § 44-6-66.

An estate in reversion is the residue of an estate, usually the fee left in the grantor and his heirs after termination of a particular estate which he has granted out of it. O.C.G.A. § 44-6-60(b). The rights of the reversioner are the same as those of a vested remainderman in fee. O.C.G.A. § 44-6-60(c).

### ***Joint Tenants***

Unless otherwise specifically provided by statute and unless the document or instrument provides otherwise, a tenancy in common is created wherever from any cause two or more persons are entitled to the simultaneous possession of any property. Tenants in common may have unequal shares, but they will be held to be equal unless the contrary appears. The fact of inequality shall not give the person holding the greater interest any privileges as to possession which are superior to those of the person owning a lesser interest so long as the tenancy continues. O.C.G.A. § 44-6-120.

A tenant in common shall be liable to account to his cotenant if he: (i) Receives any rent or other profit from the joint property; (ii) Commits any waste; (iii) Deprives his cotenant of the use of his fair proportion of the joint property; (iv) Appropriates the joint property to his exclusive use; or (v) Uses the joint property in a manner which must necessarily be exclusive. O.C.G.A. § 44-6-121.

### ***Joint Tenants; Survivorship***

Deeds and other instruments of title, including any instrument in which one person conveys to himself and one or more other persons, any instrument in which two or more persons convey to themselves or to themselves and another or others, and wills, taking effect after January 1, 1977, may create a joint interest with survivorship in two or more persons. Any instrument of title in favor of two or more persons shall be construed to create interests in common without survivorship between or among the owners unless

the instrument expressly refers to the takers as "joint tenants," "joint tenants and not as tenants in common," or "joint tenants with survivorship" or as taking "jointly with survivorship." Any instrument using one of the forms of expression referred to in the preceding sentence or language essentially the same as one of these forms of expression shall create a joint tenancy estate or interest that may be severed as to the interest of any owner by the recording of an instrument which results in his lifetime transfer of all or a part of his interest; provided, however, that, if all persons owning joint tenant interests in a property join in the same recorded lifetime transfer, no severance shall occur. O.C.G.A. § 44-6-190.

A joint tenancy must embrace the four unities of time, title, interest and possession. See *Spurlock v. Commercial Banking Co.*, 138 Ga. App. 892 (1976), citing 4A *Powell on Real Property* § 616 (1975).

Prior to 1976, a joint tenancy was treated as if each owner held a life estate and each of them had a contingent remainder interest in fee simple. This analysis effectively prevented severance of the estate by deed. See *Williams v. Studstill*, 251 Ga. 466 (1983). See also W. Agnor, *Joint Tenancy in Georgia*, 3 Ga. St. Bar. J. 29 (1966).

### Securities

Whenever certificates for shares or other securities issued by domestic or foreign corporations are or have been issued or transferred to two or more persons in joint tenancy on the books or records of the corporation, it is presumed in favor of the corporation, its registrar, and its transfer agent that the shares or other securities are owned by such persons in joint tenancy with right of survivorship and not otherwise. A domestic or foreign corporation or its registrar or transfer agent is not liable for transferring or causing to be transferred on the books of the corporation to the surviving joint tenants where a joint tenant dies a resident of this state any share or shares or other securities theretofore issued by the corporation to two or more persons in joint tenancy with right of survivorship on the books or records of the corporation, whether or not the transfer was made by the corporation or its registrar or transfer agent with actual or constructive knowledge of the existence of any understanding, agreement, condition, or evidence that the shares or securities were held other than in joint tenancy or with actual or constructive knowledge of the invalidity of the joint tenancy or of a breach of trust by the joint tenants. O.C.G.A. § 14-5-8.

Securities held jointly in beneficiary form are held as joint tenants with right of survivorship. O.C.G.A. § 53-5-62. A security is in beneficiary form when it includes a designation of beneficiary to take ownership at the death of the owner. O.C.G.A. § 53-2-64. "Registration in beneficiary form may be shown by the words "transfer on death" or the abbreviation "TOD," or by the words "pay on death" or the abbreviation "POD," after the name of the registered owner and before the name of a beneficiary." O.C.G.A. § 53-5-65. However, such registration has no effect on ownership and may be cancelled until the owner's death. O.C.G.A. § 53-5-66. Upon death of the owner, ownership passes to the beneficiary. O.C.G.A. § 53-5-67. If a security is reregistered in the name of a beneficiary, the registering entity is discharged from all claims to a security by the

estate, creditors, heirs, or devisees. O.C.G.A. § 53-5-68. However, transfer does not limit the rights of creditors of security owners. O.C.G.A. § 53-2-69.

### **Accounts**

A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent. O.C.G.A. § 7-1-812(a).

Unless a contrary intent is manifested by the terms of the account or the deposit agreement or there is other clear and convincing evidence of an irrevocable trust, a trust account belongs beneficially to the trustee during his lifetime; and, if two or more parties are named as trustee on the account, during their lifetimes the account belongs to them in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent. If there is an irrevocable trust, the account belongs beneficially to the beneficiary. O.C.G.A. § 7-1-812(c).

Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent, unless there is clear and convincing evidence of a different intention at the time the account is created. If there are two or more surviving parties, the respective ownership of each during his lifetime shall be in proportion to his previous ownership interests under Code Section 7-1-812, augmented by an equal share for each survivor of any interest the decedent may have owned in the account immediately before his death; and the right of survivorship continues between the surviving parties. O.C.G.A. § 7-1-813(a).

If the account is a P.O.D. account, on death of the original payee or of the survivor of two or more original payees, any sums remaining on deposit belong to the P.O.D. payee or to the P.O.D. payees in equal portions if surviving or to the survivor of them if one or more die before the original payee; if two or more P.O.D. payees survive, there is no right of survivorship in event of death of a P.O.D. payee thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them. O.C.G.A. § 7-1-813.

If the account is a trust account, on the death of the trustee or the survivor of two or more trustees, any sums remaining on deposit belong to such person or persons named as beneficiaries who survive the death of the trustee or the survivor of two or more trustees, unless there is clear and convincing evidence of a contrary intent. If two or more beneficiaries survive: (1) They receive equal portions of the sums contained in the trust account; and (2) There is no right of survivorship in event of death of any beneficiary thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them. In other cases, the death of any party to a multiple-party account has no effect on beneficial ownership of the account other than to transfer the rights of the decedent as part of his estate. A right of survivorship arising from the express terms of the account or under this Code section, a beneficiary designation in a trust account, or a P.O.D. payee designation cannot be changed by will. O.C.G.A. § 7-1-813(c).

## Tax Refunds

Tax refunds and over-payments of \$2,500 or less are paid directly to a surviving spouse and are her sole and separate property. O.C.G.A. § 53-1-6(a). Such payments are not subject to creditor claims. O.C.G.A. § 53-1-6(b).

## Trust Assets

Trust assets are not part of a decedent's estate. *Napier v. Mitchell*, 183 Ga. 93 (1936). Nonetheless, the Georgia estate recovery regulations make a direct attack on trusts by providing that any trust that denies recovery for medical assistance is void on and after the time of its making. Section 111-3-8-.04(7). Subsection (7) appears to have no statutory basis and appears to be inconsistent with the Department's contention that it can pursue recovery against non-probate assets; if the Department's claim against non-probate assets is effective, then subsection (7) is moot. To date, Department's authority to modify trust law and probate law in this fashion has not been challenged.

## Property subject to claims

Only property "of the estate" is subject to claims against the estate. *Auto Alignment Servs. v. Bray*, 214 Ga. App. 53 (1994); *LaFavor v. LaFavor*, *supra*. If property is not part of the estate, a judgment does not attach to the property and is void. *Johnson v. Blackshear*, 196 Ga. 652 (1943); *Odom v. Hoppendeitzel*, 153 Ga. 20 (1922).

Only those property interests owned by the decedent that survive death constitute property of the estate. A person cannot convey an interest in property he does not own.<sup>85</sup> For example, in *Holt v. Laurens*, 193 Ga. 136 (1941), the court held that a sale pursuant to levy of a judgment "divests what title the deceased had, and accordingly the administrator can not recover it from the purchaser as belonging to the estate for purposes of administration." Although a creditor could open an estate and claims funds in the hand of the sheriff arising from the sale, he cannot recover the property. *Id.* In *Brown v. Granite Holding Corp.*, 221 Ga. 560 (1965), the court found that property which is not included in a deceased spouse's estate cannot be set apart for year's support. Property that is not vested in a decedent at the time of death is not subject to such claims. *Kenner v. Kenner*, 214 Ga. 381 (1958).

In *Biggers v. Crook*, 283 Ga. 50 (2008), Biggers and Crook, brother and sister, inherited property as joint tenants with rights of survivorship. Biggers borrowed money against his interest, which was secured by a deed to secure debt. Upon Biggers' death, Crook filed a declaratory judgment action seeking a declaration that she was the sole owner and that other claimants had no interest in the property by inheritance or by virtue of the debt. The trial court granted Crook's motion for summary judgment, which required the Court "to consider as a matter of first impression the effect one tenant's execution of

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<sup>85</sup> "It is elementary that land not owned by the grantor cannot pass by his deed. Pendar, § 19-20. In *W.T. Harber & Bro. v. Nash*, 126 Ga. 777 (1906), the court held that only an interest that a defendant could sell is leviable. There, the defendant owned a defeasible life estate which terminated if she left the land during her lifetime. The court found that an estate which would terminate by the very act of depriving a debtor of his enjoyment thereof is too intangible and fleeting to be subject to levy. See also *Ray v. Ashburn Bank*, 212 Ga. 37 (1955), finding that an estate at-will is not leviable.

a deed to secure debt has on a joint tenancy with right of survivorship.” The opposing claimants argued that the deed to secure debt severed the joint tenancy. The court found otherwise. A deed to secure debt is not a transfer as would sever the joint tenancy and relates on to the indebtedness. “That being so, the effect of William Biggers's death was that Crook, as the surviving joint tenant, became the sole owner of the property and the property did not become part of William Biggers's estate.”

In *Harbin v. Harbin*, 261 Ga. App. 244 (2003), property was held in joint tenancy with right of survivorship. A Will purported to convey the decedent's interest to his children and they sued to reform the deed. The court found that, upon the decedent's death, the surviving joint tenant became the sole owner of all of the property and “none of the property became a part of Mr. Harbin's estate.” The will could not sever the joint tenancy since such estates must be severed during lifetime and a will is not effective until a testator's death. “It follows that, when Mr. Harbin died, title to all of the property vested at his death in Ms. Harbin as the surviving joint tenant, and the attempted devise of this property in Mr. Harbin's will was adeemed or destroyed because Mr. Harbin did not own the property at his death.” *See also Barnes v. Mance*, 246 Ga. 314 (1980) (Land passing under deed with right of survivorship “was not part of Mance's estate”); *Wilson v. Brown*, 221 Ga. 273 (1965) (“Since the account which Johnson Brown and/or Artelia Brown had with the association was one of joint tenancy with the right of survivorship, it necessarily follows that no interest in the account passed to the estate of Johnson Brown upon his death.”).

In *Commercial Banking Company v. Spurlock*, 238 Ga. 123 (1977), a husband and wife held a certificate of deposit jointly with right of survivorship. The husband owed the bank funds and died without repaying the loan. He had executed a promissory note securing his debt against, among other collateral, “deposits, accounts, items and monies of the undersigned now or hereafter with the holder.” Following his death, the wife presented the matured CD for payment. The bank set off the husband's debt and paid her the difference. Mrs. Spurlock argued the bank had no right to set off. The Supreme Court agreed. “Mrs. Spurlock, as the surviving joint tenant owned the entire account upon the death of her husband, the other joint tenant. ... Furthermore, ownership vested immediately upon the death of the joint tenant.” Thus, the right of survivorship was not defeated by the husband's individual encumbrance of the account and the husband's debt could not be set off because the CD vested in the wife upon the husband's death. *See also Sams v. First National Bank*, 119 Ga. App. 96 (1969) (executor could not recover savings account held jointly with survivorship because account immediately vested in survivor); *Sams v. McDonald*, 223 Ga. 53 (1967) (executor's motion to intervene, claiming ownership of an account held with right of survivorship was denied).

In *Dixon v. Evans*, 222 Ga. 133 (1966), the court held that the sale of a life estate under levy for taxes passes only the life estate. *See also Townsend v. McIntosh*, 205 Ga. 643 (1949) (upon trial of a contest between remaindermen and purchaser, at the facts demanded a verdict in favor of the remaindermen). Similarly, a vested remainder interest may be subject to levy without termination of the life estate. *Thornton v. Hardin*, 205 Ga. 215 (1949); *Pound v. Faulkner*, 193 Ga. 413 (1942).

In *Dean v. Andrews*, 236 Ga. 643 (1976) the court held that a security deed is an absolute deed passing legal title of said property to the grantee-creditor thus leaving no leviabale interest in the property in the grantors. The defendant may not levy the property until title reverts to the grantor unless she first pays the outstanding balance owed the grantee-creditor.

Trust property does not become part of the personal estate of a decedent and cannot be subject to the claim of a widow for year's support. *Napier v. Mitchell*, 183 Ga. 93 (1936).

In addition to the foregoing, O.C.G.A. § 44-13-1 appears to exempt up to \$5,000 from levy and sale. The application for this exemption may be made by any dependent. O.C.G.A. § 44-13-2.

### ***Appeals***

Generally, the appeal of a final judgment from probate court is to the Superior Court. O.C.G.A. § 5-3-2(a); § 15-6-8(3). They must be filed within 30 days after entry of the order being appealed. O.C.G.A. § 5-3-20(a). Review is de novo. O.C.G.A. § 5-3-29. "The record which is transmitted to the superior court in connection with any de novo appeal from the probate court shall include certified copies of all documents which will be recorded in the official record books of the probate court. In addition, a certified copy of any alleged will which is denied probate will be transmitted even though it will not be recorded on the probate court records. No exhibits, transcript of hearing, depositions, interrogatories, notices to produce documents, or any other materials which reflect the evidence presented in the probate court shall be transmitted to the superior court in connection with a de novo appeal. Instead, any such materials in the possession of the court (other than documents required by law to be kept on file with the probate court) shall be returned to the attorney who presented them, if the probate court is requested to do so or does so on its own motion, and the attorney may then present them at the superior court hearing if he desires." Rule 9.3

If a Probate Court has expanded jurisdiction, then appeal is to the Supreme Court or the Court of Appeals. O.C.G.A. § 15-9-123(a). The general laws and rules relating to appellate practice for cases appealed from Superior Court apply to such courts. O.C.G.A. § 15-9-123(b).

An appeal which is not a final judgment, when either party lodges objections to any proceeding or decision affecting the real merits of the case, is by writ of certiorari. O.C.G.A. § 5-4-2.

### ***Collections***

Presumably, if a claim is successful, then the State acquires the rights of a judgment creditor and its claim may be levied on all of the estate of the defendant, both real and personal. O.C.G.A. § 9-13-10. As indicated above, it appears as though non-probate assets are exempt from levy since they are not part of the estate.

No execution is permitted prior to issuance of a judgment. O.C.G.A. § 9-13-1. Further, unless there is express statutory authority, the court may not dispense with a levy and simply grant a writ of possession. *Ponderosa Granite Co. v. First Nat'l Bank*, 173 Ga. App. 105 (1984). Once a judgment is entered, the Department has those remedies generally available to judgment creditors under O.C.G.A. § 9-11-69. Land may not be levied unless personal property is insufficient to pay the debt. O.C.G.A. § 9-13-53. A levy is against property in the defendant's possession. O.C.G.A. § 9-13-50(b). If another person makes a claim to the property or an affidavit of illegality is interposed, then the sheriff must return the execution and all other papers to the superior court. O.C.G.A. § 9-13-99. The right to the property where an execution is returned is decided by a jury. O.C.G.A. § 9-13-100. Where property is not in the possession of the defendant, the burden of proof is on the plaintiff in execution. O.C.G.A. § 9-13-102.

The State has indicated that it would impose liens in certain circumstances where recovery is deferred. O.C.G.A. § 49-4-147.1 authorizes "claims," not "liens." Because there is a difference between a statutory liability and the remedies available to enforce that liability, the basis for the Department's threatened liens appears to be dubious.<sup>86</sup> The meanings of the terms "claims" and "liens" are not interchangeable and imply different creditor remedies.<sup>87</sup>

There are instances when liens are authorized. For example, the Department has express authority to impose a lien when benefits are procured through fraud. O.C.G.A. § 49-4-146.3. The Department has a subrogation right when any Medicaid recipient is injured by a third-party, O.C.G.A. § 49-4-148, as well as a lien. O.C.G.A. 49-4-149. In such cases, the Department perfects its lien by following the procedures for perfecting hospital liens, in O.C.G.A. § 44-14-470 through 44-14-473.<sup>88</sup> There does not, however, appear to be any express authority for imposition of liens in the estate recovery context. To the extent that a lien must be filed, it takes effect only from the time it is filed for record with the Clerk of Superior Court. O.C.G.A. § 44-2-2. Any lien imposed while specified persons are living would also be subject to the limitations described in *Ullmer, supra*.

Although in certain circumstances federal law permits the use of TEFRA liens, 42 U.S.C. § 1396p(b)(1), to secure payment, there is no clear statutory authority for the use of TEFRA liens in Georgia. Further, TEFRA liens are not listed among those liens established in Georgia under the general lien statute. O.C.G.A. § 44-14-320.

Tax liens, which are governed by O.C.G.A. § 48-2-56, are priority liens; however, they do not have priority over other purchasers whose rights attached prior to the time the lien

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<sup>86</sup> "It is not the remedy that creates the debt, but the remedy is generally a method provided for collecting the debt." *Byars v. Griffin*, 168 Ga. 41 (1929). Further, although creditors may at times have multiple remedies, there are also instances where a debt exists, but the creditor lacks a remedy. See *Miller v. Branch Banking & Trust Co.*, 292 Ga. App. 189 (2008). Thus, there is no logical necessity that enactment of one remedy necessarily implies the existence of another.

<sup>87</sup> The remedy for enforcement of a debt may be statutory or may exist at common law. However, the remedy does not alter, change or affect the character of the liability. *Peavy v. Turner*, 107 Ga. 401 (1899).

<sup>88</sup> A hospital lien is perfected by filing it in the office of the Superior Court of the county where the service was provided and in the county where the patient resides. O.C.G.A. § 44-14-471(a)(2).

was filed in the Superior Court. O.C.G.A. § 48-2-56(c).<sup>89</sup> Accordingly, they might attach to the proceeds from a sale, but would not affect sales completed prior to notice of the lien. Since the Department contends its claim would have equal priority with tax claims, one might presume that any lien filed by the Department would be treated similarly.

## Specific Non-Probate Property Interests

Clients, obviously, have questions concerning specific property. They want to know whether specific interests in property and forms of ownership are subject to estate recovery. In this section we apply the rules described above in analyzing the State's potential claim against specific types of property. Because there is virtually no Georgia case law addressing expanded estate recovery, if it is permitted, our review covers cases from other jurisdictions.<sup>90</sup>

### *Retroactive Effect*

DCH may attempt to make claims against vested property interests. Prior to May 3, 2006, there was no Medicaid estate recovery program in Georgia. The Georgia Constitution provides that “**No bill of attainder, no ex post facto law, retroactive law, or laws impairing the obligation of contract or making irrevocable grant of special privileges or immunities shall be passed.**” Ga. Constitution, Article I, Section I, Paragraph X (emphasis added). This should mean that, to the extent that rights vested in property prior to May 3, 2006, those rights are protected. With respect to transactions occurring on or after May 3, 2006, additional analysis is required.

In *Estate of Wood v. Arkansas Department of Human Services*, 894 S.W.2d 573 (Ark. 1995), the Department attempted to apply estate recovery legislation retroactively to recover benefits paid. There, the Arkansas Act was effective August 15, 1993, and the recipient died on October 4, 1993. The State's claim was for benefits paid from December 1991, through October, 1993. The Court held that all legislation is presumed to apply prospectively. Retroactive effect cannot be implied, but must be clearly stated. The court found that applying the statute retroactively would change the nature of the recipient's property rights.<sup>91</sup>

### *Revocable Transfers*

Where a Medicaid applicant transfers property, but retains the power to revoke the transfer through the date of death, no real value has passed and the property remains in the decedent's estate. In *Bonta v. Burke*, 98 Cal. App. 4th 788, 793 (Cal. App. 3rd 2002),

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<sup>89</sup> The regulations indicate that even a property subject to a lien can be sold free of the lien; the lien shifts from the property to the proceeds at closing. See Ga. R. & Regs. § 111-3-8-.07(9).

<sup>90</sup> We caution that the legislature could change the law. As stated in *In re Sherwood's Estate*, 122 Wash. 648, 655 (1922), “The right of the owner of property to direct what disposition shall be made of it after his death is not a natural right which follows from mere ownership. On the contrary, the right has its sanction in the laws of the state... The state may, if it so chooses, take to itself the whole of such property, or it may take any part thereof less than the whole and direct the disposition of the remainder.”

<sup>91</sup> See also *Dep't of Social & Health Servs. v. Oliver (In re Estate of Burns)*, 131 Wn. 2d 104 (1997). However, in *Estate of Pierce v. State Dep't of Soc. Servs.*, 969 S.W.2d 814 (Mo. Ct. App. W.D. 1998), the court found that a law could be applied retroactively where substantive right were unchanged and only the Department's collection remedy was changed.

the court boiled the inquiry down to “what passed when?” The remaindermen of a Medicaid recipient’s life estate argued that decedent’s interest in property terminated at the moment of her death and, therefore, they took nothing by distribution or survival that was subject to California’s estate recovery statute. The court found otherwise, holding that because the decedent retained the unbridled power to divest her daughters of any interest whatsoever, the property had no real value to them prior to decedent’s death. Thus, because California had, by statute, adopted the more expansive definition of estate recovery, the property was subject to the Department’s claims. A similar result was reached in *Belsh v. Hope*, 33 Cal. App. 4<sup>th</sup> 161 (Cal. App. 5<sup>th</sup> 1995), where the State made a claim against a revocable trust.

### ***Joint Tenancy***

In an unpublished decision, the California Court of Appeals found that the decedent’s interest in a joint tenancy that passed by reason of death is part of the decedent’s estate for purposes of estate recovery. The court rejected the joint tenant’s argument that the law applies only to death bed transfers rather than cases where the interest was acquired through the provision of labor and materials. *Bonita v. Perez*, 2003 Cal. App. Unpub. LEXIS 11862 (Cal. App. 6<sup>th</sup> 2003). It should be noted that California has legislation enacting expanded estate recovery.

In *In re Estate of Serovy*, 711 N.W.2d 290 (Iowa 2006), the State asserted a claim against a joint tenancy interest. The Court found that Iowa’s estate recovery statute prevented the interest from passing by operation of law; instead, it was subject to probate. See Iowa Code, § 249A.5(2)(c) and (d). As such, the interest was subject to the State’s claim. It was, however, beyond the Court’s authority to order sale of the entire property since the decedent owned only a one-third interest and a personal representative is not empowered to exercise dominion over property that was never owned by the decedent. The Court rejected the joint tenant’s argument that the estate recovery legislation impaired their contract rights, noting that estate recovery simply made it impossible for the decedent to perform her contract obligation; the joint tenants would still have a right to sue her for breach of contract.

In *State v. Lasater (In re Estate of Lasater)*, 30 Kan. App.2d 1021, 54 P.3d 511 (2002), the court of appeals affirmed denial of the State’s claim against a joint tenancy. Ruth Lasater executed a deed conveying a 1% interest in her home to her son for \$600. Although she failed to use the “magic words” creating a joint tenancy, the habendum clause made it clear that it was her intent to create a joint tenancy with rights of survivorship. The Department argued that she conveyed only a tenant in common interest, making her home subject to probate and subject to its claim. The State argued that the arrangement lacked the “four unities” - (1) unity of interest, (2) unity of title, (3) unity of time, and (4) unity of possession. An interest or estate must be acquired by all cotenants, by the same conveyance, commencing at the same time, and held for the same term of undivided possession. The court found the deed did not fail to satisfy this requirement because unity in equality of possession is not one of the four unities. Instead, the unity of possession, or unity of interest, refers to all tenant having interests of the same duration; one cannot be a joint tenant for life and have another joint tenant for years. (*Citing 2 Tiffany Real Prop.* § 418 (3d ed. 2001)). Further there was unity of

possession because all joint tenants share an undivided interest in the whole. “There is no prohibition, however, against one cotenant having an undivided 99% interest and the other having an undivided 1% interest in the land.”

### ***Beneficiary Deeds***

In *State Dep't of Soc. Servs., MO HealthNet Div. v. Knight (In re Estate of Jones)*, 280 S.W.3d 647 (Mo. App. W.D. 2009), the court allowed a claim against decedent's children who received realty under a beneficiary deed. The case was initiated when the State requested that an estate be opened for the purpose of filing its \$17,056.75 claim. The probate court denied that request after finding there were no assets subject to administration. The State then filed a writ of mandamus with the court of appeals, which ruled that an estate must be opened before a ruling could be made regarding whether assets were subject to administration. Letters were then issued, after which, the State demanded an accounting seeking \$22,226.24. The property potentially subject to the State's claim was realty that passed under a beneficiary deed; its value was stipulated at \$24,000.

The probate court allowed the State's claim and the beneficiaries under the deed appealed. On appeal they argued that Missouri had not expanded its definition of “estate” under the probate code and, therefore, the State could not pursue nonprobate assets. The court rejected appellant's arguments, finding that the State is a creditor of a Medicaid recipient's estate and that Section 461.300, R.S. Mo., which is part of the probate code, provides that a creditor can recover against a nonprobate transfer such as a beneficiary deed.

### ***Life Estates***

As noted above, Georgia law provides that a life estate terminates at death and a creditor seizing the life estate seizes only what the life tenant possessed. Thus, subjecting life estates to estate recovery would either require legislative change, or would require that the courts ignore Georgia property law.

Where property law is abandoned or ignored, confusion arises. Recently a writer described this confusion as the creating “zombie” life estates.

Because of the widespread confusion about basic concepts of property law, many states with increasing (and disturbing) frequency, now treat life tenants as though they continue to have some interest in the land after their death. These states are acting as if a life tenancy, which we know ends at the death of the life tenant, continues to have some existence - like a zombie, still alive after death, haunting the frightened fee owner.

The problem arises when a life tenant receives state aid, such as Medicaid, beginning after the life tenant has become the owner of a life estate. Many states do not require the life tenant to sell his interest in the life estate property, unlike land to which he holds the fee simple title. It is more expedient to allow him to remain in his property while receiving the aid, and would be wasteful to require him to sell the property since he would not likely receive full value. But the state expects to be repaid for the aid after the recipient dies; so the state attaches a lien on the property and asks for a portion of the value of the property from the remainderman after the life tenant's death.

In doing this, the state is clearly acting as though some interest of the life tenant, to which the Medicaid lien attached, is transferred to the remainderman at the life tenant's death. Since we know this is not the case, we need to sort out what is really going on here. Since the remainderman did not receive anything from the state, owned his interest in the property before the life tenant began to receive aid, and has no control over the life tenant, the existence of this lien attached to the remainderman's title is clearly unfair and absurd. No other creditor of a life tenant has a claim against the remainderman's interest.<sup>92</sup>

An example of how the result differs when legislative change occurs is found in *In re Estate of Laughead*, 696 N.W.2d 312 (Iowa 2005). There, an estate recovery claim was filed against a life estate retained by the Medicaid recipient (Ruby Laughead) in a 338 acre farm. The trial court held that, under Iowa law, the life estate is a probate asset and allowed the claim.<sup>93</sup> On appeal, the judgment was affirmed. The court found that Iowa's estate recovery legislation subjects "retained life estates" to probate where they are subject to the State's claim. The Court did not address whether the result would be different if the remainderman had held a fee simple interest and then had conveyed a life estate to Ruby Laughead. The Court rejected constitutional arguments, finding that the remainder interest was not impaired since the State made no claim against the remainder interest.

In *State v. Willingham*, 206 Ore. App. 156 (2006), the State made a claim against a life estate arguing that Oregon had "abrogated the common law rule that a life estate is extinguished at the moment of death for purposes of recovering medical assistance payments from the estate of a recipient." The court found that the legislature changed the law in 1995 so that the "estate" subject to recovery includes life estates. This legislative change modified the common law rule that a life estate interest is extinguished upon the death of a Medicaid recipient.

### *Spouse's estate*

One of the most hotly contested issues in recent years is whether the State can collect its estate recovery claim from the estate of the Community Spouse if the estate of the Institutionalized Spouse is insufficient to pay its claim. The decisions thus far are mixed and appear to turn primarily on State law.<sup>94</sup> The issue, in most cases, is whether the Institutionalized Spouse held a property interest in the Community Spouse's estate at the time of death. Here, before examining the law in other jurisdictions, it should be noted that nothing in the Georgia statute, manual or regulations expressly authorizes a claim against the estate of a Community Spouse.

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<sup>92</sup> K. Salzberg, *Zombie Life Estates, Ghost Value Transfers, and Phantom Takings: Confusion of Title and Value in Property Law Legislation*, 22 Quinn. Prob. Law Jour. 363, 378-381 (2009).

<sup>93</sup> In valuing the Department's claim, the parties stipulated that the tax tables, under federal and Iowa law, should be used.

<sup>94</sup> The author of an HHS policy brief indicates that States could reach a spouse's estate, noting that many do not do so. See U.S. Dep't HHS, *Spouses of Medicaid Long-Term Care Recipients* (April 2005), at <http://aspe.hhs.gov/daltcp/reports/spouses.htm>. Whether this is the case, the author nonetheless indicates that States "may not interfere in any way with use or disposal or property, including the home, during the lifetime of the surviving spouse, who may freely spend it, sell it, or give it away without concern for a Medicaid claim."

Because support issues were raised in several estate recovery cases, we begin with a short review of Georgia law relating to spousal property and support. The law in the mid-1800's provided that a woman's civil existence was merged into the husband, except insofar as the law chooses to recognize her separately. See *Bradley v. Tenneco Oil Co.*, 146 Ga. App. 161 (1978), citing Ga. L. 1855-1856, p. 229. The *Married Women's Act of 1866* altered this rule, establishing a married woman's right to a separate estate. Georgia law now provides that the separate property of each spouse shall remain the separate property of that spouse. O.C.G.A. § 19-3-9. In domestic actions, separate property is distinguished from marital property, which is defined as "property acquired as a direct result of the labor and investments of the parties during the course of the marriage." *McArthur v. McArthur*, 256 Ga. 762 (1987). Separate property is not subject to equitable division, while marital property is. *Id.* "[P]roperty acquired during the marriage by either party by gift, inheritance, bequest or devise remains the separate property of the party that acquired it, and is not subject to equitable division. *Id.*

Under Georgia contract law, an individual is not liable for the debts of another unless the debt is assumed in writing. O.C.G.A. § 13-5-30(2). In *Walton Electric Membership Corporation v. Snyder*, 226 Ga. App. 673 (1997), in 1992, Deborah Patton signed a contract with the EMC. In 1993, Howard Snyder signed a separate contract with a separate account number. One month later, Deborah moved into an apartment with Howard; when she did so she left an outstanding balance of \$301.28 due to the EMC. Patton and Snyder were married in 1994. When the EMC became aware of Patton's outstanding balance due and that she was married to Snyder, it transferred her outstanding balance to his account. Snyder refused to pay the bill. A dispute arose and the EMC disconnected his power; after spending a night in a motel, Snyder paid the bill under protest.

Snyder then filed suit, claiming an unjustified, wrongful termination of electrical services and seeking actual, as well as punitive, damages. On cross motions for summary judgment, the court granted Snyder's motion for summary judgment on tort liability and denied the EMC's motion for summary judgment on the punitive damages claim. In affirming the trial court, the court of appeals stated: "the trial court correctly determined that appellee Snyder is not liable for the individual debt of another without assuming such debt in writing. O.C.G.A. § 13-5-30 (2). This result does not change because the individual debt was accrued by a spouse."

The separate debts of each spouse remain separate. In *Vereen v. Vereen*, 284 Ga. 755 (2008), a husband argued that a trial court erred in ordering him to pay a \$27,000 tax debt due the IRS. The judgment was affirmed because the trial court considered evidence that the husband and wife filed separate tax returns and that the husband incurred the debt on his own. See also *Tucker v. Bank of Alapaha*, 231 Ga. 202 (1973) (If with the knowledge of the payee, the entire consideration is to go only to the husband, and passes only to him, the husband is the real primary debtor and the wife being in the position of a surety is not liable for any part of the joint note); *Shivers v. Hunnicutt*, 220 Ga. 620 (1965) ("Where land is purchased by a wife and paid for with her money, in equity it is her property though deeded by the seller to her husband. Such property, as against a claim by her, cannot lawfully be subjected to a judgment against

her husband where at the time of the creation of the debt on which the judgment is founded, credit was not given to the husband on the faith of his apparent ownership of such property”). It is, however, clear that spouse may become liable for her spouse’s debts by agreement. *Citizens & Southern Nat’l Bank v. Mann*, 234 Ga. 884 (1975).

At common law, there was a duty of support between spouses. In *Davenport v. Davenport*, 215 Ga. 496 (1959), the Court stated: “Marriage imposes upon a husband the legal obligation to provide means for the maintenance of his wife; and, if she be separated from him by reason of his misconduct, this creates a responsibility on the part of the husband to provide maintenance and support of the wife in keeping with his ability and suitable to her condition and habits of life while living with him, which is a lawful demand, and which when legally enforced is called alimony. ... When a married woman has a husband who is financially able to support her, he is primarily liable for her support.” See also *Nabors v. Blanche Reeves Interiors, Inc.*, 139 Ga. App 638 (1976).<sup>95</sup> However, this broad obligation of support was premised on former Ga. Code Ann. § 53-510, which essentially disenfranchised women so that a wife could not even recover for her own medical expenses when injured; since her husband was obligated for her support, the right of recovery was his. Section 53-510 was repealed by Ga. L. 1979, pp. 466, 491-492.

There is no tenancy by curtesy in Georgia. O.C.G.A. § 53-1-2. Curtesy is a life interest which a husband has in certain property owned by his wife. Curtesy required a legal marriage, an estate in possession seised in the wife, and issue born alive during the mother’s lifetime. At this time, Georgia law goes so far as to allow one spouse to disinherit the other, subject to the right of year’s support.

With the foregoing in mind, it is improbable that Georgia law would support a finding that the marital estate is unified and that an Institutionalized Spouse owns an interest in his Community Spouse’s estate. If that were the case, then Georgia law would not permit a testator to disinherit his spouse, which is allowed. O.C.G.A. § 53-4-1. The only claim available to a disinherited surviving spouse is for year’s support. O.C.G.A. § 53-3-1(c); O.C.G.A. § 53-3-5.<sup>96</sup> This implies that a spouse has no vested interest in a decedent’s estate.

Against this backdrop, we begin looking at estate recovery claims against the estate of a surviving spouse. In *Idaho Dep’t of Health & Welfare v. Jackman (In re Knudson)*, 1998 Ida. LEXIS 70 (June 16 1998), The Institutionalized Spouse conveyed her interest in property to the Community Spouse prior to death. When the Institutionalized Spouse died, her estate had nominal value and the Department accepted those funds as partial payment on its estate recovery claim. After the Community Spouse, the Department filed a claim in the Community Spouse’s estate for the remainder of its estate recovery claim. The court found that Idaho law expressly allowed recovery from the Community Spouse’s estate, see I.C. § 56-218(1), and that collection was not prohibited by federal law. *Knudson* ignores the plain text of Section 1396p(b), instead concluding that since

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<sup>95</sup> A related claim exists in favors of counties who support the indigent. O.C.G.A. § 36-12-3.

<sup>96</sup> A testator may may provision in lieu of year’s support and, if done, the surviving spouse may make an election. O.C.G.A. § 53-3-3.

marital assets are analyzed cumulatively during eligibility, that they are also analyzed cumulatively in estate recovery.

In *In re Estate of Jobe*, 590 N.W.2d 162 (Minn. App. 1999), the court permitted recovery from the estate of a surviving spouse. There, Minnesota law expressly permitted such recovery. The court found that OBRA “expressly grants states the “option” to define an individual’s estate to include “other” assets in which a decedent held “any legal title or interest at the time of death.” The Court concluded that Minnesota had adopted an expanded and broad definition of “estate” and, therefore, Minnesota law “allows medical assistance benefit reimbursement from the estate of a surviving spouse from “assets of the estate that were marital property or jointly-owned property at any time during the marriage.”<sup>97</sup>

In *Hines v. Dep’t of Pub. Aid*, 358 Ill. App. 225 (2005), the Illinois Court of Appeals came to a different conclusion. There, an Institutionalized Spouse conveyed property to his Community Spouse. The Community Spouse had not received any medical assistance; the claim was for medical assistance paid on behalf of her Institutionalized Spouse. The executor disputed the claim, arguing that Illinois law was preempted by Section 1396p(b). The trial court overruled the executor’s objection and held that the claim should be paid. On appeal, the Court of Appeals reversed the trial court. Although the Department argued that State law adopted an expanded version of estate recovery, the Court found that the legislature limited expanded estate recovery to instances where the deceased individual received benefits under a long-term care insurance policy. Since the Institutionalized Spouse had no long-term care insurance, “the Illinois statute would be limited to real and personal property included within his probate estate.” *Id.*, at 229-230. Since the Institutionalized Spouse had no probate estate, there could be no action against it.

The Department next argued that Illinois and federal law authorized an action against the estate of the Community Spouse. The Court of Appeals found that “[a] plain reading of [Section 1396p(b)] discloses a blanket prohibition against states’ recovery of medical assistance benefits, except in the three specified situations, and because that initial prohibition is not lifted by an express authorization to recover medical assistance benefits from the estate of a surviving spouse, Illinois law allowing just such a recovery exceeds the authority granted states under the federal law. *Id.*, at 231.<sup>98</sup> The court rejected the State’s argument that *North Dakota Department of Human Services v. Thompson*, 1998 ND 226, 586 N.W.2d 847 (N.D. 1998) should be followed. The court found that the analysis in *Thompson* was weak and that no definition of the Institutionalized Spouse’s estate “no matter how broad, can trump the statute’s absolute prohibition against recovery from any person not covered by an express exception. In

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<sup>97</sup> The *Jobe* court relied, in part, on *N.D. Dep’t of Human Servs. v. Thompson*, 1998 ND 226 (1998), which allowed the State to trace assets which were conveyed to the Community Spouse. The Ohio Court of Appeals relied on *Jobe* in *Ohio Dep’t of Job & Family Servs. v. Tultz*, 152 Ohio App. 3d 405 (2003). There, the court held that since recovery is permitted only after the death of a surviving spouse, it would not construe the law so that a surviving spouse’s death severs the Department’s access to recoverable funds.

<sup>98</sup> The Court noted the same result was reached in *In re Estate of Budney*, 197 Wis. 2d 948, 951 (Wis. App. 1995).

other words, which definition of "estate" is applicable is irrelevant if federal law does not permit states to seek recovery of medical assistance payments from the estate of the surviving spouse of a recipient." *Hines*, at 232.

The Illinois Department appealed the *Hines* decision to its Supreme Court. In *Hines v. Department of Pub. Aid*, 221 Ill. 2d 222 (2006), the Court affirmed the Court of Appeals under the following rationale. Initially, the Court found that Section 1396p(b) provides that "estate" shall include the probate estate under State law. At the State's option, the term "estate" may also include "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." *Id.*, at 229. Although the Department clearly had a right to seek reimbursement from the estate of the Institutionalized Spouse, that is not what it was attempting to do. Instead, it was seeking reimbursement from the Community Spouse. No provision is made in Section 1396p(b) for collection from the Community Spouse. Therefore, if State law was read to permit collection from the estate of a Community Spouse, it would exceed what is permitted under federal law.

The court went on to indicate that the State legislature could expand the definition of the Institutionalized Spouse's estate to provide that assets conveyed to a Community Spouse remain part of an Institutionalized Spouse's estate. For example, New Jersey Statute § 30:4D-7.2 defines a deceased Medicaid recipient's estate as including assets conveyed to a survivor. The Illinois legislature changed State law which expressly limited such an approach to situations where the Institutionalized Spouse had long-term care insurance. Thus, the probate definition applies. "Under Illinois probate law, property held in joint tenancy is never part of the estate of a joint owner who dies first." Because the assets vested in the Community Spouse at the time of the Institutionalized Spouse's death, the Department's claim for reimbursement was denied.<sup>99</sup>

In *In re Estate of Smith*, 2006 Tenn. App. LEXIS 715 (November 1, 2006), the Tennessee Court of Appeals took its analysis of this issue a step further. The facts of the case were stipulated and, therefore, the issue before the court was simply whether the State could pursue estate recovery from the Community Spouse for benefits paid on behalf of the Institutionalized Spouse. *Id.*, at \*2.<sup>100</sup> Initially, the Court held that Section 1396p(b) is a limited exception to the general rule that no recovery is allowed; and that the State's reimbursement claim is limited to the estate of the Medicaid recipient. The State then argued that under the expanded definition of "estate," assets conveyed to the Community Spouse are included in the Institutionalized Spouse's estate. The state

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<sup>99</sup> See also *In re Estate of Budney*, 541 N.W.2d 245 (Wis. App. 1995) (holding the OBRA does not permit claims against the surviving spouse's estate); *In re Estate of Craig*, 82 N.Y.2d 388 (1993) (same). A subsequent New York decision allowed spousal estate recovery on different grounds. New York approves a Medicaid application and then pursues a support claim against a spouse who refuses to spend-down to the spousal impoverishment limits. In such cases, the State may collect its support judgment from the estate of the Community Spouse. See *In re Estate of Klink*, 278 A.D.2d 883 (App. Div., 4<sup>th</sup> Dept. 2000).

<sup>100</sup> There were no facts in the *Smith* record showing that the Institutionalized Spouse owned any property at the time of her death, cash or otherwise. *Id.*, at \*5.

argued it could “follow” assets once held by the Institutionalized Spouse which were conveyed. The Court rejected that argument, finding that the expanded definition of an “estate” in Section 1396p(b) requires an ownership interest *at the time of death*. In order for the State to make a claim against an asset, the Medicaid recipient must have owned a “legal title or interest” in the asset at the time of death and, in *Smith*, the Institutionalized Spouse owned no such interest in the assets at the time of her death. The Court expressly rejected the argument that an equitable or marital interest was sufficient.

The analysis in *Smith* and *Hines* invites a closer look at Section 1396p(b)(4)(B), the expanded definition of “estate.” There, States have the option of defining “estate” to include:

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.

Read literally, Section 1396p(b)(4)(B) limits recovery to assets where the Medicaid recipient (1) owned a legal title or interest; (2) at the time of death; (3) to the extent of such interest. The examples used in the text of the statute indicate that it applies only to assets conveyed as a result of death; it does not apply to assets where legal title was conveyed prior to death.

In *In re Estate of Barg*, 752 N.W.2d 52 (Minn. 2008), *cert. denied* 2009 U.S. LEXIS 4876 (June 29, 2009),<sup>101</sup> the State filed a claim against the Community Spouse (Francis) to recovery medical assistance paid on behalf of his Institutionalized Spouse (Dolores). Prior to death, Dolores conveyed all of her interest in property to Francis. The trial court found that the estate recovery claim was allowed in part and disallowed in part as a result. The State appealed, contending it could recover its claim from Francis’ full estate.

At the time of Dolores’ death, assets belonging to either Dolores or Francis included three certificates of deposit, a checking account, and an IRA account, all in the name of Francis alone; one certificate of deposit payable to the funeral home for Dolores’ funeral; two vehicles, together worth approximately \$9,000; the homestead titled in Francis name, valued at \$120,800; and miscellaneous household goods and furniture. All assets had been jointly held at some time during the couple's 55-year marriage.

Francis died, never having received Medicaid benefits. After his death, the State filed a claim for Dolores’s care in the amount of \$108,413.53. The executor disallowed \$44,533.53 of the claim, and allowed \$63,880. The State appealed, contending it was entitled to its full claim.

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<sup>101</sup> The lower court opinion is *In re Estate of Barg*, 722 N.W.2d 492 (Minn. App. 2006).

In reviewing the State's claim, the Court noted Minnesota's long history of requiring Medicaid recipients to pay their share of the cost of care. Further, the State's estate recovery act expanded the definition of "estate" and provided for recovery from either the recipient's estate or from his spouse's estate. "The 2003 amendments to the Minnesota estate recovery law modify common law to provide for continuation of a recipient's life estate or joint tenancy interest in real property after his death for the purpose of recovering medical assistance, Minn. Stat. § 256B.15, subd. 1(a)(3) (2006), and include that continued interest in the recipient's estate. Minn. Stat. § 256B.15, subs. 1g, 1h(b), 1i(a), 1j. The 2003 amendments also establish specific procedures for exercising claims against these continued life estate and joint tenancy interests, as well as procedures and waiting periods that differ according to whether the recipient's spouse, dependent children, or other relatives living in the homestead survive the recipient." *Barg*, at 61-62.

Against this background, the question before the court was whether federal law authorized recovery of Medicaid benefits for a recipient spouse from the estate of a surviving spouse. Second, if recovery is permitted, does federal law limit the recovery to assets which the recipient spouse had an interest at the time of death. Third, if recovery is so limited, did Delores have assets in which she held an interest at the time of death; specifically, did she have a recoverable interest despite having conveyed her interest to her husband during her lifetime?

In light of the conflict among states regarding whether a claim can be made against the estate of a surviving spouse, the Court found the split in authority sufficient to conclude that federal law does not preclude all claims against the estate of a surviving spouse. However, the Court concluded that the allowable scope of spousal recovery is limited; there is no principled basis for reading Section 1396p(b) to subject assets transferred prior to death to estate recovery. "To be recoverable, the assets must have been subject to an interest of the Medicaid recipient at the time of her death."<sup>102</sup> Because the Court concluded that Delores had no interest in property at the time of her death, there was no basis for the estate recovery claim.<sup>103</sup>

In *Estate of Shuh*, 248 S.W.3d 82 (Mo. App. 2008), the Missouri Court of Appeals diverged from *Smith*, *Hines* and *Barg*. There, although holding that the State's claim failed, the court held that the State *could* recovery from a surviving spouse's estate *if* the State sufficiently expanded its definition of "estate" to include "assets contained in the surviving spouse's estate [which] were assets of the recipient individual's estate or jointly owned by the couple during their marriage. Therefore, we find the Medicaid Act allows a state to seek recovery from any remaining assets from the recipient individual's

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<sup>102</sup> This holding limits *In re Estate of Gullberg*, 652 N.W.2d 709 (Minn. App. 2002). There, the court held that estate recovery applies only to those assets in which the Medicaid recipient held an interest at the time of death. However, the *Gullberg* court also found that a marital interest was owned which allowed the tracing of marital assets held by a surviving spouse. The *Barg* court found that imputing a continuing joint tenancy by reason of marriage is at odds with the plain meaning of Section 1396p(b)(4)(B). The language of federal law makes it clear there is no recovery against interests that were previously conveyed.

<sup>103</sup> The Court nonetheless allowed recovery of the claim allowed by the personal representative since that issue was not appealed. Having partially allowed the claim below, and not having sought reversal, the estate was not permitted to seek relief on appeal.

estate through the estate of the recipient's surviving spouse where the more expansive definition of "estate" is used in the state's probate statutes."<sup>104</sup> Missouri, however, had not sufficiently expanded its estate recovery statute and a creditor's remedy available under Missouri probate law relating to "recoverable transfers" was not applicable.

In *Estate of Bruce*, 260 S.W.3d 398 (Mo. App. 2008), the State made a claim for \$150,528,63 in the estate of Orville Bruce for medical assistance paid on behalf of his wife, Minnie Bruce. Minnie died in 2002, and Orville died in 2005. Orville never received Medicaid benefits. Orville's estate consisted of a home and an automobile; he had owned the home with Minnie as tenants by the entirety.

The trial court granted the State's claim and the Bruce estate appealed. The estate argued that although Missouri law permits recovery against a spouse's estate, Section 1396p(b) does not and that federal law preempts State law. The court found that Section 1396p(b) "plainly restricts recovery of Medicaid benefits from a recipient's estate to three specific situations, and none authorizes a state to seek recovery from the recipient's spouse." Section 1396p(b) does, however, authorize the State to make a claim against all assets that are in the Medicaid recipient's estate as defined by State law. Under Missouri law, Minnie Bruce's estate did not include assets held as joint tenants by the entirety. That form of ownership "is based on a legal fiction that the husband and wife own the property jointly as a single person. [cit.] Together, each has an undivided interest. When one of the spouses dies, the surviving spouse becomes the property's sole owner by virtue of being owner of 100 percent of the property. Hence, property owned by Minnie and Orville Bruce as tenants by the entirety was not part of Minnie Bruce's probate estate and did not fit within the definition of estate." The State's claim that the property was a recoverable transfer under Section 461.300 R.S.Mo. also failed because property passing by the entireties is not a recoverable transfer.

### *Trusts*

In *Iowa Dep't of Human Servs. v. Eral (In re Estate of Gist)*, 763, N.W. 2d 561 (Iowa 2009), the Court examined whether a decedent's interest in a trust was recoverable. There, Alice and Glenn Pirie signed a joint will, leaving assets to each other and, at the death of the survivor, in trust for their daughter, Elenore Gist. The Elenore Gist trust was established in 1983<sup>105</sup> after the death of Alice. Elenore was 47 at the time. She began receiving medical assistance in 1995 and continued receiving benefits through the time of her death in July, 2006. Following her death, the State filed a claim against the trust in the amount of \$396,570.20. The trustee objected to the claim.

In analyzing the State's claim, the Court examined the nature of the trust. The court found that it was a discretionary trust with standards.<sup>106</sup> A trust is a discretionary trust with standards if "the beneficiary has a right that the trustee pay him the amount which

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<sup>104</sup> In jurisdictions non-community property jurisdictions, the portion of the court's relating to "jointly owned" assets appears to violate Section 1396p(b) and is subject to further review if those assets were not conveyed by reason of death.

<sup>105</sup> It is worth noting that the trust was drafted prior to OBRA 93 and, therefore, could not have been drafted in accordance with its trust provisions.

<sup>106</sup> Restatement (Third) of Trusts § 50 (2003).

in the exercise of reasonable discretion is needed for his support . . . ; and the beneficiary can transfer this interest or his creditors may reach it, unless it is protected by a spendthrift clause.” The court found that, under Iowa law, this sort of interest in a trust is one where the beneficiary can require the trustee to pay him the amount, which in the exercise of reasonable discretion, is needed to support him. The court further found that the interest continued through the time of death. Further, the Iowa statute expressly makes all such interests subject to probate. Iowa Code § 249A.5(d). Having made these findings, the remaining inquiry was whether a spendthrift provision prevented collection. The court found that under Iowa law, it does not. A spendthrift clause does not prevent creditors from making claims where they provided necessary services or supplies. Applying this exception, the Court found the State had provided Elenore with necessary goods or services. “Therefore, the spendthrift provision of the trust does not prevent the State from collecting its Title XIX lien.”

*In In re Barkema Trust*, 690 N.W.2d 50 (Iowa 2004), George Barkema left assets to three children in trust for his fourth child, Lois. He directed: “If possible, only the income from said share shall be used for Lois, however, if necessary for her proper support and maintenance, then the corpus of said trust may be invaded to the extent said trustees deem necessary.” His will was probated in 1978 and Lois went on nursing home Medicaid in 1998. Lois died in 2003 after the State had paid \$55,000 in medical assistance. The State filed a claim against the \$18,000 remaining in the trust. The trial court granted the State’s claim and an appeal followed.

On appeal, the Court determined that the trust was a discretionary support trust, which suggests there is an enforceable standard requiring the trustee to provide a minimum level of support to the beneficiary. The Court then examined whether Lois’ interest in the trust is the type of interest contemplated in Iowa’s estate recovery statute. The court found that federal law provides that “estate” may include any asset in which the Medicaid recipient owned any legal title or interest at the time of death. Finding that Iowa’s legislature intended a broad interpretation of “estate” the court found that “or interest” may include equitable interest. The next determination was whether the interest was “actually available” under both federal and state law. “In order for an asset to be considered an actually available resource, an applicant must have a legal ability to obtain it.” *Id.*, at 56 (*quoting Hecker v. Stark County Soc. Serv. Bd.*, 527 N.W.2d 226, 237 (N.D. 1994)). Because the trust contained enough of a distribution standard to create an interest Lois could support, and because medical assistance was necessary for her support, the claim was allowed.

The result in *Barkema* is at odds with *Smith, supra*. In *Smith*, the Tennessee Court of Appeals found that the interest owned immediately prior to death must be a legal interest. Nonetheless, two factors limit *Barkema*. First, the Iowa legislature expressly altered its law to provide that interests such as the one Lois held in the trust are subject to probate. That is not the case in most States. Second, the court found that the assets must be actually available. Trusts which do not include language creating an enforceable standard would not fall within the *Barkema* holding. Other assets, such as life estates and joint tenancies would, to the extent of that interest, since they are subject to partition and division during the Medicaid recipient’s lifetime.

In *Estate of DeMartino v. Div. of Medical Assistance and Health Servs.*, 861 A.2d 138 (N.J. Super., App. Div. 2004), the State sought collection from a testamentary trust created by the Medicaid recipient's spouse, who predeceased him. In 1999, the Medicaid recipient had transferred all assets to his wife, Anne. Anne died in 2000. Her will created a testamentary special needs trust for her husband. The court found that because the trust was funded with the Medicaid recipient's elective share of his wife's estate, he had an interest in the trust assets when it was created. Further, his life interest in the assets continued through the time of his death. The court found that, under these facts, the Department could make a claim on the remaining trust assets under New Jersey's expanded estate recovery statute.

## Planning Considerations

Individuals applying for Medicaid can plan to minimize its effect. However, because any plan to minimize estate recovery necessarily impacts eligibility, such planning should not be undertaken by those unacquainted with the eligibility rules. For example, while the transfer of a home might protect that asset from estate recovery, it would also create a period of ineligibility during which the applicant would not receive medical assistance.

Most Elder Law Attorneys are qualified to assist applicants with planning. Many Elder Law Attorneys are members of the National Academy of Elder Law Attorneys and can be located, using the "Find a lawyer" tool at [www.naela.org](http://www.naela.org).

## Conclusion

The law concerning Medicaid estate recovery is still developing in Georgia. At this time, it is certain that probate assets are subject to estate recovery. It is impossible to know whether the Courts will authorize expanded estate recovery since the legislature has not changed probate, contract or property law to create a mechanism for recovery against non-probate assets. Until cases or legislation further develop the law, the only certainty is controversy.

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## Attachment A: Summary of Georgia's State Plan (Recovery Provisions)

Section 4.17 of the State Plan indicates that Georgia:

- Imposes liens on real property on account of benefits incorrectly paid;
- Imposes TEFRA liens on real property of an individual who is an inpatient of a nursing facility, ICF/MR, or other medical institution where the individual is required to contribute toward the cost of institutional care all but a minimal amount of income required for personal needs.<sup>107</sup>
- Imposes liens on both real and personal property of an individual after the individual's death.

The State Plan states that Georgia complies with the requirements of Section 1396p(b) and with 42 C.F.R. § 433.36(h)-(i).

Adjustments or recoveries for Medicaid claims correctly paid are as follows:

4. For permanently institutionalized individuals, adjustments or recoveries are made from the individual's estate or upon sale of the property subject to a lien imposed because of medical assistance paid on behalf of the individual for services provided in a nursing facility, ICF/MR, or other medical institution.
  - a. Adjustments or recoveries are made for all other medical assistance paid on behalf of the individual.
5. The State determines "permanent institutional status" of individuals under the age of 55 other than those with respect to whom it imposes liens on real property under Section 1396p(a)(1)(B) (even if it does not impose those liens).
6. For any individual who received medical assistance at age 55 or older, adjustments or recoveries of payments are made from the individual's estate for nursing facility services, home and community-based services, and related hospital and prescription drug services.
  - a. In addition to adjustment or recovery of payments for services listed above, payments are adjusted or recovered for other services under the State plan listed below:
    - i. [None listed]
7. If an individual covered under a long-term care insurance policy received benefits for which assets or resources were disregarded as provided in Supplement 8c Attachment 2.6-A, (State Long-Term Care Insurance Partnership), the State does not seek adjustment or recovery from the individual's estate for the amount of assets or resources disregarded.

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<sup>107</sup> The Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) permits the State to secure its future recovery, following the death of a Medicaid recipient, in two circumstances. In the first instance, there must be a hearing, following notice, where it is determined that an institutionalized Medicaid recipient will not return home. In the second instance, TEFRA liens are permitted after a court determines that Medicaid benefits were incorrectly paid. See M. Wilson, *Future of Medicaid Planning in Missouri*, *supra*, at 67. See 42 U.S.C. § 1396p(b)(1).

Estate recovery is limited as follows:

2. Adjustment of medical assistance correctly paid will be made only after the death of the individual's surviving spouse, and only when the individual has no surviving child who is either age 21, blind or disabled.
3. With respect to liens on the home of any individual who the State determines is permanently institutionalized and who must as a condition of receiving services in the institution apply their income to the cost of care, the State will not seek adjustment or recovery of medical assistance correctly paid on behalf of the individual until such time as none of the following individuals are residing in the individual's home:
  - a. A sibling of the individual (who was residing in the individual's home for at least one year immediately before the date that the individual was institutionalized), or
  - b. A child of the individual (who was residing in the individual's home for at least two years immediately before the date the individual was institutionalized) who established to the satisfaction of the State that the care the child provided permitted the individual to reside at home rather than become institutionalized.
4. No money payments under another program are reduced as a means of adjusting or recovering Medicaid claims incorrectly paid.

Regarding specific procedures, the State Plan references Attachment 4.17A, which provides:

3. Specifies the procedures for determining that an institutionalized individual cannot reasonably be expected to be discharged from the medical institution and return home. The description of the procedure meets the requirements of 42 C.F.R. § 433.36(d).
4. Specifies the criteria by which a son or daughter can establish that he or she has been providing care, as specified under 42 C.F.R. § 433.36(f).
5. Defines the following terms:
  - a. Estate (at a minimum, estate as defined under State probate law). Except for grandfathered States listed in section 4.17(b)(3), if the State provides a disregard for assets or resources for any individual who received or is entitled to receive benefits under a long term care policy, the definition of estate must include all real property, personal property and assets of an individual (including any property or assets in which the individual had any legal title or interest at the time of death to the extent of the interest and also including the assets conveyed through devices such as joint tenancy, life estate, living trust, or other arrangement);
  - b. Individual's home;
  - c. Equity interest in the home;
  - d. Residing in the home for at least 1 or 2 years;
  - e. Con a continuing basis;
  - f. Discharge from a medical institution and return home, and;
  - g. Lawfully residing.
6. Describes the standards and procedures for waiving estate recovery when it would cause undue hardship;

7. Defines when adjustment or recovery is not cost-effective. Defines cost-effective and included methodology or thresholds used to determine cost-effectiveness.
8. Describes collection procedures. Includes advance notice requirements, specifies the method for applying for a waiver, hearing and appeals procedure, and the time frames involved.

Attachment 4.17A.1 described the process for determining when an institutionalized individual cannot be expected to return home and the process for placing a lien on the home.

Attachment 4.17A.2 described the proof necessary to gain deferral for a caregiver child.

Attachment 4.17A.3 defines the following terms:

4. "Estate" means all real and personal property under the probate code. Estate also includes real property passing by reason of joint tenancy, right of survivorship, life estate, survivorship, trust annuity, homestead or any other arrangement. The estate also includes a life estate interest and excess funds from a burial trust or contract, promissory notes, cash and personal property.
5. "Individual's home" means true, fixed and permanent home and principal establishment to which whenever absent, the individual has the intention of returning to his domicile.
6. "Equity interest in the home" means value of the property that the individual holds legal interest in to beyond the amount owed on it in mortgages and liens.
7. The following phrases are also defined: "Residing in the home for at least one or two years," "On a continuing basis," "Discharge from the medical institution and return home," and "Lawfully residing."

Attachment 4.17A.4 defines undue hardship as (1) the assets to be recovered is the sole income-producing asset of the Medicaid beneficiary's heirs; or (2) The recovery of the assets would result in the heirs becoming eligible for governmental public assistance based on need and/or medical assistance programs.

The following procedures are used by the State for waiving estate recoveries when recovery would cause an undue hardship, and when recovery is not cost-effective:

1. The creditor's claim contains information on the right to apply for an undue hardship waiver;
2. The personal representative completes a request for Undue Hardship Waiver within 30 days of the creditor's claim being filed, enclosed supporting documentation and forwards it to the Department for an evaluation on whether to grant a waiver. If a waiver is granted, recovery may be terminated or the Department may compromise by delaying recovery until the death of the eligible heir. In determining whether an undue hardship exists, the following criteria will be used:
  - a. The asset to be recovered is a income producing farm or one or more of the heirs and the annual gross income is limited to \$25,000 or less; or

- b. The recovery of assets would result in the applicant becoming eligible for governmental public assistance based on need and/or medical assistance programs.
- c. Heirs who disagree with the Department's denial may file for an administrative appeal within 30 days of the notice of denial.
- d. The heirs have the burden of proof in all administrative hearings.

The State defines cost-effectiveness as follows (include methodology/thresholds used to determine cost effectiveness):

- The State employs the following methodology in determining if recovery is cost-effective. The regulations of estate recovery mandate<sup>108</sup> that we must pay years support for the family, funeral expenses up to five thousand dollars (\$5,000), necessary expenses of administration, and unpaid taxes prior to any claims for Medicaid. In addition, the State must pay the third party administrator of the estate recovery program's collection expenses and pay a special attorney general to handle these claims in Probate Court. Estates valued at \$25,000 or less are exempt from estate recovery because it is not cost effective for the state to pursue recovery.

The State uses the following collection procedures:

1. At application and during re-determination the applicant or the member is notified of the estate recovery program.
2. Potential recovery cases are identified by data matches, newspaper clipping services, and referrals received from probate courts, nursing facilities and local county offices.
3. After death of the member, a Notice of Intent to File a Claim Against the Decedent's Estate is forwarded to the member's personal representative or the representative's attorney. In addition, a questionnaire is forwarded requesting information about a surviving spouse, a child under the age of 21, a blind or disabled child, any real property, and the administration of the estate.
4. If all the criteria to pursue estate recovery are met, upon the estate being opened, the Department files a Creditor's Claim for the total amount of medical assistance paid on the deceased member's behalf.
5. If an estate is not opened, the State may recoup funds through the member's bank account. The administrator of the program may present an affidavit to a financial institution requesting that the financial institution release account proceeds to recover the cost of services correctly provided to a member. The affidavit shall include:
  - a. The name of the decedent;
  - b. The name of any person who gave notice that the decedent was a Medicaid member and that person's relationship to the decedent;
  - c. The name of the financial institution;
  - d. The account number;

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<sup>108</sup> It is worth noting that federal law requires adherence to the State Plan rather than State regulations. Thus, unless the regulations were deemed to have been incorporated by reference, this section of the State Plan evidences a misconception at DCH regarding which rule must be followed if the two diverge.

- e. A description of the claim for estate recovery; and
  - f. The amount of the funds to be recovered.
6. A financial institution shall release account proceeds to the administrator of the program if all of the following conditions apply:
- a. The decedent held an account at the financial institution that was in the decedent's name only;
  - b. No estate has been, and it is reasonable to assume that no estate will be, opened for the decedent;
  - c. The decedent has no outstanding debts known to the administrator of the program; and
  - d. The financial institution has received no objections or has determined that no valid objections to released the proceeds have been received.
  - e. If the proceeds have been released pursuant to this section and the Department receives notice of a valid claim to the proceeds that has a higher priority under O.C.G.A. § 53-7-40 than the claim of this section, the Department may refund the proceeds to the financial institution or pay them to the persons or governmental entity with the claim.

## Attachment B: Georgia Estate Recovery Regulations

### *111-3-8-.01 Legal Authority.*

In accordance with Title XIX of the Social Security Act, 42 U.S.C. § 1396p, the State of Georgia has defined a process to recover the cost of medical assistance payments from the estates of deceased Members. The Official Code of Georgia gives the state the authority to recover these monies. O.C.G.A. § 49-4-147.1. In addition, the recovery methodology must adhere to statutory provisions of the Georgia Revised Probate Code of 1998, O.C.G.A. Title 53.

### *111-3-8-.02 Definitions.*

- (1) "**Authorized representative**" means a guardian or a person designated by the Member to act on his or her behalf during the Member's life.
- (2) "**Debt**" means a sum of money owed from one person to another, including the right of the creditor to receive and enforce payment.
- (3) "**Department**" means the Georgia Department of Community Health, Division of Medical Assistance.
- (4) "**Discharge from the medical institution and return home**" means a qualifying discharge, which involves the Member's dismissal from the nursing institution and/or facility for at least thirty (30) days wherein the Member's personal effects and bed are released at the same time of his or her discharge.
- (5) "**Equity interest in the home**" means value of the property in which the Member holds legal interest beyond the amount owed on it in mortgages and liens.
- (6) "**Estate**" means all real and personal property under the probate code. Estate also includes real property passing by reason of joint tenancy, right of survivorship, life estate, survivorship, trust, annuity, homestead or any other arrangement. The estate also includes excess funds from a burial trust or contract, promissory notes, cash, and personal property. Estates valued at \$25,000 or less are exempt from estate recovery because it is not cost effective for the state to pursue recovery.
- (7) "**Hearing**" means a formal proceeding before an Administrative Law Judge or Probate Judge in which parties affected by an action or an intended action of the Department shall be allowed to present testimony, documentary evidence, and argument as to why such action should or should not be taken.
- (8) "**Heirs**" means heirs-at-law who are entitled under the statutes of intestate succession to property of a decedent and beneficiaries who are entitled to inherit the estate if there is a lawful will.
- (9) "**Lawfully residing**" means permissive use by the owner/power of attorney at the law.
- (10) "**Lien**" means a claim, encumbrance or charge against the Medicaid Member's real or personal property on account of medical assistance paid to the Member correctly under the State Plan. A Lien may be placed on the real property of a Member who is an inpatient of a nursing facility, intermediate care facility for the mentally retarded, or other institution or a Lien may be placed on both real and personal property of a Member after the Member's death.

- (11) "**Long-term care**" means a service provided in a long-term care facility or in the home, under federally approved home and community based services, as an alternative to institutionalization.
- (12) "**Medical assistance**" means payment by the State's program under Title XIX of the Social Security Act or Medicaid program, administered by the Department.
- (13) "**Member**" means a person who has been certified as Medicaid eligible, pursuant to the terms of the State Plan, to have medical assistance paid on his or her behalf.
- (14) "**Member's home**" means true, fixed and permanent home and principal establishment to which, whenever absent, the Member has the intention of returning to his or her domicile.
- (15) "**Permanently institutionalized**" means residing in a nursing facility or intermediate care facility for the mentally retarded and developmentally disabled for six (6) consecutive months or more.
- (16) "**Personal representative**" means an executor, administrator, guardian, conservator, committee, trustee, fiduciary, or other person having a status which by operation of law or written instrument confers upon such person a duty of distributing property to Heirs.
- (17) "**On a continuous basis**" means that the qualifying relative lived with the Member in the Member's home as his or her principal place of residence during an uninterrupted timeframe.
- (18) "**Residing in the home for at least one or two years**" means the principal place of residence.
- (19) "**State Plan**" means all documentation submitted by the Commissioner, on behalf of the Department, to and for approval by the Secretary of Health and Human Services pursuant to Title XIX of the federal Social Security Act of 1935, as amended.

### ***111-3-8-03 Notification to Member or Their Heirs.***

- (1) If a debt is due under this section from the estate of a Member, the administrator of the nursing facility, intermediate care facility for persons with mental retardation, or mental health institute in which the Member resided at the time of his/her death, the Medicaid case manager for community based services and/or the personal representative, if applicable, shall report the death to the Department within thirty (30) days of the death of the Member.
- (2) If the personal representative of an estate makes a distribution either in whole or in part of the property of an estate to the Heirs, next of kin, distributes, legatees, or devisees without having executed the obligations pursuant to this section, the personal representative may be held personally liable for the amount of medical assistance paid on behalf of the Member, for the full value of the property belonging to the estate which may have been in the custody or control of the personal representative.
- (3) When the Department receives notification of an affected Medicaid Member's death, a written notice will be provided to any known personal representative and any known Heirs which:
- (a) Explains the terms and conditions of estate recovery and refers to the applicable statute and regulations;
  - (b) Advises of the Department's intent to recover the value of Medicaid benefits correctly paid on the Member's behalf from the Member's estate and states the amount;

- (c) Explains that the Department's recovery action may include filing a lien on real property when recovery is delayed;
- (d) Explains that the Heirs may file an undue hardship waiver and the procedures and time frames for filing the waiver;
- (e) Advises the Heirs of their right to a hearing and the method by which they may obtain a hearing;
- (f) Includes a statement advising the amount of the claim may increase if there are additional Medicaid claims that have not yet been processed.

### ***111-3-8-.04 Recovery for Payments Made on Behalf of Medicaid-Eligible Persons.***

- (1) These regulations shall be construed and applied to further the intent of the Legislature to supplement Medicaid funds that are used to provide medical services to eligible persons. Estate recovery shall be accomplished by the Department or its agent filing a statement of claim against the estate of a deceased Medicaid Member. Recovery shall be made pursuant to federal authority in § 13612 of the Omnibus Budget Reconciliation Act of 1993 which amends § 1917(b)(1) of the Social Security Act, 42 U.S.C. 1396p(b)(1).
- (2) Adjustment or recovery for all medical assistance and/or services pursuant to the State Plan will be from Medicaid Members:
  - (a) Who at the time of death were any age and an inpatient in a nursing facility, intermediate care facility for the mentally retarded, or other mental institution if the Member is required, as a condition of receiving services in the facility under the State Plan, to spend for costs of medical care all but a minimal amount of the person's income required for personal needs; or
  - (b) Who at the time of death were fifty-five (55) years of age or older when the Member received medical assistance, but only for medical services consisting of nursing facility services, personal care services, home and community based services, and hospital and prescription drug services provided to Members in nursing facilities or receiving home and community based services.
- (3) The Department shall provide written notice of the Estate Recovery program to Members at the time of application for medical assistance and at the annual redetermination. Members currently receiving medical assistance prior to the Estate Recovery program's effective date set forth in Paragraph (17) of this Rule will be notified at his or her annual redetermination.
- (4) The acceptance of public medical assistance, as defined by Title XIX of the Social Security Act, including mandatory and optional supplemental payments under the Social Security Act, shall create a debt to the agency in the amount recoverable under the State Plan. Upon filing a statement of claim in the probate proceeding, the Department shall be given priority status.
- (5) The Department may amend the claim as a matter of right until the Member's estate has been closed.
- (6) The Department's provider processing reports shall be admissible as prima facie evidence in substantiating the agency's claim.
- (7) Any trust provision that denies recovery for medical assistance is void on and after the time of its making.

(8) Adjustment or recovery of debt will be made only after the death of the Member's surviving spouse, if any, and only at a time when the Member has no surviving child who is under the age 21, or a child who is blind or permanently and totally disabled pursuant to the eligibility requirements of Title XIX of the Social Security Act.

(9) With respect to a lien placed on the home of a permanently institutionalized Member, the Department will not seek adjustment or recovery of Medical assistance correctly paid on the behalf of the Member until the following persons are not residing in the Member's home:

(a) A sibling of the Member who was residing in the Member's home for at least one (1) year on a continuous basis immediately before the date that the Member was institutionalized; and

(b) A child of the Member who was residing in the Member's home for at least two (2) years on a continuous basis before the date that the Member was institutionalized and who has established to the satisfaction of the Department that he or she provided care that permitted the Member to reside at home rather than to become institutionalized.

(10) The sibling or child of the Member must demonstrate that he or she has been lawfully residing in the Member's home on a continuous basis for the periods described in Paragraphs (9)(a) and (b) respectively, since the date of the Member's admission to the medical institution, and must provide the Department with clear and convincing evidence to prove residency which may include, but not be limited to, receipts, mortgage statements, bills, mail forwarded to Member's address, or voter's registration. The sibling or child of the Member must demonstrate that he or she did not reside in any other residence except the Member's home during the periods of time set forth in Paragraphs (9)(a) and (b) respectively. The sibling or child shall maintain the burden of proof in all proceedings.

(11) No debt under this section shall be enforced against any property that is determined to be exempt from the claims of creditors under the constitution or laws of this state.

(12) The Department may delay or waive recovery from an estate if doing so would cause undue hardship for the qualified Heirs, as defined in Rule 111-3-8-.08. The personal representative of an estate and any Heir may request that the agency waive recovery.

(13) The state's right to full reimbursement of the costs of medical assistance shall not be diminished by the recovery of any judgment, settlement, or award of an amount less than the value of the original or settled claim. To enforce its rights, the state may intervene or join in any action or proceeding brought by a claimant against a third person. To aid in the recovery of the cost of medical assistance, the state shall have a first lien in the full amount of the costs of medical assistance against the proceeds from all damages awarded in a suit or settlement.

(14) Transfers of real or personal property, on or after the look-back dates defined in 42 U.S.C. § 1396p, by a Member of such aid, or by their spouse, without adequate consideration are voidable and may be set aside by an action in court.

(15) Counsel fees, costs, or other expenses shall not reduce any third party recovery obtained by the state incurred by the Member or the Member's attorney.

(16) If, after the reported death of the Member, the Department is prohibited because of exception conditions, the Department may postpone recovery until all exception conditions are no longer present. An estate does not have to be open in order for the Department to execute its claim after all exception conditions are no longer present.

Termination of recovery will occur when all real and personal property included as part of the Member's estate is no longer accessible.

(17) The effective date of the Medicaid Estate Recovery Program is May 3, 2006. Adjustment or recovery shall apply to those costs associated with medical assistance and/or services a Member received on or after the effective date.

### ***111-3-8-.05 Recovery of Assistance; Probate.***

(1) After receipt of notice of the death of an affected Member, the Department will file a claim against the estate for the full value of the Medicaid benefits paid on behalf of the Member.

(2) No action to recover a debt due by the deceased Member shall be commenced against the personal representative until the expiration of six (6) months from the date of qualification of the first personal representative to serve.

(3) Notwithstanding any other law, a claim filed for recovery of Medicaid assistance has priority in order of payment from the estate over all other claims, except the following:

(a) Years support for the family;

(b) Funeral expenses in an amount not to exceed five thousand dollars (\$5,000). However, this amount is zero (0) if the deceased Member has prepaid funeral expenses that were excluded as a resource for Medicaid eligibility;

(c) Necessary expenses of administration;

(d) Reasonable expenses of the deceased Member's last illness;

(e) Unpaid taxes or other debts due the state or the United States. The category of Medicaid Estate Recovery is a debt due the state.

(4) The affidavit of a person designated by the Commissioner to administer this action is prima facie evidence of the amount of the claim.

(5) Notwithstanding any statute of limitations or other claim presentation deadline provided by law, a state claim against an estate is not barred for lack of timely presentation if it is presented in the probate proceeding within the time specified in the published notice to creditors.

(6) The personal representative must notify the Department of the Member's death before dispersing assets of the Member. The personal representative is personally liable for any incorrectly paid assets if the Department is not informed of the Member's death and assets are distributed to Heirs and/or creditors.

### ***111-3-8-.06 Recovery of Assistance; No Estate.***

(1) The administrator of the program may present an affidavit to a financial institution requesting that the financial institution release account proceeds to recover the cost of services correctly provided to a Member. The affidavit shall include the following information:

(a) The name of the deceased Member;

(b) The name of any person who gave notice that the Member was a Medicaid Member and that person's relationship to the deceased Member;

(c) The name of the financial institution;

(d) The account number;

(e) A description of the claim for estate recovery;

- (f) The amount of funds to be recovered.
- (2) A financial institution shall release account proceeds to the administrator of the program if all of the following conditions apply:
  - (a) The deceased Member held an account at the financial institution that was in his or her name only;
  - (b) No estate has been, and it is reasonable to assume that no estate will be, opened for the deceased Member;
  - (c) The deceased Member has no outstanding debts known to the administrator of the program;
  - (d) The financial institution has received no objections or has determined that no valid objections to release proceeds have been received.
- (3) If proceeds have been released pursuant to this section and the Department receives notice of a valid claim to the proceeds that has a higher priority under O.C.G.A. § 53-7-40 than the claim of this section, the Department may refund the proceeds to the financial institution or pay them to the person or government entity with the claim.<sup>109</sup>

### ***111-3-8-.07 Imposition of Liens.***

- (1) The basis for authority to impose liens is based on the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA). The TEFRA lien law provides that the agency can place a Lien on the available real estate of a Member who enters a nursing home and is "permanently institutionalized."
- (2) The state may place a Lien on the Member's home when there is not a reasonable expectation that the Member will return home and when none of the following persons are living in the home:
  - (a) The Member's spouse;
  - (b) A child under twenty-one (21) years of age;
  - (c) A disabled child of any age; or
  - (d) A sibling with an equity interest in the home who has lived in the home for at least one (1) year before the Member entered the nursing home, and is lawfully residing in such home. The sibling must provide the State with clear and convincing evidence which demonstrates residency on a continuous basis and the sibling's equity interest. Additionally, the sibling must demonstrate that he or she did not reside in any other residence except the Member's home during the period of time specified in this subparagraph (2)(d). The sibling has the burden of proof in all proceedings.
- (3) Liens may be imposed to protect recovery of benefits correctly paid to Medicaid Members when permitted by federal and state law. However, the use of lien authority requires prior notification to the Member or any known Heirs.
- (4) The Department shall notify the Member and the authorized representative, if applicable, of its determination that the Member is permanently institutionalized and not reasonably expected to return home and its intent to file a Lien on Member's real property. Notice must include an explanation of liens and their effect on a Member's ownership of real property. A Lien may not be filed less than thirty-one (31) days from the date of the notice to the Member and after any hearing process has been completed, if a hearing is requested.

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<sup>109</sup> See O.C.G.A. § 18-2-2.

(5) A Member or his or her authorized representative may, within thirty (30) days after receipt of notice request an administrative hearing under this Rule 111-3-8-.07. A Member is deemed to have received notice within five (5) days from the date of the notice. Administrative hearings and appeals for Medicaid Members are governed by the procedures and time limits set forth in 42 C.F.R. § 431.200 et seq. Only one (1) appeal shall be afforded on behalf of a Member, for each notice received. The administrative law judge shall make the determination if a Member can or cannot reasonably be expected to be discharged from the medical institution and returned home or if a specific exception set forth in 111-3-8-.07(2) applies.

(6) The Department or its agent shall file a notice of Lien with the recorder of the county in which the real property subject to the Lien is located. The notice shall be filed prior to the Member's death and shall include the following:

(a) Name and place of residence of the real property subject to the Lien; and

(b) Legal description of the real property subject to the Lien.

(7) The Department shall file one (1) copy of the notice of Lien with the local DFCS office in the county in which the real property is located. The county in which the real property is located shall retain a copy of the notice with the county office's records. The Department or its agent shall provide one (1) copy of the notice of Lien to the Member and the Member's authorized representative, if applicable, whose real property is affected.

(8) The Lien continues from the date of filing until the Lien is satisfied, released or expires. From the date on which the notice of Lien is recorded in the office of the county recorder, the notice of lien:

(a) Constitutes due notice against the Member or Member's estate for any amount then recoverable under this article; and

(b) Gives a specific Lien in favor of the Department on the Medicaid Member's interest in the real property.

(9) The Department has the authority to release any Lien placed upon the property of a Member deemed permanently institutionalized should that Member be subject to a Discharge from a medical institution and return home. The Department shall release a lien obtained under this rule within thirty (30) days after the Department receives notice that the Member is no longer institutionalized and is living in his or her home. If the real property subject to the lien is sold, the office shall release its lien at the closing and the lien shall attach to the net proceeds of the sale.

### ***111-3-8-.08 Hardship Waiver.***

(1) Hardship waivers will be submitted to the program administrator for review. The denial of a hardship waiver may be appealed as provided under the Administrative Procedures Act, O.C.G.A. § 50-13-1 et. seq. The waiver is limited to the period in which the undue hardship exists.

(2) There is no hardship waiver provided at the time of lien placement against the real property of a deceased Medicaid Member. The equity interest of the heir will be considered to determine the percentage of the deceased member's interest in the property.

(3) Lien placement is utilized to delay recovery until such time as an exemption to recovery does not exist, or in the case of a hardship, until such time as the hardship no

longer exists. The state's lien would be for the Medicaid benefits paid on behalf of the Member or the percentage of interest of the deceased Member at the time of sale, whichever is less.

(4) Recovery will be waived in whole or in part pursuant to Rule 111-3-8-.08(1) of any estate or lien recovery when the requesting party is able to show, through clear and convincing evidence, that the state's pursuit of recovery subjects them to undue hardship. In determining whether an undue hardship exists, the following criteria will be used:

(a) The asset to be recovered is a income producing farm of one or more of the Heirs and the annual gross income is limited to \$25,000 or less; or

(b) The recovery of assets would result in the applicant becoming eligible for governmental public assistance based on need and/or medical assistance programs.

(5) Notwithstanding the provisions of Paragraph (4) of this Rule, an undue hardship exists when it would not be cost effective for the Department to recover the assistance paid. Estates valued at \$25,000 or less are exempt from estate recovery because it is not cost effective for the Department to pursue recovery. In this instance, undue hardship does not need to be asserted.

(6) Undue hardship does not exist when:

(a) The adjustment or recovery of the Member's cost of assistance would merely cause the Member's family members inconvenience or restrict the family's lifestyle;

(b) The Member and/or the Heirs divest assets to qualify under the hardship provision.

(7) To the extent that there is any conflict between the preceding criteria and the standards that may be specified by the secretary of the Department of Health and Human Services, the federal standards shall prevail.

(8) The personal representative and/or Heirs shall apply for an undue hardship exemption by:

(a) Making a written request to the Department within thirty (30) days of receipt of the notice.

(b) Verifying to the Department's satisfaction the criteria specified in this section for an undue hardship waiver.

(9) The Department shall issue a decision on an undue hardship exemption request within thirty (30) days of receipt of the request and supporting documentation;

(10) If the state denies the personal representative's request for an undue hardship waiver, the personal representative may request an appeal. The denial of a waiver must state the requirements of an application for an adjudicative proceeding to contest the Department's decision to deny the waiver and where assistance may be obtained to make such application.

(11) If an appeal is requested, a hearing shall be conducted by the probate judge if the estate is in probate court. An administrative law judge shall conduct the administrative hearing if the case is not in probate court.

(12) If the Department deems a hardship does exist, the state may waive recovery or defer recovery until the death of eligible exempt dependents, on the sole discretion of the Department.

(13) The provisions of this section are severable. If any provision of this section is held invalid, the remaining provisions remain in effect.