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June 7, 2004

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Re: Estate Recovery in Georgia; Proposed Regulations.

Honorable Members of the Board of Community Health, Ladies and Gentlemen:

We are writing to you in response to the recently released Proposed Estate Recovery Regulations for the Georgia Medicaid Program. On behalf of the Georgia citizens which the Board serves, we have great concern over a number of issues raised by the proposed Regulations. In providing our comments, we believe we are acting consistent not only with the general principles of public policy considerations, but also in furtherance of the ideal expressed by Governor Sonny Purdue to “[b]ring decision-making closer to those citizens who are affected through local control and recognition of public sentiment on the issues of great concern to the citizens of Georgia.” More than 50,000 Georgians are receiving nursing home Medicaid benefits, and their lives, as well as the lives of their family members, will be impacted by the proposed Regulations.

Although we believe that the implementation of Estate Recovery in Georgia is bad public policy, we understand that this debate may be closed. Although we are not aware of any new legislation regarding estate recovery, recent budget proposals indicate that Georgia

may reverse its position on estate recovery which, until now, has been “no estate recovery.” This appears to be the case even though, assuming current savings estimates, it would cost each Georgia citizen less than 18 cents to avoid the fear and trauma that accompanies headlines screaming that the State is taking Mom’s home. Nonetheless, since estate recovery appears to be a foregone conclusion, we believe it is incumbent on the Board and on representatives of our Georgia citizenry to work together to create Policy and a Recovery Program that is lawful, reasonable, fiscally sound, and the least onerous practicable. It is in this spirit that we are providing this letter to you for your consideration and action.

Enclosed with this cover letter is a Memorandum which details the specifics of our immediate concerns over the Proposed Regulations. To assist you in navigating the Memorandum, a Table of Contents is provided. In brief, our concerns fall within three main categories: Policy considerations, notice considerations, and a multitude of significant legal issues. As detailed in the Memorandum, this includes, but is not limited to, the following:

**Policy Considerations:**

- The policy supporting the Estate Recovery Program should be designed to foster a program that is lawful, reasonable, fiscally sound, and the least onerous practicable.
- The experience of other states can be looked upon for guidance in establishing good policy, especially the recent and ongoing experience in Texas and Michigan.

**Notice Considerations:**

- Broader notice of the Proposed Estate Recovery Regulations needs to be provided to the public.
- More time needs to be given to allow more careful analysis of the Proposed Regulations, and to facilitate a joint effort by the Board and interested persons and organizations to identify potential issues and problems in the Proposed Regulations, and to resolve these issues and problems prior to actual implementation of the Estate Recovery Program.
- Once the Program is implemented, reasonable and adequate formal notice of the Estate Recovery Program should be provided to all Medicaid applicants prior to their accepting any benefits.

**Legal Issues and Conflicts of Law:**

- The Proposed Regulations must be revised to make them consistent with the mandates of CMS (formerly HCFA) Transmittal 75 regarding Estate Recovery.
- The inclusion of the definition of the term “asset” is superfluous and needs to be eliminated.

- The definition of “estate” needs to be revised to limit application to the probate estate as defined by Georgia law, and to render it consistent with Georgia estate and property laws.
- The provision for retroactive enforcement must be removed, as it is most likely unenforceable as being in violation of the federal Medicaid laws and the Georgia Constitution.
- Estate recovery claims made by the Department must be made in compliance with the Georgia laws regarding debtors and creditors, including as to priority of claims, and the Department, like other creditors of an estate, must provide supporting documentation for its claim.
- As Estate Recovery is an estate matter, hearings should be held in the Probate Court before the appropriate Probate Judge, not before an Administrative Law Judge.

While these are the issues of immediate concern, other issues are raised in the enclosed Memorandum and we ask that they be considered as well. Thank you for your attention and consideration in this matter. We are pleased to offer our assistance and we trust that you will agree with our concerns. Please do not hesitate to let us know if we can provide other or further assistance in this matter.

Respectfully,

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David L. McGuffey  
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Member, National Academy of Elder Law  
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**John Etheriedge, Member, National Academy of Elder Law Attorneys**

**Cc: The Honorable Governor Sonny Perdue  
News Media**

**Enclosure**

# Public Comments Regarding Georgia's Proposed Estate Recovery Rules

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## **Highlighted Concerns:**

Although many concerns are expressed in this Memorandum, we highlight the following:

- The Governor's budget estimates that estate recovery will save the State \$1,459,717.<sup>1</sup> In 2002, there were 8,560,310 Georgia citizens.<sup>2</sup> Assuming the savings estimated by the Governor's office, estate recovery threatens to take Mom's home so the State can save less than 18 cents per citizen.<sup>3</sup> Taking this analysis further, in fiscal year 2002, Georgia spent \$835,955,653 on nursing

<sup>1</sup> <http://www.opb.state.ga.us/Budget/AFY04BR.pdf>

<sup>2</sup> <http://www.ph.dhr.state.ga.us/pdfs/ohip/vsr/vitalstatisticsreport.02.pdf>

<sup>3</sup> There are 5,237,710 Georgians between the age of 20 and 64. Assuming only those individuals are paying taxes, allowing the State to take Mom's home saves them less than 28 cents each.

home Medicaid benefits.<sup>4</sup> Allowing the State to take Mom's home produces savings factor of ".001746" (or less than 1% of total spending on nursing home Medicaid).

- Federal law allows the State to limit estate recovery to the probate estate. Georgia's enabling legislation indicates that we have adopted that approach and that estate recovery is limited to the probate estate. Nonetheless, the Proposed Regulations are not clear on this point. Instead, the proposed regulations are inconsistent with legislation in Georgia governing the treatment of estates, trusts and creditor rights, are internally inconsistent in numerous places and may create confusion in the law. We believe litigation necessary to resolve these issues could be avoided by correcting the regulations now.
- If estate recovery is not limited to the Medicaid Applicant's estate (and the regulations are not clear on that point), then litigation will reduce estimated cost savings since state legislation limits recovery to the Medicaid recipient's estate. Of greater concern, however, expansive estate recovery will increase the incidence of divorce among the elderly. Since the purpose will be protection of the Community Spouse's livelihood and protection of her assets, the fallout for divorces driven by estate recovery will land squarely at the Board's feet and those of the Governor.<sup>5</sup> This issue was raised recently in Maryland where the Maryland Legislature was told: "We are concerned that the estate recovery of surviving spouses will provide an additional incentive for a spouse to file for divorce from the nursing home spouse. This is contrary to the spirit of the federal Medicaid "spousal impoverishment" laws which are meant to protect a married person from impoverishment when his or her spouse is institutionalized."<sup>6</sup> We believe there is a direct correlation between the comprehensive nature of Medicaid eligibility rules/estate recovery and divorce. Where Medicaid eligibility or estate recovery would tend to impoverish a Community Spouse or her estate, attorneys will counsel clients with substantial assets, particularly clients with children from previous marriages, to consider this option.<sup>7</sup> The undersigned has been informed that at least one Georgia lawyer is now advising elders to consider divorce in the context of Medicaid eligibility.
- Estate recovery will increase the incidence of financial exploitation among the elderly who are concerned about estate recovery. It may also increase the

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<sup>4</sup> <http://www.statehealthfacts.kff.org/cgi-bin/healthfacts.cgi?action=profile&area=Georgia&category=Medicaid+%26+SCHIP&subcategory=Medicaid+Spending>.

<sup>5</sup> Unfortunately, the public will blame the Executive Branch of State Government because estate recovery will be implemented through regulation, as opposed to legislation. For this reason, and other reasons addressed below, we believe the Board should not attempt to extend its authority beyond the plain meaning of the enabling legislation without further guidance from the Legislature.

<sup>6</sup> See Letter from Maryland State Bar Association to the Chairman and Members of the Maryland House Health and Government Operations Committee, dated March 17, 2004 (copy on file with author).

<sup>7</sup> See Letter from Maryland State Bar Association to the Honorable John Hurson, Chair, Maryland House Health and Government Operations Committee, dated March 30, 2004 (copy on file with author); see also T. Begley and J. Jeffreys, *Representing the Elderly Client: Law and Practice* § 8.07[D] (Panel 2003) (discussing the "divorce option").

incidence of physical abuse and neglect if family members fail to seek nursing home care for the elderly due to fears about the State “taking the homeplace.”

- Estate recovery will deter elders from seeking appropriate medical assistance, thereby placing a greater burden on emergency room and other health care resources.<sup>8</sup>

We believe the Board should consider ways in which the Proposed Regulations could be changed to mitigate these concerns. We address many of these issues throughout this Memorandum and begin our analysis with a short history of Estate Recovery, followed by a detailed review of Georgia’s Proposed Estate Recovery Regulations. Interspersed throughout are public comments received in Georgia and in other States identifying public policy concerns associated with Estate Recovery.

### **Medicare, Medicaid and Estate Recovery: A Short History:**

#### ***Deficiencies in Medicare Long-Term Care Coverage:***

Medicare is a federal health insurance program for 40 million elderly and disabled Americans. It pays health care expenses, and, in the case of long term care, for “limited” skilled care. It does not pay for expenses classified mainly as custodial care. As a result, Medicare is an insufficient resource for Georgia citizens seeking assistance paying for long term care.

For Medicare to cover skilled care in a nursing home the following requirements must be met:

- The care received by the patient must be skilled. This means the patient must receive health care or therapy, and such must be performed or supervised by a trained technician or professional.
- The patient must have been in a hospital for at least three days prior to going into the nursing facility and such hospital stay must have ended no more than 30 days from entry into the nursing facility.
- A physician must order that nursing home care is required every day for the same condition that caused the hospitalization.
- The nursing home must be a Medicare-approved skilled facility.

Medicare will pay all costs for up to 20 days (assuming skilled care remains necessary) and then, for days up to 80 additional days (days 21 to 100) after the patient pays a daily co-payment in an amount fixed annually by the U. S. Centers for Medicare & Medicaid

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<sup>8</sup> One study, which surveyed seriously ill persons over age seventy, found that twenty-nine percent would rather die than go to a nursing home. See Robert L. Kane & Rosalie A. Kane, *What Older People Want from Long-Term Care, and How They Can Get It*, 20 HEALTH AFFAIRS, Nov.-Dec. 2001, at 115. For many, the concept of passing property from one generation to the next is both ancient and is Biblically sound, see e.g., Genesis 27:27. They may choose to forego necessary care rather than have the State take the home.

Services (CMS). This year, the daily co-pay is \$109.50. Many Medicare beneficiaries have purchased a Medicare supplemental policy that covers the skilled nursing facility co-payment. Medicare pays the excess. **There is no Medicare skilled nursing facility coverage after 100 days.** It is possible to begin a new benefit period to cover skilled nursing care if the patient stays out of the skilled nursing facility for at least 60 days in a row. **As a result of these stringent requirements, Medicare pays only about 5 percent of the costs of care in a nursing home.**

In the United States Medicaid pays approximately 50 percent of all nursing home costs; and almost 75 percent of nursing home residents receive Medicaid benefits.

### ***Medicaid and its Link to Estate Recovery:***

The Medicaid program, 42 U.S.C. §§ 1396, 1396a-v, established as part of the Social Security Act in 1965, is a cooperative federal-state public assistance program that makes federal funds available to states electing to furnish medical services to certain impoverished individuals. *See West Virginia v. U.S. Department of Health and Human Services*, 289 F.3d 281, 284 (4<sup>th</sup> Cir. 2002). Persons qualify for Medicaid benefits if they are aged, blind, disabled or the parent of a minor child, and their income and resources are insufficient to meet the costs of necessary care and services for the child, as measured by specified statutory criteria. 42 U.S.C. § 1396a. All 50 States have a Medicaid program of some description; Medicaid is viewed as beneficial because it allows these individuals to access health care they otherwise could not afford. Even so, the Medicaid Act is an "enormously complicated program[ ]. The system is a web; a tug at one strand pulls on every other." *Stephenson v. Shalala*, 87 F.3d 350, 356 (9<sup>th</sup> Cir. 1996).

If a state elects to participate in the Medicaid program, it must submit a Medicaid plan to the Department of Health and Human Services ("HHS") for approval.<sup>9</sup> If the plan is approved by HHS, then the state is then entitled to reimbursement from the federal government of a certain percentage of the costs of providing medical care to eligible individuals--the Federal medical assistance percentage ("FMAP"). *West Virginia, supra*. If a state fails to comply with the requirements imposed by the Medicaid Act or by HHS, the state risks the loss of all or a part of its FMAP. *See 42 U.S.C.A. § 1396c* (West 1992); *West Virginia*, at 284. One of those requirements is estate recovery. Because an applicant's principal residence is excluded as a countable resource in determining eligibility, *see* 42 U.S.C. § 1382b(a)(1), some persons who possess valuable assets are allowed to receive benefits. Congress justified this incongruity by authorizing "estate recovery," that is, the recovery of all or a portion of the benefits paid from the estate of such a beneficiary after his or her death.

From the funds collected from the estates, the federal government is credited with a percentage equal to the state's FMAP, and the state retains the balance. *See West Virginia, supra*. Currently, Georgia's FMAP is Sixty-Two point Fifty-Five percent

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<sup>9</sup> Georgia's State Plan is online at <http://www.cms.hhs.gov/medicaid/stateplans/toc.asp?state=GA>. As of this time, Section 4.17 of the State Plan does not impose a lien or provide for estate recovery. *See* [http://www.cms.hhs.gov/medicaid/stateplans/State\\_Data/GA/4.17/X\\_001.pdf](http://www.cms.hhs.gov/medicaid/stateplans/State_Data/GA/4.17/X_001.pdf).



(62.55). See *Federal Register*, June 17, 2003 (Vol. 68, No. 116), pp. 35889-35890. **Thus, the most Georgia would realize is 37 cents (less the cost of collection) on every dollar recovered through Estate Recovery.** For that nominal recovery, Georgia citizens who are victims of chronic illness, and their families, will be subjected to emotional turmoil when this program is implemented.<sup>10</sup>

Federal law governing estate recovery is at 42 U. S. C. §1396p(b) (1998). The language of the federal statute is as follows:

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

(1) No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except that the State shall seek adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan in the case of the following individuals:<sup>11</sup>

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

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

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

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

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

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

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

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

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

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

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

<sup>10</sup> "Simply put, the [author of this Memorandum] believes that the estate recovery program is bad public policy that yields little in terms of dollars actually recovered but creates substantial non-financial problems, such as "widespread clinical depression in aged and disabled nursing home residents." See *West Virginia v. U.S. Department of Health and Human Services*, 289 F.3d 281, 286 (4<sup>th</sup> Cir. 2002).

<sup>11</sup> See *Department of Medical Assistance v. Hallman*, 203 Ga. App. 615, 617, n1 (1992) (noting that estate recovery is limited by this section).

(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.

Significantly, as discussed in this Memorandum, the statute limits recovery proceedings to protect surviving spouses or qualified dependents from poverty during their lifetimes or dependency. *See Nevada v. Ullmer*, 2004 Nevada LEXIS 20, \*6 (Nev. April 1, 2004). Congress has long been concerned with preventing spousal impoverishment. The federal estate recovery legislation attempts to strike a balance between cost recovery and spousal impoverishment by limiting reimbursement efforts to situations where impoverishment is no longer an issue." *Id.*

### ***Estate Recovery:***

Although most States have implemented some form of estate recovery, the programs are unpopular.<sup>12</sup> They are politically sensitive and challenging to administer. For that reason, implementation and federal enforcement of Medicaid estate recoveries has been spotty and inefficient at best.

The purpose of estate recovery, according to its legislative history was "to assure that all of the resources available to an institutionalized individual, including equity in a home,

<sup>12</sup> See, e.g., C. Gearon and C. Hudnall, *Backlash Derails Estate Recovery*, January 2004, <http://www.aarp.org/bulletin/statenews/Articles/northeast.html> (reporting on the political backlash from citizens angry over estate recovery); Coalition of Wisconsin Aging Groups, *2002/2004 Platform*, available at <http://www.cwag.org/Platform.htm> ("Roll back estate recovery and lien law provisions in Wisconsin to include only the federal mandates. Further, work at the federal level to prohibit all estate recovery of Medical Assistance benefits."); Citizens for Better Care Bulletin, *Estate Recovery: Medicaid to Take Back Long Term Care Benefits*, [http://cbcmi.org/publications/est\\_rec.htm](http://cbcmi.org/publications/est_rec.htm) (supporting repeal of estate recovery); *Connecticut Proposed Bill 5283* (February 2004), proposing repeal of estate recovery in Connecticut, <http://www.cga.state.ct.us/2004/tob/h/2004HB-05283-R00-HB.htm>.

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.” (United States Code, Congressional and Administrative News, 97<sup>th</sup> Congress—Second Session—1982, Legislative History [Public Laws 97-146 to 97-248] Volume 2, St. Paul, Minnesota, West Publishing Company, p. 814) (emphasis added). The justification, on the other hand is simply assurance that the Medicaid beneficiary’s estate is tapped dry.<sup>13</sup>

Although Governor Sonny Purdue’s commitment to Georgia’s citizens is “no new taxes,”<sup>14</sup> **Estate Recovery is a tax** imposed on a specific class of Medicaid beneficiaries and is often called “The Other Death Tax.”<sup>15</sup> It has also been called a predatory loan.<sup>16</sup> When they die, most Americans leave estates that are too small to owe any federal estate tax. However, for those persons who suffer from chronic conditions requiring nursing home care, Medicaid “taxes” them in order to recover long-term care expenditures made on behalf of program recipients. Thus, by implementing Estate Recovery, Georgia is raising taxes and levying them, in many cases, against the estates of those least able to pay them.<sup>17</sup> **Many of these individuals are World War II veterans, or their spouses.**<sup>18</sup>

Excerpt from Ruth Jones McClendon, *Texas To Take Homes of Frail And Elderly Who Use Medicaid*:<sup>19</sup>

Dear Rep. McClendon:

<sup>13</sup> U.S. Department of Health and Human Services, *Caring for Frail Elderly People: Policies in Evolution, Chapter 14: United States*, <http://www.aspe.hhs.gov/daltcp/reports/chap14.htm> (1996).

<sup>14</sup> On January 13, March, 2004, in his annual message to the Citizens of Georgia, Governor Purdue said: “I will not allow anyone to make your struggle harder by reaching deeper into your pocket with a tax increase.” “If you have to live within your means, state government will too. We will not raise taxes to balance this budget.” See J. Skorburg, *Georgia Governor Touts Spending Restraint, No New Taxes*, Budget & Taxes (March 1, 2004), at <http://www.heartland.org/Article.cfm?artId=14566>.

<sup>15</sup> See Joint Economic Committee, Democratic Staff, *Medicaid Estate Recovery: The Other Estate Tax* (June 2002); see also A. Miller, *Georgia may tax its dead for care*, Atlanta Journal-Constitution, Mar 20, 2004, at <http://www.libertypost.org/cgi-bin/readart.cgi?ArtNum=41663>; A. Miller, *Ga. to bill estates for Medicaid*, Atlanta Journal-Constitution, May 21, 2004, at <http://www.ajc.com/metro/content/metro/0504/22estate.html>.

<sup>16</sup> Comments of Martha Eaves, 87, of Conyers, the legislative chairwoman of the Georgia Council on Aging, an advocacy group as reported in *Georgia may tax its dead for care, supra*. “The policy would turn Medicaid coverage into a ‘predatory loan,’ she said.” *Georgia may tax its dead for care, supra*.

<sup>17</sup> Admittedly, this appears to be the current trend. See, e.g., Editorial, *Look who’s raising taxes: Republican-run states*, U.S.A. Today, May 16, 2004 (“Georgia. In 2003, less than 24 hours after becoming the state’s first Republican governor in more than a century, Sonny Purdue proposed hiking taxes by about \$762 million to close a budget gap.”), available at [http://www.usatoday.com/news/opinion/editorials/2004-05-16-our-view\\_x.htm](http://www.usatoday.com/news/opinion/editorials/2004-05-16-our-view_x.htm).

<sup>18</sup> In 2000, CNN reported that the average age of D-Day veterans was 77. Today, the average age would be 81. See *D-Day Museum opens: ‘Last hurrah’ for World War II vets*, June 6, 2000, at <http://www.cnn.com/2000/US/06/06/dday.remembrance/>. Speaking about veterans, generally, Anthony Principi, Secretary of Veterans Affairs, was recently quoted as saying “These soldiers gave up part of their lives or part of their bodies for us. We need to make the difficult decisions to care for them.” L. Winik, *What Do We Owe Our Veterans?*, Parade Magazine, page 4, Atlanta Journal-Constitution, May 30, 2004.

<sup>19</sup> See <http://www.seniorjournal.com/NEWS/Medicaid/3-07-29texas.htm>.

"My mother is in a Special Care Unit in Mesquite. In 2002, she had a brain tumor and unsuccessful surgery. It never occurred to us that the state of Texas would seize the property of a person whose family were homesteaders and lifelong residents of the state.

"My mother worked for over 35 years, was a legal resident, paid taxes and was a productive member of society for 84 years. When my mother passes away, not only will I lose my mother, but also the place I live and maintain."

*Note: The State of Texas has recently considered implementation of Estate Recovery and received the following Public Comments:*

**Veterans, who have given so much to protect this country, should not have their homesteads subject to "confiscation" by the estate recovery law.**<sup>20</sup>

*The program is seen as an estate tax on the poor and on the less educated who do not have the resources to secure the services of estate lawyers to protect their assets.*<sup>21</sup>

*The estate recovery program is an estate tax on the poor and therefore it is the wrong thing to do.*<sup>22</sup>

*The estate recovery program was described as a "death tax".*<sup>23</sup>

**As a matter of policy, thus far, Georgia has declined to enforce estate recovery.** Georgia made that decision after making inquiries concerning its exposure for failing to enforce estate recovery. Georgia received a response from HHS, dated June 18, 1998, explaining that there is no penalty for failure to implement the program, although implementation was encouraged.<sup>24</sup> Thereafter, on September 18, 1998, Laura Marshall, spokesperson for the Department of Medical Assistance was quoted as saying that **"we are not going to do it. For the emotional impact, it was probably not worth the cost."**<sup>25</sup> As **Appendix A** demonstrates, Ms. Marshall was correct because, as of 1997, no State was reporting recoveries exceeding one percent (1%) of total

<sup>20</sup> <http://www.hhsc.state.tx.us/medicaid/EstateRecovery/ER-PubComments.html>, Summary of Public Input Received Via Internet and the Mail.

<sup>21</sup> <http://www.hhsc.state.tx.us/medicaid/EstateRecovery/ER-PubComments.html>, San Antonio Public Hearing Meeting Notes, Monday, February 9, 2004, 4:00 - 7:00 p.m.

<sup>22</sup> *Id.*, Harlingen Public Hearing Meeting Notes, Wednesday, February 11, 2004, 4:00 - 7:00 p.m.

<sup>23</sup> *Id.*, Summary of Public Input Received Via Internet and the Mail.

<sup>24</sup> Reported in I. Leff, *Georgia Nursing Home Medicare and Medicaid*, in *Elder Law* (February 23, 2001), an Annual Program sponsored by the Institute of Continuing Legal Education in Georgia. It is this writer's understanding that HHS has not changed its position and that Georgia is not in danger of losing its FMAP, in whole or in part.

<sup>25</sup> *Id.* "The nursing home industry predicts estate recovery will create "a public relations nightmare" for Georgia. 'The asset recovery will be a problem because of the family and people who will inherit this property,' says Fred Watson, president of the Georgia Nursing Home Association. 'They won't understand this. It never has been done before. They're going to view it as big government taking their property.'" See *Ga. to bill estates for Medicaid, supra* (emphasis added).

Medicaid expenditures.<sup>26</sup> In light of the policy reasons mitigating against estate recovery, we do not believe Georgia's position should be reversed and suggest that the estate recovery regulations be abandoned.

The emotional impact referenced by Ms. Marshall is real. In almost every case, when death occurs, the Medicaid applicant will want to pass wealth to his heirs, an impulse as old as the Bible itself.<sup>27</sup> Former President Jimmy Carter says the following about his own estate plan:

One of the most interesting and gratifying responsibilities at our age is to decide what to do with accumulated wealth and possessions. In all too many cases, couples fail to leave a will of any kind. Whether it's a few pieces of furniture and some personal items or broader holdings of stocks and real estate, we should decide what will happen to our belongings. We must remember that, no matter what we do, the Internal Revenue Service will be one of our major heirs. How much of our estate will go for taxes can be greatly affected by whether or not we plan for the future. . . . We are leaving a substantial portion of our estate to the Carter Center. . . . We have retained an interest in some of our bequests, amending the arrangements to accommodate changing circumstances and sometimes for sentimental reasons. For instance, we have a special feeling about our property around Plains. Both Rosalynn's and my ancestors who were born in the 1700s are buried there, and most of the land that we own was acquired several generations ago. . . . [W]e wish to keep intact and owned by our direct descendants.<sup>28</sup>

Former President Carter's description of his estate plan underscores the natural inclination we all have toward directing how our assets will be distributed. Beyond personal and sentimental reasons for controlling the disposition of assets, the social significance of inheritance laws was recognized by Alexis de Tocqueville in *Democracy in America*. Those who control the direction wealth takes as it passes to the next generation have immense power. Tocqueville observed: "What is called family pride is often founded upon an illusion of self-love. A man wishes to perpetuate and immortalize himself, as it were, in his greatgrandchildren." For middle-class seniors who need long-term care, the present Medicaid system is, in effect, a health lottery that deprives them of this opportunity. No rational person would enter such a lottery voluntarily.

As stated elsewhere in this Memorandum, only individuals unfortunate enough to suffer from a chronic disease are victims of the present health care financing system. This is true because Medicare pays health care costs for Elders afflicted with acute ailments. In our view, estate recovery deprives middle class and poor citizens of this psychological

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<sup>26</sup> In 1999, estate recovery nation-wide recouped only about \$200 Million, roughly one-tenth of one percent of the \$190 Billion spent. *See Medicaid Estate Recovery: The Other Estate Tax, supra*. One reason estate recovery is nominal is because estate left by Medicaid beneficiaries are typically small. *Id.*

<sup>27</sup> *See e.g.*, Proverbs 13:22. A search of the word "inheritance" in the New International Version of the Bible reveals 219 verses discussing the concept.

<sup>28</sup> Jimmy Carter, *The Virtues of Aging* 20 (1998).

and emotional benefit. The loss of this psychological and emotional right is one factor that drives contemplation of the “divorce option” described above and, in some cases, would drive self neglect (*e.g.*, failure to seek necessary medical services).

**Public Comment from Texas:** It seems unfair to force the elderly poor to surrender their possessions for which they labored for a lifetime. As people age, they are increasingly likely to need medication. In order to pay for the medications, the elderly must use savings, go back to work, or sign up for Medicaid. Often unable to find jobs, poor elderly persons have limited options.<sup>29</sup>

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**. *See 42 U.S.C.A. § 1396p(b)(1)* (West Supp. 2001).

**Note:** A report on Georgia’s Vital Statistics for FY 2002, prepared by the *Office of Health Information and Policy, Division of Public Health*, indicates that in 2002, Georgia’s population was 8,560,310. Of that number, **1,546,897 were aged 55 or older**.<sup>30</sup> In other words, the Proposed Estate Recovery Regulations have a potential impact on nearly 20% of Georgia’s population.<sup>31</sup> Four in ten individuals over the age of 65 will use a nursing home at some point in their lives,<sup>32</sup> meaning that the proposed regulations directly impact 8% of Georgia’s population. Because “Medicaid remains the dominant payer for nursing home care, compensating providers for more than 77% of nursing home patient days of care,” it is fair to assume estate recovery will be impact each nursing home resident and their families.<sup>33</sup>

The provisions do not take effect while there is a surviving spouse or dependent child of the beneficiary, *see 42 U.S.C. § 1396p(b)(2)*; 42 C.F.R. § 433.36(g)(3) and (h), and may be waived in cases where they “would work an undue hardship,” *see 42 U.S.C. § 1396p(b)(3)*. Potential Medicaid beneficiaries should be informed of the estate recovery provisions before they elect to accept Medicaid benefits. *See State Medicaid Manual § 3810(H)(1)*.

<sup>29</sup> <http://www.hhsc.state.tx.us/medicaid/EstateRecovery/ER-PubComments.html>, Houston Public Hearing Meeting Notes, Friday, February 20, 2004, 4:00 p.m. - 7:00 p.m.

<sup>30</sup> *See* <http://www.ph.dhr.state.ga.us/pdfs/ohip/vsr/vitalstatisticsreport.02.pdf>.

<sup>31</sup> Of this number, in FY 2002, 53,527 Georgians received nursing home Medicaid benefits. *See Department of Community Health, State Fiscal Year 2002 Annual Report*, page 15, [http://www.communityhealth.state.ga.us/departments/dch/v4/top/audiences/home/issues/annual\\_report/dch\\_annual\\_02.pdf](http://www.communityhealth.state.ga.us/departments/dch/v4/top/audiences/home/issues/annual_report/dch_annual_02.pdf) (combined recipients of Intermediate care, nursing home services and swing beds).

<sup>32</sup> *AHCPR Research on Long-Term Care*, <http://www.ahrq.gov/research/longtrm1.htm>.

<sup>33</sup> *See Department of Community Health, Health Utilization Statistics*, available at [http://www.communityhealth.state.ga.us/cgi-bin/doas\\_navengine.cgi?websession\\_id=51245117187492004052621185460&sitedir=/departments/dch/v4&configfile=body.cfg&lookuppathname=/shared/con\\_dhp/health\\_utilization\\_stats](http://www.communityhealth.state.ga.us/cgi-bin/doas_navengine.cgi?websession_id=51245117187492004052621185460&sitedir=/departments/dch/v4&configfile=body.cfg&lookuppathname=/shared/con_dhp/health_utilization_stats).

Public Comments from Texas:

Current clients and those who have applied for services prior to the effective date of the estate recovery program should be exempt from the program. Although the federal requirement has been in place since 1993, it would be fairer for the program to apply only to clients who receive notification about it at the time they apply for services.<sup>34</sup>

The State approved this program without the input and consent of the local community. Some were upset that the State decided to come to the community to ask opinions and suggestions for the program after approving it, knowing that it is already too late to stop its implementation.<sup>35</sup>

Guardians would need to be appointed in order for the ICF/MR clients to have somebody on their side that understands notices and program-related provisions.<sup>36</sup> Of note, if Guardianships are required, then the expenses provided for in O.C.G.A. § 29-5-13 are taxed to the Ward. No provision exists, at present, to allow those expenses as a medical necessity. This should be changed to accommodate the Ward's needs.

To the states that already had operational estate recovery programs, OBRA 93's call to arms served merely as reinforcement. OBRA 93 did provide a standard to which all programs must comply. The statute does grant the states some room with which to formulate a system to best serve its needs. Because of this leniency, it can be simply stated that there are no two estate recovery programs alike. Therefore, a single definition of an estate recovery program does not exist. With this in mind, if Georgia implements an estate recovery program, then the program should be narrowly tailored to limit its financial and emotional impact on Georgia citizens.

The federal statute makes it clear that estate recovery is prohibited under certain circumstances. For example, recovery may not occur if there is a surviving spouse, blind or disabled child, or a child under the age of twenty-one. A further consideration preempting recovery is a showing of "undue hardship" by an individual. Undue hardship may include cases where the estate is the sole source of income for the survivors, where the asset is a homestead of minimal value, as well as any additional circumstances which may be determined upon a case by case analysis. If no relatives in the excluded categories exist and there is a lack of a showing of undue hardship, then recovery may be instituted immediately upon the death of the Medicaid beneficiary.

As has been previously stated, estate recovery programs vary from state to state. Accordingly, it is difficult to ascertain an exact procedure these programs follow in the actual recovery of funds. Nevertheless, some tracking process must exist allowing states to monitor who is receiving Medicaid funds, how much has been expended on

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<sup>34</sup> <http://www.hhsc.state.tx.us/medicaid/EstateRecovery/ER-PubComments.html>, San Antonio Public Hearing Meeting Notes, Monday, February 9, 2004, 4:00 - 7:00 p.m.

<sup>35</sup> *Id.*, Harlingen Public Hearing Meeting Notes, Wednesday, February 11, 2004, 4:00 - 7:00 p.m.

<sup>36</sup> *Id.*, San Antonio Public Hearing Meeting Notes, Monday, February 9, 2004, 4:00 - 7:00 p.m. Of note, there is no provision in Georgia's Proposed Regulations requiring the appointment of a guardian in cases where an agent is not available to receive notice.

that person at any given time, and when that person passes away. Because recovery may be restricted by a statute of limitations, keeping abreast of the deaths of Medicaid recipients is oftentimes the most difficult task. Notice of death may be provided in several ways: by the executor of the estate, by the public assistance case worker, or through a process of scanning newspapers or applications to open an estate.

Once notice of death has been received, the agency in charge of estate recovery for the state generally presents a claim to the estate or files a claim in court for assets not included in the probate estate. The agency can only claim an amount equal to the total amount of assistance provided or the value of the estate, whichever is less. The agency generally is bound by the time limitations to file a claim against the estate as are other creditors under state law. Because of these time constraints, if an estate is not opened by the heirs, then the agency has the ability to do so on its own accord. The claim generally will be given priority over all unsecured creditors with the exception of funeral and burial expenses, probate fees, taxes, and other administrative expenses.

Medicaid liens and estate recovery have similar functions, but have potentially different results for the Medicaid recipient. It is important to recognize and understand the differences as well as how they work in conjunction with each other for the purposes of this bibliography. Simply stated, a Medicaid lien acts as a security interest on the recipient's property while the recipient is living, while estate recovery only becomes effective upon the death of the recipient.

Only a few circumstances bring upon the occasion in which a Medicaid lien may be imposed. One such occasion is when medical assistance is improperly paid. Of particular concern is the situation when the recipient is institutionalized in a medical facility or nursing home and there exists no reasonable expectation of the beneficiary returning home. Under this circumstance, a lien may only be placed upon the real property of the recipient and must be released if the beneficiary does indeed return home.

Additional safeguards have been enacted in other States to prevent potentially harmful effects of the imposition of such liens. Like estate recovery, no lien may be placed if there is a surviving relative such as a spouse or child. Furthermore, there can be no foreclosure sale in order to precipitate recovery. Recovery can only take place when there is disposition of the property either by sale or transfer or upon the death of the recipient. Medicaid liens are not addressed herein.

There were several forces propelling the enactment of estate recovery programs on the federal level. By far the most compelling was the financial cost of the Medicaid system. Medicaid is an overworked, sometimes abused means of obtaining health care. The future of the system has been the topic of much debate both during the passage of OBRA '93 and in subsequent legislative debates. With its future hanging in the balance, the estate recovery program was enacted to attempt to recoup funds from the estate of the program's recipients. The funds that are recovered are to serve as a means of financing future medical assistance. Our humble suggestion is that estate recovery has never and will never accomplish that goal and that it causes more problems than it is worth. A



more balanced approach to financing long term care has been advanced by the National Academy of Elder Law Attorneys.<sup>37</sup>

Some argue that estate recovery creates an incentive for the elderly to seek alternatives to Medicaid. Many of elderly have a strong desire to be able to leave an inheritance to children, grandchildren, or other loved ones. The possibility of estate recovery may encourage the elderly to purchase long-term care insurance or discover other means to finance their long-term care. However, the strong incentive to leave a bequest to one's children could also discourage the elderly from securing the care they need.

Public Comments from Texas:

There was some concern that the program would dissuade people who need medical attention from seeking Medicaid or other public health services if they perceive that the government may "confiscate" their estate.<sup>38</sup>

Since the elderly will be afraid of losing their homesteads, many of them will not apply for services they need. As a result, the number of medical emergencies and otherwise avoidable hospitalizations will increase.<sup>39</sup>

Citizens who need services may be afraid to apply for them if the system is intimidating and not user friendly.<sup>40</sup>

The probability exists that Estate Recovery will have the unintended effect of increasing the incidence of Elder Abuse. The National Elder Abuse Incidence Study<sup>41</sup> defines "Financial or material exploitation" as the illegal or improper use of an elder's funds, property, or assets. Elders who fear estate recovery would be more vulnerable to those who would encourage them to divest themselves of assets based on the fear that they "might" someday require nursing home care.

Public Comment from Texas: Vulnerable long-term care clients will be exposed to exploitation from others willing to use the clients' fears to obtain their estate. There was some concern that the program would unintentionally encourage exploitation of clients by forcing them to transfer their homesteads prior to receiving services or risk losing them.<sup>42</sup>

On January 11, 2001, the Health Care Financing Administration of the U.S. Department of Health and Human Services published Transmittal 75 of the "State Medicaid

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<sup>37</sup> National Academy of Elder Law Attorneys, *White Paper on Reforming the Delivery, Accessibility and Financing of Long-Term Care in the United States* (2000).

<sup>38</sup> <http://www.hhsc.state.tx.us/medicaid/EstateRecovery/ER-PubComments.html>, San Antonio Public Hearing Meeting Notes, Monday, February 9, 2004, 4:00 - 7:00 p.m.

<sup>39</sup> *Id.*, Harlingen Public Hearing Meeting Notes, Wednesday, February 11, 2004, 4:00 - 7:00 p.m.

<sup>40</sup> *Id.*, Fort Worth Public Hearing Meeting Notes, Tuesday, February 17, 2004, 4:00 p.m. - 7:00 p.m.

<sup>41</sup> See [http://www.aoa.gov/eldfam/Elder\\_Rights/Elder\\_Abuse/ABuseReport\\_Full.pdf](http://www.aoa.gov/eldfam/Elder_Rights/Elder_Abuse/ABuseReport_Full.pdf).

<sup>42</sup> <http://www.hhsc.state.tx.us/medicaid/EstateRecovery/ER-PubComments.html>, San Antonio Public Hearing Meeting Notes, Monday, February 9, 2004, 4:00 - 7:00 p.m.

Manual—Part 3—Eligibility” containing new and revised material effective February 15, 2001, bearing on mandatory and optional Medicaid estate recoveries. Among numerous other subjects, Transmittal 75 provided guidance on how and under what circumstances state Medicaid programs may engage in estate recovery. The Text of Transmittal 75 is online at [http://www.cms.hhs.gov/manuals/45\\_smm/sm\\_03\\_3\\_3800\\_to\\_3812.asp](http://www.cms.hhs.gov/manuals/45_smm/sm_03_3_3800_to_3812.asp).

Ten years ago, the State of Wisconsin enacted a statute permitting estate recovery from surviving spouses. In 1995, the Wisconsin Court of Appeals invalidated the statute as overbroad. In *DHHS v. Estate of Budney*, 541 N.W.2d 245 (Wis. App. 1995), the court refused to enforce a claim against the surviving spouse of a Medicaid recipient. The court concluded that the state statute conflicted with federal law and, therefore, was unenforceable.<sup>43</sup> As a result, the state was forced to return assets it had previously recovered from surviving spouses. *See, e.g., Estate of Haas v. State of Wisconsin*, No. 97-0100 (Wis. App. February 12, 1998) (unpublished decision).<sup>44</sup> This led to a class action lawsuit that resulted in the state returning every penny it had collected. **The lesson here is that an improperly structured estate recovery program would ultimately cost the State more in terms of unenforceable recovery, expenses and political capital.**

### **Georgia’s Venture into Estate Recovery:**

In our American system of government, the legislature is in charge of making law and policy, the administrative branch is charged with implementing those laws and the judicial branch is charged with interpreting them. Both the administrative and judicial branches of government should, in theory, act consistent with the legislative agenda without imposing their own agenda, thus altering the legislation. In that regard:

[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).

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<sup>43</sup> In Tennessee, the Chancery Court for Hamilton County recently reached the same conclusion. *See In re Estate of Mary Frances Williams*, No. 03-P-256 (January 30, 2004) (holding that recovery from the estate of the Medicaid recipient's spouse was not permitted).

<sup>44</sup> *See* <http://www.wisbar.org/res/capp/z1997/97-0100.htm>.

*HCA Health Servs. v. Roach*, 265 Ga. 501, 502 (1995).<sup>45</sup> Thus, the underlying legislation is the necessary point of origin in examining the Proposed Regulations.

### ***Georgia Legislation:***

Georgia enacted enabling legislation authorizing estate recovery in 1937.<sup>46</sup> The text of that legislation, codified at O.C.G.A. § 49-4-59, is as follows:

(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.

Further, O.C.G.A. § 49-4-147.1 provides:<sup>47</sup>

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**<sup>48</sup> for the amount of any medical assistance payments made on such person's behalf by the department. The commissioner shall waive such claim if he determines enforcement of the claim would result in substantial and unreasonable hardship to dependents of the individual against whose estate the claim exists. (Emphasis added).

No Georgia case has cited or interpreted these laws. It is clear, however, that these are the statutes defining the Board's authority regarding estate recovery. Nonetheless, these Statutes are the basis for the regulations reviewed below:

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<sup>45</sup> See *State Revenue Com. v. Edgar Bros. Co.*, 185 Ga. 216, 233 (1937). There, the Court notes 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. Nonetheless, they have only such powers as are 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 Service Com. v. Charles H. Turner, Inc.*, 200 Ga. App. 144, 145 (1991) (holding statute did not give Commissioner discretionary authority to regulate beyond statute's terms).

<sup>46</sup> Estate Recovery originated in Old Age Assistance Act of 1937.

<sup>47</sup> This Statute was enacted in 1981. See Ga. L. 1981, p. 917, § 1.

<sup>48</sup> O.C.G.A. § 49-4-147.1 is consistent with 42 U.S.C. § 1396p(b)(1) which limits estate recovery to the estate of the deceased Medicaid recipient. See *Brumley, supra*; *In re Estate of Mary Frances Williams, supra*; *Estate of Craig*, 624 N.E.2d 1003 (N.Y. 1993).

## ***Georgia's Proposed Estate Recovery Regulations***

### **Public Notice:**

Beginning on August 1, 2004, Estate Recovery will impact families in Georgia when property is seized that would otherwise have passed to the heirs of Medicaid beneficiaries. While Estate Recovery is arguably required under 42 U.S.C. § 1396p(b), it is bad policy and appears to be inconsistent with the mission of State Government as declared in our Constitution.<sup>49</sup> At a time when our national government has underscored the importance of passing assets from one generation to another by repealing the estate tax for the wealthy,<sup>50</sup> estate recovery would take assets from the poorest sector of our society, impoverishing them further. This, by any measure, is not impartial and complete protection of property.<sup>51</sup> Individuals who suffer from acute conditions, such as heart attacks or strokes are victims of estate recovery because their medical bills are covered by Medicare; instead, only those individuals unfortunate enough to suffer from chronic conditions are victimized.

[O]ne could certainly argue that the current system of financing medical care favors acute care and disfavors chronic care and is thus disease discriminatory. Most Americans with chronic illnesses impoverish themselves paying for their care, and then Medicaid pays for their care. For example, bypass surgery is paid for by Medicare. However, a person with Alzheimer's Disease does not have long-term coverage for her care under Medicare and must become destitute before receiving Medicaid coverage.<sup>52</sup>

The Proposed Regulations should not be implemented without broader notice to Georgia's citizens and meetings throughout the State. There is a feeling throughout much of the State that officials in "Atlanta" make decisions without input from the community at large. In that regard, one comment expressed in Texas was as follows: "HHSC did not sufficiently publicize the hearings or inform the public about the policy change. An announcement about the local hearing appeared only two days before in the newspaper. Many elderly do not have access to the Internet. Most people attending the hearing were professionals working with seniors rather than the senior citizens themselves. People living in rural areas were put at a disadvantage because the hearings are being held in major metropolitan areas."<sup>53</sup>

<sup>49</sup> The Preamble to Georgia's Constitution provides that State Government is "To perpetuate the principles of free government, insure justice to all, preserve peace, **promote the interest and happiness of the citizen and of the family**, and transmit to posterity the enjoyment of liberty, we the people of Georgia, relying upon the protection and guidance of Almighty God, do ordain and establish this Constitution. (Emphasis added).

<sup>50</sup> On June 7<sup>th</sup>, 2001, President Bush signed the Economic Growth and Tax Relief Reconciliation Act of 2001. That Act essentially repealed the federal estate tax for America's wealthy.

<sup>51</sup> Georgia Constitution, Article I, Section I, Para. II.

<sup>52</sup> National Academy of Elder Law Attorneys, *White Paper on Reforming the Delivery, Accessibility and Financing of Long-Term Care in the United States*, pages 8-9 (2000).

<sup>53</sup> <http://www.hhsc.state.tx.us/medicaid/EstateRecovery/ER-PubComments.html>, Fort Worth Public Hearing Meeting Notes, Tuesday, February 17, 2004, 4:00 p.m. - 7:00 p.m.

The Proposed Regulations were originally published under a public notice, dated May 12, 2004. That notice stated that the Department intends to recover costs for services provided on or after August 1, 2001. **Initially, we note that retroactive enforcement is contrary to HCFA Transmittal 75, which requires “advanced notice of any proposed recovery.”** See *HCFA 75*, § 3810(D).<sup>54</sup> Further, we believe retroactive application of these regulations is both unfair and is contrary to Georgia law. The retroactive application of an estate recovery program was addressed in *Estate of Wood v. Arkansas Dep't of Human Servs.*, 319 Ark. 697, 894 S.W.2d 573 (1995). There, a 1993 Arkansas statute created a debt claim against the estate of deceased Medicaid beneficiaries. When the State attempted to enforce the claim retroactively, the Probate Court allowed a claim seeking reimbursement for services provided in 1991, but the Supreme Court of Arkansas reversed. The legislation failed to indicate whether it could be applied retroactively and Court refused to presume a legislative intent to do so. “It is presumed that all legislation is intended to apply prospectively only.”

Although the public notice indicates that retroactive application is contemplated, the reasoning behind the Arkansas presumption (principles of fairness as well as notice)<sup>55</sup> suggests that the same result reached in *Estate of Wood* should be reached here. For example, the proposed regulations may have the effect of impairing transactions entered into prior to their announcement. To the extent they do, they are arguably in violation of Georgia’s Constitution.<sup>56</sup> Litigation will necessarily ensue, particularly where parties have relied on the State’s continuing representation that Estate Recovery would not be implemented in Georgia. Our suggestion is that prospective, rather than retrospective, application of the regulations is the only fair result.

**Public Comment in Texas:** Estate recovery should not be applied to current Medicaid recipients. Recovering from the estates of current recipients would be in conflict with what the State told clients upon application when they were assured that their homesteads would be not affected by their receipt of Medicaid services.<sup>57</sup>

The proposed regulations are, in many ways a redundant and convoluted attempt to outline what Georgia proposes to do. In some sections, addressed below, they appear to be limited to the probate estate of the deceased Medicaid Applicant. In others, they appear to reach beyond the estate. The notice provisions, addressed in more than one section, are less than clear. The hardship provisions are less expansive than federal law permits. Because there is no enforcement history as of yet, we raise a number of issues

<sup>54</sup> HCFA Transmittal 75 § 3810(H)(1) states: “You should provide notice to individuals at the time of application for Medicaid that explains the estate recovery program in your State.” A second “specific” notice should be sent when recovery is attempted. *Id.*, at (H)(2). The legislative history makes it clear that Congress considered advanced notice to be appropriate. See House Rept. 103-111 (Part 2 of 8) § 5112 (May 25, 1993), available on Lexis.

<sup>55</sup> “Retrospective statutes are forbidden by the first principles of justice.” *Bank of Norman Park v. Colquitt County*, 169 Ga. 534 (1929).

<sup>56</sup> No bill of attainder, 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. Georgia Constitution, Article I, Section I, Para. X.

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because unclear regulations will necessarily result in litigation, increasing hardship and emotional trauma for Georgia's citizens and collection costs for the State.

***Text of Proposed Regulation:***

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

In accordance with Title XIX of the Social Security Act, 42 U.S.C. § 1396a, 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 Probate Code, O.C.G.A. §53-7-1 et. seq.

Authority O.C.G.A. 49-4-147.1. **History.**

**Synopsis**

**Statement Of Purpose and Main Features of Proposed Rules**

This regulation is enacted to provide the statutory authority for the process by which Medicaid funds, paid on behalf of the Medicaid member, will be recovered from the member's estate.

**Differences Between Existing And Proposed Rules**

This is a new regulation. There is no existing rule.

**Comments:**

The enabling legislation, O.C.G.A. 49-4-147.1, clearly limits the Departments claims to the estate of the deceased Medicaid applicant. Thus, we agree that the "recovery methodology must adhere to statutory provisions of the Probate Code, O.C.G.A. §53-7-1 et. seq." While Section 49-4-147.1 does not define the term "estate," the term is defined elsewhere by the Legislature so its plain meaning can be readily identified.<sup>58</sup> Further, since collection must come through the estate, the State is limited to collections that may be accomplished by the personal representative or executor, which lends further credence to the argument that the common definition of estate applies. In that regard, we are confused by certain aspects of the regulations, taken as a whole, which seem to indicate the Department intends to assert claims against assets that are not in the

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<sup>58</sup> See, e.g., *Carringer v. Rodgers*, 276 Ga. 359, 366 (2003) ("we apply the plain meaning to the words of the statute to carry out the legislature's intention. The express language of the Act will be followed literally and no exceptions to the requirements of the Act will be read into the statute by the courts.").

Estate. Since the Executor and/or Administrator would have no control over Assets (defined below)<sup>59</sup> which are not in the Estate (defined below), such claims are beyond those authorized in O.C.G.A. § 49-4-147.1 (the Department may make a “claim against the estate of a Medicaid recipient”). We believe clarification of this issue now might obviate inevitable litigation where the Department would be required to defend a position seemingly not authorized by the Legislature.<sup>60</sup>

### ***Text of Proposed Regulation:***

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

(1) “Assets” means real property passing by reason of joint tenancy, reserved life estate, survivorship, trust, annuity, homestead or any other arrangement. Assets also include excess funds from a burial trust, promissory notes, cash, and personal property.

**Comments:** Consistent with our prior comment, we believe inclusion of this defined term unnecessarily adds confusion to an already confused subject. O.C.G.A. § 49-4-147.1 does not appear to authorize claims against persons other than the Estate of a deceased Medicaid beneficiary. Since the Legislature did not change the law concerning how land is owned, transferred, titled, or passed in probate, if a claim were asserted against Assets as defined here, litigation over the Department authority is inevitable. We believe the more prudent course would be to remove this defined term and to limit estate recovery to the probate estate until such time as the Legislature sees fits to expand the authority granted in the enabling legislation.

We have a further concern with inclusion of the phrase “and personal property.” When a Medicaid recipient dies, the State has no economic interest in property with nominal value such as Mom’s china, her clothing, and other items which may have tremendous sentimental value to survivors. We believe the regulations should be clearly carved back to exclude that type of personal property so it can be passed immediately to her heirs.

(2) “Debt” means a sum of money owed from one person to another, including the right of the creditor to receive and enforce payment.

(2) “Department” means the Georgia Department of Community Health, Division of Medical Assistance.

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<sup>59</sup> Because the State is not required to define the term “Assets,” *see* 42 U.S.C. § 433.36(e), and because the definition is inconsistent with the scope of a probate estate as defined by the Legislature, the term should be removed from the Proposed Regulations.

<sup>60</sup> Although we believe the Department would have the burden of proof, the regulations might unnecessarily cloud titles in Georgia. Where the Legislature has otherwise provided that Assets pass outside the Estate, we do not believe the Executor and/or Administrator has a legal right or duty to assert claims against those Assets or against the persons holding them. Thus, the Department would be required to pursue those Assets in separate litigation and would be asserting a claim other than one against the estate of a Medicaid recipient. This appears to be contrary to both 42 U.S.C. § 1396p and O.C.G.A. § 49-4-147.1

(3) “Equity interest in the home” means value of the property that the individual holds legal title to beyond the amount owed on it in mortgages and liens.<sup>61</sup>

(4) “Estate” means all real and personal property under the probate code and any property received by an heir or devisee by distribution as joint tenancy, tenancy in common, right of survivorship and living trust.

**Comments:** See our Comment regarding “Assets.” Congress has not defined the term “estate” in the federal statute and, therefore, we look to State law for its meaning. See *Bucholtz v. Belshe*, 114 F.3d 923 , 925 (9<sup>th</sup> Cir. 1997). Our Legislature has defined the term “estate” to mean “the quantity of interest which an owner has in real or personal property.” See O.C.G.A. § 44-1-4. Division of the right of possession from rights of title is also codified. See O.C.G.A. § 44-1-12; § 44-5-40; § 44-6-60(a); § 44-6-80 to 44-6-90. Further, a right of survivorship is enforceable. See *Commercial Banking Company v. Spurlock*, 238 Ga. 123 (1977); see also O.C.G.A. § 44-6-190. Since the Legislature did not expressly authorize the Board to change the law relating to estates in land, in light of the present definition in the Proposed Regulations, we are concerned about potential conflicts between Georgia Statutes and the regulations.

After an interest in land is conveyed, the Medicaid Applicant no longer “owns” the separate estate created by the divestment.<sup>62</sup> For example, estates in land held with rights of survivorship, life estates and interests in trusts ordinarily do not survive the decedent and, therefore, would not be “subject to [being] administered by the legal representative, if there is one, for the payment of debts, the purposes of distribution, and other purposes provided for by law.” O.C.G.A. § 53-4-8. Moreover, the jurisdiction over Trusts is distinct from that of the Estate. O.C.G.A. § 53-12-4 and, therefore, conflicts squarely with O.C.G.A. § 49-4-147.1.

Beyond the questionable nature of pursuing estate recovery not contemplated in the enabling legislation, this type of estate recovery is simply unfair because the Medicaid beneficiary will have already suffered a transfer penalty associated with the initial transfer.

“Estate” should be re-defined consistent with the probate estate contemplated in the enabling legislation. Alternatively, the definition should be deleted in favor of the definition supplied in O.C.G.A. § 44-1-4.

(5) “Heirs” mean those who are entitled under the statutes of intestate succession to property of a decedent.

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<sup>61</sup> This is a required term. See 42 C.F.R. § 433.36(e)(2). The term is applied in subsection 433.36(g)(3)(iii), which preclude imposition of a lien against a home where the Medicaid Applicant’s sibling is residing if that sibling has an equity interest in the home and resided there at least one year prior to the applicant’s institutionalization.

<sup>62</sup> A remainder is an estate in land, and whether vested or contingent, may be freely assigned and conveyed. See *Darnell v. Holtzclaw*, 260 Ga. 891, 892 (1991).



(6) “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.

**Comment:** Because the claim authorized by law is one against the estate, we believe all hearings should be before the Probate Judge, subject to the Uniform Probate Court Rules including, but not limited to Rule 5 concerning compulsory discovery.

(7) “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.

(8) “Lawfully residing” means permissive use by the owner/power of attorney and the law.

(9) “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.

(10) “Medical assistance” means payment by the State’s program under Title XIX of the Social Security Act or Medicaid program, administered by the Department.

**Comment:** “Medical assistance is defined in 42 U.S.C. § 1396d(a). At least one court has held that estate recovery is limited by the terms of the federal legislation. *See Pottgieser v. Kizer*, 906 F.2d 1319, 1320 (9<sup>th</sup> Cir. 1990) (holding that premiums are not “medical assistance” and therefore, may not be recovered). Since no recovery is permitted except, with certain limitations, “medical assistance,” *see* 42 U.S.C. § 1396p(b)(1), we believe this definition should be limited to the federal definition cited above.

(11) “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.

(12) “Permanently institutionalized” means residing in a nursing facility or intermediate care facility for the mentally retarded and developmentally disabled for six (6) months or more.

(13) “Residing in the home on a continuous basis” means the principal place of residence.<sup>63</sup>

(14) “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.

Authority O.C.G.A. 49-4-147.1. **History.**

<sup>63</sup> This definition improperly collapses two definitions which are required by 42 C.F.R. § 433.36(e).

## Synopsis

### Statement Of Purpose and Main Features of Proposed Rules

This regulation is enacted to provide definitions of the terms used in this Chapter governing the process of recovering the cost of medical assistance payments from Medicaid members.

### Differences Between Existing And Proposed Rules

This is a new regulation. There is no existing rule.

#### ***Text of Proposed Regulation:***

#### **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, and the personal representative, if applicable, shall report the death to the Department within ten (10) days of the death of the member.

Comment: In light of this provision, we believe the Department will have ample time to prepare and submit its claim and the extended period for amending its claim, see 111-3-8-.04(4), should be eliminated for the reasons stated below.

(2) If a personal representative or executor of an estate makes a distribution either in whole or in part of the property of an estate to the heirs, next of kin, distributees, legatees, or devisees without having executed the obligations pursuant to this section, the personal representative or executor 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 or executor.

Comment: This provision is unnecessary since every personal representative or executor is liable for any improper distribution. Further, this provision in the regulations seems to imply some unique liability to the State beyond his or her liability to other creditors, beneficiaries and heirs, which is contrary to law. The personal representative or executor would have the same fiduciary duty to all parties interested in the estate. Thus, the provision is confusing and should be removed.

There is another reason for eliminating or modifying this subsection. As the regulations currently stand, the personal representative could not pass Mom's personal possessions to her heirs without fear of liability. We believe transfers of personal property having nominal economic value, but significant sentimental value, should take place

immediately after the death of the Medicaid recipient and the personal representative should not fear liability for making those transfers.

(3) When the Department receives notification of an affected Medicaid member's death, a written notice will be provided to 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;

(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.

**Comment:** While we believe notice to the heirs is appropriate, we also believe notice should be supplied to the Personal Representative or Executor at the same time since that fiduciary has a duty to investigate the propriety of all claims against the estate. The notice should clearly state that, since the claim is one against the estate, any contested hearing, other than an application for a hardship waiver, will take place in the Probate Court.

**Public Comment from Texas:** There was concern that heirs or estate managers would not have adequate time to review or refute the long-term service claims generated by the State.<sup>64</sup> This concern would have application in Georgia if the Department fails to specify a time limit on delivery of a notice to heirs and/or personal representatives or executors.

Authority O.C.G.A. 49-4-147.1. **History.**

## Synopsis

### Statement Of Purpose and Main Features of Proposed Rules

This regulation is enacted to provide the notice requirements for the process of recovering the cost of medical assistance payments from Medicaid members.

<sup>64</sup> <http://www.hhsc.state.tx.us/medicaid/EstateRecovery/ER-PubComments.html>, San Antonio Public Hearing Meeting Notes, Monday, February 9, 2004, 4:00 - 7:00 p.m.

## Differences Between Existing And Proposed Rules

This is a new regulation. There is no existing rule.

### ***Text of Proposed Regulation:***

#### **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 agency filing a statement of claim against the estate of a deceased Medicaid member.<sup>65</sup> 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).

**Comment:** This provision seems to be consistent with both federal and state law by limiting estate recovery to the estate of the deceased individual. It is not, however, consistent with inclusion of the defined term “Assets” as noted above.

(2) Recovery will be pursued from Medicaid members:

(a) Who at the time of death was any age and an inpatient in a nursing facility, intermediate care facility for the mentally retarded, or other mental institution if the individual 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 individual 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 individuals in nursing facilities or receiving home and community based services.

**Comment:** Other States, such as Tennessee, limit estate recovery to medical assistance for nursing home care. Given the difficulty senior citizens have in financing the cost of prescription medication (even with changes enacted in December, 2003, little assistance is provided through Medicaid), we believe the Board should exclude recovery for medical assistance related to prescription medication.

(3) The acceptance of public medical assistance, as defined by Title XIX of the Social

<sup>65</sup> *Padgett v. Toal*, 261 Ga. App. 154, 155 (2003) (Section “42 U.S.C. § 1396p (a) (1), part of the federal medical assistance legislation, provides that when medical assistance is provided to an individual, “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.”).

Security Act, including mandatory and optional supplemental payments under the Social Security Act, shall create a debt to the agency in the total amount paid to or for the benefit of the member for medical assistance after the member reached fifty-five (55) years of age. Payment of benefits to a person under the age of fifty-five (55) years does not create a debt. Upon filing a statement of claim in the probate proceeding, the Department shall be given priority status.

**Comment:** We believe the State's claim is clearly subordinate to the claims of secured creditors. We believe the law in Georgia relating to secured creditors gives those persons an interest in the property securing the debt which, in turn, reduces the Medicaid recipient's equity interest in the home. By failing to specify the Department's position concerning what is meant by "priority status," this provision confuses debtor-creditor law in Georgia.

(4) The Department may amend the claim as a matter of right up to one (1) year after the last date medical services were rendered to the decedent.

**Comment:** Where the Department has notice that an estate has been opened, we believe the Department's claim should be limited in the same manner as other claims brought by creditors of the estate. This section creates a conflict with the Probate Code and potentially extends the administration of the estate beyond what is necessary. Families, the personal representative and the State have an interest in facilitating estate administration so that the process is not delayed. We do not believe probate administration should be held hostage to an extended estate recovery reporting period and that, if necessary, the State should shorten the time limit for the submission of vendor claims to Medicaid following a reported death from six months to 3 months, which would enable the State to file its claim in probate court on a timely basis.

(5) The Department's provider processing reports shall be admissible as prima facie evidence in substantiating the agency's claim.

**Comment:** Although the regulations attempt to impose personal liability on the Executor and/or Administrator of an Estate, the Department does not have legal authority to relieve the Executor of his or her duty to other potential claimants as well. Therefore, the Executor and/or Administrator will be required to verify the Department's claims. The burden of proof should remain with the Department. See O.C.G.A. § 24-4-1, and submission of the report should not create any presumption of law or fact. Otherwise, this provision of the regulations, which appears to be a regulatory exception to the hearsay rule, would raise serious questions when the rights of other interested parties are weighed. How would anyone who questions the accuracy of the Department's claim "double-check" or "cross-examine" the report? The right to cross examine the Department's witness is codified at O.C.G.A. § 24-9-64. Further, in light of recently publicized reports questioning the accuracy of certain Department records, this regulation should be re-worked. At a minimum, this provision should be re-written to require that any report prepared by the Department must include all back-up

documentation so the claim may be independently verified and should recognize compulsory discovery as provided in the Uniform Probate Court Rules, Rule 5.

**Public Comment in Texas:** Would the recovery claims be based on the exact amount Medicaid spent on an individual or an average or other fixed amount per month?<sup>66</sup> We express the same concern in Georgia.

(6) Any trust provision that denies recovery for medical assistance is void on and after the time of its making.

**Comment:** This provision should be removed from the regulations. It is an attempt to re-write the Georgia Trust Code, O.C.G.A. § 53-12-1 et seq. At common law, a trust is an entity distinct from the Applicant and, absent a reversion to the estate, property placed in the trust is not part of the probate estate. *See Bucholtz v. Belshe*, supra, at 926 (“At common law, when a person creates, and transfers property to, an inter vivos trust and the trust estate does not revert to the settlor's estate on his death, the trust property is not subject to probate administration in the settlor's estate.”). Nonetheless, the Department is not without recourse. Here, because the Department's claim is a debt, the Department will have the same claim that any other creditor would have if the Applicant makes a fraudulent conveyance. A debtor and creditor relationship exists from the time the Medicaid Applicant is bound to pay the Department. O.C.G.A. § 18-2-1. Pursuant to O.C.G.A. § 18-2-21, the Department may contest any conveyance interfering with its rights. Under Georgia's Uniform Fraudulent Transfers Act, O.C.G.A. § 18-2-70 et seq., the term “creditor” means “a person who has a claim.” O.C.G.A. § 18-2-71(4).

Until such time as the debtor-creditor relationship is established, transfers to trust (or otherwise) should be allowed, subject to any applicable transfer penalty, *see* 42 U.S.C. § 1396p(c) and rules governing the availability of assets. *See* 42 U.S.C. § 1396p(d).

This provision also creates confusion in the area of third party special needs trusts. The law is presently structured to encourage those who do not have a support obligation to contribute toward the supplemental needs of disabled family members. Funds contributed are often placed in trusts known as third party special needs trusts. Under federal and Georgia law, these trusts are exempt from estate recovery because they do not belong to the Medicaid recipient. To the extent this provision is construed to require estate recovery in these instances, we believe it is illegal and will result in unnecessary litigation.

(7) The debt created in this section shall not be enforced if the member is survived by:

(a) A spouse;

(b) A child or children under twenty-one (21) years of age; or

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<sup>66</sup> <http://www.hhsc.state.tx.us/medicaid/EstateRecovery/ER-PubComments.html>, Fort Worth Public Hearing Meeting Notes, Tuesday, February 17, 2004, 4:00 p.m. - 7:00 p.m.

(c) A child or children who are blind or permanently and totally disabled pursuant to the eligibility requirements of Title XIX of the Social Security Act.

(8) 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.

(9) The agency shall not recover from an estate if doing so would cause undue hardship for the qualified heirs, as defined in section 111-3-8-.08. The personal representative of an estate and any heir may request that the agency waive recovery when recovery would create a hardship. A hardship does not exist solely because recovery will prevent any heirs from receiving an anticipated inheritance.

**Comment:** As stated below, we believe “qualified heirs” should include any lineal descendant who is a dependant. In today’s society, grandparents frequently provide significant care for grandchildren and, thus, a cookie-cutter analysis of dependency relationships may harm many Georgians.

(10) 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 medical funds, 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.

**Comment:** This regulation appears to relate to Medicaid liens, which are different from Medicaid Estate Recovery. However, as a practical matter, the first section would certainly be litigated to the extent the Department’s position is that a judgment or award between parties is not binding. Assuming the regulation is upheld, which is doubtful, the result will be that the Department is joined as a necessary party in every proceeding so ensure that judgments and awards are binding. Where claims are settled, they are resolved with the knowledge that liability may be in question and therefore, each party compromises their position. The Department’s apparent refusal to make the same acknowledgement would preclude settlement in many cases, which is against Georgia’s policy of encouraging alternative dispute resolution. Since the legislature has not altered the law relating to attorney’s liens, O.C.G.A. § 15-19-14, the final sentence appears to be illegal and would likely be found unenforceable since the Attorney’s lien attaches to the suit itself and is, therefore, a “first lien” against the recovery.<sup>67</sup> As a practical matter, any other interpretation would bar the court house doors for tort victims who find it necessary to hire attorneys on a contingent fee basis. In those cases, an attorney’s lien for fees and expenses must have priority over the Department’s claim.

(11) 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

<sup>67</sup> At Attorney’s lien is not only against the recovery, but is against the suit itself. See *Travelers Ins. Co. v. Bagwell*, 116 Ga. App. 675, 676 (1967).

consideration are voidable and may be set aside by an action in court.

**Comment:** This provision should be removed for several reasons. First, it is not authorized in the enabling legislation. Second, it creates a potential cloud on every title involving a Medicaid beneficiary, which is unnecessary. This is unnecessary because the State's interests are already protected by O.C.G.A. § 49-4-146.1 (defining Medicaid fraud) and § 49-4-146.3 (providing the Department with a remedy where Medicaid fraud occurs). If a transfer occurs after the Medicaid beneficiary's death, then the personal representative or executor is personally liable. See 111-3-8.05(6). Further, transfer penalties are imposed when a transfer is made by the Medicaid Beneficiary without receipt of fair value in return. The same applies to transfers made by the Community Spouse prior to eligibility. After eligibility is established, this provision violates MCCA's Spousal Impoverishment Provisions. Specifically, 42 U.S.C. § 1396r-5(c)(4) provides: "Separate treatment of resources after eligibility for benefits established. During the continuous period in which an institutionalized spouse is in an institution and after the month in which an institutionalized spouse is determined to be eligible for benefits under this title [42 USCS § § 1396 et seq.], no resources of the community spouse shall be deemed available to the institutionalized spouse."

Instead of creating clouds on title, to the extent improper transfers occur on or after the lookback period, transfer penalties should apply.

(12) 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.

**Comment:** If this provision is meant to prevent heirs from sharing in a recovery where an Elder is abused and litigation ensues, then it is plainly against public policy and should be re-written to provide that the State will share in attorney's fees and expenses associated with claims against tort-feasors. Elder abuse is a crime in Georgia and those responsible for Elder abuse should be held accountable and punished civilly and criminally. By failing to share in the cost of civil litigation, the State is discouraging those who have standing to pursue civil claims from doing so because in many cases, they would be asked to donate substantial personal time and resources to collect the very judgment the State seeks to recover. Beyond the public policy reasons supporting any effort designed to hold abusers accountable, the State has a financial interest in paying its share of attorney's fees and expenses. This is true because, absent the efforts of heirs who seek to hold third parties accountable, there would be no third party recovery in the first place.

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

**Comment:** In light of the enabling legislation, we do not believe this subsection could be enforced unless the Executor and/or Administrator is prevented from closing the estate.



In most instances, the Executor and/or Administrator will have an interest in closing an Estate when administration is complete. Further, other parties may have an interest in some portion of the Estate and, in Section 111-3-8-.03(2), the Department has taken the position that the Executor and/or Administrator is personally liable for making distributions prior to reimbursing the State. Where a legitimate exception exists which prohibits estate recovery, we believe estate recovery should be waived entirely for the purpose of allowing the Executor and/or Administrator to fulfill his or her obligations to other interested parties and to close the Estate.

Authority O.C.G.A. 49-4-147.1 and 42 U.S.C. 1396p. **History.**

## **Synopsis**

### **Statement Of Purpose and Main Features of Proposed Rules**

This regulation is enacted to explain the estate recovery process including defining members, exclusions, reimbursement, and transfers of property.

### **Differences Between Existing And Proposed Rules**

This is a new regulation. There is no existing rule.

### ***Text of Proposed Regulation:***

#### **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 decedent 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 (\$5000). However, this amount is zero (0) if the decedent has prepaid funeral expenses that were excluded as a resource for Medicaid eligibility;

(c) Necessary expenses of administration;

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

(e) Unpaid taxes.

Comment: We do not understand this provision when it is contrasted with O.C.G.A. § 53-7-40. Since the enabling legislation provides for claims against the estate and does not otherwise modify the Probate Code, we question the Department's authority to rewrite the law governing the priority of claims in probate administration. Section 53-7-40 provides:

Unless otherwise provided by law, all property of the estate, both real and personal, shall be liable for the 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 solvent, the personal representative is authorized to provide a suitable protection for the grave;
- (3) Other necessary expenses of administration;
- (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.

By all appearances, the Department attempts to undermine the rights of judgment creditors, secured creditors and other lien holders who have property and/or contract rights in the assets subject to estate recovery. Although the regulations define the phrase "Equity interest in the home," no where else do the regulations clearly outline the respective interests of other creditors who may have superior claims. Since federal law precludes imposition of a lien against property while a Community Spouse is living in the home, he or she may borrow funds against the home place on or after the look back date for the purpose of support. Lenders providing those funds would have lien rights superior to those of the Department. By failing to recognize those rights, as a practical matter, the Department makes it impossible for the Community Spouse to use assets as contemplated in MCCA's Spousal Impoverishment provisions (42 U.S.C. § 1396r-5(c)). Thus, not only does this provision appear to violate Georgia law, it potentially violates federal law as well. This provision of the regulations should be removed in favor of the priority scheme envisioned by the Legislature.

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

Comment: See previous Comment regarding Department reports.

Public Comment from Texas:

The State should set up a clear process by which clients and their families can monitor, verify and dispute "bills" listing the number of services provided and the dollar value associated with them.<sup>68</sup>

(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 or executor must notify the Department of the member's death before opening an estate in probate court and/or dispersing assets of the member. The personal representative or executor 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.

Authority O.C.G.A. 49-4-147.1 and 53-7-42. **History.**

## Synopsis

### Statement Of Purpose and Main Features of Proposed Rules

This regulation is enacted to explain the estate recovery process for a member's estate in probate court and the applicable probate rules governing this section.

### Differences Between Existing And Proposed Rules

This is a new regulation. There is no existing rule.

### ***Text of Proposed Regulation:***

#### **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 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;

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<sup>68</sup> <http://www.hhsc.state.tx.us/medicaid/EstateRecovery/ER-PubComments.html>, Summary of Public Input Received Via Internet and the Mail.

- (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 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;
- (d) The financial institution has received no objections or has determined that no valid objections to release proceeds have been received.

Comment: If this action was taken by a private creditor, it might be deemed to be conversion. We do not believe this type of self-help is good public policy. Instead, because the enabling legislation authorizes collection from the estate and the regulations themselves contemplate collection through the estate, the Department should proceed in probate court in the same manner as any other creditor.

(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.

Authority O.C.G.A. 49-4-147.1 and 53-7-40. **History.**

## **Synopsis**

### **Statement Of Purpose and Main Features of Proposed Rules**

This regulation is enacted to explain the estate recovery process for a member's estate that is not governed by the probate court.

### **Differences Between Existing And Proposed Rules**

This is a new regulation. There is no existing rule.

***Text of Proposed Regulation:***

**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.

(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.

<p><b><u>Comment:</u></b> We believe all persons holding a secured interest at the time a lien is imposed should receive notice of the Department’s action as well.</p>
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(4) The Department shall notify the member and the member’s 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 an individual’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.

(5) A member or his or her designee may, within thirty (30) days after receipt of notice request an administrative hearing under this rule. A member is deemed to have received notice within five (5) days from the date of the notice. Administrative hearings and appeals by Medicaid members are governed by the procedures and time limits set in Georgia Administrative Comprehensive Chapter §290-1-1-.01. Only one (1) appeal shall be afforded on behalf of a member, for each notice received.

(6) The Department or its designee 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.

**Comment:** We believe all liens should be filed in the same place and in the same manner as any other lien against realty. Since “every deed conveying lands shall be recorded in the office of the clerk of superior court of the county where the land is located,” see O.C.G.A. § 44-2-1, and because liens must be indexed in the same office, see O.C.G.A. § 44-2-2(a)(1), we believe the regulation should be re-written to specify filing consistent with this law. Any other result would make it impossible for potential purchasers to assure themselves that they have clear title prior to closing a transaction. See O.C.G.A. § 44-2-4 (regarding rights of innocent purchasers).

(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 designee shall provide one (1) copy of the notice of lien to the member or the member’s authorized representative, if applicable, whose real property is affected.

**Comment:** See Comment on Section 111-3-8-.07(6).

(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 state may not enforce a lien under any of the following circumstances:

(a) The member’s spouse is alive, even if not living in the home;

(b) The member’s child under twenty-one (21) years of age is alive, even if not living in the home;

(c) The member’s blind or disabled child of any age is alive, even if not living in the home;

(d) An adult child of the member is living in the home, if that child lived in the home for at least two (2) years prior to the member’s admission to the nursing home and provided care that kept the member from entering a nursing home.

(e) The member's brother or sister is living in the home, if he or she lived in the home for at least two (2) years prior to the member's admission to a nursing home.

**Comment:** This provision operates only in cases when persons named in Section 111-3-8-.07(1) are not living in the home. Because, merely filing a lien (without enforcement) may violate federal law, our suggestion is that the regulation be re-written to provide that liens are not filed under the circumstances outlined in 111-3-8-.07(9). See 42 U.S.C. 1396p(a)(2). For example, in *Nevada v. Ullmer*, 2004 Nevada LEXIS 20 (Nev. April 1, 2004), the Supreme Court of Nevada held that while liens may be filed, "to prevent spousal impoverishment, the lien must provide that the government release the lien upon the surviving spouse's demand pursuant to any bona fide sale or financial transaction involving the home." That being the case, the better and more cost-effective course would be to refrain from filing the lien during the Community Spouse's lifetime.

(10) The Department has the authority to release any lien placed upon the property of an individual deemed permanently institutionalized should that person be discharged and return to a non-institutional home environment. 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.

Authority O.C.G.A. 49-4-147.1 and G A ADC §290-1-1-.01. **History.**

## **Synopsis**

### **Statement Of Purpose and Main Features of Proposed Rules**

This regulation is enacted to describe the process of imposing liens.

### **Differences Between Existing And Proposed Rules**

This is a new regulation. There is no existing rule.

### ***Text of Proposed Regulation:***

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

(1) Hardship waivers will be submitted to the 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 of any estate recovery when the requesting party is able to show, through clear and convincing evidence, that the state's pursuit of estate 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.

**Comment:** O.C.G.A. § 49-4-147.1 provides that: "The commissioner shall waive such claim if he determines enforcement of the claim would result in *substantial and unreasonable hardship to dependents* of the individual against whose estate the claim exists." (Emphasis added). We believe the intent of the legislation could be fairly construed to consider hardship situations beyond those set forth in the proposed rules. For example, if beneficiaries provide upkeep on the property against which recovery is sought, we believe the Statute authorizes the Board to compensate them and that, absent compensation, an unreasonable hardship would exist. As public comments from Texas (reprinted below) indicate, without some consideration of the family's investment in upkeep, the property subject to estate recovery may not maintain its value. We also believe Georgia law would authorize the Board to broadly read the term dependant to include grandchildren or other lineal descendants who are residing in a home. We believe the statute would authorize the Board to waive recovery against income producing property other than farms.<sup>69</sup>

Further, the Board has not considered a hardship exception contemplated in Transmittal 75, which we believe Georgia's enabling legislation would allow. At Section 3810.C.1, Transmittal 75 provides that a homestead of modest value may be exempt: "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

<sup>69</sup> Transmittal 75 authorizes a hardship exemption for the sole income-producing asset of survivors (where such income is limited), such as a family farm or other family business. See State Medicaid Manual § 3810.C.1.



in your State plan." The Board should amend the hardship rules to exempt homesteads of modest value.

### Public Comments from Texas:

Although the proposed framework allows for home maintenance deductions, there were some comments speculating that family members would stop upkeep on the client's estate if they knew that it would be used to recover costs. Some witnesses provided anecdotal testimony concerning situations where they had seen houses/estates fall into disrepair, which would make the recovery less cost effective.<sup>70</sup>

Relatives who have sacrificed their own careers to prevent or delay placing their loved ones in nursing homes should be credited for "sweat equity".<sup>71</sup> This type of equity would work like a credit line or down payment for estate recovery purposes.<sup>72</sup>

The estate recovery program will not only punish the owner of the homestead after his or her death, but entire families as well. This will be more evident in communities where it is common for the children and other relatives of the client to have contributed with their labor and other resources toward building the homestead.<sup>73</sup>

The exemption covering 50 percent of the average price of homes in the county where the homestead is located should be modified so that the exemption would be set at the same value statewide.<sup>74</sup>

Grandchildren and siblings should be added to the list of exemptions.<sup>75</sup>

HHSC should allow heirs of deceased clients to have an extended period of time to reimburse the State so they are not forced to liquidate the deceased person's estate immediately.<sup>76</sup>

The sentimental value a family places on a home may exceed the tax appraisal value.<sup>77</sup>

The exemption on the price of homes should be modified from 50 percent of the average price for homes in the county where the homestead is located to 50 percent of the average price of homes in the county with the highest average homestead value in the

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<sup>70</sup> <http://www.hhsc.state.tx.us/medicaid/EstateRecovery/ER-PubComments.html>, San Antonio Public Hearing Meeting Notes, Monday, February 9, 2004, 4:00 - 7:00 p.m.

<sup>71</sup> Family caregivers are viewed as an unpaid extension of the health care system, providing the equivalent of an estimated \$196 billion in free care annually. See National Alliance for Caregiving, *Toward a National Caregiving Agenda: Empowering Family Caregivers in America*, at 2 (July 2001).

<sup>72</sup> *Id.*, San Antonio Public Hearing Meeting Notes, Monday, February 9, 2004, 4:00 - 7:00 p.m.

<sup>73</sup> *Id.*, Harlingen Public Hearing Meeting Notes, Wednesday, February 11, 2004, 4:00 - 7:00 p.m.

<sup>74</sup> *Id.*, San Antonio Public Hearing Meeting Notes, Monday, February 9, 2004, 4:00 - 7:00 p.m.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*, Fort Worth Public Hearing Meeting Notes, Tuesday, February 17, 2004, 4:00 p.m. - 7:00 p.m.

state.<sup>78</sup>

Using the average homestead value in the county as an exemption is inconsistent and unfair for families in rural counties. The same value should be used statewide.<sup>79</sup>

The State should exempt more than 50 percent of a homestead's value.<sup>80</sup>

Provide hardship exemptions for property essential for attaining self-support. These could include farms, auto repair and barber shops, regardless of their value.<sup>81</sup>

(5) Undue hardship does not exist when:

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

(b) The heir divests assets to qualify under the hardship provision.

(6) 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.

(7) The estate representative 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.

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

(9) If the state denies the estate representative's request for an undue hardship waiver, the estate 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.

(10) If an appeal is requested, an 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.

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*, Houston Public Hearing Meeting Notes, Friday, February 20, 2004, 4:00 p.m. - 7:00 p.m.

(11) 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.

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

Authority O.C.G.A. 49-4-147.1. **History.**

## Synopsis

### Statement Of Purpose and Main Features of Proposed Rules

This regulation is enacted to describe the applicability of the hardship waiver and The process by which an application may be submitted.

### Differences Between Existing And Proposed Rules

This is a new regulation. There is no existing rule.

### Additional Public Comments from Other States:

#### ***Texas:***

It is unfair to attempt to recover costs for services offered to low-income clients while the federal government subsidizes wealthy farm corporations when they agree not to grow certain kinds of crops and when inheritance taxes are scheduled to be reduced or eliminated for persons with higher incomes.<sup>82</sup>

Many said the program is unfair, especially toward the elderly poor receiving long-term care, because the State does not attempt to recover costs from other populations to whom other kinds of services are provided. Concern was expressed that some people might decide not to apply for Medicaid long-term care services in order to avoid a claim on their property. They said the program will ultimately target individuals who cannot afford to hire an attorney to take advantage of estate planning loopholes.<sup>83</sup>

Medicaid Estate Recovery is the only program where the government is asking for repayment for services provided to clients. The federal/state governments do not ask communities or individuals to repay for any benefits secured from improved infrastructure, schools, military installations, or parks: So why is the government asking long-term care Medicaid clients to repay for the services they received? There was a perception that these clients were being singled out by the State.<sup>84</sup>

Middle-income families will probably be the most affected because the poorest of the poor do not have property they can lose and the wealthy can use legal procedures to protect their property.<sup>85</sup>

Clients without homesteads would be exempt from paying for Medicaid services they received and that is unfair.<sup>86</sup>

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<sup>82</sup> <http://www.hhsc.state.tx.us/medicaid/EstateRecovery/ER-PubComments.html>, Harlingen Public Hearing Meeting Notes, Wednesday, February 11, 2004, 4:00 - 7:00 p.m.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*, San Antonio Public Hearing Meeting Notes, Monday, February 9, 2004, 4:00 - 7:00 p.m.

<sup>85</sup> *Id.*, Fort Worth Public Hearing Meeting Notes, Tuesday, February 17, 2004, 4:00 p.m. - 7:00 p.m.

The State should not resort to the use of liens. Federal law does not require liens in Medicaid estate recovery programs and therefore Texas should not use them.<sup>87</sup>

Any family members living in the home for at least a year should be exempt. This issue was raised in relation to several other concerns: the displacement of family members living in the home and consequent dependence on welfare and the likely loophole inherent in the narrow parameter of "unmarried."<sup>88</sup>

Heirs of the deceased should be protected from coercive tactics designed to force payment of Medicaid charges. They should be allowed an extended period of time to reimburse the State.<sup>89</sup>

Heirs should have the option of selling the property or using other funds to pay Medicaid in order to prevent the forced liquidation of the deceased client's estate.<sup>90</sup>

The proposed recovery program would impact a small segment of the population only-a segment that the government had traditionally tried to encourage to better itself. Recovery will impact the poor who have just a little, as the poorest of the poor lack possessions for recovery and the wealthy do not use Medicaid.<sup>91</sup>

Medicaid estate recovery seems to discriminate against women, who are the majority of people in nursing homes.<sup>92</sup>

Set a statute of limitations beyond which the government could not come back and seize the estate of the deceased.<sup>93</sup>

Provide general notice at time of application explaining the estate recovery program. Adequate information regarding estate recovery implementation will ensure that people have the opportunity to make educated decisions and plans.<sup>94</sup>

Program rules should explain very clearly and in plain language the procedure for applying for a hardship waiver.<sup>95</sup>

Use the appraised value rather than the market value to determine the value of the homestead.<sup>96</sup>

Procedures could be put in place that would help determine whether there is a need for some clients to be in a nursing home. This may save money by removing some nursing home clients to other less-costly settings where they may be better served.<sup>97</sup>

Base the exemption value on the average value of a home in the county with the highest home values, instead of on 50 percent of the average value of homes in the county where the homestead is located.<sup>98</sup>

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86 *Id.*

87 *Id.*

88 *Id.*, Fort Worth Public Hearing Meeting Notes, Tuesday, February 17, 2004, 4:00 p.m. - 7:00 p.m.

89 *Id.*

90 *Id.*

91 *Id.*, Houston Public Hearing Meeting Notes, Friday, February 20, 2004, 4:00 p.m. - 7:00 p.m.

92 *Id.*

93 *Id.*

94 *Id.*

95 *Id.*

96 *Id.*

97 *Id.*

98 *Id.*

Exempt families with disabled children of any age, all community-based services clients who participated in Medicaid waivers and Title XX social services programs.<sup>99</sup>

Also exempt from recovery individuals with shortened work histories due to physical disabilities.<sup>100</sup>

Exempt homesteads that are owned in part by any person other than the spouse of the client.<sup>101</sup>

Expand the definition of exemptions for persons beyond the narrowly defined unmarried and living in the home requirements. A married person could be living in the home and caring for the person, thereby actually saving Medicaid dollars.<sup>102</sup>

Compensate family members and relatives of the client for services they provided. The care of a relative may have delayed the client's entry into a nursing home facility, saving Medicaid dollars. Family care time should be credited to offset the amount of costs the State attempts to recover from the estate. The amount that is credited for the labor involved in caring for the client at home should equal no less than the minimum wage<sup>103</sup>

Raise the property exemption amount (suggested levels: \$150,000 or \$200,000-\$250,000). This would be more equitable to clients living in urban areas. A penalty or charge should only be placed on homesteads valued at 20 percent above the average homestead value.<sup>104</sup>

Medicaid estate recovery would affect the quality of life for Medicaid clients. Residents and their families have few options for choosing other forms of care or treatment.<sup>105</sup>

Like their counterparts who attended the public hearings, most people contacting HHSC via the Internet and by regular mail described the estate recovery program as an unfair one.<sup>106</sup>

Poor long-term care clients are being unfairly targeted as the group from which program costs are to be recovered by the State; few other groups are ever asked to re-pay the State for services they received.<sup>107</sup>

The "confiscation" of clients' estates will cause economic hardship to heirs, especially to those who have made personal and financial sacrifices in order to care for their aging or disabled parents or relatives over extended periods of time.<sup>108</sup>

Estate recovery should not be applied to current clients. Current clients were told upon signing up for Medicaid that their homesteads were not at-risk of being forfeited by the State at any time.<sup>109</sup>

Establish a "grandfather clause" to exempt currently enrolled clients from the program.<sup>110</sup>

The exemption from recovery of a portion of the homestead value benefits more those homeowners who have chosen to live in bad neighborhoods that have lower property values. For these people, a higher percentage of the total value of their homestead would be exempted from the recovery law compared to

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*Id.*

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*Id.*

101

*Id.*

102

*Id.*

103

*Id.*

104

*Id.*

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*Id.*, El Paso Public Hearing Meeting Notes, Wednesday, February 25, 2004, 4:00 -- 7:00 p.m.

106

*Id.*, Summary of Public Input Received Via Internet and the Mail.

107

*Id.*

108

*Id.*

109

*Id.*

110

*Id.*

homeowners who may own similar homes in better neighborhoods where property values are higher.<sup>111</sup>

To make conditions fair across all groups, the State should "confiscate" all estates from clients, regardless of the value of the estate.<sup>112</sup>

As compared to the filing of a claim, it will be more cost-efficient for the State to place a lien against the homesteads of clients. A lien would guarantee prompt payment compared to the filing of a claim. Working through the claim and probate process may cost more because of the extra legal work required and the additional obstacles the State would have to overcome.<sup>113</sup>

Since Medicaid operates on a statewide basis, the exempted dollar value for homesteads should be standardized across the entire state.<sup>114</sup>

The dollar value of the estate exempted from recovery should reflect the one for the county with the highest average homestead value.<sup>115</sup>

The State should not attempt to recover costs from estates or homesteads that have been appraised at less than a certain value (less than \$100,000, for example).<sup>116</sup>

All farm and ranch land should be exempted from the estate recovery program.<sup>117</sup>

In order to make conditions fair for clients from all income groups, other assets, besides the homestead and other real property, should be subjected to the cost recovery program. Other assets should include things like bank accounts, mutual funds, pension plans, stock funds, insurance policies, IRA's and other forms of investments.<sup>118</sup>

Expand the definition of exempted homesteads to include those where any grandchildren of the deceased client live.<sup>119</sup>

Use recovered funds to support community care programs that are more cost efficient and helpful to the clients than institutional programs.<sup>120</sup>

Thus far, Texas is still accepting comments regarding the shape its program will take. On May 20, 2004, the Center for Public Policy Priorities submitted the following suggestions regarding the program:<sup>121</sup>

- 1) Use Texas' statewide average homestead value (about \$96,000 in 2002) for the undue hardship exemption, rather than the \$50,000 that HHSC has proposed. Other states have gained CMS approval for using the statewide average standard (South Carolina, Vermont). This exemption could be limited to low-income heirs (e.g., CMS approved Vermont exempting up to \$125,000 of homestead values for heirs under 300% of poverty).
- 2) Extend full exemption from estate recovery to a broader range of relatives living in the home, including : married children, grandchildren, parents, and grandparents, to recognize the many

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111 *Id.*

112 *Id.*

113 *Id.*

114 *Id.*

115 *Id.*

116 *Id.*

117 *Id.*

118 *Id.*

119 *Id.*

120 *Id.*

121 See <http://www.cppp.org/products/alertsflyers/alt5-20-04.html>.

extended family structures which low-income households may take. A number of other states do this. (The proposed rule as drafted would exempt only spouses, minor children, disabled children and unmarried adult children.) We believe, for example, that it makes no sense to exempt an unmarried adult child living in the family home, but to deny that exemption to adult child living in the home who is married.

- 3) Undue hardship exemption for family-owned businesses should be equivalent to exemption for family farms.
- 4) The rules should clearly grant HHSC authority to negotiate both the amount of the recovery and the time frame for payment.

Whether these suggested changes will be implemented remains to be seen. However, the concerns expressed appear to be valid.

### ***Michigan:***

Recently, Michigan has considered implementing estate recovery. A group known as “Citizens for Better Care” has posted the following comments regarding estate recovery on its website:<sup>122</sup>

- It reduces rather than increases government funding of long term care. Government coverage of long term care is already too limited and should not be further reduced. U.S. consumers already spend more than \$25 billion each year on long term care out of their own funds. Long term care should be included in the planned national health insurance program.
- Medicaid is already too complex. Consumers find it difficult to understand and use. Estate recovery adds to these problems.
- It may keep some people from seeking health care, hurting their quality of life and possibly causing more serious medical problems that are treated later at greater cost. For example, Vermont has implemented an estate recovery program because of the federal law. Since January, almost 50 people have refused long term care services because of their fear of estate recovery.
- It creates incentives for financial exploitation of the elderly, as they are encouraged to give away their property to avoid estate recovery. Some people will be taken advantage of by others and left without the resources to meet their own needs.
- It will decrease the value of the housing stock, as it reduces incentives for families to pay property taxes and maintain homes during a relative’s nursing home stay or extended illness. Neighborhoods will suffer as houses are abandoned.
- It may deprive people of using their home to obtain needed funds. For example, a surviving spouse may not be able to obtain certain types of loans or grants if the State has placed a lien on the home.
- It may not recover much, if any, money. Many states with estate recovery programs have found them expensive to operate. For example, Colorado advocates report that their four year old program has yet to recover the costs of running the program. As noted earlier, the program will likely reduce the value of homes and the amount of property taxes paid.

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<sup>122</sup> See [http://cbcmi.org/publications/est\\_rec.htm](http://cbcmi.org/publications/est_rec.htm).

- It will take money from consumers and give it to nursing homes and health insurance companies. Reducing the availability of Medicaid will force people to pay nursing homes at higher, unregulated private rates or to buy sometimes worthless long term health care insurance. While this will create a windfall for nursing homes and health insurance companies (the major advocates for estate recovery), it will take money away from consumers that they need for other purposes.
- It will deprive lower income families of needed resources, as the home is often a resource they use to sustain or improve their economic standing.
- It will increase distrust in government, as citizens wonder why it is spending money to take their homes instead of funding a decent long term care system.

While other State experiences may or may not correlate directly with Georgia's proposed regulations, it does tell us that the public is interested in these issues and there are suggestions which can be gleaned from those public comments. Where appropriate, those issues are raised in our discussion of Georgia's Proposed Estate Recovery Regulations.

### **Conclusion**

In Conclusion, we initially urge the Board to continue Georgia's current policy and refrain from pursuing estate recovery. However, if estate recovery is to be pursued, then we respectfully suggest the following:

#### **Policy Considerations:**

- That the effective date be the date the regulations are implemented and that retroactive application be abandoned.
- Veterans, particularly those who served during war time, should be exempt from the estate recovery regulations. This could be accomplished through a hardship waiver.
- That the hardship waiver provisions be expanded to encompass homesteads of modest value, any income producing property where income is limited, and that the definition of dependants be expanded to include any lineal descendant. The policy supporting the Estate Recovery Program should be designed to foster a program that is lawful, reasonable, fiscally sound, and the least onerous practicable.
- The experience of other states can be looked upon for guidance in establishing good policy, especially the recent and ongoing experience in Texas and Michigan.



### **Notice Considerations:**

- Broader notice of the Proposed Estate Recovery Regulations needs to be provided to the public. The regulations should clearly require delivery of written notice to all Medicaid Applicants at the time of application, informing them that their probate estate may be subject to estate recovery.
- More time needs to be given to allow more careful analysis of the Proposed Regulations, and to facilitate a joint effort by the Board and interested persons and organizations to identify potential issues and problems in the Proposed Regulations, and to resolve these issues and problems prior to actual implementation of the Estate Recovery Program. This includes consideration of issues such as avoiding an increased incidence in elder divorce rates and elder abuse.

### **Legal Issues and Conflicts of Law:**

- The Proposed Regulations must be revised to make them consistent with the mandates of CMS (formerly HCFA) Transmittal 75 regarding Estate Recovery.
- The inclusion of the definition of the term “asset” is superfluous and should be eliminated.
- The definition of “estate” should be consistent with O.C.G.A. § 44-1-4 and should be clearly limited the probate estate as defined by Georgia law. This would bring the definition into conformity with other laws in Georgia relating to estates and property rights.
- The provision for retroactive enforcement must be removed, as it is most likely unenforceable as being in violation of the federal Medicaid laws and the Georgia Constitution.
- Estate recovery claims made by the Department must be made in compliance with the Georgia laws regarding debtors and creditors, including as to priority of claims, and the Department, like other creditors of an estate, must provide supporting documentation for its claim.
- As Estate Recovery is an estate matter, hearings should be held in the Probate Court before the appropriate Probate Judge, not before an Administrative Law Judge.

We hope you find our comments and concerns helpful. If we can provide other or further assistance as you deliberate these matters, please do not hesitate to contact us.

June 8, 2004

Respectfully,

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## Appendix A

### State Medicaid Estate Recovery Programs<sup>123</sup>

	(1) Type of Estate Recovery	(2) Assets Subject to Recovery	(3) Use of TEFRA Liens	(4) Surviving Spouse Dependent in Home	(5) Undue Hardship Criteria	(6) Amount Collected As Percent of Total 1997 Medicaid Expenditures
Alabama	probate	---	yes	2	1,2,3	.13%
Alaska	none	---	NR	NR	NR	---
Arizona	probate	---	no	1	1,4	---
Arkansas	probate	---	no	1	1	.02%
California	expanded	1,2,3,5,6	yes	4	4	.02%
Colorado	probate	---	yes	1	1	.19%
Connecticut	expanded	4	yes	1	None	.74%
Delaware	probate	---	yes	4	4	.02%
Florida	probate	---	no	1	1,3	.09%
Georgia	none	---	NR	NR	NR	---
Hawaii	probate	---	yes	1	1	.01%
Idaho	probate	---	yes	2	1,2,3	.54%
Illinois	probate	---	yes	2	NR	.34%
Indiana	probate	---	no	1	1,2,3	---
Iowa	expanded	1,2,3,4	no	4	1	.52%
Kansas	probate	---	no	4	1	.26%
Kentucky	expanded	---	no	1	1	---
Louisiana	probate	---	no	2	1	.00%
Maine	probate	---	no	1	1,4	.45%
Maryland	expanded	1,2	yes	1, 2, 3	1	---
Massachusetts	probate	---	yes	2	1	.39%
Michigan	none	---	NR	NR	NR	---
Minnesota	expanded	NR	yes	2	1,2,3	.83%
Mississippi	probate	---	no	2	1	.03%
Missouri	probate	---	yes	1, 2	1	.11%
Montana	expanded	1,2,4	yes	1	1,2,3	.3%
Nebraska	probate	---	no	1	1,3	.09%
Nevada	expanded	1,2,3,4	no	2	2,3,4	.14%
New Hampshire	probate	---	no	2	1	.78%
New Jersey	expanded	7	no	1	1	.05%
New Mexico	probate	---	no	2	1,3	---
New York	NR	---	yes	1	NR	---
North Carolina	probate	---	no	1	1	.01%
North Dakota	probate	---	no	4	1,2,3,4	.49%
Carolina	probate	---	no	1	1	.04%
North Dakota	NR	---	NR	NR	NR	---
Ohio	expanded	1,5	no	4	1,2,3	.74%
Oklahoma	probate	---	no	1, 4	1,2,3	---
Oregon	expanded	1,2	no	1	2	.05%
Pennsylvania	probate	---	no	1	1	.12%
Rhode Island	expanded	1,2,3	no	4	1	.20%
South	probate	---	no	1	1	.00%

<sup>123</sup>

See [http://www.longtermcarelink.net/reference/ref\\_medicaid\\_recovery.html](http://www.longtermcarelink.net/reference/ref_medicaid_recovery.html).

Carolina	none	---	NR	NR	NR	---
South Dakota	probate	---	no	1	1,2,3	.36%
Tennessee	probate	---	no	4	1	---
Texas	NR	---	NR	NR	NR	---
Utah	expanded	1,2,3	no	4	1,3	---
Vermont	probate	---	yes	2, 3, 4	1,2,3	---
Virginia	expanded	1,8	yes	2	1	.52%
Washington	probate	---	no	3	1	.23%
West Virginia						
Wisconsin						
Wyoming						

**1) Type of Estate Recovery**

probate=State restricts recovery to property defined in probate code  
expanded=State goes after assets in addition to probate  
none=State had no recovery program as of 1997  
NR=State did not respond to this portion of the survey

**(2) Assets Subject to Recovery--Assets the States, who have an expanded definition of probate, go after**

1=cash (the \$2,000 retainable spenddown or burial money not used)  
2=other personal property of recipient that might have avoided probate  
3=property transferred under joint tenancy with rights of survivorship  
4=property in which recipient had a life estate interest (might be a trust)  
5=trust (usually inter vivos)  
6=annuity  
7=all allowed by OBRA 93  
8=other not defined  
NR=not reported or no recovery program

**(3) Use of TEFRA Liens**

yes=State uses TEFRA liens  
no=State does not use TEFRA liens  
NR=not reported or no recovery program

**(4) Surviving Spouse Dependent in Home--State's procedure in going after a home when the surviving spouse lives there.**

1=State may waive its right to go after the home when the surviving spouse dies  
2=State may defer recovery to death of surviving spouse  
3=State negotiates amount of waiver or recovery  
4=State uses some method other than above  
NR=not reported or no recovery program

**(5) Undue Hardship Criteria--Related to (4) above but these are State procedures towards going after all assets when it may cause undue hardship**

1=State may waive recovery  
2=State may defer recovery until death of eligible exempt dependents  
3=State may negotiate amount of recovery  
4=State may use some method other than above  
NR=not reported or no recovery program