
Chapter 3: Performance of Ohio's Current Medicaid Estate Recovery Program

OBRA 1993: Federal Mandate

In Section 13612 of the Omnibus Budget Reconciliation Act of 1993 (OBRA 1993), also known as Public Law 103-66, Congress required that states recover the Medicaid costs of nursing facility and other long-term care services from the estates of Medicaid recipients, and that states must establish procedures for waiving recovery in undue hardship cases. This was the first time Congress enacted legislation which required estate recovery. Estate recovery programs were previously optional for states pursuant to the Tax Equity and Responsibility Act of 1982 (TEFRA).¹²

Effective Date of New Provision

Section 13612 of OBRA 1993 does not apply to individuals who died before October 1, 1993. This section applies to Medicaid payments beginning on or after October 1, 1993.

Implementation in Ohio

In Ohio, a work group convened to implement the Medicaid estate recovery mandate. Ohio requested a delayed compliance date through the Health Care Financing Administration (HCFA) regional office by demonstrating that state legislation was required. (Ohio statute at that time enabled ODHS to implement the estate recovery program as an option, but no program was operational.) Ohio Revised Code (ORC) Sections 5111.11 was amended and 5111.111 was adopted as an integral part of Amended Substitute House Bill 167. These provisions became effective on November 15, 1995. The Ohio Medicaid Estate Recovery Program began collections

¹² Summary of the Provisions of the OBRA 1993 (P.L.103-66) Affecting Medicare and Medicaid Programs, CCH Summary, MISC-DOC, Med-Guide 1993-2 MED-GUIDE-TB, (January 1, 1993), paragraph 41,604.

in December 1995 for claims incurred since January 1, 1995. Medicaid benefits paid prior to January 1, 1995, are not affected by this program and will not be recovered.

Ohio's program was originally designed to meet but not go beyond the federal mandates for the program. For example, it continues to use the most minimally acceptable federal definition of estate (probatable assets) and it initially used the shortest list of claim types to be recovered.

Designation of Attorney General's Office

In Ohio, the estate recovery program is administered by the Ohio Department of Human Services (ODHS), which since January 1, 1995, has delegated collection efforts to the Ohio Attorney General's Office (AGO). ODHS has the option of administering the program or contracting out all or a portion of recovery collections to other entities.

The AGO's collection authority under ORC section 132.02 was seen as a way to assign duties for the program within a short implementation window that left too little time for a formal issuance of a request for proposal (RFP) and selection of a contractor. Section 132.02 provides in part that:

“Whenever any amount is payable to the state, the ...agent responsible for administering the law under which the amount is payable shall immediately proceed to collect the amount or cause the amount to be collected and shall pay the amount into the state treasury in the manner set forth pursuant to section 113.03 of the Revised Code. If the amount is not paid within forty-five days after payment is due, the ...agent shall certify the amount due to the attorney general, in the form and manner prescribed by the attorney general, and notify the director of budget and management thereof.”

Section 109.081 of the Revised Code stipulates that nine percent of amounts collected by the AGO are to be credited to the AGO claims fund, used to pay expenses incurred by the office of the Attorney General. At the current time, there is no interagency agreement between ODHS and AGO regarding estate recovery.

If ODHS were to issue an RFP to contract out recovery collection and the contract was not awarded to the AGO, the AGO would still be active in estate recovery efforts by representing ODHS's interests in the court system.

Cost Benefit Analysis: Recovery Ratio to Labor Cost of ODHS/AGO

The benefits that are achieved from implementing and operating an estate recovery program must be viewed in conjunction with the cost of the recovery process. The average recovery ratio for the 22 states that had recovery programs prior to 1993 was approximately \$14 recovered for every one dollar that is spent. The ratios ranged from \$1.73 collected per dollar spent in Rhode Island, to \$51.36 collected for each dollar spent in Massachusetts. Recovery ratios may be misleading if they do not consider the overall recovery per elderly Medicaid recipient. “The bottom line, therefore, is not the recovery ratio, but the total amount cost-effectively returned to Medicaid to meet the needs of other recipients.”¹³ In Ohio, because of the AGO’s nine percent finder’s fee, for every dollar paid to the AGO for collection services, \$10.11 dollars are collected.

The AGO has assigned the part time services of one assistant attorney general and several case representatives to operate the actual collection of estate monies, with intermittent help from other administrative and systems support staff. The AGO also relies on the assistance of two special counsel as a pilot project. In Summit and Fairfield counties, privately contracted attorneys assist the AGO by working within the local probate court in securing information leading to recoveries. The AGO withholds the nine percent finder’s fee from the amounts turned over to ODHS, and remits a portion of that fee to the local special counsel.

The finder’s fee is currently borne entirely by the state of Ohio. There is failure to date to obtain federal financial participation (FFP) for the administrative cost of operating Ohio’s estate recovery program (the finder’s fee assessed to ODHS by the AGO for these services), as obstacles to procure federal match have remained unresolved. This loss of approximately \$926,000 in FFP through June 1999 may make it worthwhile to consider issuing a request for proposal and contracting with an entity that can provide a cost-based rationale for the fees assessed ODHS and respond to other programmatic needs.

ODHS ongoing administrative costs have been minimal, including only the fraction of time for the programmer who runs the monthly claims report to identify deceased recipients, and a fraction of the work time of two program staff, one who provides answers to general inquiries and the other who occasionally searches records in the eligibility computer system to seek additional party addresses. Additional time has been allocated by policy analysts for working on the state plan amendment and related rules, and development of training materials. However, to achieve the most effective estate recovery program, increased devotion to program design, rule development, completion of state plan amendments, continued refinement of operations, possible preparation of an RFP and the resulting selection and supervision process, and fulfillment of government and general public training needs would definitely add to ODHS’s staffing demands.

¹³ Virginia, Medicaid Asset Transfers and Estate Recovery, Report of the Joint Legislative Audit and Review Commission to the Governor and the General Assembly of Virginia, Senate Document No. 10, (1993), p. 56.

Ohio Estate Recovery Collections Have Increased Every Year Since the Program Began

Every year that the estate recovery program has operated, the program has shown increased amounts recovered. Part of this is explained by the time frame in which claims may be collected. In January, 1995, the expenditure of claims became recoverable. If a nursing home resident receiving Medicaid benefits was admitted to the facility in July 1994 and was there until his death in March 1995, estate recovery could only pursue monies for services received from January to March 1995. For every month past the program's initial start date of January 1, 1995, it is more likely that total recoverable amounts will represent more of the client's entire span of time receiving Medicaid benefits.

Funds Collected Are Returned to Federal and State Treasuries

Funds collected by the AGO are returned to ODHS, minus the nine percent finder's fee. The portion of the collected money representing the federal share of Medicaid paid claims is returned to the federal government. (It is this return of federal money that enables the state to pursue FFP for the AGO's finder's fee.) The remaining state share is returned to the General Revenue Fund.

Ohio's Estate Recovery Program Helps to Defray Future Medicaid Long Term Care Costs

To get an understanding of how estate recovery collections help defer the cost of future Medicaid long term care expenses, **Table 3-a** illustrates the number of people that Medicaid could fully fund, for an entire year at the going Medicaid rate, from the money that the Estate Recovery Program has collected for that federal fiscal year. By reducing the amount recovered by the finder's fee, and dividing the remainder into the average nursing facility (NF) per diem for the year, the Ohio Medicaid Estate Recovery Program has, from January 1995 through June 1999, defrayed the cost of funding 405 residents' year-long stays at Ohio NFs.

Table 3-a: Ohio Medicaid Estate Recovery Collections: Equivalencies to Cost of One Person's Year-Long Stay in a Nursing Facility		
Federal Fiscal Year	Average Medicaid Nursing Facility Per Diem Rate*	# of People funded at a NF for one whole year by Medicaid Estate Recovery Collections.
1996	\$ 98.52	43
1997	\$103.55	95
1998	\$110.09	129
1999 to date (Oct.1998 through June 1999)	\$112.15** **projected	138
Combined years:	Average: \$103.40	Total: 405

* Source: ODHS Bureau of Long Term Care Facilities, Section of Planning and Research

Recovered Amounts by State Fiscal Year

The tables described below are displayed on the following page:

Table 3-b outlines by state fiscal year the number of individuals identified as deceased, the recoverable amount of Medicaid claims paid on behalf of the recipient, the amount actually recovered by the Attorney General's Office, the average claims amount paid per recipient and the average amount recovered per recipient.

Table 3-c displays distribution of the total recovered funds into the 9% AGO finder's fee, the state share, and the federal share. The last column calculates the amount potentially available in federal financial participation (FFP) for the costs incurred for collection, by multiplying the finder's fee amount by the FFP percentage for Ohio for each federal fiscal year.

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Ohio Medicaid Estate Recovery: State Fiscal Year Summaries

Table 3-b: Estate Recovery Claims and Collections

Deceased Recipients Age 55 and Over				Average Claim Amount	Average Collection Amount
Year	# Recipients	Total Recoverable Claim	Total Collected	Per Recipient	Per/Recipient
Total SFY1995	7,953	\$41,273,611.97	\$0.00	\$5,189.69	\$0.00
Total SFY1996	19,304	\$396,516,426.18	\$928,946.12	\$20,540.64	\$48.12
Total SFY1997	19,750	\$765,745,441.37	\$3,556,615.42	\$38,771.92	\$180.08
Total SFY1998	20,151	\$1,088,057,172.22	\$5,307,224.17	\$53,995.19	\$263.37
Partial SFY1999*	25,114	\$1,432,003,404.52	\$7,759,302.75	\$57,020.12	\$292.18
Grand Total	92,272	\$3,723,596,056.26	\$17,552,088.46	\$40,354.56	\$190.22

* Partial SFY 1999 includes months July 1998 through June 1999, and is incomplete re: total recoverable claims

Table 3-c: Distribution of Recovered Funds

Year	Total Collected	Collected Amounts Returned to:		Finders Fee	
		Federal Funds	State Funds	Fee Charged by Attorney General's Office	Potential Amount of Fee Recoverable from Federal Government
Total SFY1995	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Total SFY1996	\$928,946.12	\$508,641.64	\$336,699.32	\$83,605.16	\$50,305.23
Total SFY1997	\$3,556,615.42	\$1,924,897.01	\$1,311,623.03	\$320,095.38	\$190,374.42
Total SFY1998	\$5,307,224.17	\$2,820,063.93	\$2,009,510.06	\$477,650.18	\$278,907.42
Partial SFY1999*	\$7,759,302.75	\$4,165,713.33	\$2,907,566.85	\$698,337.26	\$406,123.91
Grand Total	\$17,552,088.46	\$9,419,315.91	\$6,565,399.26	\$1,579,687.98	\$925,710.98

Ohio's Low Collection Rate in Comparison to Other States

Ohio's collection rate (collections recovered as a percentage of total Medicaid expenditures) was 00.06% in 1997, significantly lower than the national average of 00.26% found in North Carolina's recent survey of state estate recovery programs.¹⁴ In state fiscal year (SFY) 1997, Ohio collected \$3.6 million. If Ohio's program yielded collections at the rate of the national average, Ohio would have collected \$15.1 million during that year alone. Another Midwestern state of comparable population, Illinois, collected \$16.3 million in their SFY 1996, and in SFY 1997 collected \$19.2 million.¹⁵ (Ohio has collected a total of \$17.6 million from the program's start in December, 1995 through June, 1999.)

It is difficult to isolate explanatory variables such as collector performance and specific state policy options to explain the variance in state collection rates. However, North Carolina's study did note that Ohio was in the **lowest ten states** ranked by collection as a percent of total Medicaid spending in 1997. That study observed that "Compared to other states, states having the lowest collections as a percent of total Medicaid spending are less likely to apply Estate Recovery and/or Transfer of Asset policies to services that go beyond those required by federal law. These states are also less likely to pursue assets that go beyond the state's definition of 'probate estate.'" ¹⁶

Comparison to Other States That Contract out Recovery Efforts

Collection Rates

North Carolina's survey indicates that 19% (8) of the 42 states responding contract out at least a part of recovery efforts. At least five of the states use the same independent contractor. However, collection rates for the "contractor states", as a percent of total Medicaid spending, was not found to be significantly different from average collection rates overall (.27% compared with .26%). As noted above, this collection rate is considerably higher than Ohio's, at .06%.

¹⁴ North Carolina, Comparing State Medicaid Recovery Efforts, Long-Term Care Policy Office in collaboration with Division of Medical Assistance, Department of Health and Human Services, (October 1998), Attachment #4.

¹⁵ Illinois, Johnetta W. Jordan, Manager, Bureau of Collections, Technical Recovery, in a letter to Nancy Rickson, ODHS, dated June 18, 1998.

¹⁶ North Carolina, Comparing State Medicaid Recovery Efforts, Attachment #4.

Contract Fees

The North Carolina survey found that fees charged by contractors range from 10% to 19.4% of collections, and averaged 14.5%.¹⁷ In Ohio, this would be comparable to the AGO collecting a 9% fee for its collection efforts, per Section 109.081 of the Revised Code.

Factors in Ohio That May Be Preventing a Higher Rate of Recovery

Different portions of this report will discuss in more depth the following characteristics of Ohio's current estate recovery program operation that may hinder recovery potential:

- ✓ use of the most restrictive definition of estate;
- ✓ omission of the target population defined as “permanently institutionalized individuals”;
- ✓ no tracking of estate of surviving spouse or dependent children;
- ✓ no implementation of liens, and
- ✓ treatment of homestead property in a way in which sale of property is more likely than in other states to occur prior to death.

Ohio's Program Design Meets Only Minimum Federal Requirements

Collection rates may be lower than other states because Ohio's program design has for the most part met only the minimal federal requirements. As discussed in more depth in the following chapter, Ohio did not choose to widen the definition of estate to pursue collections of assets that do not fall under a person's probated estate (e.g., life estates, trusts, jointly held property with “survivorship”). These assets can be quite extensive. Additionally, Ohio law does not authorize collection from the target population defined as “permanently institutionalized individuals of any age” even though federal law mandates inclusion of this population in a state's recovery efforts.

Ohio Has Not Implemented Certain Authorized Features of the Program

Collection rates may be lower than other states because certain operational features authorized through the ORC at sections 5111.11 and 5111.111 are not implemented. For example, the state has the option to pursue the estate of a spouse or to place liens, but the AGO Revenue Recovery Unit does not do so. Obstacles to implementation are discussed in the chapters on program design and liens.

Ohio Requires Disposition of Real Estate Assets Prior to Death

¹⁷ North Carolina, Comparing State Medicaid Recovery Efforts, Attachment #4.

Another factor that reduces the level of collections in Ohio in comparison to other states is Ohio's practice of disposition of a recipient's real estate assets prior to death. Ohio and only a few other states require the sale of homestead property after a six month institutionalization period. This practice is described later, in chapter 5 on liens and chapter 7 on eligibility. The resulting sales of personal residences may result in lump sum payments to ODHS, or the recipient's return to a private pay status. Such actions result in savings to the Medicaid program, but are not reflected in estate recovery collections.

It is clear that program performance is a result of key aspects in program design, the extent to which the program design can be implemented, and the efficiency of the collection process itself. These areas will be explored in the following two chapters that study federal design parameters and compare actions taken in other states' estate recovery programs.

Chapter 4: Design Issues of State Medicaid Estate Recovery Programs

U.S. Dept. of HHS: HCFA Instructions to States

Under the estate recovery provisions in Section 1917(b) of OBRA 1993, states must recover certain Medicaid benefits correctly paid on behalf of an individual. The Health Care Financing Administration (HCFA), a branch of the U.S. Department of Health and Human Services, issued instructions explaining the rules under which states must recover from an individual's estate for Medicaid benefits correctly paid and incorrectly paid. States may define estates to include the home or any other real or personal property or other assets in which the recipient had a legal title or interest at the time of death.

HCFA has yet to publish final rules about the OBRA 1993 changes. Therefore, the following discussion follows the guidelines released in Section 3810 of the State Medicaid Manual, released by HCFA to states as HCFA publication 45-3.¹⁸ The chapter also notes other states' practices and legislation, and describes the program as it is currently operated in Ohio.

Study Results from Other States or on National Level

Discussion in this chapter includes results gleaned from the following reports, in addition to the materials directly submitted to Ohio from other states for purposes of this study:

1. Estate Recovery Reference Guide: October 1994, by American Public Welfare Association Medicaid Management Institute;
2. Medicaid Estate Recovery: A Survey of State Programs and Practices, by Charles P. Sabatino and Erica Wood, AARP Public Policy Institute #9615, Sept. 1996; and

¹⁸ U.S. Dept. of Health and Human Services, Health Care Financing Administration, ¶3810. Medicaid Estate Recoveries, State Medicaid Manual, Part 3 (HCFA-Pub. 45-3).

3. Comparing State Medicaid Recovery Efforts, Long-Term Care Policy Office in collaboration with Division of Medical Assistance, Department of Health and Human Services, North Carolina, October 1998.

Target Populations: Which Medicaid Participants Must Be Included in the Estate Recovery Program?

States are required to seek adjustment or recovery of medical assistance correctly paid on behalf of certain individuals under their state plan. There are three mandatory population categories for this recovery.

First Category: Permanently Institutionalized Individuals

Ohio's law on estate recovery does not address the first population category subject to estate recovery according to federal law, **permanently institutionalized individuals**. This group is defined as persons of any age who are residents of a NF or ICF/MR, or inpatients in other medical institutions as defined in 42 CFR 435.1009, and who must, as a condition of receiving services in the institution under the state plan, apply their income to the cost of care, as provided in 42 CFR 435.725, 42 CFR 435.733, 42 CFR 435.832, and 42 CFR 436.832. Permanently institutionalized individuals are those people who the state determines cannot reasonably be expected to be discharged and return home, *including individuals who qualify as both permanently institutionalized individuals and who are at least 55 years old*.

Ohio, in accordance with section 5111.11 of the Ohio Revised Code, is not currently pursuing recoveries from the estates of this federally mandated population. At the time the Ohio work group convened in 1994, HCFA instructions and rules on state operation of estate recovery programs were not available. Ohio policy analysts sought clarification from HCFA regarding the multiple categories of individuals subject to estate recovery, and at that time they were not given clear information. The Ohio analysts incorrectly concluded that the only group mandated to participate in estate recovery in Ohio was the population group which is discussed next, those age 55 and older. This misunderstanding is easily understandable, because there is considerable duplication between the two groups. Consequently, only the second federally mandated target group, described next, was included in Ohio law in 1995. However, the federal law provides for a different scope of recovery for the target group of permanently institutionalized individuals than it does for the group of recipients age 55 and older.

What is the Scope of Recovery for Permanently Institutionalized Individuals?

Recoveries must be made from the individual's estate (after death) or from the proceeds of the sale of the property on which a lien has been placed (before or after death). HCFA instructs states to seek adjustment or recovery, at a minimum, of amounts spent by Medicaid on the person's behalf for services provided in a nursing facility (NF), intermediate care facility for the mentally retarded (ICF-MR), or other medical institution. These amounts also include Medicare cost sharing for qualified Medicare beneficiaries (QMBs) to the extent that the Medicare cost sharing was for these institutional services. States also have the option of recovering amounts up to the total amount spent on the individual's behalf for medical assistance for other services under the state plan.

The date on which the state considers the individual to be permanently institutionalized does not affect which expenditures are recoverable from the individual or his or her estate. If a state elects to recover all paid medical assistance, assistance furnished prior to the time the state determined the individual to be permanently institutionalized would be included. If states elect to recover only those expenditures for institutional services, expenses for all institutional services furnished to the individual (regardless of whether they were furnished during the current stay in the facility) are recoverable. State plans must reflect the medical assistance payments subject to recovery.

Twenty other states indicated in North Carolina's recent survey that they applied Estate Recovery policies to services beyond those required by federal law. Fifteen states apply estate recovery policies to all Medicaid services provided.¹⁹

To achieve compliance with federal law, Ohio would have to add this mandated target group of permanently institutionalized individuals to Ohio's state plan. This action requires several decisions about implementation. The state must describe or explain each element below:

- 1) the process by which it will determine that an institutionalized individual cannot reasonably be expected to be discharged from the medical institution and return home;
- 2) the notice to be given the individual;
- 3) the process by which the individual will be given the opportunity for a hearing;
- 4) the hearing procedures; and
- 5) by whom and on what basis the determination that the individual cannot reasonably be expected to be discharged from the institution will be made.

States are not required to use the Supplemental Security Income (SSI) "intent to return home" rule for purposes of determining whether an individual is permanently institutionalized for use in estate recovery policy. This rule applies only to eligibility determinations.

¹⁹ North Carolina, Comparing State Medicaid Recovery Efforts, p. 3.

In Charles P. Sabatino and Erica Wood's survey of state Medicaid estate recovery programs, states relied on any combination of four basic methods to determine the institutionalized individual's ability to be discharged and return home. The four methods were:

- 1) A physician's statement that the resident is considered permanently institutionalized;
- 2) The person's declaration of intent to return or not return home;
- 3) An assessment by a third party; or
- 4) Presumptions about the length of stay in the institution, placing the burden of proof on residents to rebut. The length of stay applied by these states ranged from 30 days to two years.²⁰

One way for Ohio to define "permanently institutionalized" and be congruent and consistent with existing policy is to adopt the same criteria used regarding eligibility and homestead property. Under Ohio eligibility criteria, a homestead property loses its exemption when the individual can no longer be considered temporarily absent (i.e., there is a six month limit to temporary absence.) This policy could be adapted to infer that once the time frame allotted for a temporary absence from the homestead has expired, and the person resides in an institution, that person is permanently institutionalized. A person could be considered permanently institutionalized at an earlier point than six months, if the physician indicated that the person was not likely to return home, or if the person declares an intent to not return home. Hawaii's state code states that:

There is a rebuttable presumption that the recipient cannot reasonably be expected to be discharged from the facility and return home if the recipient or a representative of the recipient declares that there is no intent to return home or if the recipient has been institutionalized for six months or longer without a discharge plan.

Does the Category "Permanently Institutionalized" Include Children?

This federally mandated category does not specifically exclude children. Therefore, the category of permanently institutionalized individuals could include persons under the age of eighteen or twenty-two, if they meet the other operational parts of the definition of "permanently institutionalized." For instance, Ohio could select for its definition those who were institutionalized beyond a six month period, and thereby include children who have spent this amount of time at a NF or ICF-MR. Subsequent questions about the impact this mandated target population would have on children include:

- 1) If a child were subsequently discharged home, would he/she be subject to estate recovery?

²⁰ Charles P. Sabatino and Erica Wood, Medicaid Estate Recovery : A Survey of State Programs and Practices, American Association of Retired Persons, Public Policy Institute # 9615, (September, 1996) , pp. 28-29.

If either an adult or a child were subsequently discharged home, the person would no longer be classified as “permanently institutionalized”, and therefore would not be subject to estate recovery under this mandated category. However, an adult who was discharged home may be subject to recovery under the next category, age 55 and older, for claims paid for services rendered after the person reached age 55.

- 2) If a Medicaid-eligible child died who was a resident of a NF or ICF-MR, could estate recovery make a claim against his/her estate?

Yes. The eligibility standards for allowable income and resources are the same for a child under age twenty-two as for any single adult. Recovery could be pursued, for instance, if the child owned real estate or had liquid resources in a savings account.

- 3) Would the claim seek to recover from the parents’ assets?

The income and resources of the parents are not “deemed” to be available to a child requiring an institutional level of care in the Medicaid program. The child is determined to be eligible based on his/her own assets, regardless of the assets of the parents. Likewise, recovery for paid Medicaid services from the estate of a child would be limited to collections from the child’s actual estate.

Second Category: Individuals Age 55 or Older

The second population category subject to estate recovery is **individuals age 55 or older**. States must seek adjustment or recovery from the estate of an individual who was age 55 or older when that person received medical assistance. (A determination of permanent institutionalization is not necessary to recover against recipients 55 years of age and older, but such a determination is necessary if the state uses TEFRA liens. TEFRA liens are discussed in Chapter E.)

What is the Scope of Recovery for Persons Age 55 and Older?

States must recover up to the total amount spent by Medicaid on the person’s behalf, but only for payments made for nursing facility (NF) services (including skilled nursing facility (SNF) and intermediate care facility for the mentally retarded (ICF-MR) services), home and community based services (HCBS), as defined in Sections 1915(c) and (d), 1929, and 1930 of the Social Security Act, and related hospital and prescription drug services. Related hospital and prescription drug services are any hospital care or prescription services provided to an individual while receiving nursing facility services or home and community-based services. These amounts also include Medicare cost sharing for QMBs to the extent that the Medicare cost sharing was for NF services, HCBS services, and related hospital and prescription drug services described above. At the state’s option, additional amounts--up to the entire amount spent on the individual’s behalf for medical assistance--for any other items or services under the state’s plan may also be recovered. These other items and services must be listed in the state plan. Recovery is limited to medical assistance for services received at age 55 or thereafter.

Prior to the amendment to Ohio's Section 5111.11 by Amended Substitute House Bill 215 (effective September 29, 1997), only the following federally mandated services were subject to recovery in Ohio for recipients age 55 or older:

- # NF services (which by federal definition included SNF and ICF-MR services).
- # HCBS Waiver services (such as PASSPORT and the Individual Options Waiver).
- # Related hospital and prescription drug services defined as any hospital care or prescription services provided to an individual while receiving NF services and HCBS services.
- # Medicare cost sharing benefits for QMBs related to the above.

Effective with the state budget language bill (H.B.215) signed in July 1997, the program was expanded to include estate recovery for all services correctly paid under the medical assistance program. This amendment was implemented for persons whose deaths were first recorded in July, 1998.

What Are the Differences in the Scope of Recovery Between the Two Target Groups?

The two population categories (permanently institutionalized individuals; and persons age 55 or older) are not mutually exclusive. When a person meets criteria for both categories, recovery efforts for the category of permanently institutionalized individuals apply. Estate recovery for the age 55 and older population who are NOT permanently institutionalized is limited to claims for medical assistance for services which are received at age 55 or thereafter.

Third Category: Individuals with Long Term Care Insurance Policies Used for Medicaid Eligibility "Disregards"

The third population category subject to estate recovery consists of a subcategory of individuals with long term care insurance policies: those in states which use the LTC insurance policy to disregard assets or resources in the process of determining Medicaid eligibility. This is a state-defined category, because it is a state's choice whether or not to adopt this policy option pertaining to eligibility criteria. Ohio has not adopted this option.

What is a "Partnership State?"

Five states (California, Connecticut, Indiana, Iowa, and New York) are often referred to as "public-private partnership states" because a program was initiated as a Public/Private Partnership

through a Robert Wood Johnson grant. The federal law made special provision for individuals in these states that held long term care insurance policies. These states had an approved State plan, as of May 14, 1993, which provided for the disregard of assets or resources in determining eligibility for medical assistance (either to the extent that payments are made under a long term care insurance policy, or because an individual has received or is entitled to receive benefits under such a policy) and therefore, these states are not required to seek adjustment or recovery from the individual's estate for Medicaid costs for nursing facility and other Medicaid long term care expenses.

Under current Medicaid rules, purchasers of LTC insurance who bought policies without the public-private partnership would have to spend-down their assets after their LTC insurance benefits have been exhausted in order to become Medicaid eligible. According to Joshua Weiner, in partnership states, Medicaid acts as a kind of reinsurance for persons with limited private long term care insurance. In Connecticut, California, Indiana, and Iowa, the level of Medicaid-protected assets is tied to the amount that the private insurance policy pays out. The other model, used by New York, protects an unlimited amount of assets if an individual purchases a policy that meets state standards. It targets a higher income population than do the other states. ²¹

Ohio is NOT a Partnership State

Non-partnership states must pursue recovery even if LTC insurance was purchased. Any states that have a state plan approved after May 14, 1993 which provided for the disregard of assets or resources in determining eligibility for medical assistance (either to the extent that payments are made under a long term care insurance policy, or because an individual has received or is entitled to receive benefits under such a policy) are required to seek adjustment or recovery from the individual's estate for Medicaid costs for nursing facility and other Medicaid long term care expenses. **In addition, such states must, for this population, expand the definition of estate**, as described later, to the optional all-inclusive definition.

Ohio is not one of the five partnership states, but it did pass a law using the partnership concepts. ORC Section 5111.18, passed in H.B. 152 effective July 1, 1993, and amended through H.B. 215, effective September 29, 1997, specifies that ODHS shall establish the Ohio LTC insurance program "if it determines that such action would not violate any federal statute or regulation or receives from the U.S. Department of HHS a waiver of any federal requirement that would otherwise be violated." This program would exclude resources of an individual covered by a LTC insurance policy from determination of eligibility for Medicaid and from determination of any amount to be recovered by the state for payments under Medicaid for services correctly provided. Additionally, such resources were not to be subject to liens. Its intent was to exclude resources in amounts equal to LTC insurance benefits paid.

²¹ Joshua M. Weiner, "Can Private Insurance Solve the Long Term Care Problems of the Baby Boom Generation?" Testimony, (March 9, 1998).

Since Ohio is not one of the five states to have this provision in their state plan by May 14, 1993, it may not waive estate recovery on the resources considered exempt for eligibility purposes. In addition, by federal mandate, recovery efforts for this population must define an estate as all assets, not those just limited to the probatable estate. ORC Section 5111.18 has not been implemented, because of the federal restrictions noted.

However, Kansas is not a partnership state, yet it has devised a method to serve as an incentive for recipients to purchase a long term care insurance policy by crediting the paid LTC insurance benefit amount toward estate recovery. Their state law at K.S.A. 39-709 (g)(2) reads:

The monetary value of any benefits received by the recipient of such medical assistance under long-term care insurance, as defined by K.S.A. 40-2227 and amendments thereto, shall be a credit against the amount of the claim provided for such medical assistance under this subsection (g).

This law was in place prior to the passage of OBRA 1993, therefore it is debatable whether HCFA would find such a provision subsequently placed in state law acceptable.

North Dakota code at section 50-24.1-02.5, titled “Effect of purchase of insurance on disqualifying transfer” became effective August 1, 1995. It states that an individual who secures and maintains insurance that covers the cost of substantially all necessary medical care, including necessary care in a nursing home and necessary care for an individual who qualifies for admission to a nursing home but receives care elsewhere, for at least thirty-six months after the date an asset is disposed of, may demonstrate that the asset was disposed of exclusively for a purpose other than to qualify for medical assistance by providing proof of that insurance.

Are There Any Limitations on Adjustment or Recovery?

Limits on Recovery from Surviving Spouses, Minor Children, and Blind and Disabled Children

Adjustment or recovery can only be made after the death of the individual’s surviving spouse, if any, and only at a time when the individual has no surviving child under age 21, or no blind or disabled child of any age. Further limitations are placed on pursuit of adjustment or recovery in cases involving liens, as discussed later in the next chapter.

From a review of state-submitted statutes, many states pursue the estate of a surviving spouse, including California, Illinois, Idaho, Iowa, Kansas, Minnesota, Missouri, New Hampshire, New York, North Dakota, Oregon, Wisconsin, and Wyoming. New Hampshire is currently in litigation

about pursuit of an estate of a surviving spouse and imposition of liens on the surviving spouse's property. In a California court decision involving liens, the court affirmed the state's ability to pursue the surviving spouse's estate, as discussed later. North Carolina's 1998 survey also listed Alabama, Louisiana, Maryland, Massachusetts, New Mexico Nevada, and West Virginia as states that defer rather than waive recovery when there is a surviving spouse or dependent.

Limiting Extent of Claim on Estate of Non-recipient

Other states have added language that clarify the extent to which the state could make a claim on the estates of surviving spouses, disabled children, or siblings of disabled children. A California lawsuit resulted in a court decision that the state's practice of pursuing recovery from the non-disabled siblings' inheritance while not pursuing the inheritance of the disabled sibling was non-allowable. As long as disabled siblings are alive, no recovery can be pursued from non-disabled child heirs.

The federal law merely permits pursuit of recovery at a point in which there is no surviving spouse or disabled child, and although the claim is limited to the costs incurred by the Medicaid program, it sets no limits about the amounts recoverable from the estates of surviving spouses or disabled children. Idaho limits the claim to the value of assets of the estate that were community property or the deceased recipient's share of the separate property, and to jointly owned property. Indiana law limits recovery to the value of the assets included in the predeceased spouse's probate estate. Minnesota law states that: "A claim against the estate of a surviving spouse who did not receive medical assistance, for medical assistance rendered for the predeceased spouse, is limited to the value of the assets of the estate that were marital property or jointly owned property at any time during the marriage." Oregon's language allows a claim for a deceased client only to the extent that the surviving spouse received property or other assets from the estate of the deceased at the time of death. Wyoming limits the claim on a surviving spouse's estate to the value of assets during the marriage.

Most notably, the South Dakota Department of Social Services may file a claim against the estate of the surviving spouse of a medical assistance recipient to satisfy the debt established under this section. The surviving spouse is defined as a person "who was married to the deceased medical assistance recipient when the recipient became eligible for medical assistance, who has not divorced the medical assistance recipient, and who has not remarried after the recipient's death." A provision allows the surviving spouse, at the time the estate of the recipient is administered, to limit his or her own estate's financial responsibility in Medicaid estate recovery proceedings. The statute states that:

A surviving spouse may petition the Department of Social Services for purposes of limiting the financial responsibility of the estate of the surviving spouse. The financial responsibility of the estate of the surviving spouse may not exceed the value of the estate of the surviving spouse as of the date of death of the medical assistance recipient. For purposes of the determination of the financial

responsibility, it shall be assumed that the surviving spouse died simultaneously with the medical assistance recipient. The petition for financial responsibility shall be filed with the Department of Social Services within six months of the date of death of the medical assistance recipient.

Minnesota law states that it will pursue the estate of a predeceased community spouse, but a Minnesota policy bulletin notes that this provision cannot be implemented until federal law changes or a waiver can be obtained.

ORC Section 5111.11 includes the specific federal limitations on pursuing recovery, but provides no clarifying language. In discussing whether Ohio should adopt restrictions on the amount recoverable from the estates of surviving spouses or disabled children, the study group considered the criteria categories established by the study group subcommittee (see appendix A). The other states' limitations on recovery strike a high mark for "fairness" in differentiating the extent to which one spouse's estate may have been formed out of the inheritance from the recipient, or the jointly held property. However, these provisions score quite low on both the extent to which recovery can be maximized, and also the degree to which the policy shapes the behavior of a targeted population with considerable resources, so that they become responsible for financing their own long term care needs instead of becoming users of Medicaid-purchased services.

How does the Estate Recovery Program Define Estate? What is the Scope of Recovery?

States are given two choices for definition of estate. The first is the "**probate definition.**" Under the probate definition, states must include all real and personal property and other assets included within the individual's estate as provided in the State probate law.

Brian Burwell notes that:

A criticism of estate recovery programs is that they unfairly target estates of the truly poor, while recipients with larger estates avoid estate recovery through effective Medicaid planning. Sophisticated planners can use a variety of advanced planning techniques to allow assets to pass to heirs outside the probate process, thereby defeating the attempts of states to recover assets under the estate recovery process. On the other hand, recipients who do no planning are subject to the full force of estate recovery...thus, estate recovery programs may be effective in "picking the bones" of a lot of small estates, while being ineffective in capturing the assets of relatively large estates.²²

²² Burwell and Crown, "Medicaid Eligibility Policy and Asset Transfers: Does Any of This Make Sense?" p. 82.

Ohio code on Medicaid Estate Recovery currently uses this mandatory and most restrictive probate definition. Within this definition, Ohio pursues recovery of probatable assets within the estate, including cash assets that were exempt under Medicaid for eligibility purposes because they were below the Medicaid asset limit.

Does Ohio Seek Recovery If No Estate Is Filed with Probate Court?

Ohio's estate recovery program may, in certain cases, pursue recovery even if the estate was so small it would not be cost effective to file it with the Probate Court. Specifically, Ohio pursues recovery from **personal needs accounts** owned by residents and maintained by nursing facilities, as outlined in ORC section 5111.112 and OAC rule 5101:3-3-60. (Personal needs allowances are described in chapter 7.) This provision was passed in part to address the need for the nursing facilities to "close their books" when estates were not filed for deceased residents, as the option of depositing the amounts in Ohio's "unclaimed funds" account became unavailable. Ohio also has a process to collect minimal bank account balances. Although other states do, Ohio rarely pursues recovery of other personal property owned outright by the recipient prior to death, such as automobiles, jewelry, or furniture.

What is the Role of Recovery of Personal Needs Allowance (PNA) Account Funds Managed by Nursing Facilities?

Ohio House Bill 167 (effective on November 15, 1995) altered the estate recovery program by stipulating that any funds remaining in a deceased recipient's PNA account managed by the nursing facility were now required to be returned to ODHS, if an estate is not filed for the recipient in probate court and the funds are not required to pay for funeral or burial expenses.

Although Ohio has not tracked the recovered assets by category, AGO staff operating the program estimate that approximately half of the recovered monies in Ohio's program comes from the collection of the remaining balances in PNA accounts maintained by the nursing facilities. Residents may or may not choose for the facility to manage their accounts. Regardless of whether the resident's account is managed by the NF, it can contain no more than \$1,500 at any time. These observations are important from two standpoints: 1) a large part of the recovered monies are from accounts of persons with assets too small to be part of a probated estate; and 2) most claims are for small amounts that in large volume add up to millions of dollars.

What About Recovery of Assets That Fall Outside the Probated Estate?

In addition to property and assets under the probate definition, the **second option** per federal law permits states to recover any other real property, personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest). This includes assets conveyed to a survivor, heir, or assign of the deceased through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.

Examples of types of property generally considered as outside of the probate estate and that do not pass by will or by the laws of intestacy include:

- property held in joint tenancy “with right of survivorship”;
- life insurance payable to a named beneficiary;
- property held in a trust;
- retirement plans payable to a named beneficiary;
- pay-on-death bank accounts and trust arrangements on bank accounts payable to a named beneficiary at death; and
- deeds in which the deceased held only a life estate, with the property going after death to a named beneficiary who holds the “remainder” interest in the property.

State Practice Surveys: Expansion of Definition of Estate

Ohio’s review of statutory language submitted by other states yielded the following ones that have expanded the definition of estate: California, Colorado, Iowa, Idaho, Illinois, Maine, Nevada, New Jersey, Oregon, and South Dakota. Minnesota is currently studying the issue.

The North Carolina (NC) survey, completed in 1998, asked for self-reporting whether estate recovery is limited to probate estates. It too revealed California, Iowa, Nevada, New Jersey, Oregon and South Dakota as the states that reported they do pursue other assets. The following states were also listed, but statutory language was not found in Ohio’s review: Connecticut, Kentucky, Maryland, Montana, Rhode Island, Washington, and Wisconsin.

Expansion of the definition of estate was sometimes achieved incrementally. States expanded to specified types of assets. The NC survey specifically asked whether the state recovered cash below Medicaid asset levels, other personal property owned by the beneficiary, personal or real property jointly owned, personal or real property for which the beneficiary had a life estate prior to death, or other types. In the NC survey, California reports pursuing trusts and annuities, and Oregon reports recovering revocable trusts.

State Practice Surveys: Expansion to Jointly Owned Property

By far, the most common expansion in the estate definition was to property held jointly. The AARP report indicated that an American Bar Association survey showed 23 states in 1995 were pursuing recovery against property owned jointly prior to death, including California, Colorado, Connecticut, Delaware, Iowa, Idaho, Illinois, Kentucky, Maryland, Maine, Montana, North Dakota, New Hampshire, Nevada, New York, Oregon, Pennsylvania, South Carolina, South Dakota, Utah, Washington, West Virginia, and Wyoming. It also erroneously listed Ohio.

In the AARP study, Connecticut, Colorado, Delaware, Kentucky, Maryland, and New York reported they only recovered from the probatable estate, so these states may be referring to tenancy in common which passes by will or by intestacy. Ohio's review of statutory language submitted by other states in 1998 yielded the following list of states that authorize recovery against jointly owned property: California, Colorado, Iowa, Idaho, Illinois, Maine, Nevada, Oregon and South Dakota. Illinois pursues joint tenancy interest but only in real property subject to lien.

State Practice Surveys: Expansion to Life Estates

The AARP study's ABA survey found nine states that seek recovery against property in which the beneficiary had a life estate, yet it erroneously included Ohio along with Maine, Montana, Nevada, Oregon, Pennsylvania, Utah, Washington and Wyoming. The later NC study counted only Connecticut, Iowa, Montana, and Nevada as reporting use of this practice.

Iowa's definition of estate includes recovery from jointly held property and trusts. South Dakota's definition includes jointly held bank accounts and personal needs allowance accounts (PNAs) managed by facilities.

Issues Regarding an Expanded Definition of Estate

The issue of expansion of the definition of estate for Medicaid estate recovery purposes is one of the most contentious policy choices, yet a crucial one for the goals of program equity and effective recovery. While using the most restrictive definition of estate (i.e., limited to probate) may be the easiest and least controversial to administer, it falls far short in terms of goals of maximizing recovery and treating recipients equitably. The most restrictive definition limits recovery to those likely to have the least resources and who lack financial savvy to protect assets by using other non-probatable avenues. It contributes to the sense, as some analysts have reported, that Medicaid is not just a "means-tested" program, but a "mean" program, that leaves persons with considerable assets whole, while thoroughly depleting the estates of those with the least assets to contribute.

Minnesota is currently grappling with the topic of adapting an expanded definition of estate for their estate recovery program. They note that it is an area that creates anxiety in the legal community regarding probate and transfer of property issues, and for the county auditors and recorders regarding title issues. While these are indeed legitimate administrative concerns, the obstacles posed are surmountable and should not pose limits on Ohio policy to the degree that pursuit of these considerable non-probate resources is abandoned.

The AARP Public Policy Institute survey notes that legal practitioners expressed more uncertainty about the scope of recovery in states that used an expanded definition of probate, in the following areas.

- Evaluation of life estates (How will the state determine what the estate was worth at the time of death? Will a life expectancy annuitization be used?)
- Application to joint tenancy and trusts (How would a lien be enforced against a joint owner?)
- Application to personal property and cash (What procedures does the state use to collect such property?)
- Multi-party accounts and pay-on-death accounts (How does recovery relate to state banking laws, multi-party account laws?)
- Recovery of nursing home accounts ²³

It is useful to study how other states have surmounted these procedural challenges. Illinois legislative language addresses some of the practical concerns about the expansion of “estate” to include joint tenancy. Illinois statute states at ILCS 5/5-13 that a claim arising against assets conveyed to a survivor, heir, or assignees of the deceased person through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement is not effective until the claim is recorded or filed in the manner provided for a notice of lien. The claim is subject to the same requirements and conditions to which liens on real property interests are subject. A claim arising under this section attaches to interests owned or subsequently acquired by the estate of a recipient or the estate of a recipient’s surviving spouse. The transfer or conveyance of any real or personal property of the estate as defined in this section shall be subject to the fraudulent transfer conditions that apply to real property.

The Illinois law section 5/3-states that a joint tenancy interest in real property shall be subject to the lien created by section 3-10. “The filing and approval of an application for aid under this Article on or after the effective date of this Code shall constitute a severance of the joint tenancy, effective on the date of the filing or recording of the notice of lien. The severance shall be solely for the purpose of enforcing the lien. For all other purposes, the joint tenancy shall remain in effect and be unimpaired. The lien shall be enforceable only to the extent of the interest of the recipient. A fractional part of the property, to be determined by dividing the total value of the property by the number of joint tenants, shall be presumed to have belonged absolutely to the recipient.”

Property held jointly with right of survivorship may be the most substantial asset a Medicaid beneficiary may retain and is the most frequent type of expansion used by other states.

ORC 5111.181: Exclusion of Value of Life Insurance Policy in Determining Eligibility

²³ Sabatino and Wood, p. 17.

Ohio law at section 5111.181, amended in Senate Bill 67 (effective June 4, 1997), sets up an option for Ohio to recover proceeds of a life insurance policy up to the amount the department may recover against the property and estate of the owner under ORC section 5111.11. After the recipient dies, the life insurance policy could pay the state up to the claim amount, then the remainder would be issued to a second beneficiary. The value of a life insurance policy (that would otherwise be considered a resource in determining eligibility for Medicaid) could be excluded from any determination of a person's eligibility for Medicaid if the policy holder designates ODHS as beneficiary of the policy. ODHS may pay premiums to keep the policy in force. Premiums paid by the department would be considered medical assistance payments correctly paid on behalf of the recipient and also subject to recovery under section 5111.11. The section stipulates that the department shall not implement this section if implementation would violate any federal requirement unless the department receives a waiver of the requirement from HHS.

ORC section 5111.181 has not been implemented because a federal waiver has not been obtained. It also presents some practical concerns about administration:

Are premiums of the policy fully paid? If the answer is yes, the policy holder could name the state as first beneficiary, and exempt the cash value as a countable resource in determining eligibility. But there is no provision prohibiting the policy holder from borrowing against the cash value or canceling the policy after eligibility has been granted. It is also not clear if ownership can be assigned to the state. If the premiums are not fully paid, the state cannot pay the premiums using Medicaid funds, and the client is not able to pay further premiums. In these cases, the policy usually is redeemed for cash value, or converted to a burial account.

Tracking Recovery by Asset Source

Notably, some states that use an expanded definition of "estate" track their recovery by asset sources. South Dakota uses these categories:

- 1) Resident Account Recovery, including PNA accounts from NFs and small amounts from bank accounts per affidavit;
- 2) Trust recovery of irrevocable income trusts;
- 3) Probate recovery;
- 4) Medical Assistance Liens; and
- 5) Nondisclosure of assets.

Kansas tracks case assets from:

- 1) Banks;
- 2) Conservators;
- 3) Family;

- 4) Miller Trusts;
- 5) Personal Needs Allowances;
- 6) Prepayment; and
- 7) Probate.

From these categories Kansas is able to track case numbers by these categories, calculate the average amount recovered per category or per case, and report the total recovered amounts by these categories. The report also lists refunds awarded.

Can Recovery Be Waived Due to Undue Hardship?

Pursuant to OBRA 1993, states are given the latitude to waive estate recovery in those situations when the implementation of the recovery causes an undue hardship on individuals involved. States may limit the waiver to the period the undue hardship circumstances exist. (Undue hardship waiver protection does not apply to individuals with long term care insurance policies who became Medicaid eligible by virtue of disregarding assets because of payments made by a long term care insurance policy or because of an entitlement to receive benefits under a long term care insurance policy.)

Components of an “undue hardship” may include a permanent waiver of recovery efforts, a temporary deferral or postponement, and negotiation of modified recovery agreements (e.g., satisfying a claim with a payment schedule subject to reasonable interest instead of forcing a sale of a non-liquid asset).

HCFA guidelines state that an undue hardship may exist when the estate subject to the recovery is the sole income-producing asset of the survivors and income is limited (e.g., a family farm or other family business which produces a limited amount of income when the farm or business is the sole asset of the survivors). States should provide for special consideration of cases in which the estate subject to recovery is:

- (1) the sole income-producing asset of survivors (where such income is limited), such as a family farm or other family business; or
- (2) a homestead of modest value; or
- (3) involved in other compelling circumstances.

States must adopt application procedures for undue hardship waivers for individuals who will be affected by recovery of amounts of medical assistance. These procedures must, at a minimum, provide for advance notice of any proposed recovery. They must also specify the method for applying for a waiver, the hearing and appeal rights, and the time periods involved in the waiver process. States should specify the procedures used for collection, which must be reasonable as not to create an undue hardship due to the actual collection. In situations where recovery is not

waived because of undue hardship, and heirs of the estate from which recovery is sought wish to satisfy the recovery claim without selling a non-liquid asset subject to recovery, the state may establish a reasonable payment schedule subject to reasonable interest. The state may also undertake partial recovery to avoid an undue hardship situation.

When states consider criteria for undue hardship, they may conclude that an undue hardship does not exist if the individual created the hardship by resorting to estate planning methods under which the individual divested assets in order to avoid estate recovery. The state may adopt a rebuttable presumption that if the individual obtained estate planning advice from legal counsel and followed this advice, the resulting financial situation would not qualify for an undue hardship waiver.

Ohio's Undue Hardship Waiver

In certain circumstances in which recovery from the estate is found to create an “undue hardship” to a survivor, the right to immediate recovery may be deferred or waived by the state. Undue hardship waivers are made at the discretion of the Office of the Attorney General of Ohio, in conjunction with the local probate court, on a case-by-case basis. An example of an undue hardship could be an estate that is the sole income producing asset of the survivor, such as a working farm, in which recovery would affect the property and thus affect the survivor’s livelihood.

ODHS was given authority in House Bill 167 (effective on November 15, 1995) to write the rule defining “undue hardship.” ORC Section 5111.11 allows ODHS to promulgate rules about undue hardship procedures. Thus far, Ohio has considered all reasonable requests on an individual basis, but has adopted the following circumstances in which an undue hardship waiver may be granted:

- 1) A decedent’s real property is used as part of the waiver applicant’s business (e.g., a working farm) and recovery would result in the waiver applicant losing his means of livelihood; or
- 2) A decedent’s former homestead property is, and was, prior to the death of the decedent, also the home of the decedent’s spouse, the home of a child under age 21, or the home of a blind or disabled child 21 years of age, or older; or
- 3) If the claim is being deferred, the beneficiary or heir cooperates in creating a primary lien in favor of ODHS against the estate property from which ODHS would have recovered its claim, or equivalent property.

Other States' Undue Hardship Criteria

According to the AARP study, criteria used by other states fall into six broad categories with multiple variations:

1. The estate consists of an income producing asset (business, including farm or ranch) and recovery would cause loss of livelihood.
2. Property is the primary residence of the survivors.
3. The estate's only asset is a homestead of modest value.
- 4a. Without receipt of estate proceeds, the survivor would become eligible for public and/or medical assistance.
- 4b. Allowing the survivor to receive the estate would enable him/her to discontinue eligibility for public and/or medical assistance.
5. Recovery would deprive the survivor of necessities of life, e.g., food, shelter, clothing.
6. The survivor made substantial personal contributions to the property or to the care of the beneficiary so beneficiary could remain at home.²⁴

Is Recovery Prohibited If the Resource or Income Was Exempt for Eligibility Purposes?

During the study group meetings, the question arose about whether the state should allow those sources of income or resources which are exempt for eligibility purposes to also be exempt from estate recovery collection, including any type of reparation payments. The study group reached consensus that criteria (4a), (4b) and (5) from the AARP list that are contingent upon the economic status of the potential heir were preferable criteria for an undue hardship waiver to those that focused instead on the category of the recoverable resource.

Other states have adopted the following notable undue hardship policies:

- G** Florida: An undue hardship does not exist solely because recovery will prevent heirs from receiving an anticipated inheritance.
- G** Maine: Decisions are final unless a request is received for agency review within 30 days.
- G** North Carolina: Undue hardships shall not include loss of a pre-existing standard of living nor the establishment of a source of maintenance that did not exist prior to the decedent's death.

²⁴ Sabatino and Wood, p. 31, 33.

- G Wyoming: Undue hardship includes any additional definition promulgated by the U.S. Department of HHS as an administrative regulation. Any part of this definition that is inconsistent with HHS's definition shall become inoperative.
- G South Carolina provides an instruction sheet which sets forth the documentation necessary to verify hardship circumstances depending on the role of the heir: spouse, child, or sibling.
- G Oregon: No waiver will be granted if the Division finds that the Undue Hardship was created by resort to estate planning methods by which the undue hardship waiver applicant or deceased client divested, transferred or otherwise encumbered assets in whole or in part to avoid estate recovery. No waiver will be granted if the Division finds that the undue hardship will not be remedied by the grant of a waiver.
- G Indiana: The office may not grant an undue hardship waiver if the grant will result in the payment of claims to other creditors with a lower priority standing under Indiana's probate law. Other compelling circumstances are determined on a case-by-case basis by the Office of Medicaid. Undue hardship doesn't exist in circumstances where the state's recovery simply results in a loss of a pre-existing standard of living. Undue hardships are only available to members of the immediate family of the deceased client or the spouse, except in exceptional circumstances.

What if Adjustment or Recovery is Not Cost Effective?

States may waive adjustment or recovery in cases in which it is not cost effective to recover from an individual's estate. The individual does not need to assert undue hardship. States may determine that an undue hardship exists when it would not be cost effective to recover the assistance paid. States may adopt reasonable definitions of "cost effective." However, any methodology used for determining cost-effectiveness must be included in the state's Estate Recovery plan.

Ohio has yet to set a definition for "cost effective". Ohio's scope of recovery currently has no minimum thresholds for either the amount of the Medicaid claim or the size of the estate. However, collections below the amount of ten dollars in personal needs allowance accounts have been found to not be cost effective for the facility to disburse or the state to collect.

Wisconsin's policy on cost effectiveness is flexible and inclusive. This policy states:

Claims and liens are adjusted and settled to obtain the fullest amount practicable. Cost effectiveness of recovery is determined on a case by case basis considering but not limited to the following factors:

- (a) the administrative cost to recover;

- (b) the amount of the state’s claim against the estate;
- (c) the amount of assets in the estate;
- (d) the type and degree of liquidity of the assets in the estate; and
- (e) claims of other priority creditors.

Generally, the state will file a claim in a court-supervised estate when the amount of the claim exceeds \$100. In the case of assets transferred without court supervision, the state generally will file a claim against the estate when both the claim amount and the amount of assets in the estate exceed \$50. The state will act to recover from nursing home personal accounts when both the claim amount and the asset amount exceed \$10. Experience has shown that recovery is cost-effective at these threshold in most instances.

Wyoming’s cost effectiveness test states: “The determination by the Department that the expected expenses of a recovery, including, but not limited to, administrative costs, attorneys’ fees, court costs, costs of litigation, travel costs, expert witness fees and deposition expenses, are less than the expected amount of the recovery.”

North Dakota does not initiate estate recovery when the estimated costs for recovery together with the estimated total of other claims with preference over the Medicaid claim exceeds or nearly exceeds the assets in the decedent’s estate.

The North Carolina survey shows sixteen states establishing an estate value below which no recovery is sought, but this amount ranges from \$10,000 in South Carolina to \$50 in Wisconsin, and five more states setting no limits but considering costs against benefits or litigation costs. In the same survey, sixteen states set a claim value below which no recovery shall be sought, and four additional states do take cost/benefit ratios or litigation costs into account on a case-by-case basis. The claim value ranged from \$50 to \$3,000.²⁵

Does the State Provide Notice to Individuals About Medicaid Estate Recovery?

Notice at Time of Application for Medicaid Benefits

States should provide notice that explains the estate recovery program to individuals at the time of application for Medicaid. ODHS requires all county departments of human services to inform Medicaid recipients and their guardians about the Estate Recovery Program at the time of application or re-application for Medicaid through use of ODHS publication 7400, “Estate Recovery Information Sheet.” In addition, ODHS provides an informational pamphlet to hospital

²⁵ North Carolina, *Comparing State Medicaid Recovery Efforts*, Attachment #4.

discharge planners, nursing facilities, PASSPORT agencies and the general public upon request. Information is available on the Attorney General's web site.

Notice to Individuals Affected by Recovery

States should also give a specific notice to individuals affected by the proposed recovery whenever they seek adjustment or recovery. The notice should be served on the executor or legally authorized representative of the individual's estate. The executor or legally authorized representative should be required to notify individuals who would be affected by the proposed recovery. In the situation where there is no executor or legally authorized representative, the state should notify the family or the heirs. The notice should include, at a minimum, the action the state intends to take, reason for the action, individual's right to a hearing, method by which he/she may obtain a hearing, procedures for applying for a hardship waiver, and the amount to be recovered.

In Ohio, the Attorney General's Office serves notice on the executor or legally authorized representative of the individual's estate. Ohio law provides for court review as the next appellate step, thus making an administrative hearing unnecessary.

What are the Tracking and Collection Procedures in Ohio?

Effective estate recovery programs depend upon states being able to do the following:

- (a) identify deaths of Medicaid recipients and their surviving spouses or disabled children;
- (b) identify the amount of the incurrence of Medicaid payments in a timely manner;
- (c) identify recipients with probated estates or probatable assets worth seeking recovery; and
- (d) institute procedures to ensure that the courts recognize the state as a legitimate creditor to the estate under the probate process. ORC sections 5111.11 and 5111.111 establish the authority ODHS needs to institute such procedures.

Identifying Deaths and Claims Amounts

The Medicaid Management Information System (MMIS) of ODHS maintains a tracking file of all Medicaid recipients subject to the estate recovery program. The monthly processing involves four phases:

- 1) Recipient processing determines who should be tracked and their current status:

Upon the death of a Medicaid recipient, the caseworker at the CDHS enters this data into the Client Registry Information System-Enhanced (CRIS-E), the eligibility computer system. This information is conveyed to MMIS's Recipient Master File. At the end of each month, MMIS prepares a computer tape listing recipients who have been indicated to be deceased during that month. MMIS first looks for the date of death in the Ohio Department of Health's Vital Statistics file and then from the Recipient Master File of MMIS. (Due to various factors, the CDHS does not always change the indicator during the month of the death and therefore, not all of the recipients listed on a monthly tape necessarily died in that month.) It is important to note that both sources are used because it is necessary to track those whose Medicaid eligibility may have been terminated prior to death. (Persons receiving Medicaid who later move out of the state may not be detected from these sources.)

- 2) For persons identified above, the claims processing data base selects all claims from the monthly MMIS "paid claims file".

Once a recipient is first identified for the tracking file, the system reports on all claims paid for the recipient from the time that they became eligible for tracking to the present. It then continues to identify claims that are submitted and paid for each month thereafter.

- 3) An initial report ("Summary A") summarizes all claims paid for those recipients newly detected as being deceased.
- 4) A follow-up report ("Summary B") is completed six months later to capture claims paid subsequent to the notice of the recipient's death. It summarizes all claims paid for the six months following the time recipients are initially identified in "Summary A".
- 5) After both the initial and follow-up reports are sent to the AGO, the tracking record is closed for that individual.

ODHS sends an electronic copy of the record of Medicaid claim totals paid on behalf of the deceased recipient to the AGO's Revenue Recovery Section.

Note: Ohio's policy --that requires conversion of homestead property into a countable asset if the person is institutionalized for six months-- results in some persons selling the home, paying a lump sum amount to ODHS, and continuing Medicaid eligibility. This practice is discussed in more depth in chapter 5 on liens and chapter 7 on eligibility. There is currently no link for this lump sum payment to be subtracted from the person's estate recovery claims-tracking file that establishes the amount owed by the estate to Ohio Medicaid. This accounting link should be established, so that the estate recovery claim properly reflects the actual amount of claims for which no recovery has previously been achieved.

Tracking, Preserving and Recovering Assets

The AGO investigates the existence of an estate, and may, as part of the investigation, call nursing homes or CDHSs for additional information. The AGO generates an initial letter by computer to the last known address of the recipient, which requests information about next of kin or responsible parties. Once an estate representative is identified, an initial claim letter is generated. This initial letter contains the interim claim amount identified by the ODHS tracking system as "Summary A." The AGO is also responsible for filing claims in local probate courts on behalf of ODHS to recover some part of what Medicaid has paid for the recipient's care. If an estate has not been filed but assets exist, the AGO can ask the probate court to open the estate to file a claim.

Nursing facilities holding assets remaining in PNA accounts can automatically remit these amounts to the AGO within the time frames specified by Ohio law.

Additional tracking mechanisms would be necessary in order to pursue out-of-state recoveries, the estate of the surviving spouse, the holdings of an emancipated minor or estate of a disabled child and siblings, and enforcement of liens. The ability to track property to make sure that it is not sold, given away, or otherwise disposed of, is important to successful programs.

Do Other States Have Additional Methods That Enhance Recovery Efforts?

Recovery from Exempt Prepaid Burial Accounts

Ohio's current rule at OAC 5101:1-39-301 requires excess funds from a prepaid burial account to be remitted to the person's estate. In New Jersey, funeral directors remit refunds directly to the Estate Recovery unit. In Connecticut, there is a limit on claim priority amounts to offset prepaid arrangements. South Dakota includes in its definition of estate any funds remaining in an individual prepaid burial trust after the individual's burial expenses are paid. The policy allows any burial fund below \$6000 to use the estate money before the Medicaid claim is collected, by providing receipts. Idaho collects the residual amount of burial funds.

A Note about Ohio Burial Plans

In Ohio, Medicaid eligibility criteria places no upper limits for conversion of countable assets into the exempt asset of a prepaid burial account. Limits do exist in Kansas, North Dakota, Mississippi, Nevada and Oklahoma. Oklahoma allows \$6,000 prior to lump sum payment from liens. Limits are currently applied in statute for Kansas at \$5,000, North Dakota at \$3,000, Mississippi at \$3,000, and Nevada at \$1,500.

The tracking sheets completed by Ohio's county eligibility workers included an item about the frequency and size of prepaid burial accounts. For 327 cases tallied from those completed in August and September 1998, the average amount set aside was \$4,893.28, and the median was \$5,091.49. The range was between \$300 and \$17,096.24. Forty-five cases had accounts exceeding \$7,000.

Prepaid Burial Accounts found in Medicaid Approved Applications August and September 1998		
Amount of account	Frequency	Percentage
Under \$1000	13	3.98 %
\$1000 - \$1,999	25	7.6 5%
\$2,000- \$2,999	23	7.0 3%
\$3,000 - \$3,999	39	11.9 3%
\$4,000 - \$4,999	54	16.5 1%
\$5,000 - \$5,999	64	19.57 %
\$6,000 - \$6,999	64	19.57 %
\$7,000 - \$7,999	25	7.6 5%
\$8,000 - \$8,999	15	4.59%
\$9,000 - \$9,999	2	0.61 %
\$10,000 - \$10,999	2	0.6 1%
\$11,000+	1	0.3 1%
Total	327	100% (figures above are rounded)

Requirement for Executor to Provide Notice of Filing of the Estate to Estate Recovery Program

Other states require executors to notify the state at the time an estate is filed at county probate court. Such notice requirement is used in California, Florida, Idaho, Nevada, North Dakota, Pennsylvania, Rhode Island, Vermont, and Wisconsin. Florida requires the probate circuit judge to send a monthly report to the Health Care administrator. Wisconsin requires notice when an estate is probated or assets are transferred. The notice in some states is implemented by use of a standardized form.

California law at Probate Code, Section 215: Notice of Decedent's Death, states:

Where a deceased person has received or may have received health care ...(under medical assistance)...or was the surviving spouse of a person who received that health care, the estate attorney, or if there is no estate attorney, the beneficiary, the personal representative, or the person in possession of property of the decedent shall give the Director of Health Services notice of the decedent's death not later than 90 days after the date of death. The notice shall include a copy of the decedent's death certificate.

North Dakota Century Code at 50-24.1-07 (3) states:

Every personal representative, upon the granting of letters of administration or testamentary shall forward to the department of human services a copy of the petition or application commencing probate, heirship proceedings, or joint tenancy tax clearance proceedings in the respective district court, together with a list of the names of the legatees, devisees, surviving joint tenants, and heirs at law of the estate. Unless a properly filed claim of the department of human services is paid in full, the personal representative shall provide to the department a statement of assets and disbursements in the estate.

Elimination of the Statute of Limitations for Collection

North Dakota state law gives claims from the estate recovery program preferred status and these claims, by state law, are exempt from the statute of limitations. The need for clarification of Ohio law has arisen in the course of estate program operations. It is not certain whether the one-year-bar of ORC 2117.06 applies to claims for Medicaid estate recovery. ODOT v. Sullivan states that statutes of limitation do not apply to the state unless the statute expressly includes the state.²⁶ Furthermore, In re Moore provided that the one-year-bar did not apply to a claim for support by Mental Retardation, a situation analogous to Medicaid estate recovery (a need-based governmental program).²⁷ Finally, ORC 2117.25 states that the fiduciary shall pay claims under sections (D) (federal priority) and (G) (debts due the state) of which he has knowledge regardless of presentation. Two common pleas courts (Summit, Warren) have held that the state is not barred.

Recovery of Small Amounts Directly from Bank Accounts When No Estate Is Filed

In many cases in Ohio, the family will refuse to file anything with the court because the proceeds will all go to the estate recovery claim. Other states have resolved this issue through use of an affidavit by which the affiant swears that: (1) the bank account is the only asset; (2) there are no other debts against the estate; and (3) the family has confirmed that they will not open an estate. This practice allows for quick and efficient recovery from financial institutions.

South Dakota collects personal needs allowance (PNA) accounts from LTCFs and from banks. Wisconsin collects for estates under \$10,000 without real estate using an affidavit. Illinois statute has a provision at 755 ILCS 5/25-1 for payment or delivery of a small estate of the decedent upon affidavit.

²⁶ ODOT v. Sullivan, (1988), 38 Ohio St. 3d 137

²⁷ In re Moore. (Franklin County C. P. 1958) 154 N.E. 2d 675

In Ohio, Stark County Probate Court has already amended its form for summary administration to allow for situations when the sole asset is a bank account and, after court costs and attorney fee, the balance would be payable to the estate recovery claim. Such practice is not statewide.

Moving Medicaid Estate Recovery Up on the List of Claim Priority

The estate recovery claim is considered a debt and obligation of the estate. The remainder of the estate, after debt and obligations are paid, is distributed pursuant to the terms of the will. Section 2117.25 of the Revised Code sets the order in which payment of debts is to be paid from an estate, as follows:

Every executor or administrator shall proceed with diligence to pay the debts of the decedent, and shall apply the assets in the following order:

- (A) Costs and expenses of administration;
- (B) Except as provided in section 2117.251 [2117.25.1] of the Revised Code, an amount, not exceeding two thousand dollars, for funeral and burial expenses that are included in the bill of a funeral director, and funeral expenses other than those in the bill of a funeral director that are approved by the probate court;
- (C) The allowance for support made to the surviving spouse, minor children, or both under section 2106.13 of the Revised Code;
- (D) Debts entitled to a preference under the laws of the United States;
- (E) Expenses of the last sickness of the decedent;
- (F) Except as provided in section 2117.251 [2117.25.1] of the Revised Code, if the total bill of a funeral director for funeral and burial expenses exceeds two thousand dollars, then, in addition to the amount described in division (B) of this section, an amount, not exceeding one thousand dollars, for funeral and burial expenses that are included in the bill and that exceed two thousand dollars;
- (G) Personal property taxes and obligations for which the decedent was personally liable to the state or any of its subdivisions;
- (H) Debts for manual labor performed for the decedent within twelve months preceding the decedent's death, not exceeding three hundred dollars to any one person;
- (I) Except as provided in section 2117.251 [2117.25.1] of the Revised Code, other debts for which claims have been presented and finally allowed.

The part of the bill of a funeral director that exceeds the total of three thousand dollars as described in divisions (B) and (F) of this section, and the part of a claim included in division (H) of this section that exceeds three hundred dollars shall be included as a debt under division (I) or (J)* of this section, depending upon the time when the claim for the additional amount is presented.

Chapters 2113. to 2125. of the Revised Code, relating to the manner in which and the time within which claims shall be presented, shall apply to claims set forth in divisions (B), (F), and (H) of this section. Claims for an expense of administration or for the allowance for support need not be presented. The executor or administrator shall pay debts included in divisions (D) and (G) of this section, of which he has knowledge, regardless of presentation.

The giving of written notice to an executor or administrator of a motion or application to revive an action pending against the decedent at the date of death shall be equivalent to the presentation of a claim to the executor

or administrator for the purpose of determining the order of payment of any judgment rendered or decree entered in such an action.

No payments shall be made to creditors of one class until all those of the preceding class are fully paid or provided for. If the assets are insufficient to pay all the claims of one class, the creditors of that class shall be paid ratably.

If it appears at any time that the assets have been exhausted in paying prior or preferred charges, allowances, or claims, such payments shall be a bar to an action on any claim not entitled to such priority or preference.

Debts associated with the Medicaid estate recovery program are now included in the seventh obligation at paragraph (G) and should be paid before distribution of the will.

Other states have moved the Medicaid estate recovery claim status up on the list of obligations, and specifically stated the priority of Medicaid estate recovery claims in the priority statute. Kansas moved its claim status up to second behind reasonable funeral expenses. Utah moved claim status up to fifth as an expense of last illness. Other states' claim status include Illinois at sixth; New Jersey at fourth; Florida at third, (moved from seventh place) ; and Idaho at fifth. Pennsylvania's estate recovery claim is highest to the extent it represents payments within six months of death, else it falls sixth. South Dakota's falls first, after funeral expenses of under \$6000. Colorado is fourth, debts with preference under federal law. Minnesota's estate recovery claim counts as an expense of last illness.

Making Certain Transfers Recoverable

Using provisions from the Uniform Fraudulent Conveyance Act, other state statutes include the following language:

Florida: Fraudulent conveyance: Any person who transfers or encumbers his property for an inadequate consideration with the intent of defeating or hindering the claim of the department for reimbursement shall have made a fraudulent conveyance, and such transfer or encumbrance is void and of no effect as against the claim of the department if the department institutes a suit to set aside the conveyance within one year after the death of the debtor. A transfer or encumbrance for an inadequate consideration made within six months immediately preceding the death of the transferor is presumed to have been made with the intent of defeating or hindering the claim of the department. This section does not void any conveyance or encumbrance that is made upon and for good consideration and bona fide, as to any person or persons or bodies, politic or corporate.

Kansas: Transfers of real or personal property by recipients of medical assistance without adequate consideration are voidable and may be set aside.

Illinois (5/3-9): The transfer of money, personal property, or other personal assets, or any interest therein, by a present or former recipient into a joint tenancy account in a bank or other institution or depository shall be prima facie evidence of an intent to defeat the claim against his estate. The transfer may be voided in an appropriate legal action, or the Illinois Department may consider the recipient's interest in the joint tenancy account as an asset of his estate for the purpose of the claim provided by this Section.

Idaho (56-218): Transfers of real or personal property by recipients of such aid without adequate consideration are voidable and may be set aside by an action in the district court.

Pennsylvania: Any property which a personal representative could recover for the benefit of the estate under the Uniform Fraudulent Transfers Act is subject to the department's claim. For purposes of this section, the department will presume that any transfer of assets which a decedent made within one year of death for less than reasonably equivalent value is recoverable for the estate.

Pennsylvania: If property subject to the department's claim is transferred without the department's claim being satisfied, then the executor or administrator transferring such property, if applicable, and the person receiving such property shall become liable to pay the department's claim. Liability for debt shall be as follows:

- (1) If property subject to the department's claim is transferred without the department's claim being satisfied, then the executor or administrator transferring such property, if there is one, shall become liable to pay the department's claim.
- (2) If property subject to the department's claim is transferred to the extent that the transfer is made without valuable and adequate consideration in money or something worth money at the time of the transfer and without the department's claim being satisfied, then the executor or administrator transferring such property, if there is one, and the person receiving such property shall become liable to pay the department's claim.

Recovery efforts, as discussed in this chapter, depend on the state's ability to track assets before they are sold or transferred. Other states have found liens to be an effective tool in carrying out this task. Liens and their use for estate recovery are discussed in the following chapter.

Chapter 5: Use of Liens To Enhance Recovery Efforts

What are Liens? Does Federal or State Law Permit the Use of Liens?

States may choose whether to use liens to protect the state's interest in the property of Medicaid recipients. Ohio's statutes concerning Medicaid estate recovery at ORC Section 5111.111 permitted the Department of Human Services to place liens. House Bill 167 (effective on November 15, 1995) restricted placement of liens to non-waiver recipients.

The AARP study noted that "a great deal of confusion is evident even among persons who manage Medicaid estate recovery programs over the terminology of liens and estate claims."²⁸ Burwell and Crown observe that liens are one of the controversial issues that arose related to Medicaid estate recovery policy:

Liens are a legal instrument that helps to prevent the recipient or the recipient's family members from selling the home without first satisfying the state's creditor interest. Although technically, Medicaid recipients are subject to loss of their Medicaid eligibility if they transfer their home, it is relatively easy to transfer a home without incurring any penalty whatsoever. ...Although the application of Medicaid transfer of asset policies to the transfer of homes is meant to ensure that the home remains in a Medicaid recipient's estate until the person's death, the reality is that homes are often transferred out of the estate prior to death, and recovery is not possible. Liens help to prevent such transfers. ...Ideally, there would be alternative mechanisms that states could use to ensure that exempt assets are not transferred out of a recipient's estate, so that recovery of Medicaid

²⁸ Sabatino and Wood, p. 24.

incurred costs can occur at a later date. However, at present, liens are the only mechanism available.²⁹

May Liens be Placed While the Medicaid Consumer is Still Alive? Is There More Than One Type of Lien Allowable in Medicaid Estate Recovery?

Estate recovery programs may use either or both of the two types of liens to protect the interest of the state: pre-death (TEFRA) and post-death liens.

TEFRA Liens Are the Only Type of Lien Allowed to Be Placed Prior to Death of Recipient

Pre-death liens are those imposed upon the homes of living beneficiaries of any age who have been determined (after notice and an opportunity for a hearing) to be “permanently institutionalized” and not likely to return home. Medicaid liens against the homestead of such living institutionalized individuals are called TEFRA liens, since these liens must follow rules set out in the Tax Equity and Fiscal Responsibility Act of 1982.

TEFRA liens allow states to place liens on certain types of property and recover specific types of payments. States may use TEFRA liens as a mechanism/tool to recover medical assistance incorrectly paid or correctly paid on behalf of certain “permanently institutionalized” individuals. They may also be used to help track property when defined relatives no longer reside at an exempt residence and to track assets when recovery is pursued after the death of a spouse or child.

TEFRA Liens Are Only Applicable to the Permanently Institutionalized Individual

To recover for correct payments, states may place a TEFRA lien against the real property of an individual at any age before his or her death because of Medicaid claims paid or to be paid for that individual when: (1) he/she is an inpatient of a medical institution and must, as a condition of receiving services in the institution under the state Medicaid plan, apply his/her income to the cost of care; and (2) the Medicaid agency determines that the person cannot reasonably be expected to return home. This only describes the permanently institutionalized individuals, not the other mandated categories of estate recovery populations. However, persons age 55 and older who reside in medical institutions may be included in this category.

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Burwell and Crown, “Medicaid Eligibility Policy and Asset Transfers: Does Any of This Make Sense?”, p. 82.

Are There Any Restrictions That Prohibit Placement of TEFRA Liens?

States may not place a TEFRA lien on an individual's home if: (1) the spouse; (2) the individual's child who is under age 21 or blind or disabled; or (3) the individual's sibling (who has an equity interest in the home and who was residing in the individual's home for at least one year immediately before the date the individual was admitted to the medical institution) lawfully resides in the home.

When Must TEFRA Liens Be Dissolved /Terminated?

States must dissolve any lien imposed on an individual's real property if and when that individual is discharged from the medical institution and returns home.

What About Liens Placed After the Death of the Medicaid Consumer? Post-death Liens (Non-TEFRA, Estate Liens)

Post-death liens (also known as non-TEFRA liens, or estate liens) are often a part of the probate process. They must follow state law, although federal law dictates certain notice requirements. Federal law permits Ohio to file "post-death," or "estate recovery" liens against the real and personal property of persons who are permanently institutionalized as defined above, and those who received Medicaid services after age 55, whether or not they were received in an institution.

Liens may be used to track property after the death of the recipient, either against the estate, or on property held by surviving spouses or minor or disabled children. Liens are used in Alabama, California, Colorado, Connecticut, Delaware, Hawaii, Idaho, Illinois, Iowa, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, Nevada, New Jersey, New York, Oklahoma, Rhode Island, Utah, Wisconsin and Wyoming. Wisconsin puts liens on the home, mobile home, or home placed in a revocable trust. The lien's value is open-ended. Hawaii places a lien as a condition of receipt of any assistance. Rhode Island limits liens to recovery of Medicaid claims for those age 55 and older. New Hampshire is in litigation about surviving spouses and liens.

Are There Limitations on Recovery Using Pre-death TEFRA and Post-death Non-TEFRA Liens?

If a lien of either type is placed on an individual's home, adjustment or recovery can only be made when: (1) there is no sibling of the individual residing in the home who has resided there for at least one year immediately before the date of the individual's admission to the institution and who has resided there on a continuous basis since that time; and (2) there is no son or daughter of the individual residing in the home, who has resided there for at least two years immediately before the date of the individual's admission to the institution, who has resided there on a continuous basis since that time, and who can establish to the agency's satisfaction that he/she has been providing care which permitted the individual to reside at home rather than in an institution.

Are There Restrictions on Placement of Non-TEFRA or Post-death Liens After Recipient's Death?

The State's authority to place a lien after the individual's death is not restricted by the federal TEFRA lien provisions.

Observations about Ohio Policy on Homestead Property and the Use of Liens

Most states mirror SSI policy and allow persons to receive Medicaid services and retain their homestead property as long as the person expresses an intention to return to the home. In comparison with most other states, Ohio has an unusual policy on homestead property, due to its "209(b)" eligibility status. After a temporary absence exceeds six months, a person can no longer retain an exemption on homestead property as a countable resource for eligibility purposes, unless the recipient has any qualified relatives living in the home that would maintain its exempt status. From the point of admission to a long term care facility (LTCF) or enrollment on a home and community-based services (HCBS) waiver if the person isn't residing in the home, the individual has six months to place the homestead property on the market. This policy forces the sale or initiation of sale activity on property held by non-married recipients without other qualified relatives residing in the home. Additionally, Ohio Medicaid requires that property be sold when an offer is made for 90 percent of market value, yet SSI regulations require sale at only two-thirds of market value. More details about these policies are outlined in chapter 7.

At least two other states that have a "209(b)" status similarly require sale of homestead property after a period of institutionalization. New Jersey and Virginia also follow this policy. Virginia's report to its legislature on estate recovery efforts yielded the following discussion:

Because of this policy, the Department of Medical Assistance Services (DMAS) officials maintain that the potential for recovery at the time of the recipient's death is greatly reduced in comparison to other states. Most states exempt the home as a countable resource indefinitely, thus at the time of the recipient's death, the home is likely to remain as a potential recoverable asset. DMAS officials claim that in Virginia, a recipient's home is likely to have already been sold and the profit applied to the recipient's care.

This does not appear to be supported by data on the number of people to whom the six-month exemption applied. Joint Legislative Audit and Review Commission (JLARC) staff analysis of 510 cases indicates that 22 percent of all persons who applied for Medicaid nursing home benefits in 1991 either owned a home or had life interest in the property. However, in 34 percent of these cases, DMAS' policy requiring a sale of the property after six months could not be applied because the applicant had a spouse. The total projected value of the property for these individuals was \$21 million.³⁰

(In six percent of these cases property was not counted due to a life interest in the property. Fifty-nine percent had the six-month exemption applied.)

The report goes on to list reasons that property may still remain in recipients' possession after the six months:

Of all recipients terminated from care in 1990, 16 percent remained in possession of their homes...However, it appears that for many recipients the home has not been sold at the time they are terminated from the program. This happens for a number of reasons.

First, many of the recipients in our sample had been in a nursing home for less than six months. Forty-one percent of the people in the JLARC sample who owned property were in this category.

The remaining 59 percent, however, were terminated after having received over six months of nursing home care. In these cases, it is possible that DMAS had initiated action to force the sale of the home, but the recipient had not been able to complete the transfer before being terminated from the nursing home. According to DMAS policy, as long as the recipient is making a bona fide effort to sell, Medicaid assistance will continue. However, more than one-quarter of the recipients in the JLARC sample who owned property had been in a nursing home for more than eighteen months. For these cases, it is not clear why DMAS had not forced the sale of the home.

³⁰ Commonwealth of Virginia, Medicaid Asset Transfers and Estate Recovery, Report of the Joint Legislative Audit and Review Commission, Senate Document No. 10, Richmond, Virginia, (1993), pp. 47-48.

A second reason relates to the identification of property. Because local social service offices are not required to verify property ownership, it is possible that the office was unaware of the existence of some of this property. When this occurs, under current policy, it is impossible for the eligibility worker to initiate action to require the home to be sold. These properties will inevitably revert to the recipient's heirs at the time of death.

A final reason that property may have existed at the time the recipient was terminated was if there was a spouse or dependent child living in the home. A home will remain exempt as long as a spouse or child resides in it.

The study commissioned by the state of New Jersey, which has policies similar to Ohio and Virginia, recommends:

Instead of compelling premature liquidation of family homes, the state of New Jersey should implement a TEFRA lien program.³¹

Ohio's unusual homestead property policy has at least three implications for operation of an effective estate recovery program:

- 1) For purposes of evaluation of the state's recovery efforts, in order to be more truly comparable to other states, Ohio would need to factor in the amount recovered in "lump sums" during a person's life, a practice in which the recipient applies the proceeds from sale of real property to the cost of Medicaid-covered care already incurred.
- 2) The claim amount to be recovered after death would need to be credited with any lump sum payments made during the recipient's lifetime to maintain eligibility, such as by contributing the proceeds of a homestead property sale.
- 2) Some have concluded that Ohio's policy forcing the sale of homestead property makes the use of liens pointless. Yet TEFRA liens would still serve a purpose in Ohio by tracking all the property that may be held by the recipient at the time of application and is transferred to others instead of sold and used to pay for the recipient's Medicaid services.

In actual practice, liens have yet to be imposed in Ohio on any recipient's property in conjunction with the Medicaid Estate Recovery Program, but proceeds from real property have nevertheless been recovered once they have been identified as part of the probatable estate. Payment arrangements have been made in some cases to allow the heir to keep the real property while meeting the estate recovery obligations through use of mortgages, a kind of "voluntary

³¹ Stephen A. Moses, The Jersey Share: How to Pay for Long-Term Care with Less Federal Money .A Case Study in New Jersey, Seattle, Washington: LTC, Incorporated, (March 31, 1997), p. 51.

lien.” However, Ohio’s recovery of assets held in real property is limited by Ohio’s definition of estate which precludes recovery of property held jointly.

What Homestead Property Has Been Available for Recovery in Ohio?

The AGO currently does not track recovered assets by their category; therefore the frequency of homestead property being available for recovery is unknown. Staff of the AGO Revenue Recovery Unit have suggested that it is possible to infer that any amount collected for over \$5,000 was due to the sale of real property. Using the records of claims recovered in the month of August, 1998, a review indicates that out of 283 claims paid, sixteen (slightly over 5%) were for amounts over \$5,000. Of the sixteen claims, the highest amount recovered was for \$42,370, and the average amount was for \$13,514. The subset of collected claims of at least \$5,000 recovered a total of \$216,229.26 for the month. This represents almost one-third of the total amount recovered in August 1998 (\$663,795.17).

Can Liens Be Applied to Persons Enrolled on Home Care Waivers?

Application of liens to HCBS enrollees for estate recovery purposes is a serious issue for review. PASSPORT waiver enrollees seem to continue to be instructed in some areas of the state that liens may be imposed, yet the current Ohio law as amended specifically exempts waiver enrollees from liens. Currently, ORC Section 5111.111 allows the department to place a lien against the property of a medical assistance recipient or recipient’s spouse, other than a recipient or spouse of a recipient of home and community-based services, that the department may recover as part of the estate recovery program instituted under section 51111.11.

Interestingly, the TEFRA type of lien appears to exempt waiver enrollees by federal definition. Since TEFRA liens may only be imposed on individuals determined to be permanently institutionalized, and must be released upon the individual’s return home, the federal stipulations governing a TEFRA lien limit its application to those actually receiving services in an institution. Even though waiver enrollees are eligible for Medicaid because they receive HCBS services “in lieu of institutionalization” and they are required to need services defined at either a nursing facility or ICF-MR level of care, the federal legislation seems by its silence to exclude these Medicaid participants from being subject to a TEFRA lien. (One state does define its permanently institutionalized individuals as those who die while receiving Medicaid institutional or HCBS services. Yet a definition that precludes categorization before death occurs also would preclude the use of TEFRA liens while the Medicaid recipient was alive.)

The current ORC provision exempts or restricts use of a specific recovery method (liens) for some Medicaid recipients (enrolled on an HCBS waiver) while not exempting that method for

other Medicaid recipients (residents of facilities), based only on who receives which type of long term care service. There are defensible reasons to delay liens on the residences of HCBS enrollees while they continue to reside at their own home and are receiving waiver services. TEFRA liens are restricted in this way. Note that TEFRA liens must be removed if a “permanently institutionalized individual” is by chance discharged and returns home.

However, it is difficult to fathom a reason to continue such an exemption from liens-- for HCBS enrollees only-- after the recipient’s death, that does not arbitrarily discriminate against users of institutional services. Additionally, it can be difficult to categorize recipients when people frequently are users of multiple services, as many waiver enrollees also have short intermittent institutional respite stays, or subsequent permanent stays in institutions.

Litigation Notes

California received a court decision on a class action suit filed by surviving spouses on whose property a lien had been imposed, as due and payable upon the surviving spouse’s death or upon the sale, transfer or exchange of real property. In March of 1994, the California Department of Health was the recipient of this lawsuit (Demille v. Belshe) which challenged the right of the state to impose spousal liens, and to impose such liens prior to giving notice and the right to a pre-lien hearing (due process). In September of 1994, the United States District Court Northern District of California ruled that the imposition of spousal liens was permissible under federal law, but found that the department was in violation of constitutional requirements for due process. In addition the court ruled that the department could not enforce its liens during the lifetime of the surviving spouse.

The possible consequences that can follow the imposition of liens were cited in the decision’s discussion of the importance of providing due process. The attachment of a lien to property in and of itself can have significant consequences for the property owner. For example it may adversely affect the owner’s credit rating, can place an existing mortgage into technical default where there is an insecurity clause, clouds title, impairs ability to sell or otherwise alienate the property, and reduces the chance of obtaining a home equity loan or additional mortgage.

The suit also noted that the lien is intended to protect both the lienholder and future purchasers of the lien property. The issue of “hidden” claims has surfaced in states concerned that the state may be making a claim that is not apparent to potential buyers or to court recorders, etc.

What About Liens When There Is Joint Tenancy?

The AARP study notes that state laws generally provide that when real property is held by joint tenants with a right of survivorship, the surviving co-tenant takes clear title. The debts of the deceased tenant are not enforceable against the property. This principle is important in tracing the chain of title. Estate recovery against jointly owned property could mean that the property is saddled with the Medicaid debt of the deceased recipient, but it would not be revealed in a title search, *especially if the state had not filed a lien*. Similarly, hidden claims could adversely affect the chain of title in life estates and trusts. Title companies and the probate bar are also concerned about a lack of limitation periods on Medicaid claims, and problems with the state seeking to use liens to collect from the surviving spouse if the spouse seeks to sell the home.

Are Liens a Useful Tool in Tracking Assets?

When necessary to track and recover assets from real property, liens are a quite useful tool in tracking the assets of the recipient's estate and avoiding the issue of hidden claims. The carefulness which a state should carry out its efforts, in order to guarantee due process and to maintain the appropriate record trail to avoid clouding a title, is not a sufficient reason to abandon use of liens in the recovery program.

Widespread Misinformation is a Problem

Widespread misinformation seems to be a problem concerning Ohio's estate recovery program and the imposition of liens. Certainly much confusion and hysteria surfaced when Ohio's Medicaid Estate Recovery program began, presumably because the processes and restrictions on the use of liens are so complex. The state statute is silent about the federal restrictions, the differences between pre-death and post-death liens, and procedures that guarantee due process, such as pre-attachment notices or pre-attachment opportunities for hearing. Other states have incorporated more of the federal restrictions and procedural safeguards into their state statutes about use of liens, instead of merely referring to federal law.

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