

The Medicaid Planning Guidebook

The **first 18 pages** of this PDF contain the Table of Contents for The Medicaid Planning Guidebook (the most comprehensive manual available on this important subject matter). If you are giving financial planning, life insurance or annuity, or estate planning advice to clients who are 60 and older, you **MUST learn** and know this subject matter.

NOT knowing this subject matter can have two very negative consequences:

1) Many clients will receive bad or certainly incomplete advice which can **cost them and/or their heirs tens if not hundreds of thousands of dollars**.

2) If you are the advisor who unknowingly gives advice that puts a client's assets at risk to Medicaid spenddown or recovery, **you can be held liable**.

The Medicaid Planning Guidebook is extremely comprehensive. Reading it and learning the material covered will arm you with the knowledge you need in order to give your clients the appropriate advice.

To order your copy of The Medicaid Planning Guidebook, please e-mail info@medicaidplanning.org.

Becoming a Certified Medicaid Planner™

If you want to take your consulting to the next level, you should consider sitting for the Certified Medicaid Planner™ examination.

Why should you become a Certified Medicaid Planner™?

-Doing so will force you to learn this very important subject matter and will signify that understand Medicaid planning and are capable of giving appropriate advice to your clients.

-Doing so will help you put your current clients, future clients, and local referral sources on notice that you have gone the extra step not only to learn this subject matter but also to become "certified" in this vitally important subject matter.

The fact of the matter is that 99% of the attorneys, CPAs/EAs/accountants, financial planners, and insurance advisors **DO NOT know** this subject matter (a subject matter that can be **used to help the literally millions of people** who turn 65 every year).

Selfishly, advisors should learn this subject matter because you know that there are many clients waiting for help from someone in their local area (an area where there are few, if any, other advisors who know this subject matter well).

To learn more about becoming a **Certified Medicaid Planner™**, go to: <http://www.cmpboard.org>.

The Medicaid Planning Guidebook

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Clients: Robert is 78, and Dorothy is 76. Robert recently suffered a stroke.

Assets/Income: \$100,000 securities; \$600,000 home (no debt); Robert has SSI of \$1,500 and a pension of \$2,000 a month; Dorothy has monthly income of \$700.

2. Example.....	441
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Client: Ruth, age 87 who is suffering from the degenerative effects of Alzheimer’s disease. She has four children and several older grandchildren. Ruth’s behavior became so erratic that 24-hour care became essential.

Asset/Income: SSI of \$1,450 per month and a \$225 per month from a pension; three CDs with surrender values of \$25,602, \$74,325 and \$69,421; a deferred annuity with a net surrender value of \$100,300; a checking account with \$31,175; one vehicle with a blue-book value of \$5,400; debt free home with a value of \$101,300.

3. Example..... 446

Client: Geraldine is 77 and suffers from severe arthritis that is degenerative in nature and will likely be fully debilitated within the next four to six years. Her mother suffered from Alzheimer's before her death. She has two older sisters who are both exhibiting signs of the dementia and one is already in a nursing home.

Asset/Income: A \$600,000 home with no debt that includes a small working farm that both of her sons use to make their living; a deferred annuity worth \$72,600; a brokerage account with conservative bond investments totaling \$123,765; six CDs valued respectively at \$52,703, \$49,457, \$72,153, \$42,259, \$51,108, and \$27,075; a checking account with a \$22,700 value; SSI of \$1,370 per month plus \$515 from the interest/dividends of her securities; an older model sedan worth approximately \$3,150.

4. Example..... 451

Client: Thomas is 81 and has been in and out of the hospital over the past two months with bouts of dementia. Thomas and his brother Paul inherited Thomas's home as joint owners when their mother passed away 20 years ago. Thomas has been living with the mother and then just continued to live in the home after she died. Paul decided to move in with Thomas and has been living there for ten months. Thomas has no children.

Asset/Income: The home is valued at \$300,000, and both brothers have a one-half of interest with all rights transferring to the survivor at death; Thomas has his funeral prepaid; he has \$6,575 in checking and \$5,043 in savings. He has three CDs each worth \$75,000; Thomas retitled his car to daughter Sarah two years ago (\$7,500 value) and he gave his other daughter Melissa a check for \$7,500 at the same time he gave the car to Sarah. He has 30 savings bonds worth about \$1,000 each.

5. Example..... 455

Client: Edward and Martha (married). Ed is starting to show signs of memory lapse that is believed to be the early onset of Alzheimer's. Neither has purchased LCTI and Ed would no longer qualify; Martha does qualify, but the premiums are over \$6,000 a year far beyond what her budget can afford. They have two daughters who they would like to see inherit their estate.

Asset/Income: Together they own a home value at \$150,000 (no debt) and a combined total of \$90,000 in certificates of deposit and \$18,000 in checking; Edward receives a monthly SSI check of \$1,657 and a monthly pension of \$1,035. Martha receives a monthly SSI check of \$725.

6. Example..... 458

Client: Dolores is in the hospital for a week and the doctor in charge of supervising her believes she is ready for discharge to a nursing home as soon as a bed becomes available. She has two daughters, Darla and Darcy. Darla, the oldest, is named as an agent under Dolores's power of attorney. Darcy is permanently blind, and lives in a group home, and is surviving on SSI and Medicaid.

Asset/Income: Dolores has a home valued at \$600,000 (no debt); \$173,000 in checking, savings, and certificates; no vehicle; monthly SSI of \$1,375 and a survivor pension of \$881.

7. Example..... 464

Client: Ray and Sophie (ages 82 and 79, respectively) have been married for over 50 years. Ray's health has deteriorated to the point where he no longer recognizes Sophie. He has been in a hospital for several weeks and was discharged to a nearby nursing home for rehabilitative care; but as he has seen no improvement in his full month at the nursing home, it is likely that he will be staying indefinitely. They jointly own most assets. They have two children who are both actively helping Sophie deal with the fallout from Ray's health crisis.

Asset/Income: Two sedans worth \$8,975 and \$5,034; a modest ranch-style home worth \$295,000 (no debt); a stock portfolio worth \$127,550; a deferred annuity worth \$72,250 (with a cost basis of \$35,000); and three CDs worth \$39,055, \$62,121, and \$51,308 respectively; Ray has an IRA solely in his name worth \$37,716; he also has SSI of \$1,396 a month and a monthly pension payment of \$903. Sophie SSI income of \$895 a month and a small monthly pension of \$103.

8. Example..... 469

Client: Isaac and Agnes find themselves dealing with Agnes's declining health. Isaac is having memory lapses. Agnes, however, has started wandering off; and her dementia has gotten so bad that she is now in the nursing home after a weeklong hospital stay. Isaac never prepared for dealing with a long-term care stay beyond getting an estate plan in place. Isaac and Angie had gone to a lawyer to get a trust; but the lawyer told them that, with their limited amount of assets and the use of beneficiary designations, a will would be sufficient. However, Isaac insisted on getting a trust after attending a local estate planning workshop.

Asset/Income: Home valued at \$105,000 (no debt) which was deeded to their inter-vivos trust at the time they completed their estate plan; a checking account of \$7,221; a \$62,703 CD; a family sedan valued at \$12,000; Isaac and Agnes receive monthly SSI payments of \$1,105 and \$767 respectively.

9. Example..... 472

Client: George and Mary do not have much, but they are proud to have paid off their home before retirement. George is suffering from Alzheimer's and has spells that have gotten out of control, necessitating 24-hour care. Mary is worried about keeping what she has to live on, how much the nursing home will cost her, and if they can leave their home to their two children. Their two daughters live out of town but have flown home to help Mary get things in order.

Asset/Income: A small \$3,271 savings account; an annuity in Mary's name with a \$20,768 CSV; a sedan worth \$6,595; George's monthly SSI is \$986 and he receives a \$197 monthly pension payment; Mary receives a monthly SSI payment of \$895.

B. State-by-State Overview

Despite or perhaps because of the relative simplicity of the federal statute on estate recovery, states have gone off in numerous directions in an attempt to implement estate-recovery programs. The material below is an attempt to provide a brief overview of each state's programs and point out nuances that make the state's program unique or troublesome. This is not meant to be a definitive treatise on the subject but merely provide the reader with a starting point for their own research and understanding of the programs as they exist at the time this manual is being published. Because this area of law is highly organic, statutory and rule changes, as well as new judicial interpretations, mean that there is still a long road of evolution ahead for this topic of law. The following state-by-state summaries provide the highlights of estate-recovery laws as well as citations to source law governing each state program. For any state in which the planner provides services, it should serve as a primer for his/her own analysis.

1. Alabama (AL)

Governing Law: Alabama relies upon the federal statute for authority to conduct its estate-recovery program. The Alabama Medicaid Agency conducts its estate recovery pursuant to amendments made to its State Medicaid Plan.²⁹⁹

Estate Scope: Alabama's estate recovery is limited to the assets in a patient's probate estate. However, the estate-recovery office also pursues recovery from the mandatory payback provisions contained in (d)(4)(A) special needs trust and (d)(4)(C) pooled trusts.³⁰⁰

Spousal Recovery: Recovery in Alabama is solely limited to the patient's probate assets and the state does not pursue recovery if there is an exempt heir, nor does the state pursue recovery from any exempt heir's subsequent estate.³⁰¹

Liens: Alabama uses TEFRA liens to secure estate-recovery claims against the real property of the patient but not if any exempt person under federal law (e.g., spouse, minor child, etc.) is residing in the property.³⁰²

Partnership Program: Alabama instituted a partnership program called the "Qualified State Long-Term Care Insurance Partnership." The partnership program was also incorporated by amendment in the State Medicaid Plan.³⁰³

Hardship Waiver: Alabama provides a hardship waiver consistent with the federal statute and HHS guidelines. To procure a waiver, any affected heir or devisee must

²⁹⁹ Alabama State Medicaid Plan, on file with the Alabama Office of Government Affairs, (334) 242-5010.

³⁰⁰ Ibid.

³⁰¹ Ibid.

³⁰² Ibid.

³⁰³ Ibid.

apply with the Alabama State Medicaid Agency's Office of Estate Recovery at P.O. Box 5624, Montgomery, AL 36103-5624, (334) 242-5311.

2. Alaska (AK)

Governing Law: Alaska's estate recovery law can be found in A.S. §47.07.055.

Estate Scope: Alaska does not officially adopt an expanded estate definition.

Liens: Alaska uses TEFRA liens with the verbatim federal exclusions.

Recovery Scope: The probate estate of an individual who received medical-assistance payments is subject to a claim for recovery after the individual's death³⁰⁴ Other than recovery on the sale of a home, a claim can be made only after the death of the individual surviving spouse, if any, and only at a time when the individual has no surviving child under age 21 and no surviving child who is blind or totally and permanently disabled.³⁰⁵ Estate recovery claims are treated as "debts with preference under the laws of the state."³⁰⁶ Alaska probate code gives such debts priority in the fifth order of preference, behind administration, funeral, taxes, child support payments, and expenses of the last illness.³⁰⁷ Alaska's recovery statute is relatively benign. Where no spouse is present, any of the strategies detailed in Section 11 should suffice to minimize the effect of a lien and any recovery against the estate. When a Community Spouse is present, merely shifting the home to the Community Spouse will keep it unavailable for lien attachment and out of the patient's inevitable estate, if any. Joint ownership would seem to preclude this as well, unless the Community Spouse predeceases the patient. A lien cannot be filed while the Community Spouse lives in the property; and recovery cannot be made until after a Community Spouse dies and then only from the estate of the patient.

3. Arizona (AZ)

Governing Law: Arizona authorizes an estate-recovery program and the use of liens to assist with recovery in A.R.S. §36-2935. The program is more fully articulated by administrative regulations contained in A.A.C. R9-28-901 through A.A.C. R9-28-912. The statute authorizes Arizona's Health Care Cost Containment System (AHCCCS) to pursue first-party estate recovery.³⁰⁸

Estate Scope: The estate-recovery rules direct readers to the trust and estate code for a formal definition of the term "estate."³⁰⁹ The term "estate," therefore, includes the property of the decedent or the corpus of any trust subject to estate

³⁰⁴ A.S. §47.07.055(a).

³⁰⁵ A.S. §47.07.055(f).

³⁰⁶ A.S. §47.07.055(g).

³⁰⁷ A.S. §13.16.470(a).

³⁰⁸ A.A.C. R9-28-906 and A.A.C. R9-22-1006(9).

³⁰⁹ A.A.C. R9-28-901.

administration.³¹⁰ If the decedent is married, the estate includes only the separate property of the decedent, as well as the decedent's share of community property.³¹¹

Arizona provides a considerable exemption from recovery for certain income, resources, and property of Native Americans and Alaska Natives. This exemption includes: income and resources from tribal land and other resources currently held in trust and judgment from the Indian Claims Commission or U.S. Claims Court; ownership interest in trust or non-trust property; ownership interests left as remainder interests in an estate in rents, leases, royalties, or usage rights related to natural resources; ownership interests in rights in a property that has unique religious, spiritual, tradition, or cultural significance or rights that support subsistence or a traditional life style according to applicable Tribal law or custom; and/or income left as a remainder in an estate derived from property collected by a Native American, or by a Tribe or Tribal organization and distributed to a Native American.³¹²

Spousal Recovery: Recovery is limited to the estate or property of a recipient who was 55 or older at the time benefits were received.³¹³ Recovery from the recipient's estate is allowed only after the death of the recipient's surviving spouse and only at a time when there exists either a surviving child under age 21 or a surviving child who is considered blind or disabled per the SSI criteria.³¹⁴

Liens: Arizona's estate recovery statute directs the recovery of property by lien to be carried out "as nearly as possible" by the lien procedures contained in §§36-2915 and 36-2916 of the Arizona Revised Statutes, which respectively cover the imposition (i.e. perfection, recording, assignment, and notice) of a lien for third-party recovery and lien enforcement.³¹⁵ Any lien imposed for estate-recovery purposes must also be done in a manner consistent with federal law.³¹⁶ Liens are perfected by being recorded with the county recorder in the county where the patient's property is located.³¹⁷

Undue Hardship: A representative of the patient's estate can request exemption from recovery by submitting an undue hardship exemption request.³¹⁸ The request must be submitted in writing within 30 days of receipt of notice of a claim from AHCCCS.³¹⁹ The request must describe the factual basis for a claim that the property should be exempt from estate recovery.³²⁰ AHCCCS has 30 days from receipt of such a request to respond, but the parties can mutually stipulate to an extension of that time.³²¹ Arizona

³¹⁰ A.R.S. §14-1201.

³¹¹ Ibid.

³¹² A.A.C. R9-28-911(E).

³¹³ A.A.C. R9-28-910.

³¹⁴ A.A.C. R9-28-911(A).

³¹⁵ A.R.S. §36-2935(C).

³¹⁶ A.R.S. §36-2935(D).

³¹⁷ A.A.S. §36-2915(B).

³¹⁸ A.A.C. R9-28-911(B).

³¹⁹ Ibid.

³²⁰ Ibid.

³²¹ Ibid.

provides several presumptive conditions precedent which are the automatic basis for waiver of an estate-recovery claim for undue hardship.³²²

The first automatic waiver is granted if the estate only consists of real property that is listed as residential property by the Arizona Department of revenue or County Assessor's Office, and the heir or devisee of the property owns a business located at the residential property, the business was in operation at the property for at least 12 months prior to the death of the patient, the business provides more than half of the heir's or devisee's livelihood, and recovery would result in the heir or devisee losing his or her means of livelihood.³²³

The second automatic waiver is granted if the estate only consists of real property that is listed as residential property by the Arizona Department of Revenue or County Assessor's Office, the heir or devisee currently resides in the residence, resided there at the time of the patient's death, made the residence his or her home for the 12 months immediately preceding the patient's death, and owns no other residence.³²⁴

The third automatic waiver is granted if the estate consists entirely of personal property, the heir's or devisee's gross annual income for the household size is less than 100% of the Federal Poverty Level (including new sources of income), and the heir or devisee does not own a home, land, or other real property.³²⁵

When the estate of the patient is comprised of both personal property and real property that qualify under the automatic hardship exemption listed above, AHCCCS is prohibited from granting an undue hardship waiver and is instead directed to adjust its claim to the value of estate's personal property.³²⁶ When the heirs or devisees do not meet the requirements for an automatic undue hardship exemption, AHCCCS is required to use the flowing factors to determine whether to seek a partial recovery of funds from the estate:

- i. Financial and medical hardship to the heir or devisee;³²⁷
- ii. Income of the heir or devisee and whether the heir or devisee's household gross annual income is less than 100% of the Federal Poverty Limit;³²⁸
- iii. Resources of the heir or devisee;³²⁹
- iv. Value and type of assets;³³⁰

³²² A.A.C. R9-28-911(C).

³²³ A.A.C. R9-28-911(C)(1)(a).

³²⁴ A.A.C. R9-28-911(C)(1)(b).

³²⁵ A.A.C. R9-28-911(C)(2).

³²⁶ A.A.C. R9-28-911(D).

³²⁷ A.A.C. R9-28-912(1).

³²⁸ A.A.C. R9-28-912(2).

³²⁹ A.A.C. R9-28-912(3).

- v. The amount of AHCCCS'S claim against the estate;³³¹
- vi. Whether other creditors have filed claims against the estate or have foreclosed on the property subject to recovery.³³²

4. Arkansas (AR)

Governing Law: Arkansas codified its estate-recovery law at A.C.A. §20-76-436.

Estate Scope: Arkansas has adopted an enhanced estate definition.³³³ However, beyond the traditional probate estate, the estate recovery is only enhanced to the extent of any interest acquired from any named beneficiary of property received by beneficiary deed.³³⁴ Arkansas law specifically authorizes the use of a beneficiary deed (also known as a “Ladybird Deed”) which avoids probate but the state can still attach a recovery claim to the property even though it bypasses probate.³³⁵ Although enhanced, the limit of the enhancement to beneficial interests in property conveyed specifically by beneficiary deed creates a bright-line cordon around the use of such deeds in an attempt to bypass probate. However, because the enhancement was so specific, the use of other non-probate property transfers or protection strategies would not give rise to recovery. Beyond the beneficiary-deed exclusion, the statute encourages starving the probate estate.

Hardship Waiver: Arkansas law spells out specific occurrences where hardship is presumed.³³⁶ If an asset is the sole income-producing asset of the heir or beneficiary (i.e., family farm or family business); if without receiving the asset, the heir or beneficiary would become eligible for need-based federal or state benefits; if the receipt of the inheritance would lead the heir or beneficiary to become ineligible for benefits; and if the asset is a home with a value of 50% or less of the average prices of homes in the county where the home is located.

Spousal Recovery: There is no express or implied provision for recovery against a spouse. Notably, however, no reference is made whatsoever in the statute to the effect a spouse has on recovery efforts. The statute does have a disclaimer which says that, if there is a conflict with the federal rules, the federal rules govern.³³⁷

Partnership Program: A.C.A. §20-77-1801 to §20-77-1805 provide only for “resource disregard of one dollar (\$1.00) for every dollar of long-term care insurance

³³⁰ A.A.C. R9-28-912(4).

³³¹ A.A.C. R9-28-912(5).

³³² A.A.C. R9-28-912(6).

³³³ A.C.A. §20-76-436(a)(2)(A).

³³⁴ Ibid.

³³⁵ A.C.A. §18-12-608.

³³⁶ A.C.A. §20-76-436(a).

³³⁷ A.C.A. §20-76-436(c).

benefits paid...³³⁸ The Arkansas Long-Term Care Partnership Act makes no reference whatsoever to exclusion of assets from recovery, (likely because the recovery statute is so Milquetoast to begin with).

Liens: Arkansas makes no provision for the use of TEFRA liens to secure recovery debt.

5. California (CA)

Governing Law: Estate-recovery statute: West's Ann. Cal. Welf. Inst. Code §14009.5; Estate Recovery Administrative Code: 22 CCR §50960 to §50966.

Estate Scope: California has adopted the full enhanced definition of the recoverable estate.³³⁹ The equity interest that the patient had which is recoverable against by the state is defined by regulation as the fair-market value of the property to which the deceased patient held legal title or interest at the time of the patient's death only to the extent of such an interest, an interest less any amount previously owned and encumbered against the asset.³⁴⁰ Any claim against the estate can be exempted during the lifetime of the surviving spouse.³⁴¹ California's third district court of appeals keyed in on the fact that the expanded estate definition included anyone who came into ownership of property or assets by "survival" which is distinctively more broad than mere survivorship.³⁴²

Divestments: Similarly to the irrevocable portions of life estate is discussed above, California expressly exempts any recovery against any property interests before death.³⁴³

Annuities: California has not yet adopted the DRA annuity requirements (i.e., level payments, state as beneficiary) but does consider annuities as part of a decedent's estate.³⁴⁴

Liens: California does not use lifetime liens to secure estate-recovery claims, making it easier to deal with assets during the patient's lifetime and easier to avoid recovery by divesting the property shortly before a patient's death. Strangely enough, California does have something it calls a "voluntary post-death lien" for the purpose of tracking debt on assets that are not recoverable or easily liquidatable.³⁴⁵ The lien is used to secure the debt against property when one or more of the decedent's dependents are living in it and not willing to sell the property, are unable to pay the claim in full from other assets, and can demonstrate they are unable to retain financing

³³⁸ A.C.A. §20-77-1803(b)(4).

³³⁹ 22 C.C.R. §50960.12.

³⁴⁰ 22 C.C.R. §50960.9.

³⁴¹ 22 C.C.R. §50961(d)(2).

³⁴² *Bonita v. Burke*, 98 Cal.App.4th 788 (2002).

³⁴³ 22 C.C.R. §50961(j).

³⁴⁴ 22 C.C.R. §50961(h).

³⁴⁵ 22 C.C.R. §50965.

to pay off the debt.³⁴⁶ If a person qualifies to delay recovery and a lien is used to secure the debt, the person must make payments on the debt to the extent they are financially able.³⁴⁷

Executor Responsibility: Within 90 days of the death of a recipient of Medi-Cal benefits or his or her surviving spouse—since claims can be made against either’s estate—the attorney for the estate, beneficiary of (expanded) estate assets, personal representative of the estate or a person in possession of property claimable under estate-recovery law must give written notice of death, including a copy of the death certificate, to the Director of the Department of Health Care Services of the Estate Recovery Section.³⁴⁸ The Department then will provide whoever is handling the estate with a statement of the total debt owed to the state along with an Application of Hardship Waiver.³⁴⁹

The person handling the estate must notify the interested persons that they have 60 days to contest the claim or seek hardship waiver or exemption. A contested debt claimed by the state can be contested like any other improper debt of the estate. Hardship waivers are sought by filing the Hardship Application (see Hardship Waiver below). Exemption can force the state to withdraw its claim by providing documented proof of blindness or disability along with documented proof that the person seeking exemption is a child of the decedent.³⁵⁰ If such documentation does not exist, the person seeking exemption can request a disability determination by phone or in writing.³⁵¹ Any disability determination not made in the surviving child’s favor is final and unappealable through an administrative hearing but would presumably give rise to a cause of action against the state if the determination was improper.³⁵²

Spousal Recovery: A claim for recovery cannot be made when there is a surviving spouse or child under 21 or blind or disabled.³⁵³ The statute expressly allows for a claim against the surviving spouse’s estate to collect against assets received from the deceased patient.³⁵⁴

Life Estates: California regulations are explicit about the claims to be made against life estates. While life estates are included in the expanded estate’s scope, California goes further to delineate which life estates are to be included. Where the decedent made an irrevocable transfer of the remainder interest in the property and retained a life estate, no recovery can be claimed against either the life estate or the remainder interest.³⁵⁵ If the decedent made a revocable transfer of the remainder

³⁴⁶ 22 C.C.R. §50965(a).

³⁴⁷ 22 C.C.R. §50965(d).

³⁴⁸ 22 C.C.R. §50962(a).

³⁴⁹ 22 C.C.R. §50962(c).

³⁵⁰ 22 C.C.R. §50964(a).

³⁵¹ 22 C.C.R. §50964(c).

³⁵² 22 C.C.R. §50964(g).

³⁵³ West’s Ann. Cal. Welf. & Inst. Code §14009.5(b)(2)(A)-(C).

³⁵⁴ *Ibid.*

³⁵⁵ 22 C.C.R. §50961(i).

interest and retained a life estate, a claim against the property is for full value of the property.³⁵⁶ In a hybrid transaction where the decedent made a revocable transfer of the remainder interest and an irrevocable grant of a life estate, a claim can only be pursued against the fair-market value of the remainder interest.³⁵⁷ In short, whichever portion of the transfer was revocable exposes that portion of the property to recovery at death.

Hardship Waiver: An eligible hardship waiver applicant who files the Application for Hardship Waiver can have his or her proportion of the claim waived if the applicant meets one or more of the six factors set forth by regulation:³⁵⁸

- i. When allowing a person to receive an inheritance would allow them to discontinue eligibility for public assistance or medical assistance; or³⁵⁹
- ii. When estate property is part of an income-producing business and recovery would deny the person of the source of their income. Regulations expressly recognize a working farm or ranch as an exclusion; or³⁶⁰
- iii. When an “aged, blind, or disabled” person lived in the home for a year prior to the decedent’s death, continues to reside in the home, and is unable to obtain financing to pay off the recovery amount owed to the state; or³⁶¹
- iv. When a person provided care to the decedent for two or more years that prevented admission to a long-term care institution as documented in writing from a licensed healthcare provider; or³⁶²
- v. When the person had transferred the property to the decedent for no consideration. In other words, if someone gives a patient an asset to use until death without that asset going back to the quasi-lender as a result of the patient’s death, the quasi-lender can recover the “loaned” asset without it being subject to attachment by Medi-Cal recovery rules; or³⁶³

³⁵⁶ Ibid.

³⁵⁷ Ibid.

³⁵⁸ 22 C.C.R. §50963(a).

³⁵⁹ 22 C.C.R. §50963(a)(1).

³⁶⁰ 22 C.C.R. §50963(a)(2).

³⁶¹ 22 C.C.R. §50963(a)(3).

³⁶² 22 C.C.R. §50963(a)(4).

³⁶³ 22 C.C.R. §50963(a)(5).

- vi. When equity in real property is needed by the recipient of such property to make the property habitable or to acquire the basic staples of life.³⁶⁴

It is important to note that recovery occurs against any person who receives property by “distribution or survival” from either the patient or subsequently from the surviving spouse who received such from the patient.³⁶⁵ Under substantial-hardship regulations, an “applicant” is any “dependent, heir, or survivor” of the decedent requesting a waiver.³⁶⁶ The term “heir” is given a broad definition to include anyone who survives the decedent and is designated to recoup some or all of the decedent’s property regardless of how they receive it.³⁶⁷

Certain hardship criteria which would typically only be available to bona fide spouses or children are therefore open to any designated recipient of property. California is known as a progressive state and usually the birthplace of many progressive legal trends.

California also recognizes “palimony” and rights to support for non-relatives and non-spouses³⁶⁸ as well as progressive approaches to the rights of cohabitation homosexual relationships, whether married or not. The broad inclusion of any recipient of property to claim substantial hardship under the criteria usually reserved for kin is a further progressive alignment of Medi-Cal estate recovery with other broader principles of California law.

If a hardship waiver is not administratively granted, the applicant can request a hearing called an “estate hearing.”³⁶⁹ The applicant has 60 days from a negative determination to request an estate hearing.³⁷⁰ The hearing must be conducted within 60 days of the date of the request.³⁷¹ For in-state applicants, the hearing is conducted by the department at any agency within the applicant’s local appeals court district.³⁷² For an out-of-state applicant, the hearing is held in Sacramento.³⁷³ The hearing officer has 30 days after the hearing to submit a ruling to the director; the director then has 30 days to adopt the ruling or ask for more evidence.³⁷⁴ The decision is final when adopted by the director.³⁷⁵ An applicant can seek judicial review of a final decision by filing a petition for writ of administrative mandate in the appropriate appellate court.³⁷⁶

³⁶⁴ 22 C.C.R. §50963(a)(6).

³⁶⁵ West’s Ann. Cal. Welf. & Inst. Code §14009.5(a).

³⁶⁶ 22 C.C.R. §50960.4.

³⁶⁷ 22 C.C.R. §50960.23.

³⁶⁸ *Marvin v. Marvin*, 18 Cal.3d 660, 134 Cal.Rptr. 815, 557 P.2d 106 (1976).

³⁶⁹ 22 C.C.R. §50964(a).

³⁷⁰ 22 C.C.R. §50964(a)(3).

³⁷¹ *Ibid.*

³⁷² 22 C.C.R. §50964(a)(2).

³⁷³ *Ibid.*

³⁷⁴ 22 C.C.R. §50964(c).

³⁷⁵ 22 C.C.R. §50964(e).

³⁷⁶ 22 C.C.R. §50964(f).

Partnership Program: California is one of the original partnership states. Statutory authority is found in West's Ann. Cal. Welf. & Inst. Code §22000 to §22010. Regulations are contained in 22 C.C.R. §58000 to §58038. Both explicitly provide for an exclusion of resources from Medi-Cal eligibility and subsequent estate recovery.³⁷⁷ The ownership of a qualified plan provides a dollar-for-dollar exclusion referred to as "Medi-Cal Asset Protection."³⁷⁸

6. Colorado (CO)

Governing Law: Colorado's estate-recovery statute is found at C.R.S.A. §255-4-302. The Department of Health Care Policy and Financing has promulgated regulations at 10 Code Colo. Regs. 2505-10, Rule 8.063, et. seq.

Estate Scope: The department is authorized to make claims against an estate of an individual who received medical assistance.³⁷⁹ Recovery is only authorized to the extent it is cost effective to do so.³⁸⁰ A contract for an exempt burial fund is required to include a provision that pays over any remainder of the fund not used for the full cost of the burial to the state automatically. The remaining funds are to be used to satisfy the decedent's debt to the state.

Liens: The department is authorized to file TEFRA liens against any property of an individual who is institutionalized and from whom the state can expect to recover.³⁸¹ A lien can only be recorded if:

- i. The department determines the patient is not likely to return home; and³⁸²
- ii. There is no spouse residing in the home; and³⁸³
- iii. There is no child under 21 or blind or disabled dependent; and³⁸⁴
- iv. There is no sibling with an equity interest that lawfully resided in the home for a year prior to the patient's institutionalization; and³⁸⁵
- v. Recovery will be cost effective.³⁸⁶

³⁷⁷ West's Ann. Cal. Welf. & Inst. Code §22004(a)(3); 22 C.C.R. §50453.7(b).

³⁷⁸ 22 C.C.R. §50823.

³⁷⁹ C.R.S.A. §25.5-4-302(2)(a).

³⁸⁰ C.R.S.A. §25.5-4-302(2)(c).

³⁸¹ C.R.S.A. §25.5-4-302(3).

³⁸² 10 Code Colo. Regs. §2505-10: 8.063.13(A).

³⁸³ Ibid at (B).

³⁸⁴ Ibid at (C).

³⁸⁵ Ibid at (D).

³⁸⁶ Ibid at (E).

The department is required to use a Utilization Review Contractor to determine if a patient is unlikely to return home, a predicate factor used to decide if a lien can be filed.³⁸⁷ Such a determination must be made with a notice to the patient which includes the right to an appeal.³⁸⁸

Spousal Recovery: The state is fully barred from recovery if there is a surviving spouse.³⁸⁹ Recovery is also fully barred if there is a child under 21 or a blind or disabled “dependent.”³⁹⁰ The term “dependent” as used here is a broader exclusion than the typical use of the term “child.” Dependent could mean any person who derives a significant amount of the resources from the patient to be declared dependent for tax purposes. To the extent the term “dependent” excludes a blind or disabled child because he or she is not financially dependent, such an exclusion would appear to be impermissibly overbroad.

Hardship Waiver: The Colorado statute provides broad authority for the state department to “compromise, settle, or waive” recovery for “good cause.”³⁹¹ To determine the guidelines for “good cause,” Colorado regulations lay out presumptive hardship guidelines.³⁹² If a hardship waiver is applicable to only one of numerous estate heirs, the portion of the recovery waived allows only that heir to whom the hardship waiver was granted to receive the unclaimed portion of the estate to which the claim was released by partial waiver.³⁹³ The three presumptive hardship criteria that satisfy the “good cause” requirement are:

- i. Without the inheritance, the heir(s) would become eligible for assistance payments or medical-assistance programs; or³⁹⁴
- ii. Allowing an inheritance will cause the heir(s) to discontinue eligibility for assistance payments or medical-assistance programs; or³⁹⁵
- iii. The home is a part of a business, including a working farm or ranch, and recovery will result in loss of the heir(s) means of livelihood.³⁹⁶

Partnership Program: Colorado has implemented a long-term care partnership program.³⁹⁷ The partnership program corresponds with the estate-recovery statute to

³⁸⁷ 10 Code Colo. Regs. §2505-10: 8.063.14.

³⁸⁸ *Ibid.*

³⁸⁹ 10 Code Colo. Regs. §2505-10: 8.063.15(A).

³⁹⁰ 10 Code Colo. Regs. §2505-10: 8.063.15(B).

³⁹¹ C.R.S.A. §255-4-302(4).

³⁹² 10 Code Colo. Regs. §2505-10: 8.063.18.

³⁹³ *In re Estate of Ligon*, App. 2007, 160 P.3d 361.

³⁹⁴ 10 Code Colo. Regs. §2505-10: 8.063.18(A).

³⁹⁵ 10 Code Colo. Regs. §2505-10: 8.063.18(B).

³⁹⁶ 10 Code Colo. Regs. §2505-10: 8.063.18(C).

³⁹⁷ C.R.S.A. §25.5-6-110.

allow the application of estate recovery against only those assets not protected by the partnership program.³⁹⁸

7. Connecticut (CT)

Governing Law: Connecticut's estate recovery is contained within general claim repayment statutes contained in C.G.S.A. §17b-93 through §17b-97. Any applicant for medical assistance in Connecticut must be given a plain language of notice of the liability for repayment.³⁹⁹

Estate Scope: The claim of the estate is applicable to the probate estate of the patient.⁴⁰⁰

Spousal Recovery: There is no authority to recover from the spouse; the state's claim only takes priority over unsecured claims in decedent's estate.⁴⁰¹ Liens are levied against property, described more fully below, and the state allows the surviving spouse or dependent child to occupy the real property.⁴⁰²

Liens: The commissioner of social services is authorized to place a lien against any property that a recipient has an interest in to secure the claim of the state.⁴⁰³ The claim of the state is for all amounts which it has paid or may thereafter pay under the Medicaid assistance program on the recipient's behalf.⁴⁰⁴ The state's claim is secured by filing a certificate in the land records office of the town or towns in which any such real estate is located.⁴⁰⁵ The lien can be foreclosed against in any court of competent jurisdiction; however, a surviving spouse or dependent child may be permitted to occupy the property.⁴⁰⁶

8. Delaware (DE)

Governing Law: Delaware's Medicaid estate-recovery program is actually found in its property law statutes located at 25 Del. C. §5001 through §5006.

Estate Scope: The estate recovery definition of estate refers the reader to the Delaware's Decedent's Estate code.⁴⁰⁷ The reference takes the reader to the Section that defines which of the decedent's assets are subject to probate administration.⁴⁰⁸

³⁹⁸ C.R.S.A. §25.5-4-302(7).

³⁹⁹ C.G.S.A. §17b-77(b).

⁴⁰⁰ C.G.S.A. §17b-93(a).

⁴⁰¹ C.G.S.A. §17b-93(a).

⁴⁰² C.G.S.A. §17b-79.

⁴⁰³ Ibid.

⁴⁰⁴ Ibid.

⁴⁰⁵ Ibid.

⁴⁰⁶ Ibid.

⁴⁰⁷ 25 Del. C. §5001(c).

⁴⁰⁸ 12 Del. C. §1901.

Therefore, the estate recovery is limited to the probate estate in Delaware, as well as any lien property described below.

Spousal Recovery: Recovery from a patient's estate or from the sale of property subject to a lien is only allowed after the death of the patient and the death of the patient's surviving spouse who was residing in the home on a continuous basis.⁴⁰⁹ Recovery is also allowed through a lien on the patient's home, when there is no surviving child who is blind or disabled or who was residing in the home on a continuous basis immediately prior to the patient's death; non-disabled child or sibling of the patient lawfully residing in the home who has resided there for a period of at least two years immediately prior to the patient's admission to a long-term care service, who has resided there on a continuous basis since that time, and who can establish that he or she provided care that permitted the patient to reside in the home rather than in a long-term care facility; or a minor child who was residing in the home on a continuous basis immediately prior to the death of the individual but only until that child reaches majority.⁴¹⁰

Liens: When the state makes an outlay for a patient (55 and older) receiving services in a long-term care facility, a TEFRA lien is created against all real property of the patient, prior to the patient's death, after notice and opportunity for a hearing before the state's Department of Health and Social Services that the patient cannot reasonably be expected to return home.⁴¹¹

No lien may be imposed on a patient's home if any of the following are lawfully residing in the home: the patient's spouse; the patient's child who is either under 21, blind or permanently and totally disabled; or the patient's sibling who has an equity interest in the home and who was residing in the home for a period of at least one year immediately prior to the patient's admission to the long-term care facility.⁴¹²

The lien attaches to real property upon the state's recording of a notice of lien at the Recorder of Deeds' office in the county where the property is located.⁴¹³ The lien, once satisfied, can be released by similarly recording of release of lien form.⁴¹⁴ However, any lien imposed by the state dissolves and becomes null and void upon the patient's discharge from the long-term care facility and return home.⁴¹⁵

The Department of Health and Social Services is required to discharge any lien upon such discharge.⁴¹⁶ As discussed in the previous Section above, recovery against the property subject to lien is only allowed after the death of the surviving spouse of the

⁴⁰⁹ 25 Del. C. §5003(1).

⁴¹⁰ 25 Del. C. §5003(2).

⁴¹¹ 25 Del. C. §5002(a).

⁴¹² 25 Del. C. §5002(b).

⁴¹³ 25 Del. C. §5002(c).

⁴¹⁴ 25 Del. C. §5002(d).

⁴¹⁵ 25 Del. C. §5002(e).

⁴¹⁶ Ibid.

patient (who was living in the home on a continuous basis)⁴¹⁷ and only when there is none of the following living in the home on a continuous basis: a surviving child of the patient who is blind or disabled per SSI criteria; non-disabled child or sibling of the patient who lived in the home for two years prior to the patient's admission to a long-term care service and who provided care to the patient that permitted the patient to reside in the home rather than a long-term care facility; or a minor child who had been residing in the home on a continuous basis immediately prior to the patient's death, but only until the child reaches majority.⁴¹⁸

Hardship Waiver: Delaware's Department of Health and Social Services is authorized to waive collection if recovery would work an undue hardship.⁴¹⁹ However, hardship waivers are not considered permanent in Delaware. Any hardship waiver granted by the state remains in effect only for so long as the undue hardship conditions persist; once the reason for the undue hardship waiver no longer exists, the state is authorized to continue pursuing its recovery claim.⁴²⁰

9. Florida (FL)

Governing Law: Florida's estate recovery is governed by the "Medicaid Estate Recovery Act," which is codified at F. S. A. §409.9101.

Estate Scope: Florida's estate recovery is simply limited to a debt of the deceased recipient, which is properly claimed in probate court.⁴²¹

The Florida statute creates three broad full exclusions from recovery. First, recovery is prohibited if the decedent is survived by a spouse, a child under 21, or a child who is blind and totally and permanently disabled.⁴²² Existence of any of these persons is a full bar to recovery. The second bar for recovery is any asset which is exempt from creditor claims under Florida constitution or statute.⁴²³ The third bar to recovery comes from any heir of the estate, beyond the excluded class, claiming a waiver of recovery due to "undue hardship,"⁴²⁴ discussed more fully below.

Spousal Recovery: Florida not only does not collect against a surviving spouse or the surviving spouse's estate; recovery is completely prohibited if the deceased patient is survived by a spouse.⁴²⁵

Hardship Waiver: An heir of an estate not entitled to full exclusion as a protected heir can request a hardship waiver to waive all or part of the recovery against the estate

⁴¹⁷ 25 Del. C. §5003(1).

⁴¹⁸ 25 Del. C. §5003(2).

⁴¹⁹ 25 Del. C. §5005.

⁴²⁰ Ibid.

⁴²¹ F.S.A. §409.9101(2), (3).

⁴²² F.S.A. §409.9101(6)(a)-(c).

⁴²³ F.S.A. §409.9101(7).

⁴²⁴ F.S.A. §409.9101(8).

⁴²⁵ F.S.A. §409.9101(6)(a).

of the decedent.⁴²⁶ The statute indicates four criteria which are to be considered in determining whether such a waiver should be granted, providing a presumption in favor of granting such a waiver if any of the specified conditions precedent are satisfied:

- i. The heir currently lives in the residence of the decedent, lived there at the time of death of the decedent, made the residence a primary residence for a full year before the decedent's death, and owns no other home;⁴²⁷
- ii. The heir would be deprived of food, clothing, shelter, or medical care for the maintenance of life or health;⁴²⁸
- iii. The heir can document that he or she provided full-time care to the decedent which caused the decedent to delay admission to the nursing home. In that case, the heir claiming the exemption must be the decedent's sibling or child and must have resided with the decedent for one year prior to the decedent's death;⁴²⁹ or
- iv. The cost involved in the sale of the property would be equal to or greater than the value of the property,⁴³⁰ While the state can pursue nonexempt personal or real property when there are no liquid assets to cover the claim, the non-liquid assets are to be liquidated to satisfy the claim and the state will not take title to real property to satisfy the claim.⁴³¹

Florida has one of the easiest estate-recovery statutes to navigate. The restriction to the probate estate allows for the full gamut of probate-avoidance techniques to avoid recovery. With a full bar to recovery by the existence of a Community Spouse, any married patient would have no recovery concerns provided the Community Spouse does not predeceased the patient. Note also the hardship exclusions are broad and provide a decent backstop as a last resort for recovery avoidance.

Partnership Program: Florida authorizes the use of a partnership program under F. S. A. §409.9102. The statute itself provides only for asset disregard in the eligibility process.

10. Georgia (GA)

⁴²⁶ Ibid.

⁴²⁷ F.S.A. §409.9101(8)(a).

⁴²⁸ F.S.A. §409.9101(8)(b).

⁴²⁹ F.S.A. §409.9101(8)(c).

⁴³⁰ F.S.A. §409.9101(8)(d).

⁴³¹ F.S.A. §409.9101(10).

Governing Law: Georgia authorizes estate recovery under Ga. Code Ann. §49-4-147.1 and implements recovery via Ga. Comp. R. Regs §111-3-8-.01 to §111-3-8-.08.

Estate Scope: Georgia’s administrative code defines “estate” as all real and personal property under the probate code as well as real estate which transfers by “joint tenancy, right of survivorship, life estate, survivorship, trust, annuity, homestead are any other arrangement.”⁴³²

Estates valued at \$25,000 or less are exempt from recovery.⁴³³ For non-probate assets, the recovery administrator is authorized to file an affidavit to recover assets from a financial institution that would otherwise pass outside of probate. Georgia is one of the few states that allows for the avoidance of any transfers of assets that occur on or after the lookback date (i.e. five years prior to filing for Medicaid assistance).⁴³⁴ If any transfer is made by the patient or the Community Spouse without adequate consideration, the department can have the transaction voided by a court action.⁴³⁵

Executor Concerns: A number of persons are obliged to report the death of the patient to the Department of Community Health, Division of Medical Assistance, including the personal representative of the decedent’s estate.⁴³⁶ Such notice must be given within 30 days.⁴³⁷ If the personal representative distributes the estate without taking the state’s recovery claims into account, the personal representative can be held personally liable for the debt to the state, not the recipient of the inheritance.⁴³⁸

Once the state is notified of the death, it will submit its claim to the personal representative. The state has as much time to bring a claim as any other creditor by the date indicated in the notice to creditors which must be published by the personal representative.⁴³⁹ Claims by the state have priority over all other claims except, in order of priority:

- i. Support for the family;
- ii. Funeral expenses, if no pre-paid funeral;
- iii. Estate administration;
- iv. Expenses of the last illness; and

⁴³² Ga. Comp. R. & Regs. §111-3-8-.02(6).

⁴³³ Ibid.

⁴³⁴ Ga. Comp. R. & Regs. §111-3-8-.04(14).

⁴³⁵ Ibid.

⁴³⁶ Ga. Comp. R. & Regs. §111-3-8-.03(1).

⁴³⁷ Ibid.

⁴³⁸ Ga. Comp. R. & Regs. §111-3-8-.05(6).

⁴³⁹ Ga. Comp. R. & Regs. §111-3-8-.05(5).

- v. Unpaid taxes or other taxes due the state or federal government. (For priority, the Medicaid bill is considered a debt due the state under this category.)⁴⁴⁰

Spousal Recovery: Recovery is merely delayed, not barred, when the patient is survived by a spouse or child who is under 21, blind or permanently disabled.⁴⁴¹ The department is also required to delay recovery against any lien on a home, discussed below, while certain persons are living in the home. All this merely postpones the inevitable, since the rules explicitly allow for delayed recovery until such a time where conditions are no longer present.⁴⁴² Such recovery authority is so expansively broad that the rules explicitly declare that the claim can be executed regardless of whether there is an open estate file.⁴⁴³ Georgia's recovery becomes one of the most visibly tenacious, as recovery is directed to be pursued until all assets in the recipient's expanded estate are no longer "accessible."⁴⁴⁴

Liens: Georgia's administrative rules allow the department to impose a TEFRA lien on the recipient's real estate.⁴⁴⁵ Such liens are only authorized when the patient is not reasonably expected to return home and only when there is none of the following living in the home: spouse, child under 21; disabled child of any age; or sibling with an equity interest who lived in the home at least a year before the patient entered the nursing home.⁴⁴⁶ If the state determines that a person qualifies to have a lien placed on real property, the determination can be appealed within 30 days after receiving the notice.⁴⁴⁷

Even when a lien is attached to a home of a deceased Medicaid recipient, the state will not seek recovery against the property until none of the following are not residing in the home: a sibling of the decedent who resided in the home for at least a year before the patient was institutionalized or a child of the decedent who lived in the home for at least two years before the patient was institutionalized and provided the patient with care that caused the patient to remain home rather than become institutionalized.⁴⁴⁸ Georgia also can use a lien to attach inheritances paid out of an estate when recovery is delayed in order to maintain its claim until such time as the reason for delay no longer exists.⁴⁴⁹

Partnership Program: Georgia implemented a partnership program under the Georgia Long-Term Care Partnership Program Act, codified at Ga. Code Ann. §49-4-162 to §49-4-165. Upon the exhaustion of policy benefits or upon diminishment of

⁴⁴⁰ Ga. Comp. R. & Regs. §111-3-8-.05(3).

⁴⁴¹ Ga. Comp. R. & Regs. §111-3-8-.04(8).

⁴⁴² Ga. Comp. R. & Regs. §111-3-8-.04(16).

⁴⁴³ *Ibid.*

⁴⁴⁴ *Ibid.*

⁴⁴⁵ Ga. Comp. R. & Regs. §111-3-8-.07(1).

⁴⁴⁶ Ga. Comp. R. & Regs. §111-3-8-.07(2).

⁴⁴⁷ *Ibid.* at (6).

⁴⁴⁸ Ga. Comp. R. & Regs. §111-3-8-.024(9).

⁴⁴⁹ Ga. Comp. R. & Regs. §111-3-8-.03(3)(c).

assets below the anticipated remaining benefits of the policy, assets are disregarded for eligibility purposes and any subsequent recovery attempt by the state.⁴⁵⁰

Hardship Waiver: An heir can request a hardship waiver to ameliorate estate recovery and lien recovery.⁴⁵¹ While federal hardship criteria prevails, the administrative code sets forth two presumptive criteria for establishing undue hardship: the asset to be recovered is an income-producing farm of one or more of the heirs with an annual gross income of the farm is \$25,000 or less, or the recovery of the assets would result in the heir becoming eligible for government public assistance based on need and/or medical assistance programs.⁴⁵² However, such eligibility cannot also be the result of the heir having divested assets to qualify.⁴⁵³ The personal representative or heir has 30 days from receipt of a notice of the state's claim to file a hardship waiver.⁴⁵⁴ The state has 30 days from receipt of the request to grant or deny the request.⁴⁵⁵ A denial can be appealed.⁴⁵⁶ The appeal can be heard by an administrative law judge if the estate is not in probate; otherwise, the probate judge overseeing the probate estate can hear the appeal.⁴⁵⁷

11. Hawaii (HI)

Governing Law: Hawaii has instituted an estate-recovery program which is authorized by and couched within its general recovery statute located at H.R.S. §346-37 and is complemented by a recovery lien mechanism statute at H.R.S. §346-29.5

Estate Scope: Hawaii generally requires recovery from the probate estate of the recipient.⁴⁵⁸

Spousal Recovery: Recovery is strictly limited to the decedent's estate.⁴⁵⁹ The existence of a surviving spouse or a surviving child who is under 21 years of age, blind, or disabled presents a full bar to recovery.⁴⁶⁰

Liens: The Hawaii Department of Human Services can levy a lien against any property of the recipient of inpatient-medical assistance for institutionalization if the patient cannot be reasonably expected to be discharged and return home.⁴⁶¹ A presumption exists that the patient will not return home if the patient or the patient's

⁴⁵⁰ Ga. Code Ann. §49-4-162(b).

⁴⁵¹ Ga. Comp. R. & Regs. §111-3-8-.08(a).

⁴⁵² Ga. Comp. R. & Regs. §111-3-8-.08(4).

⁴⁵³ Ga. Comp. R. & Regs. §111-3-8-.08(6)(b).

⁴⁵⁴ Ga. Comp. R. & Regs. §111-3-8-.08(8).

⁴⁵⁵ Ga. Comp. R. & Regs. §111-3-8-.08(9).

⁴⁵⁶ Ga. Comp. R. & Regs. §111-3-8-.08(10).

⁴⁵⁷ Ga. Comp. R. & Regs. §111-3-8-.08(11).

⁴⁵⁸ H.R.S. 346-37(a).

⁴⁵⁹ *Ibid.*

⁴⁶⁰ *Ibid.*

⁴⁶¹ H.R.S. 346-29.5(b).

representative declares there is no intent to return or if the patient has been institutionalized for six months or more without a discharge plan.⁴⁶²

The department is prohibited from placing a lien on a home if any of the following reside in the home: the patient's spouse; a minor, blind or disabled child; or a sibling who has an equity interest in the home and lived in the home for one year before the patient's admission to the nursing home.⁴⁶³ No recovery can be had against the home from the lien when there is a sibling of the patient who resided in the home for a year before the patient's admission to the medical institution or child who resided in the home for two years prior to the patient's admission to the medical institution as long as the child provided care to the patient that permitted the patient to remain living in the home rather than an institution.⁴⁶⁴

If the patient died leaving a surviving spouse or a surviving minor, blind or disabled child, the existence of any one of the aforementioned survivors creates an absolute bar to recovery if any lien was filed.⁴⁶⁵ Liens are enforceable on their own in court or as an estate claim.⁴⁶⁶ Lien claims have priority over all other debts except taxes, actual funeral expenses, expenses of the last illness, the cost of the estate administration, and any allowances to the surviving spouse and children for their support during the administration of the estate.⁴⁶⁷

Hardship Waiver: The department is allowed to settle or compromise claims only when there is a showing of undue hardship.⁴⁶⁸

12. Idaho (ID)

Governing Law: Under I.C. §56-218, Idaho's Department of Health and Welfare is authorized to pursue estate recovery. Lifetime liens are authorized separately under I.C. §56-218A.

Estate Scope: Idaho adopts the broadest definition of estate allowable under federal law.⁴⁶⁹ It is also one of the few states to allow its department to file an action in district court to set aside any transfers of "real or personal property, on or after the lookback dates" proscribed by federal law, that was made "without adequate consideration."⁴⁷⁰ Divestments made by either the patient or the patient's spouse in that timeframe are potentially voidable by court action.⁴⁷¹

⁴⁶² Ibid.

⁴⁶³ H.R.S. 346-29.5(b)(1).

⁴⁶⁴ H.R.S. 346-29.5(b)(2).

⁴⁶⁵ H.R.S. 346-29.5(b)(3).

⁴⁶⁶ H.R.S. 346-29.5(d).

⁴⁶⁷ Ibid.

⁴⁶⁸ Ibid.

⁴⁶⁹ I.C. §56-218(4).

⁴⁷⁰ I.C. §56-218(2).

⁴⁷¹ Ibid.

Like the hand full of other states that allow this inclusion, the inclusion predates the DRA requirement that penalty periods are prospective from the date of application. Before enactment of the DRA, it was quite common for divestment to occur which caused a penalty that would elapse before the application is filled out but still be within the former three-year lookback window. Because those divestments could be performed to establish eligibility without any relevant penalty period (e.g. serial divestment), it could be easily understood that a legislature which could overtly curb such divestments would attempt to expand the scope of estate recovery to include those transfers as a backdoor way to deter such divestments.

However, if any divestment is made under the current prospective penalty provisions brought into existence by the DRA, the recovery of assets intentionally transferred within the lookback period would presumably be a double penalty because the patient would have had to private pay through the period of ineligibility caused by the divestment. Although not yet put to the test, the attempt to recover against such divestments like the Idaho statute provides for would be ripe for challenge based on pre-emption for two key reasons: first, the double recovery presents a windfall to the state, and, second, the estate can only be expanded to include such assets that the patient had an interest at death. To use the “other arrangement” to reach back and undo bona fide, completed gifts would exceed the scope of the federal recovery statute and run contrary to divestment rules that already take into account such transfers and penalize them soundly.

Spousal Recovery: After litigation exposed holes in the Idaho recovery statute vis-à-vis recovering against the estate of the non-recipient spouse,⁴⁷² the statute has been expanded to include full recovery from the patient or the patient’s spouse’s estate.⁴⁷³ There is no recovery allowed until after the death of the patient and the patient’s spouse, and recovery is also delayed if there is a child who is under 21, blind or permanently and totally disabled.⁴⁷⁴ While only one spouse survives, a recovery claim can be established in the deceased spouse’s estate, regardless of which spouse died and regardless of whether recovery is allowed at that time.⁴⁷⁵

Liens: Idaho authorizes the department to use liens to secure recovery.⁴⁷⁶ These liens are not used on property during the patient’s lifetime but merely to establish the state’s potential estate claim on assets in the estate which cannot be recovered against at the time the estate is administered because of the presence of a person (i.e., surviving spouse, totally disabled child, etc.) whose existence delays recovery.

Post-death liens must be attached within 90 days of a request to do so by the estate’s personal representative or successor, otherwise the department has up to three

⁴⁷² *In re Estate of Dolores Arlene Elliott*, 141 Idaho 177, 108 P.3d 324 (2005).

⁴⁷³ I.C. §56-218(1).

⁴⁷⁴ I.C. §56-218(1)(a).

⁴⁷⁵ I.C. §56-218(1)(b).

⁴⁷⁶ I.C. §56-218(6).

years to file the lien⁴⁷⁷ which is consistent with the limitations on presentation of claims under Idaho's Uniform Probate Code.⁴⁷⁸ The department can foreclose on a post-death lien without adjudication of a claim in probate where no personal representative has been appointed after one year from the date of death of the survivor of both the patient and the patient's spouse, if any;⁴⁷⁹ when the property has been abandoned by the decedent's heirs or successors, if any;⁴⁸⁰ where taxes are past due for two years;⁴⁸¹ or where all interested parties consent to the foreclosure.⁴⁸²

I.C. §56-218A authorizes the use of lifetime (i.e. TEFRA) liens to secure potential recovery and to trigger notification of any activity on the real property which cannot be recovered against at the time of the activity because of limitations on recovery. Liens can only be placed against the real property of the patient prior to death after determination that the patient cannot reasonably be expected to return home, proper notice of such determination, and opportunity for a hearing to contest such determination.⁴⁸³ No lien can be imposed on a home if any of the following people are lawfully residing in the home: patient's spouse; patient's child under age 21; patient's blind or permanently and totally disabled child; or patient's sibling who holds an equity interest and resided in the home for one year prior to the patient's admission to the medical institution.⁴⁸⁴

Idaho liens are perfected by filing them with Idaho's Secretary of State.⁴⁸⁵ Recovery by lien can only be had from the patient's estate under the recovery statute or upon the sale of the property but only after the death of the patient's spouse and only when there is no child under 21, blind or permanently disabled, or no sibling living in the home who resided in the home for one year prior to the patient's admission to the medical institution, or no child of the individual who lived in the home for two years before the patient's admission to the medical institution and provided the patient care before entry to the institution.⁴⁸⁶ The state is also authorize under I.C. §56-225 to record a request for notice in the relevant county recorder's office in order to alert the state of any transfer or encumbrance on any property subject to recovery.⁴⁸⁷

Hardship Waiver: The recovery statute specifies three presumptive conditions, proof of which would constitute the basis of an undue hardship.⁴⁸⁸ Waivers can be granted if:

⁴⁷⁷ I.C. §56-218(6)(a).
⁴⁷⁸ I.C. §15-3-803(a).
⁴⁷⁹ I.C. §56-218(6)(c)(i).
⁴⁸⁰ I.C. §56-218(6)(c)(ii).
⁴⁸¹ I.C. §56-218(6)(c)(iii).
⁴⁸² I.C. §56-218(6)(c)(iv).
⁴⁸³ I.C. §56-218A(1)(b).
⁴⁸⁴ I.C. §56-218A(2).
⁴⁸⁵ I.C. §56-218A(3).
⁴⁸⁶ I.C. §56-218A(5).
⁴⁸⁷ I.C. §56-225(1); I.C. §55-819.
⁴⁸⁸ I.C. §56-218(7).

- i. The estate subject to recovery is income-producing property that provides the primary source of support for other family members;⁴⁸⁹ or
- ii. The estate is below a minimum value (as set periodically by the department's rules);⁴⁹⁰ or
- iii. Recovery causes the heirs to be eligible for public assistance.⁴⁹¹

13. Illinois (IL)

Governing Law: Illinois authorizes recovery by statute at 305 ILCS 515-13 and under administrative rules contained in 89 Ill. Adm. Code §102.200 to §102.250.

Estate Scope: The scope of the estate is strictly limited to the patient's probate estate as defined under the Probate Act of 1975.⁴⁹² However, as one of the few states that properly complies with 42 U.S.C. §1396p(b)(4)(B), if a portion of the estate is disregarded under the exclusion provided for by Illinois' Long-Term Care Partnership Program Act⁴⁹³ (see below), then the state adopts an expanded estate definition for recovery of assets over and above the exclusions provided by the partnership program policy.⁴⁹⁴ It is possible, in a limited way, for the state to treat transfers or conveyances of property when using the expanded estate definition as fraudulent in order to pull them back into the expanded estate.⁴⁹⁵ Any such claims asserted against non-probate assets must be claimed by filing a lien (see below).⁴⁹⁶

Spousal Recovery: Illinois adopted a clear spousal-recovery statute which provided that the cost of the care shall be a "claim against the person's estate or a claim against the estate of the person's spouse."⁴⁹⁷ However, this provision was challenged and the Illinois Supreme Court ruled that the provision permitting the estate to recover from the estate of the surviving spouse violates the supremacy clause of Article 6 of the U.S. Constitution.⁴⁹⁸ In doing so, they did not find express recovery allowed against the spouse's estate in the Federal Social Security Act. Therefore, recovery against the spouse's estate in Illinois is deemed to be prohibited; and recovery is exclusively limited to the estate of the patient. Medicaid regulations expressly state that no claim is enforceable against any property, real or personal, of the deceased patient while there

⁴⁸⁹ Id at (7)(A).

⁴⁹⁰ Id at (7)(B).

⁴⁹¹ Id at (7)(C).

⁴⁹² 305 ILCS §515-13; 89 Ill. Adm. Code §102.210(a)(1).

⁴⁹³ 215 ILCS §132/2, et seq.

⁴⁹⁴ 305 ILCS §515-13; 89 Ill. Adm. Code §102.210(a)(1).

⁴⁹⁵ 305 ILCS §515-13.

⁴⁹⁶ Ibid.

⁴⁹⁷ 305 ILCS §515-13 (emphasis added).

⁴⁹⁸ *Hines v. Department of Public Aid*, 221 Ill. 2d 222, 850 N.E.2d 148 (2006).

is a surviving spouse, a surviving child who is under 21, or a child over 21 who is blind or permanently and totally disabled.⁴⁹⁹

Liens: The Department of Healthcare and Family Services is empowered to file a TEFRA lien against the nursing home patient's real property.⁵⁰⁰ Liens are to be filed on all real property, including the homestead, of the patient who cannot reasonably be expected to be discharged and return home.⁵⁰¹ There is a rebuttable presumption that, if the patient has resided for more than 120 days in one or more institutions, the patient is considered permanently institutionalized.⁵⁰²

The department is required to provide the patient at least 10 days' notice before it files a lien based on a permanent institutionalization.⁵⁰³ The notice must inform the patient of the right to contest such a determination by fair hearing.⁵⁰⁴ Any such lien expires after five years, and the state is required to renew the lien if the state still intends to pursue recovery against the asset via lien encumbrance.⁵⁰⁵

The state is prohibited from filing a lien on a home occupied by the patient's spouse; minor disabled or blind child; or sibling who has an equity interest and legally resided in the home for one year immediately before the patient's admission to the medical institution.⁵⁰⁶ The lien can be enforced anytime there is a transfer of the property, in the case of fraud, or at the time of the patient's death.⁵⁰⁷ Foreclosure is merely deferred if the property is occupied by the surviving spouse, a child under 21, or a child over 21 who is blind or permanently and totally disabled.⁵⁰⁸

Recovery is also deferred if a sibling of the patient resided continuously in the property for at least one full year immediately before the patient was admitted to the institution or a child has resided continuously in the property for at least two full years before the patient was admitted to the institution and also shows proof that care was provided for at least two years before the admission that enabled the patient to live at home rather than in an institution.⁵⁰⁹

The department must release the lien if it receives payment in full, the patient is discharged and returns home, the lien was filed in error, or a bond is filed with surety or sureties acceptable to the state (i.e., payment plan) that guarantees payment.⁵¹⁰ The state can also release a lien if it receives the value of the property to which the lien

⁴⁹⁹ 89 ILAC §102.210(d).

⁵⁰⁰ 89 ILAC §102.220(a).

⁵⁰¹ 89 ILAC §102.235(b).

⁵⁰² 89 ILAC §102.235(d).

⁵⁰³ 89 ILAC §102.235(e).

⁵⁰⁴ Ibid.

⁵⁰⁵ 89 ILAC §102.230(b).

⁵⁰⁶ 89 ILAC §102.230(c).

⁵⁰⁷ 89 ILAC §102.240(a).

⁵⁰⁸ 89 ILAC §102.240(b)(1).

⁵⁰⁹ 89 ILAC §102.240(b)(2).

⁵¹⁰ 89 ILAC §102.250(a).

attaches, but its claim for any balance due on the lien is reserved against any of the patient's subsequently discovered assets or deferred if the patient has a dependent spouse or minor children.⁵¹¹

Partnership Program: Illinois created a partnership program which is authorized at 215 ICLS §132/1 to §132/99. The partnership program expressly comports to the federal proscription of the treatment of assets for eligibility and estate recovery.⁵¹² If a patient has a policy and receives asset disregard for eligibility purposes, the asset disregard applies to the patient's estate assets; but it triggers the use of the broader definition of estate.

Hardship Waiver: Illinois provides heirs and beneficiaries an opportunity to request a hardship waiver.⁵¹³ The state's rules only provide one presumptive hardship: if the recovery would cause the heir or beneficiary to become or remain eligible for a public benefit program such as SSI, TANF, or Food Stamps.⁵¹⁴ The state is required to provide a notice to heirs and beneficiaries delineating the opportunity, time frame, and method to request a waiver based on undue hardship.⁵¹⁵ As beneficial as using a partnership program policy may seem in general, since the expanded estate is used for recovery, it is far easier to starve the patient's probate estate. With the *Hines* decision, recovery stops at the patient's estate; keeping it restricted to that is essential.

14. Indiana (IN)

Governing Law: Indiana's estate-recovery authority is found in Sections 8.5 (Liens) and 9 (Estate Claims) of Title 12 (Human Services) Article 15 (Medicaid) of the Indiana Code.

Estate Scope: Indiana employs as near a "kitchen sink" view of an estate as could be reasonably imagined from the federal options. In Indiana, the "estate" includes: all real and personal property and other assets included within an individual's probate estate; any interest in real property owned by the patient at the time of death that was conveyed to the patient's survivor through joint tenancy with right of survivorship, if joint tenancy was created after June 30, 2002; any real or personal property conveyed through a non-probate transfer; and any sum due after June 30, 2005, to a person after the death of a Medicaid recipient that is under the terms of an annuity contract purchased after May 1, 2005, with the assets of the patient or the patient's spouse.⁵¹⁶

Non-probate transfers are defined as valid transfers, effective at death, by a transferor whose last domicile was in Indiana and who immediately before death had the power, acting alone, to prevent the transfer of the property by revocation or

⁵¹¹ 89 ILAC §102.250(b).

⁵¹² 215 ILCS §132/1.

⁵¹³ 89 ILAC §102.210(f).

⁵¹⁴ Ibid.

⁵¹⁵ Ibid.

⁵¹⁶ I.C. §12-15-9-0.5(a).

withdrawal and use of the property for the benefit of the transferor or apply the property to discharge claims against the transferor's probate estate.⁵¹⁷ Any non-probate assets determined to be exempt or transferred out of the patient's probate estate before May 1, 2002, are not included.⁵¹⁸ Additionally, the term non-probate transfer expressly does not include property that transfers as tenants by the entireties or the death proceeds of a life insurance policy.⁵¹⁹ A claim for recovery cannot be enforced against any of the following:

- i. Real estate while it is necessary for the support, maintenance, or comfort of the surviving spouse, a dependent child under 21, or a dependent who is in need of support because of blindness or other disability;⁵²⁰
- ii. Personal property necessary for the support, maintenance, or comfort of the people listed above;⁵²¹ or
- iii. Personal effects, ornaments, or keepsakes of the deceased.⁵²²

Spousal Recovery: Medicaid is fully recoverable from a patient's surviving spouse's estate.⁵²³ If the patient's surviving spouse remarries, any part of the surviving spouse's estate that is attributable to the new spouse is exempt from recovery.⁵²⁴ No recovery can be claimed against the estate of the surviving spouse while the patient is survived by a child under 21 or a child who is permanently and totally disabled under SSI criteria.⁵²⁵

Priority of Claims: The state's claim for reimbursement can only be paid after the following expenses which take priority, consistent with the probate code.⁵²⁶

- i. Funeral expenses for the patient and the patient's spouse, not to exceed \$350 each;
- ii. Expenses of the last illness of the patient and the patient's spouse; and
- iii. Estate administration expenses, including attorneys' fees approved by the probate court.

⁵¹⁷ I.C. §12-15-9-0.5(b).

⁵¹⁸ I.C. §12-15-9-0.8.

⁵¹⁹ I.C. §12-15-9-0.5(b).

⁵²⁰ I.C. §12-15-9-2(1).

⁵²¹ I.C. §12-15-9-2(2).

⁵²² I.C. §12-15-9-2(3).

⁵²³ I.C. §12-15-9-1(a).

⁵²⁴ I.C. §12-15-9-1(b).

⁵²⁵ I.C. §12-15-9-2(a).

⁵²⁶ I.C. §29-1-14-9.

Liens: When it is determined that a patient cannot reasonably be expected to return to the medical institution, a lien may be filed against the patient's real property.⁵²⁷ The Medicaid agency is authorized to conduct a "lookback" of the patient's property for at least the preceding three years to find divested property interests to lien.⁵²⁸ If the property to be liened is secured by a loan used to operate a farm, the Medicaid lien is subordinate to any such farm loan, regardless of which is recorded first.⁵²⁹

No lien can be obtained if any of the following persons are lawfully residing in the home: the patient's spouse; the patient's child who is under 21 or disabled under SSI rules; the patient's sibling who has an ownership interest in the home and continuously lived in the home for 12 months before the patient was admitted to the nursing home; or the patient's parent(s).⁵³⁰

Before a lien can be imposed, the state must give the patient written notice and an opportunity to request a fair hearing.⁵³¹ If no hearing is requested, the lien can be filed at any time after 30 days has elapsed from the date notice is given to the patient.⁵³² The lien may be foreclosed on during the patient's lifetime if the property is sold or upon the patient's death; however, the lien automatically expires if the foreclosure action is not commenced within two years after the patient's death.⁵³³

No lien is enforceable if the recipient's child is living in the home and the child resided in the home for 24 months before the patient was admitted to the medical institution, provided care that delayed such admission, and continues to reside in the home since the patient's admission.⁵³⁴ Additionally, no lien can be enforced if the patient's sibling is residing in the home, has an ownership interest in the home, and continuously lived in the home for one full year before the patient's admission to the medical institution.⁵³⁵ The lien must be released if the patient is discharged and returns home to live.⁵³⁶

Partnership Program: Indiana is one of the original four partnership states. The partnership program is statutorily authorized by I.C. §27-8-12-7.1 and I.C. §12-15-39.6, which authorizes the implementation of the program under the insurance code and provides for asset disregard in Medicaid eligibility, respectively. Asset disregard is either a dollar-for-dollar disregard based upon the benefits paid out by a qualified policy or a total protection of assets if the policy has a maximum benefit of \$140,000 with a 5% annual compounded increase.⁵³⁷ However, asset disregard only makes reference to the

⁵²⁷ I.C. §12-15-8.5-2(a).

⁵²⁸ I.C. §12-15-8.5-2(b).

⁵²⁹ I.C. §12-15-8.5-2(c).

⁵³⁰ I.C. §12-15-8.5-3.

⁵³¹ I.C. §12-15-8.5-4; I.C. §12-15-28.

⁵³² I.C. §12-15-8.5-4(3).

⁵³³ I.C. §12-15-8.5-7.

⁵³⁴ I.C. §12-15-8.5-8(1).

⁵³⁵ I.C. §12-15-8.5-8(2).

⁵³⁶ I.C. §12-15-8.5-9.

⁵³⁷ I.C. §12-15-39-6-10.

assets an individual owns while still qualifying for Medicaid eligibility; there is no mention in either the partnership program statute or the estate claim statute of any asset disregard carried over to estate recovery.

Hardship Waiver: Indiana provides waivers of recovery in the case of undue hardship consistent with the federal guidelines.⁵³⁸

15. Iowa (IA)

Governing Law: Iowa's estate recovery is governed by statute located at I.C.A. §249A.5 and administrative codes—Iowa Admin. Code §441-11.1(217) and §441-75.4 (249A).

Estate Scope: Recovery, as discussed herein, is made from the patient's estate but deferred until the death of a spouse or child that qualifies for a waiver.⁵³⁹ The estate to be recovered from includes any real property, personal property, or other assets in which the patient, the surviving spouse, or child had any legal title or interest at the time of the patient's, spouse's, or child's death, to the extent of such interests, including but not limited to interests in jointly held property, retained a life estates, and interests in trusts.⁵⁴⁰

The estate recovery law has a long-arm provision that includes all of the aforementioned assets in the probate estate of the decedent.⁵⁴¹ Litigation which either challenged or clarified attempted recovery against property in joint ownership as tenants in common,⁵⁴² recovery against a retained life estate in a family farm,⁵⁴³ and recovery against the remainder of a discretionary testamentary trust,⁵⁴⁴ all have reached the Iowa Supreme Court—each reaffirming the broad reach of the state's ability to recover against the expanded estate. Iowa specifically adopts the Minnesota rationale that the estate-recovery statute requires the patient's interest in property owned by the surviving spouse to be included in the patient's estate for the purposes of Medicaid reimbursement (see Spousal Recovery below).⁵⁴⁵

A litany of persons is required to notify the state within 10 days of the patient's death, including the personal representative of the patient.⁵⁴⁶ The Iowa statute differentiates "personal representative" from "executor" by defining the personal representative as the person who filed the Medicaid application or who managed the

⁵³⁸ I.C. §12-15-9-6.

⁵³⁹ I.C.A. §249A.5(b).

⁵⁴⁰ I.C.A. §249A.5(c).

⁵⁴¹ I.C.A. §249A.5(d).

⁵⁴² *In re Estate of Serovy*, 711 N.W.2d 290 (2006).

⁵⁴³ *In re Estate of Laughead*, 696 N.W.2d 312 (2005).

⁵⁴⁴ *In re Estate of Gist*, 763 N.W.2d 561 (2009).

⁵⁴⁵ *In re Estate of Laughead*, 696 N.W.2d 312, 316 (2005), citing *In re Estate of Gulberg*, 652 N.W.2d 709, 713 (Minn. Ct. App. 2002).

⁵⁴⁶ I.C.A. §249A.5(2)(f).

financial affairs of the patient.⁵⁴⁷ If a personal representative or an executor has not properly dealt with the debts of the decedent as provided for under Iowa's probate code,⁵⁴⁸ he or she may be held personally liable for the debt to the state due under the recovery statute to the extent of the property that was in his or her control which could have been levied.⁵⁴⁹

Spousal Recovery: A temporary waiver of collection of recoverable debt is automatic if it would reduce the amount of the estate to be received by the surviving spouse, or child under 21, blind, or permanently and totally disabled at the time of the patient's death.⁵⁵⁰ Waiver can also be granted for undue hardship using the federal criteria.⁵⁵¹ If waiver is granted which defers collection to the extent the patient's estate was received by a spouse, child, or hardship waiver recipient, the amount waived shall become a debt to each of their estates or due when hardship no longer exists for a hardship waiver recipient.⁵⁵²

Liens: Iowa's administrative code provides for medical-assistance liens in Iowa Admin. Code §441-75.4 (249A) but expressly reserves their use and application to "all monetary claims which the [Medicaid recipient] may have against third parties."⁵⁵³ In other words, Iowa only authorizes the use of liens for third-party subordination claims and not to secure estate recovery claims.

Partnership Program: Iowa has a partnership program authorized by statute at I.A.C. §5144.1 to §5144.9. The statute provides for asset disregard of "a one dollar increase in the amount of assets an individual ... may retain [for eligibility purposes] for each \$1 of benefit paid out"⁵⁵⁴ There is no provision for exclusion of assets from estate recovery in either the partnership-program statute or the estate-recovery statute.

16. Kansas (KS)

Governing Law: Kansas authorizes collection against the "medical-assistance estate" in K.S.A. §39-709.

Estate Scope: The cost of care is a claim against the property or any interest therein belonging to and a part of the estate of the deceased patient or, if there is no such estate, the estate of the surviving spouse,⁵⁵⁵ as well as a claim against any moneys of either spouse held in various financial accounts.⁵⁵⁶ Transfers of real or personal property by patients without adequate consideration are voidable and may be

⁵⁴⁷ I.C.A. §249A.5(2)(f)(3).

⁵⁴⁸ I.C.A. §633.425.

⁵⁴⁹ I.C.A. §249A.5(2)(f)(2).

⁵⁵⁰ I.C.A. §249A.5(2)(a)(1).

⁵⁵¹ I.C.A. §249A.5(2)(a)(2).

⁵⁵² I.C.A. §249A.5(2)(b).

⁵⁵³ Iowa Admin. Code 441-75.4(249A).

⁵⁵⁴ I.C.A. §5144.5(1).

⁵⁵⁵ K.S.A. §39-709(g)(2)(A).

⁵⁵⁶ K.S.A. §39-709(g)(2)(B).

set aside.⁵⁵⁷ The medical assistance estate includes all real and personal property and other assets in which the deceased patient had any legal title or interest immediately before death but only to the extent of that interest.⁵⁵⁸ This expanded estate includes assets conveyed to a survivor, heir, or assign of the deceased patient through joint tenancy, tenancy in common, survivorship, transfer-on-death deed, payable-on-death contract, life estate, trust, annuities, or similar arrangement.⁵⁵⁹

Recovery can be waived if it is not cost effective to the state. Kansas's rules provide two conditions where it is not presumptively cost effective:

- i. The estate is less than the administrative costs of recovery from the estate;⁵⁶⁰ or
- ii. The estate is \$10,000 or less.⁵⁶¹

Spousal Recovery: Recovery is delayed until after the death of the surviving spouse, if any, and only until a time when the individual has no surviving child who is under 21, blind or permanently and totally disabled.⁵⁶² However, the statute expressly allows recovery in the surviving spouse's estate, limited to the expanded estate assets that flowed into such an estate from the deceased patient and potentially any lifetime transfers to the spouse without consideration.

Liens: Kansas authorizes the filing of liens against a patient's real property only after notice and an opportunity for a hearing had been given.⁵⁶³ The patient must be determined to not reasonably be able to return home, which is automatically presumed if the patient has been institutionalized for six months.⁵⁶⁴ The lien is subject to removal if the patient returns home, but the patient must be in the home for at least 90 days in order to be considered "returned."⁵⁶⁵ The lien can only be enforced before the patient's death by a foreclosure action in state district court or after the patient's death by action in a probate court estate proceedings.⁵⁶⁶ The lien can only be enforced after the death of the surviving spouse; when there is no child under 21 residing in the home; when there is no adult child, natural or adopted, who is blind or disabled residing in the home; or when no sibling of the patient is lawfully residing in the home, who resided there for at least a year before the patient's admission to the medical facility and has continuously resided there since.⁵⁶⁷ The lien remains on the property even after the title to the property transfers when recovery is forestalled unless: the lien is satisfied;

⁵⁵⁷ K.S.A. §39-709(g)(2).

⁵⁵⁸ K.S.A. §39-709(g)(3)(B).

⁵⁵⁹ Ibid.

⁵⁶⁰ 907 Ks. Admin. Regs. 1:585, §3(3)(b)(1).

⁵⁶¹ 907 Ks. Admin. Regs. 1:585, §3(3)(b)(2).

⁵⁶² K.S.A. §39-709(g)(2).

⁵⁶³ K.S.A. §39-709(g)(4).

⁵⁶⁴ Ibid.

⁵⁶⁵ Ibid.

⁵⁶⁶ K.S.A. §39-709(g)(5).

⁵⁶⁷ Ibid.

another foreclosure action terminates the lien; the value of the property is consumed by the lien, forcing the sale to satisfy the lien; or the patient returns home for 90 days or more.⁵⁶⁸ Liens not revived or acted on within 10 years go dormant and cease to operate as a lien on the property.⁵⁶⁹

Partnership Program: Kansas authorizes a partnership program under the Long-Term Care Partnership Act, codified at K.S.A. §40-2132 to §40-2137. Both the partnership act and the estate-recovery statute provide full exclusion of disregarded assets from recovery.⁵⁷⁰

17. Kentucky (KY)

Governing Law: Kentucky derives statutory authority for estate recovery from its generic third-party liability statute at K.R.S. §205.520. The meat of Kentucky's recovery plan is found in its administrative code at 907 Ky. Admin. Regs. 1:585.

Estate Scope: Kentucky uses the expanded estate definition contained in the federal law, virtually verbatim.⁵⁷¹ The service provider providing the Medicaid patient's services is required to notify the state of the death of the patient within 10 days.⁵⁷² The department then prepares a notice of its intent to recover and serves it on the estate representative.⁵⁷³ An estate representative is defined for these purposes as the court-appointed fiduciary or the fiduciary's attorney, a family member of the patient, or any other interested person who lets the state know that he or she is representing the estate.⁵⁷⁴ The estate representative is responsible for notifying the individuals who are affected by the proposed recovery.⁵⁷⁵ If no estate representative exists, the state must notify heirs or family members directly.⁵⁷⁶ The notice provides the affected person with the claim amount and the procedures for applying for an undue hardship waiver, as well as appealing any denial of such application (see Hardship Waiver below).⁵⁷⁷

Spousal Recovery: The existence of a surviving spouse or child under 21 or blind or disabled are a full bar to recovery from the estate.⁵⁷⁸

Partnership Program: Kentucky authorizes a partnership program under the "Kentucky Long-Term Care Partnership Insurance Program" at K.R.S. §205.619. The partnership program's operation is spelled out in K.R.S. §304.14-640 to §304.14-644. The estate recovery rules expressly prohibit recovery from any resources protected

⁵⁶⁸ K.S.A. §39-709(g)(6).

⁵⁶⁹ K.S.A. §39-709(g)(7).

⁵⁷⁰ K.S.A. §40-2134(d)(2) and §39-709(g)(2).

⁵⁷¹ 907 Ky. Admin. Regs. 1:585, §1(3).

⁵⁷² 907 Ky. Admin. Regs. 1:585, §4(2).

⁵⁷³ 907 Ky. Admin. Regs. 1:585, §4(3)(a).

⁵⁷⁴ 907 Ky. Admin. Regs. 1:585, §1(4).

⁵⁷⁵ 907 Ky. Admin. Regs. 1:585, §4(3)(b).

⁵⁷⁶ 907 Ky. Admin. Regs. 1:585, §4(3)(c).

⁵⁷⁷ 907 Ky. Admin. Regs. 1:585, §4(4).

⁵⁷⁸ 907 Ky. Admin. Regs. 1:585, §3(1).

from consideration during the eligibility determination process based on payment issued by a long-term care insurance policy.

Hardship Waiver: Kentucky allows for the waiver of recovery for undue hardship but provides only one presumptive condition, the proof of which creates an automatic waiver. Hardship exists if the asset subject to recovery is the sole income-producing asset (i.e., family farm or business) conveyed to the patient's surviving family members.⁵⁷⁹ This does not apply if the asset is residential real property producing income through a lease or rental agreement.⁵⁸⁰ The estate representative has 30 days from receipt of notice of the state's claim to file for an undue hardship exemption.⁵⁸¹ The state is precluded from granting an undue hardship if the person requesting it created the hardship via estate-planning methods that include divestment.⁵⁸² The state has 30 days from the receipt of a hardship waiver request to rule on it.⁵⁸³ If the state denies it, the estate representative can request an administrative hearing to appeal the decision.⁵⁸⁴

18. Louisiana (LA)

Governing Law: The statutory authority for Louisiana's estate-recovery program is LSA-R.S. 46:153.4.

Estate Scope: Recovery is strictly limited to the succession estate of the patient.⁵⁸⁵ Recovery is prohibited if it is not cost effective and the first \$15,000 or one-half of the median value of homesteads in the parish, whichever is greater, is fully excluded from recovery.⁵⁸⁶ Louisiana also provides a generous offset to recovery. Recovery can be reduced by any reasonable and necessary expense incurred by the patient's heirs after the patient's admission to the long-term care facility in order to maintain the patient's homestead but only if that homestead is included in the patient's succession estate.⁵⁸⁷ For priority of the state's recovery claim in the succession estate, the claim is considered a privilege on the succession estate and has a priority equivalent to the expenses of the last illness.⁵⁸⁸ Expenses of the last illness are subservient to only those of the funeral and succession estate administration expenses.⁵⁸⁹

⁵⁷⁹ 907 Ky. Admin. Regs. 1:585, §3(3)(a).

⁵⁸⁰ *Ibid.*

⁵⁸¹ 907 Ky. Admin. Regs. 1:585, §3(3)(b)(1).

⁵⁸² 907 KAR 1:585, §3(3)(e).

⁵⁸³ 907 KAR 1:585, §3(3)(c).

⁵⁸⁴ 907 KAR 1:585, §3(3)(d); 907 KAR 1:563, §4.

⁵⁸⁵ LSA-R.S. 46.153.4(D).

⁵⁸⁶ LSA-R.S. 46.153.4(E).

⁵⁸⁷ LSA-R.S. 46.153.4(G).

⁵⁸⁸ LSA-R.S. 46.153.4(D).

⁵⁸⁹ LSA-C.C. Art. 3252.

Spousal Recovery: Louisiana makes no provision for recovery from the succession estate of the patient's spouse and specifically adopts the federal standards for when a succession estate cannot be collected against.⁵⁹⁰

Liens: Louisiana statute does not expressly authorize the use of liens against the homestead to secure estate-recovery collection and does its level best to balance the requirement to have an estate-recovery program with the state's long tradition of protecting citizens' rights to home ownership and the state's interest in assuring the transfer of real property within family units.⁵⁹¹

Hardship Waiver: Louisiana statutorily prohibits the Department of Health and Hospitals from recovering in the case of undue hardship.⁵⁹² A statutory presumption of undue influence exists if an heir's family income is 300% or less of the U.S. Department of Health and Human Services' Federal Poverty Level Guidelines as published annually in the Federal Register.⁵⁹³

19. Maine (ME)

Governing Law: Maine's estate recovery is authorized by 22 M.R.S.A. §14.

Estate Scope: The Department of Human Services is mandated to recover against the assets of the probate estate as well as any other real and personal property and other assets the patient held title to at death, to the extent of the interest. This includes assets conveyed to a survivor, heir, or assign of the patient through tenancy in common, survivorship, life estate, living trust, joint tenancy in personal property, or other arrangement but does not include joint tenancy in real property.⁵⁹⁴ The recovery of MaineCare benefits from non-probate assets is authorized by filing a claim in any court of competent jurisdiction.⁵⁹⁵

Spousal Recovery: A claim for recovery cannot be made against the estate assets until such time as the patient has no surviving spouse and the recipient has no surviving child under age 21 or who is blind or permanently and totally disabled as defined by SSI rules.⁵⁹⁶ The Maine statute merely defers collection but does not bar it. Heirs, assignees, or transferees of the patient who are considered collectible can enter into a voluntary payment arrangement consisting of a payment plan, promissory note, or other payment mechanism that would avoid the specific attachment of assets.⁵⁹⁷

Partnership Program: Maine established a partnership program at 22 M.R.S.A. §3174-GG. MaineCare must disregard assets for eligibility purposes and estate

⁵⁹⁰ LSA-R.S. 46.153.4(H).

⁵⁹¹ LSA-R.S. 46.153.4(C).

⁵⁹² LSA-R.S. 46.153.4(F)(1).

⁵⁹³ LSA-R.S. 46.153.4(F)(2).

⁵⁹⁴ 22 M.S.R.A. §14, 2-I(F).

⁵⁹⁵ 22 M.S.R.A. §14, 2-I(B)(2).

⁵⁹⁶ 22 M.S.R.A. §14, 2-I(C).

⁵⁹⁷ 22 M.S.R.A. §14, 2-I(C-2).

recovery in an amount equal to the benefits paid by an approved long-term care insurance policy.⁵⁹⁸

Hardship Waiver: If a patient did not have estate recovery asset disregard from the partnership program policy, a claim for estate recovery can be waived for undue hardship.⁵⁹⁹ A waiver may not be granted if either the patient or the waiver applicant acted to lose, diminish, divest, encumber, or otherwise transfer any value of title to an asset for the purpose of preventing recovery under this section.⁶⁰⁰

20. Maryland (MD)

Governing Law: Maryland's estate-recovery program is authorized by a two-sentence statute authorizing the Department of Health and Mental Hygiene to make a claim against the estate of a deceased assistance recipient for medical assistance payments found at MD HEALTH GEN §15-121. The bulk of Maryland's estate recovery is found in the Code of Maryland Regulations at COMAR 10.09.24.15.

Estate Scope: The definition of "estate" in Maryland is all real and personal property and other assets included within the patient's estate, as defined for purposes of Maryland probate law.⁶⁰¹ A claim by the Department of Health and Mental Hygiene against the estate of a deceased Maryland Medical Assistance Program recipient is barred if not brought in a timely manner.⁶⁰² The state must file its claim within six months of the publication of the notice of first appointment of the personal representative or within two months after the personal representative mails or delivers a notice to the state advising them that their claim is barred unless presented within the two-month time frame.⁶⁰³

Spousal Recovery: Maryland makes no provision for recovery against a surviving spouse's estate. Recovery against the patient's estate is allowed only after the death of the patient's surviving spouse or when the patient has no surviving minor child or surviving child who is blind or disabled.⁶⁰⁴

Liens: Liens are authorized against the real property of the patient before the patient's death provided that the Department of Health and Mental Hygiene has determined the patient has no reasonable expectation of discharge and has provided both notice and opportunity for a hearing to the patient to challenge such a determination.⁶⁰⁵ No lien can be placed on the home if any of the following are lawfully residing in the home: the patient's spouse; the patient's child under 21; the patient's child who is blind or disabled; or the patient's sibling who has an equity interest in the

⁵⁹⁸ 22 M.S.R.A. §3174-GG(3).

⁵⁹⁹ 22 M.S.R.A. §14, 2-I(E).

⁶⁰⁰ Ibid.

⁶⁰¹ COMAR 10.09.24.15(A)(3).

⁶⁰² MD Code, Estates and Trusts, §8-103(f).

⁶⁰³ Ibid.

⁶⁰⁴ COMAR 10.09.24.15(A-3).

⁶⁰⁵ COMAR 10.09.24.15(A-2)(2).

home (provided that such equity interest was not divested for the result of a transfer of the property for less than fair-market value within two years prior to institutionalization)⁶⁰⁶ who was residing in the home for a period of at least one year prior to the patient's admission to the long-term care facility.⁶⁰⁷ The lien must be dissolved if the patient is discharged from the long-term care facility and returns home.⁶⁰⁸ Maryland must delay collection against any liened property until there is no sibling residing in the home who resided there for a full year before the patient's admission to a long-term care facility and who lawfully resided there on a continuous basis since admission. Collection must also be delayed if there is a child lawfully residing in the home who resided there for two years prior to the patient's institutionalization, who continues to reside there since such institutionalization, and who provided care that permitted the patient to stay in the home rather than be admitted to the facility.⁶⁰⁹

Partnership Program: Maryland's partnership program is found at MD Code, Health-General, §15-401 to §15-407. The partnership program only provides asset disregard equal to the amount of benefits paid when determining eligibility for medical assistance.⁶¹⁰ Neither the partnership-program statute nor the estate-recovery program statute and rules make any reference nor proviso for the protection of partnership policy excluded assets from estate recovery. Because the definition of estate is so narrow, Maryland appears to have consciously decided to give patients the best of both worlds: asset disregard during eligibility and estate recovery limited to the probate estate, which is by far the easiest form of recovery to plan for and work around.

Hardship Waiver: If the state determines a hardship exists, it may not seek recovery.⁶¹¹ Maryland's recovery rules provide for one presumptive definition of "substantial hardship." Hardship exists if the state's claim would result in the sale or transfer of real property owned by the decedent and the sale or transfer would result in the removal from the property a dependent (i.e., child; grandchild; great-grandchild; sibling, including half or step; parent; or ancestor of the decedent)⁶¹² who resided in the property on the date of the patient's death, resided there for two continuous years before the patient's death, and cannot provide an alternative residence.⁶¹³

21. Massachusetts (MA)

Governing Law: Massachusetts directs estate recovery under M.G.L.A. 118E §31 to §34. Massachusetts' estate-succession law reflexively refers to M.G.L.A. 118E §32 to govern the notice and claim procedures of any estate-recovery claims.⁶¹⁴

⁶⁰⁶ COMAR 10.09.24.15(A)(3).

⁶⁰⁷ COMAR 10.09.24.15(A-2)(3).

⁶⁰⁸ COMAR 10.09.24.15(A-2)(4).

⁶⁰⁹ COMAR 10.09.24.15(A-3)(2)(d).

⁶¹⁰ MD Code, Health-General, §15-405.

⁶¹¹ COMAR 10.09.24.15(A-3)(3).

⁶¹² COMAR 10.09.24.15(A)(1).

⁶¹³ COMAR 10.09.24.15(A)(10).

⁶¹⁴ M.G.L.A. 197 §9(d).

Estate Scope: Recovery is limited to the probate estate of the patient.⁶¹⁵

Spousal Recovery: Recovery can only be made after the death of the surviving spouse, if any, and only at a time when he or she has no surviving child under 21 or blind or permanently and totally disabled.⁶¹⁶

Liens: The Division of Medical Assistance is authorized to file liens against the patient's property and collect against it during the patient's lifetime if the property is sold. Repayment cannot be required by the lien if the following are lawfully residing in the property:

- i. A sibling who resided in the property for one full year before the patient was institutionalized; or
- ii. A child who resided in the property for two years before the patient was institutionalized, provided the patient care to delay institutionalization for those two years, and resided in the property continuously during the parent's institutionalization.⁶¹⁷

Hardship Waiver: The Division of Medical Assistance is authorized to grant waivers of recovery for undue hardship.⁶¹⁸

22. Michigan (MI)

Governing Law: Michigan's estate-recovery program, the last in the nation to be implemented, is contained in M.C.L.A. §400.112g to §400.112k.

Estate Scope: Michigan's reluctance in enacting estate recovery translated into a relatively generous statute. The estate-recovery claims are limited to the probate estate.⁶¹⁹ The statute provides two exemptions to recovery in addition to a hardship waiver discussed below: the equity in a patient's homestead equal to or less than half of the average price of the home in the county where the homestead is located and any portion of the estate that is the primary income-producing asset of survivors, including a family farm or business.⁶²⁰

Spousal Recovery: Michigan's law appears to provide some leeway for the Department of Social Services to pursue claims against the surviving spouse⁶²¹ and to

⁶¹⁵ M.G.L.A. 118E §31(c).

⁶¹⁶ M.G.L.A. 118E §31(b)(3).

⁶¹⁷ M.G.L.A. 118E §31(d).

⁶¹⁸ M.G.L.A. 118E §31(b)(3).

⁶¹⁹ M.C.L.A. §400.112g(3)(d).

⁶²⁰ M.C.L.A. §400.112g(3)(e).

⁶²¹ M.C.L.A. §400.112g(3)(c).

track assets of the patient available for recovery.⁶²² However, the statute explicitly bars recovery of assets from the home of a patient if any of the following are lawfully residing in the home:

- i. Patient's spouse;
- ii. Patient's child under 21 or child who is blind or permanently and totally disabled under SSI rules;
- iii. Patient's caretaker relative (i.e., any relation by blood, marriage, or adoption within the fifth degree of kinship to the patient) who resided in the home for two years before the patient's admission to the medical institution and who establishes that he or she provided care that permitted the patient to reside in the home rather than in the institution; or
- iv. Patient's sibling who has an equity interest in the patient's home and who resided in the home for one year before the patient's admission to the medical facility.⁶²³

Liens: Michigan's estate-recovery statute expressly prohibits the recording of a lien on property.⁶²⁴

Partnership Program: Michigan's statute authorizes a partnership program at M.C.L.A. §400.112c. Michigan provides a dollar-for-dollar asset disregard for any benefits paid out by a qualifying long-term care insurance policy.⁶²⁵ After diminishment of assets below the anticipated remaining benefits of a qualified policy, the assets of a patient's corresponding policy's payout cannot be taken into account for Medicaid eligibility or any subsequent recovery.⁶²⁶

Hardship Waiver: Hardship waivers are available by application.⁶²⁷ The exclusions described above are available through hardship waiver.⁶²⁸ However, no hardship shall be deemed to exist if the hardship resulted from estate-planning methods under which assets were diverted in order to avoid estate recovery.⁶²⁹

23. Minnesota (MN)

Governing Law: Minnesota's estate recovery is extensively outlined in M.S.A. §256B.15.

⁶²² M.C.L.A. §400.112g(2)(a).

⁶²³ M.C.L.A. §400.112g(6).

⁶²⁴ M.C.L.A. §400.112g(a).

⁶²⁵ M.C.L.A. §400.112c(5).

⁶²⁶ M.C.L.A. §400.112c(4).

⁶²⁷ M.C.L.A. §400.112g(3)(e).

⁶²⁸ Ibid.

⁶²⁹ M.C.L.A. §400.112g(3)(e)(i).

Estate Scope: Minnesota uses a broad definition of “estate.” The estate includes:

- i. The patient’s probate estate;
- ii. All of the patient’s interests or proceeds of those interests in the real property owned by the patient as a life tenant or as a joint tenant with a right of survivorship at the time of the patient’s death;
- iii. All of the patient’s interests or proceeds of those interests in securities the patient owned in beneficiary form at the time of the patient’s death, to the extent the interests or proceeds of those interests become part of the probate estate;
- iv. All the patient’s interest in joint accounts, multiple-party accounts, and pay-on-death accounts, brokerage accounts, investment accounts, or the proceeds of any of those accounts, held at the time of the patient’s death, the extent the interests become part of the patient’s probate estate; and
- v. Assets conveyed to a survivor, heir, or assign of the patient through survivorship, living trust, or other arrangement.⁶³⁰

The statute expressly recognizes that the continuation of a patient’s life estate or joint tenancy interest for the purpose of recovery modifies common law principles which hold that such interests usually terminate on the death of the holder.⁶³¹ The patient’s life estate and joint tenancy interests continue after death and are not merged into the remainder interest or the interest of the joint tenants.⁶³² However, the patient’s interests in real property do not continue if the property is the patient’s homestead and is jointly owned with the patient’s spouse as joint tenant with right of survivorship.⁶³³ The Medicaid recovery statute goes so far as to modify probate law indirectly by providing that the interest or proceeds of interest the patient owned as a life tenant or joint tenant, which typically merge by their nature and avoid probate, are now subject to probate estate administration and, therefore, available for recovery.⁶³⁴

Spousal Recovery: Minnesota’s statute expressly provides for recovery from the estate of the surviving spouse.⁶³⁵ When this provision was challenged, the Supreme Court of Minnesota held that federal law allowed for the recovery from the estate of the surviving spouse but that such recovery was restricted to assets that the deceased Medicaid recipient had an interest to at the time of death.⁶³⁶ The *Barg* case is instructive

⁶³⁰ M.S.A. §256B.15, Subd. 1a(b).

⁶³¹ M.S.A. §256B.15, Subd. 1(3).

⁶³² M.S.A. §256B.15, Subd. 1(5).

⁶³³ M.S.A. §256B.15, Subd. 1(6).

⁶³⁴ M.S.A. §256B.15, Subd. 1g.

⁶³⁵ M.S.A. §256B.15, Subd. 1g(a).

⁶³⁶ *In re Estate of Barg*, 752 N.W.2d 52 (2008)..

since the surviving spouse had all assets transferred into his name before the death of his Medicaid-recipient wife. Such transfers are allowed because of the exemption for divestment penalty when assets are transferred between spouses.

Because the wife had no interest in the assets at the time of her death, there was no recovery allowed against those assets in the surviving spouse's estate. Recovery is delayed by statute until after the decedent's spouse dies, if any, and only when the deceased patient has no surviving children under 21 or blind or permanently and totally disabled under the SSI rules.⁶³⁷ If recovery is delayed, the state can attach a lien on assets in the patient's estate that will follow those assets until such time as the asset can be recovered against.⁶³⁸ Such liens are similar to but distinctly different from the lifetime TEFRA liens as discussed below.

Liens: Minnesota provides for the Department of Human Services to pursue recovery in the estate of the patient or the patient's spouse; and when recovery is delayed, the state is allowed to establish a lien on assets that can eventually be recovered against.⁶³⁹ However, during the patient's lifetime if the patient is institutionalized for six months or more, there is a presumption that the patient is unlikely to be discharged if also certified by the patient's treating physician.⁶⁴⁰ When that condition precedent is established, the state can provide notice of a potential claim.⁶⁴¹ The notice does not take effect until the patient dies.⁶⁴² The notice must be recorded in each county where the patient has real property⁶⁴³ and, once it becomes effective, serves as a notice to anyone subject to take an ownership interest in the property of the state's claim.⁶⁴⁴ The notice constitutes a TEFRA lien in favor of the state for 20 years from the date of filing the notice or the date of the patient's death, whichever is later.⁶⁴⁵

Partnership Program: Minnesota authorizes a partnership program at M.S.A. §256B.0571. The partnership program allows the patient to designate assets when applying for Medicaid coverage in an amount up to the dollar amount of benefits used under the partnership policy that will be protected from recovery and lien.⁶⁴⁶

Hardship Waiver: Any person entitled to notice of a claim by the state can apply for a waiver of a claim based upon undue hardship.⁶⁴⁷ If the deceased patient divested or directed assets to avoid estate recovery, undue hardship cannot be established.⁶⁴⁸ If

⁶³⁷ M.S.A. §256B.15, Subd. 1i(f).

⁶³⁸ M.S.A. §256B.15, Subd. 1j(a).

⁶³⁹ *Ibid.*

⁶⁴⁰ M.S.A. §256B.15, Subd. 1a(e)(2).

⁶⁴¹ M.S.A. §256B.15, Subd. 1c(a).

⁶⁴² *Ibid.*

⁶⁴³ M.S.A. §256B.15, Subd. 1c(b).

⁶⁴⁴ M.S.A. §256B.15, Subd. 1c(c).

⁶⁴⁵ M.S.A. §256B.15, Subd. 1f.

⁶⁴⁶ M.S.A. §256B.0571, Subd. 9(b), Subd. 13, and Subd. 15.

⁶⁴⁷ M.S.A. §256B.15, Subd. 5.

⁶⁴⁸ *Ibid.*

the state agency denies the appeal, the person whose claim was denied can appeal the negative decision to the department's commissioner.⁶⁴⁹

24. Mississippi (MS)

Governing Law: Mississippi's Medicaid department is authorized to file claims from the estate of the deceased Medicaid recipient under MS ST §43-13-317.

Estate Scope: Mississippi allows recovery only against the estate, which is the probate estate delineated in MS ST §91 (i.e., Mississippi's trust and estate code). The state is considered a creditor of the estate.⁶⁵⁰

Spousal Recovery: If the patient is survived by a spouse or any dependent who is under 21 or blind or disabled, there is a full bar to recovery against the estate of the patient.⁶⁵¹

Hardship Waiver: The Mississippi statute incorporates by reference the standard for undue hardship promulgated by federal law and regulation as the state's applicable standards for undue hardship.⁶⁵²

25. Missouri (MO)

Governing Law: Missouri's estate-recovery statute is found in V.A.M.S. §473.398 and V.A.M.S. §473.399.

Estate Scope: The estate-recovery statute considers the money expended on behalf of the patient to be a debt of the patient's at death which is recoverable from the patient's probate estate.⁶⁵³ However, when a probate estate is insufficient to pay the decedent's bills and despite the fact that Missouri did not adopt the expanded definition of estate, Missouri probate law allows for assets received by recipients of non-probate transfers to become assets of the probate estate in order to satisfy creditors.⁶⁵⁴ The probate code gives creditors standing to petition for an accounting to discover non-probate transfers that can be used to satisfy debts.⁶⁵⁵ Numerous Missouri appellate courts have upheld the state's standing to use the accounting procedure as a way to reach non-probate assets to satisfy estate recovery debt.⁶⁵⁶

⁶⁴⁹ Ibid; M.S.A. §256.045.

⁶⁵⁰ MS ST §43-13-317(1); MS ST §91-7-145.

⁶⁵¹ MS ST §43-13-317(2).

⁶⁵² MS ST §43-13-317(2)(c).

⁶⁵³ V.A.M.S. §473.396(1).

⁶⁵⁴ V.A.M.S. §461.300.

⁶⁵⁵ Ibid.

⁶⁵⁶ *In re Estate of Jones*, 280 S.W.3d 647 (Mo. App. W.D. 2009); *In re Estate of Hayden*, 258 S.W.3d 505 (Mo. App. E.D. 2008); and *In re Estate of Macormic*, 244 S.W.3d 254 (Mo. App. S.D. 2008).

Spousal Recovery: Under Missouri statute, providing assistance to the patient creates an obligation which may be recovered by filing a claim in the probate division of the circuit court against the decedent estate of the spouse of the decedent patient upon such spouse's death for the full amount of assistance paid on behalf of the recipient during the marriage of the recipient and the spouse, provided, however, that the liability to the surviving spouse's estate cannot exceed the value of the combined resources of the recipient and the spouse of the Medicaid recipient on the date of the Medicaid recipient's death.⁶⁵⁷

As a general rule, the courts have interpreted Missouri's estate-recovery statute⁶⁵⁸ as granting broad authority to recover from estates of surviving spouses those assets which flowed into those estates from their deceased Medicaid recipient spouses.⁶⁵⁹ However, there is a bit of a split since the western district ruled that such would only apply if the state were to adopt an expanded estate definition to include automatic non-probate transfers of real property by survivorship, which it did not.⁶⁶⁰ Because Missouri's probate code does not include property owned between spouses as tenants by the entirety, each spouse owns the entire property with an undivided interest.⁶⁶¹ Property held in such a fashion is not considered part of the patient's estate and, therefore, is not recoverable in the estate of the surviving spouse.⁶⁶² Nor, by the way, can the non-probate transfer part of the probate code (V.A.M.S. §461.300) be used to pull property held in tenancy by the entirety into the deceased patient's estate for the purposes of estate recovery.⁶⁶³

Partnership Program: Missouri's partnership program is authorized by the Missouri Long-Term Care Partnership Program Act, codified at V.A.M.S. §208.690 to §208.698. Upon payment of benefits under a partnership policy, certain assets are required to be disregarded from any patient seeking assistance from MO HealthNet from both eligibility and subsequent recovery by the state.⁶⁶⁴

26. Montana (MT)

Governing Law: Montana's Department of Public Health and Human Services is authorized to conduct recovery of Medicaid benefits after a patient's death under MCA 53-6-167 and Mont. Admin. R. 37.82.431. Additionally, Montana's lien statutes are found at MCA 53-6-171 through 53-6-189.

Estate Scope: The state must execute and present a claim against the patient's estate within the time specified in the published notice to creditors in the estate

⁶⁵⁷ V.A.M.S. §473.399(2).

⁶⁵⁸ V.A.M.S. §473.399.

⁶⁵⁹ *In re Estate Shuh*, 248 S.W.3d 82, 85-86 (Mo. App. E.D. 2008).

⁶⁶⁰ *In re Estate Bruce*, 260 S.W.3d 398 (Mo. App. W.D. 2008)

⁶⁶¹ *Id.*, at 403.

⁶⁶² *Id.*, at 403.

⁶⁶³ *Id.*, at 404.

⁶⁶⁴ V.A.M.S. §208.692.2.

proceedings.⁶⁶⁵ The state may also execute and present a claim against a person who has received property of the patient by distribution or survival.⁶⁶⁶ The amount recovered from such a person must be reduced by the value of any property transferred to the person by the patient for less than fair-market value for which a period of ineligibility (i.e., divestment-penalty period) was imposed against the patient.⁶⁶⁷

Spousal Recovery: The state is prohibited from recovering while there is a surviving spouse or surviving child under 21, blind, or permanently and totally disabled.⁶⁶⁸ Once there is no such survivor, the state is no longer prohibited from pursuing its claim but is only authorized to pursue the claim against the estate of the deceased patient.⁶⁶⁹

Partnership Program: Montana's partnership program is codified at MCA 53-6-801 to MCA 53-6-805. Montana's program provides a dollar-for-dollar asset disregard from eligibility and recovery, including exemption of assets from recovery liens.

Liens: Montana's extensive lien program is found at MCA 53-6-171 through MCA 53-6-189. Before imposing a lien, the state must give the patient 30 days' written notice of its determination that the patient is permanently institutionalized.⁶⁷⁰ The patient is considered permanently institutionalized if the patient cannot reasonably be expected to be discharged from the facility to return home.⁶⁷¹ A rebuttable presumption arises that the patient is permanently institutionalized if the patient has been institutionalized for six months or longer without a discharge plan.⁶⁷² No lien can be imposed by the state when there are any of the following living in the patient's home: patient's spouse; patient's child under 21, blind, or permanently and totally disabled; or patient's sibling who was residing in the house for a period of 18 months prior to the patient's institutionalization.⁶⁷³

A Medicaid lien has the same effect as a standard judgment lien and must be renewed every six years.⁶⁷⁴ The lien may be enforced upon the death of the patient or during the patient's lifetime upon the sale, transfer, or exchange of the property by filing a writ of execution with the district court clerk in the county where the property is located.⁶⁷⁵ The state may not recover on a lien while there is a surviving spouse; a surviving child under 21, blind or permanently and totally disabled; or a sibling living in the property who lived in the home for 18 months before the patient's institutionalization

⁶⁶⁵ MCA 53-6-167(1).

⁶⁶⁶ MCA 53-6-167(2).

⁶⁶⁷ Ibid.

⁶⁶⁸ MCA 53-6-167(9)(b).

⁶⁶⁹ Ibid.

⁶⁷⁰ MCA 53-6-172.

⁶⁷¹ MCA 53-6-172(2).

⁶⁷² Ibid.

⁶⁷³ MCA 53-6-172(1).

⁶⁷⁴ MCA 53-6-174.

⁶⁷⁵ MCA 53-6-175.

and has continuously resided there since.⁶⁷⁶ When the presence of such an individual precludes recovery, it is merely delayed until the condition precluding recovery no longer exists or the property is sold, transferred, or exchanged.⁶⁷⁷ If the surviving spouse sells, transfers, or exchanges a home, the surviving spouse is entitled to a limited exemption from the recovery against the lien.⁶⁷⁸ The exemption is equal to the lesser of either the fair-market value interest in the home the surviving spouse received from the deceased patient by distribution or survival or \$100,000 less than the total fair-market value of the entire surviving spouse's other assets.⁶⁷⁹ Anyone with an interest in the property subject to lien by the state can apply for a hardship waiver.⁶⁸⁰ If the state denies a request for a hardship waiver, the person seeking such a waiver can assert a claim of entitlement for such a waiver in an action to challenge the writ.⁶⁸¹ Actions to challenge the writ may be filed in the district court where the property is located within 60 days of service or publication of the notice of the writ.⁶⁸²

Hardship Waiver: After the state presents its claim, the personal representative of the estate or another affected person can file an application for undue hardship on the form provided by the department.⁶⁸³ The applicant must submit the form to the Department of Human Services, Quality Assurance Division, Third Party Liability, 2401 Colonial Drive, P.O. Box 202953, Helena, MT 59620-2953.⁶⁸⁴ There is a presumption of undue hardship if the estate assets or property received by survival or distribution is part of a business, including a working farm or ranch that the applicant was dependent on for his or her livelihood during the patient's lifetime, if recovery would deprive the applicant of his or her sole means of livelihood, and if the applicant has no other means of satisfying the department's claim.⁶⁸⁵ Additionally, undue hardship is presumed if the applicant is over 65, blind, or a disabled relative of the patient who had been living for at least one full year in the patient's house before the patient's death, continues to live there since, and would have difficulty in securing alternate living arrangements and financing on the property to satisfy the claim.⁶⁸⁶

27. Nebraska (NE)

Governing Law: Nebraska's estate-recovery statute can be found at Neb. Rev. St. §68-919.

⁶⁷⁶ MCA 53-6-178.

⁶⁷⁷ MCA 53-6-181.

⁶⁷⁸ MCA 53-6-182(1).

⁶⁷⁹ MCA 53-6-182(2).

⁶⁸⁰ MCA 53-6-180.

⁶⁸¹ MCA 53-6-180(c).

⁶⁸² MCA 53-6-177.

⁶⁸³ MCA 53-6-167: ARM 37.82.431(2).

⁶⁸⁴ ARM 37.82.431(2).

⁶⁸⁵ ARM 37.82.421(4)(a).

⁶⁸⁶ ARM 37.82.421(4)(b).

Estate Scope: The patient becomes indebted to the state for the cost of care while on Medicaid,⁶⁸⁷ but the claim is held in abeyance until after the death of the patient.⁶⁸⁸ At that time, Nebraska's Department of Health and Human Services must file a claim in the decedent's estate to recover the debt. The personal representative of the patient's estate is required to give the state written notice identical to that which the personal representative must publish in the local newspaper which gives all creditors two months after the date of publication of the first notice in the newspaper to present their claims or be forever barred.⁶⁸⁹ The state's claim is given priority under Nebraska's Decedent's Estates Statute after the cost of estate administration, reasonable funeral expenses, and debts and taxes with preference under federal law.⁶⁹⁰ The state's claim has equal priority with the patient's last medical and hospital expenses.⁶⁹¹

Spousal Recovery: The recovery statute expressly defers recovery until after the death of the surviving spouse, if any, and only when the patient is not survived by a child who either is under 21 or is blind or totally disabled per SSI criteria.⁶⁹² Nebraska's rules are not so specific as to mandate recovery against a surviving spouse's estate but are broad enough to mirror other states that have interpreted such deferral as license to continue pursuing assets beyond the patient's estate; however, the CSRA language of the eligibility portion of Nebraska's Medicaid Assistance Act expressly prohibits recovery against any assets designated as protected under the CSRA for the Community Spouse.⁶⁹³

Liens: Nebraska does not employ TEFRA liens against the patient's home or other property in order to secure recovery.

Partnership Program: Nebraska's partnership program is authorized by statute at Neb. Rev. St. §68-1095.01, which authorizes its administration by the Nebraska Department of Health and Human Services.

Hardship Waiver: Nebraska authorizes the Department of Health and Human Services to waive or compromise its claim if it determines doing so would be in the best interest of the state or if recovery would result in an undue hardship.⁶⁹⁴

28. Nevada (NV)

Governing Law: Nevada's estate-recovery statute is N.R.S. 422.29302.

Estate Scope: Estate recovery is limited to the estate in any probate proceedings.⁶⁹⁵ However, if a transfer of real or personal property is made by a

⁶⁸⁷ Neb. Rev. Stat. §68-919(1).

⁶⁸⁸ Neb. Rev. Stat. §68-919(2).

⁶⁸⁹ Neb. Rev. Stat. §30-2483.

⁶⁹⁰ Neb. Rev. Stat. §30-2487(a).

⁶⁹¹ Ibid.

⁶⁹² Neb. Rev. Stat. §68-919.

⁶⁹³ Neb. Rev. Stat. §68-923(4).

⁶⁹⁴ Neb. Rev. Stat. §68-919(5).

Medicaid recipient for less than fair-market value, the state can use the fraudulent conveyance statute in N.R.S. Chapter 112 to recoup such assets for purpose of recovery.⁶⁹⁶

Spousal Recovery: Recovery is delayed if there is a surviving spouse, or a child under 21, blind or disabled.⁶⁹⁷ The government's interest in collecting the cost of Medicaid services provided to a patient survives and continues with any recipient's property even though the state is estopped from executing its interest until the surviving spouse's death.⁶⁹⁸ Beyond that, the state is fully authorized to recover from the undivided estate of the patient and any recipient of money or property from the undivided estate of the patient.

Liens: Nevada authorizes the use of liens on property either before or after the death of the patient.⁶⁹⁹ After death, the lien can be placed on the individual estate of the deceased patient.⁷⁰⁰ However, the Nevada Supreme Court has found that post-death liens, while permissible during a surviving spouse's or qualified dependent's lifetime to ensure adequate protection of the government's legitimate claim and protect against fraudulent transfers, the use of a lien is not an absolute right.⁷⁰¹ Liens must provide adequate leeway for the qualified dependent owner to conduct a bona fide transaction with a property, such as selling it, refinancing it, or obtaining a reverse mortgage.⁷⁰² Also, the lien must clearly delineate a claim solely for whatever interest the deceased Medicaid recipient had in the property prior to death and not to the entire property if someone else shares an interest with the Medicaid recipient.⁷⁰³

29. New Hampshire (NH)

Governing Law: New Hampshire's principal estate-recovery statute is NH ST §167:14-9. Lien language is spread over non-successive statutes: NH ST §167:14 (Authorization); NH ST 167:16 (Enforcement); and NH ST §167:16-9a (Limitations).

Estate Scope: For the purposes of recovering the costs of medical assistance provided to the deceased patient, New Hampshire includes in the patient's estate all property, real or personal, which at the time of the patient's death was held by the patient in joint tenancy with the rights of survivorship or life estate for any such title or interest established on or after July 1, 2005.⁷⁰⁴ Recovery is limited to the value of the

⁶⁹⁵ N.R.S. 422.29302.

⁶⁹⁶ N.R.S. 422.29302(3).

⁶⁹⁷ N.R.S. 422.29302(2).

⁶⁹⁸ *State Dept. of Human Resources, Welfare Div. v. Estate of Ullmer*, 87 P.3d 1045, 120 Nev. 108 (2004).

⁶⁹⁹ N.R.S. 422.29306.

⁷⁰⁰ *Ibid.*

⁷⁰¹ *State Dept. of Human Resources, Welfare Div. v. Estate of Ullmer*, 87 P.3d 1045, 120 Nev. 108 (2004).

⁷⁰² *Id.* at 1054, 119.

⁷⁰³ *Ibid.*

⁷⁰⁴ NH ST. §167:14-a(VI)(a).

patient's ownership interest and does not extend to any interest in property for which the non-patient owner paid fair-market value for at the time the ownership interest was acquired.⁷⁰⁵ Additionally, New Hampshire's statute makes a clear and broad-sweeping provision for the recovery of assets in a revocable living trust.⁷⁰⁶ Specifically, all property, real or personal, in a revocable living trust is subject to recovery by the state for medical assistance provided to the grantor of the trust; and the state is authorized to make a claim against the trust assets by providing notice to the trustee of the amount owed to the state.⁷⁰⁷ New Hampshire probate law provides generally for a one-year statute of limitations⁷⁰⁸ on claims, with the possibility of an extension of time.⁷⁰⁹ In estates where the state has a claim but cannot recover due to the existence of a qualified survivor, the state probate code allows contingency claims to be filed in the decedent's estate and the assets to remain available to the estate administrator unless the recipient of estate assets agrees to give bond for the amount owed.⁷¹⁰

Spousal Recovery: Recovery is prohibited when there is a surviving spouse, minor, or disabled child.⁷¹¹ However, the New Hampshire Attorney General issued an opinion that held that the legislature intended that the state recover for assistance granted for medical aid after the death of the patient and after the death of the patient's surviving spouse.⁷¹² When a patient dies leaving a surviving spouse and the Division of Welfare of the Department of Health and Welfare cannot present to have its claim paid within one year after the appointment of an estate administrator because of the existence of a surviving spouse, the state is required to file a contingency claim under the probate code⁷¹³ to establish and protect the state's interests in recovery after the surviving spouse passes and there is no minor, blind, or disabled child in the line of succession.⁷¹⁴

Liens: The real property of the patient can be attached by lien for recovery of medical-assistance payments, subject to certain restrictions.⁷¹⁵ Lifetime liens are only allowed to be filed against the patient's property when it is determined, after notice and an opportunity for a hearing, that the patient cannot be expected to be discharged and return home.⁷¹⁶ No lien can be imposed on the patient's home if the patient's spouse, child under 21, blind, or permanently and totally disabled under SSI rules, or sibling with an equity interest who resided in the home for at least a year before the patient was admitted to the medical institution are currently residing in the home.⁷¹⁷ Any such lien is

⁷⁰⁵ Ibid.

⁷⁰⁶ NH ST. §167:14-a(V).

⁷⁰⁷ Ibid.

⁷⁰⁸ NH ST §556:5.

⁷⁰⁹ NH ST §556:28.

⁷¹⁰ NH ST §556:6.

⁷¹¹ NH ST §167:14-a(VI)(b).

⁷¹² 1 N.H. Op. A.G. 84.

⁷¹³ NHST §556:6.

⁷¹⁴ 1 N.H. Op. A.G. 84.

⁷¹⁵ NH ST §167:14(II).

⁷¹⁶ NH ST §167:16a(b).

⁷¹⁷ NH ST §167:16a(II).

considered dissolved if the patient returns home.⁷¹⁸ Additionally, there can be no recovery of a home with a lien against it when there is a sibling of the patient who lived in the home for a year before the patient's admission to the medical institution and who has lived there continuously since admission or there is a child who has resided in the home for two years prior to the parent's admission, provided care that delayed admission, and has continued to live in the home since the parent's admission.⁷¹⁹

Hardship Waiver: The state must provide notice to anyone taking property that is subject to a recovery claim of the amount of the claim.⁷²⁰ The notice, in addition to listing the members of the patient's family that would forestall recovery, must provide the persons receiving notice of their right to request a waiver for undue hardship and the procedure for doing so.⁷²¹ Anyone receiving such a notice has 30 days from receipt of the notice to acknowledge the notice and declare exemption or request a hardship waiver; otherwise the debt must be either settled and, if it is not, the state can pursue recovery in probate or superior court, as the case may be, to enforce the recovery.⁷²²

30. New Jersey (NJ)

Governing Law: New Jersey's estate recovery is found in the collection of statutes starting at N.J.S.A. 30:4D-7.1 through N.J.S.A. 30:4D-7.8 and New Jersey's Administrative Code at 10:49-14.1.

Estate Scope: New Jersey defines "estate" as all real and personal property and other assets included in the patient's estate under probate,⁷²³ as well as other real and personal property and other assets that the patient had any legal title to or interest in at the time of death, to the extent of that interest, including assets conveyed to a survivor, heir or assign of the patient through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.⁷²⁴ The administrative code, however, tailors such a broad definition by delineating several exceptions.⁷²⁵ Estates shall not include:

- i. A life estate in which the beneficiary held an interest during his or her lifetime but which expired upon the Medicaid beneficiary's death;
- ii. A living trust established by a third party for the benefit of the now-deceased patient, provided that it was a discretionary trust that Medicaid could not compel distributions from and the trust contained no assets that the patient had any

⁷¹⁸ NH ST §167:16a(III).

⁷¹⁹ NH ST §167:16a(IV)(b).

⁷²⁰ NH ST §167:14a(VI)(b).

⁷²¹ Ibid.

⁷²² Ibid.

⁷²³ N.J.S.A. 3B:1-1.

⁷²⁴ N.J.S.A. 30:4D-7.2.

⁷²⁵ N.J.A.C. 10:49-14.1(n).

interest in within five years of applying for Medicaid or five years before death; or

- iii. A testamentary trust established by a third party, including the spouse of the patient for the benefit of the patient, provided that the trust is a discretionary trust and the trust contains no assets that the patient held any interest in within either five years of applying for Medicaid or five years before death.⁷²⁶ Assets of the Community Spouse, other than those forming the CSRA, are considered assets of the patient if any interest was acquired from the patient within the five-year window preceding application and/or preceding death.⁷²⁷

The administrative code further clarifies that the term “life estate” in the estate definition means a life estate created on the death of the patient and the term “other arrangement” includes, without limitation, trusts or annuities in which the beneficiary had an interest to at the time of death, including ones established by third parties, subject to the exclusions discussed above.⁷²⁸

Spousal Recovery: No encumbrance or recovery shall be imposed against or sought from the estate of the deceased Medicaid recipient if there is a surviving spouse, or a child under 21, blind or permanently and totally disabled.⁷²⁹ For estate property that any family member of a deceased patient resided in that was also the patient’s primary residence and remains the family member’s primary residence, the state can record a lien against the property but not enforce the lien until the property is sold or the resident family member dies or vacates the property.⁷³⁰ For all estate recoveries, no lien of any kind and no right of recovery can either exist or be pursued until the absence of any surviving spouse or any minor, blind, or permanently and totally disabled children.⁷³¹

Liens: New Jersey authorizes the use of liens to be filed against the estate of a deceased Medicaid recipient.⁷³² Because of the expansive estate definition, the statute provides for the state to file liens against property owned by third parties that may be subject to a claim because of the patient’s ownership interest at death.⁷³³ Liens against the estate are considered preferred claims under and N.J.A.C. 3B:22-2.⁷³⁴ Unlike the traditional lifetime TEFRA lien which can be put on a Medicaid recipient’s property while he or she is alive, provided there is a determination that the patient will not return home, New Jersey does not authorize or make any provisions for such a lien. The liens in New

⁷²⁶ Ibid.

⁷²⁷ Ibid.

⁷²⁸ N.J.A.C. 10:49-14.1(l)(2).

⁷²⁹ Ibid.

⁷³⁰ N.J.A.C. 10:49-14.1(g).

⁷³¹ N.J.A.C. 10:49-14.1(j).

⁷³² N.J.A.C. 10:4D-7.2(a).

⁷³³ N.J.A.C. 10:4D-7.2(b).

⁷³⁴ N.J.A.C. 10:4D-7.2(d).

Jersey are not a viable tool until the death of the patient and only then are ostensibly used to secure recovery against non-probate assets or to solidify a claim in probate where assets are temporarily exempt from recovery because of one of the exemptions provided by law.⁷³⁵

When the lien is filed, it must specifically describe the extent of the deceased patient's interest that the lien attaches to, if it is known by the state when the lien is filed.⁷³⁶ The rules presume that, if ownership was tenants in common, then the decedent owned fifty percent; but if the property is held as tenancy by the entirety or joint tenancy with right of survivorship, the lien covers a hundred percent of the property.⁷³⁷

Partnership Program: New Jersey expressly recognizes that, when a Medicaid recipient has been afforded asset protection under a partnership policy, the state is prohibited from subsequently recovering from the estate an amount up to the value of the assets disregarded at the time of the eligibility determination.⁷³⁸

Hardship Waiver: For a waiver of recovery based on undue hardship, hardship can only be demonstrated in New Jersey if the estate subject to recovery is or would become the sole income-producing asset of the survivors, and pursuit of recovery is likely to result in one or more of the survivors becoming eligible for public assistance.⁷³⁹ There is a rebuttable presumption that no undue hardship exists if the hardship resulted from estate-planning methods under which assets were divested in order to avoid estate recovery.⁷⁴⁰ Once the state makes its claim, anyone seeking a waiver has 20 days to file a request.⁷⁴¹ Once the timely request is received by the state, the state has 45 days to grant or deny the request.⁷⁴² If the request is denied, a written request for hearing must be submitted by the person seeking the waiver within 20 days of receiving the denial.⁷⁴³

31. New Mexico (NM)

Governing Law: New Mexico's estate recovery is authorized by the Medicaid Estate Recovery Act codified at N.M.S.A. §27-2A-2 to §27-2A-9.

Estate Scope: New Mexico's version of "estate" is limited to the real and personal property and other assets of the patient which are subject to probate or administration pursuant to the provisions of the New Mexico's Uniform Probate Code.⁷⁴⁴

⁷³⁵ N.J.S.A. 30:4D-7.2a.

⁷³⁶ N.J.A.C. 10:49-14.1(m).

⁷³⁷ Ibid.

⁷³⁸ N.J.S.A. 30:4D-7.2a(a)(3).

⁷³⁹ N.J.A.C. 10:49-14.1(h).

⁷⁴⁰ Ibid.

⁷⁴¹ Ibid.

⁷⁴² Ibid.

⁷⁴³ Ibid.

⁷⁴⁴ N.M.S.A. §27-2A-3(B).

Spousal Recovery: Any recovery from an estate in New Mexico can only be made after the death of the patient's spouse, if any, and only at a time when the deceased patient has no surviving child who is under 21, blind, or disabled per SSI rules.⁷⁴⁵

Hardship Waiver: When the Human Services Department decides to recover from an estate, it is required to give notice of its intent to the personal representative or successor in interest of the estate of the deceased patient.⁷⁴⁶ The department can compromise, settle, or waive recovery when it deems doing so in the state's best interest.⁷⁴⁷ The department must waive recovery if recovery would work an undue hardship.⁷⁴⁸ Recovery is presumptively waived for hardship on the showing that an asset subject to recovery is a sole income-producing asset or a homestead of modest value.⁷⁴⁹

32. New York (NY)

Governing Law: New York's estate-recovery program is authorized under NY SOC SERV §369.

Estate Scope: New York defines the term "estate" as meaning all real and personal property and other assets included within the patient's estate and passing under the terms of a valid will or by intestacy.⁷⁵⁰ Notwithstanding such narrow definition of "estate," New York's statute also explicitly directs recovery from either a trustee, trust creator, or trust creator's spouse any beneficial interest of either the trust creator or trust creator's spouse in any trust, with the exception of a testamentary trust, for the costs of medical assistance furnished to, or on behalf of, the trust creator or the trust creator's spouse.⁷⁵¹ The "beneficial interest" is defined broadly to include the income or principal to which the trust creator or trust creator's spouse is automatically entitled to under the terms of the trust by right or by discretion of the trustee, assuming the full exercise of discretion for the distribution of the maximum amount to either the trust creator or the trust creator's spouse.⁷⁵²

Additionally, there is judicial support for the proposition in New York that the state can proceed in an action under its Debtor and Creditor Law to set aside certain fraudulent transfers of real and personal property and compel such property to be returned to the estate of the recipient of Medicaid to constitute estate assets against which a future claim could be asserted for recovery.⁷⁵³

⁷⁴⁵ N.M.S.A. §27-2A-7.

⁷⁴⁶ N.M.S.A. §27-2A-8.

⁷⁴⁷ N.M.S.A. §27-2A-5(C).

⁷⁴⁸ N.M.S.A. §27-2A-6.

⁷⁴⁹ N.M.S.A. §27-2A-6.

⁷⁵⁰ NY SOC SERV §369(6).

⁷⁵¹ NY SOC SERV §369(3).

⁷⁵² NY SOC SERV §369(3).

⁷⁵³ *Bandas v. Emperor*, 1983, 121 Misc.2d 192, 467 N.Y.S.2d 749.

Liens: Lifetime liens are allowed with respect to any real property of the patient who is not reasonably expected to be discharged from the medical institution and return home.⁷⁵⁴ No lien can be imposed upon the home if any of the following are lawfully residing in the home: the patient's spouse; the patient's child who is under 21, blind, or permanently and totally disabled; or the patient's sibling with an equity interest of the home who resided in the home for one year prior to the patient's institutionalization.⁷⁵⁵ Recovery is only allowed upon the sale of the property or from the estate of the patient.⁷⁵⁶ Recovery of liened assets and estates is only allowed after there is no surviving spouse, if any, and at a time when the patient has no surviving child under 21, blind, or permanently and totally disabled.⁷⁵⁷ Additionally, in the case of a lien on the patient's home, recovery is delayed until there is no sibling of the individual who lived in the home for a year before the patient's admission, who has continuously lived in the home henceforth, and is residing in the home, or a child of the patient who lived in the home for two years immediately prior to the patient's institutionalization, who provided care to the patient that delayed such institutionalization, and is also residing in the home.⁷⁵⁸

Spousal Recovery: Recovery is merely delayed until the death of the surviving spouse and so long as there is no child under 21, blind, or permanently disabled.⁷⁵⁹ The New York Court of Appeals has held that, although the federal law did not expressly provide for recovery of Medicaid payments from the "secondarily dying spouse's estate," the 1993 changes gave the power to the states to recover against the spouse's estate for certain categories of assets.⁷⁶⁰ The surviving spouse's estate is only liable for recovery against the patient's assets that were conveyed to the surviving spouse through joint tenancy and other specified forms of survivorship.⁷⁶¹ The principle that the DSS is entitled to reimbursement of the Medicaid benefits from the surviving spouse's estate has been reaffirmed numerous times.⁷⁶² Note that the trust inclusion language in the estate scope discussed above is so exceedingly broad as to cover any interest by either a patient or a patient's spouse, which necessitates that New York planners be highly mindful of such exposure before using any trusts.⁷⁶³ New York has also taken the position that the existence of any qualified persons for which delay of recovery is mandated (i.e., spouse, minor child, blind child, or disabled child) also prohibits the state from attempting to recover assets paid to someone else not in that category.⁷⁶⁴

⁷⁵⁴ NY SOC SERV §369(2)(a)(ii).

⁷⁵⁵ *Ibid.*

⁷⁵⁶ NY SOC SERV §369(2)(b)(i).

⁷⁵⁷ NY SOC SERV §369(2)(b)(ii).

⁷⁵⁸ NY SOC SERV §369(2)(b)(iii).

⁷⁵⁹ NY SOC SERV §369(2)(b)(ii).

⁷⁶⁰ *In re Estate of Craig*, 82 N.Y.2d 388, 604 N.Y.S.2d 908, 624 N.E.2d 1003, 1006 (1993).

⁷⁶¹ *Ibid.*

⁷⁶² *In re Estate of Klink*, 278 A.D.2d 883, 718 N.Y.S.2d 758, 759, 2000 N.Y. Slip Op. 11582.

⁷⁶³ NY SOC SERV §369(3).

⁷⁶⁴ *Matter of Estate of Andrews* (3 Dept. 1996), 234 A.D.2d 692, 650 N.Y.S.2d 470.

Partnership Program: New York, of course, has one of the four original partnership programs. The program is found at NY SOC SERV §367-f. The partnership program expressly provides for a disregard of assets for recovery through estates or liens on the home, equal to the resources exempted under the partnership program during eligibility.⁷⁶⁵

Hardship Waiver: New York universally adopts the federal criteria established by the Secretary of the U.S. Department of Health and Human Services as its criteria for the waiver of recovery based on undue hardship.⁷⁶⁶

33. North Carolina (NC)

Governing Law: North Carolina's Medicaid Estate Recovery Plan is codified at N.C.G.S.A. §108A-70.5 and articulated through regulations found at 10A NCAC 21D.0101 to 10A NCAC 21D.0103.

Estate Scope: North Carolina limits the scope of the estate to all real and personal property considered assets of the patient's estate available for the discharge of debt under its probate code.⁷⁶⁷ However, if a patient qualified for asset disregard under a partnership program policy (see Partnership Program below), then the state adopts the broader definition to include any other real and personal property or any other assets that the patient had any legal title to or interest in at the time of death (to the extent of such interest), including assets conveyed to a survivor, heir, or assign through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.⁷⁶⁸ The North Carolina Department of Health and Human Services serves as a fifth-class creditor in the patient's estate.⁷⁶⁹

Spousal Recovery: North Carolina is required to provide notice to Medicaid applicants that the state will file a claim for payments made on the patient's behalf; but the notice must also explain that trust recovery will not be claimed if the patient is survived by a legal spouse, or a child who is under 21, blind, or disabled.⁷⁷⁰ The existence of any of these persons presents a full bar for recovery.

Liens: Recovery applies to a patient who cannot be reasonably expected to be discharged and return home.⁷⁷¹ There are two circumstances that give rise to a presumption that the patient is not expected to return home: the patient's actual medical condition, based upon the level of care of the patient's admission, the physician's written statement or plan of care that indicates care needs are not temporary, or six months of continuous institutionalization.⁷⁷² Before a property can be encumbered by a

⁷⁶⁵ NY SOC SERV §367-f(1)(a).

⁷⁶⁶ NY SOC SERV §369(5).

⁷⁶⁷ N.C.G.S.A. §108A-70.5(b)(2); probate code: N.C.G.S.A. §28 A-15-1.

⁷⁶⁸ N.C.G.S.A. §108A-70.5(b)(2).

⁷⁶⁹ N.C.G.S.A. §108A-70.5(c); probate code: N.C.G.S.A. §28 A-19-6.

⁷⁷⁰ 10A NCAC 21D.0101(b)(2).

⁷⁷¹ 10A NCAC 21D.0102(a).

⁷⁷² 10A NCAC 21D.0102(c).

TEFRA lien, the state must give the patient notice of the state's determination within three working days,⁷⁷³ and provide the patient with an opportunity to request a reconsideration review.⁷⁷⁴

Partnership Program: North Carolina's partnership program is codified at N.C.G.S.A. §58-55-55 through N.C.G.S.A. §58-55-80. Qualified policies, under the partnership program, provide the patient with asset disregard equal to the amount of long-term care insurance benefits paid out and protection from any subsequent recovery up to the amount of those same asset levels.⁷⁷⁵ However, for anyone who is eligible for such protection, North Carolina uses the enhanced definition of "estate" to pursue assets over and above the protected assets disregarded by the partnership policy.

Hardship Waiver: North Carolina provides full waiver of recovery based on an undue hardship.⁷⁷⁶

34. North Dakota (ND)

Governing Law: NDCC, §50-24.1-07 to §50-24.1-08 mandates the recovery of assets from the estate of the patient.

Estate Scope: Although not specifically adopted by statute, North Dakota uses the enhanced definition of estate provided under federal law.⁷⁷⁷ Claims can be presented in the patient's estate or the estate of the surviving spouse (see Spousal Recovery below).⁷⁷⁸ Every personal representative, upon granting of letters of administration are testamentary, is required to forward to the North Dakota 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 legatees, devisees, surviving joint tenants, and/or heirs at law of the estate.⁷⁷⁹ If the claim is not paid in full, the personal representative is required to provide the department with a statement of assets and disbursements in the estate.⁷⁸⁰ Claims against the estate are considered preferred claims, superseded by expenses such as funeral expenses, expenses of the last illness not covered by Medicaid, and estate administration expenses.⁷⁸¹ The state's claim is considered a claim against the decedent arising before death and subject to the three-year statute of limitations provided in the probate code.⁷⁸²

⁷⁷³ 10A NCAC 21D.0102(d).

⁷⁷⁴ 10A NCAC 21D.0102(e).

⁷⁷⁵ N.C.G.S.A. §58-55-60(7) and N.C.G.S.A. §108A-70.4(c)(2).

⁷⁷⁶ N.C.G.S.A. §108A-70.5(d).

⁷⁷⁷ *Estate of Wirtz*, 2000 N.D. 9, 607 N.W.2d 882, *Estate of Thompson*, 1998 N.D. 226, 586 N.W.2d 847.

⁷⁷⁸ *Ibid.*

⁷⁷⁹ NDCC, §50-24.1-07(3).

⁷⁸⁰ *Ibid.*

⁷⁸¹ NDCC, §50-24.1-07(1).

⁷⁸² NDCC, §30.1-19-03; *Estate of Movey*, 1994, 521 N.W.2d 85.

Spousal Recovery: A claim cannot be required to be paid or interest begin to accrue during the lifetime of the patient's surviving spouse, nor while there is a surviving child under 21, blind, or permanently and totally disabled.⁷⁸³ Claims brought timely to the deceased patient's estate are not to be disallowed because of this delay.⁷⁸⁴ The obligation to repay benefits arises during the recipient's receipt of such benefits, even though the Department of Human Services' ability to recover is suspended by statute until the death of the recipient's surviving spouse.⁷⁸⁵ The Department of Human Services is authorized to trace assets formerly held by a Medicaid recipient and to recover from the estate of the recipient's surviving spouse assets in which the deceased recipient once had an interest.⁷⁸⁶ The department bears the initial burden when a claim is made of showing traceability.⁷⁸⁷

Without ambiguity, the recovery statute presumes that all assets in the deceased non-recipient spouse's estate are assets in which the Medicaid recipient had an interest at the time of the recipient's death.⁷⁸⁸ Such a presumption is, of course, rebuttable. Case law appears to be a bit more selective as to which assets in the surviving spouse's estate are considered recoverable when the federal law is superimposed on the state mandate. Separately-owned assets in the surviving spouse's estate or assets in which the deceased patient never held an interest are precluded from recovery.⁷⁸⁹ Recovery from the surviving spouse's entire estate, including assets not traceable from the recipient, is not allowed.⁷⁹⁰ However, the *Wirtz* court and its progeny did allow the enhanced definition of the estate to be read to allow recovery against the surviving spouse's estate if it is composed of property that was at any time held jointly with the recipient spouse, regardless of whether the Medicaid recipient had an interest in the property at the time of his or her death, an interest that is known and referred to under North Dakota law as an "equitable interest."⁷⁹¹

Liens: If the Department of Human Services determines that the patient is not expected to be discharged from the medical institution and return home, the state is considered to have a claim.⁷⁹² Presumably, the state is then allowed to levy a lien to secure its claim, since the statute uses the lifetime-discharge language usually associated with the precedent requirements for a TEFRA lien. Rather than expressly stating such, the statute lumps all of the claim triggers together and states that any claims arising from such triggers "must be allowed as a preferred claim against the decedent's estate."⁷⁹³

⁷⁸³ NDCC, §50-24.1-07(2).

⁷⁸⁴ *Ibid.*

⁷⁸⁵ *Estate of Thompson*, 1998, 586 N.W. 2d 847.

⁷⁸⁶ *Estate of Bergman*, 2004, 688 N.W.2d 187.

⁷⁸⁷ *Estate of Fisk*, 2010, 780 N.W.2d 697.

⁷⁸⁸ NDCC, §50-24.1-07(5).

⁷⁸⁹ *Estate of Wirtz*, 2000, 607 N.W.2d 882.

⁷⁹⁰ *Ibid.*

⁷⁹¹ *Ibid.*; See also: *Estate of Bergman*, 688 N.W.2d 187 (N.D.2004) and *Redfield v.*

Bitterman, 620 N.W.2d 570 (N.D. 2000).

⁷⁹² NDCC, §50-24.1-07(1).

⁷⁹³ *Ibid.*

Partnership Program: The North Dakota partnership program provides asset disregard at the time of eligibility and recovery disregard in both the patient's estate and the patient's spouse's estate.⁷⁹⁴ The amount of assets protected from recovery is equal to the amount that the state demonstrates was paid by a partnership policy for long-term care provided to the patient.⁷⁹⁵

35. Ohio (OH)

Governing Law: Ohio's estate-recovery program is collectively comprised of R.C. §5111.11 to §5111.20 of the Public Welfare Code, R.C. §2113.041 and R.C. §2117.061 of the Probate Code, and R.C. §5302.221 of the Real Property Code.

Estate Scope: Estates subject to recovery in Ohio are comprised of all real and personal property and other assets to be administered under Ohio's probate code and any other real and personal property and other assets in which the patient had any legal title to or interest in at the time of death—to the extent of that interest—including assets conveyed to a survivor, heir, or assign of the patient through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.⁷⁹⁶ For non-probate estates subject to recovery, the state may present its claim directly to a financial institution via an affidavit that requests the financial institution to turn over recoverable assets.⁷⁹⁷ For non-probate real property which transfers to a beneficiary by transfer-on-death designation, the beneficiary's interest must be reported to the state by statute in order for the state to stake its claim.⁷⁹⁸ For probate estates of the patient or the patient's spouse, the administrator or executor is required to file a reporting form with the state 30 days after the granting of letters testamentary.⁷⁹⁹ The estate administrator is required to fill out and return to the state a reporting form listing the decedent's assets, or in the case of a surviving spouse's estate, the assets in the surviving spouse's estate that were also part of the deceased patient's estate.⁸⁰⁰ The state has either 90 days after the state receives the reporting form or one year after the decedent's death, whichever is later, to make a valid claim upon the decedent's estate for recovery.⁸⁰¹

Spousal Recovery: No recovery can be made from the deceased patient's estate while any of the following are alive: the patient's spouse; or the patient's child who is under 21, blind or disabled per SSI rules.⁸⁰² As the probate procedure delineated above more than hints to, the cost of Medicaid services provided to a deceased recipient can be recovered from the property that passes through the estate of the recipient's

⁷⁹⁴ NDCC, §50-24.1-07(6).

⁷⁹⁵ Ibid.

⁷⁹⁶ R.C. §5111.11.

⁷⁹⁷ R.C. §2113.041.

⁷⁹⁸ R.C. §5302.221.

⁷⁹⁹ R.C. §2117.061(B).

⁸⁰⁰ R.C. §2117.061(D).

⁸⁰¹ R.C. §2117.061(E).

⁸⁰² R.C. §5111.11(C).

surviving spouse.⁸⁰³ Recovery is only limited to the extent of assets that flowed into the surviving spouse's estate from the Medicaid recipient.⁸⁰⁴

Liens: Ohio authorizes the use of TEFRA liens to secure recovery.⁸⁰⁵ To institute a lifetime lien against the patient's property, the state must determine that the patient cannot be expected to be discharged from the institution and return home.⁸⁰⁶ A lien cannot be placed on the property if the following persons are living in the property: the patient's spouse; the patient's child who is under 21, blind or disabled per SSI rules; or the patient's sibling with an equity interest in the home and who also resided in the home for a full year immediately prior to the patient's institutional admission.⁸⁰⁷ No recovery can be made from the sale of property while a spouse or child who is under 21, blind or disabled are alive.⁸⁰⁸ Additionally, no recovery can be made from the patient's home subject to lien if either a sibling who resided in the home for a year before the patient's admission and continues to live in the home since or a child who delayed admission and resided in the home for two years before admission and continues to live in the home since are lawfully residing in the home.⁸⁰⁹ Ohio's estate recovery statute creates a rebuttable presumption of permanent institutionalization if the patient has been in an institution for at least six months or declares no intention to return home.⁸¹⁰

Partnership Program: Ohio established its partnership program under R.C. §5111.18. The estate-recovery program calls for the reduction of recovery by the amount of benefits received by the patient pursuant to the partnership policy.⁸¹¹

Undue Hardship: Ohio provides for the waiver of recovery for undue hardship.⁸¹² Waiver may not be absolute. Ohio can limit its waiver to the period of time where undue hardship exists.⁸¹³

36. Oklahoma (OK)

Governing Law: Oklahoma's estate-recovery program is covered in OK ST T. 63 §5051.3.

⁸⁰³ *Ohio Dept. of Job & Family Serv. v. Tultz*, (Ohio App. 9 Dist., 03-31-2003) 152 Ohio App.3d 405, 787 N.E.2d 1262, 2003-Ohio-1597.

⁸⁰⁴ R.C. §2117.061(D).

⁸⁰⁵ R.C. §5111.111.

⁸⁰⁶ R.C. §5111.11(A)(4)(c).

⁸⁰⁷ R.C. §5111.111(C).

⁸⁰⁸ R.C. §5111.11(C)(1).

⁸⁰⁹ R.C. §5111.11(C)(2).

⁸¹⁰ R.C. §5111.11(F).

⁸¹¹ R.C. §5111.11(D).

⁸¹² R.C. §5111.11(E).

⁸¹³ *Ibid.*

Estate Scope: Oklahoma limits its recovery to the homestead of the recipient.⁸¹⁴ The claim against the home is limited to the extent of the patient's ownership at the time the patient began receiving assistance.⁸¹⁵

Spousal Recovery: The home cannot be recovered against until after the death of the surviving spouse and only when any of the following are no longer living in the home: a child of the patient by blood or marriage under 20; an adult related to the patient by blood or marriage who is incapacitated; or a sibling of the patient who lived in the home for one year immediately prior to the patient's institutionalization, who has also resided there continuously since such admission.⁸¹⁶

Liens: Oklahoma's primary mechanism for recovery is a lien on the patient's home.⁸¹⁷ A lien can only be filed and enforced once the patient is determined not to be expected to be discharged and return home.⁸¹⁸ A one-year period of compensated care in a nursing home constitutes a determination that the patient is not expected to be discharged and return home.⁸¹⁹ In a departure from most states, Oklahoma limits its claim against the homestead for all payments of assistance after the expiration of one year from the date the patient became eligible for Medicaid assistance in the nursing home.⁸²⁰ The state must provide the patient notice and opportunity for a hearing.⁸²¹ No lien is to be filed on a patient's home while it is the lawful residence of: the patient's surviving spouse; patient's child by blood or marriage under 20; the patient's adult child by blood or marriage who is incapacitated; or the patient's sibling who has an equity interest in the property and resided in the home for one year immediately preceding patient's admission to the nursing home has remained there since.⁸²² If the lien is foreclosed against, then \$6,000 (less the value of any prepaid burial or burial insurance policies already owned by the patient) is to be set aside in an irrevocable trust to be used for the patient's funeral expenses.⁸²³

Partnership Program: Oklahoma's partnership program is found in OK ST T. 63 §1-1955.1 to §1-1955.6. Upon exhaustion of benefits from a partnership policy, the total amount of benefits paid for covered services becomes the amount of assets disregarded from the eligibility determination and any subsequent recovery by the state.⁸²⁴ Because the home is the only asset available for recovery in Oklahoma, the legal structure of the home's ownership and its equity value would dictate the amount of coverage that would be necessary with a partnership policy.

⁸¹⁴ OK ST T. 63 §5051.3(A).

⁸¹⁵ OK ST T. 63 §5051.3(F)(5).

⁸¹⁶ OK ST T. 63 §5051.3(F)(1).

⁸¹⁷ OK ST T. 63 §5051.3(A).

⁸¹⁸ Ibid.

⁸¹⁹ Ibid.

⁸²⁰ OK ST T. 63 §5051.3(B)(2).

⁸²¹ OK ST T. 63 §5051.3(B)(3) and §5052.

⁸²² OK ST T. 63 §5051.3(D).

⁸²³ OK ST T. 63 §5051.3(J).

⁸²⁴ OK ST T. 63 §1-1955.3(B) and (C).

37. Oregon (OR)

Governing Law: Oregon's estate-recovery statute is found in the "Recovery from Estates" subchapter of the Human Services Code found in O.R.S. §416.350 to O.R.S. §416.351.

Estate Scope: Under Oregon's statute, the term "estate" is defined as including all real and personal property and other assets in which the deceased patient had any legal title or interest in at the time of death including assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust or other similar arrangement.⁸²⁵ Transfers of real or personal property made by recipients of medical assistance are voidable and may be set aside.⁸²⁶

Spousal Recovery: Claims for recovery may be established against the patient's estate; but there shall be no recovery until after the death of the surviving spouse and only at such time when the patient has no child under 21, or who is blind or permanently and totally disabled.⁸²⁷ Recovery is expressly authorized by statute "from any recipient of property or other assets held by the individual at the time of death including the estate of the surviving spouse."⁸²⁸

Liens: Oregon makes no provision for the use of real property liens (TEFRA or otherwise) in recovery.

Hardship Waiver: The Oregon Department of Human Services is authorized to waive recovery when it deems it prudent to do so.⁸²⁹ A denial of a request for a hardship waiver can be the basis to request a fair hearing.⁸³⁰

38. Pennsylvania (PA)

Governing Law: Pennsylvania's estate-recovery statute is 62 P.S. §1412. However, the bulk of Pennsylvania's estate recovery rules are contained in Pennsylvania's Administrative Code 55 Pa. Code §258.1 to §258.14.

Estate Scope: The definition of property which is liable for recovery by the Department of Public Welfare is outlined in at length in 55 Pa. Code §258.3. In general, all estate property is subject to a claim and estate property includes all real personal property of the deceased patient which is subject to administration by a decedent's personal representative whether actually administered or not.⁸³¹ To clarify, the code states that property held by a decedent and another at the time of death as joint tenants

⁸²⁵ O.R.S. §416.350(5).

⁸²⁶ O.R.S. §416.350(2) and O.R.C. §411.620(2).

⁸²⁷ O.R.S. §416.350(1).

⁸²⁸ Ibid.

⁸²⁹ O.R.S. §416.340.

⁸³⁰ O.R.S. §411.095.

⁸³¹ 55 Pa. Code §258.3(a).

with rights of survivorship, or as tenants by the entireties, is not subject to a recovery claim.⁸³² Life insurance paid to a beneficiary other than the decedent's estate is excluded; but if the insurance proceeds are payable to the estate, they will be subject to a claim.⁸³³ Assets placed in trust prior to a patient's death are excluded from recovery, provided that the trust's assets are not payable to the decedent's estate.⁸³⁴ Assets in the decedent's estate directed to a testamentary trust are available for recovery because they are within the decedent's estate.⁸³⁵ Pennsylvania also provides a considerably generous exemption for Native Americans and anyone having received reparation payments which have been paid to special populations.⁸³⁶ The estate's personal representative has a duty to determine if the decedent received medical assistance from the commonwealth within the five years before the patient's death and, if so, give the Department of Public Welfare notice of the death by requesting a claim be presented.⁸³⁷ The five-year timeframe is for notification purposes and does not limit the claim.⁸³⁸ The address to be used to request a claim or for service of legal papers is: Third Party Liability Section, Department of Public Welfare, Estate Recovery Program, P. O. Box 8486, Harrisburg, PA 17105- 8486.⁸³⁹

A statement of the claim must be submitted to the personal representative within 45 days from the Department's receipt of the request.⁸⁴⁰ The recovery claim is divided when the priority of claim payment is determined.⁸⁴¹ Any amount of the claim for the six months of care preceding death is treated as a third-class claim which is only preempted by the cost of estate administration and the family exemption.⁸⁴² The remainder of the claim is treated as a miscellaneous claim with the lowest priority of all enumerated classes of claims.⁸⁴³ The personal representative of the estate is held personally liable for failure to properly pay the claim or for making a distribution when the claim is postponed without adequately securing the Department's claim.⁸⁴⁴

Spousal Recovery: Pennsylvania postpones collection of its claim until the last of the following occurs: the death of the surviving spouse; the death of any child who is blind or permanently disabled, per SSI standards; the date any surviving child turns 21; or the death of, property transfer by, or vacating of the property by any sibling who has an equity interest in the property and who has also been living in the home for at least a year prior to the patient's death.⁸⁴⁵ The personal representative must protect the

⁸³² 55 Pa. Code §258.3(b).

⁸³³ 55 Pa. Code §258.3(c).

⁸³⁴ 55 Pa. Code §258.3(d).

⁸³⁵ Ibid.

⁸³⁶ 55 Pa. Code §258.3(g).

⁸³⁷ 55 Pa. Code §258.4(a).

⁸³⁸ Ibid.

⁸³⁹ 55 Pa. Code §258.14.

⁸⁴⁰ 62 P.S. §1412(b) and 55 Pa. Code §258.4(b).

⁸⁴¹ 55 Pa. Code §258.6(a).

⁸⁴² 55 Pa. Code §258.6(a) and 20 P.S. §3392(3).

⁸⁴³ 55 Pa. Code §258.6(a) and 20 P.S. §3392(6).

⁸⁴⁴ 55 Pa. Code §258.8.

⁸⁴⁵ 55 Pa. Code §258.7(a).

commonwealth's claim during the period of postponement.⁸⁴⁶ The claim is considered protected if: the personal representative makes a distribution of the real property subject to a lien or mortgage in favor of the Department; perfects a security interest in favor of the Department in any item of personal property distributed by the estate worth over \$10,000; or places any liquid assets in excess of \$50,000 in a trust for the use of the appropriate heir(s) with the remainder payable to the state upon the trust beneficiary's death.⁸⁴⁷ The Department is not allowed to charge interest on the claim during the postponement period.⁸⁴⁸ The claim is subject to collection at the end of the postponement period.⁸⁴⁹

Liens: Pennsylvania does not employ lifetime TEFRA liens to secure the commonwealth's interests. As discussed in the previous paragraph, when a qualified heir of the decedent survives, the state postpones recovery.⁸⁵⁰ A personal representative's duty is to distribute the net estate after current expenses to the appropriate heirs and in doing so is authorized to use a lien, encumbrance, or mortgage of real property to secure the commonwealth's ultimate claim.⁸⁵¹

Partnership Program: Pennsylvania's partnership program is found at 40 P.S. §991-1110a and §991.1111. The program provides asset disregard for both eligibility and recovery.⁸⁵²

Hardship Waiver: The Department of Public Welfare must waive its claim in cases of undue hardship.⁸⁵³ Pennsylvania has one of the most generous undue hardship provisions in the country, which provides numerous presumptive situations which automatically classify as undue hardship. The following situations give rise to a mandatory finding of an undue hardship in Pennsylvania:

- i. With respect to the primary residence of the decedent, if the person requesting the waiver has continuously resided in the home for the two years immediately preceding the patient's receipt of nursing facility services, and the person has no other residence, and the person provided care or supported to the deceased patient for two years or lived with the deceased patient for two years during which time the patient received Medicaid-funded home and community-based services and also provided care to the patient for those two years or more;⁸⁵⁴

⁸⁴⁶ 55 Pa. Code §258.7(b).

⁸⁴⁷ 55 Pa. Code §258.7(c).

⁸⁴⁸ 55 Pa. Code §258.7(d).

⁸⁴⁹ 55 Pa. Code §258.7(f).

⁸⁵⁰ 55 Pa. Code §258.7(a).

⁸⁵¹ 55 Pa. Code §258.7(b).

⁸⁵² 40 P.S. §991.1110a(b).

⁸⁵³ 55 Pa. Code §258.10(a).

⁸⁵⁴ 55 Pa. Code §258.10(b).

- ii. The person requesting the waiver can get a waiver in an amount equal to any money spent by the person that was reasonable and necessary to maintain the patient's home while the patient was receiving home and community-based services or in a nursing facility, including moneys spent for real estate taxes, utility bills, home repairs and home maintenance such as lawn care and snow removal necessary to keep the property in habitable or sellable condition,⁸⁵⁵
- iii. With respect to an income-producing asset, such as a family farm, family business, or rental property,⁸⁵⁶ if a spouse, child, parent, sibling, or grandchild of the deceased patient uses the asset to generate the primary source of income for the household and there would be a gross family income of less than 250% of the federal poverty guideline without use of the asset,⁸⁵⁷ or
- iv. If the estate's gross value is \$2,400 or less, provided there is an heir.⁸⁵⁸

To request a hardship, a written request it may be sent to the Estate Recovery Program at the address listed above.⁸⁵⁹ If the Department denies the request, the affected person has 30 days from being notified in order to request a hearing.⁸⁶⁰ An appeal must be mailed to Bureau of Hearings and Appeals, Department of Public Welfare, P.O. Box 2675, Harrisburg, PA 17105.⁸⁶¹

39. Rhode Island (RI)

Governing Law: The Rhode Island estate-recovery plan is found in RI ST §40-8-15.

Estate Scope: The term "estate" in Rhode Island includes all real and personal property and other assets included or includable in the deceased patient's probate estate.⁸⁶² The total sum of medical assistance paid on behalf of a patient becomes a lien upon the estate but does not become effective or does not attach to estate property unless the Department of Human Services files a claim in the probate court.⁸⁶³ The claim is subject to the probate code's six-month window from the first publication of

⁸⁵⁵ 55 Pa. Code §258.10(e).

⁸⁵⁶ 55 Pa. Code §258.10(d).

⁸⁵⁷ 55 Pa. Code §258.10(c).

⁸⁵⁸ 55 Pa. Code §258.10(f).

⁸⁵⁹ 55 Pa. Code §258.10(i).

⁸⁶⁰ 55 Pa. Code §258.13(a).

⁸⁶¹ 55 Pa. Code §258.13(b).

⁸⁶² RI ST §40-8-15(a).

⁸⁶³ Ibid.

notice to creditors in which the claim must be filed or be forever barred.⁸⁶⁴ The estate must provide the Department with reasonable notice of the death of the patient and the property subject to administration as well as the names and addresses of all persons entitled to take a share of the estate.⁸⁶⁵ The amount of the claim, in addition to becoming a lien on the estate, also becomes a debt owed by the decedent's estate as any other creditor would present.⁸⁶⁶

Spousal Recovery: The lien which forms the basis of the state's claim against the estate is not allowed to attach against any estate of a Medicaid recipient survived by a spouse, child under 21, or child who is blind or permanently and totally disabled under SSI rules.⁸⁶⁷ The claim does not even appear to be held in abeyance or postponed, just strictly prohibited by the survival of an excepted heir.

Liens: Rhode Island does not employ lifetime TEFRA liens of property in the classical sense to secure estate assets prior to the recipient's death. Liens attach against probate estate assets but only at death and only if the recipient is not survived by the excepted heirs outlined above.⁸⁶⁸ Liens, in that sense, essentially become synonymous with the state's recovery claim.

Partnership Program: Rhode Island provides asset disregard for eligibility and estate recovery equal to the amount of qualifying long-term care insurance benefit payments provided pursuant to a partnership policy.⁸⁶⁹

40. South Carolina (SC)

Governing Law: South Carolina's estate-recovery statute is SC ST §43-7-460.

Estate Scope: South Carolina defines "estate" to mean the real property, personal property, and other assets included in an individual's probate estate.⁸⁷⁰ Estate claims are limited to exclude any recovery for home and community-based services, provided it is allowed by federal law.⁸⁷¹ Claims against the estate are given priority as established by the probate code found at SC ST §62-3-805(a)(2)(ii).⁸⁷²

Spousal Recovery: Estate recovery can only be made after the death of the patient's surviving spouse, if any, and only at a time when the decedent has no surviving child who is under 21 or who is blind or permanently and totally disabled under SSI rules.⁸⁷³

⁸⁶⁴ RI ST §40-8-15(a) and RI ST §33-11-5(a).

⁸⁶⁵ RI ST §40-8-15(b).

⁸⁶⁶ RI ST §40-8-15(c).

⁸⁶⁷ RI ST §40-8-15(a).

⁸⁶⁸ Ibid.

⁸⁶⁹ RI ST §40-8-22(a).

⁸⁷⁰ SC ST §43-7-560(F)(1) and SC ST §62-1-201(11).

⁸⁷¹ SC ST §43-7-460(G).

⁸⁷² SC ST §43-7-460(E).

⁸⁷³ SC ST §43-7-460(B).

Liens: South Carolina does not use liens (TEFRA or otherwise) to secure the state's recovery claim.

Hardship Waiver: South Carolina adopts the federal criteria issued by the Secretary of the U. S. Department of Health in Human Services for determining hardship waivers claimed by heirs or devisees of the deceased patient.⁸⁷⁴

41. South Dakota (SD)

Governing Law: South Dakota's estate-recovery statutes are found from SDCL §28-6-23 through §28-6-27.

Estate Scope: The amount to be recovered is a debt due to the South Dakota Department of Social Services by the decedent's probate estate or the estate of a surviving spouse of the decedent.⁸⁷⁵

Spousal Recovery: The estate recovery statute explicitly states that the Department of Social Services may file a claim against the estate of the surviving spouse of a medical-assistant recipient to satisfy the debt owed the state.⁸⁷⁶ However, a subsequent statute provides a mechanism for the surviving spouse to petition the Department for the purposes of limiting the financial responsibility of the surviving spouse's estate.⁸⁷⁷ 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.⁸⁷⁸ The petition to limit liability must be filed within six months from the patient's death.⁸⁷⁹

Liens: Any payment of medical assistance creates a debt and also creates a medical-assistance lien against any real property in which the patient had any ownership interest.⁸⁸⁰ The DSS must perfect the lien by filing it with the register of deeds in the county where the real property is located; the lien remains in effect for 20 years unless foreclosed or released.⁸⁸¹ Real estate deemed available to a Community Spouse under North Dakota's CSRA rules⁸⁸² is not subject to a medical-assistance lien.⁸⁸³ The lien takes priority behind any prior recorded encumbrances against the property.⁸⁸⁴

⁸⁷⁴ SC ST §43-7-460(C).

⁸⁷⁵ SDCL §28-6-23.

⁸⁷⁶ SDCL §28-6-23.

⁸⁷⁷ SDCL §28-6-23.1.

⁸⁷⁸ Ibid.

⁸⁷⁹ Ibid.

⁸⁸⁰ SDCL §28-6-24.

⁸⁸¹ SDCL §28-6-25.

⁸⁸² SDCL §28-6-17 and §28-6-22.

⁸⁸³ SDCL §28-6-26.

⁸⁸⁴ SDCL §28-6-27.

Partnership Program: The South Dakota partnership program provides explicitly for asset disregard by reducing countable assets during the eligibility process⁸⁸⁵ but does not directly provide for offset during recovery. The statute does provide for “asset protection up to the maximum as provided by federal law,” which could reasonably be interpreted to include protection for assets in recovery or lien applications.⁸⁸⁶

42. Tennessee (TN)

Governing Law: Tennessee’s estate-recovery statute is T.C.A. §71-5-116.

Estate Scope: The statute provides only for recovery from the decedent’s probate estate.⁸⁸⁷ Before any probate estate may be closed, with respect to a decedent who received assistance from TennCare, the personal representative of the estate must file with the probate clerk a release from TennCare that evidences that payment has been made, the bureau waives its claim, or that no amount is due.⁸⁸⁸ Additionally, the personal representative must provide notice of death of a deceased patient to TennCare within 60 days from the issuance of letters of administration or letters testamentary, provide the court notice whether the decedent was a TennCare recipient, and provide the notice to creditors specified in T.C.A. §30-2-306 to the Bureau of TennCare, which will prompt the bureau to file a claim.⁸⁸⁹ Case law indicates that the state uses the expanded definition of estate to pursue spousal recovery, discussed below, without the state having actually formally adopted such by statute.⁸⁹⁰

Spousal Recovery: Recovery can only be pursued from the deceased recipient’s estate after the death of the surviving spouse, if any, and only at a time when the deceased patient has no surviving child under 18, or no surviving child who is blind or permanently and totally disabled under SSI rules, or no child who has become blind or permanently disabled after reaching majority if the Bureau of TennCare and the personal representative of the estate agree repayment would constitute an undue hardship to the blind or disabled child.⁸⁹¹ If the two cannot agree, the court can determine undue hardship after *de novo* review.⁸⁹²

Liens: Tennessee prohibits the use of TEFRA liens for recovery from a nursing home patient.⁸⁹³

⁸⁸⁵ SDCL §28-6-37.

⁸⁸⁶ SDCL §28-6-38.

⁸⁸⁷ T.C.A. §71-5-116(c).

⁸⁸⁸ T.C.A. §71-5-116(c)(2).

⁸⁸⁹ T.C.A. §71-5-116(d).

⁸⁹⁰ *In Re Estate of Smith*, 2006 WL 3114250 (Tenn. Ct. App.).

⁸⁹¹ T.C.A. §71-5-116(c)(1).

⁸⁹² *Ibid.*

⁸⁹³ T.C.A. §71-5-116(a) and (b).

43. Texas (TX)

Governing Law: Texas uses a simple statute authorizing the Commissioner of Health and Human Services Commission to ensure the state Medicaid program implements estate recovery. The authorization statute is found at TX GOVT §531.077. Texas implemented its estate-recovery program by the enactment of Texas Administrative Code Rules §§373.103 to 373.307, which took effect on March 1, 2005. The result was the creation of the Medicaid Estate Recovery Program (MERP)⁸⁹⁴ which is managed by the Texas Department of Aging and Disability Services (DADS).

Estate Scope: The state is authorized to file a claim against the estate of a deceased Medicaid recipient, age 55 and older,⁸⁹⁵ who applied for certain long-term care services on or after March 1, 2005.⁸⁹⁶ The services that trigger recovery are: nursing facility services, intermediate care facility services for the mentally retarded, home and community-based services (HCBS), community attendant services (CAS), and the related cost of hospital and prescription drug services.⁸⁹⁷ Estate is defined to include the real and personal property of a deceased Medicaid recipient as further defined by the Texas Probate Code at §3(l).⁸⁹⁸ The acceptance of Medicaid assistance by the patient provides the basis for a Class 7 probate claim, as defined in §322 of the Texas Probate Code, in favor of MERP as an interested party in the estate of the deceased Medicaid recipient.⁸⁹⁹ MERP is then authorized to present its claim, under §298 of the Texas Probate Code, against the estate of the deceased Medicaid recipient in accordance with the priority established by §322 of the Texas Probate Code.⁹⁰⁰ Unsecured claims are allowed to be presented at any time before the estate is closed or within four months of receipt of notice from the estate's administrator pursuant to §298 of the Texas Probate Code.⁹⁰¹ MERP is required to file a claim within 70 days of receiving actual notice of death of the deceased Medicaid recipient.⁹⁰² However, within 30 days of the notification of death of a Medicaid recipient, MERP is required to provide a Notice of Intent to File a claim to the estate representative, the decedent's guardian, the decedent's agent under a durable power of attorney, the decedent's agent under a medical power of attorney, or any family members who have acted on behalf of the decedent if MERP is aware of the person and has his or her address.⁹⁰³ All payments on estate-recovery claims must be made payable to the "Texas Medicaid Account for Long-Term Care," and must be mailed to: MERP, P.O. Box 13247, Austin, TX 78711.⁹⁰⁴

⁸⁹⁴ Texas Admin. Code, Rule §373.101.

⁸⁹⁵ Texas Admin. Code, Rule §373.103(a)(1).

⁸⁹⁶ Texas Admin. Code, Rule §373.103(a)(2).

⁸⁹⁷ Texas Admin. Code, Rule §373.103(c).

⁸⁹⁸ Texas Admin. Code, Rule §373.105(6).

⁸⁹⁹ Texas Admin. Code, Rule §373.201.

⁹⁰⁰ Texas Admin. Code, Rule §373.203(a).

⁹⁰¹ Texas Admin. Code, Rule §373.203(b).

⁹⁰² Texas Admin. Code, Rule §373.205(b).

⁹⁰³ Texas Admin. Code, Rule §373.307(a).

⁹⁰⁴ Texas Admin. Code, Rule §373.219(a).

Texas provides generous exemptions from recovery. The state provides deductions against recovery for home maintenance and care costs. Necessary and reasonable expenses for maintaining the home (e.g., taxes, utilities, insurance, repairs, etc.) may be deducted from the state's claim if proper documentation can be provided.⁹⁰⁵ Any care costs, including payment of personal-attendant care that delayed the patient's institutionalization, are allowable offsets from the state's recovery claim.⁹⁰⁶ Medicaid rules also provide a litany of exempt assets protected for American Indians and Alaska Natives, in addition to the general class of exemptions discussed below under the Spousal Recovery discussion.⁹⁰⁷ Texas goes one step further and prohibits recovery if it is not cost effective.⁹⁰⁸ To determine if a claim is not cost effective, the rules provide for the following three criteria: the value of the recoverable estate is \$10,000 or less;⁹⁰⁹ the recoverable amount of Medicaid costs is \$3,000 or less;⁹¹⁰ or the cost involved in the sale of the property would be equal to or greater than the value of the property.⁹¹¹

Spousal Recovery: Texas does not attempt recovery beyond the estate of the patient. Claims are only pursued after the death of the patient and only if there is no surviving spouse; surviving child or children under 21 years of age; surviving child of any age who is blind or disabled as defined by 42 U.S.C. §1382c; or unmarried adult child residing continuously in the decedent's homestead for at least one year prior to the date of the Medicaid recipient's death.⁹¹² The existence of any of these classes of people presents a full bar to recovery in the decedent's estate.

Liens: Texas does not use liens (TEFRA or otherwise) to secure its estate recovery claim.

Partnership Program: The Texas partnership program is contained in V.T.C.A., Insurance Code §1651.101 to §1651.107 and V.T.C.A., Human Resource Code §32.251 to §32.257. Asset disregard is provided for eligibility and any subsequent recovery.⁹¹³

Hardship Waiver: MERP is prohibited from recovering against an estate if it would cause an undue hardship.⁹¹⁴ MERP is required to provide an undue hardship waiver request form along with the required Notice of Intent to File a claim.⁹¹⁵ An undue hardship will not be deemed to exist solely because recovery would deny heirs on anticipated inheritance or the circumstances giving rise to the hardship were created by,

⁹⁰⁵ Texas Admin. Code, Rule §373.213(a)

⁹⁰⁶ Texas Admin. Code, Rule §373.307(a).

⁹⁰⁷ Texas Admin. Code, Rule §373.207(b).

⁹⁰⁸ Texas Admin. Code, Rule §373.215.

⁹⁰⁹ Texas Admin. Code, Rule §373.215(1).

⁹¹⁰ Texas Admin. Code, Rule §373.215(2).

⁹¹¹ Texas Admin. Code, Rule §373.215(3).

⁹¹² Texas Admin. Code, Rule §373.207(a).

⁹¹³ V.T.C.A., Human Resources Code §32.253(b).

⁹¹⁴ Texas Admin. Code, Rule §373.209(a).

⁹¹⁵ Ibid.

or are the result of, estate planning methods that sheltered or divested assets in order to avoid estate recovery.⁹¹⁶ Waivers are automatically provided if:

- v. The estate property subject to recovery is a family business, farm, or ranch which was in existence for at least 12 months before the patient's death, is the primary income-producing asset of an heir, and produces half or more of the heir's livelihood which would be lost;⁹¹⁷
- vi. Recovery would cause an heir to be eligible for public and/or medical assistance;⁹¹⁸
- vii. Allowing one or more survivors would enable him or her or them to discontinue eligibility for public and/or medical assistance;⁹¹⁹
- viii. The Medicaid recipient received medical assistance as a result of a crime committed against the recipient;⁹²⁰ or
- ix. Other compelling reasons.⁹²¹

Homesteads are provided additional criteria upon which an exclusion from recovery can be claimed under the undue hardship waiver rules. A homestead can be protected from estate recovery based on hardship if:

- i. The tax appraisal district value of the homestead is less than \$100,000; but if the property exceeds this value, only the equity in excess of \$100,000 is subject to estate recovery;⁹²² or
- iii. One or more siblings or direct descendants of the deceased patient will inherit the homestead, provided that each person inheriting the homestead has gross family income below 300 percent of the Federal Poverty Level;⁹²³ however, if not all heirs qualify for the hardship waiver, only the percentage of the homestead corresponding to the qualifying heir or heirs' share of the homestead is exempt from recovery.⁹²⁴

⁹¹⁶ Texas Admin. Code, Rule §373.209(b).

⁹¹⁷ Texas Admin. Code, Rule §373.209(c)(1).

⁹¹⁸ Texas Admin. Code, Rule §373.209(c)(2).

⁹¹⁹ Texas Admin. Code, Rule §373.209(c)(3).

⁹²⁰ Texas Admin. Code, Rule §373.209(c)(4).

⁹²¹ Texas Admin. Code, Rule §373.209(c)(5).

⁹²² Texas Admin. Code, Rule §373.209(d)(1).

⁹²³ Texas Admin. Code, Rule §373.209(d)(2).

⁹²⁴ Texas Admin. Code, Rule §373.209(d)(3).

Undue hardship waiver requests must be submitted to: MERP, Hardship Waiver Request, P.O. Box 13247, Austin, TX 78711.⁹²⁵ MERP is required to make a ruling on the hardship waiver request within 40 days after receipt of the request.⁹²⁶ If MERP denies the request, an applicant can request review of the denial within 60 days of receiving the notice of denial, but the review is considered an informal process and not a hearing.⁹²⁷ MERP is required to review a request within 40 days of receiving the request.⁹²⁸

44. Utah (UT)

Governing Law: Utah's estate-recovery program is instituted under U.C.A. 1953 §26-19-13.5.

Estate Scope: Recovery is authorized against the deceased patient's estate and expanded to also include any trust when the Medicaid recipient is both the grantor and beneficiary of the trust,⁹²⁹ which is later referred to in the statute as the "recipient's inter vivos trust."⁹³⁰ Claims against the estate are to be brought like all regular claims of an estate and treated as reasonable and necessary medical expenses of the last illness under Utah's Uniform Probate Code U.C.A.1953 §75-3-805.⁹³¹ Claims against a trust are brought under U.C.A. 1953 §75-7-509 and §75-7-510.⁹³² It should be noted that the amount due only becomes a "lien" against the estate, but the use of the term lien is akin to a creditor claim against the estate and treated as such and not as a TEFRA lien as the use of the term may imply.⁹³³

Spousal Recovery: The estate-recovery statute provides that the state may recover from the recipient's estate or trust only if, at the time of death, the recipient has no surviving spouse; or child under 21; or child who is blind or permanently and totally disabled.⁹³⁴ The existence of any such qualified survivor is a full bar for recovery but not necessarily to the imposition of a lien, discussed below.

Liens: Utah makes no provision for the use of TEFRA liens to secure a patient's assets in anticipation of death but does provide that the debt becomes a lien against the estate or trust said the decedent patient.⁹³⁵ The lien is filed in the same manner as a creditor's claim in probate court.⁹³⁶

⁹²⁵ Texas Admin. Code, Rule §373.209(f).

⁹²⁶ Texas Admin. Code, Rule §373.209(e).

⁹²⁷ Texas Admin. Code, Rule §373.211.

⁹²⁸ Texas Admin. Code, Rule §373.211(b).

⁹²⁹ U.C.A. 1953 §26-19-13.5(2)(a).

⁹³⁰ U.C.A. 1953 §26-19-13.5(4).

⁹³¹ U.C.A. 1953 §26-19-13.5(2)(b) and (3)(a).

⁹³² U.C.A. 1953 §26-19-13.5(4).

⁹³³ U.C.A. 1953 §26-19-13.5(2).

⁹³⁴ U.C.A. 1953 §26-19-13.5(1).

⁹³⁵ U.C.A. 1953 §26-19-13.5(2)(a).

⁹³⁶ U.C.A. 1953 §26-19-13.5(3)(a).

45. Vermont (VT)

Governing Law: Vermont's recovery statute is contained in 33 V.S.A. §1909 and §1906a.

Estate Scope: Vermont limits recovery to the probate estate of the deceased patient and further provides an exemption for recovery against the homestead if it would pass to one or more lineal heirs or siblings of the deceased patient who either has income below 300 percent of the federal poverty level or who has contributed significantly, monetarily or otherwise, to the decedent so as to have allowed the decedent to delay or avoid nursing home placement.⁹³⁷

Spousal Recovery: Vermont prohibits recovery against a deceased patient's estate if he or she is survived by: a spouse, a child under 21, or a child who is blind or permanently and totally disabled.⁹³⁸

Partnership Program: Vermont recognizes a partnership program at 33 V.S.A. §1908a, which provides a total disregard of all assets and all recovery if a partnership policy is used.⁹³⁹ Such policies must provide coverage for at least three years of care.⁹⁴⁰

46. Virginia (VA)

Governing Law: Virginia authorizes its Department of Medical Assistance Services (DMAS) to operate an estate-recovery program in Va. Code Ann. §32.1-324 and §32.1-325. The program's definitive terms are contained in Virginia's Administrative Code at 12VAC30-20-141 and 12VAC30-20-560.

Estate Scope: Virginia seeks recovery from the estate of an individual who was age 55 or older when that person has received medical assistance from the commonwealth.⁹⁴¹ The administrative code defines the estate to include, with respect to the deceased recipient, all real and personal property and other assets held by the individual at the time of death and any other assets the individual had any legal title or interest (only to the extent of that interest) at the time of death.⁹⁴² Extended exemptions are provided for American Indians and Alaskan Natives.⁹⁴³ Annuities are specifically referenced as recoverable assets within the definition of the meaning of estate.⁹⁴⁴ Estate recovery will not be pursued by DMAS if it is not cost effective.⁹⁴⁵ The cost-effective threshold takes into account the following costs: staff time, litigation costs,

⁹³⁷ 33 V.S.A. §1906(a).

⁹³⁸ 33 V.S.A. §1906.

⁹³⁹ 33 V.S.A. §1908a(b).

⁹⁴⁰ Ibid.

⁹⁴¹ 12VAC30-20-141(C)(1).

⁹⁴² 12VAC30-20-141(A).

⁹⁴³ 12VAC30-20-141(C)(5).

⁹⁴⁴ 12VAC30-20-141(C)(8).

⁹⁴⁵ 12VAC30-20-141(F).

expert witness fees, deposition expenses, travel expenses, office supplies, postage, advertising, and publishing costs.⁹⁴⁶

Spousal Recovery: Virginia does not authorize recovery against the Community Spouse's estate. The regulations only provide for recovery after the death of the patient's surviving spouse, if any, and only at a time when the patient has no surviving child under age 21, or blind or disabled child as defined by the Social Security Act.⁹⁴⁷

Partnership Program: Virginia seeks recovery from individuals with long-term care insurance policies.⁹⁴⁸ However, no recovery is sought from an individual's estate to the extent payments have been made by a qualified long-term care partnership insurance policy.⁹⁴⁹ Va. Code Ann. §32.1-325 establishes Virginia's partnership program.⁹⁵⁰ Virginia provides asset disregard for eligibility determinations based upon the benefits provided to the patient from a qualified partnership policy.⁹⁵¹ Virginia also disregards the same amount of assets when seeking recovery from a patient's estate.⁹⁵²

Liens: Virginia does not impose liens for estate recovery.⁹⁵³

Hardship Waiver: Whenever recovery would work an undue hardship on the deceased patient's heirs, Virginia provides a waiver of recovery.⁹⁵⁴ Anyone affected by estate recovery can apply for a waiver.⁹⁵⁵ When determining the merit of an application, special consideration is shown if an asset to be recovered against is the sole income-producing asset of the survivors (e.g., a family farm or other family business).⁹⁵⁶ A hardship waiver will also be granted if the homestead to be recovered against is of modest value.⁹⁵⁷ Modest value is defined, in reference to the homestead, as a home that is worth 50% or less of the average or median price, as contained in the most recent U.S. census data or any other such source of home value information relied on by the agency, of homes in the county or city, as appropriate, where the homestead is located as of the date of the patient's death.⁹⁵⁸ Heirs are allowed to establish a reasonable payment schedule to avoid recovery against nonliquid assets.⁹⁵⁹ A hardship waiver may be limited to the time period during which the undue hardship circumstances existed or continue to exist.⁹⁶⁰ An undue hardship shall not be deemed to

⁹⁴⁶ 12VAC30-20-141(F)(2).

⁹⁴⁷ 12VAC30-20-141(C).

⁹⁴⁸ 12VAC30-20-141(C)(3).

⁹⁴⁹ *Ibid.*

⁹⁵⁰ 12VAC30-10-560(A)(3).

⁹⁵¹ 12VAC30-40-290(G).

⁹⁵² 12VAC30-10-560(A)(3).

⁹⁵³ 12VAC30-10-560(C); See also: 12VAC30-20-130.

⁹⁵⁴ 12VAC30-20-141(D).

⁹⁵⁵ *Ibid.*

⁹⁵⁶ 12VAC30-20-141(D)(1).

⁹⁵⁷ *Ibid.*

⁹⁵⁸ 12VAC30-20-141(A).

⁹⁵⁹ 12VAC30-20-141(D)(3).

⁹⁶⁰ 12VAC30-20-141(D)(4).

exist if the beneficiary created the hardship by estate planning methods that include divestment.⁹⁶¹ Any adverse determination made by DMAS can be appealed to its Appeals Division for a fair hearing pursuant to 12VAC30-110.⁹⁶²

47. Washington (WA)

Governing Law: Washington's estate-recovery program is contained in R.C.W.A. 43.20B.080, 43.20B.090, 43.20B.750 and 74.39A.170.

Estate Scope; Washington provides for recovery against the patient's estate and from non-probate assets defined by RCWA 11.02.005.⁹⁶³ The estate exempts tribal artifacts and other assets held by individual Native Americans.⁹⁶⁴ Additionally, the statute mentions explicit recovery against life estates or joint tenancy interest in real property, as it is held by the patient prior to death.⁹⁶⁵ The value of the life estate subject to recovery is the value of patient's interest in the life estate immediately before death.⁹⁶⁶ The value of joint tenancy interest subject to recovery is the value of the patient's fractional interest had the patient and the joint tenants owned the property as tenants in common on the date of the patient's death.⁹⁶⁷

Spousal and Domestic Partner Recovery: Recovery is not provided when the patient is survived by a spouse, but Washington goes one step further and provides an undue hardship to be automatically applied to recovery attempted against assets transferring to a "surviving domestic partner" whenever recovery would not have been permitted if the domestic partner had been an actual spouse.⁹⁶⁸ This provision makes Washington's estate recovery statute one of the most socially progressive in the country.

Liens: The Department of Social and Health Services is authorized to file TEFRA liens before the patient's death and to seek recovery from the patient's estate or upon the sale of the property.⁹⁶⁹ Liens can be foreclosed upon in either of these situations.⁹⁷⁰ A lien authorized by statute relates back to any real property that the deceased patient had an ownership interest in immediately before death and is effective as of that date or the date of recording, whichever is earlier.⁹⁷¹ Liens against life estates and joint tenancy property are limited as described above and only enforceable against a property right that vested after July 1, 2005.⁹⁷² The state must provide the record titleholder and/or

⁹⁶¹ 12VAC30-20-141(D)(5).

⁹⁶² 12VAC30-20-141(G).

⁹⁶³ R.C.W.A. 43.20B.080(3).

⁹⁶⁴ R.C.W.A. 43.20B.080(5)(b).

⁹⁶⁵ R.C.W.A. 43.20B.080(7).

⁹⁶⁶ R.C.W.A. 43.20B.080(7)(a).

⁹⁶⁷ R.C.W.A. 43.20B.080(7)(b).

⁹⁶⁸ R.C.W.A. 43.20B.080(5)(a).

⁹⁶⁹ R.C.W.A. 43.20B.080(8).

⁹⁷⁰ R.C.W.A. 43.20B.080(2).

⁹⁷¹ R.C.W.A. 43.20B.080(6).

⁹⁷² R.C.W.A. 43.20B.080(7).

purchaser under land contract with prior notice and a hearing appointment before a lien is recorded.⁹⁷³ A patient deemed eligible for a TEFRA lien notice must be provided an opportunity for a hearing on the state's determination that the patient is not expected to be discharged and return home.⁹⁷⁴

48. West Virginia (WV)

Governing Law: After attempts to exempt itself from the requirement to institute estate recovery,⁹⁷⁵ West Virginia has its estate recovery codified at W.Va. Code §9-5-11c.

Estate Scope: The West Virginia Department of Health and Human Resources is authorized to pursue a recovery claim against the probate estate of the deceased patient.⁹⁷⁶ Such claims for recovery are classified, for prioritization purposes, in the class of debts due the state.⁹⁷⁷ West Virginia also allows the state to pursue actions against fraudulent conveyances in order to set them aside for inclusion in the recoverable estate.⁹⁷⁸

Spousal Recovery: The state can only recover after the death of the patient's surviving spouse, if any, and only after such a time as the individual has no surviving children under 21 or who meet the SSI definition of blindness or permanent and total disability.⁹⁷⁹

Liens: The state is both authorized to file a lien against the patient's estate⁹⁸⁰ and to place a lien upon the patient's property when, after notice and opportunity for a hearing, the state determines the patient is permanently institutionalized.⁹⁸¹ No lien may be imposed on such individual's home when the home is the lawful residence of: the patient's spouse; the patient's child under 21; the patient's child who meets the SSI definition of blindness and permanent and total disability; or the patient's sibling who has an equity interest in the home and resided there for a year immediately before the patient's admission to a medical institution.⁹⁸²

Partnership Program: West Virginia's partnership program is codified at W.Va. Code §9-4E-1 to §9-4E-3. The partnership program provides a dollar-for-dollar asset disregard for determining eligibility and any subsequent recovery.⁹⁸³

⁹⁷³ R.C.W.A. 43.20B.080(1).

⁹⁷⁴ R.C.W.A. 43.20B.080(8)(a)(ii).

⁹⁷⁵ *West Virginia v. U.S. Dept. of Health and Human Services*, 289 F.3d 281 (2002).

⁹⁷⁶ W. VA. Code, §9-5-11c(a).

⁹⁷⁷ *Ibid.*

⁹⁷⁸ W. VA. Code, §9-5-11c(e).

⁹⁷⁹ W. VA. Code, §9-5-11c(b).

⁹⁸⁰ W. VA. Code, §9-5-11c(a).

⁹⁸¹ W. VA. Code, §9-5-11c(c).

⁹⁸² W. VA. Code, §9-5-11c(d).

⁹⁸³ W. VA. Code, §9-4E-3(e).

Hardship Waiver: The Department of Health and Human Resources is authorized to compromise or reduce the amount of any TEFRA lien⁹⁸⁴ or any claim against the estate⁹⁸⁵ where such would cause substantial hardship to the surviving dependents of the deceased patient.

49. Wisconsin (WI)

Governing Law: Wisconsin's estate-recovery program is found at W.S.A. 49.496.

Estate Scope: Recovery is directed to the probate estate of the deceased patient.⁹⁸⁶ The amount of the claim must be reduced by the court to exempt certain personal property, including the decedent's wearing apparel and jewelry held for personal use; household furniture, furnishings and appliances; and other tangible personal property not used in trade, agriculture, or other business.⁹⁸⁷

Spousal Recovery: Estate-recovery claims are not allowable if the deceased patient has a surviving child who is under 21 or disabled or a surviving spouse.⁹⁸⁸ If the claim is not allowed because of the existence of such persons, the probate court is required to assign the interest in any home subject to probate to a lien in favor of the Department of Health and Family Services for the amount of the claim.⁹⁸⁹ Any lien placed on the property by the probate court may not be enforced as long as any of the following survive the patient: a spouse; a child under 21; or a child who is disabled.⁹⁹⁰ This is all tempered by the appellate court ruling which held that recovery of benefits from the estate of the patient's surviving spouse is pre-empted by federal law.⁹⁹¹

Liens: In addition to post-death liens when a claim is not allowable, Wisconsin's statute explicitly authorizes TEFRA liens on a patient's home if the patient cannot reasonably be expected to be discharged and return home.⁹⁹² The state is precluded from obtaining a lien if any of the following are lawfully residing in the home: patient's spouse; patient's child under 21 or disabled; or patient's sibling with an ownership interest and who lived in the home for a year prior to the patient's admission to the nursing home or hospital.⁹⁹³ Before a lien can be obtained on a patient's home, the state is required to notify the patient in writing and provide the patient with an opportunity for a fair hearing.⁹⁹⁴ Liens are properly obtained by filing a lien in the register of deeds office in the county where the property is located.⁹⁹⁵ During the patient's

⁹⁸⁴ W. VA. Code, §9-4E-3(c).

⁹⁸⁵ W. VA. Code, §9-4E-3(f).

⁹⁸⁶ W.S.A. 49.496(3)(a).

⁹⁸⁷ W.S.A. 49.496(3)(am).

⁹⁸⁸ W.S.A. 49.496(3)(b).

⁹⁸⁹ W.S.A. 49.496(3)(c).

⁹⁹⁰ W.S.A. 49.496(3)(d).

⁹⁹¹ *Matter of Estate of Budney*, (App. 1995), 541 N.W.2d 256, 1997 Wis.2d 948.

⁹⁹² W.S.A. 49.496(2)(a).

⁹⁹³ W.S.A. 49.496(2)(b).

⁹⁹⁴ W.S.A. 49.496(2)(c).

⁹⁹⁵ W.S.A. 49.496(2)(d).

lifetime, the state may not enforce a TEFRA lien unless the patient sells the home and does not have a living child under 21 or disabled or a living spouse.⁹⁹⁶ The state is also precluded from enforcing a lien after the patient's death as long as any of the following survives the patient: a spouse; a child under 21 or disabled; a child who resides in the home, if that child lived there for 24 months before the patient's admission to the nursing home or hospital and provided care that delayed such admission; or a sibling who lives in the home who lived there for a full year before the patient was admitted to the nursing home.⁹⁹⁷

Partnership Program: Wisconsin's partnership program is contained in W.S.A. 49.45. The estate-recovery statute expressly requires recovery from estates to be offset by the exclusion amounts provided by the partnership-program policy.⁹⁹⁸

Hardship Waiver: Wisconsin waives claims upon the finding of an undue hardship.⁹⁹⁹ If recovery does not work an undue hardship and if the heirs wish to satisfy a claim without selling a non-liquid asset that is subject to recovery, Wisconsin also allows the heir to establish a payment schedule, subject to reasonable interest.¹⁰⁰⁰

50. Wyoming (WY)

Governing Law: Wyoming's estate-recovery program is found in W.S. 1977 §42-4-206 and §42-4-207.

Estate Scope: Wyoming's statute defines "estate" to include all real and personal property and other assets included in the patient's probate estate, as well as other real and personal property and other assets in which the patient had any legal title or interest at the time of the death to the extent of the interest, including assets conveyed to a survivor, heir, or assign through joint tenancy, tenancy in common, survivorship life estate, living trust, or other arrangement.¹⁰⁰¹ Additionally, Wyoming provides for any transfers of real or personal property to be set aside by an action in district court if done on or after the lookback date.¹⁰⁰² The state's claim is considered an expense of the last illness and not restricted by any statute of limitations.¹⁰⁰³

Spousal Recovery: Wyoming provides for broad recovery against the estate of either the recipient spouse or the surviving spouse. If a decedent who was single, or who was the surviving spouse of a married couple, is survived by a child under 21, blind or permanently and totally disabled under SSI rules, no claims shall be filed against the estate. A claim for medical assistance rendered to a predeceased spouse, filed against the estate of the surviving spouse who did not receive assistance, is limited to the value

⁹⁹⁶ W.S.A. 49.496(2)(e).

⁹⁹⁷ W.S.A. 49.496(2)(f).

⁹⁹⁸ W.S.A. 49.496(3)(a).

⁹⁹⁹ W.S.A. 49.496(6m).

¹⁰⁰⁰ W.S.A. 49.496(7).

¹⁰⁰¹ W.S. 1977 §42-4-206(g).

¹⁰⁰² W.S. 1977 §42-4-207(h).

¹⁰⁰³ W.S. 1977 §42-4-206(b).

of the assets of the estate that were considered marital property or jointly owned property at anytime during the marriage.¹⁰⁰⁴

Liens: Wyoming authorizes TEFRA liens on real property of a patient who the state determines, after notice and opportunity for hearing, cannot reasonably be expected to return home.¹⁰⁰⁵ Additionally, Wyoming authorizes liens against the property of the deceased patient's estate to secure recovery where it is delayed.¹⁰⁰⁶ Both pre-death and post-death liens can be recovered against upon the sale of the property.¹⁰⁰⁷ No pre-death lien can be imposed on a patient's home if any of the following are living in it: the patient's spouse; the patient's child under 21, blind or disabled per SSI rules; or a sibling of the patient with an equity interest in the home who lived in the house for at least a year prior to the patient's admission to the medical institution.¹⁰⁰⁸ Furthermore, no pre-death lien can be recovered against if either the following are lawfully residing in the home on a continuous basis since the patient's admission: a sibling of the patient who resided in the home for a year before the patient's admission or child of the patient who resided in the home for at least two years prior to the patient's admission and who establishes that he or she provided care to the patient that permitted the patient to live at home instead of being institutionalized.¹⁰⁰⁹

Hardship Waiver: The Department of Family Services is required to waive recovery claims if they work an undue hardship on the basis of criteria established by the Secretary of the U.S. Department of Health and Human Services.¹⁰¹⁰

¹⁰⁰⁴ W.S. 1977 §42-4-206(c).

¹⁰⁰⁵ W.S. 1977 §42-4-207(c).

¹⁰⁰⁶ W.S. 1977 §42-4-207(j).

¹⁰⁰⁷ W.S. 1977 §42-4-207(h).

¹⁰⁰⁸ W.S. 1977 §42-4-207(d).

¹⁰⁰⁹ W.S. 1977 §42-4-207(e).

¹⁰¹⁰ W.S. 1977 §42-4-206(f).