

THE STATE GIVETH AND THE STATE TAKETH AWAY: IN PURSUIT OF A PRACTICAL APPROACH TO MEDICAID ESTATE RECOVERY

Jon M. Zieger

In the wake of skyrocketing Medicaid costs, numerous states have instituted estate recovery programs to infuse additional capital into the failing Medicaid system. However, as the "baby boom" generation begins to gray, questions as to the intrinsic economic fairness and administrative efficacy of such programs emerge. After acknowledging the need to lessen the financial strain created by Medicaid, Mr. Zieger traces the disparate approaches to Medicaid recovery embraced by state governments, as well as finds the common denominator between such seemingly diverse programs. Mr. Zieger also explores the potential impact such programs may have on the elderly, including the impoverished elder who is unable to secure legal advice and the financially secure individual who opts to utilize estate planning as a means of sheltering assets. Moreover, Mr. Zieger points out the way that case law leaves unresolved the amount of assets the surviving family of the Medicaid recipient ultimately may receive from the decedent's estate. Finally, Mr. Zieger concludes by balancing the needs of the genuinely poor with the state's concern for fiscal stability. In balancing these competing needs, Mr. Zieger advocates limiting recovery to estates of a certain size, furnishing adequate notice so that potential Medicaid recipients may make informed decisions as to whether to accept or decline such assistance, and limiting the scope of the Medicaid recipient's estate by embracing the definition of estate as promulgated under state probate codes.

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I. Introduction

As the cost of providing medical assistance to Medicaid¹ recipients has continued to increase dramatically in the decades since that program's inception,² states have sought various methods of reducing Medicaid expenditures. Estate recovery programs, designed to recoup Medicaid assistance from a recipient's estate, represent one method states have implemented to reduce Medicaid costs. Under these programs, the cost of medical assistance provided to a recipient becomes a debt of the recipient's estate or the estate of the recipient's surviving spouse.³ As part of its effort to recover these expended funds, a state will enact statutory guidelines and empower an agency to track the estates of former Medicaid recipients and their spouses. In certain cases, the agency may place liens upon the property of the recipient while he or she is still alive and may recover on such a lien.⁴ The ability to do so, however, is limited and varies substantially from state to state.⁵ Under certain conditions, the agency will collect the amount expended on the recipient's behalf, either upon the liquidation of the recipient's assets during the recipient's life or as a creditor from the recipient's estate.⁶ The issues for consideration are thus twofold. First, to what extent should the assets of Medicaid debtors be protected recovery, and second, what recipient safeguards should accompany this type of recovery? Concomitantly, the degree of protection to be afforded to the state as creditor also should be determined.

This note supports the concept of estate recovery programs as a useful and just method of controlling Medicaid costs but proposes an adjustment to the balance of such programs to achieve maximum re-

1. Although states have various names for their medical assistance programs for the poor and disabled, this note will use the term "Medicaid" to refer to these programs, both in the aggregate and for individual state programs.

2. From 1980 to 1996 (estimated) the total outlay of Medicaid funds has increased from \$24 billion to \$159 billion. See HEALTH CARE FIN. ADMIN., HCFA STATISTICS: EXPENDITURES, PROGRAM OUTLAYS/TRENDS tbl.26 (Aug. 5, 1997) <<http://www.hcfa.gov/stats/hstats96/blustat2.htm>>. In Florida, the state with the highest proportion of elderly citizens, Medicaid expenditures are expected to reach between three and four billion dollars by the year 2000. See Burton D. Dunlop et al., *Medicaid Estate Planning and Implementation of OBRA '93 Provisions in Florida: A Policy Context*, 19 NOVA L. REV. 533, 536 (1995); see also *The Perfect Sunset*, *ECONOMIST*, Jan. 27, 1996, at 14 (noting that by the year 2010, Florida's expenditures are expected to grow as high as \$9 billion from the current level of \$1.6 billion).

3. See, e.g., 305 ILL. COMP. STAT. 5/5-13 (West 1995).

4. See *id.*

5. See *infra* notes 82-105 and accompanying text.

6. See *infra* notes 54-118 and accompanying text.

coveries while maintaining the smallest possible impact on the recipient or the recipient's family. This note will examine the need for recovery and the policies behind estate recovery programs, namely defraying current costs and reducing future expenditures by encouraging elders to plan alternative methods of funding long-term care. Additionally, it will consider the effectiveness of current programs at achieving these goals. It will also briefly contemplate various planning strategies for avoiding estate recovery and certain challenges that have been brought to the programs. Finally, in light of the unprecedented political change that potentially faces Medicaid, this note will present and argue for provisions of a model estate recovery plan which the states—if left unrestricted by the federal government—should adopt to regulate this difficult area.

Obviously, this note is written against a background of political tumult, the likes of which Medicaid has not seen in its thirty-two-year history. Even the most sagacious political observer cannot predict the final outcome for Medicaid or estate recovery. The elder law advisor will certainly consider what follows accordingly.

II. History of Medicaid and the Recovery Problem

A. Medicaid

The federal medical assistance, or Medicaid, program was established by Title XIX of the Social Security Act of 1965.⁷ It is a joint federal-state program, operated primarily by the states, that makes medical assistance available to certain eligible persons.⁸ Medicaid is more comprehensive than Medicare and many private insurance plans. It can cover prescription drugs, in-home care, and other services that are not covered by Medicare.⁹ Perhaps most importantly for the elderly, it often covers long-term care that Medicare will not.¹⁰ Nationally, reports indicate that Medicaid pays the cost of sixty per-

7. Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286.

8. As with most other elements of Medicaid, eligibility requirements differ from state to state, but federal law requires that certain groups be eligible for Medicaid under a state program in order for the state to receive federal funding. For a discussion of federal eligibility requirements, see *infra* notes 20-41 and accompanying text.

9. See 42 C.F.R. § 440.225 (1996).

10. See *id.* §§ 440.1-270; see also 42 U.S.C. § 1395(x) (1994) (setting forth the various restrictions on Medicare coverage of long-term care).

cent of all nursing home bed days.¹¹ This statistic demonstrates the tremendous need that exists for long-term care coverage of some kind, as well as the substantial economic challenges that confront states.

Medicaid is presently administered at both the federal and state levels. On the federal level, the Department of Health and Human Services oversees Medicaid through the Health Care Financing Administration (HCFA), the body empowered to oversee both Medicare and Medicaid.¹² The program currently provides medical services for approximately thirty-six million people in total,¹³ approximately 4.4 million of whom are elderly persons.¹⁴ States accepting federal Medicaid funds are required to designate a single state agency to administer or supervise the state Medicaid plan.¹⁵ This role typically will be fulfilled by the state's department of social services or similar agency with oversight responsibility for the state's other welfare programs.¹⁶ The day-to-day operation of Medicaid is generally maintained at the local level by city or county agencies.¹⁷ Recovery may, however, be carried on by a separate state agency with oversight responsibilities for various state reimbursement programs.¹⁸ As a condition of receiving federal funding, the operation of individual state programs must conform to certain broad federal restrictions.¹⁹

Setting guidelines for Medicaid eligibility is largely a state task, with certain important federal limits. Under federal guidelines various groups of persons are considered "categorically" eligible for Medi-

11. See Keren Brown Wilson & Connie J. Baldwin, *Are Nursing Homes Dinosaurs? The Nursing Home Revisited*, GENERATIONS, Winter 1995-1996, at 69. Long-term care (both institutional and community services) accounts for over 30% of total Medicaid expenditures. See KAISER COMM'N ON THE FUTURE OF MEDICAID, MEDICAID UPDATE: EXPENDITURES AND BENEFICIARIES IN 1993, at 8 (1994) [hereinafter KAISER COMM'N, EXPENDITURES AND BENEFICIARIES].

12. See Medicare and Medicaid Programs, Quarterly Listing of Program Issuances and Coverage Decisions—Third Quarter 1994, 60 Fed. Reg. 132 (1995).

13. See HEALTH CARE FIN. ADMIN., HCFA STATISTICS, MEDICAID RECIPIENTS AND VENDOR PAYMENTS BY AGE tbl.6 (Aug. 5, 1997) <<http://www.hcfa.gov/medicaid/mnatstat.htm>>; see also 141 CONG. REC. S6785 (1995) (statement of Bruce C. Vladeck, Administrator, Health Care Financing Administration).

14. See HEALTH CARE FIN. ADMIN., *supra* note 13, at tbl.6.

15. See 42 U.S.C. § 1396a(a)(5).

16. See 42 C.F.R. § 431.10(c) (1996).

17. See Barbara J. Collins, *Medicaid*, in ELDER LAW INSTITUTE: 1995, at 55, 58 (PLI Tax Law & Estate Planning Course Handbook Series No. D4-5256, 1995).

18. For example, in Illinois the Technical Recovery Unit of the Bureau of Collections controls Medicaid estate recovery. Telephone Interview with Karl Schultz, State of Illinois Bureau of Collections, Technical Recovery Unit (Apr. 10, 1996) [hereinafter Schultz Interview].

19. See 42 U.S.C. § 1396a(a) (1994).

caid benefits.²⁰ As a condition of receiving federal funding, states must make Medicaid available to these individuals.²¹ Beyond these categories of individuals, states may provide Medicaid coverage to individuals who do not otherwise qualify for SSI and who are unable to meet their medical expenses.²² Within certain limits, states may also use more liberal methods for ascertaining what resources are available to an applicant in eligibility determinations for this optional category.²³

Although eligibility requirements vary among states,²⁴ the standards used typically create the possibility that a substantial estate may remain at the recipient's death. In fact, certain assets are exempt from consideration in determining resource eligibility of aged persons under the federally established SSI standards that generally serve as the baseline for categorical Medicaid eligibility. The principal place of residence, or "homestead,"²⁵ of an institutionalized applicant, including land attached to it, is exempt from consideration if a spouse or dependent relative continues to reside there.²⁶ Household goods and effects are also exempt, with no limitation on value for married

20. See §§ 1396a(a)(10)(A)(i)(I)-(VII). These categories include aged, blind, and disabled individuals receiving assistance under the Supplemental Security Insurance (SSI) program per 42 C.F.R. § 435.4, as well as qualified Medicare beneficiaries. See 42 U.S.C. § 1396d(p)(1). Qualified Medicare beneficiaries are those individuals who are eligible to receive Medicare Part A, but whose income falls below the federal poverty limit and whose assets do not exceed twice the SSI resource availability limit. See *id.*

21. See § 1396a(a)(10).

22. See § 1396a(10)(A)(ii). The rate of enrollment growth for elderly admitted to Medicaid through these other (noncash assistance) categories is increasing significantly faster than that of cash assistance (e.g., SSI enrollees, a group which has remained relatively stable for several years. See KAISER COMM'N, EXPENDITURES AND BENEFICIARIES, *supra* note 11, at 2.

23. See § 1396a(a)(10)(C).

24. More specifically, eligibility requirements for recipients of SSI differ between states that have elected to base eligibility on the requirements in existence for receipt of Medicaid prior to the enactment of SSI and those that have chosen to use the SSI standards for determining eligibility. See Roger A. McEwen, *Estate Planning for Farm and Ranch Families Facing Long-Term Health Care*, 73 NEB. L. REV. 104, 108 (1994). States in the former category may follow stricter eligibility guidelines. See *id.* For a list of "section 209(b)" states which opted not to adopt SSI eligibility as the eligibility determinant for Medicaid in the state, see *id.* at 108 n.21.

25. Pursuant to federal regulations, the state must define the phrase "individual's home" or "homestead" in the state recovery plan. See 42 C.F.R. § 433.36.

26. See 42 U.S.C. § 1382b(a)(1); 20 C.F.R. §§ 416.1210(a), 416.1212(c) (1997); see also *Correll v. Division of Soc. Serv.*, 418 S.E.2d 232 (N.C. 1992) (finding that under North Carolina law an individual need not own the home to exclude the value of land attached thereto which the applicant did own).

couples and up to \$2,000 for single individuals.²⁷ Additionally, one automobile is exempt from consideration and, if it is deemed necessary for certain essential daily activities, there will be no limitation on its value. If the automobile is not deemed necessary for such essential activities, only \$4,500 of its value will be exempt.²⁸ Certain burial funds²⁹ and insurance policies with small cash value are exempt.³⁰ Furthermore, capital assets which are considered necessary to the applicant's income and rental property or business property offering lodging or day care which has less than \$6,000 equity and which produces rental income equal to at least six percent of equity will be exempt.³¹ After excluding these resources, an applicant will, at a minimum, be eligible when his remaining income is sufficiently low to qualify for SSI.³² Additionally, many states provide eligibility for elders requiring nursing home care, even though they normally would not be eligible for Medicaid benefits, if the elderly person's income is insufficient to meet the costs of necessary care. These fall within the group of so-called medically needy recipients.³³ Thus, one may become eligible for Medicaid under a variety of measures and still have substantial assets, if not income.³⁴ In spite of these many exemptions, the bulk of most Medicaid recipients' estates is found in the value of the primary residence.³⁵

The elderly become eligible for Medicaid benefits most often as a result of their need for long-term or custodial care.³⁶ Moreover, the longer an individual lives past age sixty-five, the more likely recourse to Medicaid becomes.³⁷ With the cost of nursing home and other

27. See 20 C.F.R. §§ 416.1210(b), 416.1216(b).

28. See 42 U.S.C. § 1382b(a)(2)(A); 20 C.F.R. §§ 416.1218(b)(1)-(b)(2).

29. See 20 C.F.R. §§ 416.1210(1), 416.1231.

30. See *id.* §§ 416.1210(h), 416.1230(a).

31. See *id.* §§ 416.1210(d), 416.1222(a); see also *id.* § 416.1224 (exempting certain property with less than \$6000 equity which is used to produce certain agricultural products for the applicant's consumption).

32. See generally *id.* § 416.1100.

33. 42 C.F.R. § 435.4 (1996).

34. See *infra* note 234.

35. See Gary Mazart, *Protecting the Home in Government Benefits Planning*, 164 N.J. LAW 34 (1994).

36. Although many elderly recipients have been historically poor, the great increase in the percentage of recipients receiving Medicaid over age 85, suggests that long-term care is the basis of the need. See *infra* note 37.

37. According to HCFA data, 9% of the population between ages 65 and 74 receives Medicaid. That number rises to 13.5% for those ages 75 to 84, and to 32.5% for the age group 85 and above. See HEALTH CARE FIN. ADMIN., MEDICAID RECIPIENTS AS A PERCENTAGE OF POPULATION BY AGE tbl.6 (Aug. 5, 1997) <<http://www.hcfa.gov/medicaid/mnatstat.htm>>.

types of long-term custodial care averaging upwards of \$38,000 per year³⁸ a cost typically not covered by Medicaid,³⁹ many elders will exhaust their savings quickly and will become sufficiently impoverished to qualify for Medicaid.⁴⁰ When the recipient dies, the remaining estate will contain exempt assets plus whatever insurance or similar proceeds accrue as a result of the recipient's death. Medicaid recipients often will leave very small estates, however, the exemption of various assets in eligibility determination based on category rather than value⁴¹ creates the potential that substantial assets may remain.

B. The Need for Recovery

The need for policies which improve the fiscal integrity of Medicaid is becoming increasingly undeniable. Current demographic trends suggest that only significant reforms will allow Medicaid to continue to provide adequate health care to the indigent. Most significant among those demographic trends is the rapid growth of the elderly population: the so-called graying of America.⁴²

Approximately one of every eight Americans is elderly (sixty-five or older);⁴³ by the year 2030, however, one in five will be elderly.⁴⁴ More importantly, the so-called oldest-old, that portion of the population eighty-five years of age or older, are the most rapidly growing segment of American society.⁴⁵ By 1994, the oldest-old comprised approximately one percent of the population, up two hundred seventy-four percent from 1960.⁴⁶ This rate of growth was more than six times the total rate of population growth and nearly three times the growth of those aged sixty-five and older.⁴⁷ The expenditures per capita for these oldest-old recipients are substantially higher than for any other

38. See Robin Toner, *Critics Say Republican Budget Will Create Shortage of Nursing Home Beds for Elderly*, N.Y. TIMES, Nov. 12, 1995, § 1, at 30.

39. See 42 U.S.C. § 1395x (setting forth various limits on Medicare coverage for long-term care).

40. See Toner, *supra* note 38 (noting that half of all elders receiving long-term care will exhaust their resources in six months or less).

41. See *supra* notes 24-35 and accompanying text.

42. See Allan J. Mayer et al., *The Graying of America*, NEWSWEEK, Feb. 28, 1977, at 50.

43. See FRANK B. HOBBS, U.S. BUREAU OF THE CENSUS, THE ELDERLY POPULATION (Aug. 5, 1997) <<http://www.census.gov/www/pop-profile/elderpop.htm>>.

44. See *id.*

45. See *id.*

46. See *id.*

47. See *id.*

age group among Medicaid recipients.⁴⁸ Approximately twelve times more money is paid to vendors per recipient aged eighty-five and older than for those ages six to fourteen (the least expensive age group for Medicaid), and approximately one and one-half times as much as those aged seventy-five to eighty-four (the next most costly age cohort behind the oldest-old).⁴⁹ Included in the growing elderly population will also be a substantially larger proportion of African Americans, Hispanics, and Native Americans,⁵⁰ who tend to be poorer than their Caucasian counterparts.⁵¹

Thus, the general trend of increasing incomes for the elderly⁵² may be somewhat offset by the increasing proportion of historically poorer elders. These trends are sufficient to warrant a careful reappraisal of Medicaid's current practices and of their long-term feasibility. Alone, these facts do not imply that estate recovery should be an important part of any such reevaluation. However, combining the evidence of an aging population with the fact that most elderly households maintain the vast majority of their net worth in a principal residence⁵³ mandates that estate recovery become an essential tool to recoup Medicaid dollars. If the current exemption of the principal residence in eligibility determination is to continue, estate recovery will play a cardinal role in reaching the locus of many elders' wealth.

C. Estate Recovery Programs

Because estate recovery programs are largely creatures of state law and vary from state to state, a single definition of an estate recovery program is implausible. However, certain common elements can

48. See HEALTH CARE FIN. ADMIN., MEDICAID RECIPIENTS AND VENDOR PAYMENTS BY AGE tbl.6 (Aug. 7, 1997) <<http://www.hcfa.gov/medicaid/mnatstat.htm>>.

49. See *id.* Specifically, those aged 85 and above were responsible for \$12,387 per vendor in 1994, while those aged 6 to 14 were responsible for \$1,043 per vendor, and those aged 75 to 84, \$8,453 per vendor. *Id.*

50. See HOBBS, *supra* note 43.

51. See generally U.S. DEPT. OF COMMERCE, CURRENT POPULATION REPORTS, CONSUMER INCOME, SERIES P60-188, INCOME, POVERTY, AND VALUATION OF NONCASH BENEFITS: 1993 (1995) (discussing racial composition of poverty-stricken elderly).

52. See *infra* note 129 and accompanying text.

53. The median net worth (assets minus liabilities) of older households was approximately \$86,324 in 1993. See U.S. CENSUS BUREAU, ASSET OWNERSHIP OF HOUSEHOLDS: 1993 tbl.D (Aug. 5, 1997) (median net worth by age of householder and monthly household income quintile, 1993 and 1991) <<http://www.census.gov/hhes/www/wealth.htm>>. This figure suggests that, in the aggregate, elderly homeowners have the great bulk of their wealth tied up in the principal residence. See *id.*

be adduced. These elements characterize estate recovery programs as they currently exist in most states. Because certain classes of assets are exempted when determining eligibility for Medicaid, a deceased Medicaid recipient may have been sufficiently needy to qualify for Medicaid and yet still leave a substantial estate.⁵⁴ An estate recovery program focuses on recovering the amount expended on the recipient's behalf from these exempt assets after the recipient's death. The broad parameters of estate recovery programs are provided by federal law and thus can be conveniently examined.

The federal Medicaid estate recovery statute⁵⁵ and its corresponding regulations⁵⁶ currently circumscribe states' ability to seek recovery from a recipient's estate. Although these federal rules are not mandatory, conformity with them is a condition of receiving federal funding,⁵⁷ and such funding, in turn, is essential to state Medicaid programs. Thus, federal guidelines now exist as the outer limit of recovery within which states are free to set their own boundaries. However, since passage of the Omnibus Budget Reconciliation Act of 1993 (OBRA '93),⁵⁸ federal limits now provide a much smaller impediment to a state's efforts at maximum recovery.

The Omnibus Budget Reconciliation Act of 1993⁵⁹ made sweeping changes both to Medicaid laws and to estate recovery programs. Three major changes have substantially impacted state programs. The largest change permits the federal government to condition states' receipt of federal funds upon the establishment of recovery programs.⁶⁰ Prior to such legislation, most states sought recovery only from responsible third parties⁶¹ or, in some cases, from the estates of recipients who died with no surviving spouse or children. These laws were relatively ineffective at generating revenue. For example, in 1987, under a typically weak recovery regime, Florida collected an average of only seventeen dollars per Medicaid-funded nursing home resi-

54. See *supra* notes 24-41 and accompanying text.

55. 42 U.S.C. § 1396p (1994).

56. 42 C.F.R. § 433.36 (1996).

57. See 42 U.S.C. § 1396a(a)(18).

58. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13612, 107 Stat. 312, 627 (1993).

59. *Id.*

60. See 42 U.S.C. § 1396p(b)(1); see also § 1396a(a)(18) (making compliance with the recovery and adjustment provisions of § 1396p a condition for federal support of state plans).

61. See Dunlop et al., *supra* note 2, at 540.

dent.⁶² The second change allows states to begin seeking recovery from recipients aged fifty-five as opposed to sixty-five years of age.⁶³ Third, the Act also expanded the definition of "estate" from the common-law probate estate to a broader concept which includes other forms of property normally not part of the probate estate.⁶⁴ For instance, a state may decide to include life estate or joint tenancy holdings of the recipient in its estate recovery program.⁶⁵ These changes increase the likelihood that states will obtain recovery from a decedent's estate.

Under OBRA '93, each state is required to enact at least a basic estate recovery procedure in order to receive federal financial support for its Medicaid program.⁶⁶ However, a few states have had estate recovery programs in place for many years.⁶⁷ The success these programs enjoyed did much to persuade Congress to change federal policy on the subject.⁶⁸ In the wake of OBRA '93, many states have now enacted such programs,⁶⁹ even if sometimes reluctantly.⁷⁰ Thus, estate

62. See *id.* at 562. Additional support for the ineffectiveness of earlier recovery procedures is seen by the fact that the amount recovered by Medicaid through adjustments (including prior-period claims adjustments, third-party liability, and other collections) has increased significantly to \$1.4 billion in 1996. See HEALTH CARE FIN. ADMIN., *supra* note 2.

63. See *id.* But see Renee R. Neeld, *Medicaid Planning: 1993 OBRA Asset Transfer Restrictions and Estate Recovery*, 37 RES. GSTAS 329, 331 (1994) (suggesting that the change from 65 to 55 may have been a scrivener's error). Additionally, current HCFA regulations state that, inter alia, adjustments and recoveries may only be obtained "[f]rom the estate of any individual who was 65 years of age or older when he or she received Medicaid." See 42 C.F.R. § 433.36(h)(1)(i) (1996) (emphasis added). Nevertheless, the statute remains unchanged at "55." 42 U.S.C. § 1396p(b)(1)(B).

64. See 42 U.S.C. § 1396p(b)(4)(B).

65. See *id.*

66. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13612(a)-(c), 107 Stat. 312, 627-28 (1993) (codified as amended at 42 U.S.C. § 1396p(b)(1)).

67. See Dunlop et al., *supra* note 2, at 556-57.

68. See SPECIAL SENATE COMM. ON AGING, DEVELOPMENTS ON AGING: 1993, 1 S. REP. NO. 103-403, at 186-90 (1993).

69. See, e.g., ALASKA STAT. § 47.07.055 (Michie 1994); ARK. CODE ANN. § 20-76-436 (Michie 1994); CAL. WELF. & INST. CODE § 14009.5 (West 1994 & Supp. 1997); COLO. REV. STAT. § 26-4-403.3 (1994); DEL. CODE ANN. tit. 25, § 5003 (1994); FLA. STAT. ANN. § 409.910 (West 1995); IDAHO CODE § 56-218A (Supp. 1996); 305 ILL. COMP. STAT. 5/5-13 (1996); IND. CODE § 12-15-9-1-5 (West 1995 & Supp. 1996); IOWA CODE § 249A.5 (1995 & Supp. 1997); KAN. STAT. ANN. § 39-709 (1994); LA. REV. STAT. ANN. § 153 (West 1996); ME. REV. STAT. ANN. tit. 22, § 14(2-1) (West Supp. 1996); MD. ANN. CODE art. 88A, § 77 (1996); MASS. ANN. LAWS ch. 118E, § 31 (Law. Co-op. 1995 & Supp. 1997); MINN. STAT. ANN. § 256B.15 (West 1995 & Supp. 1997); MISS. CODE ANN. § 43-13-317 (1995 & Supp. 1996); MO. REV. STAT. § 473.398 (1995 & Supp. 1997); N.H. REV. STAT. ANN. § 126-A:51 (1995); N.J. REV. STAT. § 30:4D-7.2 (1995); N.M. STAT. ANN. §§ 27-2A-1 to -9 (Michie 1995); N.Y. SOC. SERV. LAW § 369

recovery has become a crucial consideration for Medicaid recipients and their advisors nationwide.

State recovery statutes endeavor to track closely the format of the federal statute on the subject.⁷¹ The Illinois estate recovery statute is one example.⁷² It provides that amounts expended under the state's Medicaid program for either: (1) a person of any age who is an inpatient in a nursing facility or other medical institution or (2) a person age fifty-five or older, "shall be a claim against the person's estate or against the estate of the person's surviving spouse."⁷³ The state is not permitted to recover the amount of the claim until after the death of the recipient's surviving spouse.⁷⁴ If the recipient's spouse is no longer living, then recovery may still only be obtained if there is no surviving child under age twenty-one, blind, or permanently and totally disabled. These safeguards for a recipient's dependents apply only if Medicaid expenditures were correctly made on the recipient's behalf.⁷⁵ If, however, the recipient was not properly entitled to the assistance, the agency may recover the expenditures at any time.⁷⁶

(McKinney 1995 & Supp. 1997); N.C. GEN. STAT. § 108A-70.5 (1996); OHIO REV. CODE ANN. § 5111.11 (Anderson 1996); 62 PA. CONS. STAT. ANN. § 1412 (West 1996); S.C. CODE ANN. § 43-7-460 (Law. Co-op. Supp. 1997); UTAH CODE ANN. § 26-19-13 (1995 & Supp. 1997); VA. CODE ANN. § 32.1-326.1 (Michie Supp. 1996); WIS. STAT. § 49-496 (1997).

70. See, e.g., 1995 S.C. Acts 71 (stating that "the General Assembly reluctantly complied with the federal mandate" to seek recovery).

71. See 42 U.S.C. § 1396p (1994); 42 C.F.R. § 433.36 (1996).

72. 305 ILL. COMP. STAT. 5/5-13 (West 1995) provides:

To the extent permitted under the federal Social Security Act, the amount expended under this Article (1) for a person of any age who is an inpatient in a nursing facility, an intermediate care facility for the mentally retarded, or other medical institution, or (2) for a person aged 55 or more, shall be a claim against the person's estate or a claim against the estate of the person's surviving spouse, but no recovery may be had thereon until after the death of the surviving spouse, if any, and then only at such time when there is no surviving child who is under age 21, or blind, or permanently and totally disabled. This Section, however, shall not bar recovery at the death of the person of amounts of medical assistance paid to or in his behalf to which he was not entitled; provided that such recovery shall not be enforced against any real estate while it is occupied as a homestead by the surviving spouse or other dependent, if no claims by other creditors have been filed against the estate, or if such claims have been filed, they remain dormant for failure of prosecution or failure of the claimant to compel administration of the estate for the purpose of payment.

73. *Id.*

74. See *id.*

75. See *id.*

76. See 305 ILL. COMP. STAT. 5/11-14.5 (West 1995).

A new definition of "estate" has substantially expanded states' ability to seek recovery of expended funds. Until OBRA '93, the term "estate" remained undefined in federal and state statutes or was defined only as the probate estate under certain state statutes.⁷⁷ Where the term was left undefined, courts generally interpreted "estate" as the common-law probate estate.⁷⁸ Under OBRA '93, states may opt to expand the definition of "estate" to include any other real or personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.⁷⁹ The federal mandate extends only to recovery from probate estates, and states need not take advantage of the full scope of this broad definition.⁸⁰ Several states have, however, written or amended their recovery statutes to make recovery available from much of the property authorized by the federal statute.⁸¹

1. MEDICAID LIENS

Under certain circumstances, a lien may be placed upon an institutionalized Medicaid recipient's property while the recipient is still living. Provisions for liens were first enacted as part of the Tax Equity and Fiscal Responsibility Act of 1982⁸² (TEFRA '82), in response to rapidly increasing Medicaid expenditures and in an attempt to enhance the effectiveness of existing recovery programs.⁸³ Previously, such liens had been prohibited.⁸⁴ It is important to recognize the difference between liens and recovery under the statutory guidelines, because they are both governed by different restrictions and have different ramifications for the recipient. The lien is merely a security interest in a future recovery placed on the recipient's property while

77. See, e.g., 305 ILL. COMP. STAT. 5/5-13 (West 1995) (referencing the Illinois Probate Act of 1975 for a definition of "estate").

78. See, e.g., *Citizens Action League v. Kizer*, 887 F.2d 1003 (9th Cir. 1989).

79. 42 U.S.C. § 1396p(b)(4)(B) (1994).

80. See *id.*

81. See, e.g., IDAHO CODE § 56-218A (Supp. 1995); 305 ILL. COMP. STAT. 5/5-13 (1995); IOWA CODE § 249A.5 (1994); ME. REV. STAT. ANN. tit. 22, § 14(2-I)(F)(2) (West Supp. 1996); N.Y. SOC. SERV. LAW § 369 (McKinney 1995).

82. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 (1983).

83. See Medicaid Program; Liens, Adjustments, and Recoveries, 47 Fed. Reg. 43644 (1982).

84. See 42 U.S.C. § 1396p(b) (1988) (amended in 1993).

that person is still alive, whereas the estate recovery claim is "a bill presented to the heirs,"⁸⁵ requiring present payment. Although no recovery may be obtained while a Medicaid recipient is living, federal law allows the agency responsible for estate recovery to impose a lien upon the recipient's principal residence if certain conditions are met.⁸⁶ Two circumstances exist under which liens may be imposed on the property of a living recipient. First, a lien may be imposed on the property of a living recipient for benefits incorrectly paid, following a court judgment establishing the incorrectness of payment.⁸⁷ Second, a lien may be imposed on the real property of a recipient who is an inpatient in a medical institution or long-term care facility from which the recipient is not reasonably expected to return home.⁸⁸ The latter circumstance will suffice to justify imposition of a lien only on real property of the recipient.⁸⁹

Liens on the real property of long-term care and nursing facility patients are subject to further limitations. The first condition is that the recipient must be institutionalized in a nursing home or other long-term care facility that requires him to spend all but a minimal amount of his income for medical costs, and it must appear that the recipient cannot reasonably be expected to return home.⁹⁰ An additional condition, limiting both liens and recovery, is that there must be no surviving relative whose existence prevents application of a lien.⁹¹ This group includes a surviving spouse,⁹² a child under age twenty-one, or a child who is blind or permanently and totally disabled.⁹³ Moreover, if the lien is predicated upon a determination that the recipient is institutionalized and cannot reasonably be expected to return home, there must be no sibling who has lived with the recipient for at least one year immediately prior to admission to a medical institution.⁹⁴ There must also be no adult "caretaker" child.⁹⁵

85. Patricia Tobin, *Medicaid Basics and a Review of Amendments to Medicaid Law Under OBRA '93*, in *PLANNING FOR AGING OR INCAPACITY 1994: LEGAL AND FINANCIAL ISSUES* 203, 213 (PLI Tax Law & Estate Planning Course Handbook Series No. D4-5249, 1994).

86. See 42 U.S.C. § 1396p(a)(1) (1994); 42 C.F.R. § 433.36 (1996).

87. See 42 U.S.C. § 1396p(a)(1); 42 C.F.R. § 433.36(g)(1).

88. See 42 U.S.C. § 1396p(1)(B)(i).

89. See § 1396p(1)(B).

90. See §§ 1396p(a)(1)(B)(i)-(ii).

91. See § 1396p(b)(2).

92. See *id.*

93. See *id.*

94. See § 1396p(b)(2)(B)(i).

Before a lien founded upon permanent institutionalization may be imposed, a medical determination must be made that the recipient cannot reasonably be expected to return home.⁹⁶ This requires that the recipient receive notice of the determination and that a hearing comporting with traditional notions of substantive due process be made available to the recipient.⁹⁷ Furthermore, the notice must explain what is meant by the term lien and indicate that imposing a lien does not mean that the individual will lose ownership of the home.⁹⁸ The hearing is conducted according to state procedures established as part of the state Medicaid plan pursuant to federal regulation.⁹⁹ The burden of proof rests with the state to show that the recipient will not likely be discharged from the institution.¹⁰⁰

Additional restrictions safeguard the interests of the recipient by minimizing the impact of lien impositions. For example, no lien may be foreclosed to effect recovery, nor may a state recover any Medicaid expenditures from the estate except upon disposition of the property by the recipient (through either sale or transfer)¹⁰¹ or until after the recipient dies.¹⁰² Upon the occurrence of any of those events, however, the state is required by federal statute to seek recovery.¹⁰³ Moreover, it should be noted that if the recipient returns home, any lien placed under this provision is dissolved.¹⁰⁴ Thus, it is unlikely that the recipient will be detrimentally affected by the placement of a lien on his or her property.¹⁰⁵

2. ESTATE RECOVERY

The state may recover (in circumstances where no lien was imposed on the recipient's property during his or her lifetime or where property subject to a lien is sold) from the recipient's estate under

95. A "caretaker" child is one who resides in the recipient's home and who has taken care of the recipient for at least two years prior to admission to an institution, if such care permitted the individual to avoid institutionalization during that time. See § 1396p(b)(2)(B)(ii); see also 42 C.F.R. § 433.36 (1996) (requiring the state plan to specify the criteria by which a son or daughter can establish that he or she has been providing the care required to satisfy this provision).

96. See 42 U.S.C. § 1396p(a)(1)(B)(ii).

97. See *id.*

98. See 42 C.F.R. § 433.36(d).

99. See *id.*

100. See *id.* § 433.36(q)(2)(ii).

101. See 42 U.S.C. § 1396p(b)(1).

102. See § 1396p(a)(1).

103. See § 1396p(b)(1).

104. See § 1396p(a)(3).

105. But see *infra* notes 245-48 and accompanying text.

certain conditions. The state may also obtain "recovery" or "adjustment" for expenditures made on behalf of an individual who was age fifty-five or older for assistance consisting of "nursing facility services, home and community-based services, and related hospital and prescription drug services"¹⁰⁶ or any other services provided under the state plan for which the state chooses to seek recovery.¹⁰⁷ The recovery will be sought from property subject to a lien during the recipient's lifetime if that property is sold and was properly subject to a lien under the statute.¹⁰⁸ Otherwise, recovery will be sought from the estate¹⁰⁹ after the death of any dependent relatives, including a spouse, blind or disabled child, sibling who was resident in the home for at least one year, or caretaker child, as specified in the statute.¹¹⁰ If no such relatives remain, recovery may be sought immediately upon the recipient's death.¹¹¹

Finally, Congress tempered the relatively harsh impact of OBRA '93 by requiring states to establish hardship waiver procedures.¹¹² Congress now directs state agencies to establish these hardship guidelines in accordance with regulations promulgated by the Department of Health and Human Services.¹¹³ Under these provisions, the state waives application of its estate recovery procedures where recovery would work an "undue hardship" on the individual.¹¹⁴ Congress also intended for HCFA to provide special consideration for cases in which the estate is the sole income-producing asset of survivors, where the asset is a homestead of minimal value, or where other "compelling circumstances" exist.¹¹⁵ This part of OBRA '93 applies only to benefits paid after October 1, 1993.¹¹⁶ However, although the Department of Health and Human Services has given a conclusory statement of what

106. 42 U.S.C. § 1396p(b)(1)(B)-(i).

107. *See* § 1396p(b)(1)(B)(ii).

108. *See* § 1396p(b)(1)(A).

109. *See id.*

110. *See* § 1396p(b)(2)(A)-(B).

111. *See* § 1396p(b)(2).

112. *See* § 1396p(b)(3).

113. *See* § 1396p(d)(5).

114. *See id.*

115. *See* H.R. REP. NO. 103-11, at 209 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 536.

116. *See* Omnibus Reconciliation Act of 1993, Pub. L. No. 103-66, §§ 13611(e), 13612(d), 107 Stat. 312, 628-29.

constitutes hardship,¹¹⁷ it has thus far failed to provide any further regulations to guide state agencies. Furthermore, the determination of hardship in a particular case is left to the discretion of the state agency¹¹⁸ and, therefore, cannot be counted on by individual recipients to avoid recovery.

D. Policy Behind Estate Recovery

Congress had numerous objectives in mind when it included estate recovery as a mandatory part of state Medicaid programs. Reducing overall costs by recouping a portion of expenditures and preventing capable individuals from using Medicaid as artificially inexpensive long-term care insurance became primary goals.¹¹⁹ However, in light of the relatively small impact of estate recovery in reducing overall costs,¹²⁰ the programs may prove most successful as incentives for the purchase of long-term care insurance and consequent disuse of the Medicaid system.

The foremost consideration behind estate recovery is the reduction of the overall cost of Medicaid to states by recouping some portion of Medicaid expenditures. It is difficult to ascertain the effectiveness of estate recovery at achieving this end, because some states may not yet have fully implemented recovery programs. For instance, in Missouri, a state with a comprehensive estate recovery program,¹²¹ \$1,316,925 was recovered during fiscal year 1993,¹²² and \$8,832,006 between 1981 and 1993.¹²³ The former figure represents less than one percent of all Medicaid expenditures in that state during the same year.¹²⁴ In Illinois recovery has been somewhat more effective, generating approximately \$10,669,740 in recoveries in fiscal year 1995 and placing liens upon property valued at \$1,371,991.¹²⁵ Moreover,

117. See HEALTH CARE FIN. ADMIN., STATE MEDICAID MANUAL, PART 3, at SM3 3810(c), available in HEALTH CARE FIN. ADMIN., LAWS, REGULATIONS, MANUALS (May 1997) (CD-ROM).

118. See Schultz Interview, *supra* note 18.

119. See SPECIAL SENATE COMM. ON AGING, *supra* note 68, at 186-90.

120. See *infra* notes 122-28 and accompanying text.

121. See MO. REV. STAT. § 473.398 (1994).

122. See John J. Sastry, *Missouri's Estate Recovery Program*, 50 J. MO. B. 95, 95 (1994).

123. See *id.* at 95 n.1.

124. See KAISER COMM'N ON THE FUTURE OF MEDICAID, HEALTH NEEDS AND MEDICAID FINANCING: STATE FACTS 118 (1995). Missouri's total outlay for Medicaid in 1993 was \$2,252,000,000. See *id.*

125. Schultz Interview, *supra* note 18. It should be noted that a small portion of this total is attributable to recoveries of cash grant assistance rather than Medicaid.

the first two months of 1996 represent a substantial increase over 1995 recoveries, with \$10,014,599 recovered through the end of February 1996.¹²⁶ This increase appears to be the result of the changes in the law precipitated by OBRA '93, which only recently has been fully effectuated.¹²⁷ Additionally, although comparatively small, these figures must be examined in context. In spite of the disregard of certain large assets in determining eligibility,¹²⁸ most individuals will leave estates of negligible size, and often, no estate at all. Thus, the recovered dollars come primarily from middle-class elderly recipients who have become impoverished by long-term care expenditures and who have the bulk of their accumulated wealth invested in their primary residence. Nevertheless, Congress did possess a legitimate basis to believe that estate recovery would become a more effective solution in the future as the wealth of the elderly grows. As one would expect, net worths of older households have been steadily increasing, and as of 1993, this number had risen to \$86,324.¹²⁹ As the population's wealth increases along with the aging of the "baby boom" generation, the success of recovery programs will likely increase, and their importance in controlling Medicaid expenditures will grow.

The long-term care insurance industry was one of the major proponents of OBRA '93's estate recovery mandate.¹³⁰ This group argued that the threat of having a Medicaid recipient's estate consumed by Medicaid debts would provide a strong incentive for elders and their families to purchase long-term care insurance before the need for long-term care arises.¹³¹ Accordingly, Congress contemplated studies which suggested that elders were employing various planning strategies to artificially achieve Medicaid eligibility.¹³² Most frequently, elders converted cash reserves into exempt assets like burial funds or used savings to make home repairs, though occasionally they made

126. See *id.* Medicaid assistance liens have, however, been down somewhat according to the department, totaling \$415,006 through the end of February 1996.

127. See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13612, 107 Stat. 312, 627 (1993); see *supra* notes 58-65 and accompanying text.

128. See *supra* notes 24-35 and accompanying text.

129. See U.S. CENSUS BUREAU, ASSET OWNERSHIP OF HOUSEHOLDS: 1993 tbl.D (Aug. 5, 1997) (median net worth by age of householder and monthly household income quintile, 1993 and 1991) <<http://www.census.gov/hhes/www/wealth.htm>>.

130. See Ira Stewart Wiesner, *OBRA '93 and Medicaid: Asset Transfers, Trust Availability, and Estate Recovery Statutory Analysis in Context*, 47 SOC. SEC. REP. SER. VICE 757, 761 (1995).

131. See *id.*

132. See SPECIAL SENATE COMM. ON AGING, *supra* note 68, at 186-88.

outright transfers.¹³³ Thus, the changes brought about by OBRA '93 were aimed both at reducing manipulation and at giving the state a second chance at the sheltered wealth after the recipient's death. For chronically poor Medicaid recipients, long-term care insurance is not a viable option because of its expense. Nevertheless, estate recovery may prove unsettling to members of the middle class who can foresee their potential dependence on Medicaid. As a result, many will seek out long-term care insurance long before the need for it arises and when the product is still financially within reach. At this juncture, there is insufficient evidence to establish any causal relationship between OBRA '93 or estate recovery and increasing long-term care insurance purchases.

III. Analysis

A. Paradigm Estate Recovery Statutes in Practice

A brief consideration of how estate recovery programs operate in practice may assist the elder law attorney in advising and planning for clients in this area. In most states, when the recipient originally applies for Medicaid, a tracking designation is assigned so that the state may record all expenditures made on the recipient's behalf.¹³⁴ Upon the death of a Medicaid recipient, the state agency empowered to carry out estate recovery typically will be notified of the recipient's death.¹³⁵ Notice may be accomplished by one of several possible avenues. Often the public assistance case worker will inform the agency responsible for recovery of the death, if that case worker is aware of it.¹³⁶ Alternatively, states may employ some type of death match report or may use clippings of applications for letters testamentary.¹³⁷ In Illinois, for example, the department responsible for collections maintains a staff throughout the state that regularly searches courthouse records for death certificates and applications for letters testamentary and then compares names of decedents with a list of Medicaid recipients bound for recovery.¹³⁸ Additionally, some state agencies require that the executor of an estate notify the state of the

133. See *id.* at 188.

134. See Sastry, *supra* note 122, at 97.

135. See *id.*

136. See Schultz Interview, *supra* note 18.

137. See Sastry, *supra* note 122, at 98.

138. See Schultz Interview, *supra* note 18.

recipient's death and the consequent opening of an estate.¹³⁹ Thus, by one of the aforementioned methods, the state agency is very likely to be notified of the recipient's death. In a few states, the agency is required to provide notice of the existence of the recovery claim to all heirs and devisees whose identity can be reasonably determined.¹⁴⁰ At that point, if the necessary conditions are met, the agency will present a claim to the estate of the recipient equal to the amount of assistance expended or the value of the recipient's estate, whichever is less, or by filing a claim in the court of competent jurisdiction for assets not included in the probate estate.¹⁴¹ The agency generally must do so within the time prescribed for claims against decedents' estates under state law.¹⁴² Such a claim generally takes precedence over all unsecured claims, except funeral and burial expenses and administrative costs, such as probate fees, taxes, and other death-related expenses.¹⁴³ This order is determined by state law,¹⁴⁴ however, and may vary. If there is a surviving spouse or a disabled or blind child, the agency will simply await the time when no such relative survives and then seek recovery from the original recipients' assets to the extent that they remain.¹⁴⁵ It is important to note that "the federal statute only contemplates that the deceased recipient's assets will be traced, not that other persons can become liable to pay over their own personal assets."¹⁴⁶

B. Effect of Estate Recovery Programs on Recipient's Surviving Family

The extent to which states are permitted to collect the Medicaid debts of a deceased recipient from the estate of that recipient's relatives remains largely unclear. Generally, the relatives of a recipient will be subject to recovery only to the extent that they have received assets of the recipient.¹⁴⁷ In these cases, the burden is on the agency seeking recovery to substantiate its entitlement to recoupment of ben-

139. *See id.*

140. *See, e.g.,* MINN. STAT. § 256B.15(1a)(c) (1995).

141. *See, e.g.,* ME. REV. STAT. ANN. tit. 22, §§ 14(2-1)(B)(1)-(2) (West 1994).

142. *See, e.g.,* MONT. CODE ANN. § 53-2-611(1) (1993).

143. *See, e.g.,* CONN. GEN. STAT. ANN. § 17b-95 (West 1997); MASS. GEN. LAWS ch. 198, § 1 (1994); N.J. REV. STAT. § 30:4D-7.2(d) (1994).

144. *See* sources cited *supra* note 143.

145. *See supra* notes 71-76 and accompanying text.

146. *See* Demille v. Belshe, No. C-94-0726-VRW, 1994 WL 519457, at *7 (N.D. Cal. Sept. 16, 1994).

147. *See id.*

efits from parties to whom the recipient transferred property.¹⁴⁸ Some courts have held that the Medicaid statute governing estate recovery and its corresponding regulations "restrict only the [state's] ability to seek reimbursement from the estate of the Medicaid recipient and provide no limitation on the [state's] ability to seek reimbursement from the estate of a spouse" for debts of the original recipient.¹⁴⁹ Conversely, in *In re Estate of Burstein*¹⁵⁰ the court found that the dominant purpose of the federal limits on estate recovery¹⁵¹ is to protect a spouse or permanently disabled child from loss of support during a recipient's lifetime and to allow the recipient to provide for them after death. The latter holding comports most closely with the understanding of the HCFA¹⁵² and seems appropriate in light of the strong safeguards for the interests of vulnerable family members that are included in the federal recovery legislation.¹⁵³

A somewhat more difficult question arises when state "responsible relative" statutes come into play.¹⁵⁴ Such statutes exist in most states, though they are seldom enforced.¹⁵⁵ These statutes make certain family members responsible for the necessary debts of their relatives.¹⁵⁶ When medical assistance is furnished, an implied contract with the responsible relative is considered to have been created.¹⁵⁷ Thus, for example, a parent might be responsible for the housing or medical needs of his or her child, even though the child does not reside with the parent. Similarly, a spouse with financial means might

148. See *In re Estate of Rhodes*, 561 N.Y.S.2d 344, 346 (N.Y. 1990).

149. *Nass v. Perales*, No. 85 CIV. 4485, 1986 WL 68487, at *2 (E.D.N.Y. Sept. 3, 1986).

150. 611 N.Y.S.2d 739 (N.Y. 1994).

151. See 42 U.S.C. § 1396p (1994).

152. See, e.g., 47 Fed. Reg. 43644-45 (1990) (considering the reduced likelihood of surviving children or spouses becoming charges of the state when estate recovery is limited to cases where no spouse or child under 21, blind, or permanently disabled, survives).

153. See 42 U.S.C. § 1396p(b)(2).

154. For a discussion of responsible relative statutes and the Health Care Financing Administration's position towards them, see generally George F. Indest III, *Legal Aspects of HCFA's Decision to Allow Recovery from Children for Medicaid Benefits Delivered to Their Parents Through State Financial Responsibility Statutes: A Case of Bad Rule Making Through Failure to Comply with the Administrative Procedure Act*, 15 S.U. L. REV. 225 (1988).

155. For a discussion of family responsibility laws, see generally Usha Narayanan, Note, *The Government's Role in Fostering the Relationship Between Adult Children and Their Elder Parents: From Filial Responsibility Laws to . . . What?, A Cross-Cultural Perspective*, 4 ELDER L.J. 369 (1996).

156. See, e.g., N.Y. SOC. SERV. LAW § 101(1) (McKinney 1992).

157. See *In re Estate of Craig*, 624 N.E.2d 1003, 1005 (N.Y. 1993) (interpreting N.Y. SOC. SERV. LAW §§ 363(3), 369(2)).

be held legally responsible for the medical expenses of an impoverished spouse even though the two no longer live together. Nevertheless, because federal statutes governing Medicaid estate recovery demonstrate a clear intent to prevent the impoverishment of Medicaid recipients and their relatives, state courts have held that federal Medicaid law does limit the state's ability to recover expenditures from a responsible relative.¹⁵⁸

In *In re Estate of Craig*,¹⁵⁹ the court held that recovery of correctly paid Medicaid expenditures could not be obtained from the estate of a surviving spouse.¹⁶⁰ In that case, the wife did not have sufficient means to pay the medical expenses of her husband (\$4,737.79) when those expenses were paid by Medicaid.¹⁶¹ At her death, the remainder of a reverse mortgage created an estate of approximately \$27,000.¹⁶² The court held that a responsible relative's duty accrued at the time of the Medicaid payments, if that relative had sufficient means.¹⁶³ If, however, the means to pay for the recipient's care did not come until after payment by Medicaid or, as here, until after the death of the potentially responsible relative, that avenue of recovery was foreclosed to the state.¹⁶⁴ Thus, it is only contemporaneous sufficient means that matter for the establishment of responsible relative liability. Moreover, the court found that the surviving spouse cannot be deemed a responsible relative with financial means simply because that spouse owns a home.¹⁶⁵ However, limitations to this general principle do exist:

An exception to this prohibition is allowed after the death of persons over 65 years of age when the asset may be liquidated to recoup the person's Medicaid payments. But the exception is qualified, and does not allow the state to reach even farther back for recoupment as to a predeceased spouse's Medicaid payments The exception is a one shot, not a double barreled opportunity.¹⁶⁶

158. See, e.g., *In re Estate of Harris*, 387 N.Y.S.2d 796 (N.Y. Sur. Ct. 1976).

159. 624 N.E.2d 1003.

160. See *id.* at 1006.

161. See *id.* at 1004.

162. See *id.*

163. See *id.* at 1005.

164. But see *In re Estate of Hooley*, discussed *infra* notes 182-94 and accompanying text.

165. See *In re Estate of Craig*, 624 N.E.2d at 1004.

166. *Id.* at 1005.

The state may not seek recovery from a recipient's estate while a surviving spouse is still living, even if the spouse no longer resides with the recipient.¹⁶⁷

Recovery from a recipient's estate while children of the recipient are living is also an area over which courts have differed. Some courts have held that if a minor, blind or disabled child of the recipient was not a beneficiary of the recipient's estate, the agency may still seek recovery.¹⁶⁸ Others have held that the plain meaning of the statutory language must control, and that if any family member mentioned in the statute survives, regardless of that individual's dependency on the recipient, recovery will not be allowed.¹⁶⁹ The factual question of whether a particular child is "totally disabled" as mandated by most state recovery statutes has sometimes proven troublesome as well.¹⁷⁰

C. Challenges to Estate Recovery

Even before OBRA '93 mandated widespread passage of estate recovery programs, recipients of Medicaid challenged their validity. Such challenges to recovery of correctly paid benefits by the recipient or his or her heirs have emphasized the scope of the recipient's "estate" subject to recovery.¹⁷¹ This avenue of attack has, however, been largely foreclosed by the changes brought about by OBRA '93.¹⁷² Similarly, estate recovery programs that limit aid to recipients sixty-five years of age or older have been hailed as antithetical to the Equal Protection Clause of the Fourteenth Amendment.¹⁷³ Such challenges, however, have consistently failed and courts have continued to uphold the distinction made by states as rationally related to legitimate state interests.¹⁷⁴

167. See *In re Estate of Rundell*, 344 N.Y.S.2d 6, 8 (N.Y. App. Div. 1973).

168. See, e.g., *In re Estate of Samuelson*, 493 N.Y.S.2d 784, 787 (N.Y. App. Div. 1985).

169. See, e.g., *In re Estate of Burstein*, 611 N.Y.S.2d 739, 740 (N.Y. Sur. Ct. 1994).

170. See, e.g., *In re Estate of Peck*, 416 N.W.2d 158 (Minn. Ct. App. 1987).

171. See, e.g., *Citizen's Action League v. Kizer*, 887 F.2d 1003, 1006-07 (9th Cir. 1989) (holding that real property passing by joint-tenancy is not part of the probate estate and therefore is exempt from California's estate recovery provisions).

172. See *supra* notes 64-65 and accompanying text.

173. See, e.g., *In re Estate of Turner*, 391 N.W.2d 767, 768-70 (Minn. 1986) (noting that relaxed eligibility standards for persons over 65 make recovery from such individuals alone a rational distinction); *In re Estate of Davis*, 442 N.E.2d 1227, 1230 (N.Y. 1982) (reasoning that the legislature may have believed that individuals below age 65 stood a better chance of regaining health and returning to self-sufficiency).

174. See sources cited *supra* note 173.

In *Demille v. Belshe*,¹⁷⁵ the federal District Court for the Northern District of California issued a permanent injunction against the application of California's estate recovery statute because California's recovery procedure was held to violate due process.¹⁷⁶ In that case, the heirs of recipients were denied access to a hearing until after liens were placed upon their real property.¹⁷⁷ California law provided that a lien was to be placed on the decedent recipient's interest in the real property of a surviving spouse, in the amount of the department's entitlement, with the lien "due and payable" only upon the death of the surviving spouse or the sale, transfer, or exchange of the real property.¹⁷⁸ The court held that the risk of erroneous deprivation was too high to allow such a lien to be attached prior to a hearing.¹⁷⁹ California's legislature recently repealed that part of the state's recovery procedure.¹⁸⁰ More generally, *Demille v. Belshe* stands for the proposition that the U.S. Constitution requires states to provide Medicaid recipients or their affected heirs with an opportunity for a hearing before applying any type of lien to real property.¹⁸¹

In *In re Estate of Hooley*,¹⁸² the Supreme Court of North Dakota considered the timing of the state's ability to recoup Medicaid benefits from a recipient.¹⁸³ In that case, the State Department of Human Services sought recovery for properly made expenditures from the estate of a recipient.¹⁸⁴ The beneficiaries of the estate countered that the claim against the estate was not filed in a timely manner under the state law.¹⁸⁵ This contention rested on the beneficiaries' belief that the state's claim for recovery arose only at the time of death.¹⁸⁶ If that were the case, state law would have allowed the creditor—here the state—only three months to bring its claim.¹⁸⁷ If, however, the claim

175. *Demille v. Belshe*, No. C-94-0726-VRW, 1995 WL 23636, at *1 (N.D. Cal. Jan. 12, 1995).

176. *See id.* at *2.

177. *See id.*

178. *See id.* at *3.

179. *See id.* at *2.

180. *See* CAL. WELF. & INST. CODE § 14009.5(c) (West Supp. 1997) (as amended by 1995 Cal. Stat. 548, § 2 (1995)).

181. *See generally* *Demille v. Belshe*, No. C-94-0726-VRW, 1995 WL 23636, at *2 (N.D. Cal. Jan. 12, 1995) (conferring the right to a hearing to those with an ownership interest in the affected property).

182. 521 N.W.2d 85 (N.D. 1994).

183. *See id.* at 86.

184. *See id.*

185. *See id.*

186. *See id.*

187. *See id.*

arose during the life of the beneficiary, a three-year window existed in which claims could be brought.¹⁸⁸ The court held that the state's claim arose at the time the benefits were received, not at the point of death.¹⁸⁹ The court noted, *inter alia*, that four circumstances must exist before the state agency may recover assistance funds under North Dakota's statutory guidelines,¹⁹⁰ which are illustrative of most state recovery limits:

First, the recipient must have been sixty-five years of age or older when the benefits were received. Second, the Department may recover only from the estate of the recipient, *i.e.*, only upon the death of the recipient. Third, the Department must await the death of the recipient's spouse, if any. Fourth, it must await the death or majority of any surviving child who is under age twenty-one, or the death of a surviving child who is blind or permanently and totally disabled.¹⁹¹

Because the latter three events will eventually occur in all cases, their only function would be to govern the timing of recovery.¹⁹² These events have no bearing on the existence of the state's claim to recovery, only when that recovery may be sought.¹⁹³ However, "not all recipients of medical assistance will be age sixty-five or older when they receive aid."¹⁹⁴ Thus, the threshold issue of age at the time of receipt is the only means of completely avoiding the existence of a recovery claim at the time of death.

Applying similar principles, the court in *Estate of Cripe*¹⁹⁵ recently found that the estate of a deceased Indiana Medicaid recipient was liable for expenditures made on her behalf, despite the argument by representatives of her estate that her ability to pay arose only after her death.¹⁹⁶ Representatives of the estate relied on a statute purportedly limiting the state's recovery claim against assets to the amount of assistance paid after those assets were acquired.¹⁹⁷ The court rejected

188. *See id.*

189. *See id.* at 87. *But see In re Estate of Hoover*, 251 N.W.2d 529, 531 (Iowa 1977) (finding that the state's claim to recovery of assistance accrued at the time of death, not receipt).

190. N.D. CENT. CODE § 50-24.1-07 (1997).

191. *Hooley*, 521 N.W.2d at 86 (citing N.D. CENT. CODE § 50-24.1-07).

192. *See id.* at 87 (citing *Department of Public Welfare v. Anderson*, 384 N.E.2d 628, 633-34 (Mass. 1979)).

193. *See id.*

194. *Id.* at 87 (quoting *Anderson*, 384 N.E.2d at 633-34).

195. 660 N.E.2d 1062 (Ind. Ct. App. 1996).

196. *See id.* at 1064.

197. *See id.* at 1063-64. The estate relied upon IND. CODE § 12-5-3-14 (repealed 1983), a statute which is better understood as pertaining to responsible relative claims, rather than claims against the decedent recipient's estate. *See id.*; *supra*

this proposition, finding that the state's recovery claim is not limited to the amount of assistance paid after the recipient obtains resources.¹⁹⁸ The court also rejected the estate's argument that the state could not have a claim against the recipient's resources if the recipient herself could not have "assigned or sold her expectancy interest" in the assets, as lacking legal authority.¹⁹⁹ This notion comports with OBRA 93's expansion of the definition of estate to encompass assets that may not have actually been available to the recipient during his or her lifetime.²⁰⁰

In *Citizens Action League v. Kizer*,²⁰¹ the Ninth Circuit Court of Appeals held that "estate" within the estate recovery statute did not include property formerly held in joint tenancy²⁰² and that allowing recovery of Medicaid from a surviving joint tenant was therefore impermissible.²⁰³ In enacting OBRA '93, Congress attempted to eliminate this avenue of recovery by allowing states simply to redefine "estate" to include, among other things, property held in joint tenancy.²⁰⁴ Nevertheless, the language of the statute allows recovery from "any other real and personal property and other assets in which the individual had any legal title or interest at the time of death."²⁰⁵ Ironically, the statute allows states to include property held in joint tenancy, tenancy in common, life estate, and other forms.²⁰⁶ These two phrases appear contradictory on their face, because under state law at the time of death, an individual generally has no legal or equitable interest in property formerly held in joint tenancy prior to death or in a life estate.²⁰⁷

notes 155-67 and accompanying text (briefly discussing responsible relative statutes).

198. See *Cripe*, 660 N.E.2d at 1064.

199. See *id.*

200. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-661, § 13612(c), 107 Stat. 312, 628 (codified as amended at 42 U.S.C. § 1396p(b)(4) (1994)).

201. 887 F.2d 1003 (9th Cir. 1989).

202. See *id.* at 1006.

203. See *id.* at 1008.

204. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-661, § 13612(c), 107 Stat. 312, 628 (codified as amended at 42 U.S.C. § 1396p(b)(4)(B) (1994)).

205. 42 U.S.C. § 1396p(b)(4)(B).

206. See *id.*

207. See JOHN E. CRIBBET ET AL., *PRINCIPLES OF THE LAW OF PROPERTY* 106 (3d ed. 1989).

D. Recovery and Estate Planning

Because of the comprehensive nature of estate recovery programs, the best way to avoid the effect of these programs is through effective long-range planning.²⁰⁸ Although Medicaid eligibility requirements are exacting and demand careful attention to detail, it is possible to avoid the harshest effects of estate recovery through proper planning. Perhaps the best strategy for the elderly person with sufficient income is the purchase of quality long-term care insurance to avoid the Medicaid trap altogether.²⁰⁹

Legislators, alert to the widespread use of Medicaid planning,²¹⁰ have done much to limit the ability of elders to avoid estate recovery by imposing harsh penalties for asset transfers in the period preceding application for Medicaid. Thus, OBRA '93 instituted a longer look-back period of thirty-six months for scrutinizing transfers occurring after August 10, 1993, in order to limit the ability of elders to transfer assets.²¹¹ The transfer of assets by an applicant for less than market value will be considered to be a transfer to achieve eligibility for benefits.²¹² Any such transfer will result in a penalty of a period of ineligibility, the length of which is determined by a formula which considers the amount transferred and the prospective cost of long-term care.²¹³ Recent legislation has even gone so far as to impose a criminal penalty on those who advise a person about such transfers for a fee.²¹⁴

The previously existing thirty-month cap on ineligibility penalties also was eliminated by OBRA '93.²¹⁵ As a result, applicants may be severely penalized for asset transfers made in violation of existing regulations. It is possible for a very large asset transfer to preclude

208. A detailed description of estate planning techniques, either for Medicaid eligibility or for avoidance of estate recovery, is certainly beyond the scope of this note. What follows is therefore intended to introduce certain planning considerations regarding the assets that may remain in the estate of a Medicaid recipient as they relate to estate recovery.

209. See Brian E. Barreira, *Long-Term Care Insurance—A Necessary Option to Consider*, NAELA NEWS, July 1995, at 1 (considering the importance to elder law attorneys of examining long-term care insurance as an option to meet their client's planning needs).

210. See SPECIAL SENATE COMM. ON AGING, *supra* note 68, at 186-90.

211. See 42 U.S.C. § 1396p(c)(1)(B)(i).

212. See Gary Mazart, *Protecting the Home in Government Benefits Planning*, N.J. LAW, Oct. 1994, at 34, 35.

213. See *id.*

214. See Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4734, 111 Stat. 251, 706 (1997) (codified as amended in 42 U.S.C. § 1320a-7b(a)(6)).

215. 42 U.S.C. § 1396p.

permanently an applicant from achieving Medicaid eligibility.²¹⁶ Thus, estate planners should be extremely careful in considering the Medicaid eligibility consequences of any asset transfer.

Although trusts are an integral part of estate planning generally, they are of lesser value in protecting the assets of Medicaid recipients from recovery. One method which has been frequently employed by estate planners is the creation of a revocable *inter vivos* trust. Assets held in a revocable trust continue to be considered to be within the control of the Medicaid recipient under current law.²¹⁷ Thus, for example, in *Belshe v. Hope*,²¹⁸ a California appellate court recently found that the estate of a recipient included non-probate transfers upon death made from a revocable *inter vivos* trust.²¹⁹ The court reasoned that trust assets were subject to Medicaid liens for expenditures.²²⁰

A strategy that may prove effective in certain circumstances is the outright transfer of the home to a healthy spouse. Such a transfer continues to be exempt under Medicaid.²²¹ If, however, eligibility was based on receipt of cash assistance, a period of ineligibility might still result because the husband and wife are treated separately for such purposes.²²² Nevertheless, if the spouse who is healthy at the time of transfer later becomes ill and requires long-term care, the benefit of the transfer may be lost entirely.²²³ Moreover, in many cases, unless the at-home spouse enrolls in some sort of long-term care insurance, such action may simply delay the inevitable.

Because of these complex planning considerations for the elderly with sufficient means, long-term care insurance may be the simplest and most dependable strategy for avoiding estate recovery. By providing for the eventuality of long-term nursing home or in-home care, elders can avoid the impoverishment that drives many to rely upon Medicaid. Indeed, as noted earlier, one of Congress's main goals was to encourage elders to obtain long-term care insurance.

216. See James C. Peart, *Medicaid Nursing Home Financing and OBRA 1993 Changes*, ADVOCATE, May 1994, at 14.

217. See 42 U.S.C. § 1396p(d)(3)(A).

218. 38 Cal. Rptr. 2d 917 (Cal. Ct. App. 1995).

219. See *id.* at 175.

220. See *id.*

221. See Mazart, *supra* note 212, at 35.

222. See *id.* at 38.

223. See *id.*

E. Possible Changes in Medicaid Legislation

There have been several proposals to alter the Medicaid estate recovery program at the federal level. Although very different from one another, all of the proposals suggest an increasing role for estate recovery. At least one proposal considered by Congress would turn Medicaid over to the states through so-called block grants.²²⁴ Such a plan would leave states free to structure Medicaid programs with minimal or no federal guidance,²²⁵ forcing states to create their own estate recovery programs. Projected funding cuts would provide a strong incentive for states to make maximum use of recovery. In doing so, legislators should be mindful both of the need for reducing Medicaid expenditures and of the emotional—and politically delicate—nature of estate recovery for elders and their families. The current federal estate recovery scheme²²⁶ provides a solid foundation on which to build, but this foundation may certainly be improved. Additionally, various budget proposals have suggested a tightening of recovery procedures to help reduce Medicaid costs, while alternative proposals seek increased limits on recovery.²²⁷ Other proposals have included extending recovery expenditures for such things as home- and community-based care within the existing administrative framework of Medicaid.²²⁸

IV. Resolution

States should enact estate recovery programs which maximize recovery while having the least possible impact on recipients or their surviving spouses. This requires an aggressive approach to recovery that demands significant administrative resources,²²⁹ as well as the willingness to endure strong political opposition in some cases. The necessary changes could be made primarily by a shift in focus from the age of the recipient at the time that aid was received to the wealth of the recipient at the time of death. As a result, estate recovery programs would do more to distinguish between well-off recipients who

224. H.R. 280, 104th Cong., §§ 2100-2175 (1995).

225. *See id.* § 2135(g).

226. *See* 42 U.S.C. § 1396p (1994).

227. *See, e.g.,* H.R. 2491, 104th Cong. § 2135(g) (1995).

228. *See, e.g.,* S. 86, 104th Cong. (1995) (a proposal by Senator Feingold to give states the option of seeking recovery for home- and community-based services for individuals over age 55).

229. *See* Dunlop et al., *supra* note 2, at 536.

are simply hiding assets and poor recipients who have managed to hold on to only a small core group of assets accumulated over a lifetime such as their homes. Federal law currently requires recovery only from the estates of recipients age fifty-five²³⁰ or older. A better method of recovery would prohibit the use of liens on the property of any living recipient or spouse, by confining the definition of estate to the property subject to administration in the probate estate and by requiring that Medicaid recipients or their representatives to be fully informed of the possible effects of recovery. Finally, the institution of a minimum estate value for recovery would ensure that poor recipients are not penalized excessively for resorting to Medicaid.

Limiting recovery to estates of a certain size would prevent an excessive penalty against poor Medicaid recipients and fulfill the original aims of the estate recovery programs. Preventing financially capable elders from utilizing Medicaid as a type of long-term care insurance was one of the primary reasons for the passage of OBRA '93 and the institution of estate recovery programs.²³¹ The injustice of financially comfortable elders exploiting Medicaid sparked outrage among the public as well as numerous commentators.²³² Even after passage of OBRA '93, at least one commentator believes that "prosperous people with access to the right legal and financial advice will continue to find ways to qualify for Medicaid nursing home benefits without spending down and without estate recovery liability."²³³

One way of ensuring that Medicaid is reserved for indigent individuals is by structuring an estate recovery scheme that begins with estates with a value of, for instance, \$10,000.²³⁴ Under such a system, only those individuals whose estate value exceeded the threshold would be required to pay the state for the expenditures made on their behalves. A minimum recoverable estate value is already utilized in

230. *But see supra* note 63 (considering whether the change from 65 to 55 years of age may have been a scrivener's error).

231. *See* SPECIAL SENATE COMM. ON AGING, *supra* note 68, at 186-90 (discussing Medicaid estate planning techniques as studied by the GAO and noting that OBRA '93's amendments to Medicaid were made "in response to concerns of State officials about estate planning activity, as well as concerns of the private insurance industry that the ability of persons to transfer assets undermines the growth of the long-term care insurance market").

232. *See, e.g.*, STEPHEN A. MOSES & LTC, INC., *THE FLORIDA FULCRUM: A COST SAVING STRATEGY TO PAY FOR LONG TERM CARE* (1994).

233. *Id.* at 56.

234. In 1993, the average Medicaid applicant had \$38,202 in assets, including the home, and \$14,875 in assets other than the home. *See* SPECIAL SENATE COMM. ON AGING, *supra* note 68, at 188.

some states,²³⁵ but the minimum employed is insufficient to prevent recovery even from genuinely poor elders. If estate recovery is intended to prevent elders with sufficient means from abusing the Medicaid system, then its focus should be more particularly directed at that group. By reaching individuals who leave meager estates of three or four thousand dollars, for instance, recovery provisions deprive indigent individuals of the ability to pass on any inheritance whatsoever to friends or relatives. It is axiomatic that the desire to pass on an inheritance, to leave something of oneself behind, is of great concern to many elders.²³⁶ To be sure, those who have genuinely turned to Medicaid for their care will likely have proven themselves unsuccessful at amassing such a heritage for their progeny. Certainly, it may be argued that the complete deprivation of the right to pass on assets is the appropriate consequence of finding oneself indigent and turning to the state for support in the months or years before death. This reaction seems unnecessarily punitive. Medicaid is a program aimed at providing medical assistance to those "whose income and resources are insufficient to meet the costs of necessary medical services."²³⁷ By enlarging the scope of estate recovery, Congress was intending to ensure that the program continued to fulfill that mission, while preventing well-advised and comparatively wealthy elders from receiving its benefits.²³⁸ This necessary and compassionate goal should not deprive indigent individuals of the prospect of passing on more than a memory of destitution to their loved ones.

Rather than focusing on the age of the recipient at the time benefits were received, recovery should depend upon the size of each former recipient's estate when that person dies, with states recovering where the estate exceeds the established threshold. By seeking recov-

235. See, e.g., N.J. REV. STAT. § 30:4D-7.2a (1997) (excluding recovery or liens upon estates with a gross value of less than \$3000). This low amount suggests that the purpose of the statute is simply to prevent the wasting of administrative resources on de minimis recoveries, rather than concerns of equity toward impoverished elders and their heirs.

236. See, e.g., Marshall B. Kapp, *Options for Long-Term Care Financing: A Look to the Future*, 42 HASTINGS L.J. 719, 719 (1991) (noting that "financial impoverishment with . . . its dampening of an elder's ability to leave a significant financial inheritance to his or her heirs is perhaps the most feared result of the aging process."); see also *Proverbs* 13:22 (New American Standard) ("A good man leaves an inheritance to his children's children, and the wealth of the sinner is stored up for the righteous.").

237. 42 U.S.C. § 1396 (1994).

238. See SPECIAL SENATE COMM. ON AGING, *supra* note 68, at 186-90.

ery of assistance paid on behalf of all recipients, regardless of age, states would maximize recovery and avoid the perceived unfairness that results under present law.²³⁹ Currently, states only seek recovery of assistance paid on behalf of individuals who are fifty-five years of age or older or those who have been inpatients in long-term care facilities.²⁴⁰ This is an unnecessary and arbitrary distinction. Except to the extent that eligibility requirements are relaxed for elderly applicants, elderly recipients should be treated as are other adult recipients. Removal of the distinction would almost certainly increase the overall amount of recovery.²⁴¹ Moreover, insofar as estate recovery fulfills a perceived desire to see recipients of government welfare expenditures give something back to the system,²⁴² it will presumably be of even greater efficacy when applied to younger recipients. Consider the example of an indigent fifty-four year old who receives substantial Medicaid expenditures for successful treatment of cancer. If his good fortune continues, and he later comes into a substantial inheritance, he need not concern himself with reimbursing the state for its Medicaid expenditures on his behalf. Of course, our fortunate fellow would be in a very different situation if the expenditures were made after his fifty-fifth birthday. In that case, the state would have a claim against

239. Admittedly, seeking recovery from the estates of all one-time recipients of Medicaid would present administrative challenges, but these do not seem insurmountable in light of other records that follow one throughout life, such as Social Security data. Indeed, perhaps recovery could be better achieved by including a record of the existence of a claim in the individual's Social Security file. The suspension of Social Security payments would almost certainly require the agency to be notified of the recipient's death and would, therefore, place them in a position to notify the state of its need to seek recovery, even if that need arose several decades after the assistance was received.

240. See *supra* notes 106-07 and accompanying text. The inclusion of recipients who are inpatients in nursing facilities along with recipients aged 55 or older may suggest that states are attempting to limit recovery to those who are near death at the time of receipt and are using age as a proxy for such proximity to death. It is questionable, however, whether such a proxy would represent the kind of ageism that federal policy has generally opposed, particularly as embodied in the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 623-637 (1994). However, in light of the lowering of the threshold age of recovery from 65 to 55—in spite of increasing life expectancies—it remains unclear whether the distinction represents any policy apart from simple fiscal expediency. For a brief discussion of equal protection challenges to estate recovery, see *supra* notes 173-74 and accompanying text.

241. Although a substantial proportion of Medicaid expenditures are made on behalf of those aged 65 and over (approximately 55% in 1994), 45% of expenditures are made by those under 65, and 22.5% of Medicaid expenditures were made on behalf of those aged 21 to 65. See HEALTH CARE FIN. ADMIN., *supra* note 37.

242. See, e.g., Sastry, *supra* note 122, at 95 (recalling colonial attitudes toward social welfare programs).

his estate for the entire value of the expenditures made on his behalf. Such a scenario is the indefensible result under current law. Though such inequities are the inevitable result of many bright-line distinctions made in the law, they should not simply be disregarded without careful scrutiny. If the aim of recovery programs is to see the state reimbursed for its expenditures, for purely fiscal reasons, that goal will be achieved more fully by having the fifty-four-year-old recipient—or twenty-four year old for that matter—pay. Moreover, if the goal of recovery is instead to achieve some measure of perceived social justice by having those who are able reimburse the state for its expenditures, it obviously will also be fulfilled by having younger recipients pay.

Furthermore, limiting the placement of liens on the property of living recipients would reduce the burden of estate recovery on the recipient and his or her family members. The state currently may not place a lien on a recipient's property unless it appears reasonably certain that the recipient will not be released from a medical institution.²⁴³ Nevertheless, such an approach cannot help but put unnecessary pressure on recipients or their families as they approach the decision of whether to enter a long-term care facility or to remain at home. Because of the state's ability to learn of the recipient's death,²⁴⁴ the need for placement of a lien is limited. Rather than burden the recipient with a lien, the state should look to improve its ability to learn of recipients' deaths in a timely manner. The imposition of liens for assistance correctly paid should be limited to the rare instances where the state agency makes an affirmative showing that there is unacceptable risk to the states future interest in recovery. Factors that might be considered are the value of the home, the location of the home (an isolated or rural location might make learning of the recipient's death in a timely manner impracticable), or any past attempts to defraud the state by either the recipient or an individual with power of attorney for the recipient. Unless such an affirmative showing can be made, imposition of a lien places a small but unnecessary burden on the recipient and should be prohibited.

Confining the definition of "estate" from which recovery is sought to only that property subject to administration in the probate estate under state law would prevent the unfairness of recovery from

243. See *supra* notes 96-100 and accompanying text.

244. See *supra* notes 135-40 and accompanying text.

assets that were not, in fact, available to the recipient. The expanded definition of estate works an injustice against Medicaid recipients and their heirs by allowing recovery from assets that may not have been available to fund the care of the recipient during his or her lifetime. It is HCFA's position that these are resources that were properly available to the state at the time the recipient received the assistance.²⁴⁵ Under this view, it is merely the state's benevolent forbearance that allows the recipient to maintain these assets after death, not any positive lack of entitlement to them.²⁴⁶ If, prior to the expansion of the estate definition, a deceased recipient and a surviving spouse were formerly joint tenants of certain real property, that property could not be used to reimburse the state for the recipient's Medicaid debts.²⁴⁷ This is a just result because the recipient may not have been able to use those assets while living. Moreover, such a disposition comports with the traditional understanding of joint tenancy with right of survivorship. In that case no interest actually passes at the time of one joint tenant's death; the interest of the other joint tenant(s) simply expands or continues, unaffected by the deceased joint tenant's interest.²⁴⁸ Thus, nothing passes from the deceased joint tenant to the surviving joint tenant. For the state to obtain recovery in a case where the recipient did not have access to the asset prior to death and where the surviving joint tenant did not legally receive any property of the recipient upon the recipient's death seems an inconsistent and inequitable result. In acknowledging this inherent unfairness, some state statutes have specifically omitted joint tenancy from estate recovery even though states are authorized by federal law to include such property.²⁴⁹ Nevertheless, others have gone even further, including property formerly held by the recipient as a life estate or in a living trust within the recoverable estate.²⁵⁰

245. See 42 C.F.R. § 433.310 (1996).

246. See *id.*

247. See *Demille v. Belshe*, No. C-94-0726-VRW, 1994 WL 519457, at *15 (N.D. Cal. Jan. 12, 1995).

248. See CRIBBET ET AL., *supra* note 207, at 106 (noting that no interest actually passes to remaining joint tenants or tenants on the death of other joint tenant); see also ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* 194 (2d ed. 1993) (noting that at common law, the last surviving joint tenant became the sole owner because his original interest in the entire estate was the only interest left after all other joint tenants died, rather than because the deceased joint tenants' interests passed to the remaining joint tenant).

249. See, e.g., ME. REV. STAT. ANN. tit. 22, § 14(2-I)(f) (West Supp. 1996).

250. See, e.g., IDAHO CODE § 56-218(4)(b) (1995); IOWA CODE § 249A.5(2)(c) (1994).

Placing greater emphasis on full disclosure of Medicaid estate recovery and its possible effect on the recipient's estate would allow recipients and their representatives to make an informed decision to accept or reject Medicaid assistance. The example of one Maine homeowner who is a Medicaid recipient is instructive. She reported being completely surprised that the Medicaid payments accepted by her would create a debt of her estate.²⁵¹ In most states, notice is given to recipients at the time they apply for benefits. Typically, a recipient is notified by a statement acknowledging the possibility and import of estate recovery, which the recipient must read and sign before receiving benefits,²⁵² or through an explanation by the case worker during the public aid intake procedure.²⁵³ In a case in which a lien is sought for assistance properly paid, notice will necessarily be provided by the process of determining that the individual cannot reasonably be expected to return home from an institution.²⁵⁴ However, because of age or infirmity, the ability of many Medicaid recipients to understand the consequences of estate recovery or alternatives to Medicaid may be relatively limited. Thus, states should provide counseling to recipients or their representatives, including a description of the estate recovery program and its probable impact in the recipient's case based upon a review of the recipient's individual circumstances. Additionally, the state should take steps to publicize the existence and operation of estate recovery programs so that elders are made aware of the potential consequences of accepting Medicaid well before they require it. Most importantly, a clear statement of the alternatives to accepting Medicaid, if any, should be provided to the recipient and his or her representatives. Obviously, educating recipients as to alternatives is likely to be important only in cases where noncritical procedures are to be undertaken. Nevertheless, these seem appropriate safeguards in light of the potentially dramatic effects of estate recovery. The indigent recipient should be given every opportunity to avoid recovery by foregoing aid where that is a reasonable option.

251. See *Medicaid Recovery*, BANGOR DAILY NEWS, July 18, 1995, available in 1995 WL 8764776.

252. See, e.g., HEALTH CARE FIN. ADMIN., ESTATE RECOVERY PROVISIONS (Aug. 5, 1997) <<http://www.hcfa.gov/medicaid/obs1.htm>> (last updated Nov. 15, 1996).

253. This is the procedure followed in Illinois. Schultz Interview, *supra* note 18.

254. See *supra* text accompanying notes 96-100.

V. Conclusion

In light of the rapidly increasing cost of Medicaid²⁵⁵ and its growing share of state budgets,²⁵⁶ estate recovery will likely continue to be an important tool for cost-conscious state governments. Until public policy takes account of the need for long-term care, elders will have their life savings exhausted by its expense and will be compelled to turn to Medicaid for support. Thus, it is essential to consider carefully the objectives of estate recovery and to evaluate the methods employed to achieve those ends. Estate recovery is an innovative approach to Medicaid budget problems, but its relatively minor impact on fiscal integrity may ultimately undermine its success. The current federal statute and HCFA regulations prevent substantial abuse and do much to safeguard the interests of recipients and their families. Nevertheless, by limiting recovery to estates of a certain size, providing adequate notice to recipients, and limiting the definition of estate to the probate estate, states can minimize the impact on recipients and their heirs, while still aiding the long-term fiscal integrity of Medicaid. Furthermore, by shifting the focus of recovery from the age of the recipient to the amount of the estate, recovery programs will improve their efficiency and will become more politically palatable.

255. See HEALTH CARE FIN. ADMIN., *supra* note 2.

256. See *id.*