Widening the Gap Between Rich and Poor: Issues and Recommendations for the Implementation of Michigan’s Medicaid Estate Recovery Law

INTRODUCTION

Imagine learning that at age 90 your Great Aunt Josephine has passed away, and she has left you items from her estate and appointed you as the executor (or “personal representative” in Michigan). After your appointment as the personal representative, you receive a letter from the State of Michigan requesting payment for past expenses that the state paid on behalf of your Aunt Josephine. For the last two years, Aunt Josephine has been in a nursing home. The state is now requesting reimbursement for the two years of nursing home costs that it paid on behalf of Aunt Josephine. In the 1970s Aunt Josephine fell on hard times. She lost her job and she collected unemployment for six months. You are surprised that the state is asking for the reimbursement of nursing home expenses. You are wondering if the state can also ask for reimbursement of unemployment payments? You have never heard of reimbursing the state for services rendered. Can the State of Michigan ask for reimbursement of Aunt Josephine’s nursing home costs? Are there other costs for which the state can request reimbursement?

Under Michigan’s newly implemented Medicaid Estate Recovery Act, Michigan can recover nursing home and other medical costs from Aunt Josephine’s estate. In 2007, with the threat of losing federal Medicaid funding, Michigan was the last state to pass a Medicaid estate recovery act. The premise behind Medicaid estate recovery is that after a person who has received assistance from Medicaid dies, the state has a right to file a claim to recover the medical costs paid on behalf of the recipient. “Medicaid estate recovery . . . has no counterpart among similar taxpayer-funded programs having a limited class of beneficiaries.” The state of Michigan only has authority to collect for Medicaid expenses paid on behalf of Aunt Josephine. The state cannot collect reimbursement for Medicare, unemployment, or any other taxpayer funded program.

Our society embraces inheritances, and there is a significant body of both state and federal law dictating how they pass to recipients. The United States tax code incentivizes passing wealth via a will or trust by significantly lowering the tax rate the recipient has to pay compared to the ordinary income tax rate. The wealthy in our country structure their wealth in a way that lowers their tax burden and benefits their expected heirs.

In addition to financial wealth, which is passed to recipients via inheritances, society also places a value on heirloom items that may have a small economic value but a high sentimental value. The dictionary defines heirloom as: “[a] valued possession passed down in a family through succeeding generations.” One example would be a prized family bible, which includes extensive family trees, passed down from generation to generation. When a loved one passes away, the possession of an item that belonged to the decedent helps psychologically temper that loss. In addition, intangibles such as traditions and mores are passed down from generation to generation. Our society recognizes the importance of both tangible and intangible items being passed from generation to generation. Even though our legal system only deals with the transfer of real and personal property (i.e. financial aspects of inheritances), inheritances represent much more than just the passing of wealth between generations.

This Note begins by briefly examining the history of Medicaid and Medicare in Part I. Part II discusses the origins of Medicaid estate recovery, the mandatory and optional guidelines for recovery, and the changes in Medicaid eligibility since the enactment of Medicaid estate recovery. Part III explains the ability for states to design their own customized recovery program. Part IV describes Michigan’s estate recovery plan. Part V contains a general discussion of the Medicaid estate recovery law and examines how other state and federal courts have reconciled the differences between state and federal law in this area. Property held in joint tenancy and asset transfer rules are the two most likely categories potentially to be litigated in Michigan; the discussion is therefore limited to these topics. Part VI addresses Michigan’s potential litigation issues stemming from tension between Michigan’s existing common law and its implementation of estate recovery. Part VII discusses recommendations for modifications to Michigan’s current Medicaid estate recovery program. The recommendations include maintaining specific aspects of its current content, as well as changing and expanding other portions of the law.

I. BRIEF HISTORY OF MEDICAID AND MEDICARE

In 1965, House of Representatives Bill (H.R.) 6675 was passed by Congress establishing both Medicaid and Medicare. President Johnson viewed the passage of the bill as such a historical moment furthering President Truman’s “Great Society” reform plan that he signed the bill into law in President Truman’s hometown of Independence, MO on July 30, 1965. Medicare and Medicaid were established together to address the health care needs of society. President Truman was so enthusiastic about the new programs that he was the first person to enroll in Medicare. Medicare’s primary focus was the elderly, and Medicaid’s primary focus was the poor. Medicaid is codified as Title XIX of the Social Security Act.

Most seniors have some medical coverage through Medicare. Acute and catastrophic health care is available through Medicare. However, long-term care options are not included in Medicare. “In 2005, Medicare covered some 35.6 million elderly beneficiaries, totaling 97% of the nation’s sixty-five and older population.” As the baby boomer generation ages, the percentage of elderly will significantly increase. “Between 2000 and 2050, the percentage of Americans who are sixty-five-plus will increase from 12.4% in 2005 to almost 20.7% in 2050.” “The number of individuals eighty-five and older will more than triple” by 2050.

Today, “Medicaid is our nation’s largest health insurer, covering one in six Americans.” Medicaid “covers two-thirds of nursing home

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7. Id.
8. Id.
9. Id.; Frontpage Medicaid Timeline, supra note 5.
10. Dayton, supra note 2, at 25.
11. Id.
12. Id. at 30.
13. Id. at 27.
14. Id. at 17.
15. Id.
residents.”

Even though Medicaid was established as a safety net primarily to help the poor, Medicaid currently is helping the formerly middle-class that have become poor from spending their life savings on long-term services and support (LTSS).

“Our nation lacks a comprehensive national solution to provide LTSS to people who need help with daily activities in order to maintain their independence.”

Four options are available to disabled people who are trying to meet both their medical and financial needs. The first option is family caregivers, which include family, friends, and members of the community who are willing to provide support. The second option is private long-term insurance. The option of private long-term insurance is not available to people who already have a disability or are likely to become disabled. In addition, private long-term insurance is very expensive and so is not affordable to most middle class Americans. The third option is out of pocket spending; the disabled can pay for their own medical care and expenses. “Ten percent of those who eventually qualify for Medicaid will spend more than $100,000 of their own money” for LTSS care. The final option is Medicaid. Medicare and private health insurance do not cover most long-term care (LTC) expenses, making Medicaid the ‘safety net’ for many middle-income persons. Individual “[a]pplicants for state medical assistance may retain no more than $2,000 to $3000 in non-exempt, available assets” and couples are limited to $3,000 in non-exempt, available assets.

17. Id. (internal citation omitted).
19. Id.
20. Id.
21. Id.
22. Id.
23. Dayton, supra note 2, at 54.
24. Id.
25. FOX-GRAGE & REDFOOT, supra note 18, at 1.
26. Id. at 3 (citing Peter Kemper et al., Long-Term Care Over an Uncertain Future: What Can Current Retirees Expect?, 42 INQUIRY 335, 345 (Winter 2005/2006)).
27. Id. at 2–3.
II. THE BIRTH OF MEDICAID ESTATE RECOVERY

In 1993, Congress passed the Omnibus Budget Reconciliation Act of 1993 (OBRA ‘93), creating the first ever mandatory action of recovery for funds from a social service program. Prior to this mandate, recovery at the age of 65 was merely permissive. OBRA ‘93 required states to recover Medicaid spending from the estates of each beneficiary age 55 and over after their death. “State Medicaid programs are administered within broad federal guidelines and are financed jointly by states and the Federal Government.” OBRA ‘93 was passed partially in response to estate planners who lawfully helped clients move assets so that they could more quickly become eligible for Medicaid rather than change the asset transfer rules under the Medicaid eligibility requirements. The federal government opted to leave the majority of the transfer rules the same and put the burden on the states to recover assets from those who have assets left after death. In 2005, Medicaid estate recovery programs recovered an average of 0.61% of their expenditures; only six states recovered more than 1% of their expenditures. The following section will discuss OBRA ‘93’s mandated asset recovery program, exceptions and referrals to recovery, hardship waivers, and notice requirements. The end of this section will discuss the impact of the tightening of Medicaid eligibility requirements on Medicaid estate recovery.

A. Mandated Asset Recovery

The federal act mandates that the state must attempt to recover assets for the following medical costs:

- Nursing home or other long-term care institutional services;
- Home- and community-based services;
- Hospital and prescription drug services provided [in the settings listed above]; and

31. Id. at 627–28.
At State option, any other items covered by the Medicaid State Plan. 34

B. Prohibitions/Deferrals to Recovery

OBRA '93 prohibits recovery in a few circumstances where relatives also have a vested interest in the estate. 35 Estate recovery cannot take place upon the death of the beneficiary in the following four circumstances:

- During the lifetime of the surviving spouse . . . ;
- From a surviving child who is under 21, or is blind or permanently disabled . . . ;
- . . . [W]hen a sibling [has] an equity interest in the [beneficiary’s] home [and] has lived in the home for at least 1 year before the deceased Medicaid recipient was institutionalized . . . ;
- . . . [W]hen an adult child has lived in the [beneficiary’s] home for at least 2 years immediately before the deceased Medicaid recipient was institutionalized . . . [and the adult child] provided care. 36

C. Hardship Waivers

OBRA '93 requires states to grant hardship waivers when an “undue hardship would result” from the estate recovery. 37 “Federal guidelines suggest two specific kinds of property for the hardship exception: homesteads of modest value and income-producing property, such as farms or family businesses that are essential to the support of surviving family members.” 38 “Recently revised federal guidance defines ‘modest’ homesteads in relation to average value of the homes in the same county.” 39

D. Notice

The notification process under Medicaid estate recovery is two-fold. First, general notice should be given to the Medicaid recipient at the time of Medicaid enrollment. Later, upon the Medicaid’s recipient death, notice

35. Id. at 6.
36. Id.
38. DHHS Policy Brief No. 1, supra note 34, at 8.
39. Id.
at the time of recovery is given to the estate representative. According to the Centers for Medicare and Medicaid Services (CMS) State Medicaid Manual, states should give notice of Medicaid estate recovery upon an individual’s initial application for Medicaid.\(^{40}\) In addition, after the Medicaid recipient has died, the state should give notice to the personal representative of the estate or other affected parties.\(^{41}\) The Medicaid manual specifically uses the word *should*, not *must*, for the notice requirement when it describes both general notice and notice at the time of recovery.\(^{42}\) In a 2006 Medicaid estate recovery survey, all 35 responding states provided individuals notice at the time of application for Medicaid.\(^{43}\)

However, this [general] notice [to the Medicaid recipient] is generally a one-line or brief paragraph reference in the lengthy Medicaid application form. It is often included in a long list of many competing and important beneficiary “rights and responsibilities,” and the enrollee frequently must sign to indicate that he or she has reviewed and understands the list.\(^{44}\)

When a state seeks recovery, notice of the recovery or adjustment notice should also be given to individuals affected by the Medicaid estate recovery.\(^{45}\) In other words, the state gives notice to the executor of the will or some other legally authorized representative of the estate.\(^{46}\) If the state cannot ascertain the executor or estate representative then the State is to give notice directly to the heirs or the survivors.\(^{47}\) Similar to other claims made against an estate, the executor or the legally authorized representative is also told that he/she should give notice of the claim to all parties who are affected by the claim.\(^{48}\) According to the CMS guidelines: “The notice should include, at a minimum, [1] the action the State intends to take, [2] reason for the action, [3] individual’s right to a hearing (42 CFR Subpart E), [4] method by which he/she may obtain a hearing, [5] procedures for applying for a hardship waiver, and [6] the amount to be recovered.”\(^{49}\) The state needs to provide a form of review to the representative who receives

\(^{40}\) Health Care Financing Administration, Publication No. 45-3, supra note 37, at § 3810(G).

\(^{41}\) Id. § 3810(G)(2).

\(^{42}\) Id. § 3810(G).

\(^{43}\) Wood & Klem, supra note 33, at 3, 9.

\(^{44}\) Id. at 9.

\(^{45}\) Health Care Financing Administration, Publication No. 45-3, supra note 37, at §3810(G)(2).

\(^{46}\) Id.

\(^{47}\) Id.

\(^{48}\) Id.

\(^{49}\) Id.
the notice of recovery.\textsuperscript{50} The form of review can be an administrative hearing or court review.\textsuperscript{51}

E. Medicaid Eligibility

The Medicaid program was established for the medically needy. In 2007, Medicaid covered 58.8 million people, with children comprising approximately half of all Medicaid’s enrollees.\textsuperscript{52} The other half of the enrollees included non-elderly adults (twenty-five percent), disabled individuals (fifteen percent), and elderly adults (ten percent).\textsuperscript{53} In 2007, even though the elderly only made up ten percent of the population accepting Medicaid funds, they accounted for twenty-five percent of expenditures.\textsuperscript{54}

In order to determine eligibility, Medicaid looks at countable assets, income, and medical expenses. Countable assets include all liquid assets (such as cash, savings accounts, checking accounts, certificates of deposit, stocks, bonds, and mutual funds), real estate (excluding your primary residence), trusts, pension plans/individual retirement plans (IRA’s), land contracts, and more than one car.\textsuperscript{55} The list of assets which are not counted include your primary residence, personal belongings, one car, and an irrevocable pre-paid funeral contract.\textsuperscript{56} All income including social security, veteran’s benefits, training income, self-employment income, unemployment benefits, and all wages, pensions, rental income, and child support income is counted for purposes of Medicaid eligibility.\textsuperscript{57}

Michigan is broken into six different areas, and individuals are assigned maximum monthly income levels by county.\textsuperscript{58} Even if your income exceeds the income allowance, Medicaid may pay part of your medical bills.\textsuperscript{59} “If the family’s or individual’s net income is over the Medicaid limit, the amount in excess is established as a ‘spend-down amount.’”\textsuperscript{60} An individual must incur allowable medical expenses equal to the spend-down amount and then Medicaid will pay for expenses above

\begin{itemize}
\item \textsuperscript{50} Id.
\item \textsuperscript{51} Id.
\item \textsuperscript{52} KAISER COMMISSION ON MEDICAID FACTS, PUB. NO. 7235-04, THE MEDICAID PROGRAM AT A GLANCE 1 (June 2010), available at http://www.kff.org/medicaid/upload/7235-04.pdf.
\item \textsuperscript{53} Id.
\item \textsuperscript{54} Id.
\item \textsuperscript{56} Id.
\item \textsuperscript{57} Id.
\item \textsuperscript{58} Id.
\item \textsuperscript{59} Id.
\item \textsuperscript{60} Id.
\end{itemize}
Most people qualify for Medicaid by the spend-down method. Congress passed the Deficit Reduction Act in 2005 (DRA 2005). The purpose was to address budget deficits by reducing the spending of domestic programs. Cuts in Medicaid were targeted by the DRA of 2005; the purported Medicaid savings were implemented by drastically changing the eligibility requirements and thereby reducing the number of individuals who would be able to apply for Medicaid. Congress attempted to close what it perceived as current “loopholes” which allowed those with financial means to pay their own medical bills to gain Medicaid eligibility. As mentioned earlier, an impetus for the passage of OBRA ’93 was to mandate a state-run recovery program and to tighten up the financial eligibility requirements for Medicaid specifically for the look-back period. Even though DRA 2005 dramatically tightened up the financial eligibility for Medicaid at the federal level, Congress did not make any changes to its federal mandate for states to have a Medicaid estate recovery program. The table below compares the eligibility requirements as follows: 1) in existence prior to passage of OBRA ’93; 2) implemented under OBRA ’93; and 3) current eligibility requirements under DRA 2005. The table shows the progression of increasingly stringent eligibility requirements for Medicaid.

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61. Id.
64. Id.
<table>
<thead>
<tr>
<th>Eligibility category</th>
<th>Eligibility requirements prior to OBRA '93</th>
<th>Eligibility requirements established under OBRA '93</th>
<th>New eligibility requirements under DRA/Code Section</th>
<th>DRA Code Section</th>
</tr>
</thead>
<tbody>
<tr>
<td>Look-back Period § 6011(A)</td>
<td>30 months with a denial for a maximum of 30 months</td>
<td>3 years lookback period unless trust which is 5 years</td>
<td>5 years for all transfers</td>
<td>42 U.S.C. § 1396p(c)(1)(B)</td>
</tr>
<tr>
<td>Commencement Date of Penalty Period § 6011(B)</td>
<td>Date of the transfer or the month following the transfer. (Transfer treated individually)</td>
<td>The later of the two events: (1) the first day of the month of the transfer or (2) the date the individual is eligible for Medicaid benefits. Transfers treated cumulatively</td>
<td></td>
<td>42 U.S.C. § 1396p(c)(1)(D)</td>
</tr>
</tbody>
</table>

65. *Id.* at 572.
68. *Id.* at 573.
69. *Id.*
70. *Id.* at 575.
71. *Id.* at 575, 614.
72. *Id.*
73. *Id.* at 575–76.
<table>
<thead>
<tr>
<th>Undue Hardship § 6011(D) &amp; (E)</th>
<th>State-by-state determination with general federal guidance</th>
<th>No change</th>
<th>42 U.S.C. § 1396p(c)(2)(D)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Disclosure and Treatment of Annuities § 6012</td>
<td>If the annuity was purchased at less than fair market value, the amount less than fair market is subject to penalty.</td>
<td>The purchase of any annuity is the disposal of an asset at less than fair market value, unless the applicant includes the state as a beneficiary in the first position.</td>
<td>42 U.S.C. § 1396p(c)(1)(F)</td>
</tr>
<tr>
<td>Income First § 6013</td>
<td>Income-first or resources-first options are allowed</td>
<td>All states must follow the income-first method</td>
<td>42 U.S.C. § 1396r-5(d)</td>
</tr>
<tr>
<td>Home Equity Cap § 6014</td>
<td>No limit on the value of a residence. In</td>
<td>A $500,000 cap on the value of the primary</td>
<td>42 U.S.C. § 1396p(f)(1)(B)</td>
</tr>
</tbody>
</table>

74. Id. at 580.
75. Id. at 580–82.
76. Id. at 583.
77. Id. at 582.
78. Id. at 585.
79. Id. at 585–86. This criteria can be found under Section 3258.9(B) of the State Medicaid Manual. HEALTH CARE FINANCING ADMINISTRATION, DEP’T OF HEALTH AND HUMAN SERVICES, PUBLICATION NO. 45-3, STATE MEDICAID MANUAL § 3258.9(B).
81. Id. at 587–88.
82. Id. at 593.
83. Id. at 595.
84. Id.
85. Id. at 597.
86. Id. at 601.
87. Id. at 602–03.
All of the eligibility categories listed in the table above affect current Medicaid applicants. Of the first six eligibility categories listed in the table above, the combination of the longer look-back period combined with the commencement date of the penalty period have the greatest effect on Medicaid applicants by dramatically changing the asset transferability rules. Of aged individuals and persons with disabilities in need of long-term care will be denied Medicaid coverage on the basis of gifts they made to their children and grandchildren, or donations they made to charities, in the five years preceding their application for Medicaid. The transfer of asset penalties implies that the elderly can predict future medical problems and also implies that the assets are being transferred with the sole purpose of depleting assets in order to qualify for Medicaid. A five-year look-back period places a burden on individuals trying to qualify for Medicaid by requiring them to produce detailed records for the last five years. In addition, a greater burden is placed on the Medicaid case workers who have to research five years of records. If an applicant has depleted their assets to acceptable state Medicaid standards, but has given gifts or made charitable donations in the past five years, then the applicant will not be

| Long-term Care Partnership Program § 6021 | California, Connecticut, Indiana, and New York were “grandfathered” into LTCP | The same as when OBRA’93 was enacted | All states may provide partnership plans meeting federal guidelines | 42 U.S.C. § 1396p(b)(1), (5)|

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87. *Id.*
88. *Id.* at 601–02.
90. *Id.* at 620.
91. *Id.* at 620–21.
92. *Id.*
93. *Id.* at 621.
94. *Id.*
95. *Id.* at 571.
96. *Id.*
97. *Id.* at 573.
98. *Id.* at 573–74.
99. *Id.* at 574.
able to receive Medicaid funds until the penalty period has run to completion. Advocates for the elderly argue that with nursing home costs averaging $72,000 per year, the applicant with assets depleted to $2,000 or $3,000 cannot possibly afford to pay for their own medical costs while waiting for the penalty period to run to completion.

Medicaid provides financial protections for the spouse of the institutionalized person (otherwise known as the community spouse). In order to qualify for Medicaid, the state takes a “snapshot” of the countable resources available to the couple; this “snapshot” is called the Community Spouse Resource Allowance (CSRA). In addition to the CSRA, there is a federally mandated level known as the Minimum Monthly Maintenance Needs Allowance (MMMNA). A minimum and maximum value for the MMMNA is set each year by the federal government. Prior to the enactment of DRA 2005, when a community spouse’s income was less than the MMMNA, the states could use either an income-first or a resources-first method to allocate the assets to support the community spouse. The community spouse resource-first method allowed the spouse to keep all of his/her monthly income without a cap on the amount after joint countable assets were calculated. The resources-first option better protects the community spouse from impoverishment than the income-first option.

DRA 2005 requires states to use the income-first method to determine countable assets. Under DRA 2005, “a State must consider that all income of the institutionalized spouse that could be made available to a community spouse.”

The passage of OBRA ‘93 and then DRA 2005 created policies that make it increasingly difficult for the elderly to qualify for, and receive funds from, the federal government for health care expenses. Concurrently, there has been a lack of provisions for long-term health care in retirement. The cost of long-term care insurance is prohibitive to most individuals.

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101. BRIDGES ELIGIBILITY MANUAL NO. 400, supra note 28, at 5; Dayton, supra note 2, at 33–34.
103. Id. 594.
104. Id.
105. Id.
106. Id. at 595.
107. Id. at 594.
110. § 1396r-5(d)(6).
111. Dayton, supra note 2, at 56–59.
In addition, many long-term care policies contain restrictions from protecting those elderly with the three most common ailments: diabetes, disabilities, or Alzheimer’s.\footnote{Id. at 57.} The lack of a federally-funded long-term care program for the elderly most adversely affects women. Not only do women live longer than men, but their annual income is half of elderly mens’ annual income.\footnote{Id. at 60.}

III. THE FEDERAL GOVERNMENT GIVES STATES FLEXIBILITY IN DESIGNING THEIR OWN MEDICAID ESTATE RECOVERY PLANS

The federal government allows states to be as aggressive or passive as they choose in Medicaid recovery as long as they follow the basic requirements outlined in OBRA ’93. Various options are available to states when they develop a Medicaid estate recovery plan, but at a minimum states “must recover assets that pass through probate.”\footnote{DHHS POLICY BRIEF NO. 1, supra note 34, at 3.} “For purposes of this subsection, the term ‘estate,’ with respect to the deceased individual shall include all real and personal property and other assets included within the individual’s estate, as defined for purposes of State probate law.”\footnote{42 U.S.C. § 1396p(b)(4)(A) (2006).} This section will discuss the general flexibility states have to design their recovery programs, and will look at how an estate should be defined for the purpose of estate recovery, whether to use liens, what exclusions apply, hierarchy of recovery, thresholds of recovery, use of contractors, and where the recovered funds will be used within the state.

A. Traditional Common Law Definition of Estate

Each state has its own definition of estate. Under Michigan law, it covers all real and personal property that passes from a deceased person to their heirs or devisees through a probate proceeding.\footnote{MICH. COMP. LAWS § 400.112h(a) (2009).} Non-probate property is property that passes to an individual by an instrument other than a will.\footnote{See GEORGE A. COONEY ET AL., INSTITUTE OF CONTINUING LEGAL EDUCATION, ESTATE ADMINISTRATION IN MICHIGAN § 3.1 (2000).} Examples of non-probate property are life insurance policies, property held in joint tenancy with right of survivorship, trusts, and life estate deeds.\footnote{Id. at 60.}

B. OBRA ’93 Definition of Estate

OBRA ’93 expands the definition of estate beyond the definition of a traditional probate estate, allowing states to recover

\begin{footnotes}
\item[112.] Id. at 57.
\item[113.] Id. at 60.
\item[114.] DHHS POLICY BRIEF NO. 1, supra note 34, at 3.
\item[116.] MICH. COMP. LAWS § 400.112h(a) (2009).
\item[117.] See GEORGE A. COONEY ET AL., INSTITUTE OF CONTINUING LEGAL EDUCATION, ESTATE ADMINISTRATION IN MICHIGAN § 3.1 (2000).
\item[118.] Id.
\end{footnotes}
any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.\footnote{42 U.S.C. § 1396p(b)(4)(B).}

Under Medicaid estate recovery, each state may choose to either follow its own definition of estate or expand it to include items that are traditionally classified as non-probate property.\footnote{NAOMI KARP ET AL., AARP PUBLIC POLICY INSTITUTE, MEDICAID ESTATE RECOVERY: A 2004 SURVEY OF STATE PROGRAMS AND PRACTICES 20 (June 2005).}

In 2004, out of the forty-six states which had implemented Medicaid estate recovery programs, thirty-three went beyond the Uniform Probate Code’s traditional definition of estate in their estate recovery programs.\footnote{Id.} This has been criticized by advocates for the elderly.\footnote{Dayton, supra note 2, at 35 (criticizing how some states have been pursuing an aggressive enforcement of estate recovery by the method of “redefin[ing] fundamental concepts of property law for the purposes of Medicaid estate recovery”).} Each state is free to define the recoverable estate solely under state property law or use the more expansive estate definition found in OBRA ‘93. As a result, joint tenancy, life estates, trusts, and “other arrangements” have been litigated in many states.\footnote{Oppenheim & Moschella, supra note 30 (describing recent case summaries involving property received by right of survivorship, property received through other arrangements, homestead exemptions, disclaimer of inheritance, liens, limitations on estate recovery, timing, undue hardship, as well as an overview of selected state recovery programs).} In addition, many states have changed their statutes to reflect the broader definition of estate for the limited purpose of Medicaid estate recovery.\footnote{KARP ET AL., supra note 120, at 44.}

Under the Uniform Probate Code the following items are considered to be outside of probate:

- Property held in joint tenancy with right of survivorship;
- Life insurance payable to a named beneficiary;
- Property held in a trust;
- Retirement plans payable to a named beneficiary;
- Pay-on-death bank accounts and trust arrangements on bank accounts payable to a named beneficiary at death; and
Property in which the deceased held only a life estate, with the property going after death to a named beneficiary who holds the remainder interest in the property.\textsuperscript{125}

Some states have used the expanded OBRA ‘93 definition of estate to recover against the following types of property:

- Home held in joint tenancy with right of survivorship
  - Held with spouse
  - Held with someone other than spouse
- Home owned in trust
  - Benefits the enrollee and/or spouse
  - Benefits someone else other than the enrollee of spouse
- Bank account held in joint tenancy with right of survivorship\textsuperscript{126}
- Pay-on-death accounts
- Life estate in real property
- Insurance policies on the life of the Medicaid enrollee with a third party named as beneficiary
- Trust Property
- Remainder benefit of an annuity purchased by the Medicaid enrollee or spouse\textsuperscript{127}

C. Use of TEFRA Liens in Conjunction with Medicaid Estate Recovery

Under the Tax Equity Fiscal Responsibility Act (TEFRA) of 1982, liens can be placed pre-death on the homes of a living Medicaid beneficiary who has been institutionalized.\textsuperscript{128} When a TEFRA lien is placed against a property, CMS guidelines and federal law require that an individual be given notice and an opportunity to be heard.\textsuperscript{129} In 2007, “22 states report having authority to place TEFRA liens, although not all of these states actually place such liens, and some place very few such liens.”\textsuperscript{130} The TEFRA lien establishes a public record of the lien typically filed in the

\textsuperscript{125} Id. at 19–20.

\textsuperscript{126} Id. at 20–21. This was paraphrased for simplification.

\textsuperscript{127} Id. at 21.


\textsuperscript{129} \textit{Wood & Klem}, supra note 33, at 10.

\textsuperscript{130} Id. at 11.
county recorder’s office. If a lien is placed against a property, the property cannot be sold without the lien being removed from the property. If a pre-death TEFRA lien has been placed on a Medicaid recipient’s home, then estate recovery could occur through this lien without the state ever making a claim against the estate. When a claim is made against an estate, a hierarchy is followed to make sure the highest priority claims are paid first. Because a TEFRA lien is not a claim against the estate, it would automatically have to be paid with the sale of the property. TEFRA liens are a mechanism for a state to ensure payment without ever filing a claim. A TEFRA lien does not prohibit the filing of a claim against the estate as part of estate recovery. “[E]state recovery may occur through a lien without a claim, through a claim without a lien, or through a lien that is then enforced by a claim.”

D. Exclusion of Certain Classes on the Basis of Undue Hardship

States are allowed to exclude certain classes from recovery if the state determines an undue hardship would result. The federal government’s guidelines for property hardships exempts both the “sole income producing assets of the survivors (where such income is limited), including but not limited to, a family farm or business,” a home of “modest value,” and “other compelling circumstances.” States are free to craft their own legislation with what they consider to be compelling circumstances creating an undue hardship. Individual state Medicaid estate recovery plans have considered the following categories as potential exempt classes qualifying for a hardship waiver:

- Income Producing Asset;
- Property as Primary Residence;
- Homestead of Modest Value;
- Survivor Eligibility for Public Assistance;
- Discontinuance of Eligibility for Public Assistance;
- Deprive Survivor of Necessities of Life;
- Survivor Contributions to Medicaid Enrollee’s Care/Property;
- other compelling circumstances.

131. Id. at 10.
132. Id.
133. Id.
134. Id.
135. Id.
136. Id.
138. WOOD & KLEM, supra note 33, at x.
139. KARP ET AL., supra note 120, at 32–33.
E. **Hierarchy of Claims**

All states have established a hierarchy of claims by creditors against the estate. In 2004, “[t]hirty-five states reported that the state has priority over general creditors in estate recovery claims.” Some states allow items such as funeral expenses and estate administration to have the superior claim. In estates that have a low net worth, the position of the state in the hierarchy chain is critical for estate recovery. If the state is low on the hierarchy chain, all of the monies may be distributed before the state is allowed to assert its claim. The hierarchal position of the state for estate recovery claims is a good indicator to determine if a state is aggressively pursuing estate recovery.

F. **Threshold for Recovery**

States may assign a threshold amount for a recoverable estate. When a threshold amount is assigned, a state will not attempt to recover if the estate falls below the assigned threshold value. Other states perform a case-by-case cost analysis. Approximately half the states use either a threshold value or a case-by-case cost analysis method prior to attempting recovery.

G. **Use of a Contractor**

Some states hire private contractors to perform recovery activities. As of 2004, twelve states used contractors for either all or part of the recovery activities with eight states paying contractors based on a percentage of the recovery. The contractor negotiated payment percentage fee varied widely from a low of 5.75% to a high of 19.4%.

H. **Assignment of Recovered Monies**

The federal government does not mandate assignment of monies recovered from estate recovery to the state Medicaid budget. In 2004, thirty-three states directed their recovery amounts to their Medicaid program. In other cases, states split the monies between the state...
Medicaid program and other sources such as general revenues, county revenues, or estate recovery administration.151

IV. MICHIGAN’S ESTATE RECOVERY PLAN

Michigan’s estate recovery plan is codified under MICH. COMP. LAWS §§ 400.112(g)–(k) and 700.3805.152 The initial legislation was passed in 2007 but its implementation was delayed until July 1, 2010.153 In 2011, Senator Robert Kahn drafted Senate Bills 404, 405 and 406, which proposed drastic changes to the current estate recovery plan, but the bills were never released from committee.154 As discussed in Part III, the states have general flexibility to design their own recovery programs. This section will discuss specifically how Michigan has designed their recovery programs within the federal guidelines described in Section III and will cover the topics of estate definition for the purpose of estate recovery, liens, exclusions, hierarchy of recovery, thresholds of recovery, use of contractors, and distribution of recovered funds.

I. Michigan Defines Estate as Probate Only

For the purposes of Medicaid estate recovery, Michigan uses its own definition of “estate” in MICH. COMP. LAWS § 440.112h, rather than the more expansive definition allowed by OBRA ’93. MICH. COMP. LAWS § 440.112h defines an estate as “[a]ll property and other assets included within an individual’s estate that is subject to probate administration.”155 In addition, under MICH. COMP. LAWS § 700.1104(B), if someone changes an asset’s form while an individual’s estate is subject to recovery, that asset is also subject to recovery at the time of the Medicaid recipient’s death.156 For instance, if someone sells the primary residence while the Medicaid recipient is institutionalized, the state will consider the proceeds from the sale as part of the estate during recovery.

Assets that pass outside of the probate estate are those that are subject to a beneficiary designation (e.g., life insurance, retirement plans (pension plans, profit-sharing plans, 401(k) plan, IRAs, etc.), and pay-on-death

151. Id.
152. MICH. COMP. LAWS §§ 400.112(g)–400.112(k), 700.3805 (2009).
155. Id.
156. Id.
(POD) accounts); those that the decedent held jointly with another having survivorship rights; and those held in trust.\footnote{157}

The Michigan probate form filed with the court requires a personal representative of the estate to list both real and personal property. Real property is “land, including a building or house that is built on the land.”\footnote{158} Personal property is “everything that a person owns except real property.”\footnote{159} Specific values need to be assigned to high-value items.\footnote{160} Other lower valued items can be listed as groups such as household items.\footnote{161} Personal property items required to be listed separately are:

- Automobiles
- Jewelry
- Bank accounts
- Antiques
- Furniture
- Pre-paid burial contracts
- Life insurance (cash value)
- Annuities
- Mutual funds
- Stocks and bonds
- Any other individual item of high value (such as a fur coat).\footnote{162}

Michigan law recognizes the ownership category of joint tenancy with right of survivorship (JTWROS) also known as joint tenancy by the entireties. According to Michigan law: “[c]onveyances expressing an intent to create a joint tenancy or tenancy by the entireties in the grantor or grantors together with the grantee or grantees shall be effective to create the type of ownership indicated by the terms of the conveyance.”\footnote{163} In addition to the default creation of JTWROS when two parties are married (i.e., tenancy by the entireties), joint tenancy can also be created by using the “express words of survivorship in the granting instrument in addition to those creating a joint tenancy, such as . . . ‘with full rights of

\footnote{158}{Definitions in Probate Court Inventory Form 577, ST. OF MICH., available at http://courts.michigan.gov/Administration/SCAO/Forms/courtforms/probate/pc577.pdf.}
\footnote{159}{Id.}
\footnote{160}{Instructions in Probate Court Inventory Form 577, ST. OF MICH., available at http://courts.michigan.gov/Administration/SCAO/Forms/courtforms/probate/pc577.pdf.}
\footnote{161}{Id.}
\footnote{162}{Id.}
\footnote{163}{MICH. COMP. LAWS § 565.49 (1979).}
The impact of JTWROS is that “[u]pon the death of one joint tenant, the surviving tenant or tenants take the whole estate.” Assets owned by JTWROS do not go through probate; rather, they are automatically transferred to the other owner. Real property, automobiles, bank accounts, mutual funds, and stocks and bonds, if held in JTWROS, would not be subject to probate and therefore would not be subject to Medicaid estate recovery if there were a surviving spouse or another named party.

B. Michigan Does Not Use TEFRA Liens in Conjunction with Medicaid Estate Recovery

Michigan does not use TEFRA liens. If Michigan were to use them, the federal government would require the state to determine if an age 55 or older recipient will be permanently institutionalized. But because Michigan does not use TEFRA liens, the Medicaid qualification process in Michigan does not require such a determination. “The State does impose liens on both real and personal property of an individual after the individual’s death.”

C. Michigan’s Definition of Undue Hardship

Michigan follows the federal government’s guidelines for property hardships and it exempts both the “sole income producing assets of the survivors (where such income is limited), including, but not limited to, a family farm or business” and a home of “modest value.” A “[h]ome of ‘modest value’ is defined as [costing] fifty percent (50%) or less of the average price of homes in the county where the homestead is located, as of the date of the beneficiary’s death.” In addition, Michigan exempts situations where the recovery would either “cause a survivor to become or remain eligible for Medicaid.” Michigan explicitly states that its “[u]ndue hardship waivers are temporary.”

165. Id. at 87.
166. MICH. COMP. LAWS § 400.112(g)(9) (2009).
168. Id.
169. Id.
170. Id.
171. Id.
D. Michigan’s Hierarchy of Claims Structure

Michigan does not put itself first in priority of claims against the estate.172 Michigan’s estate recovery implementation puts itself sixth on the list of priority for claims against the estate.173 The sixth item listed in order of priority is “[d]ebts and taxes with priority under federal law, including, but not limited to, medical assistance payments that are subject to adjustment or recovery from an estate under section 1917 of the social security act, 42 USC 1396p.”174 If there are insufficient funds in an estate, the personal representative is instructed to make payments of the following costs/expenses prior to paying the state for Medicaid estate recovery: 1) estate administration; 2) funeral and burial; 3) homestead allowance; 4) family allowance; and 5) exempt tangible property.175 Hospital and medical expenses, state debts and taxes, and other creditors follow behind Medicaid estate recovery in priority of reimbursement by the estate.176

The homestead allowance is set at $20,000 for 2011.177 The homestead allowance goes to the surviving spouse. If no surviving spouse exists then $20,000 may be paid to the “decedent’s minor and dependent children.”178 Estate property may be substituted for the $20,000.179 In addition to a homestead allowance, a family allowance may be paid to the surviving spouse and other dependents who the decedent was financially supporting.180 The family allowance must be reasonable and is at the discretion of the personal representative of the estate.181 Without court approval, a personal representative can distribute up to $24,000 for up to one-year as the family allowance total.182 The exempt tangible property allowance enables the surviving spouse to acquire “household furniture, automobiles, furnishings, appliances, and personal effects with a date-of-death value up to $14,000 in 2011.”183 If there is no surviving spouse, the exemption is distributed equally to the decedent’s children.184 Estate recovery does not get paid to the state of Michigan until payment of administration costs, burial costs, homestead and family allowances, and

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173. Id. § 700.3805(1)(f).
174. Id.
175. Id. § 700.3805(a–c).
176. Id. § 700.3805(g–i).
178. MICH. COMP. LAWS § 700.2402.
179. Savel & Cumming, supra note 177.
180. Id. § 4.31 (citing MICH. COMP. LAWS § 700.2403 (2009)).
181. Id.
182. Id. (citing MICH. COMP. LAWS § 700.2405 (2009)).
183. Id. § 4.30 (citing MICH. COMP. LAWS § 700.2404 (2009)).
184. Id.
exempt property are met. If there is a surviving spouse or minor children the maximum homestead exemption, family exemption, and tangible property exemptions add up to $58,000. The $58,000 “floor” does not include burial costs and estate administration, which need to be paid prior to these allowances and exemptions.

E. Michigan’s Threshold for Recovery

Michigan does not use a threshold for recovery. Instead, Michigan chose to use a case-by-case cost analysis method. As defined in Michigan’s approved federal plan, “[r]ecovery is considered cost-effective when the potential recovery amount of the estate exceeds the cost of filing the claim and any legal work dealing with the claim.” This definition of cost-effectiveness is vague. How much does the potential recovery amount need to be to exceed the cost of filing the claim? Is $1 enough? Is $10 enough?

F. Michigan’s Use of a Contractor

The Michigan Department of Community Health (MDCH) utilizes Health Management Systems (HMS) as a contractor to administer its Medicaid estate recovery program. In addition, the contractor (HMS) is given the responsibility to review, approve, or deny undue hardship waivers. HMS receives just under fourteen percent of the amount recovered from each estate.

G. Michigan’s Assignment of Recoverable Monies

The federal government does not dictate what the monies recovered under Medicaid estate recovery are required to fund. Unlike other states that put the monies recovered from estate recovery into the general state budget, Michigan has decided to use its recovered monies to fund its Medicaid estate recovery program.

V. Litigated Issues Applicable to Michigan That Have Arisen

186. Id.
187. DHHS TRANSMITTAL NO. 10-018, supra note 167.
188. Id.
189. Id.
191. DHHS TRANSMITTAL NO. 10-018, supra note 167.
192. CHALGIAN, supra note 185.
193. MICH. COMP. LAWS § 400.112i (2009) (“Revenue collected through Michigan Medicaid estate recovery activities shall be used to fund the activities of the Michigan Medicaid estate recovery program.”).
UNDER MEDICAID ESTATE RECOVERY IN OTHER STATES

OBRA ’93’s expanded definition of estate has thrown a monkey wrench into traditional property transfers, and litigation has ensued regarding transfer of assets, life estates, JTWROS, and trusts under Medicaid estate recovery.194 Two topics that have been litigated among many different states are particularly applicable to Michigan and are explored in more detail in the following section. Both the titling of property and the property itself are subject to analysis under all Medicaid estate recovery state laws. As mentioned previously, Michigan recognizes property held in joint tenancy; if the issue of joint tenancy as part of Medicaid estate recovery is ever litigated in Michigan, Michigan will look to the decisions made in other states. This section will begin with a discussion of case law from North Dakota, Minnesota, California, and Illinois showing how other states have reconciled property held in joint tenancy against their state specific Medicaid recovery laws. The section will end with a discussion of case law from Minnesota defining recoverable assets in an estate under Minnesota state law.

A. States Disagree about the Extent of Recovery Allowed for Property Held in Joint Tenancy

As part of Medicaid estate recovery, each state must define “estate.” The definition of estate has a far-reaching impact on the extent of recovery that each state must pursue when a Medicaid recipient dies. The definition of estate will place limits on recovery as well as the extent of recovery. Litigation has ensued in cases where the statutory definition of estate is ambiguous, has changed over time, or disagrees with state or federal law, particularly on the topic of property held in joint tenancy. North Dakota and Minnesota have allowed the recovery of joint property under Medicaid estate recovery law. By comparison, California and Illinois have not allowed the recovery of joint property under Medicaid estate recovery law. In all four cases the final decision hinged on the state statutory definition of estate for the purpose of estate recovery. Detailed case discussions are found below.

In N.D. Dep’t of Human Servs. v. Thompson, (Matter of Estate v. Thompson), Nathaniel Thompson received medical assistance under Medicaid for almost two years before he died in 1992.195 When Nathaniel’s wife Victoria died in 1995, the department of human services filed a claim against the estate for reimbursement of the medical payments made on behalf of Nathaniel plus interest.196 The personal representative of the estate argued that the state statute allowing the state to recover from a

194. Oppenheim & Moschella, supra note 30, at 8.
196. Id.
recipient’s spouse conflicted with the federal statute prohibiting the recovery. In addition the personal representative noted that the federal statute had been modified between the time Nathaniel accepted Medicaid funds and when Victoria died. The personal representative argued that this matter should be settled under the terms of the statute in 1991 when Nathaniel accepted the Medicaid funds rather than the terms of the statute in 1995 when Victoria died. The personal representative of the estate argued that the plain meaning of the text from 42 U.S.C. § 1396p(b)(1) does not allow recovery from the spouse’s estate; recovery is only allowed from the estate of the individual who accepted Medicaid funds. The court rejected these arguments.

The statute changed between the deaths of Nathaniel and Victoria. This change, which included an option allowing the state to go after assets owned by the Medicaid recipient at their time of death, frustrated the personal representative’s case. The North Dakota Supreme Court held:

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197. Id. (“The state statute [N.D.C.C. § 50-24.1-07] would allow recovery from the estate of a spouse while the federal statute [42 U.S.C. § 1396p(b)(1) and (2)] would not.”).
198. Id. at 849.
199. Id. at 849–50.
200. Id. In 1988, 42 U.S.C. § 1396p(b)(1) read as follows:
   (b) Adjustment or recovery of medical assistance correctly paid under a State plan.
   (1) No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except-
   . . . .
   (B) in the case of any other individual who was 65 years of age or older when he received such assistance, from his estate.
   (2) Any adjustment or recovery under paragraph (1) may be made only after the death of the individual’s surviving spouse, if any. . . .
201. 42 U.S.C. § 1396p (2006). The statute was amended in 1993 and currently reads as follows:
   (b) Adjustment or recovery of medical assistance correctly paid under a State plan
   (1) No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except that the State shall seek adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan in the case of the following individuals:
   (A) In the case of an individual described in subsection (a)(1)(B) of this section, the State shall seek adjustment or recovery from the individual’s estate or upon sale of the property subject to a lien imposed on account of medical assistance paid on behalf of the individual. . . .
   4) For purposes of this subsection, the term “estate”, with respect to a deceased individual—
   (A) shall include all real and personal property and other assets included within the individual’s estate, as defined for purposes of State probate law; and
   (B) may include, at the option of the State (and shall include, in the case of an individual to whom paragraph (1)(C)(i) applies), any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to
[the] expansive definition is broad enough to encompass the department’s claim against the estate of a deceased spouse of a deceased recipient of medical assistance benefits for the amount of medical assistance paid out, to the extent the recipient at the time of death had any title or interest in assets which were conveyed to his or her spouse “through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.”

In *Jobes*, the Minnesota court of appeals agreed with *Thompson*. In the *Jobes* case, Amos and Alice Jobe owned a home in joint tenancy. Amos Jobe began receiving Medicaid funding in 1993 to cover his nursing home costs, he then died in 1995, and Alice died in 1996. In 1998, the county filed a claim against Alice Jobe’s estate to reimburse Amos’s medical expenses. The district court allowed the claim, and the Court of Appeals upheld it. The Minnesota Court of Appeals held:

> [b]ecause federal law now allows states to opt for a definition of estate that may include “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,” the state statute that allows medical assistance benefit reimbursement from the estate of a surviving spouse from “assets of the estate that were marital property or jointly-owned property at any time during the marriage” is entirely consistent with federal law and not preempted. We therefore affirm the district court’s allowance of this claim against the estate.

Both the State of California and Illinois have disagreed with North Dakota’s and Minnesota’s interpretation of the extent of allowable recovery. One of the first cases challenging the recovery of monies from property owned in joint tenancy occurred in California. In *Citizen Action League v. Kizer*, the plaintiffs sought a writ of mandate and an injunction against the Department of Health Services prohibiting the Department from recovering costs for medical services paid by the state of California from property which was held in joint tenancy with a former Medicaid recipient. A letter from the United States Health Care Financing Agency (HCFA) to the Director of the agency that runs California’s Medicaid estate recovery stated that HCFA’s interpretation of 42 U.S.C. § 1396p(b)(1)(B)
expands the definition of estate to include items outside of probate including property held in joint tenancy with right of survivorship for the purposes of Medicaid estate recovery.\textsuperscript{209}

The court ruled held that the “[p]laintiffs are a class comprised of persons who by right of survivorship have succeeded to property they formerly held in joint tenancy with a benefits recipient” because “‘estate’ under common law does not include property formerly held in joint tenancy, and because the HCFA letter is not compelling on this issue, we conclude that the California statute is impermissibly broad and is inconsistent with federal Medicaid law.”\textsuperscript{210}

The Illinois case, \textit{Hines v. Dep’t of Pub. Aid}, involved Beverly and Julius Tutinas who were married for more than 48 years.\textsuperscript{211} Julius received Medicaid payments for three years until he died in 1997.\textsuperscript{212} The couple held a house and an automobile in joint tenancy.\textsuperscript{213} When Julius died in 1997, the ownership of the house and car passed to Beverly.\textsuperscript{214} When Beverly died in 2001, the Department of Public Aid filed a claim against the estate to recover the money it paid in Medicaid payments for Julius’s care.\textsuperscript{215} The court determined that the department had a right to seek reimbursement from Julius’ estate but not from Beverly’s estate because Beverly did not receive Medicaid payments.\textsuperscript{216} Under the Medicaid Act, 42 U.S.C. § 1396p(b)(4)(B) (2000), Illinois had the option to define the estate of the Medicaid recipient to include items that Beverly held in joint tenancy with her husband.\textsuperscript{217} “In 1996, [the Illinois legislature] enacted new legislation which expressly limited the more expansive definition of estate

\textsuperscript{209} Id. at 1007 (citing Letter from William L. Roper, M.D., HCFA Administrator, to Kenneth W. Kizer, Director of California DHS (Sept. 4, 1986)). The text of the letter is as follows:

The Health Care Financing Administration has not construed “estate” in the context of 42 U.S.C. § 1396p(b)(1)(B) as being limited to the probate estate, nor has it issued any definitive pronouncements on this question. Therefore, States are not bound to consider “estate” to mean “probate estate.” Thus, if State law does not require that “estate” be limited to “probate estate,” that State would not be precluded from considering property which passes by operation of survivorship under title held in joint tenancy to be part of the deceased’s estate for purposes of recoveries under Medicaid.

\textit{Id.}

\textsuperscript{210} Id. at 1005, 1008.

\textsuperscript{211} \textit{Hines v. Dep’t of Pub. Aid}, 850 N.E.2d 148, 150 (Ill. 2006).

\textsuperscript{212} Id.

\textsuperscript{213} Id.

\textsuperscript{214} Id.

\textsuperscript{215} Id.

\textsuperscript{216} Id. at 153. All three exceptions in the Medicaid Act “are specifically directed to the estate of the recipient. No provision is made for collection from the estate of the recipient’s spouse.” \textit{Id.}

\textsuperscript{217} Id. at 154.
to the only situation where the Medicaid Act requires it to be used, namely, where the deceased recipient ‘has received (or [was] entitled to receive) benefits under a long-term care insurance policy.” The Illinois court distinguished the Hines case from the North Dakota decision, In re Estate of Thompson, based on the Illinois legislature’s definition of “estate” for the purpose of Medicaid estate recovery. The Thompson/Jobes and Hines/Kizer courts reached diametrically opposite rulings on the same fact pattern and the same Federal statute (42 U.S.C. § 1396p). The determinative factor in each case was the state statute defining “estate” for the purpose of Medicaid estate recovery. All of the courts were highly deferential to the state’s legislation defining “estate” for the purposes of Medicaid estate recovery. The Hines court said: “[o]ur legislature has spoken clearly on the matter, and we are bound to follow the law as written.”

B. Definition of Interest in an Estate — Transfers of Assets — Homestead and Bonds

The previous section discussed property held in joint tenancy at the time of death of a Medicaid recipient. In some cases, property interests are transferred prior to a Medicaid recipient’s death. This section will discuss how legally transferred interests were addressed under Minnesota Medicaid estate recovery law.

Today, under DRA 2005, the property interests transferred in the case discussed below cannot be legally transferred. The discussion below focuses on the definition of an interest in an asset not on the transfer of an asset. In the case, In re Estate of Barg, the state of Minnesota: 1) limited the recovery of assets to assets held at the time of death,221 and 2) allowed recovery against a surviving spouse limited by the recipient’s legal interest at the time of death.222

In Estate of Barg, Dolores and Francis Barg were married and owned a home jointly.223 In December 2001, Dolores began to receive Medicaid funds to pay for long-term care.224 In 2002, Dolores’ guardian transferred Dolores’ joint tenancy interest in both their house and certificates of deposit to her husband Francis.225 The court did not deem these transfers as “improper or fraudulent.”226 In addition, in 2002, Francis executed a will

218. Id.
219. Id. at 154–55.
220. Id. at 155.
221. In re Estate of Barg, 752 N.W.2d 52, 69 (Minn. 2008).
222. Id. at 73–74.
223. Id. at 57.
224. Id.
225. Id.
226. Id.
“leaving his estate to his surviving descendants and making no provision for his wife.”227 Dolores Barg died in January 2004, Francis Barg died in May 2004.228

The County filed a claim to recover the $108,413.53 that Dolores Barg had received as Medicaid benefits.229 The personal representative of the estate disallowed $44,533.53 of the claim.230 “The County petitioned for an allowance of the full claim, arguing that the entire value of the marital property, both the homestead and the certificates of deposit, was subject to its claim because Dolores Barg’s joint tenancy interest gave her a right to use of the entire property.”231 The district court upheld the personal representative’s partial allowance and found Dolores Barg’s interest in the property at the time of her death to be equivalent to a life estate.232

On appeal, the court ruled that under previous case law “the County’s ability to recover against Francis Barg’s estate was limited to Dolores’s interest in marital or jointly owned property at the time of her death.”233 “The court [of appeals] decided that property law principles should be applied to determine the nature of that interest and that under federal law [case law], Dolores Barg retained a joint tenancy interest in the homestead at the time of her death.”234 The court of appeals decided that Dolores retained an undivided one-half interest in the property and remanded the case back to the district court so it could assign an amount to the homestead.235

The County appealed again, and the case went to the Minnesota Supreme Court. That court agreed with the court of appeals “that real property law principles, informed by the principles of probate law, should be the basis for ascertaining any interests at the time of death.”236 The Supreme Court stated:

[w]ith those principles in mind, we caution that for an interest to be traceable to and recoverable from a surviving spouse’s estate, the interest must be (1) an interest recognized by law, (2) which the Medicaid recipient held at the time of death, and (3) that resulted in a conveyance of an interest of some value to the surviving spouse that occurred as a result of the recipient’s death.237

227. Id.
228. Id.
229. Id.
230. Id.
231. Id.
232. Id. at 57–58.
233. Id. at 58.
234. Id.
235. Id.
236. Id. at 72.
237. Id.
In addition, the court stated that if the interest is not found in standard probate law, Minnesota’s estate recovery must include the interest, and the interest must be authorized by section 42 U.S.C. § 1396p(b)(4). The court surveyed other court rulings on the recovery of assets that the recipient either held or did not hold an interest in at their time of death. Overwhelmingly, the courts agreed that only assets held at the time of death can be recovered. The Minnesota Supreme Court ruled that: “Dolores’s joint ownership in the homestead and certificates of deposit no longer existed at the time of her death,” and no other interests in the estate have been presented to the court. The Minnesota Supreme Court ruled that, because Dolores had no interest in the assets of the estate, the County did not have a basis for its claim against the estate. In addition, the court stated that Medicaid estate recovery claims can be made against the estate of a surviving spouse, but recovery is limited to the assets in which the deceased Medicaid recipient has a legal interest at the time of death. Even though the Minnesota Supreme Court ruled that the County has no basis for their claim—because the personal representative only requested a partial allowance exemption and never argued that the County had no basis for the claim—the matter was remanded to the district court to determine a partial allowance.

VI. MICHIGAN’S POTENTIAL LITIGATION ISSUES

Even though Michigan is the last state to implement Medicaid Estate Recovery, Michigan could still face litigation regarding joint tenancy with the right of survivorship, the effective date of Michigan’s recovery act, and increased number of administrative hearings for determining hardship waivers.

A. Joint Tenancy with Right of Survivorship

The Michigan Department of Human Services (DHS) has undermined the definition of joint tenancy with right of survivorship. Michigan case law has a long history of strongly supporting joint tenancy with right of survivorship for real property. In Jackson v. Estate of Green, the Michigan Supreme Court stated:

In contrast to the standard joint tenancy, it is well settled in Michigan that the survivorship quality of this type of joint tenancy cannot be unilaterally severed by the act of one cotenant. . .Thus, the survivorship

238. Id.
239. Id. at 69.
240. See id.
241. Id.
242. Id. at 72–73.
243. Id. at 73–74.
244. Id. at 74.
right of this type of joint tenancy is indestructible and is not affected by a partition action.\textsuperscript{245}

In contrast, when DHS updated its policies and procedures in April 2011 in Bridges Eligibility Manual 400, it transformed the general property common law understanding of joint tenancy with right of survivorship as well as the Michigan case law rulings when it stated the following:

Jointly owned real property is only deemed unavailable excludable if a sale would it creates a hardship for the other joint owners . . .

Note: For jointly owned real property, count the individual’s share unless sale of the property would cause undue hardship. Undue hardship for this item is defined as: a co-owner uses the property as his or her principal place of residence and they would have to move if the property were sold and there is no other readily available housing.\textsuperscript{246}

This DHS interpretation of jointly owned property destroys joint tenancy by making it severable. It also is incompatible with the Michigan Supreme Court’s interpretation of joint ownership with right of survivorship.

Similar to the California Health Care Financing Administration in \textit{Kiser}, Michigan’s DHS has expanded the definition of “estate” beyond the state legislature’s definition. In \textit{Kiser}, the California court did not give deference to the state agency’s expanded definition of estate under Medicaid estate recovery; rather, it looked at the state codification of the term under its state laws. In \textit{In re Estate of Barg}, the Minnesota district court severed the assets held in joint tenancy and ruled that a partial allowance was applicable to the previously held joint assets. The Minnesota Supreme Court overruled the district court and said that no partial allowance was allowed because these assets were not held at the time of death. By the very definition of JTWROS, assets are not held at the time of death, but instead are transferred at the time of death to another party.

\textbf{B. Notice/Effective Date of Recovery}

With three possible effective dates, the effective date is one of the first issues that could potentially be litigated in Michigan.\textsuperscript{247} According to Michigan statutes, the Medicaid estate recovery program only applies to recipients who received services after the effective date of September 30, 2007.\textsuperscript{248} Centers for Medicare & Medicaid Services (CMS) assigned an

\textsuperscript{245} Jackson v. Estate of Green, 771 N.W.2d 675, 685 (Mich. 2009).

\textsuperscript{246} \textit{CHALGIAN}, supra note 192, at 3; \textit{BRIDGES ELIGIBILITY MANUAL NO. 400}, supra note 28, at 9.

\textsuperscript{247} Information derived from Michigan Guardianship Fall Conference held on October 14, 2011 based on conversations with and presentations by attorneys Douglas Chalgian and David Shaltz. A record of the conference is on-file with the author.

\textsuperscript{248} \textit{MICH. COMP. LAWS § 400.112k} (2009).
effective date of July 1, 2010 when it issued its official approval of Michigan’s estate recovery program. When Michigan’s estate recovery program was approved by CMS on May 23, 2011, it too assigned a retroactive effective date of July 1, 2010. Therefore, the effective date of the recovery program could potentially be September 30, 2007, July 1 2010, or May 23, 2011.

C. Definition of an Estate and Interests in that Estate

Both the definition of an estate under the Medicaid estate recovery act, and which interests are contained in that estate, have been the two most litigated issues among other states. Even though Michigan has a clear definition of estate, many other states have litigated the definition of estate under the Medicaid estate recovery laws. In Thompson, Jobes, Hines, and Kizer, the courts reconciled the federal statute, 42 U.S.C. § 1396p, against their state statutes. Since the federal statute allows states, within certain guidelines, to define estate differently for the purposes of estate recovery, the courts have upheld the state’s codification of estate for the purposes of estate recovery over anyone else’s claim. In In re Estate of Barg, the Minnesota Supreme Court ruled that assets had to be held at the time of death in order to be recovered under Medicaid estate recovery. Assets transferred fraudulently would be recoverable by the state under Medicaid estate recovery.

VII. RECOMMENDED MODIFICATIONS TO MICHIGAN’S PROGRAM/IMPLEMENTATION OF PROGRAM

The federal government gives states the flexibility to design their own Medicaid estate recovery programs. One of the most important factors in designing a program is to look at the financial sustainability of the population that it is to address. Most elderly households are not wealthy. In 1999, “the median household income of elderly Medicare beneficiaries [was] just over $27,000.” The median household income for single elderly women was below $12,000. For the majority of the elderly, their net worth is primarily in their home. By the time an individual can qualify for Medicaid by reducing their cash assets to $2,000 for an individual or $3,000 for a couple, their only real asset is their home. Because of this strict asset reduction required to qualify for Medicaid funding, the homestead is typically the only asset subject to estate recovery.

249. DHHS TRANSMITTAL NO. 10-018, supra note 167.
250. Id.
252. Id. (citing Clark & Joseph F. Quinn, supra note 251, at 111).
253. Id. at 112.
The Institute of Gerontology at Wayne State University conducted a study in July 2011 to assess the wealth of the citizens in Michigan who were aged 65 or older. According to U.S. census data, 9.7 percent of the individuals age 65 or over are below the poverty level.254 And “over 22.3% of senior-headed households [are] surviving near or below the poverty threshold.”255 “For most Michigan residents age 65 and older, Social Security benefits are their primary source of income, and for about one-third of them, Social Security accounts for 90–100% of income.”256 Even in counties where the elderly are wealthier, approximately one in four elderly individuals struggles financially.257 The Institute of Gerontology study created an Elder Index to capture the actual cost of living for elder adults in Michigan.258 The Elder Index “take[s] into account expenses for housing, food, transportation, health care, and other necessities at a basic standard of living” by geographic area.259 When the Elder Index is applied to the population in Michigan age 65 and over, the Elder Index shows that 37 percent of the elders in Michigan are below the threshold.260

The Institute of Gerontology study describes the difference between the number of seniors who cannot actually make ends meet according to the Elder Index (37%) versus the number of seniors who are living below the national poverty level (9%) as invisible poverty (37% - 9% = 28%). The study also showed that women fell below the Elder Index more frequently than men, and Blacks fell below the index more frequently than Whites. With the elderly population predicted to nearly double as compared to the total population by 2030, the study predicts an increase of those seniors living in “invisible poverty.”261 Michigan’s elderly are a truly vulnerable population which needs to be protected.

A. Education

Michigan should provide education to its citizens about Medicaid estate recovery. Specifically, Michigan needs to educate its citizens on the proper way to deplete assets. With DRA 2005 imposing severe divestment penalties for improper depletion of assets, combined with so many citizens struggling to make ends meet because of health problems, education on this topic is crucial. Also, general education and training should be made

255. Id. at 2.
256. Id. at 4.
257. Id.
258. Id. at 1.
264. Id.
260. Id. at 4.
261. Id. at 11.
available to the Medicaid recipient. Some have argued that Medicaid for the elderly is really more akin to a loan program than a benefit.\textsuperscript{262} Loan programs such as financial aid require a student to go through training. The loan training educates the student as to his rights and responsibilities.

Education should also be provided to the heirs and devisees who will become the personal representatives for these estates. Since these estates will be for a small value, typically family members will be the personal representatives defending the assets against the state rather than attorneys. Family members should be made aware of their rights to reject claims from the state when there is a proper basis and/or file for a hardship waiver. For instance, in \textit{In re Estate of Barg}, the personal representative conceded to a partial allowance of the state claim. In the end, the Minnesota Supreme Court ruled that the claim was invalid but since the personal representative never challenged the validity of the claim, the personal representative was stuck paying a partial allowance equivalent to half of the estate.

Because the state analyzes the estate recovery on a case-by-case basis, it is possible for the personal representative to spend his time administering an estate from which he or she inherits nothing. The personal representative can charge its time to settle the estate against the estate, and this time is taxed as ordinary income. But it is only the value actually inherited which is taxed at the preferred estate tax rate.

\textbf{B. Replace Case Review with Threshold Recovery Amount}

Rather than a case-by-case basis review, the state of Michigan should set a threshold for review. Michigan was the only state to lose population in the 2010 Census.\textsuperscript{263} The loss of population could be attributed to the poor economic environment in Michigan; those that can afford to move to another state for a better job move out of Michigan. According to the 2010 Census: 1) the median value of owner-occupied residences in Michigan was $144,200 whereas the median value in the United States was $188,400; 2) Michigan’s poverty level was one percent above the national poverty level; and 3) Michigan’s mean household income is almost $3,000 below the national average.\textsuperscript{264} All of these factors — the loss of population, higher than national average poverty level, lower than national average household income, and the lower than national average cost of homes should be considered when setting a threshold for recovery.

Given the economic factors discussed above, Michigan’s minimum estate recovery threshold should be set high. Minimum estate recovery thresholds range from $50 to $75,000.\textsuperscript{265} Most states implementing a

\textsuperscript{262} Karp et al., \textit{supra} note 120, at 47.
\textsuperscript{264} Id.
\textsuperscript{265} Karp et al., \textit{supra} note 120, at 35.
minimum estate recovery threshold have set them between $2,000 and $15,000. Given the poor state of Michigan’s economy, setting a minimum estate value threshold of $10,000 when an estate has ascertainable heirs would be reasonable. This threshold should be applied after estate administration, funeral and burial, homestead allowance, family allowance, and exempt tangible property have been paid or distributed.

In addition, establishing a threshold for recovery will eliminate a case-by-case review and will increase the efficiency of the review process. Also since the HMS contractors are receiving their fees based on the amount of monies recovered, a threshold for recovery will create an impartial metric that the contractor can use without bias. As an alternative to threshold recovery level, a county-by-county exemption could be established that takes into account the homestead of modest value hardship.

C. Remove Roadblocks to Obtaining Hardship Waivers

Roadblocks which exist in obtaining hardship waivers need to be removed. Currently the hardship waivers are reviewed and granted by HMS contractors, who are paid based on a percentage of the amount of money recovered. Therefore the HMS contractors have a vested financial interest in denying hardship waivers. When a hardship waiver is denied, the personal representative can go before an administrative board chaired by State of Michigan officials. Personal representatives should be able to have their hardship waivers reviewed by state officials, not HMS contractors. Implementing the review by an impartial state official will remove the HMS roadblock by saving the personal representative from having to appear at an administrative hearing. The personal representative should not have to resort to an administrative hearing in order to receive fair and impartial treatment of its case.

D. Expand the Hardship Waiver Provision

The undue hardship exemption should be expanded to include the deprivation of the survivor of the necessities of life and other compelling circumstances. This proposed change would help solidify the purpose of having the hardship provision, which is to prevent the impoverishment of the surviving family members.

E. Offer State-Run Affordable Long-term Care Insurance

Michigan should offer an affordable long-term care option for its citizens. This program should meet the seven requirements set out in

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266. Id. at 64.
267. Supra note 247.
Section 6021 and codified as 42 U.S.C. § 1396p(b)(1). Under DRA 2005, individuals are encouraged to purchase long-term care policies. The amount of the policy will be excluded from the individual’s countable assets. For example, if an individual purchases a $200,000 long-term care policy, that individual is allowed to spend-down to $200,000 rather than $2,000.

F. Record Keeping

HMS should keep detailed records of their recovery and non-recovery from estates of Medicaid recipients. It is difficult to gather data on how much money is recovered by each state under its Medicaid estate recovery laws. Even the Department of Health and Human Services policy briefs rely on the financial information gathered by the AARP Public Policy Institute (in 2004 and 2007, the AARP Policy Institute gathered financial information for each state by sending out surveys to each state). Detailed record keeping is required in order to determine the best way to implement Michigan’s estate recovery law. Records should include: 1) the number of estates against which recovery was attempted; 2) the number of estates from which recovery occurred; 3) the value of those estates; 4) any hardship waivers or exemptions which were granted; and 5) the administrative fees expended in the recovery effort.

CONCLUSION

As the last state to adopt a Medicaid estate recovery act, Michigan can learn from other states’ previously litigated issues with Medicaid estate recovery. In order to protect its vulnerable elderly population, Michigan needs to maintain a minimal estate recovery by keeping: 1) the definition of estate as is; 2) the strict definition of joint tenancy with right of survivorship adopted by the Michigan Supreme Court; 3) the non-use of TEFRA loans; and 4) the non-collection of interest on the amount of the claim against the estate.

Michigan needs to change its recovery program by: 1) providing education to both the Medicaid recipients and to the heirs and devisees; 2) switching from a case-by-case review method to a threshold for recovery to ensure uniformity; 3) shifting the initial hardship review from the contractor to state officials; 4) expanding the list of hardship waivers to emphasize the purpose of not impoverishing the surviving family members; 5) offering a long-term care partnership program following the restrictions outlined in DRA §6021; and 6) keeping detailed records tracking recovery information.

269. Dayton, supra note 2, at 52–53.
270. Id. at 53.
With the financially stringent eligibility standards to Medicaid, the only possible asset of value left is the institutionalized person’s house. In general, estates subject to Medicaid estate recovery are low-value estates. In 2004, the average state recovery per estate was $8,116.27. Family members typically administer estates that are of a low-value. Part of the personal representative’s duty is to determine the value of the estate. Most personal representatives do not know the estate’s value until they have a chance to gather information. It is quite conceivable that estates subject to estate recovery in Michigan will yield no money whatsoever to the heirs of the Medicaid recipient. The personal representative would be paid for his/her time but would receive no other benefit for all the time it takes to administer an estate. The reality of administering an estate without receiving any gain or being an heir without receiving any gain widens the financial gap between the rich and poor. The poor are left unable to inherit even a small amount of money from deceased relatives, whereas the status quo for the rich is maintained when the rich pass their wealth onto the next generation through inheritances.

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271. KARP ET AL., supra note 120, at 6.

* J.D. candidate May 2014, University of Detroit Mercy School of Law. I would like to dedicate this Note to the memory of my father whose decline in his later years propelled me headfirst into the world of elder law. I would like to thank Judy Ogden for suggesting the Note topic, Professor Robert N. Brown for giving me guidance during the Note writing process, and my family for their support.