

MEDICAID ESTATE RECOVERY IN INDIANA

The Tax Man Has Taken Everything
I've Got and More!

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KEITH P. HUFFMAN

Keith P. Huffman is a member of the law firm of Dale & Huffman. Mr. Huffman received his undergraduate education from Adrian College and his legal education from Indiana University. Mr. Huffman is a member of the National Academy of Elder Law Attorneys and serves as the current President of the Indiana Chapter of the National Academy of Elder Law Attorneys. He is a member of the Elder Law Section of the Indiana Bar Association where he currently serves as chairperson of the Health Care Decision Making Committee. Mr. Huffman is a member of the Ethics Committee at Bluffton Regional Medical Center, a member of the Northeast Indiana Hospice Advisory Board, and a member of the Fort Wayne Lutheran Hospital Institutional Review Committee. Mr. Huffman is a frequent speaker on elder law topics and can be reached at huffman@dale-huffman.com. The firm's web address is www.dale-huffman.com, and the materials presented in this seminar are available on the website by opening the Seminars & Materials link and clicking on the August 14, 2008, attachment.

NICOLE R. McVICKER

Nicole R. McVicker is a member of the law firm of Dale & Huffman. Mrs. McVicker obtained a degree in public relations with minors in English and Political Science from Purdue University in 1997. She graduated from Thomas M. Cooley Law School in Lansing, Michigan, in 2001, where she was involved in the Sixty Plus Elderlaw Clinic and Christian Legal Society. Mrs. McVicker is licensed to practice law in Indiana and Washington State. She practices primarily in the areas of Medicaid, estate planning, real estate law, and corporate law. Mrs. McVicker can be reached at mcvicker@dale-huffman.com.



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"People
helping people
help
themselves"

Mitchell E. Daniels, Jr., Governor
State of Indiana

Indiana Family and Social Services Administration
402 W. WASHINGTON STREET, P.O. BOX 7083
INDIANAPOLIS, IN 46207-7083

July 25, 2008

Keith Huffman
P.O. Box 277
Bluffton, Indiana 46714

Deceased: [REDACTED]
SSN: [REDACTED] RID: [REDACTED]
Date of Death: April 11, 2008
RE Bank Account, Patient Account, etc

Please know that we are sorry for your loss. However, state and federal law require this Office to seek recovery from the estate of a person who received Medicaid benefits paid when the person was age 55 years or older. Individuals are informed of this requirement when they apply for Medicaid for themselves or on behalf of another person.

In accordance with IC 12-15-2-17.3 (d), for Medicaid recipients who have prepaid burial arrangements, as a prerequisite of Medicaid eligibility, he/she must designate the state of Indiana or the applicant's or recipient's estate to receive any remaining amounts after delivery of all funeral services and merchandise under the burial contract.

Our records indicate that you were the responsible person for [REDACTED]. If you have received funds from the nursing home patient account, excess funds from prepaid funeral arrangements and/or if you have closed the bank of the deceased, I have enclosed an Affidavit for Transfer of Assets without Administration to claim the balance of the above referenced account(s) for Medicaid benefits paid on behalf of the decedent. Remittance should be made payable to the "Treasurer, State of Indiana" and mailed to the Estate Recovery at the below:

Estate Recovery (William Gibson)
Office of Medicaid Policy and Planning
402 W. Washington Street, W382, MS 07
Indianapolis, IN 46204-2739

Sincerely,

William Gibson, Estate Recovery Analyst
Office of Medicaid Policy and Planning
Telephone: (317)234-6330; Toll free: (877)267-0013
E-mail: William.Gibson@fssa.in.gov

www.IN.gov/fssa
Equal Opportunity/Affirmative Action





"People helping people help themselves"

Michelle E. Daniels, Jr., Governor
State of Indiana

Indiana Family and Social Services Administration
402 W. WASHINGTON STREET, P.O. BOX 7083
INDIANAPOLIS, IN 46207-7083

Date: July 25, 2008

Canahan-Baidinger & Walter Funeral Home
6992 State Road 1
Spencerville, Indiana 46788

[Redacted] Deceased
SSN # [Redacted] RID# [Redacted]

The enclosed Affidavit for Transfer of Assets Without Administration is being sent to you in order to claim any remaining balance of the above referenced account for Medicaid benefits paid on behalf of the decedent.

In accordance with IC 12-15-2-17.3 (d), as a prerequisite of Medicaid eligibility, a Medicaid applicant or recipient must designate the state of Indiana or the applicant's or recipient's estate to receive any remaining amounts after delivery of all funeral services and merchandise under the burial contract. A copy of the statute is enclosed for your reference. If funds are being paid to the estate, you may disregard the affidavit and the State of Indiana will file a claim against the estate for Medicaid benefits paid on behalf of the recipient.

Remittance should be made payable to the "Treasurer, State of Indiana" and mailed to the Estate Recovery at the address listed below:

Estate Recovery (William Gibson)
Office of Medicaid Policy and Planning
MS07, 402 W. Washington Street, Rm. W5X2
Indianapolis, IN 46204-2739

If you have remitted any remaining balance to the State of Indiana, please disregard this letter.

Should you have questions or need additional information you can contact me by e-mail at William.Gibson@fssa.in.gov or by telephone at 877/267-0013 (toll free) or 317/234-6330.

Thank you for your cooperation and assistance.

Sincerely,

William Gibson
Estate Recovery Analyst

cc: [Redacted]

Keith Huffman
P.O. Box 277
Bluffton, IN 46714

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is eligible to receive Medicaid

As added by P.L. 2-1992, SEC.9. Amended by P.L. 4-1993, SEC. 111, P.L. 5-1993, SEC. 123, P.L. 1-1997, IC.60, P.L. 145-2006, SEC.86.

IC 12-15-2-17

Exclusion of resources in determining eligibility for Medicaid; conditions

Sec. 17. (a) Except as provided in subsections (b) and (d), if an applicant for or a recipient of Medicaid:

(1) establishes one (1) irrevocable trust that has a value of not more than ten thousand dollars (\$10,000), exclusive of interest, and is established for the sole purpose of providing money for the burial of the applicant or recipient;

(2) enters into an irrevocable prepaid funeral agreement having a value of not more than ten thousand dollars (\$10,000); or

(3) owns a life insurance policy with a face value of not more

than ten thousand dollars (\$10,000) and with respect to which provision is made to pay not more than ten thousand dollars (\$10,000) toward the applicant's or recipient's funeral expenses; the value of the trust, prepaid funeral agreement, or life insurance policy may not be considered as a resource in determining the applicant's or recipient's eligibility for Medicaid.

(b) Subject to subsection (d), if an applicant for or a recipient of Medicaid establishes an irrevocable trust or escrow under IC 30-2-13, the entire value of the trust or escrow may not be considered as a resource in determining the applicant's or recipient's eligibility for Medicaid.

(c) If an applicant for or a recipient of Medicaid owns resources described in subsection (a) and the total value of those resources is more than ten thousand dollars (\$10,000), the value of those resources that is more than ten thousand dollars (\$10,000) may be considered as a resource in determining the applicant's or recipient's eligibility for Medicaid.

(d) In order for a trust, an escrow, a life insurance policy, or a prepaid funeral agreement to be exempt as a resource in determining an applicant's or a recipient's eligibility for Medicaid under this section, the applicant or recipient must designate the office or the applicant's or recipient's estate to receive any remaining amounts after delivery of all services and merchandise under the contract as reimbursement for Medicaid assistance provided to the applicant or recipient after fifty-five (55) years of age. The office may receive funds under this subsection only to the extent permitted by 42 U.S.C. 1396p. The computation of remaining amounts shall be made as of the date of delivery of services and merchandise under the contract and must be the excess, if any, derived from:

(1) growth in principal;

(2) accumulation and reinvestment of dividends;

(3) accumulation and reinvestment of interest; and

(4) accumulation and reinvestment of distributions;

on the applicant's or recipient's trust, escrow, life insurance policy, or prepaid funeral agreement over and above the seller's current retail price of all services, merchandise, and cash advance items set forth in the applicant's or recipient's contract.

As added by P.L. 2-1992, SEC.9. Amended by P.L. 113-1996, SEC.1; P.L. 272-1999, SEC.39; P.L. 178-2002, SEC.80.

IC 12-15-2-18

Financial resources; state or federal higher education awards

Sec. 18. Except as provided by federal law, if an individual receives a state or federal higher education award that is paid directly to an approved postsecondary educational institution for the



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Mitchell E. Daniels, Jr., Governor
State of Indiana

Indiana Family and Social Services Administration
402 W. WASHINGTON STREET, P.O. BOX 7083
INDIANAPOLIS, IN 46207-7083

July 25, 2008

Knisley Bank
200 S. Broadway Street
Butler, Indiana 46721

Decedent: [REDACTED]
Bank Account # [REDACTED]
SSN # [REDACTED] RID# [REDACTED]

Enclosed is an Affidavit for Transfer of Assets Without Administration to claim the balance of the above referenced account for Medicaid benefits paid on behalf of the decedent.

Remittance should be made payable to the "Treasurer, State of Indiana" and mailed to the Estate Recovery at the address listed below:

Estate Recovery (William Gibson)
Office of Medicaid Policy and Planning
MS07, 402 W. Washington Street, Rm. W382
Indianapolis, IN 46204-2739

Should you have questions or need additional information you can contact me by e-mail at William.Gibson@fssa.in.gov or by telephone at 877/267-0073 (toll free) or 317/234/6330.

Thank you for your cooperation and assistance.

Sincerely,

William Gibson
Estate Recovery Analyst

Cc: [REDACTED]
[REDACTED]
[REDACTED]

Keith Huffman
P.O. Box 277
Bluffton, Indiana 46714

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"People helping people help themselves"

Mitchell E. Daniels, Jr., Governor
State of Indiana

Indiana Family and Social Services Administration
402 W. WASHINGTON STREET, P.O. BOX 7083
INDIANAPOLIS, IN 46207-7083

July 25, 2008

Golden Years Homestead
8300 Maysville Road
Fort Wayne, Indiana 46815

Decesed: [REDACTED]
SSN# [REDACTED] RID# [REDACTED]
Re: Patient Account

Enclosed is an Affidavit for Transfer of Assets Without Administration to claim the balance of the above referenced account for Medicaid benefits paid on behalf of the decedent.

Remittance should be made payable to the "Treasurer, State of Indiana" and mailed to the Estate Recovery at the address below:

Estate Recovery (William Gibson)
Office of Medicaid Policy & Planning
MS07, 402 W. Washington Street, Rm. W382
Indianapolis, Indiana 46204-2739

If remittance has already been submitted to the State of Indiana, please disregard this letter. Also, should you have questions or need additional information you may contact me by e-mail at William.Gibson@issa.in.gov or via telephone at 877/267-0013 (toll free) or 317/234/6330.

Thank you for your cooperation and assistance in this matter.

Sincerely,

William Gibson
Estate Recovery Analyst

Office of Medicaid Policy & Planning
402 W. Washington St., W382-MS07
Indianapolis, Indiana 46204-2739

Cc: [REDACTED]

Keith Huffman
P.O. Box 277
Buffton, IN 46714

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7. This affidavit is made pursuant to Indiana Code 29-1-8-1 et seq. to induce the holders of said personal monies of the decedent to turn said property over to the affiant as provided by law.

8. I affirm that the foregoing facts are true to the best of my knowledge and belief.

Administration

Indiana Family and Social Services

Office of Medicaid Policy and Planning

BY: *William Gibson*

William Gibson
Estate Recovery Analyst

Please make remittance payable to "Treasurer, State of Indiana" and mail to the attention of:

Estate Recovery (William Gibson)
Office of Medicaid Policy and Planning
MS07, 402 W. Washington Street, Rm. W382
Indianapolis, IN 46204-2739
Telephone: (317) 234-6330 Toll Free: (877) 267-0013
Fax: (317) 232-7382
E mail: William.Gibson@fssa.in.gov

HOW TO RESPOND TO THE LETTER FROM MR. GIBSON

CLAIMS AGAINST THE ESTATE—THE BASICS

Follow the Money

The federal estate recovery laws are designed to help states replenish funds to provide care for more needy individuals. The estate recovery programs have been successful. In 2005, \$411,133,981 was recovered in the United States—almost 81 million dollars more than in 2003. The national average estate recovery in 2005 was \$8,061,451, almost identical to Indiana's recovery of \$8,160,208. Indiana's estate recovery increased to \$9,770,222 in 2007.

We should expect additional estate recovery efforts in the future. The Service Center Processes and Procedure Manual in Section 3.6.5.12 requires the caseworker to refer death notices to the Estate Recovery Office (copy attached).

These recovery efforts should not come as a surprise to the families of our clients. Estate recovery rules should be mentioned in our initial conference with a client and should be covered in writing with the family.

The 2007 AARP study developed a model notice to inform families about the potential for estate recovery (Protection in Medicaid Estate Recovery: Findings, Promising Procedures, and Model Notices www.aarp.org/research/assistance/medicaid/2007_07_medicaid.html). Their forms are at the end of these materials. While these forms are not specific to Indiana, you should consider providing these forms or similar information to your clients at the beginning of your representation so there are no surprises at the end of your representation.

Federal law and Indiana law do not require estate recovery if the cost of recovery exceeds the amount collected. Many states have adopted a de minimus amount so estate recovery is not

required in small estates. Georgia first enacted its estate recovery using \$25,000 as the exemption amount for estate recovery. In 2006, the legislation in Georgia increased this amount to \$100,000; however, CMS did approve this change. Indiana does not have an estate recovery de minimus level.

[The following section is from Medicaid in Indiana for the Elderly and Disabled May 9, 2008, reprinted with permission of the Senior Law Project with special thanks to Claire Lewis, Dennis Frick, and Crystal Francis.]

Federal law requires states to assert claims against a recipient's probate estate and gives states the option to assert claims against various types of non-probate transfers. 42 U.S.C. §1396p(b). When the recipient dies, the Indiana DFR can assert a preferred claim for any Medicaid benefits received after age 55. I.C. 12-15-9-1; 42 U.S.C. §1396p(b)(1)(B). For Medicaid provided before October 1, 1993, no claim can be enforced unless the recipient was 65 years or older when the benefits were received. No claim will be asserted for the amount of the Medicare Part B premiums which Medicaid pays for a recipient. ICES Manual 4650.00.00. A trial court has no discretion to reduce the amount of a valid claim. *In the Matter of Estate of Cripe*, 660 N.E.2d 1062 (Ind.App. 1996).

Until 2002, Indiana only asserted claims against the probate estate. The 2002 Indiana legislature expanded the definition of estate in order to include some non-probate transfers. First, the definition of estate was broadened to include any interest in real estate that the recipient held as a joint tenant with rights of survivorship, if the joint tenancy was created after June 20, 2002. The expanded estate definition does not apply to joint survivorship tenancies created before July 1, 2002. The claim extends to the recipient's interest at the time of death. I.C. 12-15-9-0.5(a)(2). Although the statute refers to the recipient's interest at the time of death, the

statute actually intends to extend the claim to the interest the recipient held immediately before death.

In addition, the statute allows OMPP to assert a claim against property distributed by other types of non-probate transfers where immediately before death the recipient had the power, acting alone, to prevent transfer of the property by revocation or withdrawal and use the property for the recipient's own benefit or use the property to satisfy claims. I.C. 12-15-9-0.5(b). This section is modeled after I.C. 32-17-13 to make the beneficiaries of certain non-probate transfers subject to creditor claims and statutory allowances. The expanded definition of non-probate transfers does not apply to any assets that were transferred out of the probate estate before May 1, 2002, or that the DFR had determined were exempt or unavailable before May 1, 2002. I.C. 12-15-9-.08. The statute specifically states that it does not include the transfer of a survivorship interest in property held as tenants by the entirety or to the payment of the death proceeds of a life insurance policy. I.C. 12-15-9-0.5(b). Although not specifically listed, the statute does not extend to the transfer of a remainder interest in real estate, as a life estate holder cannot prevent the property from passing to the remainderman at death. Joint financial accounts with a survivorship interest are included in the definition, provided that the recipient had full access to the funds before death. Property held in a revocable trust where the grantor has full authority to revoke the trust or withdraw all of the funds is included in the definition. If the revocable trust provides that a third party's agreement is needed to revoke or withdraw assets, then it would not be included. An irrevocable trust is not included.

Both state and federal law now specifically address annuities. I.C. 12-15-9-0.5(a)(4) includes within the definition of "estate" any sum due to a person after the death of a Medicaid recipient on an annuity contract purchased after May 1, 2005, with the assets of the recipient or

the recipient's spouse. I.C. 12-15-9-7 provides that a person receiving beneficiary payments from an annuity contract of a deceased Medicaid recipient is liable to the State for Medicaid benefits paid. This section does not specifically refer to a contract of a recipient's spouse. The DRA also addresses annuities.

OMPP must commence enforcement of a claim against assets not included in the recipient's probate estate within nine months after the recipient's death. I.C. 12-15-9-0.6(b). I.C. 32-17-13 provides that a creditor must first demand that the personal representative of the estate file a proceeding against the non-probate transferee(s), and if the personal representative declines or fails to file a proceeding, then the creditor may file a proceeding. This would seem to require that the creditor would need to open an estate if an estate has not already been opened.

The Deficit Reduction Act of 2005 42 U.S.C. §1396p(c)(1)(F) provides that for annuities purchased on or after February 8, 2006, the state must be named as the remainder beneficiary, either in first position or in second position after the community spouse or minor or disabled child, for the amount of Medicaid benefits paid on behalf of the annuitant. 42 U.S.C. §1396p(e) provides that anyone applying for Medicaid must disclose a description of any interest the applicant or community spouse has in an annuity or similar interest, regardless of whether the annuity is irrevocable or a countable resource. Also, the Medicaid application or recertification form must provide that the State becomes a remainder beneficiary for such annuities for Medicaid benefits provided. This provision appears to mean that the State would become remainder beneficiary also on the community spouse's annuities. The State will then notify the company issuing the annuity of the State's rights as a preferred remainderman. If the State is not already listed in the annuity as remainder beneficiary, it is not clear if annuity companies would honor the State's interest. In particular, it is not clear how one spouse could agree that the State

would become beneficiary of the other spouse's annuity and have that be binding. The DRA's provisions apply for annuities purchased on or after February 8, 2006. In summary, when one purchases an annuity, the State must be listed as remainder beneficiary for Medicaid benefits paid to the annuitant. Also, when one applies for Medicaid or is recertified, the person must agree that the State will be the remainder beneficiary for any non-qualified annuity. **Indiana has not yet implemented these DRA provisions.**

In 2005, the Indiana legislature expanded recovery against a recipient's spouse. I.C. 12-15-9-1 now allows recovery "upon the death of a deceased Medicaid recipient's spouse" against the spouse's estate. Recovery against the non-recipient spouse is allowed only if that spouse dies after the recipient spouse dies. Subsection (b) provides that if the spouse remarries, no claim can be made against that part of the estate attributable to the subsequent spouse. No exception is made for any assets the spouse may have accumulated herself after the recipient spouse's death. This extension of recovery to the estate of a spouse appears to go well beyond the recovery allowed by 42 U.S.C. 1396p(b)(2). That section only allows recovery from the recipient's estate. The estate is defined as including "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 assignee of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement." §1396p(b)(4)(B). Assets that the surviving spouse accumulates after the death of a recipient spouse, even if not attributable to a subsequent spouse, are beyond this definition.

There continue to be some statutory exceptions from enforcement of OMPP's claim. No claim can be enforced against real estate or personal property while needed for the support of the surviving spouse, dependent children under age 21, or a dependent who is non-supportive

because of blindness or other disability. There is no requirement that the dependent have any certain relationship to the deceased. I.C. 12-15-9-2(1) and (2). 405 IAC 2-8-1(c) and ICES Manual §4650.05.00 go even further, as they provide that no recovery can be made until after the death of the surviving spouse.

The claim cannot be enforced against the deceased's "personal effects, ornaments, or keepsakes." I.C. 12-15-9-2(3). Also, the claim cannot be asserted against assets which were disregarded under the Indiana Long Term Care Insurance Program. 405 IAC 2-8-1 (e)(2); ICES Manual 4650.05.00.

Funeral expenses can be paid out of the recipient's estate ahead of the preferred claim. Although I.C. 12-15-9-1 refers to only a small exempt amount for funerals of \$350, the Probate Code at I.C. 29-1-14-9(a)(2), through cross-reference to I.C. 12-14-27-4, provides for a larger funeral exemption. FSSA considers there now to be no limit on how much of the recipient's estate can be used to pay for the funeral. However, I.C. 12-14-17-4 appears not to allow for any payment for funeral expenses if the recipient had a pre-paid funeral plan, no matter how small, even if that plan was not intended to cover the full cost of the funeral.

FSSA has issued a Bulletin notifying nursing homes to, in most circumstances, transfer funds remaining in a deceased Medicaid recipient's resident trust account to OMPP as repayment of the Medicaid claim. See Bulletin BT200726, issued October 4, 2007, available at www.indianamedicaid.com/ihcp/bulletins/bt200726.pdf. Some nursing home residents keep their personal funds in a trust account held by the nursing home. 410 IAC 16.2-3.1-6(h) requires a nursing home to transfer funds remaining in a trust account within thirty days of a resident's death. The Bulletin states:

At the death of a resident, OMPP should receive the resident's account fund if:

- The resident was at least fifty-five years old
- The resident was a Medicaid recipient
- The resident is not survived by a spouse
- The resident is not survived by a dependant child under twenty-one years old
- The resident is not survived by a dependant child who is blind or disabled
- The resident had pre-paid funeral arrangements, and
- No estate has been or will be opened in probate court.

Bulletin BT200726 at p.1.

Previously, each county contracted with a local attorney to represent it in estate recovery matters. Beginning in mid-2006, estate recovery was centralized. It is now being handled by Michael J. Staresnick, Estate Recovery Manager, Office of Medicaid Policy and Planning, Family and Social Services Administration, 402 W. Washington St., Rm. W382 MS 07, Indianapolis, IN 46204-2776, Phone: (317) 232-7382. He files claims in estates when he is notified of the opening of an estate. County offices have been instructed to notify him if it receives a notice of administration of an estate or if it learns of the opening of an estate. There appears to be no effort currently to identify non-probate transfers and assert claims against them, although ICES Manual 4650.10.00 does provide county offices with information about using a small estates affidavit to present a claim.

As a known creditor, notice must be given to FSSA where an estate is opened for a recipient or the recipient's spouse. The address of the Estate Recovery Manager to whom notice should be given is listed above. There is no time limit for FSSA, as a governmental entity, to file a claim. I.C. 29-1-14-1(a). If FSSA does not file a claim, then the estate can be closed under I.C. 29-1-17-2 with a final report and account and decree of distribution. If there is no appeal, the decree is final and should prevent the State from filing a belated claim.

If the estate contains real estate, one should be aware that delaying the opening of an estate might avoid the need to sell the real estate to pay FSSA's potential claim. I.C. 29-1-7-

15.1(b) states: “No real estate situated in Indiana of which any person may die seized shall be sold by the executor or administrator of the deceased person’s estate to pay any debt or obligation of the deceased person, which is not a lien of record in the county in which the real estate is situated, or to pay any costs of administration of any decedent’s estate, unless letters of testamentary or of administration upon the decedent’s estate are taken out within five (5) months after the decedent’s death.” Thus, if an estate is not opened within five months after death, real estate should not be subject to sale to pay a Medicaid claim. Frequently, there will be little if any property other than real estate in the estate.

LIENS

The Omnibus Budget Reconciliation Act of 1993 (OBRA) required every state to institute a Medicaid estate recovery system. The federal estate recovery laws are found in 42 U.S.C. §1396p. The CMS guidelines are found in Section 3810 of the State Medicaid Manual Transmittal 75 (2001).

The federal law contemplated estate recovery would be enhanced by placement of liens on real property followed by collection efforts after the recipient’s death. While Indiana is not currently aggressively placing liens on real property, we should expect this as the State more aggressively pursues estate recovery and enhances the Medicaid estate recovery laws. The Indiana laws (IC 12-15-8.5) on liens closely follow the federal law.

The federal law requires each state to recover for Medicaid benefits provided to certain individuals and allows each state to recover for other Medicaid benefits. Indiana has elected to recover for all Medicaid benefits paid to Medicaid recipients after age 55, unless prevented from doing so by federal or state law.

The Medicaid office can place a lien on a Medicaid recipient's real property only if the recipient is in a medical institution and is not reasonably expected to return home. A lien cannot be placed on the home if any of the following persons live in the home:

The Medicaid recipient's spouse;

The Medicaid recipient's child who is:

- (a) less than 21; or,
- (b) disabled under the SSI criteria;

The Medicaid recipient's sibling if the sibling has lived in the home for 12 months and has some ownership interest;

The Medicaid recipient's parent; or,

The Medicaid recipient's child of any age who has lived in the home with the recipient for 24 months, provided care that kept the recipient at home, and has lived in the home continuously since the parent entered the nursing home.

The Medicaid office must give written notice of intent to place a lien to the Medicaid recipient and the recipient's representative 30 days before recording a lien. The Medicaid recipient has that period of time to file for an ALJ hearing to establish that the requirements for the placement of a lien have not been met.

The Indiana statute sets forth provisions for foreclosing the lien. The statute also sets forth provisions for releasing the lien should the recipient be able to return to live at home.

The estate recovery rules closely follow the lien rules.

ETHICAL ISSUES IN MEDICAID ESTATE RECOVERY

The Omnibus Budget Reconciliation Act of 1993 required states to actively seek estate recovery for the cost of certain Medicaid assistance paid for certain Medicaid recipients and

allowed states to expand the definition of estate for estate recovery purposes. Indiana expanded the definition of probate estate for estate recovery purposes in 2002 and 2005.

INDIANA LAW, FOR ESTATE RECOVERY PURPOSES, NOW DEFINES THE TERM “ESTATE” AS FOLLOWS:

[EFFECTIVE July 1, 2005]

I.C. 12-15-9-0.5. “Estate” defined

- (a) As used in this chapter, “estate” includes:
- (1) all real and personal property and other assets included within an individual’s probate estate;
 - (2) any interest in real property owned by the individual at the time of death that was conveyed to the individual’s survivor through joint tenancy with right of survivorship, if the joint tenancy was created after June 30, 2002;
 - (3) any real or personal property conveyed through a non-probate transfer; and
 - (4) **any sum due after June 30, 2005, to a person after the death of a Medicaid recipient that is under the terms of an annuity contract purchased after May 1, 2005, with the assets of:**
 - (A) **the Medicaid recipient; or**
 - (B) **the Medicaid recipient’s spouse.**
- (b) As used in this chapter, “non-probate transfer” means a valid transfer, effective at death, by a transferor:
- (1) **Whose last domicile was in Indiana; and**
 - (2) **Who immediately before death had the power, acting alone, to prevent transfer of the property by revocation or withdrawal and:**
 - (A) **use the property for the benefit of the transferor; or**
 - (B) **apply the property to discharge claims against the transferor’s probate estate.**

The term does not include transfer of a survivorship interest in a tenancy by the entireties real estate or payment of the death proceeds of a life insurance policy.

Estate recovery is permitted for Medicaid benefits provided to an individual after age 55. There is no estate recovery if a person dies leaving a surviving spouse. However, at the death of the surviving spouse, estate recovery is permitted. This is a rapidly changing area of the law, with some states now seeking to trace assets and recover against transfers made to children before the second death.

Scenario No. 1: Mom is a widow. She has been in the nursing home for two years. Medicaid is helping to pay for her care. Mom dies leaving a checking account of \$1,200.00 that names her Son as a pay on death beneficiary. The Son would like you to prepare a consent to transfer so he can use the money to pay the funeral expenses not covered by Mom's prepaid funeral arrangements.

You know the funds are subject to the Medicaid repayment rules for the assistance provided to Mom. How do you proceed?

The answer to this question is provided by Opinion No. 2 of 2003 of the Legal Ethics Committee of the Indiana State Bar Association (available at www.inbar.org/content/paf/ethics_2of_2003.pdf). The consent to transfer (See I.C. 6-4.1-8 et. Seq.) is designed to ensure payment of the Indiana inheritance tax. The consent to transfer laws do not impose a duty on a transferee or the transferee's attorney to notify creditors. Consequently, there is no obligation to notify the Division of Family Resources, allowing the attorney to prepare the consent to transfer.

Ethical Opinion #2 addresses this issue by stating:

“The purpose of the statutes and regulations regarding the Consent to Transfer mechanism is to ensure payment of Indiana Inheritance Tax, which is imposed upon property transfers which take place because of death. While the Multi-Party Account law at I.C. 32-4-1.5-7 provides that resort may be made to multi-party account funds where a decedent’s probate estate is insufficient to pay claims, it also provides that written demand to assert the liability must be made upon a personal representative, and that anything recovered by the personal representative from a multi-party account shall be administered as a part of the decedent’s estate. A decedent’s estate must be opened for a personal representative to be appointed, so the legislature intended for creditor claims of a decedent to be resolved through a probate estate, whether the funds to pay claims come from the probate estate or non-probate property such as a multi-party account.

There is no duty of notice on the part of an applicant filing an Application for Consent to Transfer apart from the duties imposed upon personal representatives to notify creditors. Since Son has no duty to notify DFR upon filing an Application for Consent to Transfer, Lawyer would not have an obligation under Rule 4.1(b) to make a disclosure required by law. There would also not be a fraud involved in the sense of “[a] false representation of a matter of fact...which deceives and is intended to deceive another so that he shall act upon it to his legal injury.” (*Black’s Law Dictionary, supra*). Without a crime or fraud in Son’s Application for Consent to Transfer, Lawyer’s assistance to Son with the Application does not run afoul of the Rule 1.2(d) proscription from assisting a client in conduct a lawyer knows is criminal or fraudulent. Neither is there any tribunal under Rule 3.3(a)(2) to which Lawyer owes a duty of candor.

Whether Lawyer knows or does not know of Son's plans not to notify DFR is not significant. Where Son has no duty to notify DFR upon his filing an Application for Consent to Transfer, and filing the Application without giving notice is not a fraud, Lawyer does not violate any ethical obligation by failing to notify DFR of the filing or by assisting Son in preparing and filing the Application."

There is an obligation to notify the Son that he may have to repay the funds to Medicaid. Under I.C. 29-1-14-9, the priority of claims for Medicaid repayment lists reasonable funeral expenses as the second priority behind costs and expenses of administration. The payment of funeral expenses is limited under the provisions of I.C. 12-14-6, I.C. 12-14-17, and I.C. 12-14-21. These statutes reduce the priority order for the payment of funeral expenses when, as in this case, Mom had prepaid funeral expenses that were excluded as a resource when she was found eligible for Medicaid.

The Son will want to know how long the State has to file a claim for reimbursement of the \$1,200. I.C. 12-15-9-0.6 places a nine-month time limit on recovery against assets not included in the probate estate, if the assets were reported to the Division of Family Resources. The wording of this statute is not clear. The existence of the checking account was reported in the initial application and in each redetermination, so clearly the Division of Family Resources was aware of this account. The date of death balance has not been reported to the Division of Family Resources. You must tell the Son that it is likely the State has nine-months from the date of death to file a claim but that this is not certain.

Scenario No. 2: The same fact situation as Scenario 1 except that mother has not named Son as pay on death beneficiary, so Son asks you to prepare a small estate affidavit.

The result is the same as in the first scenario. There is no obligation to give notice to creditors when a small estate affidavit is prepared, so Lawyer may assist Son in the preparation of the small estate affidavit.

Ethical Opinion #2 addresses this issue by stating:

“As is the case with a Consent to Transfer, the law does not require notice to creditors where an estate administration is not opened, so Son breaches no duty by failing to give notice to DFR. Mother’s funds are, however, subject to the claims of Mother’s creditors, limited to nine months from date of death for nongovernmental creditors and not limited in the case of governmental creditors. In the event that DFR some day causes Mother’s estate to be opened and files its claim, Son will be required to return the funds from Mother’s bank account to the estate.

Whether Lawyer violates the Code of Professional Responsibility in assisting Son with a small estate affidavit depends upon whether not opening an estate administration and not notifying known and reasonably ascertainable creditors such as DFR is a fraud or crime. If so, Rule 1.2(d) prohibits Lawyer to withdraw from the representation. Rule 3.3 is not implicated, as no tribunal is involved, and Rule 4.1 is not implicated, as no law requires notice to creditors where no estate is opened. If Son’s conduct does not constitute a fraud or crime, Lawyer is not prohibited from assisting Son with the small estate affidavit and commits no violation of the Code of Professional Responsibility by failing to disclose anything to DFR or to a tribunal.

There is no statutory duty to open an estate regardless of the value of a decedent’s assets at death. Unless the estate is a small estate, however, such assets will not be able to be transferred. It also follows that where no estate is opened, there is not a duty to give notice to potential estate claimants. Absent a duty to open an estate or a duty to notify creditors where no

estate is opened, Son commits no fraud or crime by transferring Mother's bank account funds through the use of a small estate affidavit. Son, as "person acting on behalf of the distributees" under a small estate affidavit (I.C. 29-1-8-3), would be a fiduciary with duties to persons entitled to a distribution from the estate property, including DFR. If Son, having obtained possession of assets, fails to make distribution to DFR, Son commits a breach of this fiduciary duty. If, however, Son commits no crime or fraud thereby, Lawyer violates no Rule of Professional Conduct in assisting Son by preparing a small estate affidavit and instructing Son on its use."

Scenario No. 3: Mom is in the nursing home. It is discovered she has 966 shares of Wellpoint stock. Mom voluntarily withdraws from Medicaid. Mom dies before the stock is sold. Son asks you to open an estate for Mom. You open the estate and Son asks you not to list the Division of Family Resources as a known creditor.

Ethical Opinion #2 addresses this issue by stating:

"Lawyer's knowledge that Son intends not to notify DFR of Mother's estate changes Lawyer's obligation to DFR and to the tribunal. Son has a clear duty to provide the notice, and Lawyer, while bound by Rule 1.2(a) to abide by Son's decision, is required by Rule 1.2(e) to counsel Son that Lawyer cannot assist in conduct which is criminal or fraudulent.

It may be that Son's conduct in failing to give notice to DFR, while a breach of duty, is not a crime or fraud. Under I.C. 29-1-14-1, the remedy for failure to give a creditor notice is the creditor's otherwise untimely filed claim will not be untimely. Since DFR is exempt from the filing deadlines altogether, and the constructive notice of publication in a newspaper is adequate for other categories of creditors, DFR is not without some notice, and is not at all without remedy from the legal consequences of Son's failure to give notice. If Son's conduct is not a crime or fraud, Lawyer may continue to represent Son in the estate administration and honor

Son's demand that DFR not receive notice without violating Rule 3.3(a)(2). It should be noted, however, that Lawyer is permitted by Rule 1.16(b)(3) to withdraw from representing Son, conditioned only upon there not being a material adverse effect on Son's interest, if Lawyer finds that Son's disregarding of Lawyer's advice to give DFR notice is imprudent.

If Lawyer continues representing Son, Lawyer must take care that Lawyer does not assist Son in making a false representation to the court that all known or reasonably ascertainable creditors have received notice. A personal representative of an unsupervised estate is required in a closing statement pursuant to I.C. 29-1-7.5-4 to state that he has provided notice to creditors as required under I.C. 29-1-7-7(c) and (d). In a supervised estate, I.C. 29-1-16-5 requires the personal representative in petition to settle and allow an account to specify to the court the persons to whom distribution is to be made and the amounts to which each is entitled. If Lawyer were to prepare either a closing statement containing a false statement that creditors were given proper notice or petition to settle and allow by proposing distribution of a net estate to heirs or devisees without honoring DFR's priority under I.C. 29-1-14-9, Lawyer would be knowingly making a false statement of material fact to a tribunal prohibited by Rule 3.3(a)(1). At the point where the personal representative is required to make a statement that creditors have received proper notice, Lawyer cannot assist Son without violating Rule 3.3(a)(1).

Even if Lawyer would be permitted to continue in the representation, Lawyer's knowing assistance to Son in securing a larger inheritance through failing to give DFR notice is fraught with peril, as Son's conduct might be seen by some to constitute fraud or a crime. Under Rule 1.2(d), a lawyer shall not assist a client in engaging in conduct which is criminal or fraudulent. Further, under Rule 1.16(a)(1), a lawyer shall withdraw from a representation where the lawyer will be called upon to violate the Rules of Professional Conduct or some other law. Finally,

under Rule 3.3(a)(2), a lawyer shall not knowingly fail to disclose a fact to a tribunal necessary to avoid a client's crime or fraud. Lawyer first must counsel Son that Lawyer cannot assist (Rule 1.2(e)) and give Son the opportunity to provide DFR the notice required by law. If Son insists that DFR not receive notice, and such conduct constitutes a fraud or crime, Lawyer shall withdraw. The withdrawal can be "quiet," not communicating any red flag to the court about the reason for the withdrawal, or "noisy," where Lawyer indicates that his withdrawal is mandated by the Rules of Professional Conduct, allowing the court to infer that there is a problem with the client's conduct. In either event, Lawyer's withdrawal permits Lawyer to maintain Son's confidentiality but honors Lawyer's duty to the tribunal under Rule 3.3 and to DFR under Rule 4.1, since after withdrawal, Lawyer no longer has those duties.

Although Lawyer has a duty not to reveal a client's confidences under Rule 1.6, there are a number of possible bases under which Lawyer would be permitted to reveal to the Court that DFR is a creditor or to DFR that an administration is pending. One of these is found in Rule 1.6(a) itself, where a lawyer is permitted to make disclosures impliedly authorized to carry out the representation. Another is contained in Rule 1.6(b), where a lawyer may reveal information reasonably necessary to prevent a client's criminal act (although it may be that notice to DFR is not reasonably necessary to prevent Son from committing a crime, either because what Son is doing is not a crime or because other circumstances make disclosure not reasonably necessary to prevent a crime). One final basis is the Rule 4.1(b) requirement that in order to be truthful to a non-client, a lawyer must disclose what is required by law to be revealed, here that an estate administration has been opened, which gives rise to a duty under the Probate Code to provide notice to creditors. Lawyer's subverting of Son's instructions and revealing Son's confidential information is problematic. While arguably authorized, it resolves the conflict between Rules

1.6 and 1.2 on the one hand, and making a disclosure required by law on the other, in favor of disregarding the duty of confidentiality and overriding a client's directions as to the objectives of the representation. Such a resolution offers no ethical safe harbor to attorneys who may instead safely choose to quietly withdraw.

Rule 1.6(a) expressly permits a lawyer to make disclosures impliedly authorized to carry out the representation. It could be argued that because the notice provisions of the Probate Code require Son to give notice to known creditors, Lawyer could add DFR's name to the list of creditors to receive notice, Son's direction notwithstanding, because giving DFR notice is impliedly authorized for Lawyer to represent Son in carrying out his duties as personal representative. Lawyer would arguably not be in violation of Rule 1.2 or Rule 1.6 by adding DFR's name to the list. (Lawyer would also be honoring the "special obligation" Lawyer may have to DFR as a possible beneficiary of Lawyer's client Son as a fiduciary under the Comment to Rule 1.2.) Doing so, however, would mean that Lawyer is disclosing something Son expressly told him not to disclose, and Lawyer may well decide that withdrawal is a better option.

Rule 1.6(b)(1) authorizes a lawyer to reveal a client's information which would otherwise be confidential where disclosure is reasonably necessary to prevent the client from committing a criminal act. While it is beyond the scope of this opinion to analyze whether Son's conduct might constitute some crime, for this purpose it will be assumed *arguendo* that a crime might be implicated. The inquiry then is whether Lawyer's disclosure is reasonably necessary to prevent Son's crime. It may be that the failure to give actual notice to an agency of the State as a creditor is not reasonably necessary, since the remedy for failing to give notice is an extension of time to file a claim, and the State already has no bar to the time to file a claim. If so, Lawyer is required

by Rule 1.6 to maintain Son's confidential information and not give DFR notice. If not, Lawyer would be permitted by Rule 1.6(b)(1) to reveal the information, although, as discussed above, many lawyers would choose to withdraw from the representation rather than breach the client's confidence and disregard the client's objective.

Rule 4.1(b) further requires Lawyer to disclose what is required by law to be revealed. Since the notice provisions of the Probate Code require notice be given to known creditors, Lawyer's duty of truthfulness to third parties means that Lawyer shall give DFR notice where Lawyer knows DFR is a creditor. Once Lawyer has terminated his representation, however, he would no longer have a Rule 4.1(b) duty to disclose.

Although there are rationales for revealing Son's confidential information that DFR is a creditor, many lawyers again would terminate the representation rather than to reveal the confidential information and disregard Son's objectives. Further, while it may be possible for Lawyer to continue to represent Son up to the point where Son will be making a false statement to the court, it might be prudent for Lawyer to terminate the representation at the earliest opportunity rather than to continue the representation, reveal the confidential information, and seek to justify the breach of confidence.

HARDSHIP WAIVERS

Federal law prohibits estate recovery if it can be proven there will be a financial hardship to the surviving family members. The criteria for estate recovery hardship waivers may become more important as provisions for avoiding transfer penalties under the hardship waiver provision of the Deficit Reduction Act of 2005 are enacted.

The statute at 42 U.S.C. 1396 p(b)(3) states:

“The State agency shall establish procedures (in accordance with standards specified by the Secretary) under which the agency shall waive the application of this subsection (other than paragraph (1)(C)) if such application would work an undue hardship as determined on the basis of criteria established by the Secretary.”

The Centers for Medicare and Medicaid Services (CMS) has adopted guidelines for states to follow (State Medicaid Manual §3810(c)). These guidelines permit each state to adopt specific hardship criteria. States are permitted to apply the waiver only while the hardship exists (such as waiting for a child to turn 21). The specific criteria are:

- (1) The sole income-producing asset of survivors (where such income is limited) such as a family farm or a family business;
- (2) A homestead of modest value; or
- (3) Other compelling circumstances.

The State plan defines what a homestead of modest value is with CMS suggesting it is a home that is one-half the value or less of the average home in the county the home is in.

The Indiana provisions for a hardship waiver are found in the ICES Manual in Section 4650.20.10 and in 405 IAC 2-8-2. The decision to allow a hardship waiver can be made by the Medicaid Estate Recovery Office. Significantly, the approval of a hardship waiver is not a compromise of a claim under IC 4-6-2-11 that requires approval of the governor and the attorney general.

The application for a hardship waiver is filed on State Form 48259/OMPP003. A copy is attached.

Indiana recognizes four specific situations for hardship waivers. These are:

- a. Enforcement of the State's claim will cause the applicant to become eligible for public assistance;
- b. Enforcement of the State's claim will cause the applicant to remain dependent on public assistance;
- c. Enforcement of the State's claim will result in the complete loss of the applicant's sole source of income and the beneficiary's income does not exceed the Federal Poverty Level (FPL);
- d. Other compelling circumstance (the applicant must describe).

The ICES Manual calls for the local caseworker to process requests in situations 1-3 to determine benefit entitlement before the claim is sent to the Estate Recovery Office. With modernization, I recommend sending the complete State Form with attachments directly to the Office of Estate Recovery.

The ICES Manual offers this example of a situation for a hardship waiver:

“A recipient and his non-disabled son live together on a farm. The son works on the farm and his father shares the farm income with him. The property is in the recipient's name only and when he dies the property becomes subject to estate recovery. The son, who is beneficiary of the estate, applies for a hardship waiver claiming that without the income from the property, he will become eligible for Food Stamps. The local office must make a Food Stamp eligibility determination. (The son does not need to actually file a Food Stamp application.) The caseworker determines that if the applicant were to own the farm, he would not be eligible for Food Stamps due to the income he would have from the farm. Without the farm and its income, he meets Food Stamp eligibility

requirements. Therefore, if the State enforces its claim against the estate, the son would become eligible for assistance.”

The denial of a hardship waiver is subject to the usual appeal rights with an Administrative Law Judge.

2008 Poverty Guidelines

Persons In Family or Household	Income
1	\$10,400
2	\$14,000
3	\$17,600
4	\$21,200
5	\$24,800
6	\$28,400
7	\$32,000
8	\$35,600
For each Additional Person Add	\$3,600

The AARP Public Policy Institution commissioned a study known as “Protections In Medicaid Estate Recovery: Findings, Promising Practices, and Model Notices May 2007” (available at www.aarp.org/ppi). This study shows a 32% decrease in hardship waiver applications across the United States from 2003 to 2005. Despite this decrease, the average hardship waiver requests granted remains at 58% of the requests filed.

This study shows 8 hardship waivers were filed in Indiana in 2003 with 6 granted. This dropped to 5 waiver applications in 2005 with 4 granted. South Carolina interestingly had 380 hardship application waivers filed in 2003 with 352 of those granted.

Indiana will soon enact the provision of the Deficit Reduction Act. This Act permits a hardship waiver to eliminate or reduce penalties caused by improper gifts. The current criteria

for hardship waivers may provide insight on how hardship waivers will work in the gift/penalty context.

ESTATE RECOVERY—MARRIED COUPLES

Federal law is not clear on whether estate recovery is allowed at the death of the Community Spouse for Medicaid benefits paid by the State for the benefits of a predeceased Institutionalized Spouse. Bob Rhee and Claire Lewis are currently facing this situation. This matter has been addressed by several courts and will eventually be addressed by a court of appeals in Indiana.

Federal law provides in pertinent part:

42 U.S.C. § 1396p(b) limits a state’s power to recover Medicaid benefits, providing:

(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:

(B) In the case of an individual who was 55 years of age or older when the individual received such medical assistance, the State shall seek adjustment or recovery from the individual’s estate,...

(2) Any adjustment or recovery under paragraph (1) may be made only after the death of the individual’s surviving spouse, if any,...

(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...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 assignee of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.

STATE AND FEDERAL LAWS

In Re Estate of Thompson 586 N.W. 2nd 847 (North Dakota Supreme Court 1998)

Facts: Nathaniel Thompson received Medicaid benefits of \$58,237.30 between January 1, 1991, and his death on December 20, 1992. His wife, Victoria Thompson, died on September 15, 1995, never having received Medicaid benefits. The State Medicaid office filed a claim in her estate to recover the cost of benefits provided to her husband.

North Dakota law changed on July 1, 1995, to allow estate recovery from the Medicaid recipient and on the death of the spouse of a deceased recipient.

The Thompson Court stated federal law in effect at her death only permitted estate recovery from the recipient of medical assistance. The Thompson Court allowed estate recovery from the estate of the Community Spouse. The Thompson case does not discuss what assets were transferred from Nathaniel Thompson to Victoria Thompson at the time of his death. The Court stated in a footnote the estate of Victoria Thompson did not contend her estate included

assets not acquired from her husband “through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangements” (586 NE 2nd 852).

In the Matter of the Estate of Verna M. Wirtz 607 N.W. 2nd 882 (North Dakota Supreme Court 2000)

Facts: Clarence Wirtz received medical assistance for nursing home care from July 1996, until his death on August 24, 1997. The benefits totaled \$53,635.83. Verna Wirtz died on September 21, 1998. The parties stipulated that Clarence had not transferred any assets to Verna at the time of her death through joint tenancy, tenancy in common, survivorship, life estate, or living trust.

The Wirtz Court examined the federal estate recovery statute to determine if any assets passed from Clarence to Verna at the time of his death through “other arrangements”. The Wirtz Court held any asset transfers by Clarence to Verna during his lifetime which were traceable at her death are subject to estate recovery.

Hines v. Department’s of Public Aid 850 N.E. 2nd 1486(Ill. Supreme Court 2006)

Facts: Julius Hines entered a nursing home in 1994. He was approved for Medicaid in August 1994. He received Medicaid benefits of \$61,154.48 before his death in 1997. The title to the home and car passed to his wife Beverly at his death. She died in May 2001 having never received Medicaid benefits.

The Illinois Supreme Court concluded federal law permitted estate recovery only for the estate of Julius Hines. The Court found the Illinois legislators had not enlarged the permitted federal estate recovery to include within his estate the assets which passed to her at the time of his death in 1997. The Court stated the legislators originally adopted such expanded estate recovery laws but changed those laws in 1996.

In Re: The Estate of James Clifford Smith (Tenn. Ct. App., No. M2005-01410-COA-R3-CV, Nov. 1, 2006)

Facts: Mary Smith qualified for Medicaid in a nursing home on July 1, 2002. The Tennessee Medicaid Bureau paid \$34,262.54 for her care from that date until her death in September 2003. James Smith died in December 2003, never having received Medicaid benefits. Tennessee Care filed a claim in his estate seeking recovery for the funds paid on her behalf.

The Tennessee Court of Appeals did not discuss Tennessee law. The Court held the plain language of 42 U.S.C. §1396p(b)(4)(B) only permits recovery when the Medicaid recipient has some interest or title in an asset as of the time of the recipient's death. Since all of the marital assets had been conveyed to Mr. Smith, there could be no estate recovery from his estate.

In Re the Estate of Francis E. Borg State of Minnesota Supreme Court 2008A05-2436

Facts: Delores Borg entered a nursing home on October 24, 2001. In December 2001, she qualified for Medicaid. The jointly owned marital property was properly transferred to her husband, Francis Borg. She died on January 1, 2004. Borg received \$108,413.52 in Medicaid benefits. She owned nothing at her death. On May 27, 2004, Francis died. The County Medicaid office filed a claim in his estate for the benefits paid for her care. Minnesota has a statute similar to Indiana's which allows for estate recovery at the second death for benefits paid for either spouse.

The Borg Court conducted a thorough analysis of the interaction of federal law and Minnesota law. The Court first considered if federal law preempted Minnesota law to have any claim in the estate of the Community Spouse to recover for benefits provided to the Institutionalized Spouse. The Court concluded federal Medicaid laws do not preclude recovery

from the estate of a surviving Community Spouse for benefits paid on behalf an Institutionalized Spouse.

The Borg Court extensively analyzed the 1993 federal estate recovery statute. The Court concluded the 1993 federal law definition of estate allowed the Minnesota and federal statutes to exist without conflicts.

The Borg Court concluded the Borgs could have owned a home or other property jointly which would have passed to others at the time of Mr. Borg's death. The Borg Court said it would allow estate recovery at the second death but restricted this recovery to assets in which Mrs. Borg had an interest in at the time of her death.

INDIANA ESTATE RECOVERY CASES

In the Matter of Elkhart County Department of Public Welfare v. Estate of Bertha E. Cripe 660 N.E. 2nd 1062, 1996.

Facts: William Mitenberg, a cousin of Bertha Cripe, died intestate on January 1, 1988. Bertha Cripe, a Medicaid recipient, died on August 14, 1989. Bertha Cripe's estate received \$103,711.63 from William's estate. The Elkhart County Department of Public Welfare filed a claim for \$90,312.62.

Discussion: The trial court allowed the claim of the County to be paid only for the period from William's death until the death of Bertha in the amount of \$20,728.63. The appellate court allowed the full claim to be paid under the provision of I.C. 12-15-9-1.

Department of Public Welfare, State of Indiana v. Lula J. Tyree et. al. 540 N.E. 2nd 18 (Sup. Ct. 1989).

Facts: Linda K. Fithian, age 28, and her minor daughters were in an automobile accident. The other driver's insurance company filed a complaint for declaratory judgment seeking to pay the policy limits and let the court decide on the distribution of the proceeds.

Linda died of her injuries and an estate was opened for her. The Department of Public Welfare paid for Linda's care until she died. Linda's estate received \$25,000 from the insurance company. The Department filed a claim for \$59,984.90.

Discussion: The Supreme Court discussed the Medicaid law statutes which allow the DPW to place a lien on any recovery when the injured person asserts a claim against any insurers as a result of injury, illness, or disease. The Court found this statute did not apply because Linda did not file the lawsuit. The Court then found the Medicaid estate recovery statute to be controlling. Because Linda was survived by minor children there could be no estate recovery, so the funds were awarded to Linda's children.

Bonnie L. Dunnewind et. al. v. Thomas E. Cook, Personal Representative of the Estate of Florence M. Cook 697 N.E. 2nd 485 (1998).

In Re: Weitzman et. al. v. Fort Wayne National Bank 724 N.E. 2nd 1120 (2000).

These cases do not involve Medicaid estate recovery at the present time. These cases may become important in Medicaid spousal recovery cases. These cases discuss the issue of when non-probate assets are subject to an election of a spousal share and allowance at the first death. Opinions in these cases discussed the general rule that only probate property is subject to the spousal election and allowance. These opinions go on to discuss the exception to the general rule when the purpose of moving the assets into a probate avoidance account is to defeat the surviving spouse from rightfully electing against the estate.

Appendix A

Refer to *ICES Program Policy Manual: Chapter 2400: Non-Financial Requirements: Sections 2434.15.00 through 2434.15.10* [<insert hyperlink>](#) for the specific policy regarding Cooperation and Good Cause Requests for Medical Assignment.

If an individual claims she could be exempt from cooperating with the prosecutor's office/child support office, then the individual can request Medical Assignment Good Cause. A task should be created for the 'FSSA Policy' quote.

Refer to Section 3.5, Processing an Application [<insert hyperlink>](#) for Medical Assignment Good Cause request tasks.

3.5.5.11 Information Request from an External Party

Other agencies such as other state eligibility programs, housing assistance, child welfare, mental health agencies, etc. may request information on a Client. Before releasing confidential information (e.g. address, telephone number, benefit status, etc.) either verbally or in writing to a requesting individual other than the applicant/Client and/or her Authorized Representative, it is important to verify the requesting party has a release of information signed by the applicant/Client in order to share information in accordance with policy.

Refer to Section 3.5, Processing an Application Part I [<insert hyperlink>](#) for Information requests from external parties.

3.5.5.12 Estate Recovery Referrals

If an individual receives Medicaid for the Disabled, Blind, Aged, or the Disabled Worker and has any resources after her death, then a referral can be made to the State's Office of Medicaid Policy and Planning. There may be a recovery of money paid for medical costs using the resources available to the Client after she passed away or after an application has been authorized and the need for a lien referral is found. If a lien referral is needed, refer to the Manage Application Work Instructions for processing a Lien Referral.

Refer to Section 3.6, Processing an Application, Lien Referrals [<insert hyperlink>](#).

Step	Estate Recovery Referrals
1.	After processing a change related to the death of an individual receiving Adult Medicaid, it is determined that an Estate Recovery Referral is needed.
2.	Create a User Defined task Estate Recovery Referral to the FSSA Medicaid Estate Recovery queue for an individual at the FSSA Medicaid Estate Recovery Unit to process. <Refer to Section 3.11.1, Creating, Parking, Forwarding, Getting, and Opening Tasks <insert hyperlink> for creating a User Defined Task>



Step	Estate Recovery Referrals
8.	<p data-bbox="451 369 743 396">The following question displays:</p> <div data-bbox="459 396 1190 436" style="background-color: black; color: white; padding: 2px;"> <p data-bbox="467 401 1057 436">Do you want to update this (Y/N)? :</p> </div> <ul data-bbox="451 443 1282 546" style="list-style-type: none"> <li data-bbox="451 443 1282 495">• If the comments entered are correct and need to be added to the case record, press "Y" for yes. <li data-bbox="451 495 1282 546">• If the information should not be added to the case record, press "N" for no. Since this is a new entry in the comments, "N" should not be selected.
9.	Return to WFMS and retrieve the next task.



Appendix B

B. Model Brochure¹⁸²

Your Guide to the Medicaid Estate Recovery Program

English—For help to translate or understand this please call [Phone number] (TTY)

Spanish—Si necesita ayuda para traducir o entender este texto, por favor llame al teléfono [Phone number] (TTY)

[Insert additional foreign language widely spoken in your state]

Questions?

Call [Phone number]

What is the Estate Recovery Program?

Medicaid is a government program that pays for health care for people with limited incomes. Some of these services are provided to people as they grow older. Medicaid pays for services that help people stay in their own home. It also pays for people to move to a nursing home, if that is what they need.



To help pay for these long-term care services, every state must have a Medicaid Estate Recovery Program. If you received Medicaid long-term care services, [state] has the right to ask for money back from your estate after you die.

In some cases, the state may not ask for anything back, and the state will never ask for more money back than it paid for your services. Regardless of what is owed, [state] will never collect more than the value of what you own at the time of your death.

How does the program work?

When you apply for Medicaid, [state] provides a notice that explains the Estate Recovery Program.

If you have received Medicaid long-term care services, after your death, the state gives specific notice to the person handling your estate, or to survivors or heirs. The notice explains what amount is to be recovered, what action the state will take, and opportunities to contest the state's action.

The state will then make a claim [through the court] to recover the property. [insert state specific recovery procedures]

What is an estate?

An estate is property, such as money, a house, or other things of value that a person leaves to family members or others (heirs) when he or she dies.

The Medicaid Estate Recovery Program does not apply to all property that a person may own. Here are some examples of property from which the state will not collect:

- [Insert state specific examples]
- Life insurance policies that name a person to receive the payment
- Bank accounts that are paid on death to another person

Which Medicaid recipients are affected by the Medicaid Estate Recovery Program?

- Those who were age 55 or older when they received the Medicaid services
- Those who were in nursing homes or other facilities, for which Medicaid paid
- Certain other Medicaid recipients with long-term care insurance policies

What Medicaid services are covered by the Medicaid Estate Recovery Program?

- Nursing home services
- Home and community-based care



- Hospital and prescription drug services
- [Insert additional services]

Are there situations when the state will not recover or recovery will be delayed?

Yes, the state will not recover if

- There is a spouse who is still alive
- There is a child under 21 years of age
- There is a child of any age who is blind or disabled
- There is a sibling or adult child living in the home who has lived there for [period of time] and who took care of the Medicaid recipient
- [if applicable, insert minimum claim or estate value]

However, the state may place a lien on the home. A lien is notice of the state's right to make a claim against the property at a later time. It does not affect immediate ownership of the property.

Are there exemptions if recovery would cause a hardship to an heir?

Yes, [state] will not recover if it causes undue hardship to your heirs. Undue hardship means:

[Insert state criteria for hardship waiver]

An heir can apply for a hardship waiver by [insert procedure, timeframe, appeal].

[Insert, if applicable, options for negotiated partial recovery or payment schedules if a full waiver is not granted.]

How can I get more information on the Medicaid Estate Recovery Program?

For more detailed information on the Medicaid Estate Recovery Program, call the [department] toll-free number at [department phone number]. This line is answered [beginning time]–[ending time], [days of the week]. Voicemail is available 24 hours a day.

You may also visit the [department] Web site at:

[Web address].

And you may e-mail questions to:

[e-mail address].

Appendix C

