

Can Medicaid Take My Client's House?

Presented by

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DISCLAIMER

This presentation and any accompanying materials are for informational purposes only and are not intended to provide, nor should they be relied upon as, legal advice.

Rules and limits can change often. The information contained herein is accurate to the best of our knowledge as of the date of this presentation.

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Agenda

- I – Medicaid rules, generally
- II – Medicaid and the Home
- III – Lifetime Liens (TEFRA)
- IV – Post-Death Liens (Estate Recovery)
- V – Potential Strategies to Protect the Home from Lien and Recovery

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Medicaid

- Medicaid is a joint federal and state health insurance program, with differing offerings covering the full spectrum of healthcare needs
 - Nursing Home or Institutional Medicaid
 - Community-based Waiver
 - And more
- Each state has unique programs as well as regulations—general rules are common across state lines, but planning strategies which work in Montana may not work in Maine or Missouri

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Medicaid Qualification

MEDICAL
TEST



INCOME
TEST



ASSET
TEST



TRANSFER
TEST



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Medicaid's Asset and Transfer Test

- Medicaid is a means-tested program, with single individuals and married couples required to be below certain asset thresholds to be eligible for benefits (for a single individual: \$2,000 in most states)
- 42 U.S.C. § 1396p restricts certain asset transfers for less-than-fair-market value in the last five years. An improper transfer will result in a penalty period, or prohibition of Medicaid coverage for a timeframe correlated with the amount of the gift

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Medicaid and the Home

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Medicaid and the Primary Residence

- The primary residence is an exempt asset (up to defined equity limit) for purposes of *initial* qualification if the **applicant declares an intent to return home**
 - The maximum equity limit ranges between \$713,000-\$1,033,000. California is the only state that does not have a limit
 - Important: Home equity limit does **not** apply if the applicant's spouse, minor, or disabled child lives in the home

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But I thought the home was exempt?

An asset, like the home, which is exempt for purposes of initial and continuing eligibility may not be exempt from lien and estate recovery

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Liens and Recovery

- TEFRA or the Tax Equity and Fiscal Responsibility Act of 1982
- State places lien on home during LIFE of Medicaid recipient to ensure *future* recovery

- Estate Recovery as codified in 42 USC § 1396p
- State asserts recovery at the DEATH of the Medicaid recipient to reimburse benefits paid

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Lifetime Liens (TEFRA)

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TEFRA

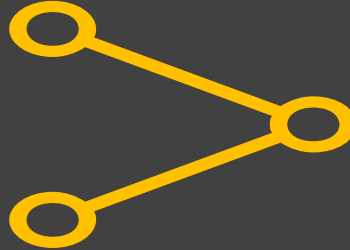
- The Tax Equity and Fiscal Responsibility Act (with regulation at C.F.R § 433:36) authorizes States to impose a lien on a home during the life of the recipient if:
 - The individual is an inpatient of a medical institution and must, as a condition of receiving services, apply his or her income to the cost of care;
 - The State determines that he or she cannot reasonably be expected to be discharged and return home;
 - The individual has had notice and an opportunity to be heard; AND
 - No spouse, child under 21, disabled child, or sibling with an equity interest lawfully residing in the home

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THE CLIENT SAYS:
I INTEND TO RETURN HOME

THE STATE SAYS:
YOU WON'T RETURN HOME



THE POLICY SOLUTION:
EXEMPT FROM INITIAL ELIGIBILITY;
SUBJECT TO LIEN DURING LIFE
AND RECOVERY AFTER DEATH

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TEFRA

- This authority is *permissive* not compulsory
 - States are required to implement recovery at death but not during life
- States which seek to impose TEFRA liens must define key legal terminology and outline certain procedures in their respective State Medicaid Plans
 - Find your own state plan relating to liens and recovery by searching 'State Medicaid Plan 4.17 Liens and Adjustments and Recoveries and 4.17 Attachment A'

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TEFRA

- No requirement for recipient to sell the property
- Lien is released if the recipient returns home
- TEFRA can attach to permanently institutionalized individuals of any age
- If the home is sold during the lifetime of the recipient, then the State can recover up to the amount of benefits paid up that point of assistance
- If not, then the lien is recovered after death up to the total amount of benefits paid

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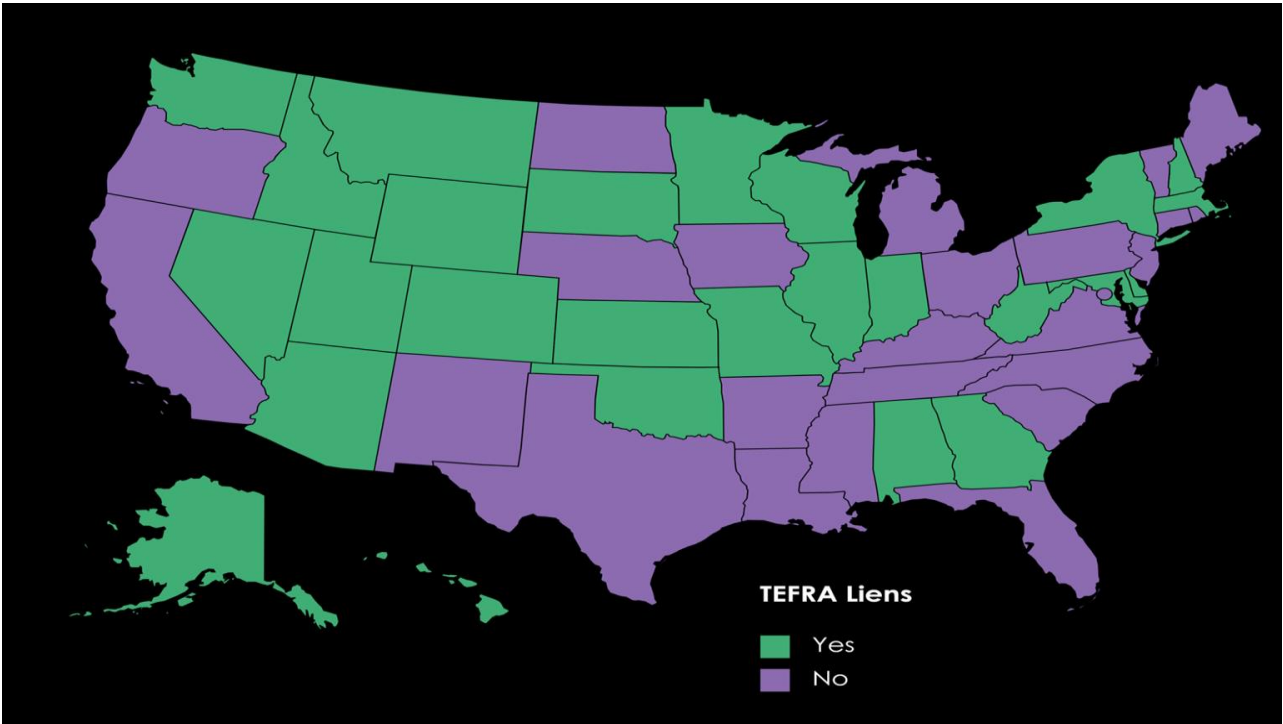
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Case Study #1 - Francis

- Francis, a single woman and homeowner, is **admitted** to facility
- Francis applies and is **approved** for Medicaid
- Statutory time (90, 120, or 180 days) passes, and State determines that Francis **cannot reasonably be expected to return home**
- State sends **notice** of lien and provides an **opportunity** for Francis to rebut the medical finding AND ask for an exemption or deferral.
- If unsuccessful, the **TEFRA lien is placed** on the home

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Example from Massachusetts

130 CMR 515.012

515.012: Real Estate Liens

Currentness

(A) Liens. A real estate lien enables the MassHealth agency to recover the cost of medical benefits paid or to be paid on behalf of a member. Before the death of a member, the MassHealth agency will place a lien against any property in which the member has a legal interest, subject to the following conditions:

(1) per court order or judgment; or

(2) without a court order or judgment, if all of the following requirements are met:

(a) the member is an inpatient receiving long-term or chronic care in a nursing facility or other medical institution;

(b) none of the following relatives lives in the property:

1. a spouse;
2. a child younger than 21 years old, or a blind or permanently and totally disabled child; or
3. a sibling who has a legal interest in the property and has been living in the house for at least one year before the member's admission to the medical institution;

(c) the MassHealth agency determines that the member cannot reasonably be expected to be discharged from the medical institution and return home; and

(d) the member has received notice of the MassHealth determination that the above conditions have been met and that a lien will be placed. The notice includes the member's right to a fair hearing.

(B) Recovery. If property against which the MassHealth agency has placed a lien under 130 CMR 515.012(A) is sold, the MassHealth agency may recover all payment for services provided on or after April 1, 1995. This provision does not limit the MassHealth agency's ability to recover from the member's estate in accordance with 130 CMR 515.011.

(C) Exception. No recovery for nursing-facility or other long-term-care services may be made under 130 CMR 515.012(B) if the member

(1) was institutionalized;

(2) notified the MassHealth agency that he or she had no intention of returning home; and

(3) on the date of admission to a long-term-care institution, had long-term-care insurance that, when purchased, or at any time thereafter, met the requirements of 130 CMR 515.014 and the Division of Insurance regulations at 211 CMR 65.09(1)(e)2.

(D) Repayment Deferred.

(1) In the case of a lien on a member's home, repayment under 130 CMR 515.012 is not required while any of the following relatives are still lawfully living in the property:

(a) a sibling who has been living in the property for at least one year before the member's admission to the nursing facility or other medical institution; or

(b) a son or daughter who

1. has been living in the property for at least two years immediately before the member was admitted to a nursing facility or other medical institution;
2. establishes to the satisfaction of the MassHealth agency that he or she provided care that permitted the parent to live at home during the two-year period before institutionalization; and
3. has lived lawfully in the property on a continual basis while the parent has been in the institution.

(2) Repayment from the estate of a member that would otherwise be recoverable under any regulation is still required even if the relatives described in 130 CMR 515.012(D) are still living in the property.

(E) Dissolution. The MassHealth agency will discharge a lien placed against property under 130 CMR 515.012(A) if the member is released from the medical institution and returns home.

(F) Verification. The applicant or member must cooperate in providing verification as to whether the conditions under 130 CMR 515.012(A) exist, and in providing any information necessary for the MassHealth agency to place a lien.

(G) Recording Fee. The MassHealth agency is not required to pay a recording fee for filing a notice of lien or encumbrance, or for a release or discharge of a lien or encumbrance under 130 CMR 515.012.



State of Utah
SPENCER J. COX
Governor

DEBORAH M. HENDERSON
Lieutenant Governor

DEPARTMENT OF HUMAN SERVICES

TRACY GRUBER
Executive Director
Office of Recovery Services
JERRA STOCKDALE
Director

January 14, 20 [REDACTED]

Preliminary Notice of Intent to Impose Medicaid TEFRA Lien

RE: [REDACTED]

Dear [REDACTED]:

This letter serves as preliminary notice of the Office of Recovery Services/Bureau of Medical Collections (ORS/BMC) intent to impose a TEFRA lien on your real property located at:

A TEFRA lien is a claim on the property of a person as security for payment of a just debt authorized by the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA). The lien will be for the debt due the state for medical assistance paid or to be paid on your behalf. The current amount paid on your behalf for expenses incurred while you were an inpatient in a care facility is \$63,169.70. This amount may continue to increase as you continue to receive medical assistance. If lien enforcement occurs after death, the amount due will include all expenses paid on your behalf after the age of 55.

According to the Department of Health's records, you meet the criteria described in Utah Code Annotated (U.C.A.) 26-19-501(1) which allows a lien to be placed on your real property. The criteria are described as follows:

- the individual is an inpatient in a care facility;
- the individual is required, as a condition of receiving services under the state plan, to spend for costs of medical care all but a minimal amount of the individual's income required for personal needs;
- the department determines that the individual cannot reasonably be expected to be discharged from the care facility and return to the individual's home; and,
- the individual has been an inpatient in a care facility for a period of at least 180 days immediately preceding the day on which the department provides the notice to the individual; and is legally presumed to be in a condition where it cannot reasonably be expected that the individual will be discharged from the care facility and return to the individual's home.

You may seek to prevent the TEFRA lien from being imposed on the real property described herein by providing any documentation to ORS/BMC that establishes that you do not meet the criteria described above.

You may also seek to prevent the TEFRA lien from being imposed by providing any documentation which establishes that the real property is exempt from imposition of a TEFRA lien under U.C.A. 26-19-501(2). The real property described herein may be exempt if any of the following individuals are lawfully residing in the real property:

- a spouse;
- a child of the individual under 21 years of age;

Medicaid Section 315 East 100 South • P.O. Box 45025 • Salt Lake City, Utah 84145-0025
telpstate (801) 536-8798 • www.ors.utah.gov

Team 65 ORHSL R72A CDD [REDACTED]

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- a child of the individual who is blind or permanently and totally disabled as defined in Title 42 U.S.C. 1382c(b)(3)(F) or;
- a sibling of the individual who has an equity interest in the home and resided in the home for at least one year immediately preceding the day on which the individual was admitted to the care facility.

If you wish to seek to prevent the imposition of the TEFRA lien, please provide substantiating documentation to the agent listed below. If you fail to provide the necessary documentation within 30 days after the day the Preliminary Notice of Intent is served, ORS/BMC will issue a Final Notice of Intent to impose a TEFRA Lien on the real property listed herein. A lien on property does not change the ownership of the property.

The TEFRA lien will be released in the event you are discharged from the long-term care facility and resume living in the real property or you provide sufficient documentation to the department that the TEFRA lien may no longer be imposed per the above conditions or exemptions. It is your responsibility to report you have been discharged from a long-term care facility to the ORS/BMC agent listed below.

If it is deemed the real property listed herein is subject to a TEFRA lien, the lien may be enforced prior to the Medicaid recipient's death if the real property described herein is sold or transferred. Otherwise, the lien will not be enforced until after the death of the Medicaid recipient. The lien will not be enforced upon death of the Medicaid recipient if the criteria for a lien waiver or deferral is met.

Sincerely,

Office of Recovery Services
Bureau of Medical Collections
Telephone: (801) 536-8798
Extension: [REDACTED]
Fax Number: (801) 536-9377

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When recorded, mail copy to:
Office of Recovery Services
Bureau of Medical Collections
Attn: [REDACTED]
PO Box 45025
Salt Lake City, UT 84145-0025

Parcel I.D. #: [REDACTED]

RECORDED FOR OFFICE OF RECOVERY SERVICES

NOTICE OF TEFRA LIEN

Office of Recovery Services/Bureau of Medical Collections

The undersigned, for and on behalf of the Office of Recovery Services/Bureau of Medical Collections, pursuant to the provisions of 26B-3-1015, Utah Code Annotated 1953, as amended, and the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), asserts a lien in the sum of \$10,751.10 against the real property located in UTAH County, State of Utah, to wit:

Property Address: [REDACTED]

Property Owner: [REDACTED]

Dated this 27th day of June, 2023

[Signature]

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Post-Death Liens (Estate Recovery)

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Estate Recovery

Omnibus Budget Reconciliation Act of 1993 requires States, on condition of Medicaid funding, to recover from the estates of deceased Medicaid recipients

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

- West Virginia called the requirement to implement estate recovery or lose Medicaid funding a “betrayal of the New Deal” and flatly refused
- It then mounted a facial challenge in the Fourth Circuit to the constitutionality of estate recovery under 10th Amendment ‘coercion’ arguments
- It failed, with the Court finding that the conditioning of the funding was not constitutionally prohibited

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Estate Recovery

States are required to recover from the estates of deceased Medicaid recipients the full cost of benefits paid:

- Individuals who were 55 years of age or older when they received assistance AND
- Generally, such assistance consisted of nursing facility services, home and community-based services, and related hospital and drug services.

States may recover beyond the estate if they so choose

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Federal Definitions

Estate

- “**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
- “**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, 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.” 42 U.S.C § 1396p(b)(4)

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Estate Recovery

States can be categorized into two recovery regimes:

- **Limited Estate Recovery:** The State recovers all real and personal property from the probate estate of the Medicaid recipient
- **Expanded Estate Recovery:** The State recovers all real and personal property from the probate estate of the Medicaid recipient **AND** any asset in which the recipient had an interest in at the time of death

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Defining the “Recovery Estate”

Each state is required, in its State Plan, to define “estate” for purposes of estate recovery. I term this the “**recovery estate**,” and should not be conflated with estate as defined in other contexts and regulatory regimes

- You can find your state’s definition, as well as other important recovery terminology and policy determinations, in Attachment 4.17A of your State Plan

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Revision: HCFA-PM-95-3
MAY 1995

(MB)

Attachment 4.17 A
Page 1

State: NEVADA

STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT LIENS AND ADJUSTMENT OR RECOVERIES

1. The State defines “estate” as follows:

"ESTATE" - means all real and personal property and other assets included in the estate of a deceased recipient of Medicaid and any other assets in or to which he/she had an interest or legal title at the time of their death, to the extent of that interest or title. The term includes assets passing by reason of joint tenancy, *tenants-in-common*, life estate, survivorship, living trust, annuity, homestead or other arrangement.

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3. The State defines the terms below as follows:

Estate – The real and personal property of a decedent, both as such property originally existed and as from time to time changed in form by sale, reinvestment, or otherwise, and as augmented by any accretions and additions and substitutions that is included in the definition of the probate estate in Section 3(l) of the Texas Probate Code.

SUPERSEDES: NONE - NEW PAGE

STATE	<u>Texas</u>	A
DATE REC'D	<u>5-7-09</u>	
DATE APP'D	<u>9-23-09</u>	
DATE EFF	<u>9-1-09</u>	
HCFA 179	<u>04-11</u>	

TN No. 04-11 Approval Date 9-23-09 Effective Date 9-1-09
 Supersedes
 TN No. 04-11 SUPERSEDES: NONE - NEW PAGE

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3. The state defines the terms below as follows

o estate

All real and personal property and other assets included within the individual's estate as provided in PA law. (20 Pa. C.S.A. sections 101. et seq, 72 PA C.S. Section 7301(r), 61 PA Code Section 101.1)

62 P.S. § 1412

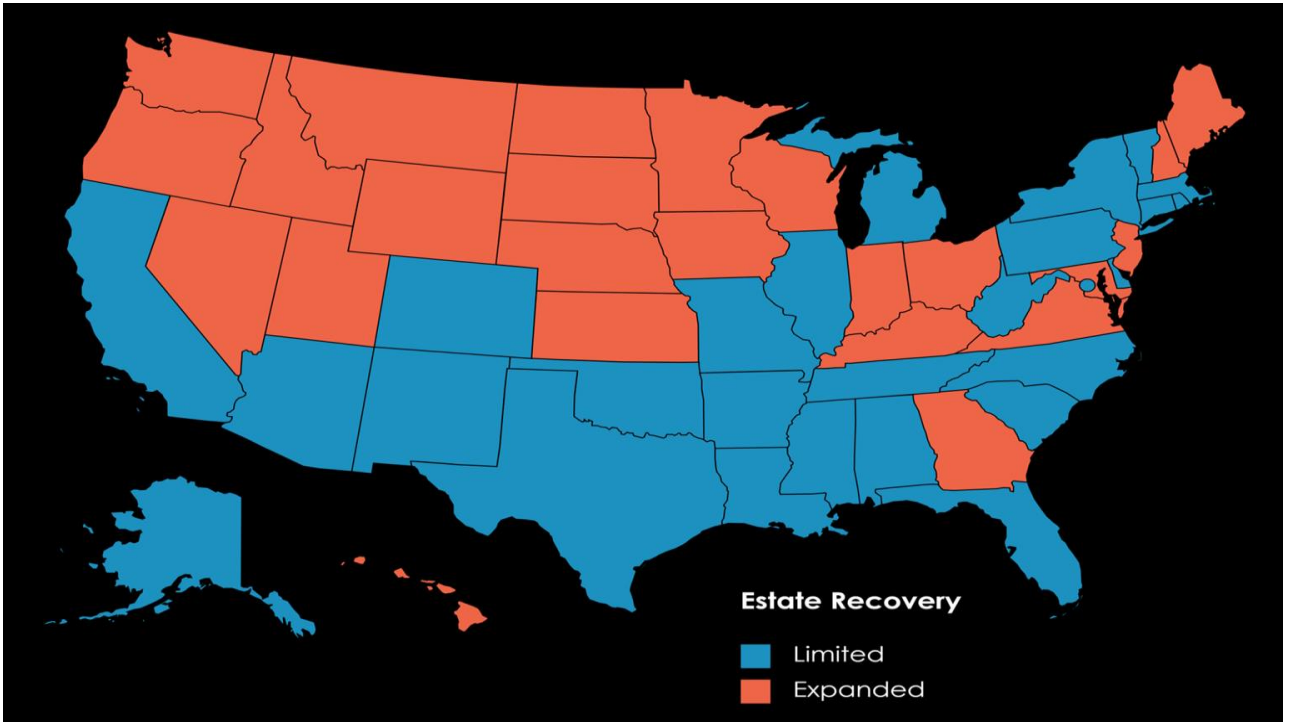
§ 1412. Repayment from probate estates

Currentness

(a) Notwithstanding any other provision of this act or any other law, the department shall establish and implement an estate recovery program to recover medical assistance paid with respect to individuals who were fifty-five years of age or older at the time that assistance was received. Under this program, the department shall recover from the probate estate of an individual the amount of medical assistance paid for all nursing facility services, home- and community-based services and related hospital and prescription drug services. With the approval of the Governor, the department may expand the estate recovery program by regulation to include medical assistance for services other than those listed in this section and to recover against other real and personal property in which an individual had any legal title or interest at the time of death. The department's claim shall have the priority of a debt due the Commonwealth.

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Case Study #2 - David

- David, a single man and homeowner, is **admitted** to facility
- David applies and is **approved** for Medicaid
- David **receives care** at the facility for 5 years
- David **passes away**
- In an Expanded Recovery Jurisdiction - State send **notice** of estate recovery to his heirs, along with instruction for applying for deferral or exemption
- In a Limited Recovery Jurisdiction - State send **notice** of estate recovery to heirs or files as creditor in probate matter
- David's heirs/Estate **pay** the balance of assistance owed to the State

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RE: Medicaid Recovery from the [REDACTED]

Dear [REDACTED]

The State of Utah is required to recover Medicaid funds from the estate or trust of an individual who was 55 years of age or older when he/she received assistance. Recovery may not be exercised until after the death of the recipient's spouse and only if there are no minor, blind, or disabled children. Recovery is made pursuant to the provisions of the Medical Benefits Recovery Act (Utah Code Annotated, 26-19-13.5) and 42 U.S.C. Section 1396.

The Office of Recovery Services asserts a lien against the real and personal property of [REDACTED] in the amount of \$284,754.34, which is the amount paid by Medicaid on the client's behalf. If additional bills are submitted to and paid by Medicaid the amount owing the State may be increased.

This debt must be paid in a timely manner. Please call me at the number listed below within ten days to discuss this matter.

Sincerely,

[REDACTED]
Office of Recovery Services
Bureau of Medical Collections

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Protecting the Home from Lien and Recovery

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Protecting the Home from Lien and Recovery

Practical Steps to Follow:

1. Can we utilize an exempt transfer?
2. Do we qualify for an undue hardship?
3. Should we engage in proactive planning?

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Exempt Transfer to Protect Home

What is an exempt transfer as it relates to the home?

A transfer statutorily allowed if conveyed to certain classes of individuals

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Exempt Transfer to Protect Home

- Transfer to a **spouse**
- Transfer to a **child** who is under 21
- Transfer to a permanently **disabled adult child**
- Transfer to a **sibling with an equity interest**
- Transfer to a **child who has been living in the home** for at least 2 years before institutionalization **and has been caring** for the applicant

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Exempt Transfer to Protect Home

- Be careful about the collateral (i.e. non-Medicaid related) consequences of such a transfer
 - Increased tax liability?
 - Discontinuation of control over asset?
 - Loss of eventual distribution?

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Undue Hardship Waiver

- Federal law requires that States determine procedures to ensure that lien and recovery do not impose an **undue hardship** upon heirs
 - “A hardship does not exist solely because recovery will prevent heirs from receiving an anticipated inheritance.” Fla. Stat. Ann. § 409.9101
- Waiver and Deferment are *not* the same thing
- Award of a hardship waivers is always discretionary

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Undue Hardship Waiver

What constitutes an ‘undue hardship’ differs from state to state:

- Sole-income producing property and gross income is below 200% of federal poverty level (**North Carolina**)
- Recovery would make beneficiary eligible for public assistance (**Ohio**)
- Homestead is of modest value (**Virginia**)
- Recovery would deprive an heir of a place to live—and they cannot afford other shelter (**Washington**)
- Loss of livelihood or necessities will endanger life (**Rhode Island**)
- Covered by qualified LTC partnership insurance policy (**South Carolina**)

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Other Options to Protect the Home

- Give away the home (**NO!**)
- Sell the home and spend down the proceeds in a Medicaid-compliant manner (**may be best practice in certain crisis planning situations**)
 - Remember: the State may directly require payback on such strategies
- Convey the home, but retain a life estate (**be careful**)
- Do nothing and wait (**equity will often be higher than eventual lien**)
- Transfer home using ladybird/beneficiary/death deed (**maybe; next slide**)
- Transfer to Living Trust (**maybe; later slide**)

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Using Death Deeds to Protect the Home

- In limited recovery jurisdictions, transferring the home using a beneficiary deed, also called a Ladybird, Beneficiary, or Death Deed, may accomplish three things:
 - Preserve Medicaid coverage as the transfer is not sanctionable because it does not go into effect until after grantor's death;
 - Property receives a step-up in basis at death; *and*
 - Removes the home from probate, thereby avoiding estate recovery

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Example: Statutory change in Arkansas

20–76–436. Recovery of benefits from recipients' estates.

(a)(1) Federal or state benefits in cash or in kind, including, but not limited to, Medicaid, Aid to Families with Dependent Children [abolished], Transitional Employment Assistance Program, Temporary Assistance for Needy Families, and food stamps distributed or paid by the Department of Human Services as well as charges levied by the department for services rendered shall upon the death of the recipient constitute a debt to be paid.

(2)(A) The department may make a claim against the estate of a deceased recipient ~~or the interest acquired from the deceased recipient by a grantee of a beneficiary deed under § 18–12–608~~ for the amount of any benefits distributed or paid or charges levied by the department.

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Using Living Trust to Protect Home

- In limited recovery jurisdictions, the transfer of the primary residence to a living trust may be a good option to avoid estate recovery
 - Be aware that some states do **not** allow transfers of the primary residence to a revocable trust because such efforts would prevent estate recovery at the death of the recipient
 - Additionally, if your state imposes TEFRA liens, such a transfer would be ineffectual for purposes of avoiding recovery because the State has already asserted its interest

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Death Deed or Living Trust to Protect Home



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Protecting the Home in Expanded Recovery

- In crisis planning situations, clients in an expanded recovery jurisdiction will find it **difficult** to find solutions if they are ineligible for an undue hardship waiver and are unable to transfer to an exempt individual
 - Medicaid's transfer of asset rules for eligibility work in tandem with expanded estate recovery to keep assets close to the grantor and subject to reimbursement

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Protecting the Home



- The best way to protect the home against lien and estate recovery is to engage in **proactive planning**
- The use of certain irrevocable trust instruments, like the Medicaid Asset Protection Trust, can prevent lien and estate recovery provisions from attaching to not just the home, but any assets properly conveyed

Remember: Just because a trust is irrevocable, doesn't mean it is Medicaid-compliant

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MAPT & ESTATE RECOVERY



GRANTOR



TRUSTEE



AT DEATH



BENEFICIARY

Result: Assets held within the MAPT are not assets within the 'recovery estate,' thereby providing insulation from lien and recovery—even in expanded recovery jurisdictions

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Case Study #3 - Eleanor

- Eleanor has you **draft** a Medicaid Asset Protection Trust
- Eleanor **conveys** her home to the MAPT
- Eleanor continuously **resides** in the home for 5 years
- Eleanor's health deteriorates and she is **admitted** to a facility
- Transfer to MAPT is beyond 5 years and **not subject to eligibility review**
- Eleanor **passes away** after receiving Medicaid assistance
- State sends a **notice** of estate recovery to Eleanor's trustee
- Eleanor's Trustee provides a copy of the trust showing it is not subject to estate recovery and the **claim is abandoned**

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Lien and Recovery Brochure

Montana Medicaid Lien Recovery & Estate Recovery Program

This pamphlet is meant to provide basic information only and does not constitute legal advice. To receive legal advice please consult an attorney.

LIEN RECOVERY: MCA 53-4-171 THROUGH 53-4-189

To secure recovery of Medicaid payments made, the Montana Department of Public Health and Human Services (DPHHS) State Medicaid Agency may place a lien on real property (real estate, land with or without improvements) owned by a Medicaid recipient living in a nursing home or institution such as Montana State Hospital and Intensive Behavior Center. A lien may be imposed only if the recipient is permanently institutionalized. For purposes of imposing a lien, a recipient is considered to be permanently institutionalized when the recipient cannot be expected to return home. The amount of the lien cannot exceed the amount Medicaid paid on behalf of the recipient.

If a lien is imposed and the recipient is discharged from the facility or institution and returns home, DPHHS may release the lien based on a written request from the recipient. Additionally, heirs may retain the property by paying the lesser of the amount the State Medicaid Agency is entitled to recover, or the fair market value of the property.

DPHHS may enforce the lien after the Medicaid recipient's death, or upon the sale, transfer or exchange of the right, title and interest in the real property.

In accordance with Social Security Act 1917 § (b)(1)(3)(B), no lien will be imposed on Tribal trust property and improvements to Tribal trust property (buildings or other attachments).

MCA 53-4-171-A lien may not be imposed if the State Medicaid Agency is notified that any of the following relatives of the recipient is living in the home:

- The surviving spouse;
- A child under 21;
- A child of any age who is blind or determined permanently and totally disabled by Social Security.

MCA 53-4-189- Hardship Waivers: The State Medicaid Agency may waive its recovery, wholly or in part, for any other interested individuals, if it determines that recovery would result in undue hardship as defined by department rule, ARM 37.82.436.

ESTATE RECOVERY AFTER A MEDICAID RECIPIENT'S DEATH: MCA 53-4-165 THROUGH 53-4-168 AND MCA 53-4-169

Federal law requires Montana DPHHS to recover Medicaid payments made on behalf of the following recipients after their death:

- Residents of nursing homes;
- Residents of institutions such as Montana State Hospital and Intensive Behavior Center; and
- Individuals age 55 and older at the time they receive Medicaid-paid services

The State Medicaid Agency may recover by filing a claim against the deceased recipient's estate for the amount Medicaid paid on the recipient's behalf. Recovery may be made from any property the Medicaid recipient had an interest in prior to the recipient's death, including both real property (real estate, land with or without improvements) and personal property including but not limited to:

- Property that is part of the recipient's probate estate;
- Property that is not part of the recipient's probate estate;
- Property that was solely owned by the recipient; and
- Property that the recipient owned jointly with another or others as a joint tenant or tenant-in-common.

Property transferred by Beneficiary Deed or Quit Claim Deed.

Recipients eligible under Medicaid Expansion are not subject to recovery except for Medicaid-paid long-term care such as nursing home and home and community-based services, as required by federal law.

DPHHS will not recover from Tribal Trust property, including real property and improvements, or from income derived from trust resources or Tribal trust property.

MCA 53-4-167- The State Medicaid Agency may not recover while there is:

- A surviving spouse, except the State can recover from the estate of the surviving spouse if the spouse dies within three years of the recipient;
- A child under 21;
- A child of any age who is blind or determined permanently and totally disabled by Social Security.

MCA 53-4-167- The State Medicaid Agency may also recover from:

- The recipient's estate after the death of the surviving spouse or child;
- The estate of the recipient's spouse, limited to the value of any property the spouse received from the recipient by distribution or right of survivorship, if the spouse survives the recipient;
- The State Medicaid Agency may recover from any person who received property from a deceased recipient by distribution or right of survivorship.

All recoveries are limited to the value of the property received from the recipient and will not exceed the amount Medicaid paid on behalf of the deceased recipient.

MCA 53-4-168- The State Medicaid Agency is entitled to receive from nursing home recipients:

- Any funds of a recipient held by a financial institution at the time of the recipient's death, such as funds in a checking or savings account;
- Any funds of a recipient held by a nursing facility at the time of the recipient's death, such as funds in a patient/resident account;
- Personal funds of a recipient held by any person at the time of the recipient's death, if the recipient resided in a nursing facility.

Note: There is no undue hardship waiver for recoveries from funds of the recipient held by a financial institution, nursing facility or other person or from unused funds in a burial/funeral contract or fund.

MCA 53-4-169- The State Medicaid Agency is entitled to receive from all recipients:

- Unused funds from burial/funeral contracts, land or other property that was specifically designated and set aside for paying for the disposition of the decedent's remains with a cumulative value greater than \$5,000.

Example: Mr. Jones has a burial account with a value of \$5,100. Cremation was \$2,300. The remaining \$2,800 must be sent to State Medicaid Agency.

Mr. Jones has a burial account with a value of \$4,800. Cremation was \$2,300. The State Medicaid Agency has no interest in the remaining \$2,500.

The State Medicaid Agency may recover for the total amount of recoverable medical expenses paid to or on behalf of the recipient except:

- Effective June 30, 2009, Medicare premiums paid for through a Medicare Savings Program (MSP) benefit are not subject to estate recovery;
- Effective January 1, 2010, Medicare copayments, coinsurance and deductible amounts paid for through an MSP benefit are not subject to estate recovery.

Circumstances may arise when the recipient's estate may not be subject to recovery if the recipient was cared for by a sibling or child living with them.

MCA 53-4-167- Hardship Waivers:

The State Medicaid Agency may waive its recovery, wholly or in part, for any other interested individuals, if it determines that recovery would result in undue hardship as defined by department rule, ARM 37.82.431.

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What does the future of estate recovery hold?

UNCERTAINTY!

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Summary: Can Medicaid Take My Client's House?

- States may choose to assert lifetime liens (**TEFRA**) if institutionalized Medicaid recipient cannot return home
- States are required to recover from the estates (**Estate Recovery**) of deceased Medicaid recipients
- States can be categorized into two recovery jurisdictions:
 - **Limited Recovery:** States that recover from the probate estate
 - **Expanded Recovery:** States that recover from the probate estate and any asset owned at time of death
- Clients can protect against recovery by:
 - Seeking a waiver through **undue hardship**, if eligible
 - Utilizing **exempt transfer** to protected class (spouse, disabled child, etc.), if circumstances dictate
 - Conveying home using Beneficiary Deed or Living Trust, if in limited recovery jurisdiction with no TEFRA
- Best practice, in both limited and expanded jurisdictions, is to engage in **proactive planning with the Medicaid Asset Protection Trust**, thereby safeguarding the home from both initial eligibility and estate recovery

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A grayscale photograph of an hourglass resting on a wooden surface. The hourglass is positioned on the right side of the frame, with its shadow cast onto the wood. A large, dark teal rectangular block is on the left, containing a white box with the word 'QUESTIONS' and a large teal question mark.

QUESTIONS?

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A grayscale photograph of three business professionals (two men and one woman) sitting around a table, smiling and engaged in a meeting. A laptop is open on the table in front of them.

THANK YOU

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