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SELECTIVE ISSUES IN EFFECTIVE MEDICAID ESTATE RECOVERY STATUTES

Raymond C. O'Brien[+]

Thirteen percent of the population of the United States is over the age of sixty-five.[1] Twenty-five percent of these sixty-five-year-olds will live past the age of ninety, and ten percent will live past the age of ninety-five.[2] Unless demographics change radically, by the year 2030 more than one-fifth of the population of the United States will be over the age of sixty-five.[3] While these statistics seem salutary, they imply the stark reality complementing advanced age: seventy percent of all aging citizens will need some form of long-term care, and many will require nursing home assistance that can cost more than ninety

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1. LORAINE A. WEST, SAMANTHA COLE, DANIEL GOODKIND & WAN HE, U.S. CENSUS BUREAU, 65+ IN THE UNITED STATES: 2010 3 (2014), https://www.census.gov/content/dam/Census/library/publications/2014/demo/p23-212.pdf.

2. *Calculators: Life Expectancy*, SOC. SEC. ADMIN., http://www.ssa.gov/planners/lifeexpectancy.html (last visited Sept. 14, 2015).

3. WEST, COLE, GOODKIND & HE, *supra* note 1, at 5 tbl.1-1.

thousand dollars each year based on estimates for 2015.[4] These costs will continue to rise, especially in densely populated areas of the country where the need for long-term care is the greatest.[5] To meet the significant cost of long-term residential care, some persons—and their families—will self-pay from family assets.[6] An increasing number of persons will pay for care with newer and more advantageous insurance policies formulated for long-term care,[7] but a significant number of Americans needing long-term care will depend upon Medicaid to cover the cost.[8]

Medicaid is a joint federal-state partnership program enacted in 1965 to provide medical care to the elderly, the blind, and the disabled poor.[9] The federal financial contribution towards each state's Medicaid expenses may not be less than fifty percent or more than eighty-three percent.[10] This program is distinct from Medicare, a singular federal program providing medical care for

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4. TREVOR TOMPSON, JENNIFER BENZ, JENNIFER AGIESTA, DENNIS JUNIUS, KIM NGUYEN & KRISTINA LOWELL, THE ASSOC. PRESS-NORC CTR. FOR PUB. AFFAIRS RESEARCH, LONG-TERM CARE: PERCEPTIONS, EXPERIENCES, AND ATTITUDES AMONG AMERICANS 40 OR OLDER 1 (2013), http://www.apnorc.org/PDFs/Long%20Term%20Care/AP_NORC_Long%20Term%20Care%20Perception_FINAL%20REPORT.pdf; GENWORTH FIN., INC., COST OF CARE SURVEY 2015 17 (2015), https://www.genworth.com/dam/Americas/US/PDFs/Consumer/corporate/130568_040115_gnw.pdf (estimating the median annual cost for a private room in a nursing home in the United States).

5. *See, e.g.*, Enrique Zamora, Deborah Nodar & Krista Ogletree, *Long-Term Care Insurance: A Life Raft for Baby Boomers*, 26 ST. THOMAS L. REV. 79, 85 (2013) ("According to the 2012 MetLife Market Survey of Nursing Home, Assisted Living, Adult Day Services, and Home Care Costs, the average costs for varying levels of long-term care continue to increase.") (citing METLIFE MATURE MARKET INST., THE 2012 METLIFE MARKET SURVEY OF NURSING HOME, ASSISTED LIVING, ADULT DAY SERVICES, AND HOME CARE COSTS 4 (2012), https://www.metlife.com/assets/cao/mmi/publications/studies/2012/studies/mmi-2012-market-survey-long-term-care-costs.pdf); U.S. Dep't of Health & Human Servs., *Assisted Living*, LONGTERMCARE.GOV, http://longtermcare.gov/where-you-live-matters/living-in-a-facility/assisted-living/ (last visited Sept. 14, 2015) (noting that assisted living costs "can be higher in urban areas").

6. *See, e.g.*, *Paying for Long-Term Care*, NIH SENIOR HEALTH, http://nihseniorhealth.gov/longtermcare/payingforlongtermcare/01.html (last visited Sept. 14, 2015) ("At first, many people pay for long-term care services with their own money . . . [including] personal savings, a pension or other retirement fund, income from stocks and bonds, or proceeds from the sale of a home.").

7. *See* CONG. BUDGET OFFICE, RISING DEMAND FOR LONG-TERM SERVICES AND SUPPORTS FOR ELDERLY PEOPLE 28 (2013), https://www.cbo.gov/sites/default/files/113th-congress-2013-2014/reports/44363-LTC.pdf (noting that while the number of people with long-term care insurance increased by approximately twelve percent from 1998 to 2005, growth has slowed in recent years as "the age group most likely to purchase [long-term care insurance] . . . reach[es] its peak as a share of the U.S. population").

8. *See, e.g.*, Michael Gilfix & Bernard A. Krooks, *The High Cost of Aging*, 151 TRS. & ESTS. 43, 43 (2012) (noting that Medicaid is "the primary payer" of long-term care in the United States).

9. *Medicaid Information*, SOC. SEC. ADMIN., https://www.socialsecurity.gov/disabilityresearch/wi/medicaid.htm (last visited Aug. 25, 2015).

10. ALISON MITCHELL & EVELYNE P. BAUMRUCKER, CONG. RESEARCH SERV., R42941, MEDICAID'S FEDERAL MEDICAL ASSISTANCE PERCENTAGE (FMAP), FY2014 2 (2013), https://www.fas.org/sgp/crs/misc/R42941.pdf.

Americans over the age of sixty-five and for persons of any age qualifying as disabled.[11] Medicare is not dependent on qualifying as poor; anyone over the age of sixty-five who is eligible to receive Social Security retirement benefits may qualify for the program.[12] In addition to eligibility requirements, there are significant differences between Medicaid and Medicare. First, Medicare does not pay for residential long-term care benefits whereas Medicaid will do so; Medicare provides a limited reimbursement benefit for skilled nursing care and then only for a specified period of time.[13] Second, Medicare is a federal program, while Medicaid is a joint federal-state program, so states must make a financial contribution, prompting greater state vigilance.[14] Third, Medicaid eligibility requirements may vary among the states, but state rules are bound by certain federal standards.[15]

Even though Medicaid provides medical services to an eligible recipient, the focus of this Article will be premised on Medicaid's payment for long-term care for nursing homes, assisted living, or increasingly, in-home care. Because Medicare will not pay for long-term care—but Medicaid will—millions of persons in need of such care seek to "spend-down" income or assets in order to qualify as sufficiently needy or poor.[16] Elder law attorneys and prescient individuals have created masterful "spend down" plans that allow clients to qualify as poor, thereby becoming eligible for Medicaid's long-term care benefits.[17] Once an individual qualifies, he or she can shift financial responsibility to pay for the care from the individual recipient to state Medicaid offices.[18] The qualifications for eligibility became more relaxed when Congress

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11. *What's Medicare?*, MEDICARE.GOV, https://www.medicare.gov/sign-up-change-plans/decide-how-to-get-medicare/whats-medicare/what-is-medicare.html (last visited Aug. 25, 2015).

12. SOC. SEC. ADMIN., SSA PUBL'N NO. 05-10043, MEDICARE 5 (2015), http://www.socialsecurity.gov/pubs/EN-05-10043.pdf.

13. CTRS. FOR MEDICARE & MEDICAID SERVS., CMS PROD. NO. 02174, YOUR GUIDE TO CHOOSING A NURSING HOME OR OTHER LONG-TERM CARE 5 (2015), https://www.medicare.gov/Pubs/pdf/02174.pdf.

14. VICTORIA WACHINO, ANDY SCHNEIDER & DAVID ROUSSEAU, KAISER COMM'N ON MEDICAID & THE UNINSURED, FINANCING THE MEDICAID PROGRAM: THE MANY ROLES OF FEDERAL AND STATE MATCHING FUNDS 15–17 (2004), https://kaiserfamilyfoundation.files.wordpress.com/2013/01/financing-the-medicaid-program-the-many-roles-of-federal-and-state-matching-funds-policy-brief.pdf.

15. *Eligibility*, MEDICAID.GOV, http://www.medicaid.gov/medicaid-chip-program-information/by-topics/eligibility/eligibilty.html (last visited Aug. 25, 2015) (explaining that state eligibility criteria must conform with federal standards, but may expand coverage with a waiver from the Centers for Medicare & Medicaid Services).

16. *See* Roloff v. Sullivan, 975 F.2d 333, 337–38 (7th Cir. 1992) (discussing the income spend-down process).

17. *See* April Rudin, *Discussing LongTerm Family Care During Thanksgiving*, ALL GLOBAL NEWS ON ONE PAGE (Nov. 23, 2010), http://www.allword-news.co.uk/2010/11/23/page/4.

18. *See* MARYBETH MUSUMECI, THE HENRY J. KAISER FAMILY FOUND., THE AFFORDABLE CARE ACT'S IMPACT ON MEDICAID ELIGIBILITY, ENROLLMENT, AND BENEFITS FOR PEOPLE WITH DISABILITIES 5 (2014), https://kaiserfamilyfoundation.files.wordpress.com/2014/04/8390-02-the-affordable-care-acts-impact-on-medicaid-eligibility.pdf.

provided for the protection of applicants' spouses by permitting the shifting of assets to protect marital property rights.[19] Protections allow the non-institutionalized spouse to freeze marital assets for the duration of the lives of both of the parties, thereby protecting the spouse against probable impoverishment.[20] But then, at the death of the latter of the two spouses, the state may seek recovery of expenditures through estate recovery programs.[21]

Estate recovery is a nascent area of the law; this fact is reflected in the various state statutes governing the process.[22] When Congress permitted spouses to exempt certain assets to protect one or both of the spouses, it also specified that states eventually could recover expenditures made.[23] But while the states could enact recovery procedures that did not exceed federal specifications, the states have been slow to respond,[24] and some states have seen their efforts stymied by litigation over the interpretation of federal Medicaid legislation and threats of preemption.[25] The issues raised in this Article suggest that there will be an increasing number of cases throughout the United States. But states have no recourse other than to become increasingly vigilant in pursuing private funds to pay for Medicaid expenditures. Concomitantly, elderly citizens and their families face uncertainty about what will become of family homes, annuities, and other property pursued to pay for long-term care stretching back years and perhaps decades.

This Article addresses three specific issues that have arisen concerning estate recovery statutes and how federal and state interaction has resulted in uncertainty among state courts, elder law attorneys, and persons seeking to qualify for Medicaid long-term care payments. First, what constitutes an "estate" for purposes of recovery of assets to pay for long-term care expenditures? Second, if assets of a Medicaid recipient are transferred during lifetime, thereby depriving the Medicaid recipient or the recipient's spouse of an interest in the asset at the time of death, is it permissible to trace the transferred assets for estate recovery? And third, should an annuity purchased to provide exempt income for a recipient's spouse be considered a resource sufficient to disqualify an applicant from Medicaid eligibility?

The three issues discussed in this Article have arisen as a result of federal legislation. A brief legislative history will demonstrate the progression of

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19. *See* 42 U.S.C. § 1396r-5(a)–(d) (2012) (providing rules for the treatment of income of institutionalized spouses). *See also* U.S. DEP'T OF HEALTH & HUMAN SERVS., POLICY BRIEF #3, SPOUSES OF MEDICAID LONG-TERM CARE RECIPIENTS 1–2, 5, 7–11 (2005), http://aspe.hhs.gov/sites/default/files/pdf/74086/spouses.pdf.

20. *See infra* note 30 and accompanying text.

21. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., POLICY BRIEF #1, MEDICAID ESTATE RECOVERY 1–2, 6–7 (2005), http://aspe.hhs.gov/sites/default/files/pdf/74101/estaterec.pdf.

22. *See infra* note 125 and accompanying text.

23. *See infra* note 112 and accompanying text.

24. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., POLICY BRIEF #1, supra note 21, at 5.

25. *See, e.g.*, Idaho Dep't of Health & Welfare v. McCormick, 283 P.3d 785, 787–89 (Idaho 2012) (addressing whether federal law preempted the state's ability to recover from an estate).

federal statutes and corresponding state regulations pertaining to estate recovery. The judicial debate over the federal mandate and the corresponding state statutory interpretations are relatively recent, and the three issues discussed in this Article—although not isolated from other legal obscurities—are important enough to long-term care planning to warrant scrutiny. More significantly, these three issues suggest that more comprehensive legislation is needed to effectively recover expenditures made from the estates of Medicaid recipients and their spouses. The conclusion of this Article will offer suggestions as to how Congress may modify sections of the Medicaid statute to better accommodate issues arising at the state level. Congress needs to provide clarity to meet the needs of the states and an expanding segment of the population.

I. HISTORY OF MEDICAID ELIGIBILITY FOR LONG-TERM CARE

Costs associated with care can be significant.[26] As one study points out, "[f]ifty percent of individuals over 85 will need assistance with daily functioning, and their home care can cost from $55,000 to $75,000 a year and up to $180,000 annually for nursing home care."[27] Prior to the codification of measures intended to protect spouses of institutionalized persons,[28] whatever assets were accumulated by a married couple were often exhausted after paying for the care of one spouse, leaving the non-institutionalized spouse impoverished in the event that he or she survived the institutionalized spouse.[29] Incrementally, federal legislation—beginning in 1988 with the Medicare Catastrophic Coverage Act (MCCA) and most significantly revamped in 2005 with the Deficit Reduction Act (DRA)—provided some protection to the non-institutionalized spouse by exempting income and assets.[30] Eventually these exempt assets became the subject of estate recovery programs seeking to recoup expenditures made for an institutionalized spouse.[31] The programs were

26. Russell N. Adler, Peter J. Strauss & Regina Kiperman, *America's Long-Term Care Crisis*, 152 TRS. & ESTS. 44, 44 (2013).

27. *Id.*

28. Medicaid defines an institutionalized spouse as someone who is married to a non-institutionalized spouse and is likely to be in long-term care for at least thirty consecutive days. *See* 42 U.S.C. § 1396r-5(h)(1)(B) (2012).

29. *See, e.g.*, CONN. GEN. STAT. ANN. § 46b-37 (West 2015) (providing that spouses are jointly liable to support their family and for specified expenses). The duty to provide necessaries can prompt spouses to divorce. *See* Andrea B. Carroll, *Incentivizing Divorce*, 30 CARDOZO L. REV. 1925, 1926–27 (2009).

30. *See infra* notes 55, 78 and accompanying text. "Asset" is often used interchangeably with "resources" in relevant federal law; the Social Security Program Operations Manual System (POMS) defines resources as "cash and any other personal property, as well as any real property, that an individual (or spouse, if any): owns; has the right, authority, or power to convert to cash (if not already cash); and is not legally restricted from using for his/her support and maintenance." SOC. SEC. ADMIN., PROGRAM OPERATIONS MANUAL SYSTEM § SI 01110.100, DISTINCTION BETWEEN ASSETS AND RESOURCES (2015), https://secure.ssa.gov/poms.nsf/lnx/0501110100.

31. *See, e.g.*, *infra* note 108 and accompanying text.

mandated by Congress and illustrated a common theme: that "Medicaid has always been intended to be 'the payer of last resort.'"[32]

Estate recovery programs originate with Medicaid's eligibility requirements, which are based on federal income and asset limits.[33] To be considered poor and thus entitled to Medicaid, the total value of the applicant's assets, excluding income, at the time of the application and throughout the time he or she is receiving Medicaid benefits, cannot exceed $2,000 for an individual and $3,000 for a married couple when they both apply for benefits.[34] Federal legislation such as the DRA,[35] and various regulations issued by the Centers for Medicare and Medicaid, affect these limits and specify penalties for violations of the guidelines.[36] Once an applicant is determined to be eligible for Medicaid long-term care benefits, Medicaid will seek to provide care in what is intended to be the "least restrictive alternative" placement, such as assisted living or in-home placement.[37] States are permitted to offer a variety of long-term care placement options as long as these options meet certain federal minimum standards.[38]

There are additional limits on what a state may recover from the estate of an institutionalized recipient.[39] First, notice of the estate recovery program must

32. *See* Dep't of Health & Welfare v. McCormick, 283 P.3d 785, 788 (Idaho 2012) (quoting Ark. Dep't of Health & Human Servs. v. Ahlborn, 547 U.S. 268, 291 (2006)).

33. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., POLICY BRIEF #1, *supra* note 21, at 1. The Department of Health and Human Services states:

> Medicaid imposes stringent limits on income and assets of recipients, consistent with its mission to provide a health care safety net for the poor and for those whose personal resources are insufficient to pay the full cost of care. In order to fulfill this mission, Medicaid also recovers expenses paid on behalf of recipients from their estates under certain circumstances.

Id. *See also* 42 U.S.C. § 1382a(a) (2012) (defining categories of income). Income may be defined as any cash or in-kind benefits that could conceivably enable the recipient to obtain food or shelter. *See* 20 C.F.R. § 416.1103 (2015). Not counted as income are items defined as medical care, need-based assistance, or income derived from other family members not available to the applicant. *See id.*

34. 42 U.S.C. § 1382(a)(3)(B).

35. *See, e.g.*, *id.* § 1396p(c)(1) (modifying the look-back period and method of disqualifying transfers made during this period).

36. *See, e.g.*, 42 C.F.R. § 435.2 (2015) (establishing Medicaid eligibility rules). *See also* Letter from Dennis G. Smith to State Medical Director, Ctrs. for Medicaid & Medicare Servs., U.S. Dep't of Health & Human Servs. (July 27, 2006), http://www.medicaid.gov/Federal-Policy-Guidance/downloads/SMD072706b.pdf.

37. Olmstead v. Zimring, 527 U.S. 581, 602 n.18 (1999). *See also* 42 U.S.C. § 1315(a), (e), (f) (2012) (allowing waivers from Medicaid requirements to be obtained); *Waivers*, MEDICAID.GOV, http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/Waivers.html (last visited Mar. 16, 2015).

38. *See* 42 U.S.C. § 1396a(a)(10)(A).

39. *See generally id.* § 1396a(a)(18) (specifying that state plans must comply with provisions of 42 U.S.C. § 1396p).

be given whenever any person applies for Medicaid long-term care assistance.[40] Second, the state may only seek recovery for long-term care monetary benefits paid to a person at least fifty-five years of age.[41] Third, the state may not institute any recovery program against Medicare savings plans.[42] Fourth, the state may not recover assets during the lifetime of the institutionalized recipient, but only upon his or her death, the death of the non-institutionalized spouse, and the death of any child with a disability or a child under the age of twenty-one.[43] Fifth, the home of a recipient is exempt from estate recovery programs if a sibling lives at the home and has done so for at least a year, or a child lives at home and has done so for at least two years and has provided care to the recipient, helping to keep the recipient at home.[44] A sixth federal limit is the requirement that each state implement a hardship program to exempt some estates from recovery.[45] As can be expected, state policies vary, but poverty and

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40. U.S. DEP'T OF HEALTH & HUMAN SERVS., STATE MEDICAID MANUAL PART 3–ELIGIBILITY § 3810(G) (2001), http://www.cms.gov/Regulations-and-Guidance/Guidance/Transmittals/downloads/r75sm3.pdf.

41. 42 U.S.C. § 1396p(b)(1)(B).

42. *Id.* § 1396p(b)(1)(B)(ii).

43. *See id.* § 1396p(b)(2)(A). The statute provides:

> Any adjustment or recovery under paragraph (1) may be made only after the death of the individual's surviving spouse, if any, and only at a time—(A) when he has no surviving child who is under the age 21, or (with respect to States eligible to participate in the State program established under subchapter XVI of this chapter) is blind or permanently and totally disabled, or (with respect to States which are not eligible to participate in such program) is blind or disabled as defined in section 1382c of this title.

Id.

44. *See id.* § 1396p(b)(2)(B). The provision states:

> [I]n the case of a lien on an individual's home under subsection (a)(1)(B) of this section, when—(i) no sibling of the individual (who was residing in the individual's home for a period of at least one year immediately before the date of the individual's admission to the medical institution), and (ii) no son or daughter of the individual (who was residing in the individual's home for a period of at least two years immediately before the date of the individual's admission to the medical institution, and who establishes to the satisfaction of the State that he or she provided care to such individual which permitted such individual to reside at home rather than in an institution), is lawfully residing in such home who has lawfully resided in such home on a continuous basis since the date of the individual's admission to the medical institution.

Id.

45. *Id.* § 1396p(b)(3)(A) ("The State 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.").

family dysfunction appear as common denominators of hardship.[46] A few state statutes delineate considerations to determine undue hardship.[47]

A seventh limitation on state estate recovery programs involves state sponsored asset protection long-term care insurance policies.[48] Sometimes these

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46. *See, e.g.*, West Virginia v. Thompson, 475 F.3d 204, 206, 208 (4th Cir. 2007) (affirming the State Medicaid Manual hardship exemption for homes that are worth fifty percent or less of the average price of homes in the county where the home is located and rejecting a state's ruling that a home worth more than this was worthy of the hardship exemption). *See also* Estate of Nicholson v. S.C. Dep't of Health & Human Servs., 660 S.E.2d 303, 306 (S.C. Ct. App. 2008) (stating that a son's imprisonment did not warrant a hardship waiver from the requirement that he actually live in the home to prevent recovery).

47. *See, e.g.*, ARK. CODE ANN. § 20-76-436(b)(2) (West 2015). The statute provides:

> In determining the existence of an undue hardship, the department shall consider factors including, but not limited to, the following: (A) The asset subject to recovery is the sole income-producing asset of the beneficiaries of the estate of the grantee of a beneficiary deed under § 18-12-608; (B) Without receipt of the beneficiary deed or proceeds of the estate, a grantee or beneficiary would become eligible for federal or state benefits; (C) Allowing a grantee of a beneficiary deed under § 18-12-608 to receive the interest under the beneficiary deed or a beneficiary to receive the inheritance from the estate would enable the grantee or beneficiary to discontinue eligibility for federal or state benefits; (D) The asset subject to recovery is a home with a value of fifty percent (50%) or less of the average price of homes in the county where the homestead is located, as of the date of the deceased recipient's death; or (E) There are other compelling circumstances.

Id. *But see* MICH. COMP. LAWS ANN. § 400.112g(3)(e)(iii) (West 2015) (providing for "[a] rebuttable presumption that no hardship exists if the hardship resulted from estate planning methods under which assets were diverted in order to avoid estate recovery.").

48. *See* 42 U.S.C. § 1396p(b)(1)(C)(iii). The statute provides:

> [T]he term "qualified State long-term care insurance partnership" means an approved State plan amendment under this subchapter that provides for the disregard of any assets or resources in an amount equal to the insurance benefit payments that are made to or on behalf of an individual who is a beneficiary under a long-term care insurance policy if the following requirements are met: (I) The policy covers an insured who was a resident of such State when coverage first became effective under the policy. (II) The policy is a qualified long-term care insurance policy (as defined in section 7702B(b) of the Internal Revenue Code of 1986 [Title 26, U.S.C.A.]) issued not earlier than the effective date of the State plan amendment. (III) The policy meets the model regulations and the requirements of the model Act specified in paragraph (5). (IV) If the policy is sold to an individual who—(aa) has not attained the age of 61 as of the date of purchase, the policy provides compound annual inflation protection; (bb) has attained age 61 but has not attained age 76 as of such date, the policy provides some level of inflation protection; and (cc) has attained the age 76 as of such date, the policy may (but is not required to) provide some level of inflation protection. (V) The State Medicaid agency under section 1396a(a)(5) of this title provides information and technical assistance to the State insurance department on the insurance department's role of assuring that any individual who sells a long-term care insurance policy under this partnership receives training and demonstrates evidence of an understanding of such policies and how they relate to other public and private coverage of long-term care. (VI) The issuer of the policy provides regular reports to the Secretary, in accordance with regulations of the Secretary, that include notification regarding when benefits provided under the policy have been paid and the amount of such benefits paid, notification regarding when the policy otherwise terminates, and such other information as the Secretary determines may be appropriate

policies are referred to as "partnership policies" and are means by which the states may offset state-paid long-term costs with private insurance proceeds.[49] Almost all of the states offer these policies, but only a few states offered them in 1993 when the Omnibus Budget Reconciliation Act grandfathered the few that did into an accepted practice.[50] Furthermore, the DRA fostered the growth of these policies, specifically Section 6021, and today states are permitted to offer long-term care insurance policies that allow the applicant to retain assets in proportion to the amount of insurance purchased.[51] In addition to state plans, an increasing number of persons are purchasing private long-term care insurance.[52] The Department of Health and Human Services has established state reciprocity guidelines to ensure recognition among the states.[53]

The history of eligibility for Medicaid long-term care and the corresponding estate recovery programs is intricately linked to the passage of successive federal statutes.[54] The recent enactment of these different statutes suggests that states continue to develop corresponding regulations, prompting the judicial issues at the focus of this Article. The following statutes form the basis for any discussion of state law.

> to the administration of such partnerships. (VII) The State does not impose any requirement affecting the terms or benefits of such a policy unless the State imposes such requirement on long-term care insurance policies without regard to whether the policy is covered under the partnership or is offered in connection with such a partnership. In the case of a long-term care insurance policy which is exchanged for another such policy, subchapter (I) shall be applied based on the coverage of the first such policy that was exchanged. For purposes of this clause and paragraph (5), the term "long-term care insurance policy" includes a certificate issued under a group insurance contract.

Id.

49. *See* ERIC M. CARLSON, LONG TERM CARE ADVOCACY § 9.15, Lexis Nexis (database updated 2014).

50. *See* TIMOTHY L. TAKACS, ELDER LAW PRACTICE IN TENNESSEE § 6.11[5], Lexis Nexis (database updated 2015).

51. *See* 42 U.S.C. § 1396p(b)(1)(C)(ii) (2012). The provision states:

> [Estate recovery] shall not apply in the case of an individual who received medical assistance under a State plan of a State which had a State plan amendment approved as of May 14, 1993, and which satisfies clause (iv), or which has a State plan amendment that provides for a qualified State long-term care insurance partnership (as defined in clause (iii)) which provided for the disregard of any assets or resources—(I) to the extent that payments are made under a long-term care insurance policy; or (II) because an individual has received (or is entitled to receive) benefits under a long-term care insurance policy.

Id.

52. Beth Slagle & Richard T. Victoria, *Long-Term Care Lawsuits Will Just Keep Coming*, 148 TRS. & ESTS. 60, 60 (2009).

53. *See* State Long-Term Care Partnership Program: State Reciprocity Standard, 73 Fed. Reg. 51,302, 51,303 (Sept. 2, 2008).

54. *See Eligibility*, MEDICAID.GOV, http://www.medicaid.gov/medicaid-chip-program-information/by-topics/eligibility/eligibility.html (last visited Sept. 15, 2015).

A. Medicare Catastrophic Coverage Act of 1988

The MCCA marked the initiation of a legislative process to protect against spousal impoverishment.[55] Congress passed the legislation with a number of goals in mind.[56] Specifically, Congress sought to exempt a flow of income to the non-institutionalized spouse through: (1) a minimum monthly monetary maintenance needs allowance (MMMNA);[57] (2) an exemption of certain assets through a community spouse resource allowance (CSRA);[58] and (3) an exemption to separate the non-institutionalized spouse's income from the institutionalized spouse's income.[59] The purpose of the 1988 legislation was to allow the non-institutionalized spouse to continue with his life without the fear that everything earned or acquired during his marriage to the institutionalized spouse would be spent on the cost of the institutionalized spouse's long-term care.[60] The MCCA was a major achievement when it was enacted, even though some of its features would be modified by future legislation.[61] Among the more important aspects of the MCCA are the following: (1) states were permitted but not required to recover Medicaid benefits paid to recipients over sixty-five years of age; (2) there was no definition of "estate," although states were told that any recovery had to be from the estate of the recipient; (3) recovery from the

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55. *See generally* Medicare Catastrophic Coverage Act of 1988, Pub. L. No. 100-360, 102 Stat. 683. *See also* 42 U.S.C. § 1396r-5(c)(4) (2012); New Mexico v. Div. of Med. Assistance & Health Servs., 964 A.2d 822, 826 (N.J. Super. Ct. App. Div. 2009) (quoting Mistrick v. Div. of Med. Assistance & Health Servs., 712 A.2d 188, 194 (N.J. 1998)). The MCCA was repealed by the Medicare Catastrophic Coverage Repeal Act of 1989, Pub. L. No. 101-234, 103 Stat. 1979, but the spousal impoverishment prevention provisions were retained. *See* 42 U.S.C. § 1396r-5(c)(4).

56. *See* Stafford v. Idaho Dep't. of Health & Welfare, 181 P.3d 456, 460, 463 (Idaho 2008) (quoting Cleary *ex rel.* Cleary v. Waldman, 167 F.3d 801, 805 (3rd Cir. 1999)).

57. The minimum monthly maintenance needs allowance is based on a federal formula. *See* 42 U.S.C. § 1396r-5(d)(3)–(4). The goal is to permit the community spouse (the non-institutionalized spouse) to receive adequate support, derived from that spouse's income or, if insufficient, the institutionalized spouse's income. *See id.* § 1396r-5(d)(6).

58. *Id.* § 1396r-5(f)(1)–(2). A community spouse is defined at 42 U.S.C. § 1396r-5(h)(2), and the federal law specifies certain assets as exempt. *See id.* § 1396r-5(h)(2); *id.* § 1382b(a); Hutcherson v. Ariz. Health Care Cost Containment Sys. Admin., 667 F.3d 1066, 1069 (9th Cir. 2012) (identifying "[a] provision of the MCCA allow[ing] an institutionalized spouse to qualify for Medicaid assistance while reserving for the community spouse a capped amount of assets for the community spouse's benefit, known as the 'community spouse resource allowance' or 'CSRA'").

59. *See* 42 U.S.C. § 1396r-5(b)(1). The MCCA provides that the assets of a non-institutionalized spouse cannot be revisited once the institutionalized spouse qualifies for Medicaid long-term care. *See, e.g.*, Houghton v. Reinertson, 382 F.3d 1162, 1175 (10th Cir. 2004) (holding that Colorado could not review the assets of the non-institutionalized spouse after eligibility is determined for the institutionalized spouse). For a discussion of what constitutes separate property, see *In re* Estate of Wiggins, 306 P.3d 201, 206 (Idaho 2013) (holding that the state may trace community property that has been transmuted into separate property).

60. *See, e.g*, *Stafford*, 181 P.3d at 460 (citing *Cleary*, 167 F.3d at 805).

61. *See* Thomas R. Oliver, Philip R. Lee & Helene L. Lipton, *A Political History of Medicare and Prescription Drug Coverage*, 82 MILBANK Q. 283, 298–99, 301 (2004) (noting that the MCCA was passed with "large, bipartisan majorities" although "most of [its] major provisions" were repealed in 1989).

recipient's estate could only occur at the recipient's surviving spouse's death; and (4) there was no express mention of recovery from the estate of a surviving spouse.[62]

The MMMNA shifts income that would be attributable to the institutionalized spouse—reducing eligibility for Medicaid long-term care—and makes this income available to the non-institutionalized spouse, regardless of the source of income.[63] The non-institutionalized spouse may keep all of his or her own income, but if support is needed, the spouse may obtain only an amount up to twenty-five percent of the excess of income over the MMMNA.[64] The CSRA allows the community spouse to retain a certain amount of resources without affecting the eligibility of the institutionalized spouse.[65] These exempt assets are reflected in the couple's resources, often assessed by the state Medicaid agency at the time of the application for Medicaid long-term care.[66] The state may not seek recovery for Medicaid expenditures until after both spouses' death.[67] Thus, the 1988 legislation permitted the non-institutionalized spouse to retain both income and assets (resources) rather than use them to pay for the institutionalized spouse's long-term care.[68] The goal of the legislation was to recognize the ownership rights of the non-institutionalized spouse in a significant portion of the community assets, exempting income and resources from attachment to pay for the institutionalized spouse's care.[69] Nonetheless, since the MCCA's enactment, litigation of the details continues, resulting in additional legislation.[70]

B. Omnibus Budget Reconciliation Act of 1993

To address some of the issues developing after the 1988 legislation, Congress enacted the Omnibus Budget Reconciliation Act of 1993 (OBRA).[71]

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62. 42 U.S.C. § 1396p(b)(1)(B)–(C), (b)(2).

63. *Id.* § 1396r-5(d)(2), (6). *See also supra* note 57 and accompanying text.

64. *Nursing Home Medicaid Coverage—Basic Financial Eligibility Rules About Income, Resources, and Spousal Protections*, N.Y. LEGAL ASSISTANCE GRP. (Aug. 26, 2014), http://www.wnylc.com/health/pdf/96/.

65. Robyn O'Neill & Lee Beneze, *A Guide to Medicaid's Spousal Impoverishment Rules*, 84 ILL. B.J. 22, 23 (1996).

66. *See* 42 U.S.C. § 1396r-5(c)(1)(B).

67. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., POLICY BRIEF #3, *supra* note 19, at 10.

68. *See* 42 U.S.C. § 1396r-5(c)(4).

69. *See supra* note 60 and accompanying text.

70. *See, e.g.*, Wis. Dep't of Health & Family Servs. v. Blumer, 534 U.S. 473, 492–94 (2002) (holding that income of the institutionalized spouse must first be given to the non-institutionalized spouse to meet the minimum monthly maintenance needs allowance); Wojchowski v. Daines, 498 F.3d 99, 109–10 (2d Cir. 2007) (holding that Social Security payable to the institutionalized spouse must first be applied to the non-institutionalized spouse); Burinskas v. Dep't of Soc. Servs., 691 A.2d 586, 591–92 (Conn. 1997) (holding that certain expenses incurred for home care may not be covered by the monthly maintenance needs allowance).

71. *See generally* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312. *See also* Ira Stewart Wiesner, *Obra '93 and Medicaid: Asset Transfers, Trust Availability,*

Specifically, the 1993 legislation provided for the following: (1) recovery could be taken from a recipient at age fifty-five rather than sixty-five; (2) states were now obligated to recover assets to the extent of expenditures made for a qualified recipient; (3) a definition of "estate" was added, similar to what appears in the current legislation; and (4) recovery may be initiated only after the surviving recipient's spouse's death, but there was no definition of what constitutes the estate of the surviving spouse.[72]

In summary, the 1993 legislation extended the "look-back" period during which any transfer of assets may adversely affect eligibility for Medicaid long-term care benefits; the period was extended to thirty-six months.[73] In addition, the legislation removed any cap on the penalty period if a transfer is made during the transfer period, and mandated added scrutiny requirements for any trust established by applicants and their spouses.[74] Additionally, if a transfer is made by the institutionalized spouse or the non-institutionalized spouse, it is possible to trace any of these assets through either party to succeeding holders of the assets.[75] Overall, the 1993 legislation sought to curb some of the advantages provided in the MCCA,[76] but the revisions of 1993 were nothing compared to legislation enacted by Congress in 2005.[77]

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and Estate Recovery Statutory Analysis in Context, 19 NOVA L. REV. 679, 682–83 (1995) (noting that there existed a perception in Congress that "well-to-do elders, through artifice and scheme, were obtaining public payment of their nursing home care while preserving their financial security and their ability to transmit wealth to younger generations," and that this perception "was crystallized by concerns raised primarily from the state Medicaid agencies and from the long-term care insurance industry").

72. *See* 42 U.S.C. § 1396p(b)(1)(B)–(C), (2), (4).

73. *Id.* § 1396p(c)(1)(B)(i).

74. *See* William H. Overman & William A. McCormick, *The SSI Anti-Fraud Provisions of FCIA 99: Welfare Reform Continues*, 13-WTR NAELA Q. 3, 3 (2000); Joel A. Mendler, *Using Trusts for Disabled Clients: Preserving Governmental Benefits*, 44 LA. B.J. 26, 27 (1996). *See, e.g.*, Bucholtz v. Belshe, 114 F.3d 923, 926 (9th Cir. 1997). The case held that the California estate recovery program was unable to reach the assets of an inter vivos trust pertaining to a decedent who died prior to 1993; the trust was not part of what was termed the estate, because

> a decedent's property *interests* in revocable inter vivos trusts end at his death, and the property vests in accordance with the trust terms alone, just as a decedent's property interests held in joint tenancy end at his death, and the property vests in accordance with the terms of the joint tenancy provisions alone.

Id. *But see* Bonta v. Burke, 120 Cal. Rptr. 2d 72, 77 (Cal. Ct. App. 2002) (finding that the state could recover from any assets in which the decedent Medicaid recipient held a remainder interest in real property); *In re* Estate of Thompson, 586 N.W.2d 847, 851 (N.D. 1998) (holding that the state could recover from the estate of the non-institutionalized spouse upon death of the institutionalized spouse when assets were held at death through an inter vivos trust).

75. *See, e.g.*, *In re* Estate of Bergman, 688 N.W.2d 187, 191–92 (N.D. 2004) (permitting tracing to access a Medicaid recipient's property passed to his wife who transferred it to her son).

76. *See supra* note 71–75 and accompanying text.

77. *See infra* Part I.C.

C. Deficit Reduction Act of 2005

The DRA contained the most significant changes to Medicaid eligibility rules.[78] Like the 1993 legislation, the DRA provided even more restrictions to transfers of homes, creations of annuities, and satisfaction of the MMMNA, and extended the "look-back" period to sixty months from thirty-six.[79] Specifically, the changes initiated by the 2005 legislation were the following: (1) transfers by spouses or applicants would be counted if made within five years (sixty months) of applying for benefits; (2) penalties imposed by transfers were shifted from the date of the actual transfer to the later date on which the Medicaid applicant would have been eligible but for the transfer penalty; (3) any annuities purchased must name the state as the remainder beneficiary, and the annuities must be irrevocable and nonassignable;[80] (4) purchases of life estates in another person's home loan repayments are scrutinized more closely; (5) exempt home equity value assigned to a community spouse, a minor child, or a disabled child is limited to a fixed amount indexed to inflation; and (6) establishing citizenship and hence entitlement to benefits will be more closely scrutinized.[81]

Restrictions provided for the recovery of assets to pay for institutional care for spouses, specific classes of children, and in some instances, siblings or adult children.[82] Applicable restraints include the following: (1) the state cannot recover from the recipient's estate and cannot execute on a lien against the recipient's residence during the life of the surviving spouse;[83] and (2) if the non-institutionalized spouse dies prior to the institutionalized spouse's death, the state may not recover from spouse's home if certain persons have lawfully lived in that home on a continuous basis since the institutionalized spouse entered into Medicaid long-term care.[84] This includes children under the age of twenty-one, blind or disabled children, children over the age of twenty-one who have resided in the home for two years prior to the parent's admission to an institution and who had provided care to that parent allowing the parent to remain in the home for as long as possible, and siblings who resided in the home at least one year prior to the institutionalization of the Medicaid recipient.[85]

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78. *See generally* Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4. For a practitioner's explanation of the legislation, *see* Bernard A. Krooks & Michael Gilfix, *Navigating the System*, 150 TRS. & ESTS. 39, 42 (2011). *See also* Morris Klein, *Medicaid Eligibility After the 2005 Deficit Reduction Act*, 41 MD. B.J. 32, 34 (2008) ("The DRA imposes more significant changes to the Medicaid program for long-term care than did previous laws.").

79. 42 U.S.C. § 1396p(c)(1)(B)(i), (f)–(g) (2012); *id.* § 1396r-5(d)(3)–(6), (e)(2)(B)–(C).

80. *See* Letter from Dennis G. Smith, *supra* note 36.

81. *See* 42 U.S.C. § 1396b(x)(1)–(5); *id.* § 1396p(c)(1), (f)(1)–(2).

82. *Id.* § 1396p(b)(1)–(2).

83. *Id*. § 1396p(b)(2)(A)–(B).

84. *Id.*

85. *See id.*

In spite of the DRA's progressive requirements, extensive litigation has arisen concerning three specific issues.[86] The first such issue is whether property in which a Medicaid recipient had an interest, but passed this interest to another via an "other arrangement," may be subject to estate recovery.[87] Traditionally, the term "estate" encompassed property passing under a last will and testament or through intestacy when there was no valid will.[88] But increasingly, wealth transfer occurs through "other arrangements," avoiding traditional estate capture.[89] Federal law provides for this evolution in definition as an option, but state statutes have been slow to accommodate the more inclusive definition of estate.[90] The second issue is whether the state may recover from assets transferred prior to death by a Medicaid applicant or the applicant's spouse.[91] Because these assets do not pass *at the time of death* of either spouse,[92] are they "traceable" so as to be available to reimburse the state under estate recovery programs? While the DRA contains language that seemingly decides this issue,[93] state courts are divided, and each side offers cogent reasons for each dissimilar approach.[94] The third issue is whether an annuity purchased to avoid disqualifying excess assets may nonetheless be considered a resource or a disqualifying transfer.[95] The business of supplying annuities for spouses of recipients of long-term care has become significant.[96] The DRA seemingly

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86. *See infra* notes 87, 91, 95 and accompanying text.

87. *See* 42 U.S.C. §1396p(b)(4)(A)–(B). *See also, e.g.*, Idaho Dep't of Health & Welfare v. McCormick, 283 P.3d 785, 791 (Idaho 2012).

88. *See* RAYMOND C. O'BRIEN & MICHAEL FLANNERY, DECEDENT'S ESTATES: CASES AND MATERIALS 5 (2d ed. 2011).

89. *See, e.g.*, *McCormick*, 283 P.3d at 791.

90. *See infra* Part II.B; U.S. DEP'T OF HEALTH & HUMAN SERVS., POLICY BRIEF #1, *supra* note 21, at 5.

91. *See, e.g.*, *McCormick*, 283 P.3d at 794 (citing *In re* Estate of Wirtz, 607 N.W.2d 882, 885 (N.D. 2000)); *In re* Estate of Barg, 752 N.W.2d 52, 71 (Minn. 2008).

92. *See* 42 U.S.C. § 1396p(b)(4)(B); *infra* note 232 and accompanying text.

93. *See* 42 U.S.C. § 1396p(b)(4)(A)–(B) ("[T]he term 'estate' . . . 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.").

94. *Compare McCormick*, 283 P.3d at 794 (quoting *Wirtz*, 607 N.W.2d at 885) (arguing in favor of subjecting assets conveyed by the recipient to the recipient's spouse before the recipient's death and "traceable to the recipient's estate . . . to the department's recovery claim" while not necessarily including "all property ever held by either party during the marriage"); *with Barg*, 752 N.W.2d at 71 (finding "no principled basis on which to interpret the federal law to allow recovery of assets in which the Medicaid recipient did not have an interest at the time of her death" and that "the language of the federal law clearly limits [the expanded definition of 'estate'] to assets in which the recipient had an interest at the time of her death").

95. *See, e.g.*, Lopes v. Dep't of Soc. Servs., 696 F.3d 180, 184 (2d Cir. 2012).

96. *See generally* Craig J. Langstraat, Lanitra Harris & James M. Plecnik, *Annuity Strategy When Spouse Needs Nursing Home Coverage*, 41 EST. PLANNING 25, 25 (2014) (discussing the use of annuities by spouses of long-term care recipients).

provides sufficient guidelines, but legal issues continue to arise.[97] This Article thus takes each issue in turn.

II. FIRST ISSUE: DEFINING ESTATE

A. Exempt Marital Property

Exemption of marital or community property permitted by successive federal laws created the need for estate recovery.[98] By exempting the applicant spouse's defined resources, assets, and income to prevent the impoverishment of the non-institutionalized spouse, these monetary resources became temporarily unavailable for Medicaid expenditures.[99] Estate recovery, eventually mandated by federal statute, is the attempt to recapture some or all of these assets not expended on Medicaid payments, and collection was to occur upon the death of both spouses.[100] This process is illustrated by the OBRA.[101] When Congress enacted legislation mandating that every state cooperate with federal law to provide Medicaid long-term care benefits, it correspondingly mandated a program to recover expenditures paid on behalf of any institutionalized Medicaid recipient.[102] This program is known as "estate recovery,"[103] and every state currently has a nominal statutory program to recover Medicaid expenditures made on behalf of an institutionalized person.[104]

The goal of the estate recovery program is two-fold. First, federal and state law recognizes that all assets acquired during marriage are community or marital assets earned from the joint efforts of both parties.[105] Thus, if one of the parties requires long-term care, he or she may qualify for Medicaid as "poor" by exempting some of the marital assets as a recognition that the non-institutionalized spouse earned those assets and should be entitled to their use.[106]

97. *See supra* notes 86–96 and accompanying text. *See also* 42 U.S.C. § 1396p(b)(4)(A)–(B) (defining the "estate" and its contents); *id.* § 1396r-5(c)(2) (providing for attribution of resources to spouses).

98. *See supra* Part I.A–C.

99. *See, e.g.*, *Barg*, 752 N.W.2d at 59 ("Medicaid thus balances the obligation of community spouses to contribute to the payment of medical expenses for their recipient spouses against the accommodation of the community spouse's need to provide for his or her own support.").

100. *See Estate Recovery and Liens*, MEDICAID.GOV, http://www.medicaid.gov/medicaid-chip-program-information/by-topics/eligibility/estate-recovery.html (last visited Sept. 16, 2015). *See also supra* note 67 and accompanying text.

101. *See supra* Part I.B.

102. *See supra* note 74 and accompanying text.

103. 42 U.S.C. § 1396p(b)(1)(A) (2012) ("In the case of an individual described in subsection (a)(1)(B) of this section, the State shall seek adjustment or recovery from the individual's estate or upon sale of the property subject to a lien imposed on account of medical assistance paid on behalf of the individual."). *See id.* § 1396p(b)(1)(B) (providing recovery provisions for persons fifty-five years of age or older at the time that such person obtained medical assistance).

104. *See infra* note 125 and accompanying text.

105. *See infra* Part IV.B; 42 U.S.C. § 1396r-5(b)(1).

106. 42 U.S.C. § 1396r-5(c)(4).

But second, spouses have a duty to provide necessities for each other, and health care is a necessity.[107] Therefore, upon both spouses' death, there should be an "estate recovery" from exempted assets and income to pay for long-term care.[108] In essence, the state is seeking to recover Medicaid expenditures made on behalf of the institutionalized spouse from assets that were exempt because they provided a home (assets) or income to a non-institutionalized spouse.[109] This process became codified as a result of federal legislation beginning in 1993, with certain rules becoming mandatory: (1) the age for recovery was lowered to fifty-five; (2) the state could seek recovery from the recipient's estate; (3) recovery of any expenditures are permitted only after the recipient's surviving spouse's death; and (4) the state has an option to enact a more inclusive definition of what constitutes an estate asset, such as when the decedent owned an interest that passes through nonprobate transfer, such as joint tenancy.[110]

Exempt marital assets were never intended to be exempt in perpetuity.[111] The ultimate intent of the estate recovery program is to subject the community assets generated by the two spouses to payment of any Medicaid expenditures; recovery is delayed until the surviving spouse's death to permit the non-recipient spouse to use the exempt assets in an unfettered fashion.[112] Sadly, upon the

107. *See* Bartrom v. Adjustment Bureau, Inc., 618 N.E.2d 1, 8 (Ind. 1993) ("When . . . there is a shortfall between a dependent spouse's necessary expenses and separate funds, the law will impose limited secondary liability upon the financially superior spouse by means of the doctrine of necessaries."). *See also id.* at 3–4 (noting that the doctrine of necessaries in its various iterations has generally been extended to medical care).

108. *See, e.g.*, *In re* Estate of Barg, 752 N.W.2d 52, 65 (Minn. 2008) ("The State may not seek recovery *from the beneficiary's estate* until the death of the surviving spouse, if any, and only if the individual has no surviving minor or disabled child.") (quoting H.R. REP. NO. 103-11, at 208 (1993)). *See also* U.S. DEP'T OF HEALTH & HUMAN SERVS., POLICY BRIEF #4, MEDICAID LIENS 3 (2005), http://aspe.hhs.gov/sites/default/files/pdf/74096/liens.pdf ("The objective [of estate recovery] was to recover taxpayer dollars invested in Medicaid by requiring more people to use private resources to defray the cost of their own long-term care.").

109. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., POLICY BRIEF #4, *supra* note 108, at 3.

110. 42 U.S.C. § 1396p(b)(1), (4). *See, e.g.*, *Barg*, 752 N.W.2d at 61. The court stated:

> For example, when two persons hold property in joint tenancy with a right of survivorship and one dies, the deceased joint tenant's interest ordinarily passes directly to the surviving joint tenant and is not part of the probate estate. Under the optional expanded definition allowed by federal law, for Medicaid recovery purposes the interest of a deceased joint tenant who had received Medicaid would be included in his estate, rather than passing directly to the surviving joint tenant.

Id.

111. *See In re* Estate of Thompson, 586 N.W.2d 847, 850–51 (N.D. 1998) (discussing the legislative purpose allowing for state recovery of Medicaid benefits from recipient's estate following the surviving spouse's death and the fact that "the relevant statutory provisions, in light of the Congressional purpose to provide medical care for the needy, reveals a legislative intention to allow states to trace the assets of recipients of medical assistance and recover the benefits paid when the recipient's surviving spouse dies").

112. *See id.* *See also* Janel C. Frank, Note, *How Far Is Too Far? Tracing Assets in Medicaid Estate Recovery*, 79 N.D. L. REV. 111, 122, 129, 140 (2003) (noting the "dual interests" served by allowing the surviving spouses to retain assets while alive and permitting Medicaid to recover upon

death of both spouses, family members are distraught when they discover that what they thought was permanently exempt is now subject to recovery. The media has taken notice of estate recovery, with one local newspaper painting a vivid picture of the process: "[the family] pictured the state as the villain in the black cape, like the villain in melodrama depicted on the silent movie screen, appearing on the doorstep to foreclose and leave the family on the street."[113]

Reflecting the fact that exempt assets were meant to safeguard the financial investment of spouses and the dependency of certain other persons, exempt assets may include the following: (1) the applicant's home up to a certain value and subject to continuing residency of a spouse or a minor or disabled or caregiving child; (2) an automobile, regardless of value if it is used for transportation; (3) all of the community property within the home, regardless of value if there is a community spouse, but otherwise with value qualifications; (4) property used for trade or business and necessary for support; (5) tools of the applicant's or spouse's trade; (6) any life insurance policy up to a face value of $1,500; (7) burial plots for the applicant and for family members plus prepaid costs for burial; and (8) $1,500 for revocable funeral arrangements.[114] These exempt assets and the corresponding federal statutes would seem to clarify any questions pertaining to estate recovery, but issues remain.[115]

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their deaths); *In re* Estate of Craig, 624 N.E.2d 1003, 1006 (N.Y. 1993) (highlighting the 1993 amendment to estate recovery provisions of federal law which allows states to recover against a recipient's estate, but only those assets "conveyed through joint tenancy and other specified forms of survivorship").

113. Sandra Reed, *You Can't Take It With You, But Can the State Take It From You?,* GLEN ROSE RPTR. (Nov. 10, 2014, 11:31 AM), http://www.yourglenrosetx.com/opinion/columinsts/article_f6fb9858-a3e3-55b4-9cf7-3db4289cd76f.html. Across the country there are similar comments. *See, e.g.*, Beth Duffy, *Estates Could Owe Medicaid*, THE GAZETTE (Grand Cedar Rapids, Iowa) (Mar. 28, 2014, 8:23 PM), http://www.thegazette.com/2013/09/13/estates-could-owe-medicaid (predicting that Medicaid expansion might cause a cycle of poverty); Carole Fader, *Fact Check: What Happens When a Medicaid Recipient Dies?,* FLA. TIMES-UNION (Jacksonville) (Mar. 29, 2014), http://jacksonville.com/reason/fact-check/2014-03-27/story/fact-check-what-happens-when-medicaid-recipient-dies (noting that estates of the deceased may be responsible for paying back all Medicaid costs); Monica J. Franklin, *Elder Law Update: Medicaid Estate Recovery in Tennessee*, 48 TENN. B.J. 35, 36–37 (2012) (explaining how estate recovery expansion may have negative consequences for the elderly); Katrina S. Jones & Marco D. Chayet, *Resolving a Medicaid Claim in a Decedent's Probate Estate*, 37 COLO. LAW. 31, 32–33, 36 (2008) (noting that states use liens to collect against all property not only probate estates); Shannon Mullen, *Medicaid's Death Bill Leaves Homes, Assets at Risk*, ASBURY PARK PRESS (N.J.) (Feb. 16, 2014, 5:33 PM), http://www.usatoday.com/story/news/nation/2014/02/16/medicaid-death-bill-homes-assets-at-risk/5534575/; Craig Reaves, *Paying for the "Institutionalized Spouse,"* N.Y. TIMES: NEW OLD AGE BLOG (June 4, 2010, 9:00 AM), http://newoldage.blogs.nytimes.com/2010/06/04/paying-for-the-instiutionalized-spouse (showing that through estate recovery, Medicaid will recoup expenses before heirs are able to receive inheritance).

114. 42 U.S.C. § 1382b(a), (d).

115. *See supra* notes 93, 114 and accompanying text.

B. Constituting the Estate

Determining the parameters of the estate and then the process of estate recovery begins with the long-term care recipient's death. The state may require the personal representative of the recipient's estate to notify the state so the state can assess whether estate recovery is appropriate.[116] What constitutes a recipient's estate must include first, "all real and personal property and other assets included within the individual's estate, as defined for purposes of State probate law."[117] These assets constitute the minimum and they may be limited depending on the state's probate statute.[118] But there is a second segment to the federal legislation: federal law permits states to exercise an option to expand the definition of estate to include other assets owned at death but passing outside of traditional probate.[119] These would include joint tenancy, survivorship provisions, life estates, living trusts, and other arrangements.[120] Modern forms of wealth transfer pass a great deal of wealth through these mechanisms, and they are incorporated into this optional portion of the federal statute.[121]

Specifically, the optional portion of the federal legislation expands assets beyond the range of traditional forms of probate,[122] providing:

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116. *See, e.g.*, CAL. PROB. CODE § 215 (West 2015). The statute states:

> Where a deceased person has received or may have received health care under Chapter 7 (commencing with Section 14000) or Chapter 8 (commencing with Section 14200) of Part 3 of Division 9 of the Welfare and Institutions Code, or was the surviving spouse of a person who received that health care, the estate attorney, or if there is no estate attorney, the beneficiary, the personal representative, or the person in possession of property of the decedent shall give the Director of Health Care Services notice of the decedent's death not later than 90 days after the date of death. The notice shall include a copy of the decedent's death certificate. The notice shall be given as provided in Section 1215, addressed to the director at the Sacramento office of the director.

Id. See also MISS. CODE ANN. § 43-13-317 (West 2015); N.D. CENT. CODE ANN. § 50-24.1-07(3) (West 2015).

117. 42 U.S.C. § 1396p(b)(4)(A).

118. *See id.*; s*ee, e.g.*, *In re* Estate of Jones, 280 S.W.2d 647, 651 (Mo. Ct. App. 2009) (noting that the federal statute represents the minimum assets included in the estate); Hines v. Dep't of Pub. Aid, 831 N.E.2d 641, 645 (Ill. App. Ct. 2005) (noting that the state probate statute did consider a decedent's automobile to be part of the estate).

119. 42 U.S.C. § 1396p(b)(4)(B).

120. *Id.*

121. *See* John H. Langbein, *Major Reforms of the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers*, 38 ACTEC L.J. 1, 10 (2012) ("The deepest trend now affecting the day-to-day reality of gratuitous transfers in the United States is the nonprobate revolution, by which I mean the burgeoning use of will substitutes to transfer property on death.").

122. *See* JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 41 (9th ed. 2013) ("*Probate property* is property that passes through probate under the decedent's *will* . . . or by *intestacy* . . . . *Nonprobate property* is property that passes outside of probate by way of a *will substitute* . . . ."). Examples of nonprobate transfers are inter vivos trusts, life insurance, joint tenancies, and payable on death contracts. *Id.* at 42.

> [A recipient's estate] may include, at the option of the State (and shall include, in the case of an individual to whom paragraph (1)(C)(i) applies), any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.[123]

Assets are further defined as including income and resources of the individual and the individual's spouse, including any "income or resources [to] which the individual or such individual's spouse is entitled."[124] Because states may define the probate estate in a manner that does not exceed federal guidelines, state statutes vary on what is included.[125] Some state statutes are expansive in scope, some are restrictive, and some specifically exclude assets from the probate estate.[126] Federal preemption is rare, and states may exercise initiative;

123. 42 U.S.C. § 1396p(b)(4)(B). An individual taking under paragraph (1)(C)(i) is someone "who has received (or is entitled to receive) benefits under a long-term care insurance policy in connection with which assets or resources are disregarded." *Id.* § 1396p(b)(1)(C)(i).

124. *Id.* § 1396p(h)(1).

125. *See* ALASKA STAT. ANN. § 47.07.055 (West 2015); ARIZ. REV. STAT. ANN. § 36-2935 (2015); ARK. CODE ANN. § 20-76-436 (West 2015); CAL. WELF. & INST. CODE § 14009.5 (West 2015); COLO. REV. STAT. ANN. § 25.5-4-302 (West 2015); CONN. GEN. STAT. ANN. § 17b-93 (West 2015); DEL. CODE ANN. tit. 25, §§ 5001, 5003 (West 2015); D.C. MUN. REGS. tit 29, §§ 6700–6702 (LexisNexis 2015); FLA. STAT. § 409.9101 (West 2015); GA. CODE ANN. § 49-4-147.1 (West 2015); HAW. REV. STAT. ANN. § 346-37 (West 2015); IDAHO CODE ANN. § 56-218 (West 2015); 305 ILL. COMP. STAT. ANN. § 5/5-13 (West 2015); IND. CODE ANN. § 12-15-9-0.5 (West 2015); IOWA CODE ANN. § 249A.53 (West 2015); KAN. STAT. ANN. § 39-709 (West 2015); KY. REV. STAT. ANN. § 205.624 (West 2015); LA. STAT. ANN. § 46:153 (2014); ME. REV. STAT. ANN. tit. 22, § 14 (West 2015); MASS. GEN. LAWS ANN. ch. 118E, § 31 (West 2015); MICH. COMP. LAWS ANN. §§ 400.112g, 400.112h, 400.112i, 400.112k (West 2015); MINN. STAT. ANN. § 256B.15 (West 2015); MISS. CODE. ANN. § 43-13-317 (West 2015); MO. ANN. STAT. § 473.398 (West 2015); MONT. CODE ANN. § 53-6-167 (West 2015); NEB. REV. STAT. ANN. § 68-919 (West 2015); NEV. REV. STAT. ANN. § 422.29302 (West 2015); N.H. REV. STAT. ANN. §§ 167:13, 167:14 (West 2015); N.J. STAT. ANN. § 30:4D-7.2 (West 2015); N.M. STAT. ANN. § 27-2A-4 (West 2015); N.Y. SOC. SERV. LAW § 369 (McKinney 2015); N.C. GEN. STAT. ANN. § 108A-70.5 (West 2015); N.D. CENT. CODE ANN. § 50-24.1-07 (West 2015); OHIO REV. CODE ANN. §§ 5162.21, 5162.211–.212 (West 2015); OKLA. STAT. ANN. tit. 63, § 5051.3 (West 2015); OR. REV. STAT. ANN. § 411.795 (West 2015); 62 PA. STAT. AND CONS. STAT. ANN. § 1412 (West 2015); 40 R.I. GEN. LAWS ANN. § 40-8-15 (West 2015); S.C. CODE ANN. § 43-7-460 (2015); S.D. CODIFIED LAWS § 28-6-23 to 23.1 (West 2015); TENN. CODE ANN. § 71-5-116 (West 2015); UTAH CODE ANN. § 26-19-13.5 (West 2015); VT. STAT. ANN. tit. 33, §§ 122, 2113 (West 2015); VA. CODE ANN. §§ 32.1-326.1, 32.1-327 (West 2015); WASH. REV. CODE ANN. § 43.20B.080 (West 2015); W. VA. CODE ANN. § 9-5-11c (West 2015); WIS. STAT. ANN. §§ 49.496, 49.682 (West 2015); WYO. STAT. ANN. § 42-4-206 (West 2015).

126. *See, e.g.*, Estate of Darby v. Stinson, 68 So. 3d 702, 706, 708 (Miss. Ct. App. 2011) (holding that the state's homestead exemption statute excluded a portion of the decedent's estate from probate and the estate recovery program). The court noted that "some states have incorporated a broad definition of estate for Medicaid expense recovery programs." *Id.* at 705. *See* MISS CODE ANN. § 85-3-21 (West 2015) (specifically exempting certain land and buildings up to a certain size

however, states must comply with federal law when defining assets, what constitutes probate, and when and to what extent payment is to be made to individuals.[127] Without a federal mandate, it is difficult to conceive of national uniformity for estate recovery programs.[128]

Some states permit singular examples of nonprobate transfers, such as recovery from real property held by a married couple under tenancy by the entirety.[129] But strict construction permits this transfer to be included only when the state probate statute specifically incorporates this transfer in the probate estate.[130] Other states incorporate language of the federal Medicaid statute,[131] but many states ignore the opportunity to define the estate in a truly inclusive fashion.[132] An inclusive statute would contain an expanded definition of the probate estate to include all forms of nonprobate transfers, including those listed in federal legislation, such as joint tenancies, living trusts, and payable on death

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and value under a homestead exemption). But other state statutes have used the expanded federal option and included transfers not within traditional probate. *See, e.g.*, IOWA CODE ANN. § 249A.53(2)(b) (West 2015) (including the entirety of both a beneficiary's and his or her spouse's estates); ME. REV. STAT. ANN. tit. 22, § 14.2-1(F)(2) (West 2015) (permitting living trusts); MO. ANN. STAT. § 473.398(6) (West 2015) (allowing life insurance proceeds).

127. 42 U.S.C. §1396a(a)(18); *In re* Jones, 280 S.W.3d 647, 650 (Mo. Ct. App. 2009). For a discussion of federal preemption of state law, *see* Idaho Dep't of Health & Welfare v. McCormick, 283 P.3d 785, 794–95 (Idaho 2012) (holding that federal law did not preempt the state's ability to recover from the estate what was once a Medicaid recipient's community property).

128. *See supra* note 125 and accompanying text (demonstrating the variety of state recovery statutes).

129. *See In re* Estate of Bruce, 260 S.W.3d 398, 400, 402–03 (Mo. Ct. App. 2008) (noting that 42 U.S.C. § 1396p(b)(4) "empowers Missouri to define 'estate' broadly and thereby to pursue property that a recipient owned jointly with another individual when the recipient died but that would not be included in the decedent's estate," where the decedent had owned a home with his wife as a tenancy by the entirety).

130. *See, e.g.*, *id.* at 402–03.

131. *See, e.g.*, IDAHO CODE ANN. § 56-218(4) (West 2015). The statute provides:

> For purposes of this section, the term "estate" shall include: (a) All real and personal property and other assets included within the individual's estate, as defined for purposes of state probate law; and (b) Any other real and personal property and other assets in which the individual had any legal title or interest at the time of death, to the extent of such interest, including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust or other arrangement.

Id. *See also* 305 ILL. COMP. STAT. ANN. 5/5-13 § 5-13 (West 2015) (including claims against estate of recipients); IND. CODE ANN. § 12-15-9-0.5(a)(1)–(4) (West 2015); ME. REV. STAT. ANN. tit. 22, § 14.2(2-1)(F)(1)–(2) (2015).

132. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., POLICY BRIEF #1, *supra* note 21, at 5 ("[E]vidence is lacking on what types of assets are included under the broad definition of estate in those states that have elected to extend their recovery efforts beyond the probate estate. One study determined that 20 of 40 responding states using the Federal minimum definition, while the remaining 24 states used some variation of the broader option. A later study reported that 30 of 48 responding states used the minimum definition.").

certificates and contracts.[133] It would also permit tracing the assets at the surviving spouse's death.[134] But federal law does not require this expanded definition; federal law requires only that the state's definition of estate include "all real and personal property and other assets included within the individual's estate, as defined for purposes of State probate law."[135] If the state does not use the precise language of the federal statute in its probate law, then there is a risk that some nonprobate transfers will not be available to the state recovery program.[136] Thus, because of state variations in defining what constitutes the estate, there is an elusive aspect to estate recovery.

Disparity among the states in collecting under estate recovery programs likely results from the large federal subsidy provided for Medicaid, the complexity of the subject area, and the nascent possibility of any recovery at all.[137] Often state statutes have not embraced modern forms of wealth transfer at death, and the parameters of what constitutes the estates are vague.[138] In spite of the fact that federal law permits a broader description of what is included in probate, the states have been slow to adopt more expansive language.[139] The cost of failure to recover estate assets can be high for both federal and state agencies, and

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133. *See In re* Estate of Thompson, 586 N.W.2d 847, 850 (N.D. 1998) (giving an example of an expansive definition of the estate).

134. *See infra* Part III (discussing the tracing of transferred assets).

135. 42 U.S.C. § 1396p(b)(4)(A) (2012). Centers for Medicare & Medicaid Services (CMS) instructs the state to specify what is included in the definition of estate. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., CTRS. FOR MEDICARE & MEDICAID SERVS., THE STATE MEDICAID MANUAL § 3810 (2001), http://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Paper-Based-Manuals-Items/CMS021927.html?DLPage=1&DLSort=0&DLSortDir=ascending.

136. *See supra* notes 130–32 and accompanying text.

137. For a discussion of the disparity among states and the type of issues that cause the differences, *see* U.S. DEP'T OF HEALTH & HUMAN SERVS., POLICY BRIEF #1, *supra* note 21, at 1–2, 8 (noting that only twelve states had recovery programs before 1990, that Medicaid is the "largest source of funds for institutional long-term care expenses," and that there are "complex tax implications" involved).

138. *See, e.g.,* MASS. GEN. LAWS ANN. 118E, § 31(c) (West 2015) ("For purposes of this section, 'estate' shall mean all real and personal property and other assets includable in the decedent's probate estate under the General Laws."); MICH. COMP. LAWS ANN. 400.112h(a) (West 2015). The Michigan provision states:

> "Estate" means all property and other assets included within an individual's estate that is subject to probate administration under article III of the estates and protected individuals code, [MICH. COMP. LAWS ANN.] 700.3101 to 700.3988, except assets otherwise subject to claims under section 3805(3) of the estates and protected individuals code, [MICH. COMP. LAWS ANN.] 700.3805, are not part of the estate.

Id. For a discussion of state hesitancy to accommodate nonprobate transfers in modern statutes, *see* Raymond C. O'Brien, *Integrating Marital Property Into a Spouse's Elective Share*, 59 CATH. U. L. REV. 617, 638 (2010).

139. *See supra* note 132 and accompanying text; U.S. DEP'T OF HEALTH & HUMAN SERVS., POLICY BRIEF #1, *supra* note 21, at 5.

failure to collect frustrates congressional intent as recited in the OBRA and most recently the DRA.[140]

An illustration of a state statutory deficiency occurred in In re *Estate of Jones*.[141] The facts included a Medicaid recipient who died at the age of ninety-two owing the state $22,226.24 in Medicaid long-term care benefits that were paid on his behalf.[142] At his death, his only asset—his home—passed to his children via a beneficiary deed, a nonprobate transfer device not traditionally associated with transfer through probate.[143] The home was valued at $24,000 and would have been sufficient to reimburse the state for its Medicaid expenditures, but the decedent's children argued that "because the State has not amended the definition of 'estate' [in its code] to include nonprobate transfers, the State cannot recover its Medicaid benefits from a nonprobate transfer."[144] At the time, the Missouri probate code defined the term estate as including "the real and personal property of the decedent or ward, as from time to time changed in form by sale, reinvestment or otherwise, and augmented by any accretions and additions thereto and substitutions therefor, and diminished by any deceases and distributions therefrom."[145] The beneficiary deed used by the decedent to transfer the home to his children was an effective nonprobate transfer device,[146] prompting the question as to whether this form of transfer could be included in the state's definition of estate.[147]

The Missouri Court of Appeals framed the issue as not involving whether the transfer could be included in the state definition of estate, but rather whether the state's estate recovery statutes allowed the state to proceed as a creditor.[148] This issue depends on the construction of another state statute specifying that: "Each recipient of a recoverable transfer of a decedent's property shall be liable to account for a pro rata share of the value of all such property received, to the

140. Cases often refer to the purpose of Congress to recover Medicaid expenditures. *See, e.g.*, Idaho Dep't of Health & Welfare v. McCormick, 283 P.3d 785, 788 (Idaho 2012) (stating that "Medicaid has always been intended to be the 'payer of last resort'"); *In re* Estate of Barg, 752 N.W.2d 52, 58–60 (Minn. 2008) (discussing the congressional intent behind Medicaid and the Omnibus Budget Reconciliation Act); *In re* Estate of Wirtz, 607 N.W.2d 882, 885–86 (N.D. 2000) (finding that Congress "revealed an intent to allow states a wide latitude in seeking Medicaid benefit recoveries").

141. 280 S.W.3d 647 (Mo. Ct. App. 2009).

142. *Id.* at 649–50

143. *Id.* at 649, 651; Susan N. Gary, *Transfer-on-Death Deeds: The Nonprobate Revolution Continues*, 41 REAL PROP. PROB. & TR. J. 529, 532 (2006) (noting that "[a] transfer-on-death deed or TOD deed, also known as a beneficiary deed, allows the owner of real property to execute a deed that names the beneficiary who will succeed to ownership at the owner's death" and that "if the owner records the deed and does not revoke it, the beneficiary will be able to obtain title to the property at the owner's death without going through probate") (footnote omitted).

144. *Jones*, 280 S.W.3d at 650.

145. *Id.* at 651; MO. ANN. STAT. § 472.010(11) (West 2015).

146. *Jones*, 280 S.W.3d at 651.

147. *Id.* at 651–52.

148. *Id.*

extent necessary to discharge . . . claims remaining unpaid after application of the decedent's estate . . . ."[149] Recoverable transfer is defined as "a nonprobate transfer of a decedent's property under sections 461.003 to 461.081."[150] Therefore, the court held that the state was a creditor and may bring an action for recovery of the money owed, even though the home was transferred through a beneficiary deed, a nonprobate transfer.[151]

Although the state was allowed to recover for long-term care benefits,[152] the case illustrates the failure of the state's statute and the difficulty of recovery.[153] This problem resulted from the fact that the estate recovery statute did not include the array of nonprobate transfers commonly used to transfer property at death—all of which are listed as permissible for the state to use.[154] Instead, recovery occurred because the state was a creditor and, as such, could seek restitution for monetary contribution from nonprobate assets if the probate estate was insufficient.[155] The case illustrates the issue of whether the state's estate recovery statute is broad enough to encompass the transfer of an asset at the death of the recipient or of his or her spouse.[156] Some state courts have accepted the challenge by interpreting state statutes broadly.[157] Other states have not been willing to adopt an expansive definition.[158] These different approaches are illustrated in the following material.

1. Expansive Statutory Construction

An expansive approach towards estate recovery is illustrated in the Supreme Court of North Dakota's decision in In re *Estate of Thompson*.[159] The facts are typical of an estate recovery case; a married couple obtained long-term care Medicaid benefits for one spouse, and the other received exempt assets or

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149. *Id.* at 652 (citing MO. ANN. STAT. § 461.300.1 (West 2015)).

150. *Id.* (citing MO. ANN. STAT. § 461.300.10(4)).

151. *Id.* at 655.

152. *See id.* at 655–56.

153. *See id.* at 651 (commenting that "the State admits that Missouri has not expanded the definition of 'estate' to include nonprobate transfers").

154. *Id.* at 650–51; 42 U.S.C. § 1396p(b)(4)(B) (2012).

155. *Id.* at 654–56. For additional statutory liability whenever the probate estate is insufficient, *see* UNIF. PROB. CODE § 6-102 (amended 2010).

156. *Jones*, 280 S.W.3d at 650. *See also* Hines v. Dep't of Pub. Aid, 831 N.E.2d 641, 646 (Ill. App. Ct. 2005), *aff'd*, 850 N.E.2d 148 (Ill. 2006) (holding that an expansive reading of the statute is not warranted and is preempted by federal law).

157. *See, e.g.*, Estate of Marusich v. State, 313 P.3d 1272, 1278, 1280–81 (Wyo. 2013) (commenting on other courts' approaches and applying an expanded definition of "estate").

158. *See, e.g.*, Hines, 831 N.E.2d at 645 (finding that "[the decedent's] interest in [a] home and [an] automobile would not be included in his 'estate' [under state law]"); *In re* Estate of Darby, 68 So. 3d 702, 705–06 (Miss. Ct. App. 2011) (holding that states have the ability to adopt a broader definition of estate).

159. 586 N.W.2d 847, 850 (N.D. 1998) (noting that the "'plain meaning' of the very broad definition of the recipient's estate in 42 U.S.C. § 1396p(b)(4) must also be considered").

income.[160] The husband's benefits totaled $58,237.30, provided between 1991 and his death in 1992.[161] He predeceased his wife, who died in 1995 with an estate of $46,507.98.[162] Then, in accordance with state law, after the personal representative notified the state of the wife's death, the state initiated a claim to recover the money spent on her husband's care ($58,237.30) plus interest ($9,356.79).[163] Between the time of the death of the Medicaid recipient (the husband), but prior to the death of the recipient's spouse (the wife), North Dakota adopted an estate recovery statute that was based on the federal expanded definition of what constitutes the probate estate.[164] The federal statute provided the following:

> (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 assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.[165]

The state filed a claim against the estate of the surviving spouse upon that spouse's death under the state's estate recovery statute,[166] and the personal representative of the now-deceased surviving spouse refused payment.[167] The personal representative argued that federal law prohibits the state from collecting for Medicaid benefits paid to a predeceasing recipient spouse from the estate of a surviving spouse.[168] In other words, although it is possible to collect from the recipient spouse, the state is prohibited from collecting from the surviving

160. *Id.* at 848–49.

161. *Id.* at 848.

162. *Id.*

163. *Id.*

164. *Id.* at 849–50.

165. 42 U.S.C. § 1396p(b)(4) (2012).

166. *Thompson*, 586 N.W.2d at 848. At the time, N.D. CENT. CODE § 50-24.1-07(1)–(2) provided:

> (1) On the death of any recipient of medical assistance who was fifty-five years of age or older when the recipient received the assistance, and on the death of the spouse of such a deceased recipient, the total amount of medical assistance paid on behalf of the recipient following the recipient's fifty-fifth birthday must be allowed as a preferred claim against the decedent's estate . . . (2) No claim must be paid during the lifetime of the decedent's surviving spouse, if any . . . .

Id. at 849 (citing N.D. CENT. CODE ANN. § 50-24.1-07(1)–(2) (West 2015)).

167. *Id.* at 848, 850.

168. *Id. See* 42 U.S.C. § 1396p(b)(1) (prohibiting recovery of medical assistance paid for an individual under the state Medicaid plan except under certain circumstances).

spouse. In response to the personal representative, the state relied upon another section of the federal statute permitting the state to collect from the surviving spouse the value of medical assistance paid to the recipient after the non-recipient surviving spouse's death.[169] However, the personal representative contended that even if the state were correct, the state's recovery statute was not enacted until after the recipient spouse's death in 1992.[170] The personal representative argued that the state statute could not be applied retroactively to collect from the non-recipient surviving spouse at her death in 1995.[171]

The North Dakota Supreme Court held that a state estate recovery program could not collect from the estate of a decedent recipient of Medicaid long-term care during the lifetime of that recipient's spouse.[172] Nonetheless, the state could, upon that recipient's spouse's death, inquire how that surviving non-recipient spouse acquired any assets from the recipient and then utilize the estate recovery statute to collect any amounts paid for long-term care.[173] Furthermore, the state statute's expanded definition of what constitutes the probate estate offers added elements that may be included in the recovery program at the surviving spouse's death.[174] The fact that the expanded definition of what constitutes the probate estate was not adopted until after the recipient spouse's death was immaterial.[175] The statute was in effect at the surviving spouse's death.[176] The practice contemplated by the state was valid since the state was simply collecting a debt that was due, not applying a statute retroactively.[177]

By permitting the state statute to be applied against the estate of a Medicaid recipient who died prior to the enactment of the statute, the state court adopted

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169. *Thompson*, 586 N.W.2d at 850. *See* 42 U.S.C. § 1396p(b)(4). *See also* Idaho Dep't of Health & Welfare v. McCormick, 283 P.3d 785, 790–91 (Idaho 2012) (holding that assets may include any property in which the Medicaid recipient spouse owns or holds an interest after October 1, 1993); *In re* Estate of Craig, 624 N.E.2d 1003, 1006 (N.Y. 1993) (construing the Omnibus Budget Reconciliation Act of 1993 to permit estate recovery programs against surviving non-recipient spouses).

170. *Thompson*, 586 N.W.2d at 851–52.

171. *Id.* The personal representative argued that the state was seeking an "inappropriate retroactive application of a statute." *Id.* at 852.

172. *Id.*

173. *Id.* at 850–51.

174. *Id.* at 850 (discussing 42 U.S.C. § 1396p(b)(4) as outlining the types of property recoverable under the state statute). The court stated:

> That expansive definition is broad enough to encompass the department's claim against the estate of a deceased spouse of a deceased recipient of medical assistance benefits for the amount of medical assistance paid out, to the extent the recipient at the time of death had any title or interest in assets which were conveyed to his or her spouse . . . .

Id.

175. *Id.* at 852 (concluding that the state's claim would not be an impermissible "retroactive" application of law because the duty to repay "arises upon receipt of the benefits") (quoting *In re* Estate of Hooey, 521 N.W.2d 85, 87 (N.D. 1994)).

176. *Id.* at 849.

177. *Id.* at 852.

an expansive approach to estate recovery.[178] The court implied that such a ruling is justified in light of the state's policy of promoting "wide latitude in seeking estate recoveries."[179] The practice is also consistent with the policy of state collection upon both spouses' death, one or both of whom collected long-term care benefits.[180] Such a conclusion, a preference for an expansive state recovery approach, is shared by other courts.[181] For example, the Supreme Court of Idaho, deciding whether the state's estate recovery program was preempted by federal law, held that, "[i]n light of the ambiguously inclusive nature of 42 U.S.C. § 1396p(b)(4)(B) and the plain definition of 'assets' in 42 U.S.C. § 1396(h)(1), we cannot find that federal law preempts the State from providing for recovery of assets."[182] It appears that courts find an expansive approach to estate recovery based on the federal mandate that states engage in recovery, a preference for avoiding federal preemption, and overarching policy goals.[183]

2. *Strict Statutory Construction*

Not every state agrees with the expansive approach taken by the North Dakota Supreme Court. A notable example is the Illinois decision of *Hines v. Department of Public Aid*.[184] The Appellate Court of Illinois held that federal Medicaid law did not permit estate recovery from the estate of the surviving spouse of a Medicaid recipient of long-term care.[185] The facts involved a husband who applied for and began receiving Medicaid long-term care assistance in 1994.[186] At the time he began receiving benefits, he and his wife jointly owned a home and an automobile, and he received long-term care benefits until his death in 1997.[187] The recipient's spouse survived her husband

178. *Id.* (holding that the decedent's obligation to repay his benefits began at the time of the receipt, and that the statute is not retroactive when it draws upon facts antecedent to its passing); *see also id.* at 850 (determining that an expansive reading of the statute allowed the state to make a claim against the estate of a deceased person who was married to a benefit recipient).

179. *Id.* at 851.

180. *See id.*

181. *See, e.g.,* Idaho Dep't of Health & Welfare v. McCormick, 283 P.3d 785, 794–95 (Idaho 2012).

182. *Id.* at 794. *See also infra* notes 236–67 and accompanying text.

183. *See id.* at 794 (stating that the ambiguous nature of the federal statute prevents the court from "find[ing] that federal law preempts the State from providing for recovery of assets from both spouses' estates"); *Thompson*, 586 N.W. 2d at 851 (highlighting congressional intent to allow states wide discretion in estate recovery).

184. 831 N.E.2d 641, 647 (Ill. App. Ct. 2005) (disagreeing with the "expanded definition" of "estate" in *Thompson*).

185. *Id.* ("Because federal law does not provide an exception to the general rule prohibiting recovery of medical assistance payments that would permit recovery from the estate of the surviving spouse of a recipient, Illinois law to the contrary exceeds the authority granted under the federal statute.").

186. *Id.* at 642.

187. *Id.*

for four years but died in 2001.[188] At the time of her death she still owned the home and the automobile, but both were sold following her death, with the home selling for $69,641.89 and the automobile for $2,000.[189] Upon her death the state sought to recover $61,154.48, the cost of long-term care for her husband, from her estate.[190] The issue then arose as to whether the state could recover from the non-recipient spouse's estate for benefits paid on behalf of the recipient spouse, or whether the claim was barred by the federal Medicaid statute.[191]

The Illinois Circuit Court held that the state recovery program was not preempted by the federal statute.[192] Federal law permits states to include in the estate of a deceased recipient "any other real and personal property and other assets in which the individual had any legal title or interest at the time of death."[193] In this particular case, the non-recipient spouse inherited the house through a joint tenancy nonprobate transfer.[194] This is permitted under Illinois law.[195] The attorneys for the estate of the non-recipient spouse countered that the expanded definition of what constitutes the estate only applies when the decedent recipient spouse benefitted from state-sponsored long-term care insurance.[196] The Illinois Circuit Court disagreed, holding that the statute permitted estate recovery against assets which are part of the Illinois Probate Estate of the Medicaid recipient, not only a recipient receiving state-sponsored long-term care insurance.[197]

The estate of the non-recipient spouse appealed the decision of the Illinois Circuit Court to the state's appellate court.[198] The appellate court held that the state statute permits claims to be brought against any inpatient in a nursing facility, the estate of such person, or the spouse of that person, but only upon the death of that person's spouse.[199] Additionally, when determining the estate of the surviving spouse the court began by acknowledging that federal law specifies

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 643.

193. *Id.* (citing 42 U.S.C. § 1396p(b)(4)(B) (2012)).

194. *Id.* at 642–43.

195. *See* 305 ILL. COMP. STAT. ANN. 5/5-13 (West 2015). The Illinois statute is based on the federal statute. *Compare id.* ("'[E]state' also includes any other real and personal property and other assets in which the deceased person had any legal title or interest at time of his or her death . . . including assets conveyed to a survivor . . . through joint tenancy . . . ."), *with* 42 U.S.C. § 13 1396p(b)(4)(B) ("[A]ny 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 . . . through joint tenancy . . . .").

196. *Hines*, 831 N.E.2d at 643 (noting that the broad definition of an estate may be used for other situations, but is only required for recipients of state-sponsored long-term care insurance).

197. *Id.*

198. *Id.* at 642.

199. *Id.* at 644 (citing 305 ILL. COMP. STAT. ANN. 5/5-13 (West 2015)).

that states "*may* utilize the broad definition of the Medicaid recipient's 'estate' . . . but they are only required to apply that definition when the recipient benefitted from . . . long-term care insurance coverage."[200] The appellate court noted that the Illinois state statute defines the term "estate" in two different ways,[201] with both methods permitting a claim against the estate of a spouse of a Medicaid recipient upon that surviving spouse's death.[202] The first way an estate may be defined is to include "all real and personal property and other assets included within the person's estate, as that term is used in the Probate Act of 1975."[203] The second way provides an expanded definition of estate, consistent with the federal provision.[204] But, unlike the federal statute, the state statute provides the following restrictive phrase:

> *[H]owever*, in the case of a deceased person who has received (or is entitled to receive) benefits under a long-term care insurance policy . . . *'estate' also includes any other real and personal property and other assets in which the deceased person had any legal title or interest at the time of his or her death*.[205]

The state statute, unlike its federal counterpart, included a provision that appeared to condition the expanded definition of estate to those receiving long-term care insurance.[206] Because the Medicaid recipient did not receive long-term care insurance, his estate at the time of his death must be defined by the first, more limited definition of the term "estate."[207] Because the home and automobile did not pass to the surviving spouse under the more restrictive version of the state statute, the property was beyond the reach of the state's estate recovery program.[208] Put simply, the recipient's estate under the Probate Act of 1975 did not include his home and automobile at the time of his death, and while the more expansive definition would include these items, the statute's broader definition of estate was inapplicable because the recipient did not receive long-term care insurance as stipulated by the statute.[209]

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200. *Id.* at 643. *See* 42 U.S.C. § 1396p(b)(4) (permitting states a definition of estate that exceeds what is typically included in the probate estate).

201. *Hines*, 831 N.E.2d at 645.

202. *Id.* at 644 (citing 305 ILL. COMP. STAT. ANN. § 5/5-13 (West 2015)).

203. *Id.* (quoting 305 ILL. COMP. STAT. ANN. § 5/5-13). This portion of the state statute mirrors the federal code provision. *See* 42 U.S.C. § 1396p(b)(4)(A).

204. *Hines*, 831 N.E.2d at 644–45 (emphasizing that the language in the state statute allows a broad definition of estate that is also found in the federal statute). *See* 42 U.S.C. § 1396p(b)(4)(B).

205. *Hines*, 831 N.E.2d at 644 (quoting 305 ILL. COMP. STAT. ANN. 5/5-13).

206. *Compare* 305 ILL. COMP. STAT. ANN. § 5/5-13 (using the word "however" to limit the expanded definition of "estate"), *with* 42 U.S.C. § 1396p(b)(4)(B) (providing that no limitation on how "estate" can be defined within the confines of the statutory language).

207. *Hines*, 831 N.E.2d at 645.

208. *Id.*

209. *Id.* ("Julius's interest in the home and automobile would not be included in his 'estate' under the Probate Act. Those interests would be part of his more expansively defined estate, but

Thwarted in its pursuit of the home and automobile through the state's expanded definition of estate, the Department of Public Aid then argued that the manner by which the surviving spouse obtained the property from the recipient spouse did not matter.[210] The state argued: "[B]ecause a claim against the probate estate of the surviving spouse is permitted, it does not need to rely on the broad definition of 'estate' to reach the property in the [spouse's] estate."[211] But the appellate court disagreed, holding that recovery may be taken from the recipient spouse's estate at the surviving spouse's death.[212] This recovery is limited to what the surviving spouse inherited from the estate of the recipient spouse.[213] Thus, since the Illinois statute defines the estate of the recipient in a very narrow fashion, thereby excluding the home and automobile from passing through the recipient spouse's probate, these items are not now available to the state estate recovery program from the estate of the non-recipient surviving spouse.[214] The problem results from the Illinois statute: the surviving spouse did not receive the home and automobile in such a way as to make them available to the state's estate recovery program.[215] Moreover, any efforts on behalf of the state to attach these assets, the house, or the automobile, were prohibited by federal preemption.[216]

The appellate court rejected the state's argument that the state definition of "estate" and the entire estate recovery program should be viewed more expansively, thereby ignoring the limitation imposed by the word "however."[217]

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those cannot be reached by the Department because Julius does not fall within the second situation.").

210. *Id.*

211. *Id.*

212. *Id.* ("Recovery from the estate of a surviving spouse is, in fact, prohibited by federal law.").

213. *Id.* (agreeing that the petitioner was correct in the argument that "federal law limits the State's recovery to the estate of the individual Medicaid recipient").

214. *Id.* (noting that the recipient did not fall under the more "expansive" definition, that his "estate" would be limited to his "probate estate," and because, as the petitioner argued, the state could only recover from the Medicaid recipient's estate per federal law, and not from the surviving spouse's estate). The court noted:

> A plain reading of the statute discloses a blanket prohibition against states' recovery of medical assistance benefits, except in the three specified situations, and because that initial prohibition is not lifted by an express authorization to recover medical assistance benefits from the estate of a surviving spouse, Illinois law allowing just such a recovery exceeds the authority granted states under the federal law.

Id. at 646.

215. *Id.* at 645 (discussing how the state statute's "however" clause "implie[d] a distinction or limitation" with regard to the definition of "estate").

216. At least one state has ruled that "[t]he preemption of state law is not to be readily inferred." *In re* Estate of Mundell, 857 P.2d 631, 632 (Idaho 1993).

217. *Hines*, 831 N.E.2d at 645 ("The use of [the word] 'however' . . . implies a distinction . . . [and n]othing in the record indicates [the recipient] received or was entitled to benefits under a long-term-care insurance policy . . . [and his] 'estate' . . . would be limited to real and personal property included within his probate estate; which, in this case, was none.").

It is understandable that courts preferring a more expansive approach to estate recovery permit this so as to "[further] the broad pu[r]pose of providing for the medical care of the needy," acknowledging that "the greater amount recovered by the state allows the state to have more funds to provide future services."[218] But the Illinois appellate court rejected any attempt to expand the terms of the estate recovery program statute[219] and held that the appropriate remedy is to address the terms of the state statute that confined the expanded definition of estate to those Medicaid recipients receiving long-term care insurance.[220]

Defining the estate in a manner to include both probate and nonprobate assets is one task; another is to permit assets that have been transferred inter vivos to any third party to become available for estate recovery. States grapple with whether property may be traced to the ownership of a Medicaid recipient and his or her spouse through a bona fide transfer during the lifetime of either.[221] This is the issue in the following material.

III. SECOND ISSUE: TRACING TRANSFERRED ASSETS

As has been recited in the preceding cases, federal law permits states to define an estate in the traditional manner, under Part A of 42 U.S.C. § 1396p(b)(4), as including "all real and personal property and other assets included within the individual's estate, as defined for purposes of State probate law."[222] But then, Part B of the provision permits a state, at its own option, to permit recovery from any

> real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.[223]

Both sections of the federal legislation imply transfers occurring at death, but the federal statute does not specifically encompass the situation involving spouses when the institutionalized Medicaid recipient spouse transfers property *during his or her life* to the non-recipient spouse under valid Medicaid transfer

218. Belshe v. Hope, 38 Cal. Rptr. 2d 917, 925 (Cal. Ct. App. 1995). *See also* N.D. Dep't of Human Servs. v. Thompson, 586 N.W.2d 847, 851 (N.D. 1998) ("[The] broad purpose [of estate recovery] is furthered more fully by allowing states to trace a recipient's assets and recover them from the estate of a recipient's surviving spouse."). *But see In re* Estate of Budney, 541 N.W.2d 245, 246 (Wis. Ct. App. 1995) (holding that the state statute was preempted by federal law when it sought recovery from the estate of a surviving spouse without a preceding transfer).

219. *Hines*, 831 N.E.2d at 647 ("No definition of [the decedent's] estate, no matter how broad, can trump the statute's absolute prohibition against recovery from any person not covered by an express exception . . . . The federal statute clearly and unambiguously states that recovery of any medical payments is generally not permitted.").

220. *Id.*

221. *See infra* Part III.

222. 42 U.S.C. § 1396p(b)(4)(A) (2012).

223. *Id.* § 1396p(b)(4)(B).

rules.[224] Later, the non-recipient spouse may opt for an inter vivos transfer of that property, or retain that gifted property up to and including that spouse's death.[225] Are the assets that passed to the non-recipient spouse included in the terms of the estate recovery statute, even though they did not pass "through joint tenancy, tenancy in common, survivorship, life estate, [or] living trust"?[226]

Because of the terms of the federal statute, states are stymied by the question of whether to include inter vivos transfers within the parameters of the estate recovery program.[227] The following two decisions offer contrasting views on this issue.

A. The McCormick *Approach: Other Arrangement*

At least one court has held that a state may recover the value of inter vivos transferred property from the estate of the surviving spouse of a recipient under what is described as tracing of assets.[228] In deciding In re *Estate of Wirtz*,[229] the Supreme Court of North Dakota adopted a policy expressing "wide latitude in seeking Medicaid benefit recoveries,"[230] holding that the state may trace the assets owned by the non-recipient spouse at death to the Medicaid recipient so as to recover expenditures for Medicaid payments.[231] The state court held that tracing is permitted under the federal statute's incorporation of an "other arrangement" provision.[232] Nonetheless, the court also ruled that collection may not be made "from a surviving spouse's separately-owned assets because of a past obligation to pay a now deceased Medicaid recipient's medical expenses as necessaries, or recovery from the surviving spouse's entire estate, including assets not traceable from the recipient."[233] This limitation is not a surprise, as it was also recited in an earlier decision, which held that any separately owned assets in the recipient spouse's estate are not available for tracing because they were never assets in which the decedent recipient held an interest.[234] The point is a simple one: the federal recovery provisions permit recovery of assets passing to a non-recipient spouse through probate or nonprobate transfer, and there is no express incorporation of assets gifted to a non-recipient spouse. Nonetheless,

224. *See id.* § 1396p(b)(4)(A)–(B).

225. *Id.* § 1396p(c)(1)(J).

226. *Id.* § 1396p(b)(4)(B).

227. *See infra* Part III.A–B.

228. *See In re* Estate of Wirtz, 607 N.W.2d 882, 886 (N.D. 2000).

229. 607 N.W.2d 882 (N.D. 2000).

230. *Id.* at 886 (citing *In re* Estate of Thomson, 586 N.W.2d 847, 851 (N.D. 1998)).

231. *Id.*

232. *Id.* at 885–86.

233. *Id.* at 886.

234. *See In re* Bergman, 688 N.W.2d 187, 191 (N.D. 2004) (holding that it was permissible for the state to trace assets from the recipient to his spouse and then to the spouse's son for purposes of collection); *but see In re* Estate of Barg, 752 N.W.2d 52, 71 (Minn. 2008) (holding that the state may only recover from assets in which the Medicaid recipient had a legal interest at the time of the recipient's death).

the *Wirtz* decision held that such power is given in the statute's provision for "other arrangement."[235]

Tracing of assets has been allowed in other states, too. Support for a state's ability to trace resources in accordance with the federal Medicaid statute was sustained in *Idaho Department of Health & Welfare v. McCormick*,[236] decided by the Supreme Court of Idaho.[237] In *McCormick*, prior to marriage, a wife owned a home as her separate property, but then during the marriage she executed a quitclaim deed transferring the home to herself and her husband.[238] Three years later, she executed a durable power of attorney naming her husband as her attorney in fact.[239] The next year the husband, operating under the durable power, conveyed the house to himself as sole owner and then six weeks later applied for Medicaid assistance to pay for his wife's long-term care.[240] The wife qualified for Medicaid assistance and more than $106,251.08 was paid before she died four years after qualification.[241]

The husband predeceased his wife by one year and his daughter was appointed as the personal representative of his estate; the only asset was the house shared by the couple and previously transferred.[242] The house was appraised at $81,688.95.[243] The wife was still receiving long-term care benefits when the husband died, so the state filed a claim against the house in which the husband was living under the state's estate recovery program, targeting "any property or estate which, at any time, had been the community property of the decedent and decedent's spouse, or which had been the property of decedent's spouse."[244] The magistrate court denied the state's claim against the husband's house because the wife (the Medicaid recipient) would have no interest in the house *at the time of her death*; the district court affirmed this decision, holding that if recovery were allowed it would conflict with federal law.[245] Such a holding is not inconsistent with other state courts that have held that the recipient spouse must have an interest in the property *at the time of his or her death* in order to make the property subject to estate recovery and be within the parameters of

235. *Wirtz*, 607 N.W.2d at 885.

236. 283 P.3d 785 (Idaho 2012).

237. *Id.* at 794. *See also In re* Estate of Peterson, 340 P.3d 1143, 1151–52 (Idaho 2014) (holding that an entire inter vivos transfer of interest by a Medicaid recipient was available for estate recovery, not just the life estate); *In re* Estate of Wiggins, 306 P.3d 201, 203, 209 (Idaho 2013) (finding that the state may trace community assets that had been transmuted into separate property of the non-recipient spouse for Medicaid eligibility).

238. *McCormick*, 283 P.3d at 786.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* at 787 (citing IDAHO CODE ANN. § 56-218 (West 2015)).

245. *Id.* at 787–88.

federal law.[246] But the *McCormick* court formulated a different approach, one that permits and recognizes that "excess resources saved by virtue of Medicaid funds are meant to be tracked and recovered."[247]

On appeal from the decision of the magistrate court, the Idaho Supreme Court ruled that federal Medicaid rules should be read broadly, distinguishing it from other courts that interpreted the language of the Medicaid statute as less inclusive.[248] The court held that a broad interpretation of the Medicaid statute includes an appreciation of "the Medicaid program's overall purpose,"[249] prompting an expansive definition of "estate" to include "the value of the assets of the estate that had been . . . community property, or the deceased participant's share of the separate property, and jointly owned property" of a deceased Medicaid recipient or that person's spouse.[250] Based on this broad interpretation of the Medicaid statute, it follows that the federal legislation "seems to specifically address resources in which the recipient had an interest at one time but disposed of through her own actions or those of her spouse—such as a lifetime transfer of a home."[251] The court's ruling thus permits estate recovery efforts to reach assets that had been transferred by gift during the course of the recipient's life to the recipient's surviving spouse or others.[252]

In the case of In re *Estate of Barg*,[253] the Supreme Court of Minnesota did not permit this.[254] Instead, that court restricted recovery to assets actually owned by the recipient at the time of the recipient's death, or that passed at the recipient's death to a surviving spouse through probate or nonprobate transfer.[255] In either situation, the state's estate recovery is not preempted by federal law because the asset is owned by the recipient at the time of death.[256]

The reasons behind the *McCormick* court's decision are as follows. First, federal legislation mandating estate recovery programs should be read in an expansive fashion, truly making Medicaid "the payer of last resort."[257] Second, the federal statute's reference to other assets provides the basis for recovering those assets, even though these assets may have to be tracked or traced through

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246. *See, e.g.*, *In re* Estate of Barg, 752 N.W.2d 52, 71 (Minn. 2008).

247. *McCormick*, 283 P.3d at 788.

248. *Id.* at 793 ("Thus, while the *Barg* court seemed convinced that the language [of the Medicaid statute] excluded lifetime transfers, we find it to be ambiguously inclusive.").

249. *Id.* at 789. *See also id.* at 794 ("At the very least, it renders the proper scope of recovery somewhat ambiguous, in which case this Court may look to the overall purpose of the statute for guidance.").

250. *Id.* at 790 (citing IDAHO ADMIN. CODE r. 16.03.09.905 (2015)).

251. *Id.* at 793 (citing 42 U.S.C. § 1396p(h)(1) (2012)).

252. *Id.* at 794–95.

253. 752 N.W.2d 52 (Minn. 2008).

254. *Id.* at 71–72.

255. *Id.*

256. *Id.* at 73–74.

257. *McCormick*, 283 P.3d at 788.

the estate of the recipient's spouse.[258] Third, the federal reference to "other arrangements" may be read to include assets that were held by the recipient but transferred to a spouse before death, during lifetime, and therefore not present at the time of death.[259] Fourth, the court stated:

> [The] ambiguously inclusive language in the definition of "estate"—purporting to extend recovery to assets transferred by "other arrangements"—coupled with the definition of "assets"—plainly including the resources of the recipient's spouse as well as assets the recipient disposed of before death—calls into question the Estate's strict reliance on the phrase "at the time of death."[260]

Finally, the court's reluctance to hold that federal law preempts state law, plus the overall purpose of Medicaid estate recovery, permits recovery from assets transferred during lifetime and not available at the time of death.[261]

By holding that the federal Medicaid statutes must be read in an expansive manner, the Supreme Court of Idaho in its *McCormick* decision joined the reasoning of the Supreme Court of North Dakota in *Wirtz*.[262] The courts in both cases held that Congress intended "to allow states to trace the assets of recipients of medical assistance and recover the benefits paid when the recipient's surviving spouse dies."[263] At least, as the court concluded in *McCormick*, this is an acceptable rationale upon which state courts may act when there is no explicit preemption pronouncement by Congress.[264] The court summarized its holding and rationale with the following: "This Court has been loathe in the past to surrender State sovereignty to the federal government and has found preemption of our State's duly enacted laws only where the congressional intent is rather clear."[265] Implicitly, the court concluded that it could read the federal statute in an expansive manner to permit tracing inter vivos gifts to their source, regardless of whether these assets were owned by a recipient of long-term benefits at the time of death.[266] In addition to applying a more expansive definition of federal Medicaid statutes, the *McCormick* decision differed because it also defined "assets" as encompassing all resources of both spouses, permitted

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258. *Id.* at 791 (referencing the Idaho estate recovery statute, IDAHO CODE ANN. § 56-218(4) (West 2015), and Idaho's regulation permitting "recovery through the recipient's spouse's estate not only of assets in which the recipient holds an interest at the time of death, but also 'assets of the estate that had been, at any time after October 1, 1993, community property'") (citing IDAHO ADMIN. CODE r. 16.03.09.905.01 (West 2015)).

259. *Id.* (citing 42 U.S.C. § 1396p(b)(4)(B) (2012)).

260. *Id.* at 794 (citing 42 U.S.C. §§ 1396p(b)(4), (h)(1)).

261. *Id.*

262. *Id.* (citing *In re* Estate of Wirtz, 607 N.W.2d 882, 886 (N.D. 2000)).

263. *Id.* at 794 (citing *Wirtz*, 607 N.W.2d at 886 (N.D. 2000)).

264. *Id.*

265. *Id.* (citing Christian v. Mason, 219 P.3d 473, 476 (Idaho 2009)).

266. *Id.* at 794–95.

estate recovery to reach assets passing at the time of death, and traced assets that passed during lifetime.[267]

B. The Barg *Approach: Preemption*

Not all courts are willing to apply a more expansive view of state authority.[268] One court holding an opposite view to the *McCormick* court is the Supreme Court of Minnesota in its decision of In re *Estate of Barg*.[269] The *Barg* decision relied upon the express wording of the federal statute, resulting in federal preemption of expansive construction by state courts.[270] Specifically, in *Barg*, the court held that Medicaid law preempts any expansive definition or practice aimed at recovering "the value of the assets of the estate that were marital property or jointly owned property *at any time during the marriage*."[271] If these assets were transferred during lifetime and not available at death, federal law preempts estate recovery.[272] The facts of the case involved spouses, married in 1948 and remaining married until the wife's death in 2004, a period of fifty-six years.[273] During the 1960s, the couple took joint tenancy title of two parcels of real property in Minnesota and owned them when the wife applied for Medicaid benefits in 2001.[274] Her application was approved, and shortly thereafter she transferred her interest in the real estate to her husband; she also surrendered any interest in certificates of deposit held at the local bank.[275] Subsequently, the husband executed a last will and testament "leaving his estate to his surviving descendants, and making no provision for his wife."[276]

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267. *Id.* at 793 (noting that "[a]lthough the *Barg* court analyzed the definition of 'estate' in 42 U.S.C. § 1396p(b)(4)(B), it did not address the definition of 'assets' in section 1396p(h)(1)"). *See also id.* at 794–95 (allowing estate recovery for assets passing at time of death and tracing assets that passed in lifetime).

268. *See, e.g., In re* Estate of Barg, 752 N.W.2d 52, 65–66 (Minn. 2008). *See also In re* Craig, 624 N.E.2d 1003 (N.Y. 1993) (stating that federal law "gives the States, at their option, the power to recover against a spouse's estate, but only against the recipient's assets that were conveyed through joint tenancy and other specified forms of survivorship").

269. 752 N.W.2d 52 (Minn. 2008). *See also* Gheen v. State *ex rel*. Dep't of Health, Div. of Healthcare Fin./Equalitycare, 326 P.3d 918, 923 (Wyo. 2014) (holding that the statutory definition of "estate" does not include property transferred prior to death).

270. *See Barg*, 752 N.W.2d at 69–71. The court noted, "[the government's] argument would take us too far down the path of favoring the purpose of the law at the expense of the plain meaning of its language," *id.* at 69, that "other arrangement" means "arrangements other than those expressly listed that also convey assets at the time of the Medicaid recipient's death," *id.* at 70, and that "the language of the federal law clearly limits [an] expansion to assets in which the recipient had an interest at the time of her death." *id.* at 71.

271. *Id.* at 68 (citing MINN. STAT. ANN. § 256B.15, subdiv. 2 (West 2015)).

272. *Id.* at 73–74.

273. *Id.* at 57.

274. *Id.*

275. *Id.*

276. *Id.*

The wife died in 2004 after receiving $108,413.53 in Medicaid benefits; the husband died five months later without ever having received similar benefits himself.[277] Two months after the husband's death, the state filed a claim against his estate to recover the full amount of the Medicaid benefits paid on behalf of the decedent's wife, "arguing that the entire value of the marital property, both the homestead and the certificates of deposit, was subject to its claim because [the wife's] joint tenancy interest gave her a right to use of the entire property."[278] This, the state argued, was consistent with Minnesota's recovery statute that permitted the state to recover marital property owned as joint tenancy at any time during the marriage.[279] The district court held that the wife's interest in the home was limited "because she had conveyed it to her husband before her death, evaluated her interest as a life estate, and upheld the partial disallowance."[280] The state appealed, arguing that it was entitled to the full value of the property, but the appellate court ruled that the wife had only a joint interest in the property, equivalent to one-half the value, and thereby limited recovery.[281] The state then appealed to the Supreme Court of Minnesota, seeking full recovery of the transferred property.[282]

The issue for the state's highest court was whether federal legislation required, for purposes of recovery, that any interest in marital or jointly owned property be held by the recipient spouse *at the time of his or her death*.[283] The facts indicate that the wife did not own the property at the time of her death, and the state's court of appeals held that this was required,[284] based on that court's reading of the federal statute.[285] However, the state argued that there was "nothing in the federal statute prior to the 1993 amendments that limited the

277. *Id.*

278. *Id.*

279. *Id.* at 64–65. *See* MINN. STAT. ANN. § 256B.15, subd. 2 (West 2015) ("Recovery of medical assistance expenses in the nonrecipient surviving spouse's estate is limited to the value of the assets of the estate that were marital property or jointly owned property at any time during the marriage.").

280. *Barg*, 752 N.W.2d at 56.

281. *Id.*

282. *Id.* at 58.

283. *Id.* at 62–63 (reciting the broader three issues).

284. *Id.* (citing *In re* Estate of Barg, 722 N.W.2d 492, 497 (Minn. Ct. App. 2006); *In re* Estate of Gullberg, 652 N.W.2d 709, 714 (Minn. Ct. App. 2002)).

285. *Barg*, 752 N.W.2d at 62. The court stated:

> The court of appeals held that a partial disallowance of the County's claim was proper, relying on its earlier decision in *Gullberg* that the broad [state] authorization . . . for recovery up to the value of all assets of the estate that were marital property or jointly owned at any time during the marriage was partially preempted by the 1993 amendments to the federal law that limit the expanded estate to assets in which the recipient spouse had a legal interest at the time of her death.

Id. (citing *Barg*, 722 N.W.2d at 495–96). *See also* 42 U.S.C. § 1396p(b)(4)(B) (2012) (stating that the "estate," for recovery purposes, "may include . . . any other . . . assets in which the individual had any legal title or interest at the time of death").

states' authority to pursue estate recovery of Medicaid benefits paid, and that the 1993 amendments were intended by Congress to expand state options, not limit them."[286] In response, the estate of the surviving spouse argued that "there should be no recovery here because [the recipient] had no legal interest in the homestead or the certificates of deposit at the time of her death, having conveyed her interest to her husband during her lifetime."[287]

Reviewing both arguments, the state supreme court looked first to the fact that federal law permits recovery only from the recipient's estate and not from the separate estate of the surviving spouse.[288] States that permit recovery from the surviving spouse's estate—in spite of contrary language in the federal statute—must do so because these states conclude that the assets passed to the surviving spouse[289] and would therefore come within the terms of the federal legislation, even though recovery cannot be sought until after the surviving spouse's death.[290] Thus, federal law would not preempt the state from recovering assets that the surviving spouse obtained from the recipient as a result of inheritance through probate or nonprobate transfer.[291] But this would not encompass all forms of transfer.[292] Would inter vivos transfers, illustrated by the facts of the *Barg* decision, be available for estate recovery? The Minnesota statute would permit recovering from the surviving spouse's estate "the value of the assets of the estate that were marital property or jointly owned property *at any time during the marriage*."[293] Does preemption apply to a state statute permitting recovery from transfers at "any time during the marriage"?[294] This is the issue considered in *Barg*.

The court held that federal law preempts the state statute's warrant to recover from assets or interests owned *at any time during the marriage*.[295] The court "conclude[d] that there is no principled basis on which to interpret the federal law to allow recovery of assets in which the Medicaid recipient did not have an interest at the time of her death."[296] The facts of this case illustrate a Medicaid recipient who transferred her joint tenancy interest in her real estate and

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286. *Barg*, 752 N.W.2d at 62.

287. *Id.* at 62–63.

288. *Id.* at 64 (citing Hines v. Dep't of Pub. Aid, 850 N.E.2d 148, 152–53 (Ill. 2006)).

289. *Id.* at 66 (citing Bucholtz v. Belshe, 114 F.3d 923, 927 (9th Cir. 1997) (holding that federal law did not preempt state recovery of assets in the recipient's estate and any recipient of the property by distribution or survival)).

290. *Id.*

291. *Id.* at 68.

292. *Id.*

293. MINN. STAT. ANN. § 256B.15, subdiv. 2 (West 2015) (emphasis added).

294. *Barg*, 752 N.W.2d at 69 (citing *In re* Estate of Wirtz, 607 N.W.2d 882, 885–86 (N.D. 2000)) (stating that *Wirtz* was an example of one state that has held that federal preemption does not apply to recovery from transfers at any time during the marriage, not just through survivorship).

295. *Id.* at 71.

296. *Id.*

surrendered any interest in her certificates of deposit during her lifetime.[297] Thus, these assets were not "assets in which the individual had any legal title or interest at the time of death."[298] The *Barg* court rejected the suggestion that the federal statute's inclusion of "or other arrangement" when coupled with statutory ambiguity and congressional purpose to permit state recovery justify an expansive approach permitting recovery from all assets in a surviving spouse's estate no matter how such assets acquired were from a recipient's estate.[299] Recognizing that the state's appeals court ruled that the recipient spouse did retain a joint interest in the lifetime transfer as an "other arrangement," the state's highest court held that it could accept this conclusion.[300] The court stated:

> The language of section 1396p(b)(4) requires that any interest included in the expanded estate must be one in which the Medicaid recipient had an interest at the time of her death, not one that was previously conveyed. We conclude that [the recipient] did not retain a joint tenancy interest in the property at the time of her death, because that interest was effectively and legally transferred before her death.[301]

Furthermore, the state's Medicaid estate recovery statute "is preempted to the extent that it allows recovery from assets in which the deceased Medicaid recipient did not have a legal interest at the time of death, and to the extent that it permits recovery beyond the extent of the recipient's interest."[302]

All of the decisions cited, *Wirtz*, *McCormick*, and *Barg*, have a common element: they seek to decipher the language of the federal Medicaid statute to determine if the federal statute preempts state efforts to recover from a recipient spouse's estate the value of assets of the estate that were marital property or jointly owned property at *any time during the marriage*.[303] *Barg* held that estate

297. *Id.* at 57.

298. 42 U.S.C. § 1396p(b)(4)(B) (2012).

299. *Barg*, 752 N.W.2d at 69 (suggesting that the "argument would take us too far down the path of favoring the purpose of the law at the expense of the plain meaning of its language").

300. *Id.* at 71–72.

301. *Id.* at 72.

302. *Id.* at 73–74.

303. *See, e.g.*, Idaho Dep't of Health & Welfare v. McCormick, 283 P.3d 785, 791 (Idaho 2012). At issue is the meaning of 42 U.S.C. § 1396p(b)(4):

> For purposes of this subsection, the term "estate", with respect to a deceased individual . . . (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[,] . . . 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) (2012). *See also In re* Estate of Barg, 752 N.W.2d 52, 63 (Minn. 2008); *In re* Estate of Wirtz, 607 N.W.2d 882, 884–86 (N.D. 2000).

recovery does not reach everything, but only to property in which there is a legal interest *at the time of death*.[304]

Other courts have held similarly, one being the Supreme Court of Wyoming.[305] The Wyoming decision involved a residence and a farm owned by a married couple as tenants by the entirety.[306] The husband died intestate; one-half of the property went to his wife, and the other half was divided between their two sons.[307] Subsequently, the mother transferred her one-half interest in the property to her sons, thereby relinquishing any ownership, but she did not tell the sons what she had done.[308] Four years later, one of the sons applied for Medicaid benefits for his mother and listed the properties in which he thought the mother still had an interest.[309] The mother was approved for Medicaid and received approximately $10,508.54 in benefits prior to her death.[310] Then, after her death, the sons discovered the quitclaim deeds for the properties and recorded them so they did not form part of their mother's estate.[311] Nonetheless, the state filed a lien against the properties to recover for the Medicaid expenditures,[312] asserting that the mother had an interest in the properties at the time of her death.[313] The district court agreed, approving the state's lien under the estate recovery program.[314]

On appeal, the Supreme Court of Wyoming reviewed the state's statute pertaining to estate recovery and the corresponding definition of what constitutes an estate.[315] The court concluded that "the statutory definition of estate does not include property properly transferred prior to death."[316] However, *Gheen* held that the mother did not effectively transfer the properties to the sons by quitclaim deeds *prior to her death*.[317] Thus, because the Medicaid recipient, the mother,

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304. *Barg*, 752 N.W.2d at 70 ("Inclusion in the list of examples of 'such assets' is predicated on the recipient having a legal interest at the time of death.").

305. Gheen v. State *ex rel.* Dep't of Health, Div. of Healthcare Fin./Equalitycare, 326 P.3d 918, 923 (Wyo. 2014) (discussing WYO. STAT. ANN. § 42-4-206(g)(ii) (West 2015), and noting that the state's definition of "estate" included "other assets in which the individual had any legal title or interest at the time of death").

306. *Id.* at 921.

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.* at 922.

314. *Id.*

315. *Id.* at 922–23. *See* WYO. STAT. ANN. § 42-4-207(j) (West 2015) (providing for filing of liens against the property of an estate); *id*. § 42-4-206(g) (defining "estate" for purposes of recovery).

316. *Gheen*, 326 P.3d at 923 (citing Estate of Marusich v. State, *ex rel.*, Dep't of Health, Office of Fin./Equalitycare, 313 P.3d 1272, 1277–78 (Wyo. 2013)).

317. *Id.* at 926 ("The deeds were not, therefore, effective to reduce or eliminate [the mother's] ownership or control of the assets.").

had an interest in the property *at the time of her death*, the property formed part of her estate subject to estate recovery in accordance with the state statute.[318]

Barg and *Gheen* both rely on the wording of the federal statute.[319] When the federal statute defines the estate from which estate recovery may be taken, the statute refers to assets at the time of death or assets conveyed by a deceased individual.[320] Such precision, according to these courts, offers no opportunity for an expansive reading of estate recovery.[321] The *Barg* court concluded that "there is no principled basis on which to interpret the federal law to allow recovery of assets in which the Medicaid recipient did not have an interest at the time of her death."[322] Other courts, *Wirtz* and *McCormick* among them, chose not to employ such a restrictive interpretation of the federal statute.[323] *McCormick*, for example, scrutinizing the same statute, concluded that the statute "contain[s] ambiguities" and permitted a more expansive definition.[324] Thus, *McCormick* looked to another section of the federal statute and applied the definition of "assets" to the "estate" from which recovery may be obtained.[325] The court concluded that if the definition of estate extended to assets conveyed through other arrangements, there should be no strict requirement that estate assets be restricted to time of death.[326] Instead, the assets may be traced to an interest some time previously.[327] The issue raised in all of these cases could be resolved by modifying the federal statute.

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318. *Id.*

319. *See In re* Estate of Barg, 752 N.W.2d 52, 70 (Minn. 2008) (stating that the court "return[s] again to the language of the federal statute"); *Gheen*, 326 P.3d at 922–23.

320. *See Barg*, 752 N.W.2d at 70 (citing 42 U.S.C. § 1396p(b)(4)(B) (2012)) (stating that "[t]he federal optional definition of 'estate' allows inclusion of '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").

321. *See id.* at 70; *Gheen*, 326 P.3d at 922–23.

322. *Barg*, 752 N.W.2d at 71.

323. *See* Idaho Dep't of Health & Welfare v. McCormick, 283 P.3d 785, 793 (Idaho 2012) (stating than an "expansive definition of 'assets,' which is imported into section 1396p(b)(4)'s definition of 'estate' by the definition's use of that term, well supports Idaho's provision for recovery from the estates of both spouses"); *In re* Wirtz, 607 N.W.2d 882, 885 (N.D. 2000) (stating that "[r]ecovery is not limited to assets in the surviving spouse's estate that the Medicaid recipient had legal title to and conveyed through joint tenancy, tenancy-in-common, survivorship, life estate, or living trust").

324. *McCormick*, 283 P.3d at 793. The court concluded, "[a]lthough the juxtaposition of the language 'at the time of death' and the other, more inclusive language in the statute is perplexing, we find that ambiguity insufficient to overcome our presumption against preemption of state law." *Id.* at 794.

325. *Id.* at 793. *See* 42 U.S.C. § 1396p(h)(1) (2012) ("The term 'assets' . . . includes all income and resources of the individual and of the individual's spouse, including any income or resources which the individual or such individual's spouse is entitled to but does not receive because of action—(A) by the individual or such individual's spouse . . . .").

326. *See McCormick*, 283 P.3d at 794.

327. *See id.*

IV. THIRD ISSUE: SPOUSAL ANNUITIES

A. Annuity Planning

The DRA continued the practice of treating the separate income and assets of the non-institutionalized spouse as exempt from consideration when establishing eligibility for the other spouse's long-term care.[328] In addition, in determining eligibility for the institutionalized spouse, the community spouse's income is not considered.[329] The MCCA created the "minimum monthly maintenance needs allowance" to permit the non-recipient spouse to receive a continuous flow of income.[330] The level of income is based on a combination of a basic allowance and excess shelter allowance.[331] Typically, the non-institutionalized spouse would purchase an annuity with non-exempt assets so as to create an income flow that would be exempt from consideration.[332] Such a practice is common and permits the non-institutionalized spouse to continue a sustainable lifestyle, living off income generated from assets that would otherwise have to be depleted before the institutionalized spouse would qualify for Medicaid.[333] Any annuity contract purchased by the non-recipient spouse had to specify that the state would be the preferred remainder beneficiary to the extent necessary to pay for expenditures made on behalf of the institutionalized spouse.[334]

Elder law attorneys often employ annuities whenever there are excess assets, and the annuity can safeguard funds for the non-institutionalized spouse.[335] Excess occurs when applying for benefits.[336] Medicaid permits a non-

328. 42 U.S.C. § 1396r-5(b)(1). For statutory provisions pertaining to disclosure and treatment of annuities, *see id.* § 1396p(e).

329. *See id.* § 1396r-5(b)(1).

330. *Id.* § 1396r-5(d)(3)(A).

331. *Id.*

332. *See, e.g.*, Hutcherson v. Ariz. Health Care Cost Containment Sys. Admin., 667 F.3d 1066, 1069 (9th Cir. 2012) (holding as acceptable a spouse converting his or her assets into an annuity and thus making the annuity exempt from consideration for the other spouse's eligibility for Medicaid long-term care). Medicaid specifically allows the community spouse to purchase an annuity. *See* 42 U.S.C. § 1396p(c)(1)(F)(i).

333. *See Hutcherson*, 667 F.3d at 1071. The court pointed out:

> [I]f [the husband], instead of purchasing the annuity, attempted to transfer funds to Appellant, [the wife] would have been ineligible for Medicaid for the approximate length of time that the funds could have covered [her] medical costs. By purchasing an annuity, [the husband] avoided this transfer penalty. . . . [The husband] was entitled to collect monthly payments from the annuity for as long as he lived.

Id. at 1072.

334. *See* 42 U.S.C. § 1396p(e)(2).

335. For a description of the practice, *see* Sean R. Bleck, Barbara Isenhour & John A. Miller, *Preserving Wealth and Inheritance Through Medicaid Planning for Long-Term Care*, 17 MICH. ST. U. J. MED. & L. 153, 193–94 (2013).

336. *See id.* at 160 (noting that "the applicant must spend down the excess income over the Medicaid rate on medical costs before he or she will be eligible for Medicaid coverage for other medical expenses").

institutionalized spouse to exempt certain specified assets, but there may be excess assets that would have to be spent prior to the institutionalized spouse obtaining Medicaid eligibility.[337] Rather than spend the assets on institutional care, elder law practitioners recommend purchasing an annuity to provide income to the non-institutionalized spouse.[338] This income would not be considered an asset because the MCCA provides that "[d]uring any month in which an institutionalized spouse is in the institution . . . no income of the community spouse shall be deemed available to the institutionalized spouse."[339] The annuity would have to be "actuarially sound" and "irrevocable and nonassignable," and the rates would have to correspond with tables maintained by the Social Security Administration.[340] Most often any annuity would be for a term of years, naming the state as the preferred remainder beneficiary after any minor or disabled child.[341]

B. Transferable Assets

Illustrating both the process and the challenge of annuities is *Lopes v. Department of Social Services*.[342] The facts involved a husband and wife applying for Medicaid for the husband.[343] The MCCA specified that the state, when considering an application from a married couple, could exclude certain community spouse funds and assets from calculations of total resources.[344] The

337. *Id.* at 194–95.

338. *Id.*

339. 42 U.S.C. § 1396r-5(b)(1).

340. *Id.* § 1396p(c)(1)(G)(ii)(I)–(II). In addition, the annuity would have to "provide[] for payments in equal amounts during the term of the annuity, with no deferral and no balloon payments made." *Id.* § 1396p(c)(1)(G)(ii)(III).

341. *See, e.g.*, Hutcherson v. Ariz. Health Care Cost Containment Sys. Admin., 667 F.3d 1066, 1067 (9th Cir. 2012). In *Hutcherson*, the husband purchased an annuity in his name with the excess assets he and his wife owned so that the money would be exempt and the wife would qualify for Medicaid assistance. *Id.* at 1067–68. The husband purchased an annuity for $100,000 and it paid a monthly amount of $2,781.63 for thirty-six months; the state was named as the remainder beneficiary and the daughter was named the second beneficiary. *Id.* The husband died and there was a remainder value in the annuity of approximately $75,000. *Id.* As the first remainder beneficiary the state collected the annuity benefits, having already paid $23,840.51 in benefits for the wife's care; the state applied what it received from the annuity first to the ongoing cost of the wife's care and the excess of $228.71 towards the past expenditure. *Id.* When the wife ceased receiving Medicaid assistance, the annuity benefit was used to pay off the remaining balance on the wife's care. *Id.* Once the state was paid $60,840.51, it released its claim against the annuity, and the daughter was entitled to the remaining amount. *Id.* But the daughter challenged the state's ability to take from the annuity, arguing that the state's recovery was limited to expenses incurred on behalf of the husband and the husband had never been institutionalized and had no expenses. *Id.* The district court disagreed and held that the plain meaning of 42 U.S.C. § 1396p(c)(1)(F)(i) allows the state to reach a deceased non-institutionalized spouse's annuity for costs incurred on behalf of an institutionalized spouse. *Id.* The Ninth Circuit affirmed. *Id.* at 1072.

342. 696 F.3d 180, 182–83 (2d Cir. 2012).

343. *Id.* at 183.

344. *Id.* at 182 (citing 42 U.S.C. § 1396r-5(c)(2)(A)).

wife applied for benefits, but the applicable community spouse resource allowance was approximately $180,000, and there were assets in excess of this amount totaling $160,000.[345] To reduce this excess amount and thereby qualify for Medicaid benefits, the wife "purchased an immediate single premium annuity with a premium of $166,878.99" that "provided for monthly payments of $2,340.83 over a period of approximately six years."[346] The annuity contract specified that the annuity was "not transferable" and rights could not "be assigned, sold, anticipated, alienated, commuted, surrendered, cashed in or pledged as security for a loan."[347] Even though a third party was willing to purchase the six-year payment stream for approximately $99,000, the wife "maintained that the annuity was a 'fixed income stream'" and not an asset that needed to be liquidated to pay for her husband's institutional care.[348] But the state's Medicaid official denied the husband's application for benefits because it was technically possible for the wife to sell the annuity income stream to a third party, making the annuity transferrable.[349] The wife appealed the decision, and the district court agreed with the wife, holding that the wife did not have the power to alienate or transfer her interest.[350] The Medicaid official appealed, and the appellate court agreed to consider whether the annuity is non-assignable and, if so, "whether it is [to be considered as] income or a resource."[351]

The U.S. Court of Appeals for the Second Circuit reviewed the facts and held that:

> The language of the relevant regulations, as clarified in the [Supplemental Security Income (SSI) Program Operations Manual System (POMS)] and in [the United States Department of Health and Human Services (HHS)]'s amicus brief, convinces us that the income stream from Lopes's annuity is properly considered income, not a resource, because the annuity is non-assignable.[352]

345. *Id.* at 183.

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.* (stating that the Medicaid official relied upon Social Services' Uniform Policy Manual § 4030.47, which provides that in determining benefit eligibility, "the right to receive income from an annuity is regarded as an available asset, whether or not the annuity is assignable") (quoting CONN. DEP'T OF SOC. SERVS., UNIFORM POLICY MANUAL § 4030.47 (2007)).

350. *Id.* at 183–84.

351. *Id.* at 184.

352. *Id.* Other decisions support the rationale of *Lopes*, that any annuity is non-assignable if the terms of the contract forbid "cashing-in" the annuity even when there is a willing purchaser. *See, e.g.*, James v. Richman, 547 F.3d 214, 218 (3d Cir. 2008) ("Even if the Department is correct that [the wife] has the *de facto* ability to effect a change in ownership of the annuity, she cannot do so without breaching the contract and incurring legal liability. Accordingly, the annuity cannot be treated as an available resource."); Geston v. Olson, 857 F. Supp. 2d 863, 876–77 (D.N.D. 2012) (noting that the annuity cannot be revoked, assigned, or liquidated); *but see* Estate of Gross v. N.D. Dep't of Human Servs., 687 N.W.2d 460, 465 (N.D. 2004) ("We conclude there was evidence from

The crucial factor for the court was the contractual terms by which the wife agreed to surrender her right to assign her payments under the annuity.[353] The court held that "[u]nder [state] law, this language suffices to make the annuity non-assignable."[354] But the Medicaid official remained adamant that an owner of a non-assignable annuity has the effective right, authority, or power to liquidate the asset as long as there is a prospective purchaser for the payment stream.[355] Nonetheless, the Second Circuit likened the annuity purchased in this case to other forms of unearned income that are classified as non-assignable even though there may be a prospective purchaser.[356] Because SSI regulations supported the view that various other forms of income streams, such as social security benefits and disability benefits can be considered as non-assignable, it was possible that this annuity was non-assignable, too.[357]

As an alternative rationale for denying exemption to the annuity, the Medicaid official argued that because the wife purchased the annuity shortly before applying for Medicaid benefits for her husband, the cash resource should still be considered an asset or a resource held by the applicant within the sixty-month period, thereby disqualifying the husband.[358] But the Second Circuit declined to classify the cash that was used to purchase the annuity as a resource.[359] Instead, the court looked to the federal statute that permits states to exclude

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which a reasoning mind could reasonably conclude there was a market for the monthly payments from this annuity.").

353. *Lopes*, 696 F.3d at 185 ("The [terms] strip[] Lopes of both the right to assign her payments under the annuity . . . and the power to assign her payments . . . .").

354. *Id.*

355. *Id.* (citing 20 C.F.R. § 416.1201(a)(1) (2015)) ("[A] community spouse's asset is a resource 'if an individual has the right, authority or power to liquidate the property, or his or her share of the property.'").

356. *Id.* (citing 20 C.F.R. § 416.1121(a)) ("Some types of unearned income are . . . annuities, pensions, and other periodic payments. This unearned income is usually related to prior work or service. It includes, for example, private pensions, social security benefits, disability benefits, veterans benefits, worker's compensation, railroad retirement annuities[,] and unemployment insurance benefits.").

357. *Id.*

358. *Id.* (citing 20 C.F.R. § 416.1207(e)) ("[I]f an individual sells, exchanges or replaces a resource, the receipts are not income. They are still considered to be a resource."). *See also id.* (citing 20 C.F.R. § 416.1103(a)) (providing that "what you receive from the sale or exchange of your own property is not income; it remains a resource"); *id.* (citing 20 C.F.R. § 416.1103(c)) (stating that "receipts from the sale, exchange, or replacement of a resource are not income but are resources that have changed their form").

359. *See id.* at 186 ("Nor do these regulations establish that Lopes's annuity is a resource merely because it existed in the form of cash shortly before she applied for Medicaid."). The U.S. Court of Appeals for the Second Circuit requested an amicus brief from the Department of Health and Human Services expressing an opinion on the issue raised. *See* Brief for U.S. Dep't of Health & Human Servs. as Amici Curiae as requested by the court at 1, Lopes v. Dep't of Soc. Servs., 696 F.3d 180 (2d Cir. 2012) (No. 10-3741-cv), 2011 WL 6742495, at *1. The amicus brief formed the basis of the court's rationale, that the annuity should not be considered as a disqualifying resource. *Lopes*, 696 F.3d at 184. The amicus brief discussed similarities with other annuities under the SSI. *See* Brief for U.S. Dep't of Health and Human Servs., *supra* at 11–13.

certain community spouse funds and assets from the calculation of total resources.[360] Specifically, "no income of the community spouse shall be deemed available to the institutionalized spouse."[361] Overall, the court relied upon the DRA, the amicus brief of HHS, and the POMS.[362] These support the policy of "protecting community spouses from impoverishment by permitting [these spouses] to retain some of their assets, while recognizing that couples must apply a fair share of their combined resources toward the cost of care before receiving benefits."[363] Therefore, as long as the spouses purchase an annuity and meet the requirements of a bona fide annuity under the DRA, "the placements of assets in an annuity will not be considered a suspect 'transfer of assets' exposing an applicant to certain penalties."[364] This is true even if the spouses purchase an annuity during the sixty-month period prior to eligibility, because "a non-assignable annuity is not a resource for purposes of determining Medicaid eligibility."[365]

Annuities are valid estate planning tools in some states, but suspect in others because of the issues raised in the *Lopes* decision.[366] Those issues involved whether the annuity is a transferable resource and whether the conversion of assets into an annuity during the sixty-month period prior to eligibility is a

360. *Lopes*, 696 F.3d at 186 (noting that "[t]he Medicaid program categorically excludes certain assets, such as a home and one automobile, from consideration as resources") (citing 42 U.S.C. § 1396r-5(c)(5) (2012)).

361. *Id.* at 182 (citing 42 U.S.C. § 1396r-5(b)(1)).

362. *See id.* at 188.

363. *Id.* Section 405 of the Tax Relief and Health Care Act of 2006 amended the annuity provisions of the DRA, substituting "institutionalized individual" for "individual" when considering whose expenses must be recoverable from an annuity when purchasing an annuity and then not be considered a transfer within the look-back period. Tax Relief and Healthcare Act of 2006, Pub. L. No. 109-432, 120 Stat. 2922, 2998. The Centers for Medicare and Medicaid Services provides added clarification at SMDL 06-018. Letter from Dennis G. Smith, *supra* note 36.

364. *Lopes*, 696 F.3d at 188 (citing 42 U.S.C. §§ 1396a(a)(18), 1396p(c)(1)(A), (e)(1)); *but see* Cook v. Bottesch, 740 S.E.2d 752, 756 (Ga. Ct. App. 2013), *rev'd on other grounds*, Cook v. Glover, 761 S.E.2d 267 (Ga. 2014) (holding that "annuities benefiting community spouses must name the State as a remainder beneficiary to avoid automatically being treated as the disposal of an asset for less than fair market value"). The Supreme Court of Georgia in *Glover* upheld the asset transfer penalty that the appeals court in *Bottesch* overturned. *Glover*, 761 S.E.2d at 272.

365. *Lopes*, 696 F.3d at 188 (joining other circuits). *See* Morris v. Okla. Dep't of Human Servs., 685 F.3d 925, 932–34 (10th Cir. 2012) (discussing the conditions under which a spouse may purchase an annuity without it counting as a resource); Hutcherson v. Ariz. Health Care Cost Containment Sys. Admin., 667 F.3d 1066, 1069 (9th Cir. 2012) ("The Medicaid statute allows the community spouse to purchase an annuity . . . . allowing the spouse to convert his or her assets, which are considered in determining the institutionalized spouse's eligibility, to income, which is not considered."); *contra Glover*, 761 S.E.2d at 268, 272 (upholding an asset transfer penalty where the annuity did not name the state as a remainder beneficiary).

366. *See, e.g.*, Estate of Gross v. N.D. Dep't of Human Servs., 687 N.W.2d 460, 463–64 (N.D. 2004).

disqualifying event.[367] The *Lopes* decision relies heavily on the amicus brief of HHS.[368] The Department's opinion is that an annuity should not be considered as a countable resource, referencing the similar status of annuities for purposes of social security.[369] Nonetheless, the lack of uniformity among the states hampers planning by elder law attorneys and receipt of possible benefits by potential long-term care beneficiaries.[370]

C. Loans to Family Members

Similar to annuities is the practice of loaning assets to family members, particularly children. The DRA requires loans to be actuarially valid and repayable in equal installments, and that there be no provision for cancelling the loan upon the lender's death.[371] The unpublished decision of *Sable v. Velez*[372] involved two married couples, each seeking to qualify for Medicaid benefits to pay for long-term care.[373] One couple purchased two promissory notes from their son: one for $80,903 and the other for $42,500.[374] The notes were payable at an interest rate between three and six percent, payable in seven years, and the loan was made to the son without a credit check or secure collateral.[375] Similarly, the other couple made promissory notes to each of their three children for $80,000, repayable with interest in monthly installments spread over four years.[376] Subsequently, both couples were denied Medicaid benefits because the state agency "considered the promissory notes to be trust-like devices, requiring

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367. *See generally Lopes*, 696 F.3d at 184, 186 (stating the question of "whether [an] annuity is non-assignable" and whether it is "income or a resource" and stating that it is likely that "the payment stream from [the] non-assignable annuity [in the case] is income").

368. *Id.* at 187–88. The court gave the Department of Health and Human Services a strong degree of deference in informing its decision. *Id.*

369. *Id.* at 188. *See also* Brief for the Amicus Curiae, *supra* note 359 at 10–11, 18.

370. *See supra* note 366 and accompanying text.

371. *See* 42 U.S.C. § 1396p(c)(1)(I) (2012). The provision states:

> For purposes of this paragraph with respect to transfer of assets, the term 'assets' includes funds used to purchase a promissory note, loan, or mortgage unless such note, loan, or mortgage—(i) has a repayment term that is actuarially sound (as determined in accordance with actuarial publications of the Office of the Chief Actuary of the Social Security Administration); (ii) provides for payments to be made in equal amounts during the term of the loan, with no deferral and no balloon payments made; and (iii) prohibits the cancellation of the balance upon the death of the lender. In the case of a promissory note, loan, or mortgage that does not satisfy the requirements of clauses (i) through (iii), the value of such note, loan, or mortgage shall be the outstanding balance due as of the date of the individual's application for medical assistance for services described in subparagraph (C).

Id. § 1396p(c)(1)(I).

372. 437 F. App'x 73, 76 (3d Cir. 2011).

373. *Id.* at 74–75.

374. *Id.*

375. *Id.*

376. *Id.* at 75.

the[ir] inclusion in [the applicant's] countable resources for Medicaid eligibility."[377]

The couples appealed the adverse rulings by the state Medicaid official, but "the District Court denied [their] motion for a preliminary injunction, finding that the plaintiffs did not make an adequate showing of success on the merits because a question existed as to whether a fiduciary relationship existed between the parents and children as borrowers and lenders."[378] Subsequently, the district court ruled that "the plaintiffs had failed to meet [their] burden of showing that the notes were not the product of a bad-faith arrangement."[379] On appeal, the U.S. Court of Appeals for the Third Circuit ruled that two steps are required to establish validity of the loans.[380] The first inquiry is "whether the [promissory] notes qualify under the regular SSI resource-counting rules as cash loans or promissory notes [under] the [POMS]."[381] If the notes do not qualify under either category, then the second inquiry would be whether the notes are considered trust-like devices pursuant to the POMS § 1120.201.[382] To be a cash loan, permitted under the Medicaid regulations, "the instrument must be a 'negotiable, bona fide loan agreement.'"[383] Furthermore, an informal loan may qualify as bona fide if it meets the following conditions: "(1) it is enforceable under state law, (2) was in effect at the time the cash proceeds were provided, (3) there is an acknowledgement of an obligation to repay, (4) there is a plan for repayment, and (5) the repayment plan is feasible."[384]

The Third Circuit upheld the holding of the district court that the applicants had failed to demonstrate that the promissory notes were bona fide.[385] The court stated, "[t]he lack of evidence of feasibility of repayment is sufficient, in itself, to support a finding that plaintiffs' notes *likely fail* the POMS test for a bona fide loan agreement."[386] The Third Circuit also agreed with the district court's finding that

> (1) the loans were not arms-length transactions, (2) the loans were informal between family members not in the business of lending money, (3) that some of the children had power of attorney over their parents, (4) the loans are not backed by collateral and there was no documentation about the borrowers' ability to repay the loans, (5) the timing of the loans made prior to the filing of the applications was suspicious, and (6)

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377. *Id.*

378. *Id.*

379. *Id.*

380. *Id.* at 76.

381. *Id.*

382. *Id.*

383. *Id.*

384. *Id.* (citing SOC. SEC. ADMIN., PROGRAM OPERATIONS MANUAL SYSTEM (POMS) § 1120.220(C) (2015), https://secure.ssa.gov/poms.nsf/lnx/0501120200).

385. *Id.*

386. *Id.*

> the loans were in the exact amount of excess resources preventing Medicaid eligibility.[387]

Even though POMS provides instructions to the Medicaid official to "assume, absent evidence to the contrary, that the written agreement is bona fide and negotiable,"[388] there were sufficient facts to the contrary to demonstrate that the loans were not bona fide.[389]

In addition to holding that the loans were not bona fide, the Third Circuit affirmed that the holding of the district court that the notes executed between the parents and the children were fiduciary in nature.[390] That is, that the parents and children did not meet their burden of "showing that it was more likely than not that a fiduciary relationship did not exist between the parents and children."[391] The notes executed between the parties could be viewed as having an implicit "understanding that the children would simply hold the money for the benefit of the parents."[392] Because trust-like devices must be considered as available resources to applicants for Medicaid, these assets prevent the applicant from qualifying for benefits.

V. STATUTORY RECOMMENDATION

Because Medicaid is a joint federal and state program, it is both understandable and expected that issues pertaining to eligibility would be resolved on a case-by-case basis among the various states. Such a practice is endemic to federalism. But it is arguable that certain benefits describable as essential to due process protection should be uniform throughout the states by force of federal law.[393] Long-term care benefits are entitled to due process protection.[394] Statistics confirm that an increasing number of citizens will

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387. *Id.* at 76–77.

388. *Id.* at 77 (quoting PROGRAM OPERATIONS MANUAL SYSTEM (POMS), *supra* note 384 at § 1140.300(D)(1) (2013), https://secure.ssa.gov/apps10/poms.nsf/lnx/0501140300).

389. *Id.* For example, "the notes may have been entered into with the purpose of attaining Medicaid eligibility, not to make loans." *Id.*

390. *Id.*

391. *Id.* The court also cites *Clyde v. Hodge*, 460 F.2d 532, 535 (3d Cir. 1972) (stating that a court must consider "surrounding facts and circumstances relevant to [each] case") and *United Jersey Bank v. Kensey*, 704 A.2d 38, 44 (N.J. Super. Ct. App. Div. 1997) (commenting that parties can maintain a trust in one another because of their relationship to each other).

392. *Sable*, 437 F. App'x at 77.

393. *See, e.g.*, Schweiker v. Gray Panthers, 453 U.S. 34, 48–50 (1981) (holding that federal regulations that permit states to "deem" income according to an arbitrary formula to impute a spouse's income are valid, but noting that such validity results from the broad authority of federal officials to make intelligible the Byzantine Social Security Act).

394. *See* Jennifer L. Wright, *Unconstitutional or Impossible: The Irreconcilable Gap Between Managed Care and Due Process in Medicaid and Medicare*, 17 J. CONTEMP. HEALTH L. & POL'Y 135, 160 (2000) (observing that "government entitlements have long been recognized as property rights, requiring due process protection"). *See also* Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (stating that statutory entitlements for qualified persons are subject to some due process protections).

require long-term care and be unable to pay for institutional care, and few of these will be aware of long-term care insurance and be unable to afford it when payment is required.[395] Recipients of care are dependent upon the benefits provided by Medicaid, and recipients' spouses, minor or dependent children, and extended families have grown complacent with assets coveted by estate recovery efforts.[396] The necessity and reliance of long-term care benefits justifies an immediate federal statutory structure to cure the disparities that have arisen within the states pertaining to eligibility of long-term care.

Estate recovery and the three issues discussed in this Article illustrate the disparity among the states.[397] First, by permitting states to elect a broader definition of what constitutes the estate of the deceased individual, the state permits one state to adopt a more expansive definition than the other, resulting in disparity of benefits.[398] This issue is augmented by state statutes that are poorly drafted, thereby excluding assets that would be included for eligibility purposes in other states.[399] Second, the debate over the requirement that an asset be available at the time of death of the Medicaid recipient seems reminiscent of litigation over recovering the value of assets transferred by a spouse prior to death.[400]

How may the state assist a surviving spouse to recover validly transferred items of value, thereby decreasing the surviving spouse's elective share? The Uniform Probate Code proposed that any property over $12,000 in value that was transferred to any single donee within two years of the donor's death be included within the elective share of the surviving spouse.[401] The federal statute or POMS regulations could implement a similar arrangement to lessen the disparity of estate recovery applicable in one state and not in another because one state is permitted to include transferred items under the auspices of the transfer being an "other arrangement."[402] Finally, the transferability of annuities receives disparate treatment among the states, resulting in denial of anticipated benefits and depriving persons of reliable planning options.[403]

It is possible that recommendations could be made to each of the states to draft their estate recovery statutes to accommodate the issues raised in this Article,

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395. Andrew Melnyk & Harsh Sharma, *Who Will Pay for Our Long-Term Care?*, AM. COUNCIL OF LIFE INSURERS 1–2 (2014).

396. *See supra* note 113 and accompanying text (discussing the surprise and dismay some families may face when states attempt to engage in estate recovery).

397. *See supra* Parts II–IV.

398. *See* 42 U.S.C. § 1396p(b)(4) (2012). *See also supra* Part II.

399. *Compare* Hines v. Dep't of Pub. Aid, 850 N.E.2d 148, 152–53 (Ill. 2006) (applying strict construction of a poorly drafted statue), *with In re* Estate of Thompson, 586 N.W.2d 847, 850 (N.D. 1998) (utilizing an expansive approach to its state statute). *See also supra* Part II.

400. *See supra* Part III.

401. UNIF. PROB. CODE § 2-205(3)(C) (amended 2010). For commentary *see* O'Brien, *supra* note 138, at 669–71.

402. *See supra* Part III (discussing the *McCormick* and *Berg* decisions).

403. *See supra* Part IV (analyzing spousal annuities).

but this is not timely and would be injurious to the due process rights of persons affected. A better approach would be to urge Congress to initiate changes to the Medicaid law. First, the estate of the recipient must include all property owned by the decedent at the time of his death, including probate, nonprobate, and assets transferred inter vivos and not present at the time of death. Second, annuities safeguard a comparable lifestyle for the non-institutionalized spouse, and precise language should be enacted to preserve this option in spite of any remote possibility of transferability. The amicus brief of HHS supports this approach, but Congress must provide for this through statutory enactment or regulations.[404]

VI. CONCLUSION

A number of factors combine to necessitate this Article. The greater longevity of an increasing number of Americans precipitates economic pressure on federal and state entitlement programs.[405] One of these programs—Medicaid—offers payment for long-term care, care that often costs thousands of dollars per month.[406] Because Medicaid is a joint federal-state effort, states must provide at least some of the money to pay for these expenses, but they are limited in how they may determine an applicant's eligibility and how they may recover from an applicant's estate upon the applicant's death.[407] Time and practice have established rules and procedures governing eligibility guidelines, but changes in the manner of transferring property at death make estate recovery programs tentative and inconsistent among the states.[408]

Inconsistency in providing benefits is not insignificant. For some persons applying for eligibility, ignorance of the law may result in loss of benefits because the applicant's state may treat an annuity as an asset, whereas another state will not.[409] Likewise, some persons may be successful in transferring assets inter vivos and safeguarding those assets for posterity; others may have assets taken for expenditures made long after the long-term care recipient's death.[410] Furthermore, because of the significance of these benefits to an

404. *See* Brief for the Amicus Curiae, *supra* note 359, at 16, 18.

405. *See supra* notes 1–8 and accompanying text.

406. *See supra* note 27 and accompanying text.

407. Federal contributions to Medicaid expenditures may not be less than fifty percent in any state and they may not exceed eighty-three percent. *See* EARL DIRK HOFFMAN, JR., BARBARA S. KLEES & CATHERINE A. CURTIS, OFFICE OF THE ACTUARY CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP'T OF HEALTH & HUMAN SERVS., BRIEF SUMMARIES OF MEDICARE & MEDICAID: TITLE XVIII AND TITLE XIX OF THE SOCIAL SECURITY ACT AS OF NOVEMBER 1, 2008 23 (2008), http://www.cms.hhs.gov/MedicareProgramRatesStats/downloads/MedicareMedicaidSummaries2008.pdf. *See also* MITCHELL & BAUMRUCKER, *supra* note 10, at 2 (indicating a statutory maximum of eighty-three percent and statutory minimum of fifty percent).

408. *See supra* Part I. *See also supra* note 138 and accompanying text.

409. *See supra* Part IV.

410. *See supra* Part III.

increasing number of persons, issues of due process arise.[411] This Article recommends that Congress enacts legislation or implement regulations to safeguard uniformity among the states as they provide long-term care benefits to a rapidly growing segment of the population.

411. *See supra* notes 1–8, 394 and accompanying text.