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# Note: The Impact of Medicaid Estate Recovery on Nontraditional Families

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# THE IMPACT OF MEDICAID ESTATE RECOVERY ON NONTRADITIONAL FAMILIES*

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** J.D. expected, University of Florida Levin College of Law, 2005; M.A., Florida International University (Political Science), 1999. This Article is my attempt to unite my academic training in law and policy and my prior professional experience in the field of human services. I initially identified the problem of unfair treatment of nontraditional families under Medicaid estate recovery programs while working in the field of long-term care; however, it was only after I became a law student and developed an understanding of property, family law, and estates and trusts that I could even attempt this Article. Therefore, I owe a debt of gratitude to my professors at the University of Florida Levin College of Law. I would also like to thank the editorial board of the *University of Florida Journal of Law & Public Policy* for thorough and careful editing. Any errors are, of course, my own.

## I. INTRODUCTION

In the wake of the Massachusetts Supreme Court's determination that the state's refusal to grant marriage licenses to same-sex couples violates the Massachusetts Constitution,[1] a lively and heated debate about the role of marriage in American society has taken center stage.[2] While the debate tends to focus on the symbolic meaning of marriage and its importance as a social institution with deep historical roots,[3] proponents of same-sex marriage also point out that marriage is a significantly important bundle of legal rights. The ability to marry grants couples a preferential status[4] under federal,[5] state,[6] and local law.[7] Currently, over 1600 combined

1. *See* Goodridge v. Dep't of Pub. Health, 440 Mass. 309 (Mass. 2003); and subsequent Feb. 3, 2004 Advisory Opinion, 440 Mass. 1201 (Mass. 2004). For a concise summary of other recent international and domestic developments that demonstrate the law's persistent movement toward broader recognition of same-sex relationships, see *Developments in the Law: II. Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe*, 116 HARV. L. REV. 2004, 2004-06 (2004).

2. *See, e.g.*, Raphael Lewis, *Weighing Gay Marriage*, BOSTON GLOBE, Feb. 10, 2004, at A12; Jack B. Harrison, *Taking Marriage Seriously*, NEW JERSEY L.J., Feb. 2, 2004; Marcia Coyle, *Each Bloc Devises its Legal Strategy on Gay Marriage*, RECORDER, Nov. 26, 2003, at 3.

3. David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 450 (1996) ("In our country, as in most societies throughout the world, marriage is the single most significant communal ceremony of belonging. It marks not just a joining of two people, but a joining of families and an occasion for tribal celebration and solidarity").

4. Gay rights advocates and scholars argue that the landmark ruling *Plessy v. Ferguson*, 163 U.S. 537 (1896) should apply to marriage rights as well, and that any separate arrangement, such as civil unions, fails to meet constitutional muster. *See* Danaya C. Wright, *The Logic and Experience of Law:* Lawrence v. Texas *and the Politics of Privacy*, 15 U. FLA. J.L. & PUB. POL'Y 423 (2004).

5. The Defense of Marriage Act (DOMA), was signed into law in 1996 and declares, that under federal law, marriage will be defined as a "union between one man and one woman." The

rights,[8] benefits, and obligations hinge on the ability to assume the status of marriage. The specific rights and benefits included in this figure vary in their significance, scope, and everyday notoriety. Most Americans understand that certain tax benefits[9] and inheritance rights[10] hinge on marital status, and many persons are also aware that social security payments,[11] family leave benefits,[12] health insurance coverage,[13] hospital

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Defense of Marriage Act, 1 U.S.C.A. § 7 (2004). The effect of this provision is the denial of over 1100 federal rights, privileges, and obligations of marriage to same-sex couples. *See infra* note 8.

6. The number and variety of laws that hinge on marital status vary significantly by state. *See* Chambers, *supra* note 3, at 447 (discussing in general the rights, benefits, and obligations that form the overall concept of marriage as a legal institution); Baker v. State, 744 A.2d 864 (Vt. 1999) (discussing the importance of marital status for many critical rights afforded to couples under Vermont law).

7. On the local government level, domestic registries may offer some benefits to public employees. One scholar explained:

> "[D]omestic partnership" ordinances have been adopted in recent years in many municipalities, counties and other governmental entities. Although "domestic partnership is not a legal substitute for marriage," the ordinances provide, for those who have registered as domestic partners, such incentives as group health insurance, family sick leave, bereavement leave, and hospital visitation rights.

Nancy G. Maxwell, *Opening Civil Marriage to Same-Gender Couples: A Netherlands-United States Comparison*, 18 ARIZ. J. INT'L & COMP. L. 141, 197 (2001).

8. There are approximately 1100 federal rights and privileges that are contingent on marriage, and an average of 500 state laws that depend on marital status. U.S. General Accounting Office Report B-275860 (Jan. 31, 1997) (reporting that 1049 federal rights and benefits depend on marital status); John Cloud, *1,138 Reasons Marriage Is Cool: The Many Legal Benefits Of Being Married*, TIME, Mar. 01, 2004 (noting that 1138 federal rights and benefits are granted to married persons).

9. Mueller v. Commissioner, T.C. Memo 2000-132 (2000) (upholding the Internal Revenue Code's treatment of married and single persons differently and rejecting petitioner's claim that the Code discriminated against any "person who shares assets and income with someone who is not his legal spouse").

10. *See, e.g.*, *In re* Estate of Cooper, 592 N.Y.S.2d 797 (N.Y. App. Term. 1993) (holding that the survivor of a same-sex relationship was not entitled to elect against the will of the decedent partner).

11. The social security system provides retirement benefits that are accrued by the worker through a payroll tax. When an individual dies, his or her benefits may be passed only to a surviving spouse or dependent child. *See Treatment of Married Couples in the SSI Program*, SOC. SECURITY ADMIN., Issue Paper No. 2003-0 (Dec. 2003).

12. *See, e.g.*, Ross v. Denver Dep't of Health, 883 P.2d 516 (Colo. Ct. App. 1994) (holding that an employer was not required to grant sick leave benefits for an employee to care for her lesbian partner, since same-sex partners do not quality as "immediate family").

13. *See, e.g.*, Hinman v. Dep't of Pers. Admin., 167 Cal. App. 3d Supp. 516 (Cal. Ct. App. 1985) (holding that an employee's same-sex partner did not qualify as a "spouse" for purposes of inclusion in an employer-provided insurance program); *but see* Tanner v. Oregon Health Sci. Univ.,

visitation rights,[14] legal standing for wrongful death and loss of consortium,[15] and even the right to make posthumous burial decisions[16] will not automatically accrue to individuals in relationships that are not formalized by a marital bond. However, the laws cited here as examples are only the proverbial "tip of the iceberg." There are countless other laws within the complex web of federal, state, and local statutes, regulations, and ordinances that stand to impact nontraditional families when they least expect to be treated differently.

This Note explores Medicaid estate recovery as one example of a federal and state initiative that, while often ignored in public discourse,[17] has the potential to impact nontraditional families quite significantly.[18]

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No. 9201-00369, 1996 WL 585547 (Or. Aug. 8, 1996) (ordering the state to provide life, medical, and dental insurance benefits to domestic partners of state employees).

14. Gays and lesbians can be denied the right to visit their partners in the hospital or make important medical decisions, since those rights are reserved for spouses or immediate family members. *See Baker*, 170 Vt. 194, 201 (Vt. 1999) (explaining that the denial of civil marriage also means that gay and lesbian couples are denied, *inter alia*, hospital visitation rights). However, gays and lesbians can sometimes use private contracts to achieve a legal outcome more reflective of their committed status. *See* King v. Bankerd, 492 A.2d 608, 611 (Md. 1985) (describing the "power of attorney" as a method by which individuals assign other persons to act as their agent in certain important decisions). A Durable Power of Attorney for Health Care provides a designated individual the right to make important health care decisions, such as whether to withhold life support measures, and also provides hospital visitation rights. *See, e.g.*, *In re* Rochester Gen. Hosp., 601 N.Y.S.2d 375 (N.Y. 1993).

15. *See* Elden v. Sheldon, 758 P.2d 582 (Cal. 1988) (holding that a same-sex partner did not have a cause of action for negligent infliction of emotional distress or loss of consortium for injury or death of same-sex partner as a result of defendant's tortuous conduct).

16. *See* Jennifer E. Horan, Note, *"When Sleep At Last Has Come": Controlling The Disposition Of Dead Bodies For Same-Sex Couples*, 2 J. GENDER RACE & JUST. 423, 424 (1999) (explaining, "[o]ne area of law where unmarried domestic partners often fall outside statutory benefits is that of determining the proper disposition of a partner's body upon death").

17. In fact, a search of the All-News database on Lexis-Nexis, using the search phrase ("gay and lesbian" AND "estate recovery") returned only one article discussing the implications of Medicaid estate recovery on gays and lesbians. That article appeared in a law journal, rather than a mass communication medium, and therefore was not even really a part of the mainstream public discourse. The article returned was Douglas A. Fendrick, *Estate Planning for Gays and Lesbians*, 156 NEW JERSEY L.J. 676 (1999).

18. Estate recovery programs have the potential to affect all unmarried persons sharing a home, even when co-ownership was entered into as a mere investment decision by two or more individuals who are not involved in any deeper emotional bond. In addition, the programs impact all nontraditional families, such as same-sex couples and groups of single friends or adult siblings who own a home together and operate like a family unit. For example, the marital exception would not protect a survivor of the following nontraditional families: two adult siblings sharing a home, two or more adult friends sharing a home, unmarried heterosexual couples, and all homosexual couples. However, while estate recovery programs also threaten all unmarried persons who share a home, the potential impact on nontraditional families is perhaps most significant. For families

Through estate recovery programs, states carry out a federal mandate and recover assets from the estates of individuals who receive Medicaid long-term care assistance.[19] Since the family home is often the only property remaining in the estate,[20] and since the amount of benefits paid often meets or exceeds the value of the average senior citizen's home,[21] the state is generally authorized to seize the entire residence. In states that have adopted an expanded definition of "estate,"[22] estate recovery programs are even authorized to seize jointly owned property to the extent of the decedent's interest.[23] However, in order to protect spouses and dependent children, the federal mandate requires that states postpone foreclosure if a spouse or dependent child is still living.[24] These protections do not apply to nontraditional families, regardless of the length of time together or other indicators of each party's intent to support the other. Indeed, the policy completely ignores the myriad forms of living arrangements that will likely increase as divorce,[25] death, and alternative lifestyles[26] challenge the assumption that senior citizens reside in husband and wife pairings.

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who lack the opportunity to solidify their relationships through marriage, there is no meaningful way to avoid the harsh application of this law. *See infra* Part VI.

19. *See* 42 U.S.C. § 1396p(b) (2004); *see also infra* Part III (discussing the evolution of mandatory estate recovery programs).

20. *See infra* text accompanying note 53.

21. *See infra* text accompanying note 57 (citing an average home value among senior citizens of $96,442).

22. *See infra* Part V (discussing the OBRA 1993 expanded definition of "estate").

23. *See id.*

24. 42 U.S.C. § 1396p(b)(2)-(2)(A) (2004) (providing, in pertinent part: "Any adjustment or recovery . . . may be made only after the death of the individual's surviving spouse, if any . . . and only at a time . . . when he has no surviving child who is under age 21, or . . . is blind or permanently and totally disabled . . ."). In addition, no lien may be attached to the residence if a qualified sibling, son, or daughter of the decedent resides in the home. *See id.* § 1396p(b)(2)(B)(i)-(ii).

25. *NBC News* (NBC television broadcast, June 20, 1997) (explaining that the divorce rate among senior citizens has doubled since 1980). *But see* David Blankenhorn & Tom Sylvester, *Sorry, But There's No Legion of "Gray Divorcees,"* ST. LOUIS POST-DISPATCH, Dec. 10, 2003, at C13 (arguing that the divorce rate among seniors has not altered significantly in recent years, but that journalists have sought out individual cases of divorce and publicized their stories as somehow reflective of a trend).

26. Alternative lifestyles include groups of single persons residing together as a family unit, such as the fictional group of women on the popular television show, "The Golden Girls," as well as alternative intimate relationships. While descriptive statistics on the incidence of homosexuality among senior citizens are lacking, there is certainly a sizable number of older gay Americans attempting to influence legislation. *See, e.g.*, Kyle Cheney, *Older Gay Couples Call for Equality*, UNIV. WIRE, Jan. 30, 2004.

The result of Medicaid estate recovery programs for nontraditional families is a divestiture of the cruelest sort. For example, if an individual in a nontraditional family dies following Medicaid-funded long-term care, the state can immediately foreclose on the decedent's interest in the home. If the home was titled in the decedent's name, the state can seize the entire home; if the home was jointly owned, the state can seize the decedent's share. If the decedent owned the home with another in joint tenancy, the surviving family members will be left with only half of the value of the home and will lose the right of survivorship; even more significantly, he or she may be forced to leave behind the comfort and familiarity of the family home in a time of profound loss and sorrow. In addition to these impacts on surviving family members, the decedent is robbed of an opportunity to pass his half-interest directly to the surviving joint tenant,[27] and must suffer to know that upon his last breath his family may be forced to leave behind the home they shared.

Part II of this Note introduces the Medicaid program and explains how it became the primary payer source for long-term care in the United States. Part III provides a brief history of Medicaid estate recovery programs, and Part IV summarizes the current status of federal Medicaid estate recovery law. Part V provides a summary of various state models of estate recovery, and analyzes the impact of these models in the context of nontraditional families. Part VI introduces homestead exemption laws as a source of protection that applies regardless of marital or familial status, and also considers whether nontraditional families should be expected to proactively protect their homes through other measures. Finding that these options do not fully resolve the problem, Part VII concludes with a recommendation that the federal government should amend the Social Security Act to require that states develop undue hardship criteria that would protect nontraditional families. This solution is ideal because it provides the necessary protection without exposing the Medicaid system to additional fraud or unduly restricting a state's ability to recoup benefits paid.

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27. This is not only contrary to the basic premise of joint tenancy under traditional property law, but also contradicts the U.S. Supreme Court's ruling in *Hodel v. Irving*. Hodel v. Irving, 481 U.S. 704 (1987) (finding that the right to descent and devise property is a distinct property right that the state must pay just compensation for in the event of a taking).

## II. BACKGROUND: THE FINANCING OF LONG-TERM CARE THROUGH MEDICAID'S "MEDICALLY NEEDY" PROVISION

Medicaid is a federally funded, state implemented medical assistance program established in 1965 under Title XIX of the Social Security Act.[28] The program was originally designed to meet the health insurance needs of economically disadvantaged persons, or those persons who come within the "categorically needy" classification.[29] At the option of each state, the Medicaid program can also provide health insurance benefits for the "medically needy." This classification includes persons who may not meet income guidelines for other welfare programs, but have been rendered functionally destitute by excessive medical bills.[30] In contrast, Medi*care* is a government-run health insurance plan for senior citizens.[31] Although public opinion surveys often reflect a widespread belief that Medicare will pay for long-term care,[32] Medicare in fact does not provide coverage for extended nursing home placement. Instead, senior citizens must turn to some other payer source when long-term care becomes necessary.[33] In theory, their options would include personal or familial assets, private

28. The Medicaid program was established under Title XIX of the Social Security Amendments of 1965, Pub. L. No. 89-97, 121-22, 79 Stat. 370 (codified as amended at 42 U.S.C. §§1396-1396s (2004) and 42 C.F.R. § 430-56 (2004). Under the Medicaid program, the federal government provides block grants to states for the development of a health insurance program for the impoverished. *See* Shawn Patrick Regan, Note, *Medicaid Estate Planning: Congress' Ersatz Solution for Long-Term Health Care*, 44 CATH. U. L. REV. 1217, 1217-18 (1995).

29. *See* 42 U.S.C. §§ 1396a(a)(10)(C), 1396a(a)(13)(B), 1396d(a)(1)-(5). Medicaid was primarily developed to provide health coverage for the "categorically needy," a term that refers to families with dependant children, the aged, blind, and disabled, and other groups that currently receive financial assistance from means-tested federal programs. *Id.*; *see* 42 C.F.R. § 435.100-.135, .700-.735 (2004).

30. "Medically needy" individuals do not meet the income requirements for other public assistance programs, but have healthcare needs that cost far more than they are able to pay. *See* 42 C.F.R. § 435.300-.350, .800-.852 (2004). For a discussion of this category as defined in one state, North Dakota, see Gregory C. Larson & Melissa Hauer, *Planning for Nursing Home Care in North Dakota*, 74 N.D. L. REV. 191, 201 (1998).

31. *See* Health Insurance for the Aged Act, Pub. L. No. 89-97, 79 Stat. 290 (1965) (codified as amended in 26, 42 & 45 U.S.C.). Medicare provides health insurance to individuals over the age of 65, or those who meet specified disability guidelines. *See* 42 U.S.C. § 1395(c) (2004).

32. *See* M. Ann Miller, *Your Money For Your Life: A Survey and Analysis of Medicaid Estate Recovery Programs*, 11 T.M. COOLEY L. REV. 581, 587 (1994). Medicare only provides coverage for rehabilitative long-term care, which is limited to 100 days of skilled nursing care. 42 C.F.R. § 409.61(b) (2004).

33. 42 U.S.C. § 1395y(a)(9) (2004); 42 C.F.R. § 411.15(g) (2004).

long-term care insurance,[34] or the Medicaid program's "medically needy" provision.

Since the vast majority of seniors do not carry private long-term care insurance,[35] and since many elderly persons lack sufficient financial resources to pay the high costs of long-term care,[36] most individuals in fact turn to Medicaid.[37] Medicaid is also a frequent payer source because most families do not plan for long-term care expenses. In fact, financial decisions for long-term care are often made during nursing home pre-admission screening interviews.[38] In this late hour, most families are left only with the option to "spend-down"[39] liquid assets on long-term care and then enroll in Medicaid. This overall lack of pre-institutionalization planning has its roots not only in financial realities, but also in societal and psychological dynamics. Aging is not a favored topic of discourse among most people; planning is generally begun only when medical needs begin to foreshadow long-term care placement.[40]

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34. As used here, the phrase "private" includes policies purchased individually or through an employer.

35. In 1998, one analyst reported that only 7% of long-term care bills are paid through private insurance arrangements. Walter M. Cadette, *Financing Long-Term Care: Options for Policy*, JEROME LEVY ECON. INST., 1 (Working Paper No. 283) *at* http://econwpa.wustl.edu:8089/eps/mac/papers/0004/0004030.pdf (last visited Mar. 20, 2004). Furthermore, since the phrase "long-term care" also includes payments for hospital stays for disability and rehabilitation following an accident, the percentage is even lower if we limit the inquiry to elderly nursing home residents.

36. The average median income for senior citizens in this nation is $ 18,778. *Income of the Aged Chartbook, 2000*, SOCIAL SECURITY ADMIN. (released 2002), *at* http://www.ssa.gov/policy/docs/chartbooks/income_aged/2000/iac00.html#money (last visited May 6, 2004). This perhaps explains why only about 38% of all nursing home residents are supported by personal or familial assets. *Retirement Survey Shows Vast Majority of Baby Boomers Have Misperceptions About Paying for Long-Term Care*, BUS. WIRE, June 1, 1999.

37. Statistics vary significantly by state, but on average, over half of all nursing home residents nationwide receive Medicaid benefits. *See, e.g.*, Jeffrey A. Marshall, *The Medicaid Death Tax: Medical Assistance Estate Recovery in Pennsylvania*, 73 PA. B. ASS'N Q. 112, 113 (2002) ("2/3rds of Pennsylvania nursing home residents receive [Medicaid] benefits"); Jon M. Zieger, *The State Giveth and the State Taketh Away: In Pursuit of a Practical Approach to Medicaid Estate Recovery*, 5 ELDER L.J. 359, 361-62 (1997) (explaining that Medicaid pays the costs of 60% of all nursing home bed days nationwide).

38. *See, e.g.*, *Experts Urge Families Consider Planning For Long-Term Care*, CHATTANOOGA FREE PRESS, July 13, 1997, at B4 [hereinafter *Experts Urge Families*] (explaining a general lack of planning for long-term care).

39. For Medicaid spend-down provisions see 42 U.S.C. § 1396(p). A residence is excluded from the applicant's assets upon initial application. *See id.*

40. One author explained:

> Too often it is only when a family member becomes disabled that they learn that these expenses will have to be paid for out-of-pocket. Furthermore, individuals

The fact that most senior citizens do not plan for long-term care is certainly a significant and alarming reality. However, when considered alongside the rapidly increasing number of individuals who will require long-term care, this trend threatens to bankrupt the Medicaid program. In recent decades, health factors such as increased longevity[41] and improved medical care have greatly expanded the elderly population.[42] At the same time, the increasing incidence of Alzheimer's has amplified the need for professional care and supervision for elderly persons.[43] In addition, societal changes such as decentralization of the family unit and increased employment of women outside the home[44] have deepened the American family's dependence on nursing homes to provide care for elderly persons.

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> whose long-term care needs arise as a result of a sudden onset of a stroke or other illness do not have adequate time to plan.

Janel C. Frank, *How Far Is Too Far? Tracing Assets in Medicaid Estate Recovery*, 79 N.D. L. REV. 111, 116 n.47 (2003) (quoting S. Rep. No. 106-229(I), at 153 (2000)).

41. Predictions regarding longevity are quite astonishing:

> The nation's fastest growing population subset, the group of 3.9 million people over eighty-five years old, will more than double by 2030, and then double again by 2050. It is expected that there will be 18 million persons in the country over age eighty-five by 2050. Today, about 57,000 Americans are over 100 years old, and, by the year 2030, it is estimated that there will be more than one million Americans over 100 years old. An astounding eight percent of today's sixty-five year olds are expected to reach age 100.

Robert D. Hayes et al., *What Attorneys Should Know About Long-Term Care Insurance*, 7 ELDER L.J. 1, 5 (1999).

42. The 2002 Current Population Survey reported 59.6 million noninstitutionalized persons aged 55 or over in the United States. *The Older Population in the United States: March 2002*, CENSUS REPORT (Apr. 2002), *at* http://www.census.gov/prod/ 2003pubs/p20-546.pdf (last visited May 6, 2004).

43. One author summarized the statistics on Alzheimer's as follows:

> [T]he statistical incidence of Alzheimer's disease — a degenerative disease whose primary symptom is the impairment of cognitive function — is sobering . . . . In 1980, more than two million individuals had Alzheimer's disease. That number is expected to increase to four million by the turn of the century and to between eight million and ten million by 2050 unless a cure or preventative measures are discovered.

Linda S. Whitton, *Caring for the Incapacitated: A Case for Nonprofit Surrogate Decision Makers in the Twenty-First Century*, 64 U. CIN. L. REV. 879, 882 (1996).

44. For a discussion of the dramatic increase of women in the work force in post-1950's America, see ARLIE HOCHSCHILD & ANN MACHUNG, THE SECOND SHIFT, 2-10 (1999).

In fact, recent reports indicate that increasing percentages of the population will require long-term care in the future.[45]

As a result of the growing need for long-term care and the continued reliance on Medicaid as the primary payer source, Medicaid coffers supply just under half of the total dollars spent on long-term care nationwide.[46] Senior citizen long-term care placement has taken a sizable "chunk"[47] out of the total Medicaid budget[48] and many states have been forced to cut back on expenditures for other underprivileged persons.[49] Unfortunately, this means that less politically influential groups,[50] such as needy children and handicapped adults, are at risk of being disadvantaged and marginalized even further.

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45. *Senate Aging Committee Hearing on Long-Term Care*, Cong. (1998) (statement of Sen. Michael B. Enzi).

46. "Medicaid is the dominant public program supporting long-term care, accounting for about 44 percent of the $134 billion spent for services in 1999, [according to a General Accounting Office Report]." Dennis Camire, *Health Care For Baby Boomers Will Demand More Provider Coordination*, GANNETT NEWS SERVICE, Sept. 24, 2001.

47. The "chunk" is quite significant:

> In 1998 about 10.6 million aged, blind and disabled were receiving Medicaid assistance, primarily in the form of long-term care services. Although this group only represented 1 in 4 of all Medicaid recipients in 1998, the group accounted for 71% of the $142.3 billion spent by Medicaid that year. In restatement most of Medicaid's budget is spent on long-term care — services for long-term care covered only a quarter of Medicaid recipients but represented close to three-quarters of Medicaid budgets.

Thomas Day, *About Medicaid Coverage of Long-Term Care, at* http://www.longtermcarelink.net/about_medicaid.html (last visited May 6, 2004).

48. The total Medicaid budget is extremely large. "According to the latest figures from the federal government's annual report on national health care spending, Medicaid's total budget had grown to $224.3 billion in 2001." Kim Krisberg, *Medicaid Cuts Eyed as States Tangle with Deficits*, NATION'S HEALTH (Mar. 2003), *reprinted at* http://www.apha.org/journal/nation/medicaidcover0303.htm (last visited May 6, 2004).

49. For example, the income ceiling for Medicaid assistance for the poor has continued to drop, so that families with incomes that are still considered nominal by most standards are considered "too well off" to qualify for Medicaid.

50. The other sub-groups that come within the Medicaid umbrella are nowhere near as politically influential as senior citizens, who have organized powerful lobbying organizations, such as the AARP, to advance their interests.

## III. THE EVOLUTION OF MANDATORY ESTATE RECOVERY PROGRAMS

While the demographic and societal trends described above have already stretched the Medicaid budget significantly,[51] the baby boomer generation threatens to completely bankrupt the program.[52] Lawmakers have realized a critical need to begin replenishing Medicaid coffers now through sources other than tax revenues. One way to recoup the costs of Medicaid is to recover any remaining assets from the estates of decedent Medicaid beneficiaries. In theory, this practice also serves an important public policy goal of passing more of the cost burden to private rather than public resources.[53] Financial logic also supports this practice. Although Medicaid is a means-tested program and most recipients will not have large estates, beneficiaries will typically own their home until death because spend-down provisions permit applicants to retain the principal residence.[54] Coincidentally, this single asset is often quite close to the value of benefits received. With an average nursing home stay of two and a half years,[55] at an average annual cost of $50,000,[56] the typical Medicaid recipient has often accumulated healthcare benefits of approximately $100,000-$125,000 — a figure that equals or exceeds the value of the average senior citizen's home, which is approximately $100,000.[57]

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51. *See supra* Part I and sources cited therein.

52. Camire, *supra* note 46 ("Sen. John Breaux, D-La., chairman of the Senate Special Committee on Aging, said the nation's 'long-term care system is outdated and ill-equipped to handle the impending wave of 77 million baby boomers'"). In addition, the cost of long-term care rises by 8% each year, according to the National Association of Insurance Commissioners. Paul Palazzo, *Can You Afford To Grow Old? — Lack Of Planning For Long-Term Care Could Add Fiscal Ruin To Poor Health*, SEATTLE TIMES, Nov. 1, 1999, at D1.

53. In this manner, estate recovery is an important way to deter "Medicaid planning." *See infra* note 64 and sources cited therein.

54. *See Experts Urge Families*, *supra* note 38.

55. Hayes et al., *supra* note 41, at 3.

56. *See, e.g.*, Frank, *supra* note 40, at 116 ("An individual in a nursing home can expect to pay between $35,000 and $60,000 each year for the cost of care"); Hayes et al., *supra* note 41, at 3 (citing an average cost of $47,000 per year for nursing home services). The "odds [of nursing home placement] rise to sixty percent for a person over seventy-five. In addition, people who do enter a nursing home can expect their stay to average two and one-half years." *Id.* at 3; *see also* Cadette, *supra* note 35, at 1 (citing an annual cost of "upwards of $50,000 per year"); Dee DePass, *Baby Boomers Ignoring Long-Term Care Needs*, STAR TRIB., June 2, 1999, at 3D ("A year of nursing home care costs between $40,000 and $80,000, depending on location").

57. A web site targeted to the senior market provided the following statistics on home ownership among seniors: "Eighty percent of 65-plus Americans owned their homes, an ownership percentage far above the national average. Seventy-six percent of older homeowners own their homes free and clear. Average home value is $96,442. (Home ownership for other age groups is: 15 to 24, 17.9%; 25-34, 45.6%; 35-44, 66.2%; 55-64, 79.8%.)." *Suddenly Senior* (citing *American Housing Survey for the United States*, U.S. CENSUS BUREAU (2000); *Housing Characteristics:*

Yet despite the attractiveness of estate recovery from a purely economic or mathematical perspective, and although states have had discretionary authority to enact estate recovery programs since 1982,[58] early efforts were largely ineffective and estate recovery was not systematically pursued.[59] In fact, during the period from 1982 until 1993, when estate recovery was still optional, only 28 states established programs to recoup costs from the estates of decedent beneficiaries.[60] Many states resisted the enactment of estate recovery programs because the potential political ramifications for state officials seemed to outweigh financial benefits to the state. In the eyes of state legislatures, estate recovery was a dangerous public relations move which robbed senior citizens of the opportunity to pass property to loved ones.[61] Yet in the eyes of the federal government, estate recovery was critical to the Medicaid program's ability to continue providing for groups beyond the elderly.[62]

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*2000*, U.S. CENSUS BUREAU (2001)), *at* http://www.suddenlysenior.com/maturemarketstats2002.html (last visited May 6, 2004).

58. Since the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 132(b), 96 Stat. 324, 370-73 (1982) (codified at 42 U.S.C.A. 1396p(a) (2004)), the federal government has enabled states to recover the cost of Medicaid benefits from the estates of beneficiaries. However, there is evidence that some states pursued estate recovery even before the 1982 legislation:

> [I]n 1975, the Oregon Legislature authorized the recovery of the cost of medical assistance from beneficiaries sixty-five years and older. Also, Michigan's Department of Social Services had attempted to establish a recovery program. But the Department abandoned the effort in 1956, after a state attorney general opinion stated that absent statutory authority, no recovery was permitted.

Miller, *supra* note 32, at 592.

59. Regan, *supra* note 28, at 1247-48 (explaining that under the pre-OBRA 1993 optional estate recovery scheme, "only one-half of all states maintained . . . estate recovery programs and, among those that did, very few were effective"); Miller, *supra* note 32 (asserting that among those states that had enacted estate recovery programs, the methods and relative success of these efforts varied significantly. "In Rhode Island, the state reported a gross recovery of approximately $4.24 per nursing home resident. In Oregon, the gross recovery was only $327.44").

60. Frank, *supra* note 40, at 117.

61. For example, when Texas developed its state program according to the federal mandate, public outcry was significant. Peggy Fikac, *Estate Seizure Worries Texans; Law Oks Taking Homes of Some Patients to Recoup Medicaid Costs*, SAN ANTONIO EXPRESS-NEWS, July 15, 2003, at 1A (citing correspondence from citizens to state officials: "Reminds me of Hitler getting the gold fillings out of the inmates' teeth in the concentration camps before they went to the ovens," . . . "You've Got Some Nerve" came from another man who said his elderly parents were "horrified and scared that all they've worked for and all that they hoped to pass on to their kids and grandchild will be gone").

62. One court summarized the federal government's position as follows: "allowing states to recover from the estates of persons who previously received assistance furthers the broad purpose

This fundamental difference in vantage point would ultimately be resolved through a national mandate. Federal lawmakers determined that optional estate recovery programs were insufficient; forced state participation would be the only way to prevent budgetary collapse. Beyond pecuniary concerns, federal law makers also hoped that mandatory estate recovery would discourage abuse of the program by middle class persons who qualify for Medicaid by transferring or shielding assets prior to the three-year lookback period[63] used during initial application.[64] Estate recovery would enable states to retrieve assets that had somehow escaped discovery during initial application, thereby preserving the program's spirit as a means-tested social safety net for the truly economically disadvantaged.

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of providing for the medical care of the needy; the greater amount recovered by the state allows the state to have more funds to provide future services." Belshe v. Hope, 33 Cal. App. 4th 161, 173 (Cal. Ct. App. 1995).

63. When an individual applies for Medicaid benefits, 42 U.S.C. § 1396p(c)(1)(A), (B) directs state officials to determine whether assets have been transferred or divested by the applicant within a certain "lookback period." The lookback period is 36 months for most transfers, but an extended 60 month period applies to all transfers into an inter vivos trust. *Id.* § 1396p(c)(1)(B). Any transfers of assets for less than fair market value within the lookback period will result in a penalty calculation, meaning that the applicant is ineligible for Medicaid benefits until he or she privately pays for long-term care services in an amount equal to the value of the assets transferred. *Id.* § 1396p(c)(E). Assets held in co-ownership arrangements will be considered transferred when any action is taken that reduces or eliminates the applicant's (or his or her spouse's) ownership or control of the asset. *Id.* § 1396p(c)(3).

64. In public discourse, asset shielding for Medicaid eligibility is often framed as the "smart" or "necessary" way to approach long-term care planning. *See, e.g.*, Jenny Callison, *When Family Needs Family*, CINCINNATI ENQUIRER, Aug. 10, 2003, at 1D ("Lack of planning to shield even modest assets can disqualify a person from needed Medicaid benefits down the road"). However, there is an active and ongoing debate concerning Medicaid "estate planning" among academics, practicing attorneys, and lawmakers. *See, e.g.*, Eleanor M. Crosby & Ira M. Leff, *Ethical Considerations in Medicaid Estate Planning: An Analysis of the ABA Model Rules of Professional Conduct*, 62 FORDHAM L. REV. 1503 (1994) (presenting case studies to depict the murkier areas of estate planning, such as the case of a client who wishes to lie on the Medicaid application in order to receive benefits); Regan, *supra* note 28 (detailing federal amendments in the early 1990s that closed many estate-planning loopholes, and concluding that although these steps are significant, the problem will continue until Congress develops viable long-term care financing options rooted in the private sector); John M. Broderick, Note, *To Transfer or Not to Transfer: Congress Failed to Stiffen Penalties for Medicaid Estate Planning, but Should the Practice Continue?* 6 ELDER L.J. 257, 291-92 (1998) (arguing that additional legislation is needed to prevent Medicaid estate planning, since the practice can "becom[e] a threat to the elder's autonomy and independence" and result in a conflict of interest for the attorney).

These federal interests were codified in the *Omnibus Budget Reconciliation Act of 1993* (OBRA 1993),[65] which conditioned state eligibility for federal Medicaid matching funds on the enactment of programs to recoup certain Medicaid costs.[66] Specifically, OBRA 1993 amended the Social Security Act to mandate recovery of the value of long-term care benefits from the estate of decedents who received Medicaid benefits beyond the age of 55.[67] As amended, the Social Security Act plainly requires that each state develop an estate recovery program.[68]

Despite the clear federal mandate, in the years immediately following the new legislation, many states continued to drag their feet and estate recovery seldom occurred.[69] Even among early adopter states, recovery took place in very limited circumstances, and the income generated by these programs remained nominal.[70] Additionally, many state lawmakers continued to express concerns that estate recovery would create a public relations problem; some states forestalled implementation of estate recovery programs as long as they could.[71]

Today, while many state programs are still in their infancy, the trend is clearly toward more systematic recovery,[72] and estate recovery programs

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65. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, tit. XIII, § 13562, 107 Stat. 312, 596-605 (1993) (codified at 42 U.S.C. § 1396p) (2004).

66. *See* 42 U.S.C. § 1396p(b).

67. *Id.* § 1396p(b)(1)(B).

68. *Id.* § 1396a (establishing the Medicaid portion of the Social Security Act which conditions state receipt of funding on "compl[iance] with the provisions of section 1917 [42 U.S.C. § 1396p] with respect to liens, adjustments and recoveries of medical assistance correctly paid . . . transfers of assets, and treatment of certain trusts."). *Id.* § 1396a(a)(18). In provisions specifically dealing with Medicaid estate recovery, the Act provides, in pertinent part, "In the case of an individual who was 55 years of age or older when the individual received such medical assistance, the State *shall* seek adjustment or recovery from the individual's estate." *Id.* at § 1396p(b)(1)(B) (emphasis added).

69. One survey found that in 1997, four states — Alaska, Georgia, Texas and Michigan — still had not developed estate recovery programs. Susan Harmuth & Beth Kidder, *State Medicaid Estate Recovery Programs*, N.C. DEP'T OF HEALTH AND HUM. SERVICES (1998), *at* http://www.longtermcarelink.net/reference/ref_medicaid_recovery.html (last visited May 6, 2004).

70. *See, e.g.*, Steven Saunders & John M. Hall, *So What Gives With Medicaid Estate Recovery?*, 21 VT. B. J. & L. DIG. 31 (1995) (writing in 1995 about the state of Vermont's "on-again/off-again approach to estate recovery in previous years").

71. *See* June Gibbs Brown, *Medicaid Estate Recovery Programs*, 6 REPORT OEI-07-92-00880 (1995). West Virginia vehemently resisted the federal mandate, and even filed suit against the federal government, alleging that forced estate recovery was a violation of the Tenth Amendment to the U.S. Constitution. *See* West Virginia v. Dep't of Health & Human Servs., 289 F.3d 281 (4th Cir. 2002). The suit was unsuccessful, and the state subsequently yielded to federal law and established an estate recovery program. *See id.*

72. One author provides a concise summary of data showing this trend:

are likely to expand further as nursing home placement becomes even more widespread and costs continue to rise.

## IV. Overview of Federal Law Governing Estate Recovery Programs Today

Beyond its formation of mandatory estate recovery, OBRA 1993 also introduced several other significant changes. Most notably, the legislation encouraged states to conduct estate recovery against a much broader range of assets by adopting an expanded definition of "estate." This and other significant changes are noted in the following summary of estate recovery as it is delineated in the federal legislation.

### A. *Spousal and Dependent Child Protections*

Even under OBRA 1993's mandatory estate recovery programs, a state's ability to collect against the estate of a Medicaid recipient is not absolute. Estate beneficiaries are not only potentially insulated from recovery claims that relate to Medicaid benefits provided before passage of OBRA 1993,[73] but additional limitations protect decedents' still-living family members. The federal statute only permits the state to recover from the estate after the death of the surviving spouse or dependent child of a Medicaid recipient.[74] Generally, this is interpreted to mean that the surviving spouse or dependent children have the legal equivalent of a life estate in the property, since the state retains the right to retrieve the decedent's assets from their estates upon death.

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> For instance, in Missouri, a state with a comprehensive estate recovery program, $1,316,925 was recovered during fiscal year 1993, and $8,832,006 between 1981 and 1993. The former figure represents less than one percent of all Medicaid expenditures in that state during the same year. In Illinois, recovery has been somewhat more effective, generating approximately $10,669,740 in recoveries in fiscal year 1995 and placing liens upon property valued at $1,371,991. Moreover, the first two months of 1996 represent asubstantial increase over 1995 recoveries, with $10,014,599 recovered through the end of February 1996.

Zieger, *supra* note 37, at 374-75.

73. Courts disagree on whether OBRA 1993 should be applied retroactively. An Arkansas state court found that the law could not be applied retroactively in Estate of Wood v. Arkansas Dep't of Hum. Servs., 894 S.W.2d 573 (Ark. 1995). *But see In re* Estate of Thompson, 586 N.W.2d 847 (1998) (reaching the opposite result and recovering for benefits paid prior to OBRA's passage).

74. 42 U.S.C. § 1396p(b)(1)(B).

## B. *The Expanded Definition of "Estate" in OBRA 1993*

OBRA 1993 not only made estate recovery mandatory; the amended law also strengthened existing estate recovery programs by significantly expanding the state's ability to seize assets. As a baseline, the statute defines the term "estate" to include all assets within the individual's estate under state probate law.[75] Additionally, at the option of each state,[76] recovery programs can define "estate" to also include "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."[77] This

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75. At a minimum, the "estate," for estate recovery purposes, includes "all real and personal property and other assets included within the individual's estate, as defined for purposes of state probate law." *Id.* § 1396p(b)(4)(A).

76. More and more states have adopted this expanded definition in recent years. *See, e.g.*, Frederick Melo, *Cape Cod, Mass., Officials Criticize New Medicaid Laws*, CAPE COD TIMES, Aug. 21, 2003 (explaining Massachusetts' 2003 adoption of the expanded definition of "estate" for estate recovery purposes).

77. 42 U.S.C. § 1396p(b)(4)(B). The significance of the new definition is captured below:

> The probate estate [which was often the basis for pre-OBRA 1993 estate recovery efforts] does not include certain property that is said to pass outside of the estate. Property interests that pass outside of the probate estate include joint property interests, life estate interests, property that passes by way of survivorship, payable-on-death provisions, life insurance, and beneficial interests in trusts. Under OBRA, states may define "estate" as the probate estate, or may expand the definition to include property that the decedent had an interest in and that passed to others outside of the probate estate. Thus, states now have the option of implementing a broad-based estate recovery, depending upon how they choose to define the "estate."

Frank, *supra* note 40, at 118. Practically speaking, the decedent's estate is likely to be comprised solely of a home since this is one of the few assets Medicaid permits recipients to retain. *See* 42 U.S.C. §1382b(a)(1). Before OBRA 1993 expanded the definition of "estate," the Medicaid estate recovery provisions of the Social Security Act did not define "estate." Therefore, states typically defined the term based on its common law meaning in that jurisdiction. *See* Citizens Action League v. Kizer, 887 F.2d 1003, 1006-08 (9th Cir. 1989) (finding that "estate" should be defined based on its common law meaning, which did not include joint tenancies); Bucholtz v. Belshe, 114 F.3d 923, 925-27 (9th Cir. 1997) (finding that since OBRA 1993 should not be applied retroactively, for cases in which the recipient received benefits prior to 1993, the common law definition of "estate" should govern recovery determinations. The common law definition did not include property held in an inter vivos trust, but did include community property and property held in tenancy in common).

expanded definition of "estate" further advances the governmental interests of recouping costs in order to continue providing for the truly needy,[78] since it enables states to reach property that could traditionally be sheltered by various loopholes.[79] The provision was a response to the many asset transferring or sheltering mechanisms that have been promulgated since Medicaid's inception.[80]

### C. *The Use of TEFRA Liens*

In an effort to make estate recovery even more efficient, states are also authorized to attach liens to property belonging to Medicaid long-term care recipients while they are still alive.[81] However, liens may only be attached in certain specific circumstances.[82] Most significantly, the state may not attach a lien if a spouse or dependent child is still living.[83] In all other situations, the state must first make a showing that the Medicaid beneficiary is not reasonably expected to be discharged from the long-term care facility.[84] However, even under these circumstances, additional

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78. *See supra* Part II.

79. For a thorough discussion of one of the boldest loopholes, fraudulent divorce, see Michael Farley, Note, *When "I Do" Becomes "I Don't": Eliminating the Divorce Loophole to Medicaid Eligibility*, 9 ELDER L.J. 27 (2001).

80. The evolution of mandatory and more effective estate recovery programs has significantly restricted Medicaid estate planning. OBRA 1993 increased the penalties that could accrue as a result of unqualified asset transfers, reduced the ability to qualify for Medicaid despite receiving trust income, and further empowered states to seize assets that are discovered in the Medicaid recipient's estate after death. Kristin A. Reich, *Long-Term Care Financing Crisis: Recent Federal and State Efforts to Deter Asset Transfers as a Means to Gain Medicaid Eligibility*, 74 N.D. L. REV. 383, 391 n.62 (1998).

81. One author explained the key difference between estate recovery and TEFRA liens:

> They are both governed by different restrictions and have different ramifications for the recipient. The lien is merely a security interest in a future recovery placed on the recipient's property while that person is still alive, whereas the estate recovery claim is "a bill presented to the heirs," requiring present payment.

Zieger, *supra* note 37, at 370-71.

82. Liens may also be attached if the state determines, following a proceeding, that the state has paid Medicaid benefits that the recipient was not authorized to receive. *See* 42 U.S.C. § 1396p(a)(1).

83. It is irrelevant whether the spouse or dependent child is residing in the home. *See id.* § 1396p(b)(2).

84. The state must conduct this in a manner that comports with due process requirements:

> [A] medical determination must be made that the recipient cannot reasonably be expected to return home. This requires that the recipient receive notice of the

familial protections further limit the state's ability to attach liens to property. If the Medicaid beneficiary's sibling or adult child resides in home, and has lived there for a certain length of time before the Medicaid beneficiary was admitted to the long-term care facility, the state cannot place a lien on the property.[85]

Once a lien has been attached, the state will foreclose against it if the Medicaid beneficiary attempts to alienate the property, such as through sale or gift.[86] Otherwise, the state will foreclose at the time of the Medicaid beneficiary's death.[87] If, however, the recipient is discharged from the long-term care facility, the lien will be automatically removed from the property.[88]

### D. *The Provision of Hardship Waivers*

Beyond spousal and dependent-child exceptions, estate recovery programs may also protect surviving family members under certain other circumstances. States must provide for "undue hardship" waivers.[89] However, while the federal government requires that states provide waivers,[90] it did not define "undue hardship" in OBRA 1993. Instead, the federal enactment vaguely instructs states to "establish procedures in

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> determination and that a hearing comporting with traditional notions of substantive due process be made available to the recipient. Furthermore, the notice must explain what is meant by the term lien and indicate that imposing a lien does not mean that the individual will lose ownership of the home. The hearing is conducted according to state procedures established as part of the state Medicaid plan pursuant to federal regulation. The burden of proof rests with the state to show that the recipient will not likely be discharged from the institution.

Zieger, *supra* note 37, at 372. This provision is found in 42 U.S.C. § 1396p(1)(B)(i).

85. These protections are found in 42 U.S.C. § 1396p(b)(2)(B)(i)-(ii). The Medicaid beneficiary's sibling must have resided in the home for at least one year prior to admission to a long-term care facility. In the case of the adult child, however, further conditions must be met. The child must have lived in the Medicaid beneficiary's residence and he or she must have provided care to his or her parent for at least two years prior to admission to a long-term care facility. The care provided must have forestalled admission to a skilled facility. In this manner, the law essentially rewards families who are able to provide care in a more cost-effective manner.

86. *Id.* § 1396p(b)(1).

87. *See id.* § 1396p(a)(1).

88. *See id.* § 1396p(a)(3).

89. *See* 42 U.S.C. § 1396p(b)(3).

90. *See* Johnson v. Guhl, 91 F. Supp. 2d 754, 769 (2000) (finding that "[t]he use of the word 'shall' in § 1396p(c)(2)(D) makes the 'undue hardship' exception mandatory rather than precatory. "The language succinctly sets forth a congressional command, which is wholly uncharacteristic of a mere suggestion or 'nudge'").

accordance with standards specified by the Secretary [of each state's agency that oversees Medicaid programs] under which the agency shall waive [estate recovery] . . . if such [recovery] would work an undue hardship on the basis of criteria established by the Secretary."[91] As a result of this rather hazy directive, hardship criteria vary significantly by state.

In most states, hardship waivers are based on "unduly restrictive" criteria, so that very limited protections actually exist.[92] In some highly restrictive states, hardship waivers are only granted where the home is of very modest value, or where the home is the principle source of income for heirs.[93] In these states, a surviving nontraditional family member would

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91. 42 U.S.C. § 1396p(b)(3). In addition, there are some procedural regulations imposed upon states by the Health Care Financing Administration (HCFA):

> According to section 3259.8(C) of the [HCFA] guidelines, the state has "considerable flexibility in deciding the circumstances under which [the state] will not count funds in trusts under the trust provisions because of undue hardship." Under the undue hardship provision, however, the state must, at a minimum, provide for "notice to recipients that an undue hardship exception exists; [a] timely process for determining whether an undue hardship waiver will be granted; [a] process under which an adverse determination can be appealed." Section 3259.8(c).

*Johnson*, 91 F. Supp. 2d at 769.

92. The phrase was used to explain Vermont's approach to the "undue hardship" determination. Saunders & Hall, *supra* note 70, at 31. That state permits officials to forego estate recovery in the following instances:

> (1) when the deceased Medicaid recipient's sibling lived in the recipient's home for at least one year prior to the decedent's date of admission to long-term care, the Department will not seek recovery from the estate if doing so would dispossess the sibling of his/her interest in the home . . . (2) . . . when a son or daughter lived in the Medicaid recipient's home for at least 2 years prior to the date of the recipient's admission to long-term care, and also provided care to the recipient which permitted him/her to remain at home and avoid admission to a long-term care [facility] for a longer period than would otherwise have been possible . . . (3) . . . if the only funds that can be recovered from the Medicaid recipient's estate are assets which serve as the sole source of income for the decedent's immediate family, such as a family farm or business . . . . (4) . . . if liquidation of income-producing assets to satisfy the Department's claim would result in the decedent's immediate family needing to apply for public assistance.

*Id.* at 32 (citations omitted).

93. The Federal Health Care Financing Administration (HCFA) published a state manual which recommends that states give hardship consideration when: "the estate subject to recovery is (1) the sole income-producing asset of the survivors, (2) a homestead of modest value, or (3) other compelling circumstances exist." *In re* Estate of Cox, 180 Misc. 2d 83, 85 (1999). The latter

not be able to claim a hardship that comes within the state's guidelines. Even among those states that have adopted more comprehensive standards for determining hardship,[94] the lists of factors rarely contain provisions that would protect nontraditional family members in the same manner that spouses are protected.[95] Additionally, courts and legislatures have been

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provision seems to suggest that the federal government envisaged a much broader hardship waiver, but states have typically adopted much more narrow standards.

94. *See, e.g.*, California has one of the most comprehensive sets of standards for determining whether a hardship waiver should be granted. *See* CAL. CODE REGS. tit. 22, § 50963(a)(1)-(6) (2004) (providing six factors that may be taken into account by California officials in determining whether an "undue hardship" exists). The list includes:

> (1) When, without receipt of the proceeds of the estate, the applicant would become eligible for public assistance payments and/or medical assistance programs; or, (2) When allowing the applicant to receive the inheritance from the estate would enable the applicant to discontinue eligibility for public assistance payments and/or medical assistance programs; or, (3) When the estate property is part of a business, including a working farm or ranch, and recovery of medical assistance expenditures would result in the applicants losing their sole means of livelihood; or, (4) When any aged, blind or disabled individuals who have been continuously living in the decedent's home for one year or more, and continue to reside there, would have difficulty obtaining financing (such as a home equity loan) to repay the State; or, (5) When the applicant transferred the property to the decedent for no consideration; or, (6) When equity in the real property is needed by the applicant to make the property habitable, or to acquire the necessities of life, such as, food, clothing, shelter or medical care.

*Id.*

95. Some states have adopted very vague language. Since large bodies of case law have yet to develop, there is little interpretive material available and citizens cannot reasonably predict whether their particular situation would come within the state's definition of an "undue hardship." The decision, therefore, will typically rest with bureaucrats who also may lack interpretive guidelines. The Arkansas undue hardship test's final prong, even when read against the complete section, is an exceptionally vague standard:

> (A) The estate asset subject to recovery is the sole income-producing asset of the beneficiaries of the estate; (B) Without receipt of the proceeds of the estate, a beneficiary would become eligible for federal or state benefits; (C) Allowing a beneficiary to receive the inheritance from the estate would enable a beneficiary to discontinue eligibility for federal or state benefits; (D) The estate 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 beneficiary's death; or (E) *There are other compelling circumstances.*

ARK. CODE ANN. § 20-76-436 (Michie 2003) (emphasis added).

very reluctant to establish guidelines for handling cases that suggest a different form of hardship not envisaged by lawmakers.[96]

However, one rare exception, the Pennsylvania estate recovery program, does provide a set of undue hardship factors that could conceivably protect a surviving nontraditional family member if the surviving member has lived with and cared for the decedent. In many cases, nontraditional families will come within the language of the statute because the parties have cohabited for the requisite period of time and the surviving member was a source of pre-institutionalization care.[97]

## V. THE IMPACT OF STATE MODELS OF IMPLEMENTATION ON NONTRADITIONAL FAMILIES

As the preceding sections explain, mandatory estate recovery advances the important governmental purposes of maintaining the ability to provide for the poor and discouraging middle class reliance on Medicaid. However, these goals have been expressly limited since they must yield to the governmental interest of preventing spousal impoverishment or

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96. *See, e.g., In re* Estate of Frink, No. 21744-2-III, 2003 Wash. App. LEXIS 3103 (Wa. Dec. 30, 2003) (interpreting the hardship waiver provisions strictly, and finding that an applicant for a hardship waiver in Washington state did not meet the statutory requirements. While the applicant was impoverished due to already present financial and employment problems, these difficulties were not caused or worsened by the state's recovery efforts. The waiver would only be provided if the actual estate recovery efforts were the cause of all or a significant portion of the applicant's impoverishment).

97. The Pennsylvania regulations regarding hardship waivers would seem to protect a surviving nontraditional family member in at least some circumstances:

> (b) The Department will find undue hardship and will permanently waive its claim with respect to the primary residence of a decedent if the person requesting the undue hardship waiver mets all of the following conditions:
> (1) The person has continuously resided in the primary residence of the decedent for at least 2 years immediately preceding the decedent's receipt of nursing facility services, or, for at least 2 years during the period of time which Medicaid-funded home and community based services were received.
> (2) The person has no other alternative permanent residence.
> (3) The person has provided care or support to the decedent for at least 2 years during the period of time that Medicaid-funded home and community based services were received by the decedent, or for at least 2 years prior to the decedent's receipt of nursing home services during which time the decedent needed care or support to remain at home.

55 PA. CODE § 258.10 (2004). Clearly, a surviving nontraditional family member could demonstrate that he or she meets all three criteria.

hardship to dependents. The legislation specifically provides that recovery cannot take place so long as a spouse or dependent child is alive.[98] This, too, reflects a commendable legislative purpose. There is tremendous sorrow upon the passing of one's spouse; consequently, for moral and public accountability reasons it would be unacceptable for the state to step in and force a sale of the marital home.[99] Similarly, from an economic efficiency standpoint, the state has an interest in keeping citizens off public assistance. A policy that seizes the principle assets of recently widowed senior citizens would clearly be irrational since it would likely drive many individuals into a state of poverty. However, these potential injustices and absurd economic outcomes do not only threaten the marital bond or traditional family unit. The spousal and dependent child exceptions only protect limited classes and therefore fail to consider the impoverishment and hardship potentially faced by surviving members of nontraditional families.

As the previous section revealed, the federal mandate leaves many details of estate recovery within the discretion of the states. It should therefore not be surprising that estate recovery programs vary considerably by state.[100] Programs differ in the type of property recovered, as well as in the manner in which it is acquired. Since this Note focuses on the impact of estate recovery efforts on nontraditional families, the following analysis divides state programs based on their potential to impact these families by divesting the family home.

### A. *State Programs that Retain a more Restrictive Definition of "Estate"*

As noted above, OBRA 1993 declares that states may expand the definition of estate to include

> 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.[101]

98. *See supra* Part IV and accompanying notes.

99. Indeed, state lawmakers were concerned about the negative public perception that this can create. *See* Brown, *supra* note 71.

100. *Id.*

101. 42 U.S.C. § 1396p(b)(4)(B).

Despite this authorization, the majority of states continue to use the traditional definition of "estate" for recovery purposes.[102] In these states, estate recovery efforts are confined to probate property, which includes all property that passes by will or intestacy.[103] Therefore, joint tenancy property, life insurance proceeds, and interests in trusts remain beyond the reach of estate recovery. As a result, the risks to surviving nontraditional family members are less significant.

Nontraditional families that own property in joint tenancy, or have placed the property in a trust arrangement,[104] would not be at risk for divestiture of the family home following the death of a family member who received Medicaid benefits for long-term care since the home would pass outside of the probate estate. However, nontraditional families are at risk if legal and equitable title to the home is held in the Medicaid beneficiary's name only. In that case, the entire home would pass through the probate estate, and the state could recover the asset regardless of the decedent's intended disposition as reflected in his will.[105] This harsh result could, however, be avoided if title is transferred at some earlier point.[106]

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102. For a state-by-state breakdown, see Harmuth & Kidder, *supra* note 69.

103. For example, North Dakota uses the following definition for estate recovery purposes: "property, whether movable or immovable, wherever situated, that would pass by intestate succession if the decedent died without a valid will." Frank, *supra* note 40, at 130 (quoting N.D. CENT. CODE § 30.1-05-02(1)(a)(7) (1999)).

104. However, in order to qualify for Medicaid benefits at the time of initial application, the trust arrangement would have to be established prior to the applicable lookback period. Otherwise, it will be deemed a gift, and the applicant will be assigned a penalty equal to the value of the transfer.

105. In contrast, if a home was titled in the name of only one legal spouse, then the spousal protection would still apply and the home could not be recovered until the surviving spouse's death.

106. However, any changes in home ownership must be accomplished long before nursing home needs become apparent, since title transfers for little or no consideration will be treated as gifts. This is particularly important for gay and lesbian couples, since property is often titled in one person's name, particularly if the two met later in life. For example, if Partner A has title to the home, but Partner B has been helping to pay the mortgage and other expenses for twenty years, the two may assume that there will be a way to ensure that Partner B retains the home if something should happen to Partner A. This is particularly true if the couple is unaware of Medicaid estate recovery laws. Once the couple does become aware of the laws, if Partner A decides to alter the ownership arrangement of the home, by either placing the entire home in Partner B's name or placing it in joint tenancy with B, he must do so before the three-year lookback period begins. Otherwise, he will not be eligible for Medicaid benefits for a period of nursing home care that equals the value of the transfer. Of course, the same strategy can also backfire. For example, assume the same couple wished to be proactive and Partner A placed the home in joint tenancy long before his own long-term care needs became apparent. If Partner B suddenly requires long-term care, the state will be authorized to recover against half of the home to recoup Medicaid benefits paid to B. This would be true even if Partner B were a new partner, who just moved into the home and never paid any amount of the mortgage. The law would consider the joint tenancy to be a gift

### B. *State Programs that have Adopted an Expanded Definition of "Estate"*

Following OBRA 1993, at least fifteen states have adopted an expanded definition of "estate."[107] A state has adopted an expanded definition if it pursues recovery from property that is not traditionally included within the probate estate. For example, although Maryland and Rhode Island technically use an expanded definition of "estate," this does not mean that either state recovers against all forms of property listed in OBRA 1993. Instead, these two states only recover against the probate estate, liquid assets that may have escaped probate, and limited types of personal property.[108] In states that have only expanded "estate" to include these other assets, nontraditional families could still protect the home through a joint tenancy arrangement.

In contrast, other states have adopted a significantly more comprehensive definition of "estate." For example, Idaho,[109] Iowa,[110] Massachusetts,[111] Minnesota,[112] and New Jersey[113] have explicitly adopted the recommended OBRA 1993 definition by including language that is remarkably similar to that legislation's definition of "estate."[114] In these

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made by A to B, and upon transfer B would be recognized as the legal owner of one-half of the home. At this point, the couple would also be precluded from reversing the joint tenancy and placing the property back into Partner A's name, since 42 U.S.C. § 1396p(c)(3) declares that co-owned property will be considered transferred if either person reduces or eradicates his or her share. As these examples demonstrate, there is no easy answer for gay and lesbian couples that wish to retain the home for the surviving partner.

107. The following states currently use an expanded definition of "estate": California, Connecticut, Iowa, Kentucky, Maryland, Massachusetts, Minnesota, Montana, Nevada, New Jersey, Oregon, Rhode Island, South Dakota, Washington, and Wisconsin. *See* Harmuth & Kidder, *supra* note 69.

108. *See id.*

109. *See infra* note 116 (providing a citation to, and full text of, the relevant Idaho code provision).

110. *See* IOWA ADMIN. CODE r. 249A.5 (2003).

111. *See* MASS. GEN. LAWS ch. 118E, § 31 (2004).

112. *See* MINN. R. 256B.15 (2003).

113. *See* N.J. STAT. ANN. § 30:4D-7.2 (West 2004).

114. IDAHO CODE § 56-218 (Michie 2003).

> [The estate includes 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 (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.

states, property held in joint tenancy would be subject to estate recovery, to the extent of the decedent's interest.[115] As this qualifier indicates, the state may only recover the decedent's share of the property.

The broadening of estate recovery to reach jointly held property significantly threatens countless families. In many families, property is held in joint tenancy with rights of survivorship as a means of ensuring survivors' rights to the home in the event of one owner's death.[116] Joint tenancies are premised on the common law theory that the decedent's interest in the property dissolves upon his death.[117] Families therefore enter joint tenancy arrangements with an expectation that the home will pass to survivors by operation of law. Given the overall lack of awareness about Medicaid policies in the general population, it is highly improbable that nontraditional families are aware that in some states, estate recovery programs can eradicate these protections. Therefore, when states adopt a fully expanded definition of "estate," they completely erode the traditional protections of a joint tenancy, as well as the expectations and hopes of parties who place homes in this form of concurrent ownership.[118]

Even though estate recovery against jointly held property only reaches the decedent's half interest, the recovery nonetheless poses considerable

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*Id.*

115. *See supra* text accompanying note 114. In the text of the Idaho statute provided, the parenthetical clearly establishes this proposition. Other states have adopted the notion of the expanded estate, but have not chosen to use OBRA 1993's recommended language. *See, e.g.*, IND. CODE ANN. § 12-15-9-0.5 (West 2004).

116. A brief description of joint tenancy property demonstrates the party's likely expectations:

> The main benefit of a joint estate can be found in the doctrine of survivorship, which maintains that "when two or more persons are seized of a joint estate, . . . the entire tenancy upon the decease of any of them remains to the survivors, and at length to the last survivor; and he shall be entitled to the whole estate, whatever it may be." While either party can sever a joint tenancy, neither party has the ability to bequeath property held by both parties in joint tenancy. This aspect also incorporates a probate avoidance feature, in that ownership of the property will pass to the surviving joint tenant as an operation of law without becoming part of the estate of the decedent.

Major Joseph E. Cole, *Introduction to Estate and Tax Planning Fundamentals*, 47 A.F. L. REV. 189, 201 (1999).

117. These basic notions of joint tenancy with right of survivorship are delineated in 20 AM. JUR. 2D *Cotenancy and Joint Ownership* § 21 (2003).

118. In this sense, the law essentially rewrites traditional property law. Frank, *supra* note 40, at 131-32 (discussing *In re* Estate of Jobe, 590 N.W.2d 162 (Minn. Ct. App. 1999), which held that the traditional rule of joint tenancy with right of survivorship did not invalidate the state's ability to recover against property jointly owned).

hardship on surviving nontraditional family members who consider the intact residence to be their home. First, the satisfaction of the state's demand will often require a sale of the property, since many seniors lack the means to effectuate a "buy out" by reimbursing the state from saved or borrowed funds. A forced sale, conducted on the state's terms, is not necessarily in the best interests of survivors; the real estate market may be at a lull or survivors may not have time to adequately prepare the residence for the market. In certain areas of the country, rising home values and tight real estate markets may render it impossible for survivors to purchase a new home with their remaining half-interest.[119] These financial realities could result in a forced relocation — away from place of employment, family, and friends. While the above examples assume that the home is previously unencumbered, the existence of a mortgage can further complicate matters.[120] Survivors, who in many cases will also be senior citizens, may no longer have employment income. In that case, they would most likely be unable to secure financing for a subsequent home.

Even more, the use of liens in some states to secure the state's interest in property introduces additional concerns when the state recovers against jointly owned property. The New Jersey administrative code authorizes that state's program to attach liens encompassing the entire value of jointly owned property.[121] Although eventual recovery is capped in proportion to

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119. For example, in some of the nation's most concentrated gay and lesbian communities (such as Key West, Florida, and San Francisco, California), home prices are already high and continue to rise at astounding rates. *See Housing Costs Rising Faster Than Income*, SUN-SENTINEL, May 26, 2002, at 1A ("Monroe County, home of Key West, has the most expensive housing in Florida. Workers can't find affordable places to live on the island. Monroe tops the state in average housing costs."); *Coldwell Banker Annual Study Finds $1.1 Million Variance for Same Property in Nation's Most Expensive and Most Affordable Markets*, BUS. WIRE, July 31, 2001 (discussing the results of a study comparing property values in over 300 American cities and metropolitan areas).

120. For example, the surviving partner may no longer be working, so that if he or she must pay off part of the mortgage with his or her half interest and then enter the real estate market to purchase a new home, he or she may no longer be able to obtain another mortgage.

121. N.J. ADMIN. CODE tit. 10, § 49-14.1(m) (2004). The statute provides, in pertinent part:

> Any lien filed on or after October 4, 1999 against an estate as described in (l)2 above shall describe the extent of the deceased Medicaid beneficiary's interest covered by the lien, if known to the Division at the time the lien is filed. For example, if a deceased Medicaid beneficiary at the time of his death owned real property as a tenant-in-common with another individual, the lien should state that it encumbers only 50 percent of the equity in the real property. *If the deceased Medicaid beneficiary held a tenancy-by-the-entirety or joint tenancy with a right of survivorship, then the lien shall state that it encumbers all of the property.*

the decedent's interest in the property, even a temporary encumbrance of the entire residence could be significantly burdensome to survivors. A lien clouds title, thereby impacting the owner's credit rating, and can potentially violate mortgage lender agreements, prevent owners from borrowing against the home, and limit the ability to freely alienate the property.[122] This is not to mention the discomfort that many individuals feel at the thought of potential liabilities.

Congress likely intended to prevent these emotional and financial strains when it drafted spousal and familial exceptions. Unfortunately, concern was not extended beyond the traditional family unit; as a result, nontraditional families residing in states that have adopted the expanded definition of "estate" are at particular risk for divestiture of a jointly owned family home.

## VI. OTHER AVAILABLE PROTECTIONS FOR NONTRADITIONAL FAMILIES

As the preceding sections revealed, state programs that have adopted the expanded definition of "estate" threaten nontraditional families most significantly. In these states, property held in joint tenancy can be recovered following the death of a Medicaid long-term care recipient. Nontraditional families are significantly less threatened in states that have not adopted the expanded definition of "estate," since these programs only recover against probate assets. Considering this problem of inequitable treatment in Medicaid estate recovery practices, the following discussion

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*Id.* (emphasis added).

122. The nature of a lien, and the threats, burdens, and obligations it necessarily places on a homeowner, is explained in the following passage:

> It stands as a charge upon [the homeowner's] property, a cloud upon the title to his real estate, a blot upon his character as a citizen, and yet it is claimed it is "due process of law," because if it is sought to enforce collection of such taxes by a suit in court the taxpayer will have notice of such proceedings, and may then defend against the prima facie case of guilt and indebtedness arbitrarily found against him. All the other summary remedies for collection provided by law are open to the treasurer, and may at any time be enforced; and, unless the taxpayer assumes the burden of removing the cloud upon his title and the lien upon his property by affirmative action, they stand as a menace to his credit and right of possession of his property, and as "due process of law" because of his right to notice and defense, provided the treasurer chooses to resort to the remedy of a suit in court.

Meyers v. Shields, 61 F. 713, 724 (N.D. Ohio 1894).

notes and discusses the various means by which individuals may avoid the harsh effects of these laws.

### A. *Universally-Applicable Protections Afforded Under State Homestead Exemptions*

Despite the significantly different treatment of traditional and nontraditional families by most estate recovery programs, and although many families are at risk of losing jointly owned family homes in those states that have adopted the expanded definition of "estate," other protections found elsewhere in the law can equalize somewhat the impacts of estate recovery on traditional and nontraditional families. Estate recovery programs in most states must yield to a statutory or state constitutional homestead protection. These provisions exempt all or part of the primary residence from attachment or seizure by creditors.[123] Since the law treats the state as a creditor for estate recovery purposes, homestead protections can substantially limit estate recovery efforts.[124]

Some states, such as Florida[125] and Texas[126] protect the primary residence in its entirety without reference to the home's economic value.

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123. Thus, the use of TEFRA liens would obviously be prohibited, just as outright estate recovery is impermissible in these states.

124. When an individual initially applies for Medicaid benefits, the home is not considered an asset for spend-down purposes. Therefore, when a Medicaid recipient dies, the home is often the only asset remaining in the estate. The federal government also recognizes this reality. In a report discussing successful estate recovery programs, the Department of Health and Human Services explained that the attachment of liens or outright sale of homes is an essential mode of recouping some of the Medicaid expenditures associated with long-term care. Brown, *supra* note 71. While the home is generally the most significant remaining asset, other commonly seized assets include "checking accounts, savings accounts, and personal needs funds of nursing home patients." *Id.*

125. FLA. CONST. art. X, § 4 (2003). The Florida homestead protection provides:

> There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, . . . the following property owned by a head of family . . . a homestead [and] personal property to the value of one thousand dollars . . . . The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child. The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the entirety with the spouse.

*Id.*

126. TEX. PROP. CODE ANN. § 41.002 (Vernon 2004) (codifying the Texas homestead exemption, providing protection for the homestead up to various acreages — depending on the use and nature of the property (i.e., rural vs. urban)).

In these states, estate recovery is essentially impossible since the home is typically the only asset remaining in a Medicaid beneficiary's estate.[127] Given that these protections apply to all homeowners, homestead laws in these states provide a universal protection against estate recovery, regardless of marital or familial status.[128]

However, in most other states, a weaker homestead provision leaves a substantially greater portion of the home within the grasp of estate recovery. In these states, the homestead provision typically protects only a fraction of the homeowner's equity in a principle residence.[129] The Uniform Probate Code recommends a homestead protection of $15,000,[130] while some states only shield up to $5,000 of equity.[131] Under these less protective homestead laws, estate recovery programs may attach and enforce against the home's value beyond the protected amount. Nontraditional families would be divested of the unprotected portion of the home, while the estate recovery program's familial exceptions would continue to protect the residence so long as a surviving spouse or dependent child is alive. Therefore, in many states, homestead laws do not provide sufficient protections for nontraditional families, and other protections are necessary.

### B. *Can Nontraditional Families Protect Themselves from the Harsh Effects of Estate Recovery Laws?*

One could argue that nontraditional families should be aware that many laws hinge on marital status; perhaps it is unreasonable to claim that yet

127. *See id.* One scholar explained the legislative history of the homestead protection, finding evidence that the amendment was passed in order to prevent Medicaid estate recovery in Florida. *See* Miller, *supra* note 32, at 596-97.

128. Indeed, Arizona's statutory homestead exemption, which protects up to $100,000 of equity in the homestead, articulates this point clearly: "Any person the age of eighteen or over, married or single, who resides within the state may hold as a homestead exempt from attachment, execution and forced sale, not exceeding one hundred thousand dollars in value . . . ." ARIZ. REV. STAT. § 33-1101(A) (2004).

129. For example, in California, a statutory homestead exemption protects graduated amounts of equity, beginning with $50,000 as the default amount. *See* CAL. CIV. PROC. CODE § 704.730 (West 2004). Higher amounts of equity will be protected if the home is owned by an elderly or disabled person, or if a "family unit" resides there. However, even in these circumstances, the highest amount of equity that the law will protect is $150,000, an amount that is significantly less than average home values in some of California's more costly metropolitan areas.

130. UPC § 2-402 recommends a homestead protection of only $15,000. In some states that protect the home to a certain dollar amount, a much higher ceiling is provided.

131. Alabama's homestead exemption protects only $5,000 of equity and up to 160 acres of land. *See* ALA. CODE § 6-10-2 (2004).

another example of the law's special treatment for married couples would lead to unfair surprise.[132] Since nontraditional families can sometimes obtain rights that turn on marital status through private contract, perhaps the obligation to protect against the harsh effects of Medicaid estate recovery should rest with those individuals who choose to reside in nontraditional family arrangements.[133] While a thorough examination of this position could form the basis of a separate article, the argument is simply not applicable here. As the following discussion reveals, there is no reasonable way for individuals in nontraditional families to protect against this particular law's harsh effects.

In theory, one way to avoid estate recovery is to simply avoid receipt of Medicaid long-term care benefits. However, this is much easier said than done. Although individuals have the option to purchase long-term care insurance or pay for services out of pocket, both alternatives are costly and beyond the reach of many families — particularly fixed-income retirees.[134] Hence, long-term care insurance and private pay arrangements are the exception, not the norm. Additionally, the long-term care insurance industry is highly unregulated, so that it is not even clear whether this investment would necessarily provide full protection when long-term care is needed.[135] Finally, while nontraditional families can place the home in special trust arrangements in order to avoid recovery, this would be classified as a transfer and must therefore be completed prior to the relevant lookback period. In addition, the lengthy lookback period renders this option unavailable to more recently formed nontraditional families, and also makes it difficult for families to predict in advance precisely how the property should be transferred in order to protect the home.[136] Finally, given the overall lack of long-term care planning that occurs in the general population, it may simply be unreasonable to expect meticulous advance planning from any particular population segment. For all of these reasons,

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132. *See supra* Part I.

133. *See id.*

134. *See supra* Part II.

135. For instance, an individual who has paid premiums for years can be refused coverage if, in the early and undiagnosed stages of dementia, she neglects to pay and the policy lapses. When this occurs, the senior would still have to turn to Medicaid despite her advance planning. For a fascinating discussion of fraud in the long-term care insurance industry, see Richard Alexander, *Avoiding Fraud When Buying Long-Term Care Insurance: A Guide For Consumers and Their Families*, *at* http://consumerlawpage.com/article/insure.shtml (last visited May 6, 2004).

136. This is because estate recovery programs are evolving every year, and new laws are emerging with each legislative session. Also, some trust arrangements may hinge on the couple's ability to correctly predict who in the family will eventually require long-term care.

the best solution is a legislative response, which is described in detail below.

## VII. RECOMMENDATIONS AND CONCLUSION

As estate recovery efforts become more systematic, seniors living in nontraditional family settings will invariably be impacted when loved ones pass away following Medicaid-funded long-term care. These seniors will not receive the protection from impoverishment and hardship that has been afforded to those who reside in traditional family settings. As discussed above, the homestead protection in most states only protects a portion of the home's value, and presently there are no reasonable means by which families can take proactive steps to protect the jointly owned home. Finally, most states' undue hardship criteria are either highly restrictive or overly vague, so that families cannot hinge financial well-being on this source of relief.

One way for Congress to remedy the inequitable impact of Medicaid estate recovery laws is to simply prevent recovery against the principal residence.[137] Following the example of homestead exemption laws, such a provision would be universally applicable and therefore not hinge on marital or familial status. However, this would be an overly broad solution to the problem, and would directly impair the ability of states to preserve and recoup already overstretched Medicaid budgets. The recovery of assets from the estates of decedent Medicaid beneficiaries advances admirable and necessary governmental goals by protecting the integrity and reach of the Medicaid program, and also discourages fraud and abuse by more affluent Americans. Since the home is often the sole asset of decedent Medicaid beneficiaries, it must be within the program's initial reach in order to make estate recovery worthwhile.

As another option, Congress could amend the law to expand provisions that postpone recovery beyond the spouse and dependent children. Such an amendment would protect nontraditional family members and postpone recovery until their death.[138] However, this is also a less desirable solution. In order to overcome the problems explored in this Note, the provision would need to include a very broad definition of "family member."

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137. Frank, *supra* note 40, at 143 ("One way to minimize the impact of estate recovery would be to exempt the homestead from recovery by recognizing that recovery of the home constitutes an undue hardship to the surviving family").

138. Thus, the surviving nontraditional family member would receive what is essentially a life estate in the home, and the state would recover the home upon the survivor's death.

Unfortunately, any definition broad enough to protect the myriad forms of nontraditional families would also be broad enough to invite substantial abuse by those wishing to postpone or avoid estate recovery for purely avaricious reasons.[139]

For these reasons, the soundest solution would be an amendment to the Social Security Act to require that states establish undue hardship criteria that would protect nontraditional families from immediate divestiture of the family home. A suitable undue hardship provision could either declare its application to nontraditional family members, or it can be modeled after the Pennsylvania example and simply list factors that would tend to protect surviving nontraditional family members.[140] The person or persons claiming protection under such a provision would receive the same treatment as a legal spouse or dependent child: the state would permit surviving nontraditional family members to continue residing in the home until death, and would recover the Medicaid beneficiary's share of the home from the estate of the last surviving claimant.

Since undue hardship can be determined through a quasi-judicial process, there is far less likelihood of abuse if the problem is addressed in this manner. In an administrative hearing, there is a greater opportunity for the state to conduct fact-finding and detect fraudulent claims. The individual claiming that he or she resided in and shared ownership of the home as a nontraditional family member could be required to take an oath in such a hearing, and the decision-maker would have an opportunity to review evidence brought forward by the survivor to demonstrate the existence of a familial bond. In such an inquiry, the factors considered by the *Braschi v. Stahl Associates*[141] court to determine whether two men in a same-sex intimate relationship constituted a family would be highly instrumental. The *Braschi* court explained that such a determination:

> should be based upon an objective examination of the relationship of the parties . . . [using] a number of factors, including the

139. Since the spousal and dependent child exemptions categorically preclude estate recovery, any Medicaid applicant could name his or her roommate, relative, or friend as a "nontraditional family member" in order to prevent any further estate recovery efforts by the state until that person's death. In essence, such a provision would give the Medicaid beneficiary a virtually limitless specific power of appointment over a life estate in the home, which he or she can exercise at the time of initial application for Medicaid benefits.

140. *See supra* text accompanying note 97.

141. 543 N.E.2d 49 (N.Y. 1989). In *Braschi*, the surviving same-sex partner asserted his right to remain in the couple's rent controlled apartment because although the apartment was only leased in the decedent's name, Braschi was a "family member" and therefore entitled to assume the lease. *See id.*

> exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society, and the reliance placed upon one another for daily family services.[142]

Thus, in an undue hardship hearing of this sort, the surviving nontraditional family member could demonstrate the existence of a connection that rises to a level deserving of special protection by bringing forward evidence that establishes most or all of the *Braschi* factors.[143] The risk of fraud would be significantly reduced, since it would be difficult for a more distant friend or associate to establish that he or she resided in the home and shared a familial relationship with the decedent.[144]

While the use of more comprehensive undue hardship criteria could provide some protections for nontraditional families, this is only one possible solution. Ultimately, Congress must recognize and resolve the problem of inequitable estate recovery laws in a manner that it deems most suitable. Nevertheless, a rapid response is needed. In the continued absence of protections for nontraditional families, it is not impossible to envision a scenario where, despite his best efforts to protect survivors through an express grant of survivorship rights, an ailing Medicaid beneficiary must suffer to know that upon his last breath loved ones may be left emotionally and financially devastated.

142. *Id.* at 55.

143. For instance, the surviving party could demonstrate that he resided in the home by introducing phone and utility bills into evidence, or by certifying that he has been receiving mail at the address for a certain length of time. Evidence of financial interdependency, such as joint checking accounts, shared purchases, and reciprocal wills or life insurance policies would also be demonstrative of a familial bond. Finally, the survivor can demonstrate the level of emotional intimacy by evidencing that the nontraditional family took vacations together, entrusted each other with confidential or sensitive information, and established bonds with each other's blood relatives.

144. In addition, the state could establish penalties for fraudulent claims.