

The Ultimate Guide to Probate

Overland Park, Kansas - June 29, 2015

The Ultimate Guide to Probate

Authors

Charles J. Andres
Stephen M. Johnson
Charles J. Andres, Attorney at Law
130 North Cherry, Suite 101
Olathe, KS

K. Kirk Nystrom
Nystrom Law Office
112 Southwest 6 Street, Suite 102
Topeka, KS

Mark A. Werner
Law Office of Mark Werner
201 S. Broadway Street
Suite C
Pittsburg, KS

Roberta L. Wilkes
Wilkes & Dunn
831 Armstrong
Kansas City, KS

The Ultimate Guide to Probate
V. Medicaid Estate Recovery Rules, Remedies and Appeals
Charles J. Andres, Presenter

- A. State and Federal Estate Recovery Regulatory Update
- B. Estate Hearings and Undue Hardship Waivers
- C. Exemption, Judicial Review and Additional Appeals

V. Medicaid Estate Recovery Rules, Remedies and Appeals

Charles J. Andres and Stephen M. Johnson¹

A. State and Federal Estate Recovery Regulatory Update

Medicaid is a federal need-based governmental benefit program administered by individual states. Medicaid's federal and state layers intertwine in an intricate web of federalism, so estate recovery is handled by the states as compelled by federal law. Medicaid's use has expanded greatly over its history, since being signed into law by President Lyndon Johnson in 1965, as Title XIX of the Social Security Act.² Medicaid's grand bargain is medical funds for the poor and other at risk or marginalized groups. The federal coffers pour money into the states' hands for distribution to Medicaid recipients. But this benevolence has a price: estate recovery and reimbursement. Many Americans have structured their finances for a Medicaid spend down, intentionally impoverishing themselves to receive government benefits, knowing that Medicaid will stake a claim in whatever remains of their trust or estate after death.

Irrevocable special needs trusts have risen prominently to facilitate this planning. An eligible beneficiary can start a first party, self settled special needs trust for herself, or a family member can start a third party trust or a pooled trust for the beneficiary's benefit.³ A first party special needs trusts must have a Medicaid payback clause, be irrevocable and in writing, and the beneficiary cannot be a trustee.

As the population ages and elderly patients often require more intensive and expensive medical care in their final years of life, Medicaid has been expanding, leaving state and federal governments increasingly intertwined in a financial tango.⁴ While some patients pay privately or use long term care insurance benefits, most patients rely on a combination of private and government insurance benefits to pay for their medical care. Many elderly patients battling chronic ailments or their final illnesses increasingly have

¹ Copyright, 2015, Charles J. Andres and Stephen M. Johnson. Andres and Johnson are members of the Kansas, Missouri, Kansas City, and Johnson County bars, and the Kansas City Estate Planning Society, and welcome correspondence at charlesjandres@cs.com and steve@johnsonlawkc.com.

² Thomas D. Begley, Jr. and Jo-Anne Herina Jeffreys, *Representing the Elderly Client: Law and Practice, Volume 1* (Wolters Kluwer, 2014), §9.01; Lawrence A. Frolik and Richard L. Kaplan, *Elder Law in a Nutshell* (West, 2014), §5.1; Mary R. McCormick & Christine A. Gilsinan, *Elder Law (Missouri Practice Series Vol. 41)*, Ch. 8 (2014).

³ First party special needs trusts spring from 42 U.S.C. §1396p(d)(4)(A). Pooled trusts work best for under \$100,000, where a trust could be uneconomical, to minimize administration costs. K.S.A. §58a-414; V.A.M.S. §456.4-414.1. Arcare, Inc., of Overland Park, Kansas, is a great nonprofit trustee for a pooled trust. By contrast, third party special needs trusts are not defined by federal law, but are used where first party trust criteria do not apply. Kansas practitioners drafting special needs trusts should consult Brian M. Vazquez, a Medicaid attorney with the Kansas Department of Health & Environment, on Medicaid estate recovery and drafting issues. The authors draw on an excellent presentation, "The ABCs of SNTs," by Bernard A. Krooks, Esq. (of Littman Krooks LLP, New York), from the 2015 Kansas City Estate Planning Symposium (April 23-24, 2015), on file with the authors.

⁴ See e.g. Michael G. Smith, "Legislative Update and Basic Definitions," *Medicaid, Medicate and Social Security Update* (NBI, 2013).

relied on governmental programs or benefits to pay for their medical care.⁵ And while Medicaid's recovery rules for these expenses are fairly recent, Kansas and Missouri's probate laws distinguishing these expenses in a decedent's estate follow a long standing tradition.

The Affordable Care Act (ACA)

Until the ACA's advent in 2010, Medicaid paid for medical care "for pregnant women, families with dependents, children, the blind, the elderly, and the disabled."⁶ The ACA broadened Medicaid's coverage, fundamentally transforming the Medicaid landscape in three ways.

First, the ACA wove expanded funding threads into the Medicaid tapestry for "States that agree to extend coverage to all individuals who [a] are under age 65 and [b] have incomes below 133% of the federal poverty line."⁷ The ACA made this new Medicaid funding thread mandatory, so the Court struck it down (by a 7-2 vote), since a "[s]tate that opts out of the ... expansion in health care coverage ... stands to lose not merely 'a relatively small percentage' of its existing Medicaid funding, but all of it."⁸ The Court found, to paraphrase the Old Testament sage Job, "the government giveth and the government taketh away," since under the ACA, "[a]ny State that refuses to expand its Medicaid programs is threatened with a severe sanction: the loss of all its federal Medicaid funds."⁹ The Court saw the ACA's Medicaid expansion thread¹⁰ as a scorpion's tale, threatening to whip around in a state's budgetary blind spot, effectively coercing a state, like "a gun to the [state's] head," to plunge towards insolvency (by accepting an unfunded Medicaid expansion) or forego Medicaid payments entirely.¹¹

Second, the ACA requires all states to use modified adjustment gross income to determine Medicaid eligibility.¹² This change seems uncontroversial.

Third, the ACA changed the federal income eligibility level from 37% of the federal poverty level to covering every person under age 65 with income below 133% of the federal poverty level.¹³ And according to a Congressional Budget Office analysis, the federal government would provide 100% of this Medicaid expansion's increased costs

⁵ This impulse towards government funded health care is not just American: since 1948, Great Britain's National Health Service has provided basic universal health care (or socialized medicine) to British citizens, similar to the Affordable Care Act's design for American citizens.

⁶ *NFIB v. Sebelius*, 567 U.S. ____ (2012), 132 S.Ct 2566, available at <http://www.supremecourt.gov/opinions/11pdf/11-393c3a2.pdf>, Joint Dissent, Slip Op. at 38 (citing 42 U. S. C. § 1396a(a)(10)).

⁷ 42 U. S. C. § 1396a(a) (10)(A)(i)(VIII).

⁸ *Sebelius*, Slip Op. at 51 (Roberts, C.J.).

⁹ 42 U. S. C. § 1396c; *Job* 1.21.

¹⁰ 42 U. S. C. § 1396c.

¹¹ *Sebelius*, Slip Op. at 51 (Roberts, C.J.). The Medicaid expansion forced states to: "either accept a basic change in the nature of Medicaid, or risk losing all Medicaid funding." *Id.*, at 59; see also *Sebelius*, Slip Op. at 41-42 and 28-48 *passim* (Scalia, Kennedy, Thomas, and Alito, JJ. Joint Dissent).

¹² 42 U.S.C. § 1902(3)(14)(A), 2107(1)(1)(E).

¹³ 42 U.S.C. § 1396a(a)(10)(A)(ii).

through 2016, then at least 90% of the increased costs for 2017 and future years.¹⁴ This cost shifting provision left some concerned that a time bomb funding gap between federal and state governments may now exist: Medicaid coverage is already a large portion of most states' budgets and some worry that the financial gravity of Medicaid's expanding cost universe could plunge many states' long term budgets over the cliff into an insolvency black hole.

Medicaid After the ACA

In the ACA's wake, as refracted through the *Sebelius* lens, each state has the option to expand Medicaid, and if the state elects to do so, proceed under the Medicaid rules as read through the ACA-*Sebelius* lens. Controversially, Kansas and Missouri have each elected not to expand their Medicaid coverage.¹⁵

Recovering Medicaid Funds from the Estate

Mandatory Medicaid estate recovery dates back to the Omnibus Budget Reconciliation Act of 1993, which compel states to recover "medical assistance" paid on a decedent's behalf.¹⁶ Since the start of Medicaid in 1965, states have always had the *option* of recovering money correctly paid to a Medicaid recipient from the recipient's estate.¹⁷ But in 1982, Congress changed the Medicaid recovery landscape with the Tax Equity and Fiscal Responsibility Act (TERFA), which allows Medicaid to bring a lien against a recipient's property for benefits incorrectly paid to a Medicaid recipient.¹⁸ A state's participation in the federal Medicaid program is optional, but once the state participates in Medicaid, the state must recover Medicaid money spent.¹⁹ Medicaid estate recovery rules follow a parallel idea to the I.R.S.' estate tax inclusion rules about what property is (or is not) in a Medicaid recipient's probate estate when they die.²⁰ But one Medicaid recovery statistic forebodes grimly, suggesting the program may not be very economical or effective – in 2004, about \$361.7 million was collected by all states in Medicaid estate recovery work, which was 0.789% of the nursing home spending that year.²¹

Medicaid's complex qualification rules are beyond this seminar's scope. But the Medicaid income or total assets thresholds for Kansas and Missouri are quite low.²²

¹⁴ *Sebelius*, Slip Op. at 45 (Scalia, Kennedy, Thomas, and Alito, JJ. Joint Dissent). 42 U. S. C. §§1396d(y), 1396d(y)(1).

¹⁵ Then again, the United States is a Republic composed of states (U.S. Const., Art. IV, §4), which are to be laboratories of democracy - as Justice Brandeis wrote: "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

¹⁶ Begley, *Representing the Elderly Client*, §9.01.

¹⁷ 42 U.S.C. §1396a(a)(18).

¹⁸ 42 U.S.C. §1396p(a)(1).

¹⁹ McCormick, *Elder Law*, §10:7.

²⁰ I.R.S. Code §§2031(a), 2033-2046.

²¹ Begley, *Representing the Elderly Client*, §9.01.

²² McCormick, *Elder Law*, §8:6; Mo. Code Regs. Ann. title 13, §40-2.200(2); 42 U.S.C. §1382a(a).

B. Estate Hearings and Undue Hardship Waivers

Kansas and Missouri have Medicaid recovery procedures, including estate hearings and undue hardship waiver methods.²³ Let's explore the landscape contours of these Medicaid recovery rules. While some rules or trends apply nationwide, the local rules have important nuances for attorneys to know.²⁴ State Medicaid recovery procedures see Medicaid benefits' end from their beginning.²⁵ When it comes to estate recovery litigation, "[v]ery few estate recovery claims are contested, and ... even fewer are successful."²⁶ States cannot impose a waiting period to establish residency for Medicaid.²⁷

1. Kansas Estate Recovery

Kansas law specifies individual eligibility rules for Medicaid benefits and the administrative regulations are read through the lens of Kansas law.²⁸ Kansas law views applying for and receiving Medicaid benefits as entering into a two-part contract for need-based medical care benefits. First, when a person applies for and receives Medicaid benefits, his or her "real and personal property or estate" is subject to recovery for any Medicaid amount paid for the person's care.²⁹ Second, by applying and receiving Medicaid benefits, the recipient allows Kansas to "use" liens on the recipient's assets, file "claims against the recipient's estate," make "agreements with [the recipient's] heirs," "and any other means of recovery allowed under" Kansas law.³⁰ As long as the medical assistance was paid on the recipient's behalf after June 30, 1992, Kansas has a claim.³¹

Kansas Estate Recovery Exceptions

The Kansas Department of Health & Environment's claim is restricted to medical assistance paid if the individual: (A) was 55 years or older or (B) was admitted as inpatient at a long-term care facility.³² So Kansas imposes some limits on what medical assistance it is eligible to claim from an estate. Kansas cannot file a claim to recover from an estate where: (1) the recipient's spouse survives at least 6 months after the recipient's death or (2) the recipient's disabled child³³ under age 21 survives at least 6 months after

²³ The authors thank S. Lynn Bayes-Weiner, Esq., for permission to use her research in this section. Her research has been adapted and expanded throughout this section.

²⁴ See Begley, *Representing the Elderly Client*, §§9.02-9.04 (national Medicaid estate recovery trends).

²⁵ The celebrated poet and 1948 Nobel Literature Laureate T.S. Eliot put it well: "What we call the beginning is often the end/And to make an end is to make a beginning/The end is where we start from." T.S. Eliot, *The Four Quartets*, "Little Gidding," (No. 4), V.

²⁶ Begley, *Representing the Elderly Client*, §9.01.

²⁷ McCormick, *Elder Law*, §8:2 (citing *Shapiro v. Thompson*, 394 U.S. 618 (1969) and *Edelman v. Jordan*, 415 U.S. 651 (1974)).

²⁸ K.S.A. §39-709 (Supp. 2014).

²⁹ K.A.R. §129-6-150(a) (as of Feb 28, 2014). Available at http://www.sos.ks.gov/pubs/register/2014/Vol_33_No_07_February_13_2014_p_133-184.pdf, p. 173.

³⁰ Id.

³¹ K.A.R. §129-6-150(b).

³² K.A.R. §§129-6-150(b)(1)(A),(B).

³³ K.A.R. §§129-6-85(b) or (c) (disability criteria).

the recipient's death.³⁴ If either of these exceptions applies, Kansas' claim against the Medicaid recipient is filed against the surviving spouse's estate.³⁵

Kansas Medicaid Liens

Since the Medicaid qualification level is quite low, a Medicaid recipient likely will not have much real or personal property in their own name. A lien can be placed on a deceased Medicaid recipient's real property before death.³⁶ Once the Medicaid recipient has died, Kansas has one year to impose a real property lien.³⁷

Perhaps a Medicaid recipient had done estate planning or elder law planning to move valuable property to a relative or someone else. If a Medicaid recipient's property interest ended or was transferred at death (e.g. tenants in common, joint tenants with rights of survivorship, pay on death, transfer on death, or via Will or Trust), Kansas can recover from that property interest too, but recovery is limited to the decedent's actual interest "immediate before" death.³⁸ So if the decedent made extensive deathbed transfers, these would be subject to estate recovery. But if the decedent made wise, long term, strategically planned transfers (including transfers outside Medicaid's 5 year look back window), those transfers would not be subject to estate recovery claims.

Estate Recovery in Probate

After death, all of a person's assets and liabilities becomes their probate estate.³⁹ Since any Medicaid recipient has granted the state a right to recover "medical assistance" paid in exchange for the Medicaid funds, the state becomes a creditor, so probate's creditor process is triggered.

A probate estate can be opened by (1) the decedent's family or heirs or (2) the decedent's creditors.⁴⁰ In the first scenario, the deceased Medicaid recipient's family petitions to open a probate estate. If the family opens the estate, the Kansas Estate Recovery Unit will file a first class creditor claim in the Estate.⁴¹ The state's claim is strong and has a high priority - only creditor claims for funeral expense reimbursement come before repaying the state's claim.⁴²

³⁴ K.A.R. §§129-6-150(c)(1), (2).

³⁵ K.A.R. §129-6-150(d).

³⁶ K.A.R. §129-6-150(e).

³⁷ K.A.R. §129-6-150(f). Cf. A creditor's 6 month deadline to file a probate claim. K.S.A. §59-2239.

³⁸ K.A.R. §129-6-150(g).

³⁹ Any attorney practicing probate law should consult the Kansas Probate Code (K.S.A. Ch. 59), the Kansas Probate Handbook, the Kansas Judicial Council Forms, and the seminal Kansas probate treatise by Samuel Bartlett, the Kansas Probate Code's author. Charles J. Andres and D. Michael Dwyer, eds., *Probate and Trust Administration After Death* (7th ed. 2008); the Kansas Judicial Council Forms (3rd ed. 2011) (available at http://www.kansasjudicialcouncil.org/publications/probate_forms3d.shtml); and Samuel E. Bartlett, *Kansas Probate Law and Practice* (5 vols., 1953 rev. ed.).

⁴⁰ K.S.A. §59-705(1) ("surviving spouse or next of kin"); K.S.A. §59-705(2) (creditors).

⁴¹ K.S.A. §59-1301 (creditor claim classes).

⁴² KEESM 1725.1; Begley, *Representing the Elderly Client*, § 9.10[A].

In the second scenario, if the family does not open the probate estate, then as a creditor, the Kansas Estate Recovery Unit has the right to open a probate estate⁴³, and will do so based on (1) the claim amount, (2) the estate's overall value, and (3) a cost benefit analysis.⁴⁴ As discussed above, the Kansas Estate Recovery Unit can file a claim against all the decedent's property owned immediately before death.⁴⁵

Having explored Kansas' estate recovery rules, now we switch gears and move across state lines to Missouri.

2. Missouri Estate Recovery

Missouri law provides for estate recovery from a Medicaid recipient's estate.⁴⁶ Missouri's has a seventh class claim as a creditor of the estate.⁴⁷ But Missouri law takes a different approach vis-à-vis Kansas law on making a probate estate claim. Where Kansas law gives the Kansas Estate Recovery Unit discretion to pursue claims, Missouri law expressly states [1] Missouri (via MO HealthNet) will not file the claim or [2] the Missouri Probate Court will not allow the claim if (1) the collection cost exceeds the claim or (2) collecting the claim would prevent the surviving spouse or dependents from receiving "reasonable care and support" from the decedent's estate.⁴⁸ Any federal claim is exempt from this Missouri statute.⁴⁹

Assuming Missouri's claim is large enough to pursue, MO HealthNet goes after the claim. MO HealthNet must show proof of the money spent on the decedent's behalf.⁵⁰ If Missouri decedent was enrolled in MO HealthNet at his or her death, before closing the probate estate, the estate's personal representative must file a release with the Probate

⁴³ K.S.A. §59-705(2).

⁴⁴ While an estate must be opened for the decedent's Will to be valid, many Medicaid recipients' estates would fall under Kansas' small estate affidavit procedure, K.S.A. §59-1507b, exempting estates with under \$40,000 in assets from the probate process. Cf. Begley, *Representing the Elderly Client*, §§9.05[B], 9.11[I].

⁴⁵ K.A.R. §129-6-150(g).

⁴⁶ V.A.M.S. §473.398.1 (West 2014 Supp.). The Missouri statute's design is "to allow specified state agencies to recover funds expended on behalf of deceased recipients." 4 Mo. Prac., Probate Code Manual § 473.398. See *In re Estate of Graham*, 59 S.W.3d 15 (Mo.App. W.D.2001). McCormick, *Elder Law*, Ch. 10 and §§10:8-10:12. There are two interesting points between Kansas and Missouri law: (1) Missouri names a much broader swath of potential service providers and (2) Missouri law covers earlier payments (January 1, 1978 vis-à-vis June 30, 1992).

⁴⁷ V.A.M.S. §473.398.2 (West 2014 Supp.) and V.A.M.S. §473.397(7) (creditor claim classes); Begley, *Representing the Elderly Client*, §9.10[A]; McCormick, *Elder Law*, §10:11.

⁴⁸ MO HealthNet is a division within the Missouri Department of Social Services, which works under the federal Social Security Act to ensure high quality medical care for low income, elderly, and other vulnerable groups of Missourians. MO HealthNet's website is (<http://dss.mo.gov/mhd/>). MO HealthNet began in 2007. McCormick, *Elder Law*, §8:1, n.1. V.A.M.S. §§473.398.3(1), (2) (West 2014 Supp.). Missouri law hones in on the collection cost and places the burden on the state and/or Probate Court to do the cost-benefit analysis as a threshold matter, not as one among several factors as Kansas does. Again, while preferring the surviving spouse and dependent's needs over the state's or other creditors is noble public policy, it seems odd that an estate which was small enough to qualify for Medicaid during the decedent's lifetime would be sizeable enough to provide "reasonable care and support" for the surviving spouse and dependents for any length of time. McCormick, *Elder Law*, Ch. 8.

⁴⁹ V.A.M.S. §473.398.5 (West 2014 Supp.).

⁵⁰ V.A.M.S. §473.398.4 (West 2014 Supp.).

Court Clerk a MO HealthNet release showing complete repayment unless MO HealthNet has waived some portion of the repayment.⁵¹

Claim Reduction

What if the decedent was on Medicaid and large amounts of money were spent on his or her behalf, much larger than the estate's value at death? Can a Medicaid estate recovery claim be negotiated down, or must an insolvent estate result? Kansas allows some flexibility, based on the claim amount, the estate's value, and other factors, as discussed above. Kansas Estate Recovery representatives have discretionary authority to can negotiate claims up to 20% off the value without further authorization. But any more negotiated reduction must be authorized by the head of the Kansas Estate Recovery Unit. By contrast, Missouri is less flexible.

Liens

While federal law mandates state estate recovery efforts and provides for notice, federal law defers to state law on collections and the actual estate recovery procedures.⁵²

Kansas Liens

The Kansas Department of Health & Environment can place a lien on a Medicaid recipient's property in two cases: (A) after the recipient's death, or (B) after 6 months of inpatient care, the Agency may make the determination that the recipient "cannot reasonably be expected to be discharged and returned home."⁵³ Kansas law defines "return home" as 90 days at home (where the lien would attach) without re-admittance.⁵⁴ When Kansas determines that a Medicaid recipient cannot "return home," the recipient's attending physician must fill out the Form ES3152.⁵⁵ Since the Medicaid recipient has due process rights, the state can only file the lien (option (B) above) after notice and an opportunity for a hearing have been given.⁵⁶ But if the Medicaid recipient does "return home," Kansas' lien is dissolved.⁵⁷

A Kansas lien can be enforced before or after the Medicaid recipient's death by filing a foreclosure action in the Kansas district court or probate court where the real estate is located.⁵⁸ But a Kansas lien can only be enforced: (1) after the surviving spouse's death, (2) when the decedent has no children aged 20 or less lives in the home, (3) when no blind or disabled adult child lives in the home, and (4) when the decedent's brother or sister does not live in the home, if they have lived there at least 1 year immediately before

⁵¹ V.A.M.S. §473.398.5 (West 2014 Supp.).

⁵² Begley, *Representing the Elderly Client*, §9.07.

⁵³ K.S.A. §§39-709(g)(4)(A), (B).

⁵⁴ K.S.A. §39-709(g)(4)(B).

⁵⁵ Available at

https://khap.kdhe.state.ks.us/kfmam/trainingDocs/LTCTrainingAcademy/FormsandMiscForms/ES-3152Medical_Assistance_Lien_10_04.pdf.

⁵⁶ K.S.A. §39-709(g)(4)(B). Begley, *Representing the Elderly Client*, §9.06 (Medicaid's federal notice requirements).

⁵⁷ K.S.A. §39-709(g)(4)(B).

⁵⁸ K.S.A. §39-709(g)(5)

the recipient is admitted into the “nursing or medical facility” and “has resided there on a continuous basis since that time.”⁵⁹

Missouri Liens

A Missouri lien may be imposed on a Medicaid recipient’s house unless: (1) the recipient’s spouse lives there, (2) the recipient’s child who is under 21 or is blind or permanently and totally disabled lives there, (3) the recipient’s sibling has (a) an equity interest in the house and (b) resided there for at least 1 year before the recipient was admitted into a nursing or medical facility, (4) the recipient is given notice of the lien, and (5) an individual who objects to imposing the lien is ineligible for medical assistance.⁶⁰

A Missouri lien may be imposed, but Missouri will not seek adjustment or recovery of the lien if: (a) the Medicaid recipient’s child over the age of 21 lives in the home and cared for the recipient continuously for 2 years immediately prior to the recipient entering the nursing or medical facility (and the child’s care allowed the Medicaid recipient to live at the house during that time), and (b) the child continues to reside there.⁶¹ For this exception to apply, the child must submit a “sworn affidavit” to the state proving these facts. The affidavit must be provided to the MO HealthNet Division, TEFRA Lien Recoveries, P.O. Box 6500, Jefferson City, MO 65102-6500 before the lien has been satisfied against the Medicaid recipient’s house.⁶²

Lien Foreclosure

A Missouri lien “does not affect ownership interest in a property until [the property] is [a] sold, [b] transferred, [c] leased or [d] upon [the Medicaid recipient’s] death ... at which time the lien is satisfied, subject to”: (A) any property sale costs paid first, (B) if the decedent’s probate estate is pending, lien repayment is subject to various fees, including personal representative fees and attorneys fees, (C) property maintenance and repair costs, and (D) the Medicaid recipient’s burial costs.⁶³

Hardship Waivers

At the federal level, the Omnibus Budget Reconciliation Act of 1993 requires Medicaid estate recovery be waived if recovery would be an undue hardship.⁶⁴ Hardship waiver criteria are left to the states.⁶⁵ In Kansas, a Medicaid recipient, recipient’s spouse, or surviving family may request a waiver from estate recovery or liens for undue hardship.⁶⁶

⁵⁹ K.S.A. §§39-709(g)(5)(A)-(D).

⁶⁰ 13 CSR §70-4.110(1)(D). Available at <https://www.sos.mo.gov/adrules/csr/current/13csr/13c70-4.pdf> (pp. 9-10); McCormick, Elder Law, §§10:3-10:6.

⁶¹ 13 CSR §§70-4.110(3)(A)-(D). The careful reader will see parallels to the federal government’s house transfer exemption for caregivers under Medicaid.

⁶² 13 CSR §70-4.110(3)(F).

⁶³ 13 CSR §§70-4.110(6)(A)-(B).

⁶⁴ 42 U.S.C. §1396p(b)(3); Begley, *Representing the Elderly Client*, §9.05[A]. The hardship waiver is a compassionate grace or mercy route, which avoids the emotionally charged (and arguably unjust) debtor relationships one reads about in Charles Dickens’ books or Victor Hugo’s *Les Misérables*.

⁶⁵ Begley, *Representing the Elderly Client*, §9.11[H].

⁶⁶ KEESM 1725.3

Kansas factors include: (1) type of assets involved, (2) availability of alternate means for satisfying the claim, (3) family actions which helped the decedent, especially when the family helped the decedent avoid or reduce medical care costs (saving Medicaid money), (4) impact of recovery action on the surviving family, (5) impact of recovery action on the decedent's business, and (6) other relevant factors. Missouri does not have a hardship waiver.

Estate Recovery Exemption with Qualified LTC Insurance Policy

Kansas and Missouri both have Long Term Care partnership programs where if a Medicaid recipient (1) has a specifically endorsed LTC policy, (2) after depleting the insurance payout, (2) may still qualify for Medicaid if they meet all other eligibility requirements, and (3) provides dollar for dollar asset protection.⁶⁷ Each dollar paid out for partnership insurance benefits permits the recipient to keep one dollar of assets if the recipient needs to apply for Medicaid.

Medicare, Social Security Disability Income (SSDI), Supplemental Security Income (SSI), and Veteran's Affairs (VA) benefits are important elder law benefits available to many Kansans and Missourians, and may be used to pay for medical care. But details of those benefits are beyond this paper's scope since states may not recover them from a decedent's estate. *Ceteris paribus*, an attorney could counsel a client to pursue these non-recoverable government benefits *before* (or in lieu of) pursuing recoverable Medicaid benefits.

C. Exemption, Judicial Review and Additional Appeals

An unfavorable legal decision usually makes its appellate journey from its first source in the district court, up to the second stage at the appeals court, and up to the third and final stage at the Supreme Court. Medicaid appeals are administrative law matters, so they are not handled via the usual appeals route. The Medicaid appeals process first involves a hearing before an administrative law judge or hearing officer, second, by the district court, and third, by the appeals court. Administrative law issues are distinguished from other legal issues since administrative law judges are executive branch officers, not judicial branch officers like most other judges. State administrative law judges are patterned off the federal administrative law model, which has generated considerable controversy as its decision making power and relevance has grown with the federal administrative/welfare state's evolution during the twentieth century.

The state must provide the Medicaid applicant with 8 things: (1) approval or denial within 30 days of receiving the applicant's Medicaid application; (2) adequate written notice of any actions, including: (a) the right to appeal, (b) the method for requesting a hearing, and (c) an opportunity to be represented; (3) if Medicaid benefits are denied, the hearing must be requested within 90 days of denial date and the Fair Hearing must be held within 30 days of request; (4) denial must include a reason and supporting citation; (5) if appealed within 10 days, then benefits must continue until a final determination is made; (6) the state carries the burden of proof; (7) applies to the applicant's general

⁶⁷<https://www.ksinsurance.org/ltc/policies.htm> (Kansas) and <http://www.partnershipforlongtermcare.com/missouri-partnership/index.html> (Missouri).

Medicaid eligibility as well as denial of a “medically necessary service,” and (8) a Fair Hearing must be accessible to people with disabilities and/or limited English proficiency.⁶⁸

Fair Hearing

A Medicaid recipient has a right to a “Fair Hearing” governed by the Federal Administrative Procedures Act.⁶⁹ The Supreme Court has held that public entitlements like Medicaid are a constitutionally protectable “property interest,” so a Medicaid recipient has a Fourteenth Amendment right to due process before Medicaid can be taken away.⁷⁰ Due process is the opportunity to be heard at the hearing “at a meaningful” time and manner.⁷¹ For a Fair Hearing to satisfy due process, three factors are weighed: (1) the private interest (degree of loss to the individual) that will be affected by an official action, (2) the risk of erroneous deprivation of the benefit interest through the official procedure used, and (3) the government’s interest (including fiscal and administrative burdens which a procedural requirement would entail).⁷² Various governmental actions may trigger lead to a Fair Hearing.⁷³ A Fair Hearing is required when the Medicaid application “is not acted upon with reasonable promptness.”⁷⁴ The practitioner should consult a leading elder law treatise in counseling clients with Medicaid Fair Hearings.⁷⁵

A Medicaid applicant may request a hearing by phone, but should confirm the request in writing.⁷⁶ The applicant has a right to receive the state’s file before the hearing and put on evidence at hearing. The Fair Hearing is the Medicaid applicant’s sole chance to present evidence and make a record for appeal. A Fair Hearing can be conducted by phone conference between the Medicaid applicant in the local office and the state hearing officer.

Notice of the Fair Hearing will be mailed to the Medicaid applicant at least 7 days before hearing. The applicant has the right to review the state’s file, but must request the file in advance.

Within 90 days of requesting the Fair Hearing, a decision must be made unless a continuance is requested.⁷⁷ Decisions must: (1) be in writing, (2) be based only on evidence introduced at the Fair Hearing, (3) include a right to promptly implement a decision favorable to the applicant, and (4) include a right to state court judicial review.

⁶⁸ If a state does not answer the application within 30 days of receipt, the applicant has a right to appeal. Begley, *Representing the Elderly Client*, §§10.03-10.04.

⁶⁹ Begley, *Representing the Elderly Client*, Ch. 10; 5 U.S.C. §554 (FAPA); McCormick, *Elder Law*, Ch. 9.

⁷⁰ *Goldberg v. Kelly*, 397 U.S. 254 (1970); Begley, *Representing the Elderly Client*, §10.11[C][2].

⁷¹ *Goldberg*, 397 U.S., at 267; *Armstrong v. Manzo*, 380 U.S. 545 (1965); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

⁷² *Mathews v. Eldridge*, 424 U.S. 319 (1976).

⁷³ V.A.M.S. §208.080.1; McCormick, *Elder Law*, §9:2.

⁷⁴ 42 U.S.C. §1396a(a)(3). Missouri follows this “reasonable promptness” theme: a Fair Hearing is available if the application lay dormant more than a “reasonable time” after filing. V.A.M.S. §208.080.5; McCormick, *Elder Law*, §9:2.

⁷⁵ See e.g. Begley, *Representing the Elderly Client*, Ch. 10.

⁷⁶ See e.g. McCormick, *Elder Law*, §9:3; V.A.M.S. §§208.080.4 - 208.080.5.

⁷⁷ Begley, *Representing the Elderly Client*, §10.06[A].

Even if the Medicaid applicant receives benefit approval, a Fair Hearing might still be a good idea. A Fair Hearing could be used to increase the spousal share and allow additional assets to be transferred to the community spouse⁷⁸

Medicaid Appeal

To avoid a Medicaid appeal, the applicant should (1) submit a good, valid Medicaid application the first time, (2) wait to apply, and assert a pre eligibility medical expenses demand to pay past medical bills if necessary, (3) respond promptly to all 10-day document requests from Medicaid caseworker, (4) request an extension if documents cannot be provided within 10 days that deadline (and ask the caseworker's supervisor for an extension if needed), (5) review the notice of adverse decision to identify the issues in dispute and the specific reason(s) for the decision, and (6) call the caseworker.

The state is not required to pay the applicant's appeal cost (including attorney's fees and costs), but the federal government matches often matches part of the state's appeal cost.⁷⁹

In some cases, the applicant might want to (1) request the appeal to preserve the date, but request the caseworker to reopen the applicant's file and make a redetermination, (2) work with the caseworker to request deadline extensions, and (3) focus on mastering the Income Maintenance Manual (IMM)'s detailed policies, which the caseworkers use.

Kansas

Kansas gives Medicaid recipients a right to appeal a notice of denial by filing a request for a Fair Hearing before an impartial hearing officer. To appeal, the Medicaid recipient must file a written request with the Office of Administrative Hearings, 1020 S. Kansas Avenue, Topeka, KS 66612 within 30 days of the written notice. If The Kansas Department of Health & Environment mailed the notice of denial to the Medicaid recipient, the Medicaid recipient is allowed 3 more days to file the request, for a total of 33 days to appeal.⁸⁰

Missouri

Missouri also gives Medicaid recipients a right to appeal.⁸¹ Missouri Medicaid applicants can appeal by requesting a Division of Medical Services Fair Hearing to challenge: (1) denials of prior approval for services, (2) denials of community based waiver services, (3) denials of applications for nursing home and intermediate care facility care, (4) service delays, (5) decisions refusing to pay for services already provided, or (6) other circumstances where the Medicaid recipient believes an error has occurred.⁸²

⁷⁸ IMM 1030.035.20.05. This strategy only works for a hearing officer or court, and requires proving that the "interest from the asset does not raise the community spouse's income to the minimum monthly maintenance needs allowance."

⁷⁹ Begley, *Representing the Elderly Client*, §10.10.

⁸⁰ K.S.A. §77-531.

⁸¹ See e.g. <http://www.alsopelderlaw.com/Firm-News/MQL-Advanced-Elder-Law-Medicaid-Crisis-Planning-and-Benefits-Restoration-5-29-2014.pdf>.

⁸² McCormick, *Elder Law*, §§9:8-9:9; V.A.M.S. §§208.100, 208.110.

In Missouri, after the Fair Hearing has occurred, the applicant can appeal the decision twice. First, the applicant can appeal to the Circuit Court. The Court's scope of review focuses on whether the agency's decision "is supported by competent and substantial evidence on the record as a whole."⁸³ The second and final appeal for the applicant is to the Missouri Court of Appeals. The Court of Appeals reviews and interprets the agency's decision under Missouri law.⁸⁴

Conclusion

We have surveyed the Medicaid estate recovery landscape and how Medicaid appeals work in Kansas and Missouri. This is a complex and oft changing area of law, and one where clients rely on the attorney's expertise, experience, and wise counsel to guide them through the Medicaid reimbursement labyrinth, along with the winding veins and intricately connected tissues of federal and state law. As we advise clients on the "Long Trail" of Medicaid benefits, estate recovery, appeals, and how it all relates to probate law, remember that "the trail is always new."⁸⁵

⁸³ *Collins v. Dept of Social Services, FSD*, 141 S.W.3d 501 (2004) (MO App SD).

⁸⁴ The Missouri Court of Appeals does not review the Circuit Court's decision. *Pollar v. MO Dept of Social Services, FSD*, 752 S.W.2d 466 (1988) (MO App WD). The Court of Appeals interprets the agency's action under V.A.M.S. §536.140.2.

⁸⁵ "The Long Trail," in Rudyard Kipling, *Complete Verse* (Doubleday, 1989), 164-166.