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Joint Committee on Finance

Paper #324

Estate Recovery (DHS -- Medical Assistance and Related Programs)

[LFB 2013-15 Budget Summary: Page 220, #9]

CURRENT LAW

Federal law requires state medical assistance (MA) agencies to recover costs of MA-funded services from the probate estates of deceased MA recipients of any age that were permanently institutionalized, and to recover costs of some services provided to all MA recipients over the age of 55. Federal law establishes limits and requirements for the amount and types of services that states may collect from estates, but, within those limits, states have options with respect to these collections. Current state law does not authorize DHS to collect from all types of assets, nor does it authorize DHS to maximize collections from estates to the extent permitted under federal law.

GOVERNOR

Increase funding by \$1,016,400 (-\$1,144,900 GPR, -\$2,630,300 FED and \$4,791,600 PR) in 2013-14 and by \$887,200 (-\$1,407,600 GPR, -\$3,071,000 FED and \$5,365,800 PR) in 2014-15, to reflect the net effect of: (a) administrative costs and increasing staff for the estate recovery program (\$508,200 GPR and \$508,200 FED in 2013-14, and \$443,600 GPR and \$443,600 FED in 2014-15 and 8.50 positions (4.25 GPR positions and 4.25 FED positions), beginning in 2013-14); and (b) reducing MA benefits funding due to anticipated increases in collections that would occur due to proposed statutory changes and staff increases (-\$1,653,100 GPR, -\$3,138,500 FED and \$4,791,600 PR in 2013-14 and -\$1,851,200 GPR, -\$3,514,600 FED, and \$5,365,800 PR in 2014-15).

Currently, DHS is required to recover amounts the state paid for certain benefits individuals received while they were enrolled in several MA-related programs ("recipients"), the

GPR-funded community options program, and the disease aids program (which are referenced as "clients" in the bill). However, statutory provisions relating to recoveries under these programs vary. The bill would make the recovery provisions consistent with each other (including the use of common definitions), make changes to the non-probate property recovery program so that it would apply to all types of assets, and renumber and change statutory references to these provisions.

The bill contains provisions to expand the Department's authority and ability to recover the cost of public assistance payments made on behalf of long-term care recipients from the estates of recipients and their spouses by: (a) defining "property of a decedent" to encompass all real and personal property to which the recipient held an interest including, upon the death of a surviving spouse, property to which the recipient held a marital property interest within five years before or during the individual's program eligibility; (b) authorizing DHS to recover the cost of all MA-eligible services provided to a long-term care program recipient, not just the cost of MA-eligible long-term care services; (c) changing the amounts recoverable from MA benefits provided through managed care organizations (MCOs), from the payments MCOs made to health care providers for services the recipient received, to the capitation payments DHS paid to the MCO to support services for the recipient; (d) voiding property transfers intended to hinder, delay or defraud the state from recovering MA benefits; and (e) limiting the amounts pooled trusts may retain to 30% of the amount in the recipient's trust immediately before the recipient's death. The statutory changes in the bill for these and other related provisions are summarized in more detail in the attachment.

These changes would apply to MA recipients in a long-term care program [(Family Care, IRIS (Include, Respect I Self-direct), Family Care Partnership, and PACE (the Program for All-Inclusive Care for the Elderly)], COP (the community options program) participants, and clients in the disease aids program.

DISCUSSION POINTS

1. These provisions are intended to improve the state's ability to recover costs of public assistance (primarily MA) individuals receive, and to make the state's estate recovery program more equitable.

Under current law, MA-eligible individuals who are knowledgeable about the state's estate recovery practices can take advantage of a number of legal and financial instruments to proactively take actions to avoid estate recovery and pass more of their assets on to their heirs or beneficiaries. DHS staff who work in this area believe that most individuals that take advantage of these instruments are those with the knowledge and finances to hire an attorney to assist them in protecting their assets from future recoveries, while those who do not or cannot seek legal assistance are often subject to the state's estate recovery requirements. The provisions in the bill that would expand estate recovery to the estate of a MA recipient's spouse, expand the definition of an estate, and void unrecorded and certain other transfers are intended to curtail some of the most common ways individuals try to avoid estate recovery.

DHS believes that all of the proposed changes are permissible under federal law, although it is possible that some would be subject to legal challenges. However, the Elder Law and Family Law Sections of the State Bar of Wisconsin have identified a number of provisions in the proposal that they believe would be in violation of federal law. Given the complexity of the changes to estate recovery in the bill, and their interaction with federal law, the Committee could delete the provisions and propose these items as separate legislation to be reviewed by a standing committee.

2. DHS notes that in most cases, the cost of benefits the MA program pays on behalf of recipients is well above the total value of the recipient's estate. For example, the average cost to the state MA program for providing care in a skilled nursing facility is approximately \$125 per day, or \$45,600 per year.

Types of Recoverable Assets

3. In most cases, individuals avoid estate recovery by setting up their estate so as to avoid probate. Probate is a legal process that is used to transfer assets from the estate of a deceased person to a beneficiary. Through the probate process, creditors can place claims on an individual's estate to collect their debts. Some assets are not subject to probate including property owned in joint tenancy or as survivorship marital property, life insurance (unless the estate is named the beneficiary or the named beneficiary does not survive the insured person), assets held in trust, and property subject to a payable-on-death (POD) or transfer-on-death designation. Creditors, including DHS, often cannot recover from assets that are not subject to probate. Under the bill, DHS would be able to recover from these assets, even if the assets have been transferred to another person.

4. In addition to expanding the definition of "property of a decedent" to include more types of assets that would be subject to estate recovery, the bill specifies the creation of new documents that would improve the Department's ability to collect from estates. Under current law, DHS often is not notified when a MA recipient's real property assets are transferred. The bill would create a new "request-for-notice" document that DHS would file with the register of deeds in the county where the real property is located. If any individual tried to transfer, encumber, or terminate an interest in real property for which DHS filed a request for notice, DHS would have to be notified. DHS would then be able to file any claim it has on that estate. Transfers, encumbrances, or terminations of interest would not be valid unless DHS determined that it had no claim on the property, which would prevent the transfers from taking place before DHS had an opportunity to recover its claim. Two other documents that would be created in the bill would permit DHS to terminate or clear the request-for-notice.

5. Although the bill would require county registers of deeds to file additional documents, the Department would pay county registers the current filing fee (\$30 per document) to support these filing costs. The Wisconsin Register of Deeds Association has expressed no significant concerns regarding implementing the proposed filing requirements.

6. To provide DHS additional authority to recover from these assets, the bill would permit DHS to obtain a lien against any real property, not just a home, and recover from those assets. DHS would also be able to provide to individuals holding property an affidavit containing notice of a claim for recovery and would be able to bring action to compel the individuals to

transmit the property. As under current law, DHS would not be able to enforce a lien or affidavit as long as the recipient's spouse or the recipient's child, if under the age of 21 or disabled, is alive.

The bill would also permit DHS to commence court action to void a transfer of real property if the transfer was made by an MA recipient or someone on their behalf and the following conditions applied: (a) the MA recipient was MA eligible at the time of the transfer, (b) DHS was not notified of the transfer, and (c) the transfer was made to hinder, delay, or defraud DHS from recovering for benefits paid on behalf of the recipient. If the court voids the transfer, the real property reverts to the MA recipient's estate, which allows DHS to recover from it.

7. The bill would establish new notification requirements for trustees of living trusts and special needs trusts. Specifically, for living trusts, if a settlor or the settlor's predeceased spouse was an MA recipient, a trustee would be required to provide written notice to DHS by registered or certified mail, within 30 days after the death of the settlor and before any property held in the trust is distributed. Trustees of special needs trusts would have to provide written notice to DHS by registered or certified mail within 30 days after the death of any beneficiary. The notice must include demographic information about the beneficiary or the settlor and the settlor's predeceased spouse, if any, information about how to file a claim, a copy of the trust document, and documentation supporting the value of the trust on the beneficiary's or settlor's date of death.

8. DHS indicates that in recent years it has seen an increase in the number of individuals over age 65 who create special needs trusts. These types of trusts are usually set up to provide care for groups of disabled individuals. The trusts are structured so that after one member of the trust dies, the deceased individual's trust holdings are retained by the trust to fund care for the other members of the trust. Recently these trusts have started drafting the trust language for MA recipients to prevent DHS from recovering the costs of MA services from the trust if the cost of the MA services the individual received exceeds the amount the individual held in the trust.

The bill would specify that special needs trusts and pooled trusts may retain no more than 30% of the balance in the individual's account and then only if the trust properly notifies DHS of the MA recipient's death and the amount the recipient held in the trust.

Marital Property

9. In addition to expanding the types of financial instruments from which DHS could recover, the bill would expand estate recovery to include the estate of the MA recipient's spouse. Under the bill, DHS could recover 100% of the former marital property that was or became marital property within five years before the MA recipient's enrollment in the program and is held in the estate of a recipient's spouse upon the death of the spouse. The spouse's estate would have the burden of proof to show that some property is not former marital property, and therefore not subject to estate recovery. Currently, DHS can only recover marital property in the form of a home if it is held in the recipient's estate and is not survivorship marital property, which automatically passes to the living spouse outside of probate.

10. DHS indicates that part of the rationale for the expansion of estate recovery to include the spouse's estate is that the state's spousal impoverishment rules allow the recipient's

spouse to keep these assets to prevent the spouse from becoming impoverished. However, once the recipient's spouse has died, these assets are no longer needed for this purpose, and therefore should be used to reduce the cost to state taxpayers, rather than be passed on to the spouse's heirs or beneficiaries.

11. Wisconsin's marital property laws specify that, unless documentation is provided to demonstrate otherwise, both spouses have equal ownership of most property either spouse acquires during their marriage. The primary exceptions are property either spouse owned before the marriage, property received as a gift or inheritance, or property classified as individual property through a marital property agreement.

12. The bill would create a presumption, refutable by clear and convincing evidence, that all of the property in the estate of the recipient's spouse is 100% marital property and therefore subject to the Department's estate recovery claims. DHS has not yet determined what documents individuals would need to provide to demonstrate clear and convincing evidence, but expects it would follow the same requirements that exist for divorces, death, creditors' actions against an individual or spouse, or for MA spousal impoverishment. Some examples of these documents include a copy of any marital property agreement, bank statements at the time of the MA recipient's death, income statements since the recipient's death, or tax returns.

13. Although the forms of documentation required for clear and convincing evidence may match existing documentation requirements in other state programs, all of the examples provided by the Department are situations in which the individual affected is providing their own documentation. In the case of estate recovery, the recipient's spouse may have to retain these documents for many years and then, after their death, their heirs or beneficiaries would have to provide the documentation to the Department. Spouses may not maintain the necessary records or heirs and beneficiaries may have difficulty locating them after the spouse's death.

14. In instances where a recipient's spouse mingles former marital property in the form of cash assets with cash assets they accrued after the recipient's death, DHS indicates it may apply a "marital out first" policy. By applying a "marital out first" policy, the Department would assume that the recipient's spouse spends the marital property assets before his or her individual assets, therefore DHS would not be able to recover from the spouse's estate if the spouse's estate can demonstrate the spouse spent an amount equivalent to the marital property assets the spouse held with the recipient. The bill does not specify how DHS would be required to treat these cases.

15. Under current law, other creditors, such as credit card companies and banks, can generally collect 100% of the marital property held in the estates of either spouse. The proposed changes would allow DHS to recover for MA benefits like other creditors collect for other debts.

16. It has been argued that collecting from the estates of an MA recipient's spouse could create an additional incentive for heirs and beneficiaries to take advantage of the MA recipient and his or her spouse. Since any property a spouse retains when the recipient enrolls in MA will be subject to estate recovery, heirs or beneficiaries may pressure both the recipient and the spouse to place their assets in the heirs' possession to maximize their inheritance. Currently, heirs and beneficiaries have less of an incentive to pressure the spouse to give them the couple's marital

property assets because those assets are not recoverable by the state. Considering the bill retains a look-back period of five years, it is unknown how many families would plan ahead and be inclined to make these choices.

17. It also might be argued that the proposed changes reduce the ability of low-income individuals to pass their assets on to their heirs. However, it could also be argued that these individuals are the individuals who are least likely to take advantage of these long-term planning strategies, which are primarily used by individuals and families with greater income and assets.

Recovery of Family Care Capitation Payments

18. The bill also makes changes to how the state recovers from the estates of former Family Care enrollees. Under current law, DHS recovers for the cost of the actual services the Family Care enrollee received. Under the bill, the state would recover the amount of the capitation payment that DHS made to the managed care organization to provide services to the enrollee.

19. Collecting payments for each service a former Family Care enrollee received requires more staff time than collecting amounts DHS paid in capitation payments. Currently, DHS has to identify each service with the help of the Family Care managed care organization. Then, after all of the services have been identified, DHS may respond to legal challenges from family members of the deceased recipient who dispute that the individual actually received all of the services DHS identifies. DHS notes it has had four challenges per month in the past year and three and a half challenges per month in the previous year.

20. Guidance from the Centers for Medicare and Medicaid Services (CMS) requires states to collect either the amount of the capitation payment paid for managed care, or a percentage of the capitation payment. DHS currently collects for the cost of services based on information from the Family Care managed care organizations, which is inconsistent with CMS's guidance.

21. It could be argued that recovering the full capitation payment from the estates of Family Care recipients is unfair. The Family Care capitation payment to managed care organizations reflects average costs of providing services -- some individuals receive services that cost less than the amount of the capitation rate and some individuals receive services that cost more than the capitation rate. Under the bill, some individuals would have more assets recovered from their estates than they received in services, while others would have less of their assets recovered from their estates than they received in services.

22. The state could choose to only recover a percentage of the capitation rate and still meet CMS guidance. However, the Department indicates that very few estates are sizable enough for it to fully recover even the costs of the services the individuals receive, which suggests few cases would be affected by the change.

Primary Fiscal Effects

23. If the Committee adopts these provisions, the funding in the bill should be adjusted to correct an error in the calculation of the estimated savings. Funding in the bill should be

increased by \$381,800 (\$131,800 GPR and \$250,000 FED) in 2013-14 and reduced by \$803,100 (-\$277,000 GPR and -\$526,100 FED) in 2014-15 (Alternative 1).

24. The largest source of the savings relates to the proposal to extend estate recovery to marital property real estate that is held in the estate of a recipient's spouse and real property held in joint tenancy. The estimate assumes that there are 3,982 married MA recipients receiving long-term care who owned a home, that approximately 4.56% of the spouses pass away each year, 76% of the deceased spouses never enrolled in MA themselves, and 90% of the spouses did not sell their homes for fair market value during the spouse's lifetime.

Based on these assumptions, real property would be collected from the estates of 124 spouses in 2014-15, but because the estate recovery provisions would not take effect until three months after the bill's general effective date, DHS would collect from 83 estates in 2013-14. On average, \$20,000 would be collected from each estate, so that a total of \$1,655,900 PR would be collected in 2013-14 and \$2,483,800 PR would be collected in 2014-15. Administrative costs and staff would increase by \$257,600 (\$128,800 GPR and \$128,800 FED) in 2013-14 and \$215,800 (\$107,900 GPR and \$107,900 FED) in 2014-15 to make these collections.

25. The estimate also includes recoveries from 25 and 28 transfer-on-death deeds in 2013-14 and 2014-15, respectively. The average recovery would be \$46,500 and the total amounts collected would be \$1,187,000 PR in 2013-14 and \$1,334,600 PR in 2014-15. To make these collections, administration costs would have to increase by \$608,000 (\$304,000 GPR and \$304,000 FED) in 2013-14 and \$511,600 (\$255,800 GPR and \$255,800 FED) in 2014-15.

26. DHS suggests that the fiscal estimate in the bill probably understates the amount of recoveries the Department would be able to collect as a result of these changes. It is also likely that total recoveries will grow in the future as the state population ages and more MA enrollees receive long-term care services.

ALTERNATIVES

1. Approve the Governor's recommendations and increase funding in the bill by \$381,800 (\$131,800 GPR and \$250,000 FED) in 2013-14 and reduce funding by \$803,100 (\$277,000 GPR and \$526,100 FED) in 2014-15 to reflect the correction identified in Discussion Point 23.

ALT 1	Change to Bill Funding
GPR	- \$145,200
FED	-276,100
PR	<u>421,300</u>
Total	\$0

2. Delete provision.

ALT 2	Change to Bill	
	Funding	Positions
GPR	\$2,552,500	-4.25
FED	5,701,300	-4.25
PR	<u>-10,157,400</u>	<u>0.00</u>
Total	<u>-\$1,903,600</u>	<u>8.50</u>

Prepared by: Grant Cummings
Attachment

ATTACHMENT

Summary of Estate Recovery Provisions

Definitions

Create the following definitions, as they relate to estate recoveries.

- a. "decedent" -- a deceased client (or recipient) or deceased nonclient (or nonrecipient) surviving spouse, whichever is applicable.
- b. "department" -- the Department of Health Services.
- c. "conveyance" -- written instrument evidencing a transaction and that satisfies statutory requirements for conveyances of real property.
- d. "fair market value" -- the price that a willing buyer would pay a willing seller for the purchase of real property.
- e. "fraudulent transfer" -- a transfer of title to real property for less than fair market value or a transfer of title to real property by a conveyance that is not recorded during the lifetime of the grantor in the office of the register of deeds of the county in which the real property is located.
- f. "grantee" -- person to whom the interest in land passes. Whenever consistent with the context, reference to the interest of a party includes the interest of the party's heirs, successors, personal representatives and assigns.
- g. "grantor" -- the person from whom an interest in lands passes by conveyance, including, without limitations, lessors, vendors, mortgagors, optioners, releasers, assignors and trust settlors of interest in lands. Whenever consistent with the context, reference to the interest of a party includes the interest of the party's heirs, successors, personal representatives and assigns.
- h. "long-term care program" -- any of the following: Family Care, IRIS (Include, Respect, I Self-Direct), Family Care Partnership, Program for All-Inclusive Care for the Elderly (PACE), and any program that provides long-term care services and is operated by DHS under a state plan amendment, waiver, or demonstration project.
- i. "nonclient surviving spouse" and "nonrecipient surviving spouse" -- any person who was married to a client (recipient) while the client (recipient) was receiving services for which the cost may be recovered and who survived the client (recipient).
- j. "property of a decedent" -- all real and personal property to which the client held any legal title or in which the client had any legal interest immediately before death, to the extent of that title or interest, including assets transferred to a survivor, heir, or assignee through joint

tenancy, tenancy in common, survivorship, life estate, living trust, or any other arrangement. Property of a decedent also includes all real and personal property in which the nonclient surviving spouse had an ownership interest at the client's death and in which the client had a marital property interest with that nonclient surviving spouse at any time within five years before the client applied for long-term care services, MA, the community options program (COP), and/or the disease aids program (aid for individuals with kidney disease, cystic fibrosis, or hemophilia) or during the time that the client was eligible for those services.

k. "public assistance" -- any services provided as a benefit under a long-term care program (Family Care, IRIS, Family Care Partnership, PACE), MA, COP, or the disease aids program that may be recoverable.

l. "recipient" -- a person who received public assistance.

Estates of Surviving Spouses

Specify that all property of a decedent (as defined above) that is included in the estate of a client or recipient or in the estate of a nonclient surviving spouse or nonrecipient surviving spouse is subject to DHS' claim. Create a presumption, which may be rebutted by clear and convincing evidence, that all property in the estate of the nonclient surviving spouse or nonrecipient surviving spouse was marital property held with the client or recipient and that 100 percent of the property in the estate of the nonclient surviving spouse or nonrecipient surviving spouse is subject to DHS' claim.

Currently, the state recovers for assets that are in the recipient's estate through the probate process, plus some, but not all, non-probate assets, which can be transferred administratively upon the death of an individual. Some non-probate assets pass to heirs free of any creditors' claims, including DHS claims for reimbursement of medical services.

Recovery for All Services for Long-Term Care Recipients Over Age 55

Authorize DHS to recover payments for all services provided to a recipient while the recipient was participating in a long-term care program.

Currently, DHS may only recover from the estate of a recipient for MA services paid on behalf of the recipient while the recipient resided in a nursing home, was an inpatient in a hospital and was required to contribute to the cost of care, or was over the age of 55. For individuals over age 55, DHS may only recover for services provided under a home and community-based waiver program, related hospital services, related prescription drug services, and personal care services.

Calculation of Recovery Amounts for Services Provided by MCOs

Specify that the amount DHS may claim against an estate of a recipient or an estate of a nonrecipient surviving spouse for services that are provided by a managed long-term care program funded by capitated payments is the amount of the capitated payment for the recipient.

Currently, by rule, for individuals enrolled in Family Care, DHS may recover the amount of the services the recipient received from the managed care organization (MCO), not the amount of the capitated payment DHS made to the MCO.

Voiding Certain Transfers of Real Property

Voidable Transfers. Specify a transfer of real property is voidable by DHS if all of the following apply: (a) the transfer was made by a grantor who was receiving or who received MA, or by someone on his or her behalf, during the time the grantor was eligible for MA; (b) DHS was not notified and was unaware that the transfer was made; and (c) the transfer was made to hinder, delay, or defraud DHS from recovering MA benefits that were paid on behalf of the grantor. Authorize DHS to commence an action in circuit court against the grantee to void the transfer. If the court voids the transfer, the title to the real property reverts to the grantor or his or her estate.

Presumption. Establish a presumption, that may be rebutted by clear and convincing evidence, that a fraudulent transfer made by a grantor while the grantor was eligible for MA was made to hinder, delay, or defraud DHS from recovering MA benefits that were paid on behalf of the grantor.

Burden of Proof. Provide that with respect to a fraudulent transfer made for less than fair market value, the burden of proof for establishing fair market value is on the grantee. Fair market value must be established through a credible methodology, which may include an appraisal performed by a licensed appraiser.

Inapplicable to Purchaser in Good Faith. Provide that voidable transfers are not voidable, if after the voidable transfer, the real property was transferred by a conveyance to a purchaser in good faith and for a valuable consideration, and the conveyance was recorded.

Applicability. Specify that transfers are voidable under these provisions if the transfer is made on or after the effective date of this section or the transfer was made before the effective date of the paragraph but the grantor is receiving MA on, or receives MA after, the effective date of these provisions.

Treatment of Real Property Owned by Certain Public Assistance Recipients

Creation of Documents for Recording. Require DHS to create a document entitled "Request for notice of transfer or encumbrance and notice of potential claim" ("Request"), which would require notice to DHS with respect to any transfer of title to, placement of an encumbrance on, or termination of an interest in, a property and which would provide notice that DHS may have a claim against the property on the basis of providing public assistance to an individual who has or had a legal interest in the property.

Require DHS to create a document entitled "Termination of request for notice of transfer or encumbrance and notice of potential claim" ("Termination") which would provide notice that, with respect to a property against which a "Request" has been recorded, no notice to DHS is

required when title to the property is transferred, an encumbrance is placed on the property, or an interest in the property is terminated.

Require DHS to create a document entitled "Certificate of Clearance" ("Clearance") which would provide notice that, with respect to property against which a "Request" has been recorded, but against which a "Termination" has not been recorded, DHS has no objection to the transfer of title to, placement of an encumbrance on, or termination of an interest in, the property, and that no notice to DHS is required in the future when those actions are taken.

Recording of Request for Notice and Termination of Request for Notice. Provide that whenever an individual becomes eligible for public assistance, and at any time during the time that an individual is eligible for public assistance, DHS may record a "Request" if the individual has any of the following ownership interests in real property: (a) current ownership interest in real property, including a marital property interest; or (b) at any time within the five years before the individual applied for public assistance or during the time that the individual is eligible for public assistance, a marital property interest in real property with his or her current spouse, if that spouse currently holds title to the real property. DHS must record the document in the office of the register of deeds of the county in which the real property is located. An interest in real property includes a vendee's or vendor's interest in a land contract or an interest in real property held in a revocable trust.

Provide that whenever DHS determines that, with respect to property against which a "Request" has been recorded, DHS no longer requires notice when title to the property is transferred, an encumbrance is placed on the property, or an interest in the property is terminated, DHS would record a "Termination" in the office of the register of deeds of the county in which the "Request" was recorded.

Disclosure of Request for Notice. Provide that if, in the course of a title search on real property, a title insurance company or agent finds that a "Request" has been recorded against the property but a "Termination" has not been recorded against the property, the title insurance company or agent must disclose that a "Request" has been recorded against the property in any report submitted preliminary to issuing, or in any commitment to offer, a certificate of title insurance for the real property.

Transferring, Encumbering, or Terminating an Interest in Property; Clearance by the Department. Specify that any person transferring title to, encumbering, or terminating an interest in property against which a "Request" has been recorded, but against which a "Termination" has not been recorded, must notify DHS of the proposed transfer, encumbrance, or termination. If, on the date that the person sends the notice, the recipient who had the ownership interest in the property when DHS recorded the "Request" is alive, the person may transfer title to, encumber, or terminate interest in the property with no further action by DHS. If the person is deceased, DHS must determine whether it has a claim against the property for recoverable amounts paid on behalf of the recipient. If DHS determines that it has no recoverable claim, DHS must issue to the person seeking to transfer title to, encumber, or terminate an interest in the real property, a "Clearance," which the person must record along with the instrument transferring title to, encumbering, or terminating the interest in the property. If DHS determines the claim is

recoverable, DHS must follow the procedure described below. Provide that transferring title to, encumbering, or terminating an interest in the property is not valid unless DHS issues to the person and the person records a "Clearance."

Procedure if the Department Has a Claim Against Real Property. Create a procedure for DHS to follow if: (a) DHS determines it has a claim against real property in response to a notice of proposed transfer, encumbrance, or termination of interest in the property; or (b) upon the death of a recipient whose surviving spouse has an ownership interest in real property in which the recipient had a marital property interest with that spouse at any time within five years before the recipient applied for public assistance or during the time that the recipient was eligible for public assistance, regardless of whether DHS recorded a "Request" with respect to the property.

Unless the property is being transferred by affidavit or through formal or informal administration of the recipient's estate, require DHS to send the person providing the notice or to the surviving owner of the property, whichever is applicable, a statement of claim that states all of the following: (a) DHS has a claim against the property that it intends to recover from the property; (b) the amount and basis for the claim; (c) that the person has a right to an administrative hearing which must be requested within 45 days after DHS sent the statement of claim, on the extent and fair market value of the recipient's interest in the property and how to request an administrative hearing; and (d) that the transferee of the recipient's interest in the property or the surviving owner of the property may request from DHS a hardship waiver and how to request a hardship waiver.

Provide that a person who receives a statement of claim from DHS is entitled to and may, within 45 days after DHS sent the statement of claim, request a departmental fair hearing on the value of the property and the extent of the recipient's interest in the property. The value of the recipient's interest in the property would be determined in the manner described below under "Value of Recipient's Interest."

Authorize DHS to recover against the property in the manner determined by DHS to be appropriate, including by placing a lien on the property. DHS may enforce a lien on the property by foreclosure in the same manner as a mortgage on real property. Retain current law provisions that prohibit DHS from enforcing a lien as long as the recipient's spouse or the recipient's child, who is under age 21 or disabled, is alive. Provide that if the recipient's surviving spouse or child, who is under age 21 or disabled, refinances a mortgage on the property, the Department's lien is subordinate to the new encumbrance.

Require DHS to release a lien that it cannot enforce because the recipient's spouse or child, who is under age 21 or disabled, is alive, if any of the following applies: (a) the recipient's surviving spouse or child, who is under age 21 or disabled, sells the property for fair market value during the spouse's or child's lifetime; (b) the recipient's surviving spouse or child transfers the property for less than fair market value and/or the transferee, or surviving owner sells the property during the spouse's or child's lifetime and places proceeds equal to the lesser of DHS' lien or the sale proceeds due to the seller in a trust or bond, and DHS is paid the secured amount upon the death of the recipient's spouse or disabled child or when the recipient's child, who is not disabled, reaches age 21.

Expand Types of Recoverable Property and Property Subject to Liens

Provide that property transferred by affidavit to or by an heir, trustee, or guardian is subject to DHS' right to recover amounts paid on behalf of the decedent or the decedent's spouse. Upon request, require the heir or trustee to provide DHS information about any of the decedent's property that the heir, trustee, or guardian has distributed and information about the persons to whom the property was distributed.

Expand the interests for which DHS may be assigned a lien, by the probate court or a personal representative closing an estate by sworn statement, from "home" to "real property, including a home" and/or "real property".

Provide that death benefits payable under a life insurance policy or an annuity are subject to the right of DHS to recover an amount equal to public assistance payments paid on behalf of the deceased policyholder or annuitant.

Consolidated Recovery Provisions Applicable to Public Assistance Programs

Create provisions relating to recovery of correct public assistance payments, using common definitions described above, that would apply to each public assistance program.

Recoverable Amounts. Create a presumption, which may be rebutted by clear and convincing evidence, that all property of the deceased nonrecipient surviving spouse was marital property held with the recipient and that 100% of the property of the deceased nonrecipient surviving spouse is subject to a DHS claim.

Authorize DHS to collect from the property of a decedent, by affidavit or by lien, amounts equal to services provided under public assistance programs and that was paid on behalf of the decedent or the decedent's spouse. However, retain conditions that DHS may recover from the property of a decedent only if the decedent (a) died after September 30, 1991, and (b) is not survived by a spouse or a child who is under age 21 or disabled.

Repeal two additional conditions that must apply in order for DHS to recover from the property of a decedent under current law: (a) no person files a petition for administration or summary settlement or assignment of the decedent's estate within 20 days of death; and (b) the value of the property subject to administration in this state left by the decedent, after payment of burial costs, does not exceed \$50,000.

Transmittal of Property Upon Receipt of Affidavit. Provide that any property of a decedent that is transferred by a person who has possession of the property at the time of the decedent's death is subject to the right of DHS to recover public assistance. Upon request, require the person who transferred the property to provide DHS information about the property of the decedent that the person has transferred and information about the persons to whom the property was transferred.

Require that an affidavit from DHS contain all of the following information: (a) that DHS

has a claim against property that it intends to recover from the property; (b) the amount and basis of the claim; (c) that the person may have a right to an administrative hearing on the extent and fair market value of the recipient's interest in the property, which must be requested within 45 days after DHS sent the affidavit; (d) how to request an administrative hearing; (e) that the person may request from DHS a hardship waiver, if the person co-owned the property with the decedent or is a beneficiary of the property; and (f) how to request a hardship waiver.

Recovery Against Real Property. Under current law, DHS is provided a lien in the amount that it may recover, under "Recoverable amounts" above, on any interest in the decedent's real property if all of the following conditions apply: (a) if the decedent died after September 30, 1991; (b) the decedent is not survived by a spouse or a child who is under age 21 or disabled; (c) no person files a petition for administration or summary settlement or assignment of the decedent's estate within 20 days of death; and (d) the value of the property subject to administration in this state left by the decedent, after payment of burial costs, does not exceed \$50,000. DHS is also provided a lien to recover on any interest in the decedent's home if conditions (a), (c), and (d) above apply.

The bill would require DHS be provided a lien if the decedent died after September 30, 1991, and removes reference to the other three conditions. The bill also expands the amount that DHS may recover through the lien from "any interest in the decedent's home" to "any interest in any property of the decedent that is real property, including a home".

Allowable Costs of Sale of Real Property. Provide that if any real property of a decedent has been sold after the death of the decedent, only the following reasonable expenses, if any, incurred in preserving or disposing of the real property may be deducted from the sale proceeds that DHS may recover: (a) closing costs of sale, including reasonable attorney fees of the seller, the cost of title insurance, and recording costs; (b) property insurance premiums; (c) property taxes due; (d) utility costs necessary to preserve the property; and (e) expenses incurred in providing necessary maintenance or making necessary repairs, without which the salability of the property would be substantially impaired. Provide that these expenses may only be deducted from the sale proceeds if they are documented and approved by DHS and they were not incurred while any other individual was living on the property.

Value of Recipient's Interest. Provide that, for purposes of determining the value of the recipient's interest in property of the decedent, all of the following apply. First, if the recipient held title to real property jointly with one or more persons other than their spouse, the recipient's interest in the real property is equal to the fractional interest that the recipient would have had in the property if the property had been held with the other owner or owners as tenants in common.

Second, if the recipient held title to personal property jointly with one or more persons other than their spouse, the recipient's interest in the personal property is equal to either the percentage interest that was attributed to the recipient when his or her eligibility for public assistance was determined or, if the percentage interest was not determined as part of an eligibility determination, the fractional interest that the recipient would have had in the property if the property had been held with the other co-owner or co-owners as tenants in common.

Third, if the recipient held a life estate in real property, the recipient's interest is equal to the recipient's percentage of ownership in property based on the recipient's age on date of death and calculated using the fair market value of the property and life estate - remainderman tables used by DHS to value life estates for purposes of determining eligibility for MA.

Fourth, a property's fair market value is the price a willing buyer would pay a willing seller for the purchase of the property. The burden of proof for establishing a property's fair market value is on the surviving owners or beneficiaries, or their representatives. Fair market value must be established through a credible methodology, which may include an appraisal by a licensed appraiser.

Fair Hearing. Provide that a person who has possession of any property of the decedent, or who receives an affidavit from DHS for transmittal of any property of the decedent, is entitled to and may, within 45 days after the affidavit was sent, request a departmental fair hearing on the value of the property and the extent of the recipient's interest in the property, if the property is not being transferred by affidavit or through formal or informal administration of the decedent's estate.

Action or Order to Enforce Recovery. Provide that if, after receipt of an affidavit, a person who possesses the property of a decedent does not transmit the property to DHS or timely request a hearing, DHS may bring an action to enforce its right to collect recoverable amounts from the property or may issue an order to compel transmittal of property. Any person aggrieved by an order issued by DHS may appeal the order as a Class 3 contested case proceeding by filing a request for appeal, within 30 days after date of order, with the Division of Hearings and Appeals in the Department of Administration. The date on which the Division receives the request for appeal would be the date of service. The only issue at the hearing would be whether the person has transmitted the property to DHS. The decision of the Division would be the final decision of DHS.

Provide that, if any person named in an order to compel transmittal of property fails to transmit the property under the terms of the order and no contested case to review the order is pending and the time for filing for a contested case review has expired, DHS may present a certified copy of the order to the circuit court for any county. The sworn statement of the Secretary of Health Services would be evidence of DHS' right to collect recoverable amounts from the property and of the person's failure to transmit property to DHS. The circuit court would, without notice, render judgment in accordance with the order. A judgment rendered by the circuit court would have the same effect and would be entered in the judgment and lien docket and may be enforced in the same manner as if the judgment had been rendered in an action tried and determined by the circuit court. Provide that these recovery procedures are in addition to any other recovery procedure authorized by law.

Rules for Hardship Waiver

Prohibit DHS from promulgating rules establishing standards for determining whether the application of estate recovery would work an undue hardship in cases involving claims against the estates of nonclient surviving spouses or nonrecipient surviving spouses.

Currently, DHS is required to promulgate rules establishing standards to determine whether the recovery of payments would work an undue hardship in individual cases. If DHS determines that recovery would work an undue hardship in a particular case, DHS is required to waive the recovery of payments in that case.

Trusts

Living Trusts. Provide that, notwithstanding a notice of a deadline for filing claims that the trustee has published in a newspaper, if a settlor of a living trust or if a predeceased spouse of a settlor of a living trust, at any time received any services provided as a benefit under a public assistance program, the trustee must provide written notice to DHS by registered or certified mail within 30 days after the death of the settlor and before any property held in trust is distributed. Specify that the notice must include demographic information about the settlor and the settlor's predeceased spouse, if any, information about how to file a claim, a copy of the trust document, and documentation supporting the value of the trust on the settlor's date of death.

Provide that after the death of a settlor who received, or whose spouse received, public assistance benefits, DHS may recover from the property held in a living trust immediately before the settlor's death, an amount equal to the public assistance paid on behalf of the decedent or the decedent's spouse. Specify that the deadline for DHS to file a claim for recovery is four months after the date of the trustee's notice for filing claims.

Within 90 days after the receipt of a claim for recovery from DHS, require a trustee to pay to DHS any amount that DHS may recover. If a trustee distributes the property from the trust before DHS makes a claim to the trustee for the recovery of public assistance payments, the trustee must provide DHS with information about the distributed property and to whom it was distributed or transferred. Provide that DHS is entitled to recover from the persons to whom the property was distributed or transferred.

Special Needs or Pooled Trusts. Provide that, notwithstanding a notice of a deadline for filing claims that the trustee has published in a newspaper, within 30 days after the death of a beneficiary under a special needs or pooled trust, the trustee must provide a written notice to DHS by registered or certified mail. Specify that the notice must include demographic information about the decedent, information about how to file a claim, a copy of the trust document, and documentation supporting the value of the decedent's property held in the trust on the decedent's date of death. Within 90 days after receipt of a claim from DHS, require the trustee to repay DHS for any MA paid on behalf of the decedent, as required under the terms of the trust.

Provide that if a trustee fails to comply with the notice and repayment requirements, the trustee is personally liable to DHS for any costs DHS incurs in recovering amounts from the property distributed from the trust before any repayment is made and for any recoverable amounts that DHS is unable to recover from persons to whom the property was distributed.

Provide that after the death of a beneficiary under a special needs or pooled trust, the trustee may retain up to 30% of the balance in the decedent's account, unless the trustee fails to

comply with the notice and repayment requirements above, in which case the trustee may not retain any of the balance in the decedent's account.

Reporting to the Department of Revenue and Recovery of Payments Through Tax Returns

Require DHS to certify to the Department of Revenue at least annually the amounts of assets that, based on notifications and other information received by DHS, DHS has determined that it may recover. The certification would be subject to the current requirements for such certifications and to a new requirement, created in the bill, that the determination was rendered as a judgment as described under "Action or Order to Enforce Recovery" above. DHS must also inform the person that it intends to certify to the Department of Revenue an amount that DHS determines to be due for setoff from any state tax refund that may be due the person.

Family Care Recovery Rules

Require that recovery of correctly paid payments for the Family Care benefit by liens, affidavits, and estates follow the process created in statute under the bill. Repeal current provisions that authorize DHS to use a process DHS establishes by rule.

Transfers More than 30 Years Old

Under current law, there is a provision that prohibits any person, the state, or political subdivision from commencing an action affecting real estate based on an instrument that was recorded more than 30 years before an action is commenced, unless a legal instrument or notice describing the claim is recorded with the register of deeds within 30 years after the instrument is recorded. If the notice or instrument is not recorded until after the 30 years, the claim is still effective, except with respect to the rights of the purchaser of the real estate or any interest in the real estate that was during the time between the end of the 30 years and the recording of the notice. The bill would make these provisions apply to DHS liens on real property.

Initial Applicability and Effective Dates

These provisions would take effect on October 1, 2013, or the 90th day after the bill's publication, whichever is later. Provisions relating to the recovery of long-term care payments and recovery of capitation payments would first apply to services individuals received on that effective date. Provisions relating to special needs and pooled trusts would first apply to pooled trusts that are created or modified on that effective date and to trustee notification requirements for deaths that occur on that effective date. Provisions relating to recoveries of public assistance from the property of a decedent would first apply to the recovery of public assistance provided to individuals who die on that effective date.