INDIANA MEDICAID ESTATE RECOVERY: THE RULES AND CHANGES TAKING PLACE

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DISCLAIMER

The information and recommendations in these materials are subject to constant change. Therefore, these materials should serve only as a foundation for further investigation and study of the current law and procedures related to Medicaid. All information contained herein should be carefully reviewed and should serve only as a guide. The author hereby disclaims any and all liability arising from or claimed to have arisen from reliance on the procedures and information set forth in these materials.

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INDIANA MEDICAID ESTATE RECOVERY:
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A. State and Federal Estate Recovery Rules and Regulations

(1) Overview

Federal law, 42 USC 1396p, and Indiana Code 12-15-9, require the State to seek recovery of any property or funds in the estates of deceased Medicaid recipients for Medicaid paid to the recipients during their lifetimes from the age of 55 until death. The Medicaid recipients and the recipients' authorized representatives are notified of this requirement at the time the Medicaid recipients apply for Medicaid benefits. The amounts recovered from recipients' estates are then used to provide benefits to present and future Medicaid recipients.

The total amount of Medicaid benefits paid on a recipient's behalf must be allowed as a preferred claim against the recipient's estate in favor of the State. This amount is payable after certain, limited funeral and burial expenses, certain expenses of the last illness of the recipient, and expenses in administering the estate, including attorneys' fees, as set forth in Indiana Code 12-15-9-1. Medicaid providers have up to one (1) year to file claims with Medicaid. The term "estate" as defined in IC 12-15-9-0.5 is broader than a decedent's probate estate. It includes all real and personal property and other funds or assets included in an individual's probate estate and any real or personal property conveyed through a non-probate transfer.

There are approximately 60,000 deaths in Indiana each year, and approximately 52,000 of these decedents are 55 years or older at the time of death. Since approximately one-fifth of the population in the state is on Medicaid, there are approximately 10,400 people in Indiana who die each year who were Medicaid recipients 55 years of age or older.

The Medicaid Estate Department of the Family and Social Services Administration has increased its efforts in locating open estates, and in locating property and other assets. It has also begun opening estates in cases where significant property or other assets have been located but no estate has been opened. In 2015, the State recovered $15,364,494, a significant increase over previous years, and is on pace to recover significantly more than this amount in 2016.

These materials outline the Statutes and regulations that apply to estate recovery, as well as the changes taking place at the state level.

(2) Probate Claims and Non-probate Transfers

At the time an applicant applies for Medicaid benefits, the applicant is given a Notice Regarding Rights & Responsibilities for Health Coverage. This Notice is included in these materials as Appendix A. Paragraph 19 of the Notice states, "Benefits paid on your behalf after you become fifty-five (55) years of age become a preferred claim against your estate. This claim has priority over all claims except prior recorded claims and taxes."

(a) Probate Claims

Whenever the Estate Recovery Department receives notice that an estate has been opened, the analyst will file a claim in the estate. As part of their research, if no notice has been received, the analyst will check both Mycase and Doxpop to see if an estate has been opened against which the claim can be filed. As discussed in more detail below, in cases where the estate recovery analysts have located significant property, funds or other assets, the Estate Recovery Department has started opening estates to recover these assets. Pursuant to IC 12-15-9-1, the affidavit of a person designated by the secretary to administer this section is evidence of the amount of the claim. Upon request, the State will also provide a claim itemization which lists all claims paid by Medicaid on behalf of the decedent.

(b) What is recoverable?

The State can seek recovery of all real and personal property and other assets included in an individual's probate estate or conveyed through a non-probate transfer. IC 12-15-9-0.5. The state can also seek recovery of any interest in real property owned by the individual at the time of death that was conveyed to the individual's survivor through joint tenancy with right of survivorship, if created after June 30, 2002 and sums due under an annuity contract purchased after May of 2005. As noted above, the term "estate" as defined in IC 12-15-9-0.5 is broader than a decedent's probate estate. It includes all real and personal property and other assets

included in an individual's probate estate and any real or personal property conveyed through a non-probate transfer.

A non-probate transfer is a valid transfer, effective at death, by a transferor who immediately before death had the power, acting alone, to prevent the transfer of the property by revocation or withdrawal and use the property for his or her benefit or apply the property to discharge claims against the transferor's estate. Common examples of non-probate transfers that are subject to estate recovery are real estate transfers by a Transfer on Death designation on a deed or through a revocable trust. It does not include transfer of an interest in a tenancy by the entireties real estate or payment of the death proceeds of a life insurance policy. IC 12-15-9-.05(b).

The types of property, funds and other assets that are subject to estate recovery include, but are not limited to, real estate owned by the recipient, funds in an annuity, bank accounts, retirement accounts, stocks, bonds, assets in a revocable trust, payments due the recipient on a promissory note, funds from a nursing home account, funds remaining in a Qualified Income Trust (QIT), also called a Miller Trust, U.S Savings Bonds, and excess funds from a prepaid funeral arrangement. The Estate Recovery Department does not generally seek recovery of funds or assets in an irrevocable trust or life estates retained in real property by the decedent.

(1) Prepaid funeral arrangements

In accordance with Indiana Code 12-15-2-17, Medicaid recipients who have prepaid burial or funeral trust arrangements must designate the State of Indiana or the recipient's estate to receive any remaining amounts after delivery of all services and merchandise under the contract as a prerequisite for Medicaid eligibility. Additionally, if the recipient assigned an insurance policy or policies to a funeral home or designated a funeral home as the beneficiary, any remaining amounts after delivery of all services and merchandise are to be paid to the estate or the State of Indiana.

(2) Qualified Income Trusts (Miller Trusts)

42 USC 1396p(d)(4)(B)(ii) requires that the State will receive all amounts remaining in a Qualified Income Trust upon the death of a Medicaid recipient up to an amount equal to the total medical assistance paid on behalf of the individual. Importantly, this statute does not limit the amount the State can recover to the amount of the benefits received after establishment of the Qualified Income Trust.

The payments made to the State from a Qualified Income Trust after the death of the Medicaid recipient can be made by a check, money order, or cashier's check payable to "Treasurer, State of Indiana," Estate Recovery Program, Indiana Family and Social Services Administration, 402 W. Washington St., W382 MS 7, Indianapolis, IN 46204.

(3) Special Needs Trusts

42 USC 1396p(d)(4)(A) provides that certain special needs trusts will not be counted as a resource in determining Medicaid eligibility if the funds remaining in the trust upon the death of the individual will be subject to recovery by the State. Specifically, the statute states that this will apply to "[a] trust containing the assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual." Trustees of these "d(4)(A) trusts" will only be able to pay taxes out of the trust after the trust beneficiary dies until Medicaid has been reimbursed for the amount it has been paid on behalf of the trust beneficiary. See I.C. 30-4-3-25.5.

These same rules will not apply to pooled trusts managed by a nonprofit association for a disabled person. The funds remaining in a pooled trust after the death of the trust beneficiary can be retained for other disabled persons. In the case of the ARC of Indiana Master Trusts, the ARC retains 50% of the balance left in the trust upon the recipient's death, and the remaining 50% is distributed to the State up to the amount of assistance paid to the recipient.

(4) Bank accounts

IC 32-17-11-17 states that a joint account belongs to the parties in proportion to the net contributions by each party to the sums on deposit. It is common for a Medicaid recipient to have a joint bank account with an adult child who assists them with paying bills and other financial matters. The accounts often consists of social security and pension payments. If the adult child has not made any contributions to the account, he or she does not have an ownership interest in the account. If the adult child did make contributions to the account, he or she as an ownership interest in proportion to the contributions made.

Although IC 32-17-11-18 states that the funds remaining on deposit at the death of party to a joint account belong to the surviving party or parties as against the estate of the decedent, the analysis does not stop there. IC 32-17-13-1 defines a non-probate transfer identical to the definition in the estate recovery statute, IC 12-15-9-0.5(b). Consequently, any transfer to the surviving parties of funds which they did not contribute is a non-probate transfer. And as discussed, a non-probate transfer is considered part of a recipient's estate under Medicaid law. Additionally, Indiana Code section 32-17-13-2, states that:

> [e]xcept as otherwise provided by statute, a transferee of a non-probate transfer is subject to liability to a decedent's probate estate for: *(1) allowed claims against the decedent's probate estate*; and (2) statutory allowances to the decedent's spouse and children; to the extent the decedent's probate estate is insufficient to satisfy those claims and allowances.

(emphasis added). Therefore, Medicaid may collect on joint accounts to the extent that the decedent's probate estate is insufficient and to the extent of the value of the non-probate transfer received. Ind. Code § 32-17-13-3.

(5) Wrongful death claims

IC 34-23-1-1 provides that the personal representative of the estate may maintain an action for wrongful death as long as the action is brought within 2 years, and the damages recovered for reasonable medical, hospital, funeral and burial expense shall inure to the exclusive benefit of the decedent's estate for the payment thereof.

The Estate Recovery Department routinely files claims in estates opened to prosecute a wrongful death action. In these cases, the State does not file a claim for all Medicaid assistance paid but only for medical, hospital, funeral and burial expenses paid by Medicaid relating to the wrongful death of the recipient age 55 or older.

(6) Survivorship actions

IC 34-9-3 provides for, among other things, the continuation of personal injury actions after the death of a party. In these actions, the decedent did not die from the personal injury sustained in the action, but from other, unrelated causes. For example, a resident in a nursing home falls and suffers a wrist fracture, and two years later dies from complications of pneumonia. The proceeds from a judgment or settlement of the action go into the decedent's estate.

Medicaid Estate Recovery has a claim against the estate for all Medicaid assistance paid to the recipient from age 55 until death. However, the State generally compromises these claims and accepts less than the full amount so that the heirs of the estate will receive some of the funds; otherwise, the heirs would have no incentive to pursue these cases and the State would obtain no recovery.

(7) Compromise and Settlement of Claims

When the State is seeking to recover from an estate, the claims may be compromised or settled. However, Indiana Code §4-6-2-11 allows for compromise only with approval from the Attorney General's Office and the Governor's Office. The Governor and Attorney General are given the power to make such compromise or settle the claim when they believe it is in the best interest of the State to do so.

In the case of the settlement of a wrongful death claim, IC 34-51-2-19 may also come into play. It states:

> If a subrogation claim or other lien or claim that arose out
> of the payment of medical expenses or other benefits exists in respect
> to a claim for personal injuries or death and the claimant's recovery

> is diminished:
> (1) by comparative fault; or
> (2) by reason of the uncollectibility of the full value of the claim for personal injuries or death resulting from limited liability insurance or from any other cause;
> the lien or claim shall be diminished in the same proportion as the claimant's recovery is diminished. The party holding the lien or claim shall bear a pro rata share of the claimant's attorney's fees and litigation expenses.
> *As added by P.L.1-1998, SEC.47.*

(3) Priorities and Exemptions

The Indiana Medicaid estate recovery statute is found at Indiana Code §12-15-9-1. It provides as follows:

> Upon the death of a Medicaid recipient, the total amount of Medicaid paid on behalf of the recipient after the recipient became fifty-five (55) years of age must be allowed as a preferred claim against the estate of the recipient in favor of the state. The affidavit of a person designated by the secretary to administer this section is evidence of the amount of the claim and is payable after the payment of the following in accordance with IC 29-1-14-9:
>
> (1) Funeral expenses for the recipient, not to exceed three hundred fifty dollars ($350).
>
> (2) The expenses of the last illness of the recipient that are authorized or paid by the office.
>
> (3) The expenses of administering the estate, including the attorney's fees approved by the court.

See also USC §1396p(b)(1)(B).

This statute provides that the State has a preferred claim against the assets in an estate for Medicaid benefits received by the recipient from age of 55 until death. The approach taken by the Medicaid Estate Recovery Department is to read this statute in conjunction with IC 12-14-17-3 and IC 29-1-14-9.

There is a common misconception among probate attorneys that all burial expenses have priority over Medicaid's claim; however, that is not the case. IC 29-1-14-9(a)(2) states that

reasonable funeral expenses have priority; however, if a decedent has received Medicaid the amount of funeral expenses having priority shall not exceed the limits in IC 12-14-17. Although IC 12-15-9-1(1) only allows a preference for funeral expenses of $350, IC 12-4-17-4 provides an exemption of up to $1750 for funeral expenses and IC 12-4-17-5 provides and exemption for up to $400 for burial expenses, for a total of $2,150. Reading these statutes together, the Estate Recovery Department will allow a preference over its claim in the amount of up to $2,150 for funeral and burial expenses.

IC 29-1-14-9(a)(4) provides a priority for all debts and taxes having a preference under the laws of the United States, and IC 29-1-14-9(a)(6) provides a priority for all debts and taxes having preference under the laws of the State. The last category of claims pursuant IC 29-1-14-9(a)(7) is all other claims allowed, which have no priority. Medicaid's claim falls under IC 29-1-14-9(a)(6) and has priority over all claims except for recorded debts, including mortgages, federal taxes, costs of administration, including attorneys' fees, funeral and burial expenses up to $2,150, and certain expenses of the last illness.

There are a few exceptions outlined in I.C. §12-15-9-2 for when the state's claim cannot be enforced.

> A claim may not be enforced against the following:
>
> (1) Real estate of a recipient while it is necessary for the support, maintenance, or comfort of the surviving spouse, a dependent child less than twenty-one (21) years of age, or a dependent who is non-supporting because of blindness or other disability.
>
> (2) Personal property necessary for the support, maintenance, or comfort of the surviving spouse, a dependent child less than twenty-one (21) years of age, or a dependent who is non-supporting because of blindness or other disability.
>
> (3) Personal effects, ornaments, or keepsakes of the deceased.
>
> (4) Assets of an individual who has purchased a long term care policy that are disregarded pursuant to IC12-15-39.6-10. 405 IAC 2-8-1(e)(2)

I.C. §12-15-9-2. Under Section (1), there is no relationship requirement for a dependent. Additionally, "[t]he office may not file a claim against the estate of a recipient's surviving

spouse." I.C. §12-15-9-5. The State does not seek recovery from the recipient's estate in cases where the recipient died with a surviving spouse while the surviving spouse is still living, and only rarely after the death of the surviving spouse. Importantly, these exceptions for the spouse apply to a surviving spouse. If the spouse of a Medicaid recipient predeceases the Medicaid recipient, the assets of the predeceasing spouse may be subject to estate recovery upon the death of the recipient unless they pass to a testamentary special needs trust established for the benefit of the surviving spouse. See 405 IAC 2-3-1.1(i)(4).

Pursuant to 405 IAC 2-8-1(d), if the recipient is survived by a child, no recovery shall be made while the child is either under twenty-one years of age or blind or disabled as defined in 42 U.S.C. 1382c.

(a) Undue Hardship Waivers

Indiana Code section 12-15-9-6 provides for the waiver of the State's claim in cases of undue hardship. An undue hardship exists if enforcement of the State's claim would result in one of the following:

1) Causing a beneficiary of the decedent's estate to become eligible for public assistance. Here, "public assistance" means Aid to Families with Dependent children, Medicaid, food stamps, or Supplemental Security Income;
2) Causing a beneficiary of the decedent's estate who is currently eligible for public assistance to remain dependent on that public assistance;
3) The complete loss of an income-producing asset or assets when the beneficiary of the decedent's estate has no other source of income and the beneficiary's income does not exceed 100% of the poverty level as determined by the U.S. Department of Health and Human Services.
4) Other compelling circumstances as determined on a case-by-case basis. 405 IAC 2-8-2.

Undue hardship does not exist in circumstances where the State's recovery simply results in a loss of preexisting standard of living. 405 IAC 2-8-2.

Unless exceptional circumstances are shown, the beneficiary of the decedent's estate must be a member of the decedent's immediate family to be eligible for consideration for an undue hardship waiver. For purposes of an undue hardship waiver, "immediate family" means a spouse, child, grandchild, great-grandchild, parent, grandparent, brother or sister. 405 IAC 2-8-2.

An application for undue hardship waiver must be filed with the FSSA within 90 calendar days of the date that the executor or personal representative of the deceased's estate receives notification of the State's claim. The FSSA will review and respond within 45 calendar days of the receipt of a properly-completed application. An appeal and request for a hearing must filed within 30 days of receipt of the FSSA's decision that an undue hardship waiver has been denied. 405 IAC 2-8-2.

(b) Medicaid liens

A Medicaid recipient will often be able to retain their home and still qualify for Medicaid benefits. This is typically done by continuing to live in the home or showing that the recipient intends (and is capable) of returning to the property. However, IC 12-15-8.5-2 provides that, "[w]hen the office, in accordance with 42 USC 1396p, determines that a Medicaid recipient who resides in a medical institution cannot reasonably be expected to be discharged from a medical institution and return home, the office may obtain a lien on the Medicaid recipient's real property for the cost of all Medicaid expenditures made on behalf of the recipient." The only time a lien cannot be obtained is if the recipient's parent, spouse, child who is less than 21 or disabled, or sibling with an ownership interest in the home who has lived in the home for at least 12 months lawfully resides in the home of the Medicaid recipient. See IC §12-15-8.5-3.

Medicaid applicants who own real property, as a condition of eligibility, are required to sign an Agreement to Offer Property for Sale or Rent and Repayment Agreement. The applicant agrees to offer the property for sale or rent at fair market value and to either place a sign in a conspicuous place on the property clearly stating that the property is for sale or rent and giving the applicant's name and address or phone number, or list the property with a realtor. They also agree to notify the Division of Family Resources as soon as the property is sold or rented.

The Estate Recovery Department has not routinely filed Medicaid liens in the past but this is another change that will likely occur within the next year.

Prior to obtaining a lien on the Medicaid recipient's real property, notice must be provided, in writing, to the Medicaid recipient and his or her authorized representative. IC §12-15-8.5-4. This Notice must that the office has determined the Medicaid recipient cannot reasonably be expected to be discharged from the medical institution, the office intends to impose a lien on the home, and the Medicaid recipient has a right to a hearing under IC 12-15-28. The lien cannot be filed unless 30 days have passed from the time the notice is provided and the hearing process is completed, if a hearing is requested. See IC §12-15-8.5-4.

To obtain the lien, the office must file a notice of lien with the county recorder where the real property is located. The notice must be filed before the death of the recipient and must include the name and place of residence of the individual against whose property the lien is asserted and the legal description of the real property subject to the lien. One copy of the notice must be filed with the division of family resources in the county where the real property is located and to the recipient or the recipient's authorized representative. IC §12-15-8.5-5.

Once recorded with the county recorder's office, due notice of the lien has been provided and a specific lien is recorded in favor of the office on the Medicaid recipient's interest in the real property. The lien will continue until it is satisfied or released. IC §12-15-8.5-6.

The office can foreclose on the lien during the lifetime of the Medicaid recipient if the property sells or if the Medicaid recipient dies. However, the lien expires if the foreclosure is not commenced within 2 years after the death of the Medicaid recipient. IC §12-15-8.5-7.

The lien against the Medicaid recipient's real property cannot be enforced if either of the following individuals resides in the home:

(1) The recipient's child of any age if the child:

  (a) Resided in the home for at least twenty-four (24) months before the Medicaid recipient was admitted to the medical institution;

(b) Provided care to the Medicaid recipient that delayed the Medicaid recipient's admission to the medical institution; and

(c) Has resided in the home on a continuous basis since the date of the individual's admission to the medical institution.

(2) The Medicaid recipient's sibling who has an ownership interest in the home and who has lived in the home continuously beginning at least twelve (12) months before the Medicaid recipient was admitted to the medical institution.

See IC §12-15-8.5-8.

A lien on real property under IC 12-15-8.5 will be released within 10 days if the division of family resources receives notice that the recipient is no longer residing in a medical institution and has returned to live at home. If the house is sold, the lien will be released at closing and will attach to the net proceeds of the sale. IC §12-15-8.5-9.

IC §12-15-8.5-12 identifies certain conditions under which a lien will be void. Specifically, it states as follows:

(b) A lien under this chapter is void if both of the following occur:

(1) The owner of property subject to a lien under this chapter or any person or corporation having an interest in the property, including a mortgagee or a lienholder, provides written notice to the office to file an action to foreclose the lien.

(2) The office fails to file an action to foreclose the lien in the county where the property is located not later than sixty (6) days after receiving the notice.

(4) Non-Probate Transfers

As noted above, a non-probate transfer is a valid transfer, effective at death, by a transferor who immediately before death had the power, acting alone, to prevent the transfer of the property by revocation or withdrawal and use the property for his or her benefit or apply the property to discharge claims against the transferor's estate. IC 12-15-9-.05(b).

IC 12-15-9-.06 provides that the State's claims against assets not included in the decedent's probate estate can be enforced as set out in IC 32-17-13. An action to recover a non-probate asset must be commenced within nine months after the decedent's death. IC §32-17-13-8. This time limit does not apply to any assets that were not reported to the county office of the division of family resources.

Non-probate assets will be subject to recovery by the decedent's probate estate for allowed claims against the estate and statutory allowances to a spouse and children to the extent the probate estate is not sufficient to satisfy those claims and allowances. See IC §32-17-13-2. Common examples of non-probate transfers which are subject to liability to the decedent's estate to satisfy Medicaid claims are real estate transferred by a Transfer on Death Deed or assets that pass through a revocable trust. These assets will be subject to the state's claim against the probate estate if the probate estate is not sufficient to satisfy the claims.

In these circumstances, the non-probate transferee may be subject to liability to the extent of the non-probate transfers received. See IC §32-17-13-2(b). Such liability is enforceable, upon due notice to the Transferee, in Indiana in the county where the transfer occurred, the transferee is located, or the probate action is pending. IC §32-27-13-6. To commence a proceeding against a transferee, the personal representative of the decedent's estate must first receive a written demand for the proceeding from a surviving spouse, surviving child, or a creditor. IC §32-17-13-7(a). If the personal representative does not commence the proceeding within sixty (60) days, the person making the demand may commence the proceedings in the name of the estate at their expense. IC §32-17-13-7(b).

B. What Changes are Taking Place at the State Level?

A year or so ago, when most elder law attorneys in the state were advising clients of estate recovery statutes, they were able to tell their clients that there was not a high probability of the state pursuing probate assets and non-probate transfers with proper planning. Such advice is no longer applicable with the changes that are taking place at the state level. What was once a remote possibility is now a practical reality as FSSA and the Attorney General's Office have

recently developed a more assertive and comprehensive approach. The Estate Recovery Department has increased its staff, implemented processes and procedures to locate property, assets, and open estates, and started opening estates.

(1) Locating Property and Assets

Estate Recovery receives notice from attorneys and personal representatives when estates are opened pursuant to IC 29-1-7-7 and 7.5. However, although the State's Medicaid claim is arguably reasonably ascertainable with even a minimum of due diligence, it is common for attorneys to open estates and not provide notice to the State. The estate recovery analysts find this out in numerous ways, including phone calls from family members and relatives, inquiries from title companies when closing on the sale of property, and as part of the research conducted by the FSSA analysts which includes on-line searches of Mycase and Doxpop. There are also a number of attorneys who contact Estate Recovery immediately after the death of the decedents to inquire if there is a Medicaid claim whether or not an estate is or will be opened.

There are some counties in Indiana where the Court Clerks send to the Department of Mental Health and Addictions (DMHA) copies of notices for all estates opened in that county. Estate Recovery obtains these notices from the DMHA, and the estate recovery analysts then conduct research and determine which, if any, of these decedents were Medicaid recipients and then file claims in those estates.

Nursing homes are required to send notice to the FSSA's Division of Family Resources when a Medicaid recipient dies. The estate recovery analysts access the State's databases to obtain monthly lists of deceased Medicaid recipients for every county in the State of Indiana. The analysts then conduct research to see if the decedent died owning property or other assets, then search Mycase and Doxpop on-line to see if an estate has been opened. There is a lag time of three to four months after a Medicaid recipient dies before their identifying information is accessible through the State's databases.

The FSSA Estate Recovery Department conducts extensive research to locate property, funds and others assets. The estate recovery analysts use several different websites and

databases. Accurint is searched for property, prior addresses, relatives, and various additional assets. If real property is found, the analyst will search the county property card for the current assessed value of the property. Beacon or Zillow may also be searched for comparison.

The FSSA also has its own internal databases that the analyst will research. These databases contain information that the Medicaid recipient would have provided during the eligibility determination and any redeterminations that have occurred. Trust documents, pre-need funeral agreements, bank statements, deeds, and resident fund statements are a few of the documents that may be in the FSSA internal databases.

The estate recovery analysts also research IndianaUnclaimed.gov and file claims with the Unclaimed Property Division of the Attorney General's Office if any unclaimed property is found. Although most individual unclaimed property claims are not more than $50.00, the total assets collected from unclaimed property are significant.

Pursuant to IC 4-6-2-1, the Attorney General shall prosecute and defend all suits instituted by or against the State. The Estate Recovery Department works closely with Deputy Attorneys' General in the Attorney General's Office to petition for the opening of Medicaid recipient's estates and/or whenever litigation arises in the course of estate recovery activities.

(2) Opening Estates

As noted above, whenever the Estate Recovery Department receives notice or learns that an estate has been opened by a Personal Representative, the analyst will file a claim in the estate. As part of their research, if no notice has been received, the analyst will check both Mycase and Doxpop to see if an estate has been opened against which the claim can be filed.

In April of 2015, in cases where the analysts have located significant property, funds or other assets and no estate had been opened, the Estate Recovery Department started opening estates to recover these assets. The most common situation where the FSSA will seek to have an estate opened is when the analyst has discovered a recipient has a substantial ownership interest in real property, which is usually the recipient's home. The FSSA will also seek to have an

estate opened when the analyst has uncovered a lesser amount that is relatively easy to collect, i.e., a bank account with $20,000. In the last year and a half the State has opened over 300 estates. At the present time, the State has over 100 estates pending that were opened by the State.

Indiana Code section 29-1-7-4 provides that "[a]ny interested person . . . may petition the court having jurisdiction of the administration of the decedent's estate . . . for the appointment of an administrator for the estate . . . ." As discussed earlier, the FSSA is an interested person, where it has a preferred Medicaid claim. *See* I.C. § 12-15-9-1 *et seq*.

Petitions to open estates and appoint an administrator are filed by the Office of the Indiana Attorney General. The Petitions request that the probate court appoint an administrator and attorney to administer the estate. Pursuant to IC 33-37-3-1, the state is not required to pay a filing fee. After the petition is filed and the administrator is appointed, the State files its claim in the estate, and the case proceeds like any other probate estate. It is important to note that the administrator and attorney appointed by the probate court represents the estate, not the state or Medicaid Estate Recovery.

The analysts complete their research and refer cases to the Attorney General's Office within three to four months of the date of death of the recipient in order to avoid the effect of IC 29-1-7-15.1(b) and IC 29-1-10-21which, when read together, provide that an estate must be opened within five months after the date of death in order to be able to obtain a court order to sell the property and apply the proceeds to the State's claim. Specifically, IC 29-1-7-15.1(b) states:

> (b) No real estate situate in Indiana of which any person may die seized shall be sold by the executor or administrator of the deceased person's estate to pay any debt or obligation of the deceased person, which is not a lien of record in the county in which the real estate is situate, or to pay any costs of administration of any decedent's estate, unless letters testamentary or of administration upon the decedent's estate are taken out within five (5) months after the decedent's death.
>
> IC 29-1-10-21 states:
>
> Sec. 21. (a) All authority to act with respect to an estate administered under IC 29-1-7 and IC 29-1-7.5 is vested exclusively

in the personal representative.
(b) If this article prohibits an action by the personal
representative, the prohibition restricts the personal representative,
regardless of court order . . . .

(3) Time Limit for Claims

Indiana Code section 29-1-14-1 sets out various constraints on claims that can be made against estates. Such constraints includes a three-month time limitation after the first published notice to creditors or nine months after the death of the decedent. However, claims of the United States, the state, or a subdivision of the state cannot be barred under this section. Consequently, the FSSA can seek recovery of a Medicaid claim up and until the estate is closed, and in some instances, can apply to have the estate reopened.

(4) Probate Process from the Perspective of the Attorney/Administrator

The state's efforts in opening these estates is still a somewhat new practice and has come with some logistical complications. The state, Medicaid Estate Recovery and the private attorneys representing these estates have had to educate certain courts (and their clerks) on the rules and regulations relevant to opening these estates. For example, we have recently run into issues with publication and appearance of attorneys/administrators at the time of filing. Most of these minor issues have been resolved with little effort and education. However, there is still an unresolved issue in some of these estates where the state has filed its Petition to open the estate and its claim within the five (5) month deadline but the court has not issued an Order or Letters of Administration within the deadline. IC 29-1-7-15.1 states, in part, as follows:

> (b) No real estate situate in Indiana of which any person may die seized shall be sold by the executor or administrator of the deceased person's estate to pay any debt or obligation of the deceased person, which is not a lien of record in the county in which the real estate is situate, or to pay any costs of administration of any decedent's estate, *unless letters testamentary or of administration upon the decedent's estate are taken out within five (5) months after the decedent's death.*

(Emphasis added.) This is an area that is ripe for litigation since these estates and claims are being properly filed within the deadline, but the courts are sometimes not acting timely in appointing the administrators and issuing the Letters of Administration.

There are no appellate opinions on this issue; however, at the present time, there have been two instances where the Attorney General's office have briefed and argued this issue. In both cases, the trial court's found letters of administration were "taken out" if Petitions were timely filed within five months of the date of death, regardless of whether the letters testamentary or of administration were issued after five months from the date of death. The reasoning in both cases was that the Petitioner has no control over when the court or administrator will act, and it would violate a Petitioner's due process rights if they were subject to a time bar for activities beyond their control. Neither case was appealed.

Assuming that the estate is opened on time and Letters have been issued, the clerk of the Court must publish Notice of Administration. IC 29-1-7-7. The notice must also be served by first class postage prepaid mail on each heir, devisee, legatee, and known creditor whose name and address is set forth in the petition for probate, unless otherwise ordered by the Court. This notice must be served within one (1) month after the first publication of notice or as soon as possible after that time. This is an important exception in these types of probate cases in that it is often difficult to identify heirs and creditors. Often the state seeks to appoint an Administrator who does not have personal knowledge of the decedent or their family. See IC 29-1-7-7.

To comply with the notice requirements and begin administering the estate, the Administrator must then begin investigating the decedent, as well as his or her family and assets. Medicaid estate recovery will often supply Administrator's with certain information that they have obtained regarding possible assets. However, the first step is often *attempting* to communicate with the heirs. This is an educational process. Most heirs and family members are under the belief that the remaining probate and non-probate assets belong to them. Additionally, it is very common that family members are residing in the real estate of the decedent when these estates are opened. It is up to the Administrators of these estates to reach out to these individuals and try to help them understand the estate recovery process and what their options are. This can be a simple process when the family has worked with an attorney to qualify for Medicaid and

they are somewhat familiar with estate recovery. However, that is not always the case. In these cases, Administrators find themselves assisting with hardship waivers, attempting to settle claims, assisting third parties in the purchase of the estate assets, evicting the individuals who occupy the real estate, filing police reports, and other miscellaneous activities. In other words, these estates come with unique and sometimes complex issues.

The next step is usually to begin finding and collecting the assets of the estate. Westlaw offers a great technology where attorneys can complete people searches which also pull credit reports and provide information on possible assets. The Administrators must then follow up and determine whether the assets still exist and how they are titled. Since most Medicaid recipients cannot keep a lot of assets and qualify for benefits, this is primarily applicable to real estate, vehicles, and bank accounts. Bank accounts can easily be acquired with Letters of Administration, a Death Certificate and an EIN for the estate.

An inventory of the probate assets must be prepared within sixty (60) days of the Letters of Administration being issued. IC 29-1-7.5-3.2. If the estate is supervised, the inventory must be supplied to any distributee who requests a copy unless it has been filed with the Court. See IC 29-1-12-1. The inventory must:

> indicate the fair market value of each item of property belonging to the probate estate, including a statement of all known liens and other charges on any item. The property must be classified in the inventory as follows:
>
> (1) Real property, with plat or survey description, and if a homestead, designated as a homestead.
> (2) Furniture and household goods.
> (3) Emblements and annual crops raised by labor.
> (4) Corporate stocks, including the class, the par value or that the stock has no par value, and if preferred stock, the dividend rate.
> (5) Mortgages, bonds, notes, or other written evidences of debt or of ownership described by the name of the debtor, recording data, and other identification.
> (6) Bank accounts, money, and insurance policies if payable to the estate of the

decedent or to the decedent's personal representative.

(7) All other personal property accurately identified, including the decedent's proportionate share in any partnership. However, no inventory of the partnership property is required.

IC 29-1-7.5-3.2. Additionally, in preparing the inventory, the Administrator "*may* employ a disinterested appraiser to ascertain the fair market value as of the date of the decedent's death of an asset that has a value that may be subject to reasonable doubt.... The name and address of any appraiser must be indicated on the inventory with the item or items the appraiser appraised." IC 29-1-7.5-3.2(c)(emphasis added). Emphasis has been added to this section because this is also an area that could be ripe for issues in these estates. If the estate does not have liquid assets to pay for an appraisal, it is unclear whether the Court will require it. In most circumstances, the courts understand that it is in the best interest of the estate to accept a Comparative Market Analysis or other valuation of the real estate. However, this may not always be accepted. Additionally, the value of the real estate within these estates is often an issue. Medicaid estate recovery and the state are generally looking at the assessed value of these properties when they open the estates. As previously stated, where a recipient appears to have an interest in real estate with a substantial amount of equity ownership of the property, the state will file a Petition to open the estate. However, it is not uncommon for the real estate value to be significantly less than the value listed on the most recent tax assessment. Some of these properties have been vacant, broken into, ransacked, trashed, emptied and stripped of appliances, etc. Also, it is common that the Medicaid recipient was not in a position to invest in their real estate or properly maintain their real estate for a significant period of time prior to their death.

The Administrator is also required to administer the estate's assets in accordance with state statutes, local rules and certain approvals from the state. When the state opens these cases, they are supervised estates. An Administrator in a supervised estate has very little independent authority to act on the assets without court approval. He or she must petition the Court for the authority to sell, mortgage, or exchange property unless such authority if given without court approval under the terms of the Will. See IC 29-1-13 et seq.

Under IC 29-1-15-11, the Administrator may file a petition to sell, mortgage or lease real property. This statute requires that the Court hold a hearing on this petition and requires notice to all heirs and lienholders unless they waive notice. If the Court approves the petition, the Court order for the sale shall describe the property, direct whether the sale shall be public or private, direct that the sale shall be for fair market value if at a private sale or no less than two-thirds of the market value if at a public sale. See IC 29-1-15-13.

IC 29-1-15-9 provides a notable exception. It states as follows:

> Perishable property and other personal property which will depreciate in value if not disposed of promptly, or which will incur loss or expense by being kept, and so much other personal property as may be necessary to provide allowance to the surviving spouse and children pending the receipt of other sufficient funds, may be sold without notice, and title shall pass without prior authorization; but the personal representative shall be responsible for the actual value of the property unless, after making a report of such sale, and on a proper showing, the court shall approve the sale.

This statute will allow sale without notice in certain, limited, circumstances.

In addition to needing Court authority, the Administrator may also need to seek approval of certain transactions from FSSA, the Office of the Attorney General and the Governor's Office. This is especially true when attempting to settle the state's claim against the estate. It is not uncommon for the heirs or family members of the decedent to want to keep the assets in the estate. In these circumstances, the Administrator can attempt to assist the heirs, the estate, and the state, in their negotiations. If the heirs (or other party) are willing to settle the claim for a reasonable amount and the settlement prevents future attorney fees, administrative costs, or risks to the assets, the state is likely going to be open to settlement. As previously stated, Indiana Code §4-6-2-11 specifically allows for compromise only with approval from the Attorney General's Office and the Governor's Office. The Governor and Attorney General are given the power to make such compromise or settle the claim when they believe it is in the best interest of the State to do so.

Once all of the assets have been administered, the Administrator must make distributions of the assets. In a supervised estate, he or she is not permitted to make distributions to heirs, devisees and legatees until entry of the final decrees of distribution issued upon the filing of the Final Account. In accordance with IC 29-1-17-1, the Administrator may petition for a partial distribution if the property is perishable in nature, would materially depreciate if distribution were delayed, or if estate funds would be required to store the asset. The distributee must consent to accepting the property and agree to return its value to the estate if it is later determined that the property is needed to pay claims and expenses. In supervised estates, the estate must be closed within 1 year of the Administrator's appointment. See IC 29-1-16-2. This can be done after the claims period has expired and all claims have been paid, settled, or disallowed, by filing a Final Account and petitioning the Court for a Decree of Final Distribution. See IC 29-1-17-2. Notice of the Final Account must be given to all interested parties. The Court will set a hearing upon the filing of the accounting and notice will be given to all persons entitled to share in the final account. Heirs may also waive notice of the accounting and permit the Court to act immediately.

(C) Ideas for Preventing Estate Recovery when Planning for Medicaid Benefits before Eligibility

Indiana exempts or excludes property from estate recovery that was subject to a non-probate transfer that the Division of Family Resources determined was exempt/unavailable or that was transferred out of the Medicaid recipient's probate estate before May 1, 2002. IC 12-15-9-0.8.

Below are some examples of ways to assist clients in planning for Medicaid eligibility while also avoiding estate recovery after the Medicaid recipient dies:

A. Gifts

When qualifying for Medicaid, an applicant can gift assets to become eligible. If the assets are no longer in the applicant's estate, they cannot be subject to estate recovery. However, gifts

will *generally* subject an applicant to a penalty period if made within the sixty (60) month lookback period unless the gifts are made to a party who falls under an exception to the rules.

(1) Gifts to a Spouse

Gifts to a spouse or to a trust for the "sole benefit" of a spouse will not result in a transfer penalty. 42 USC §1396p(c)(2)(B)(i); 405 IAC 2-3-1.1(k)(2). This is a very helpful rule when qualifying one spouse for Medicaid benefits because a "community spouse" will be able to keep certain assets.

(2) Gifts to a Disabled Child

Gifts or transfers to a disabled child, or to a trust for the "sole benefit" of a disabled child will not result in a penalty. 42 USC §1396p(c)(2)(B)(iii); 405 IAC 2-3-1.1(k)(4). The child must meet the disability criteria for SSI to be considered disabled. However, the disabled child does not need to be receiving SSI.

Importantly, this exception will not apply to a disabled stepchild of the individual applying for Medicaid, even if the transfer to the disabled child is completed by the spouse who is the parent of the child.

(3) Transfer to a Trust for a Disabled Person

(a) Gift to a trust for a disabled individual

There is also no penalty for a gift or transfer to a trust for the benefit of a disabled person under the age of sixty-five (65). 42 USC §1396p(c)(2)(B)(iv); 405 IAC 2-3-1.1(k)(5). Under this rule, there is no requirement that the disabled person be related to the applicant. It is unclear whether the trust must include a payback provision to the state to make it a "sole benefit" trust.

(b) Gift to a Pooled Self-Settled Special Needs Trust

Additionally, a pooled self-settled special needs trusts for disable persons will not be counted when determining eligibility for Medicaid and will not be subject to estate recovery

A pooled trust will require funds remaining in the trust at the recipient's death to be retained by the trust to benefit other disabled persons and does not have to be payable to the state to the extent benefits have been paid on behalf of the disabled individual. Unlike a d(4)(A) trust, a pooled trust may be set up by the recipient of public benefits, him- or herself. The primary example of a Pooled Trust in this state is the ARC of Indiana.

(4) Gift of the Home

In general, the transfer of a home for less than fair market value will create a penalty. However, there are a few exceptions to this general rule:

- If the transfer is to a child under age 21, blind, or disabled;
- If the transfer is to a child who was residing in the home for a minimum of two years immediately before the applicant became institutionalized and the child provided care to the applicant which allowed the applicant to live at home; or
- If the transfer is to a sibling with an equity interest in the home who resided in the home for a minimum of one year prior to the applicant becoming institutionalized.

See IHCPPM §2640.10.15.05; 42 USC §1396p(c)(2)(A); 405 IAC 2-3-1.1(k)(1).

(5) Gifts Exclusively for a Purpose Other than to Qualify for Medicaid

There should be no transfer penalty for assets transferred <u>exclusively</u> for a purpose other than to qualify for Medicaid. 42 USC §1396p(c)(2)(C)(ii). The transfer must not be an attempt to escape estate recovery or a lien. 405 IAC 2-3-1.1(k)(7) states that "[i]n order to establish that a transfer was made exclusively for purposes other than to qualify for medical assistance, the applicant or recipient must submit sufficient evidence to show that the transfer was made exclusively for reasons not related to Medicaid eligibility, estate recovery, or lien." This is further discussed in IHCPPM §2640.10.30, which states:

> An allegation by the individual that the property transfer was done to avoid Medicaid estate recovery will not be accepted as a satisfactory showing that the property was transferred exclusively for a purpose other than to become eligible for Medicaid. Clearly, an individual who makes this claim has the intention of becoming eligible for Medicaid, or estate recovery would not even be an issue. Furthermore, a simple statement made by or on behalf of a recipient who has transferred property, that the transfer did not affect eligibility is therefore allowable, does not constitute a satisfactory showing. The individual may be trying to protect all future eligibility. Again the avoidance of estate recovery may be the intent and will not suffice.

The determination on whether a transfer was made for a purpose other than to qualify for Medicaid will be determined on a case by case basis based on the circumstances of each individual. See CMS State Medicaid Manual §3258.10(C)(2).

B. Loan Repayment and Payment of Expenses

When an applicant has too many available resources and wants to qualify for Medicaid while avoiding estate recovery, one simple option is through the prepayment of expenses. Examples include, but are not limited to, reserving funds for funerals and burials, paying the balance on a debt, or purchasing household goods or personal effects.

(1) Reserve Funds for Funerals and Burials

Funds can be reserved for funerals and burials by setting up irrevocable funeral trusts or by irrevocably assigning life insurance policies to fund a funeral trust. I.C. 30-2-10; PPM §2625.30.20. Exempt funeral trusts and burial spaces can be purchased for the applicant, applicant's spouse, and/or the applicant's immediate family. PPM §2615.20.20.10. "Immediate family" is defined as "an individual's minor and adult children, including adopted children and step children; an individual's brothers, sisters, parents, adoptive parents, and the spouses of those individuals. Neither dependency nor living-in-the-same-household will be a factor in determining whether a person is an immediate family member." See *Indiana FSSA v. Cully,* 769

N.E.2d (Ind. Ct. App. 2002) relying on the definition of "immediate family" in the SSI regulations at 20 CFR 416.1231(a)(4).

Funeral trusts are normally revocable for the first thirty (30) days. However, to obtain favorable treatment for Medicaid, IC 30-2-13-12.1(m) allows the trust to be made immediately irrevocable by waiving the revocability period. See also PPM §2615.20.10. This is a particularly important detail to consider if attempting to obtain eligibility by the first of a month. Additionally, it is important to note that under IC 12-15-2-17(d) a funeral trust must designate state Medicaid or the applicant or recipient's estate as the beneficiary of any remaining trust assets after payment of the funeral or burial expenses to be an exempt resource. If an applicant or recipient is going to irrevocably assign life insurance to fund a funeral trust, the DFR verifies the date of execution of the assignment and the date the assignment is accepted by the company so that the cash surrender value of the policy is no longer available to the applicant or recipient as a resource. PPM §2615.20.10.

Importantly, insurance policies which set funds aside for a funeral with the purchase of services to be made after death may not be exempt resources. See *St. Bd. Of Funeral and Cemetery Service v. Settlers Life Ins. Co.,* 2014 Ind. App. Lexis (Ind. Ct. App. 2014).

(2) Pay off Debt or Mortgage

Another option for converting available assets to an exempt resource is to pay funds towards an existing debt. To qualify an applicant or recipient for Medicaid, the individual could pay off existing debt, either in whole or in part, depending upon the amount of the debt and the amount of available assets.

The applicant may want to put available assets into a mortgage on real estate because the home is an exempt resource or will not be subject to estate recovery for the reasons previously discussed, including:

- If it is the principal residence of the community spouse, minor children, adult disabled or blind children, or parent(s) if the applicant or recipient is still a minor.
- If the home is owned solely by a community spouse.

Paying off an existing mortgage on the real estate or investing in repairs to the real estate, is a great way to reduce available assets without incurring a penalty period. However, an applicant or recipient must be cautious about increasing the equity in a home too high in certain circumstances since the DRA has a home equity cap. This means that a person will not be eligible for Medicaid if the person's equity in the home exceeds the home equity cap. See 42 USC §1398p(f). In 2016, the home equity cap in Indiana is $552,000.

(3) Purchase Household Goods or Personal Effects

In general, household goods and personal effects are exempt. See PPM §2615.30.00. Thus, a person with too many available assets for Medicaid eligibility purposes may want to purchase household goods or personal items to help them become eligible for benefits. For example:

> Mrs. Jones was about to apply for Medicaid when she realized she had $7,000 in unclaimed property on Indiana Unclaimed from an old investment of her deceased husband. Since she is entitled to this asset, she must claim the funds and spend them down to less than $2,000 to be eligible for benefits. Mrs. Jones is also in the process of moving to assisted living and could use new furniture to furnish her apartment. Mrs. Jones can use the $7,000 to purchase the furnishings she needs. She can also use these funds to buy personal items such as clothing, food, toiletries or anything else she may want for herself or the apartment.

The only household goods and personal effects that will not be considered exempt are valuable collectible items.

C. Put Real Estate in the Name of a Community Spouse

Where a Medicaid applicant is married and has a community spouse, the applicant can transfer real estate to the community spouse without penalty and all real estate owned solely by the community spouse will be considered exempt. IHCPPM §2635.10.10.05. Additionally, as previously discussed, "[t]he office may not file a claim against the estate of a recipient's surviving spouse." I.C. §12-15-9-5. The State does not seek recovery from the recipient's estate

in cases where the recipient died with a surviving spouse while the surviving spouse is still living, and only rarely after the death of the surviving spouse. There are no transfer penalties between spouses. Thus, all real estate should be placed in the name of the community spouse when applying for Medicaid for one spouse to avoid penalties and estate recovery on the real estate.

When placing assets in the name of the spouse, it is also advisable to always consider a new will for the community spouse with a Supplemental Needs Trust to protect the institutionalized spouse's eligibility if the community spouse passes away and to prevent estate recovery. At this time, the state is not seeking estate recovery against a Testamentary Supplemental Needs Trust.

D. Purchase of a Life Estate

Another option to avoid estate recovery is to purchase a life estate in real estate owned by a family member. The DRA, in 42 USC §1396p(c)(1)(J), provides as follows:

> For purposes of this paragraph with respect to a transfer of assets, the term 'assets' includes the purchase of a life estate interest in another individual's home unless the purchaser resides in the home for a period of at least 1 year after the date of the purchase.

In other words, a life estate purchased on or after November 1, 2009 in a family member's home will be an exempt resource and should incur no transfer penalties as long as the purchaser resides in the home for at least a year. On the other hand, if the purchaser does not reside in the home for a full twelve months, there will be a full transfer penalty for purchasing the life estate.

> Example: Mom moves in with her son. Son owns a home that he paid $200,000 for and is now worth $250,000. Son owes $150,000 on a home mortgage and has a mortgage payment of $1,700 per month. Mom is 75 years old and purchases a life estate in the son's home. The purchase price is $130,372.50 based upon the life estate/remainder tables in the Indiana Health Coverage Program Policy Manual. See Section 2605.25.10.05. Son will not incur taxes on the $130,372.50 because he has sold a partial

interest in his home for less than the $250,000 exclusion of gains under the IRS rules. If son uses the funds to pay off his mortgage, he will drastically increase his net worth and reduce his monthly expenses. Son is simply required to keep his mother in his home for a year after the purchase date so that his mother can avoid a Medicaid penalty.

Importantly, Indiana will require the purchaser of the life estate to offer the life estate for sale or rent after leaving the home. This can be done by simply posting a "Life Estate for Sale" sign in a window.

At this time, the State is not seeking estate recovery against a life estate interest after the Medicaid recipient passes away.