I. Estate Recovery - Background

a. What is it?
A collection program allowing states to recoup private assets owned by a beneficiary upon the beneficiary’s death for repayment of a state’s Medicaid’s expenditures made on behalf of the beneficiary.

b. What is Medicaid?
A cooperative federal / state program to provide reimbursement for medical care receive by qualifying beneficiaries.

c. History
i. 1965 Social Security Amendments - 3 layer cake
   i. Mandatory hospitalization coverage for the elderly paid by taxes collected through Social Security
   ii. Voluntary insurance coverage for the elderly to cover the cost of a physician
   iii. Coverage expansion of existing medical indigency programs to cover medically indigent families and disabled
ii. 1965 Social Security Amendments allowed states to impose liens on property in a Medicaid decedent’s estate
iii. Dissatisfaction with the states’ reluctance to engage in the recovery process
iv. OBRA ’93 mandated estate recovery for state Medicaid programs

d. 42 U.S.C. 1396p (Section 1917 of the Social Security Act)
   i. Subsection (a) - “Imposition of lien against property of an individual on account of medical assistance rendered to him under a state plan”
   ii. Subsection (b) – “Adjustment or recovery of medical assistance correctly paid under a State plan”
iii. Subsection (c) – “Taking into account certain transfers of assets”
iv. Subsection (d) – “Treatment of trust amounts”
v. Subsection (e) – “Disclosure and treatment of annuities”
vi. Subsection (f) – “Disqualification for long-term care assistance for individuals with substantial home equity”
vii. Subsection (g) – “Treatment of entrance fees of individuals residing in continuing care retirement communities”
viii. Subsection (h) – “Definitions”


a. 42 U.S.C. 1396p (b)(1) – federal mandate
   “(1) No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except that the State shall seek adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan in the case of the following individuals:…”

b. Who is covered by estate recovery?
   i. 42 U.S.C. 1396p (b) (1)(A) – inpatient in a LTC arrangement with a patient obligation
      (A) In the case of an individual described in subsection (a)(1)(B) of this section, the State shall seek adjustment or recovery from the individual's estate or upon sale of the property subject to a lien imposed on account of medical assistance paid on behalf of the individual.

      (Language from 42 U.S.C. 1396p (a)(1)(B)(i) - (i) who is an inpatient in a nursing facility, intermediate care facility for the mentally retarded, or other medical institution, if such individual is required, as a condition of receiving services in such institution under the State plan, to spend for costs of medical care all but a minimal amount of his income required for personal needs…)
ii. 42 U.S.C. 1396p (b)(1)(B) – **receives Medicaid benefits on or after 55 years of age**

(B) In the case of an individual who was 55 years of age or older when the individual received such medical assistance, the State shall seek adjustment or recovery from the individual's estate…”

c. Federal Exceptions and Limitations

i. 42 U.S.C. 1396p (b)(2)(A) – **surviving spouse, minor child, disabled or blind child**

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

ii. 42 U.S.C. 1396p (b)(2) – **Partnership Long Term Care Insurance Policy disregards** (See III.b.vii below)

(C)(i) In the case of an individual who has received (or is entitled to receive) benefits under a long-term care insurance policy in connection with which assets or resources are disregarded in the manner described in clause (ii), except as provided in such clause, the State shall seek adjustment or recovery from the individual’s estate on account of medical assistance paid on behalf of the individual for nursing facility and other long-term care services.
(ii) Clause (i) shall not apply in the case of an individual who received medical assistance under a State plan of a State which had a State plan amendment approved as of May 14, 1993, and which satisfies clause (iv), or which has a State plan amendment that provides for a qualified State long-term care insurance partnership (as defined in clause (iii))
which provided for the disregard of any assets or resources…”

iii. 42 U.S.C. 1396p (b)(3)(A) – Hardship waiver

III. Kansas Estate Recovery Provisions

a. Initial Kansas Basis - Chapter 150, 1992 Session Laws
   i. POD accounts –
      1. Banks - K.S.A. 9-1215 & 9-1216
      2. Credit Unions - K.S.A. 17-2263 & 17-2264
   iii. Probate Provision – K.S.A. 59-1301

b. K.S.A. 39-709 (f)(2)
   i. Allows a claim against a deceased recipient's estate
   ii. Allows a claim against a surviving spouse's estate
   iii. Values the claim – medical assistance paid after June 30, 1992
   iv. Can’t proceed when there is a surviving spouse
   v. Can’t proceed when there is a surviving minor child or a disabled or blind child
   vi. Payments received from long-term care insurance are a credit against the state’s medical assistance claim
   vii. Transfers by medical assistance recipients for inadequate consideration are voidable and may be set aside
   viii. Allows claims against a recipient’s guardianship or conservatorship estate

c. Probate provision – K.S.A. 59-1301
   i. The medical assistance claim is a first class demand with priority being granted to reasonable funeral expenses within the class.
ii. True driver of the Kansas estate recovery process – K.S.A. 59-2239 - A creditor can only initiate a probate action within 6 months of the date of death.

d. Kansas Regulatory support – K.A.R. 30-10-11 (h) – recovery from deceased Medicaid recipient’s NF resident trust

e. Kansas Statutory Amendments over the years

i. 1997 – K.S.A. 59-3504 – Medical assistance claim survives a transfer-on-death (TOD) deed

ii. 2002 – K.S.A. 16-304, 16-311 – Medical assistance claim can be presented against excess funds left in funeral plans, including those funded by insurance

iii. 2004 – SB 272

i. K.S.A. 39-709 (f)(3) – “Medical assistance estate”

“The medical assistance estate is defined as including all real and personal property and other assets in which the deceased individual had any legal title or interest immediately before or at the time of death to the extent of that interest or title. The medical assistance estate includes, without limitation assets conveyed to a survivor, heir or assign of the deceased recipient through joint tenancy, tenancy in common, survivorship, transfer-on-death deed, payable-on-death contract, life estate, trust, annuities or similar arrangement.”

ii. K.S.A. 39-709 (f) (4 – 8) – Liens

A. Basic – “The secretary … or secretary’s designee is authorized to file and enforce a lien against the real property of a recipient of medical assistance in certain situations, subject to all prior liens of record.”

B. Coverage - K.S.A. 39-709(g)(4)
1. Recipients covered - A medical assistance recipient who is an inpatient in a nursing home or other medical institution for longer than 6 months.

2. Property covered - Real property owned by recipient

C. Defenses to imposition of assistance liens - 42 U.S.C. 1396p (a)(2)

1. No lien can be imposed if any of following individuals are residing in the home:

   a. “the spouse of such individual”

   b. “such individual’s child who is under age 21, or (with respect to States eligible to participate in the State program established under subchapter XVI of this chapter) is blind or permanently and totally disabled, or (with respect to States which are not eligible to participate in such program) is blind or disabled as defined in section 1382c of this title”

   c. “a sibling of such individuals (who has an equity interest in such individual’s home and who was residing in such individual’s home for a period of at least one year immediately before the date of the individual’s admission to the medical institution”

2. Key - Imposition is different than enforcement

D. Enforcement of lien - K.S.A. 39-709(g)(5)
1. Lien is enforced by filing of action to foreclose such lien or through a probate action.

2. Limitations on enforcement - See federal rules
   a. After the death of the surviving spouse of the recipient; and
   b. When there is no child of the recipient; natural or adopted, who is 20 years of age or less residing in the home;
   c. When there is no adult child of the recipient, natural or adopted, who is blind or disabled residing in the home; or
   d. When no brother or sister of the recipient is lawfully residing in the home, who has resided there for at least one year immediately before the date of the recipient’s admission to the nursing or medical facility, and has resided there on a continuous basis since that time; or
   e. When no son or daughter of the recipient (who was residing in the individual’s home for a period of at least two years immediately before the date of the recipient’s admission to the medical institution, and who establishes to the satisfaction of the State that he or she provided care to such individual which permitted such individual to reside at home rather than in an institution), is lawfully residing in such home and who has resided in such home on a continuous basis since the date of the individual’s admission to the medical institution. (This is based on federal law and is not in the State law. See 42 U.S.C. 1396p (b)(2)(B).)
iv. HB 2183 - House Substitute for HB 2166 (2013)

1. New post-death lien provision at K.S.A. 39-709 (g)(4)

(A) After the death of a recipient of medical assistance, the secretary of health and environment or the secretary’s designee may place a lien on any interest in real property owned by such recipient.”

2. New notice requirement on DCF re death of recipient at K.S.A. 39-709 (f)(8)

“(8) Within seven days of receipt of notice by the secretary for children and families or the secretary’s designee of the death of a recipient of medical assistance under this subsection, the secretary for children and families or the secretary’s designee shall give notice of such recipient’s death to the secretary of health and environment or the secretary’s designee.”

IV. Issues and Results

a. Issues

i. Notice to Medicaid of death, probate


iii. Prepayment as option when

iv. Issues with post-death lien

A. Claim vs. Lien


I. Lien is not a claim – state procedure allowed a post-death lien even though there was a surviving spouse

II. State procedure defective because it did not clearly identify property affected

III. State procedure defective because it did not clearly advise surviving spouse that she could have lien released for
legitimate purposes – reverse mortgage, equity line mortgage, etc.

v. “Intent to return” vs. pre-death lien

A. “Intent to return” is a recipient’s or their agent’s subjective statement that they wish to return home

B. Lien process – evidentiary based & separate from recipient’s intent

C. Defense of ability to return home & CARE Assessment and referral of recipient’s nursing home needs –

KEESM Section 8114 – “CARE Assessment Process and Eligibility For Payment - All individuals applying for admission to a nursing facility, either as private pay or for medical eligibility, must have their needs assessed to determine if the individual needs the level of care provided by a nursing facility and, if appropriate, whether the individual has a mental illness or mental retardation or related condition and is in need of specialized services.”

vi. Improper Payments – K.S.A. 39-719b – 4th class claim but unlimited / not restricted by age or surviving spouse / child

b. Collections - $100 million in 21 years
HEALTH MANAGEMENT SYSTEMS

ESTATE RECOVERY PROGRAM

SYNOPSIS: Private contractor for part of estate recovery in Kansas

COVERAGE BY HMS:

Post-death recoveries involving probate, conservatorships, guardianships, family agreements in lieu of probate, nursing home funds, POD bank accounts, funeral plan excess and (d)(4) trusts (disability payback and charitable pooled trusts)
Pre-death recoveries involving Medicaid liens
Waiver requests involving recoveries noted above
Negotiated settlements involving recoveries noted above
Inquiries on claims amounts (for handling TOD deeds, resident trust funds, funeral plan excess and POD accounts)
Inquiries on procedures used by HMS in recoveries

COVERAGE BY KDHE:

Pre-death recoveries involving pre-payments
Estate Recovery policy interpretation and procedure
Estate Recovery legislative and constituent inquiries
Estate Recovery appeals
Estate Recovery reporting
Estate Recovery outreach
Inquiries on land title, spousal elective share, funeral plans/trusts, funeral refunds
Review of supplemental needs trust being presented in conservatorships

CONTRACT OVERSIGHT:

Brian M. Vazquez
Attorney/Administrator
Estate Recovery Unit
Kansas Dept. of Health & Environment
Phone: 785-296-0696
Fax: 785-296-8825
Email: bvazquez@kdheks.gov

HMS CONTACT INFORMATION:

HMS Estate Recovery Program
5601 SW Barrington Court South,
Topeka, KS 66614
Phone: 1-800-817-8617
Fax: 1-646-465-6530 (goes to email)
Email: KSestaterecovery@hms.com

Manager/Attorney: Ben Sherber