

**MEDICAID ESTATE RECOVERY PROGRAM (MERP)
REAL ESTATE ISSUES**

VICTOR A. KORMEIER, JR.

Konneier & Walters, L.L.P.

675 Bering Drive, Suite 350

Houston, Texas 77057

Telephone: 713/973-2777

Fax: 713/984-1141

Email: vkormeier@kwlawyer.com

State Bar of Texas

ADVANCED ELDER LAW

March 5, 2009

Houston

CHAPTER 3

State Bar of Texas
ADVANCED ELDER LAW - 2009

March 5, 2009
Houston

CHAPTER 3

VICTOR A. KORMEIER, JR.
Kormeier & Walters, L.L.P.
675 Bering Drive, Suite 350
Houston, Texas 77057
Telephone: 713/973-2777
Fax: 713/984-1141
Email: vkormeier@kwlawyer.com

BIOGRAPHICAL INFORMATION

EDUCATION:

BBA, University of Texas
J.D., University of Texas

PROFESSIONAL ACTIVITIES AND MEMBERSHIPS:

Partner, Kormeier & Walters, L. L. P., Houston, Texas
Board Certified, Estate Planning and Probate Law, Texas Board of Legal Specialization
Member, State Bar of Texas - Real Estate, Probate and Trust Law Section
Houston Bar Association, Probate, Trusts and Estate Section, (1996-2007)
Member, Texas Academy of Probate and Trust Lawyers
Member, Houston Estate and Financial Forum
Member, Texas Society of CPAs - Certified Public Accountant
Member, Financial Planning Association - Certified Financial Planner (CFP)®
Licensed Real Estate Broker (Texas)

OTHER MISCELLANEOUS STUFF:

From 1966 until 1968 Mr. Kormeier served as an officer in the U. S. Army primarily in the role of Fiscal Officer for the 125th Transportation Command and as advisor to the Saigon Port Authority, Finance Division, Saigon, Vietnam.

Kormeier was employed by the firm of Deloitte, Haskins & Sells as a tax advisor in their Houston office from 1968 until 1972 with particular emphasis on the taxation of estates and trusts. In 1972, he resigned his position as a Tax Specialist to join 3D/International. Kormeier's responsibilities expanded to all non-technical activities including General Counsel, the financial and accounting functions, facilities, business related systems, and administrative services for the entire 3D/International firm. The firm performed Project Management, Architecture, Engineering, Purchasing, and other building related disciplines and employed over 700 people worldwide.

In January, 1980, Mr. Kormeier resigned his position as Director, Senior Vice President, Treasurer and Chief Financial Officer of 3D/International, Inc. to become Executive Vice President of Lakor International, Inc. Lakor International, Inc. developed several apartment projects and other real estate in Houston.

Beginning in 1985, Mr. Kormeier has devoted substantially all of his time to the practice of law concentrating in the estate planning, probate, trust and tax areas. In August, 1991, he joined with Richard B. Walters to form the law partnership of KORMEIER & WALTERS, L.L.P.

He presently serves on the Board of Trustees of the Episcopal High School, Houston, Texas, and serves as President of the Episcopal High School Endowment Fund. In addition, he has served as Executive Chairman of the Board and Treasurer of the Episcopal High School. He is currently a member of the Board of Directors of the Episcopal Foundation, currently serving on its finance committee and formerly served as President of the Foundation. He is a former Trustee of St. John School, Houston, Texas.

TABLE OF CONTENTS

I. LADY BIRD DEEDS 1

 A. Introduction 1

 B. Acknowledgments 1

 C. Medicaid Estate Recovery Program (MERP) A Brief-Incomplete History 1

 1. Medicaid Came Into Being - 1965 1

 2. Medicaid Estate Recovery in Texas 2

 3. What Comprises the Estate for MERP Purposes? 3

 D. Title Insurance 4

 E. Conclusion 4

II. SHORT SALE ADDENDUM 4

III. FORECLOSURES 5

IV. APPENDIXES

 APPENDIX A - Example of Lady Bird Deed Form

 APPENDIX B - Selected MERP rules in Texas

 APPENDIX C - Full Text of Recent Estate of Wallace G. Jones (case from Missouri)

 APPENDIX D - Example of Short Sale Addendum

I. Lady Bird Deeds

A. Introduction

According to urban legend, President Johnson once used a type of transfer-on-death deed to transfer some property to his wife, "Lady Bird", the former First Lady. While I really don't believe that this is the genesis of this type of deed, it does make a good story.

A Lady Bird Deed has several other names, some of which are really more descriptive. Enhanced Life Estate Deed, Beneficiary Deeds or Revocable Transfer on Death Deeds are other names for the same animal. While not as sexy or catchy as "Lady Bird Deed", Enhanced life Estate Deed seems to be a much more descriptive moniker.

Attorney's have used deeds with a retained life estate for centuries which allowed real property to be convey to the grantee, but the grantor retained the right to use the property during his/her lifetime. At the death of the life estate holder, the title fully vests in the grantee or remainderman without the need for probate. While not exactly the same thing, the surviving spouse's homestead right in Texas is an example of how the life estate works.

The Enhanced Life Estate adds relatively new wrinkles to the traditional Life Estate Deed by giving the remainderman a retained right to sell or mortgage the property without anyone else's consent or participation. Essentially, the life estate holder has the unilateral right to cancel the remainder interest. In other words, the remainderman's interest is really a contingent remainder, contingent on two events: a) the death of the life tenant; and b) non-transference of the property to a third party by the life tenant during the life tenant's lifetime. Therefore, we have four important aspects of the Enhance Life Estate Deed: (i) since the remainderman doesn't know if he will get the property we don't have a completed gift and no way to value the remainder interest (i.e. No gift, no gift tax return; no gift, no fraudulent conveyance; and no gift, no violation of the transfer-for-value for Medicaid purposes); (ii) since the transfer is complete at death without any further action on the part of the grantee or grantor, there is no requirement for probate, so the property is not part of the probate estate (which seems to be a big deal in Medicaid Estate Recovery Program); (iii) there is no asset owned by the grantor at death because the life estate is extinguished without further action on the part of

the grantor; and (iv) lastly, if all works as planned, since the transfer is on death, the remainderman gets a stepped-up basis in the property.

However, before you flip to the end of the paper and start filling out the Exhibit "A" (an example of an Enhanced Life Estate Deed) for one of your clients, you really need to take a closer look at where we are, and will this really work. Do you run the risk of putting a "cloud" on the title of the property which would destroy some of the value of the property? Is the State of Texas going to have a lien on the property for Medicaid Estate Recovery Program? What if the remainderman should inconveniently predecease the life tenant causing judgments against the remainderman to attach to the property. Again, what if the life tenant should again predecease the life tenant, and the title company decides to require probate of the remainderman's estate by interpreting the remainder interest as being vested subject to divestment. Not a likely scenario, but you never know, and we are in relatively uncharted waters.

B. Acknowledgments

This author owes a debt to Molly Dear Abshire and her presentation in Chapter 9 of this course. Her paper was a joint effort of Wright, Abshire, Attorneys, P.C. and the Law Office of H. Clyde Farrell, along with Bucky Olive of Wright Abshire who did extensive research in preparing the paper. The paper should have its own place in your library.

C. Medicaid Estate Recovery Program (MERP) - A Brief-Incomplete History:

In order to make a proper assessment of the potential for disaster, we need to review a short history of the Medicaid Estate Recovery Program in Texas to see if there is any clue as to where it is going in the future.

1. Medicaid Came Into Being - 1965

In the very beginning, Medicaid law allowed for, but did not require, states to make a claim for recovery for the services provided of those 65 years or older. However, there were restrictions on how recoupment was to be accomplished, particularly where there was a surviving spouse and only if there was no surviving minor or disable child. In the beginning, liens during the beneficiary's lifetime were prohibited. However, there was an

exception for benefits incorrectly paid. Recovery has not been a terribly successful program. In 1992, the 28 states that had estate recovery programs collected \$63 million.

The Tax Equity and Fiscal Responsibility Act ("TEFRA") was enacted in 1982. Congress allowed, but did not require, states to place a pre-death lien against the property of certain Medicaid beneficiaries.

Omnibus Budget Reconciliation Act of 1993 ("OBRA '93") contained three important provisions related to the long term care (LTC) Medicaid programs. First, it implemented new rules for the treatment of transfers of assets for less than fair market value (which replaced the previous more lenient rules). Secondly, it implemented new rules for treatment and exemption of certain trusts. Thirdly, it required mandatory estate recovery provisions. The mandatory estate recovery provisions were effective October 1, 1993. States were required to implement at least a basic estate recovery process. Still, even under the 1993 law, property liens were optional with the states.

2. Medicaid Estate Recovery in Texas

This is where it gets interesting. In 1987, the Texas Legislature enacted a Medicaid liens statute. The Texas Department of Human Services ("DHS") was to impose liens against the homes of deceased Medicaid beneficiaries who had received care in a medical institution, such as a nursing home. The statute was really unpopular. Representative Bill Clemons (D-Pollock) requested Governor Bill Clements to enjoin the Department of Human Services ("DHS") from enforcing the law until the Legislature had an opportunity to review it in 1989. The law was repealed by Senate Bill ("SB") 1 in 1989 Legislative session, and Senator Grant Jones of Abilene lost his bid for re-election owing largely to his role in introducing the Medicaid liens statute. You might infer that this was a "hot issue" and not one to be dealt with lightly.

In a letter of March 9, 1995, to DeAnn Friedholm, State Medicaid Director, from the Texas Attorney General's office, the Attorney General's Office stated that the Texas Health and Human Services Commission ("HHSC") did not have the statutory authority to implement the estate recovery provisions of OBRA '93 without legislative action, and no such action had been forthcoming. The Texas Probate Code, Chapter

VIII, Proceedings During Administration, Part 4, Presentment of Claims, Section 322, Class 7, states: "Claims for repayment of medical assistance payments made by the state under Chapter 32, Human Resources Code, to or for the benefit of the decedent." Therefore, Medicaid estate recovery claims have seventh priority status, falling behind such claims as funeral expenses, secured claims, mortgage liens, child support, and taxes. However, some would believe that this probate code provision alone gave Texas authority to implement estate recovery.

On June 10, 2003, Governor Perry signed HB 2292 which amends Subchapter B, Chapter 531, Government Code, by adding Section 531.077 to read as follows:

(a) The commissioner shall ensure that the state Medicaid program implements 42 U.S.C. Section 1396p(b)(1).

(b) The Medicaid account is an account in the general revenue fund. Any funds recovered by implementing 42 U.S.C. Section 1396p(b)(1) shall be deposited in the Medicaid account. Money in the account may be appropriated only to fund long-term care, including community-based care and facility-based care.

The citation 42 U.S.C. §1396p(b)(1) is the OBRA '93 Medicaid estate recovery statute. The Texas statute made no mention of the TEFRA liens at 42 U.S.C. §1396p(a). Imposition of a lien during the beneficiary's lifetime requires that the beneficiary cannot reasonably be expected to be discharged from a medical institution. Clearly, a very intrusive determination has to be made to meet the requirements for TEFRA liens. Also, the imposition of a lien on the homestead of a surviving spouse would violate the Texas Constitution. States are not required to use liens, and Texas, to date, has not done so.

The Texas estate recovery statute became effective September 1, 2003, but was not implemented on that date. HHSC still had to promulgate the rules. The effective date of the final rules of the Texas Medicaid Estate Recovery Program ("MERP") is March 1, 2005. The Texas statute is very terse and didn't address the various options under the Federal law. The question then becomes, can HHSC by rule exercise those

options set forth in the Federal statute to expand the scope of estate recovery? Given the history of estate recovery in Texas, it would appear that the Legislature (and not HHSC) must exercise these options.

3. **What comprises the Estate, for MERP purposes?**

States may use the narrow Federal definition of "estate" and limit Medicaid estate recoveries to only those assets that pass through probate. Alternatively, they may choose to define "estate" in a broader context, which enables them to recover from some or all property that bypasses probate. Such property includes assets that pass directly to a survivor, heir or assignee through joint tenancy, rights of survivorship, life estates, living trusts, annuity remainder payments, or life insurance payouts. As is true of probate estates, most such arrangements operate under other, non-Medicaid laws that define rights and responsibilities in the disposition of bank accounts or other liquid investments, real estate ownership, life insurance policies, etc. For this reason, implementing Medicaid rules against a background of non-Medicaid law carries the potential for lack of legal clarity, competing claims to property of deceased Medicaid beneficiaries, and inconsistent outcomes. Despite such legal and practical obstacles to fully implementing an estate recovery program that uses the broad definition of "estate," it is clear that states could increase Medicaid recoveries, possibly by substantial amounts, by collecting from assets that individuals could otherwise shelter from recovery (i.e., by shifting them out of the future probate estate into a form outside the State's Medicaid recovery orbit).

The home is considered to be part of the recoverable estate unless it is protected for the spouse or certain other close relatives, or is conveyed outside of the State's definition of "estate" (e.g., through a life estate).

The term "estate" for Medicaid estate recovery purposes includes; (1) all real and personal property and other assets included within the individual's estate, as defined under state probate law and (2) at the state option, in addition to property and assets under the probate definition, any other real or personal property and other assets in which the individual has any legal title or interest at the time of death (to the extent of such interest). This would include assets conveyed to a survivor, heir, or assign of deceased, through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangements. See 42 U.S.C. §1396p(b)(4). The terms "survivorship", "joint tenancy", and, particularly, "or other arrangements" are troubling.

April, 2005 Policy Brief by U.S. Department of Health and Human Services (HHS), Office of Disability, Aging and Long-Term Care Policy (DALTCP) and Thomson/MEDSTAT. Under Texas MERP rules (see Appendix B), estate is defined as follows:

Estate--The real and personal property of a decedent, both as such property originally existed and as from time to time changed in form by sale, reinvestment, or otherwise, and as augmented by any accretions and additions and substitutions that are included in the definition of the probate estate found in §3(1), Definitions and Use of Terms, Texas Probate Code.

Tex. Admin. Code, tit. 1, §373.105(6).

"Estate" in the Texas Probate Code is defined similarly. Thus, the state must recover from assets comprising the probate estate, and they may, when properly enabled, recover from other assets beyond what is defined under the probate law. In Texas, the probate code is pretty clear as to what is and is not included in the probate estate. Given the history, it would appear that only the legislature is empowered to alter the definition of estate for Medicaid recovery purposes, and not HHSC. So far, the legislature has chosen not to do so.

Texas case law appears to provide no answer to the question of whether Lady Bird Deeds can effectively defeat MERP rules in Texas. The commentators on the various blogs you can find via Google (as well as traditional sources), seem to indicate that Texas is where the Ladybird Deed concept originated. Yet, research does not identify cases dealing with the Medicaid impacts of such a transaction in Texas, nor is there even any Texas authority clearly authorizing the use of Ladybird Deeds (except perhaps, indirectly, Texas Probate Code sections 322 and 450).

However, case law in other states does exist. For example, Estate of Wallace G. Jones, Deceased, State of Missouri, Department of Social Services, MO HealthNet Division, Respondent, v. Violet J. Knight and Tommy Jones, Appellants, (Westlaw No. WD 69310), judgment released on Jan. 13, 2009, provides an excellent discussion of the government's case in a non-probate transfer via a beneficiary deed (which, as you recall, a "Beneficiary Deed" is the equivalent of a "Lady Bird deed"). The full text of the case is found in Appendix C.

D. Title Insurance

One ancillary consideration and practical problem in this context is title insurance. Title insurance companies may require a release or a statement that Medicaid will not pursue recovery which may be difficult if not impossible to obtain. The Medicaid beneficiary may still be alive and no claim has been presented. The beneficiary may desire to revoke the life estate, but then be unable to convince the title company that there is no potential claim either from Medicaid or from the contingent remainderman. This situation could require some shopping to find the right title company, i.e. one not familiar with the potential problems of a Lady Bird Deed or who has not been burned thereby. Then, you might see title

companies securing a statutory exclusion from their policies for Medicaid claims.

E. Conclusion

Although commentators often state that the Lady Bird Deed concept originated in Texas, not much law or analysis exists on the topic in recognized legal publications. The concept of a Lady Bird Deed as a proper non-probate tool may be impliedly authorized by Texas Probate Code Sections 322 and 450, but no Texas state or federal case law exists on whether such a Deed can properly be used as a Medicaid planning device to prevent a home from being subject to MERP. Without caselaw expressly authorizing the practice, no one would argue that it is a risky endeavor. A look to what other states are doing (at least with states that have similar definitions of "estate" as Texas) might provide some insight. Nonetheless, who knows what a Texas court would hold at the end of the day, especially considering the current economic climate? Other important practical considerations such as title insurance policies will come into play as well, especially when Title Companies catch on to the Lady Bird Deed concept. The bottom line is that this practice is uncertain at best, although it seems to be catching on. The author believes that the continued growth of this practice will eventually lead to case law developments in Texas that will provide more guidance on this issue.

II. Short Sale Addendum

The Texas Real Estate Commission (TREC) has issued a December 15, 2008 form entitled "SHORT SALE ADDENDUM". (See Appendix D).

The addendum specifically addresses the condition where the seller's net proceeds at closing will be insufficient to pay the balance of the seller's mortgage loan. Unfortunately, this is a situation we may well see more of in the near future.

Under the terms of the addendum, the seller requires the consent of the lienholder to sell the Property pursuant to the contract, and the lienholder's agreement to accept the seller's net proceeds in full satisfaction of the seller's liability under the mortgage loan and to provide a release of lien against the property in a recordable form.

The form was promulgated by the Texas Real Estate Commission in concert with the Texas Bar Association as a result of the request from Realtors across the state who have been experiencing the need for such an arrangement.

III. FORECLOSURES

My thought on foreclosures is really very simple. You need to make it difficult for the mortgagee to collect to enhance your bargaining position, if you have any. One of the most effective means is to demand that the original promissory note be produced. It is difficult to determine if this will be effective, but given the current state of mortgage industry, the consolidations that have gone on, the transfers of files between entities and the general disarray of the market place, there is a better than even chance that it might be difficult to produce the original, which of course, is the best evidence of the indebtedness.

IV. APPENDIXES

Appendix A

*****This deed is a template only and should be reviewed by competent legal counsel before preparation or execution*****

**GENERAL WARRANTY DEED
[Enhanced Life Estate Deed]**

NOTICE OF CONFIDENTIALITY RIGHTS: IF YOU ARE A NATURAL PERSON, YOU MAY REMOVE OR STRIKE ANY OR ALL OF THE FOLLOWING INFORMATION FROM ANY INSTRUMENT THAT TRANSFERS AN INTEREST IN REAL PROPERTY BEFORE IT IS FILED FOR RECORD IN THE PUBLIC RECORDS: YOUR SOCIAL SECURITY NUMBER OR YOUR DRIVER'S LICENSE NUMBER.

THE STATE OF TEXAS §
 § KNOW ALL MEN BY THESE PRESENTS:
COUNTY OF [INSERT] §

That [Insert name of Grantor] ("Grantor"), [Insert Marital Status, e.g., a Married Man, a Single Person], for and in consideration of the sum of TEN AND NO/100 DOLLARS (\$10.00) and other good and valuable consideration paid to Grantor by [Insert Name of Grantee] (the "Grantee"), [Insert Marital Status, e.g., a Married Woman, a Single Person] whose address is set forth below, the receipt and sufficiency of which is hereby acknowledged, has GRANTED, SOLD AND CONVEYED and by these presents does GRANT, SELL AND CONVEY unto the Grantee herein, **SUBJECT TO THE RESERVATION OF A LIFE ESTATE**, with the full possession, benefit and use for the life of the Grantor, all the Grantor's right, title and interest in and to all that certain property (the "**Real Property**") lying and being situated in [Insert] County, Texas, described as follows, to-wit:

[INSERT LEGAL DESCRIPTION];

together with all the Grantor's right, title and interest in and to (a) all improvements located on the Real Property, if any, (b) any and all appurtenances, easements or rights-of-way affecting the Real Property, and all of Grantor's rights, if any, to use the same, (c) any rights of ingress and egress to and from the Real Property and Grantor's rights to use the same, (d) the mineral rights, if any, owned by Grantor relating to the Real Property, and (e) all right, title and interest of Grantor, if any, in and to (i) any and all roads, streets, alleys and ways (open or proposed) affecting, crossing, fronting or bounding the Real Property, (ii) any and all strips, gores or pieces of property abutting, bounding or which are adjacent or contiguous to the Real Property (however owned or claimed by Grantor), and (iii) all reversionary interests, if any, in and to the Real Property. The Real Property, together with the rights and interests set forth in (a) through (e), inclusive, are herein collectively referred to as the "**Property**". Notwithstanding any contrary provisions hereof, Grantor is conveying the rights set forth in (c) and (e) **WITHOUT WARRANTY** of any kind, whether express, implied or statutory.

This conveyance is made SUBJECT TO, all and singular, but only to the extent that the same are currently valid and enforceable against the Property, (a) all rights-of-ways and easements, whether of record or not, (b) all restrictions, covenants and conditions, reservations, mineral severances, oil and gas leases and all other instruments that affect the Property, and, (c) rights, if any, of adjoining property owners of fences situated on a common boundary line.

Grantor reserves to [as applicable, himself/herself] a life estate in and to the Property, without any liability for waste, including the possession, use, and enjoyment of the Property, as well as the rents, issues, and profits of the Property, for and during [as applicable his/her] natural lifetime, and with full power to sell, convey, mortgage, lease or otherwise manage and dispose of the Property, in fee simple, with or without consideration, without the joinder or release of the Grantee.

Subject to the reservation of the life estate set forth above, TO HAVE AND TO HOLD the Grantor's right, title and interest in and to the Property, subject to the matters herein set forth, together with all and singular the rights and appurtenances thereto in anywise belonging unto the Grantee, Grantee's heirs, successors and assigns forever; and the Grantor does hereby bind Grantor, Grantor's heirs, successors and assigns to WARRANT AND FOREVER DEFEND, all and singular the Grantor's right, title and interest in and to the Property unto the Grantee, Grantee's heirs, successors and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof.

Whenever the context of this General Warranty Deed requires, (a) the singular nouns and pronouns include the plural, (b) any gender includes the other genders and (c) the term "successors and assigns" includes legal representatives, heirs, executors, administrators, successors and assigns.

EXECUTED this the _____ day of _____, 200__.

GRANTOR:

[INSERT NAME OF GRANTOR]

Grantee's Address:

[Insert]
[Insert]

[Insert Acknowledgment]
Return to:

[Insert]
[Insert]

***THIS TEMPLATE IS PRESENTED WITHOUT WARRANTY
EITHER EXPRESSED OR IMPLIED.*****

Appendix B

Current Texas Rules Governing Medicaid Estate Recovery

All of the rules can be found at the following link:

[http://info.sos.state.tx.us/pls/pub/readtac\\$ext.ViewTAC?tac_view=4&ti=1&pt=15&ch=373](http://info.sos.state.tx.us/pls/pub/readtac$ext.ViewTAC?tac_view=4&ti=1&pt=15&ch=373)

The Rules are arranged in the Texas Administrative Code under the following titles and chapter:

TITLE 1 ADMINISTRATION
PART 15 TEXAS HEALTH AND HUMAN SERVICES COMMISSION
CHAPTER 373 MEDICAID ESTATE RECOVERY PROGRAM

Of particular importance are the following sections (excerpted below):

RULE §373.105(6) - Definitions

- (6) Estate--The real and personal property of a decedent, both as such property originally existed and as from time to time changed in form by sale, reinvestment, or otherwise, and as augmented by any accretions and additions and substitutions that are included in the definition of the probate estate found in §3(1), Definitions and Use of Terms, Texas Probate Code.

RULE §373.205 Medicaid Estate Recovery Program (MERP) Claim

- (a) Contents of MERP Recovery Claim. The MERP claim will be presented to the estate personal representative (executor, administrator, or guardian) or filed by depositing it in the appropriate Probate Court and will include the amount of the claim, the date or dates of the covered Medicaid services provided, and a statement that to MERP's best knowledge the deceased Medicaid recipient had:
- (1) No surviving spouse;
 - (2) No surviving child under age 21;
 - (3) No surviving child of any age who is blind or disabled as defined by 42 U.S.C. §1382c;
 - (4) No unmarried adult child residing continuously in the decedent's homestead for at least one year prior to the time of the Medicaid recipient's death; and
 - (5) That to the best knowledge of the MERP no undue hardship, as defined by these rules, exists and that recovery will be cost-effective.
- (b) A Medicaid Estate Recovery (MERP) claim will be filed within 70 days after MERP has actual notice of the death of a Medicaid recipient aged 55 years or older who received covered long-term care services.

RULE §373.207 Exemptions from Claims

- (a) Medicaid Estate Recovery claims will be sought only after the death of the Medicaid recipient, and if there is no:
- (1) Surviving spouse;
 - (2) Surviving child or children under 21 years of age;
 - (3) Surviving child of any age who is blind or disabled as defined by 42 U.S.C. §1382c;
or
 - (4) Unmarried adult child residing continuously in the decedent's homestead for at least one year prior to the time of the Medicaid recipient's death.

- (o) Certain assets and resources of American Indians (AI) and Alaska Natives (AN) are exempt from estate recovery claims. The following AI/AN income, resources, and property are exempt from Medicaid Estate Recovery:

[This statute goes on to list numerous assets of American Indians that are exempt from recovery]

RULE §373.209 Undue Hardship Waivers

- (a) The Medicaid Estate Recovery Program (MERP) will not recover from estates if recovery would cause undue hardship. An undue hardship waiver request form will be provided with the MERP Notice of Intent to File a Claim, and undue hardship waiver requests must be made within 60 days of the date of the MERP Notice of Intent to File a Claim.
- (b) An undue hardship does not exist solely because:
- (1) Recovery would prevent heirs or legatees from receiving an anticipated inheritance; or
 - (2) The circumstances giving rise to the hardship were created by, or are the result of, estate planning methods under which assets were sheltered or divested contrary to the requirements of Medicaid law in order to avoid estate recovery.
- (c) Undue hardship waivers include:
- (1) The estate property subject to recovery has been the site of the operation of a family business, farm, or ranch at that location for at least 12 months prior to the death of the decedent; is the primary income producing asset of heirs and legatees, and produces 50 percent or more of their livelihood; and recovery by the State would affect the property and result in the heirs or legatees losing their primary source of income;
 - (2) Heirs and legatees would become eligible for public and/or medical assistance if a recovery claim were made;
 - (3) Allowing one or more survivors to receive the estate will enable him or her or them to discontinue eligibility for public and/or medical assistance;
 - (4) The Medicaid recipient received medical assistance as the result of a crime, as defined by Texas law, committed against the recipient; or
 - (5) Other compelling reasons.
- (d) Undue Hardship Waivers Applicable to Homesteads After receiving a Medicaid estate recovery claim, an heir may assert that recovery against a deceased Medicaid recipient's homestead would be an undue hardship and that the homestead should therefore be exempt from recovery for the cost of Medicaid long-term care services. The Health and Human Services Commission will exempt a decedent's home from estate recovery based on undue hardship when the following conditions have been established to the Commission's satisfaction:
- (1) The tax appraisal district value of the homestead is less than \$100,000. If the tax appraisal district value of the homestead exceeds this amount, the first \$100,000 of the tax appraisal district value for the most recent tax year at the time of the recipients' death shall be exempt from estate recovery. Any equity value of the tax appraisal district value for the most recent tax year at the time of the recipients' death in excess of \$100,000 is subject to estate recovery.
 - (2) One or more siblings or direct descendants of the deceased person (lineal heir(s), such as children and grandchildren) will inherit the homestead of the deceased Medicaid recipient, provided that each sibling or lineal heir inheriting the homestead has gross family income below 300 percent of the Federal Poverty Level.

- (3) When there are multiple heirs and not all heirs qualify for the hardship waiver, only that percentage of the homestead that corresponds to the qualifying heir or heirs' share of the homestead will be exempt from Medicaid estate recovery.
- (4) "300 percent of the federal poverty level" is a gross income test; no exclusions or deductions are allowed.
- (5) "Family" means that the Health and Human Services Commission will consider each heir separately. Heirs will not be aggregated into one family unless the heirs are minor children who are siblings. In the case of the adult heir, his or her family will be limited to the heir, the heir's spouse, and the heir's biological or legally adopted minor children and stepchildren residing in the household. In the case of the heir who is a minor, the heir's family will be the heir, his or her parent(s) or stepparent residing in the household, and the heir's minor siblings residing in the household, including half-, step-, and legally adopted siblings.
- (e) HHSC has exclusive authority to waive its Medicaid estate recovery claim and grant undue hardship waivers as determined by the Medicaid Estate Recovery Program (MERP) program on an individual case-by-case basis. An undue hardship waiver determination will be made by MERP within 40 days of the receipt of an undue hardship waiver request form and all required necessary supporting documents by MERP.
- (f) Undue hardship waiver request forms must be submitted to the following address: MERP, Hardship Waiver Request, P.O. Box 13247, Austin, Texas 78711.

473.399,² to include nonprobate transfers, (2) the State is not a creditor under section 461.300, (3) even if the State is a creditor, it was required to amend its Medicaid State Plan or promulgate a rule regarding its interpretation of section 461.300, and (4) the State failed to notify Decedent that it would pursue nonprobate assets outside the definition of "estate" found in section 473.398. Knight and Jones's four points are denied, and the judgment of the probate court is affirmed.

Factual and Procedural Background

This appeal pertains to a petition brought by the State for an accounting under section 461.300 of a nonprobate asset transferred by Decedent to his children, Violet J. Knight and Tommy Jones. Decedent, who was a resident of Boone County, Missouri, died on November 9, 2003, at the age of 92. Upon Decedent's death, his home passed to Knight and Jones via a beneficiary deed Decedent had filed with the Boone County Recorder of Deeds on January 7, 2000. Because Decedent's home was his only asset, no estate was opened.

During his lifetime, Decedent received Medicaid nursing home benefits from the State. The application for benefits signed by Knight on behalf of Decedent stated, "I/We UNDERSTAND that the State of Missouri may file a claim against my/our estate to recover any assistance received." In order to recover the payments it made on behalf of Decedent, the State filed an Application of Interested Party for an Order to Require Supervised Administration with the probate court on October 19, 2004, requesting that a probate estate be opened. At that time, the State claimed that Decedent's estate owed the State \$17,056.75 for Medicaid benefits it provided on behalf of Decedent. Because the probate court found there were no assets in Decedent's estate subject to administration, it denied the State's application.

The State then filed a writ of mandamus with this court, which ruled that an estate had to be opened prior to a determination of whether there were assets subject to administration.

² All references to sections 473.398 and 473.399 are to RSMo 2007.

Letters of Administration for supervised administration were issued to Knight on October 4, 2005. With the consent of Jones, Letters of Administration were re-issued on October 11, 2005, allowing independent administration, and naming Knight as personal representative of Decedent's estate. On October 5, 2005, the State sent a letter to Knight's attorney requesting that she initiate an action for accounting under section 461.300. After Knight refused to initiate the action for accounting, the State filed a petition for accounting with the probate court on November 10, 2005, seeking recovery of Medicaid benefits paid on behalf of Decedent in the amount of \$22,226.24. The parties later stipulated that the value of the property at the time of transfer was \$24,000.

On December 17, 2007, the probate court entered its judgment allowing the State's petition for accounting and its claim in the amount of \$22,226.24, stating that Knight and Jones were liable to the estate. Knight and Jones filed this timely appeal.

Standard of Review

Generally, the appellate court will affirm the judgment of the trial court unless there is no substantial evidence to support it, it is against the weight of the evidence, it erroneously declares the law, or it erroneously applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). However, because statutory construction is a question of law, the appellate court's review is de novo, and it gives no deference to the trial court's determination of law. *Mo. Highway & Transp. Comm'n v. Merritt*, 204 S.W.3d 278, 281 (Mo. App. E.D. 2006).

Point I

In their first point on appeal, Knight and Jones contend that the probate court erred in allowing the State's claim because there were no assets in Decedent's estate in that his only asset, his home, passed to Knight and Jones via a beneficiary deed. Knight and Jones further

argue that because the State has not amended the definition of “estate” in section 473.398.1 to include nonprobate transfers, the State cannot recover its Medicaid benefits from a nonprobate transfer. Because Knight and Jones’s first point on appeal deals with the structure of both the federal Medicaid Act and Missouri’s Medicaid estate recovery program, we will first describe the interaction between these programs.

Medicaid is a cooperative federal-state program that “seeks to provide medical assistance to low-income individuals who are unable to meet the costs of their medical care.” *Hutchings ex rel. Hutchings v. Roling*, 193 S.W.3d 334, 340 (Mo. App. E.D. 2006). If a state chooses to participate in the Medicaid program, the federal government will supply financial assistance to aid that state in providing health care. *Id.* Once a state chooses to participate in the Medicaid program, “the state must comply with all federal statutory and regulatory requirements.” *Id.* at 340-41. Missouri has chosen to participate in the Medicaid program, codifying its state program at section 208.001, RSMo Cum. Supp. 2008, et seq. The MO HealthNet Division within the Department of Social Services is authorized to promulgate rules and implement the provisions of Missouri’s Medicaid program under section 208.001.3.

In compliance with federal law, Missouri has established an estate recovery program in order to recover the value of Medicaid benefits paid by the State from the estate of a deceased Medicaid recipient. *See* 42 U.S.C. § 1396p(b);³ § 473.398-399.⁴ According to section 1396p(b)(4)(A), a state’s definition of “estate” must include at a minimum “all real and personal property and other assets included within the individual’s estate, as defined for purposes of State

³ Specifically, section 1396p(b)(1)(B) provides: “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, but only for medical assistance consisting of” certain enumerated services, such as “nursing facility services.”

⁴ Section 473.398 provides: “Upon the death of a person, who has [received Medicaid benefits], the total amount paid to the decedent or expended upon his behalf . . . shall be a debt due the state . . . from the estate of the decedent. The debt shall be collected as provided by the probate code of Missouri, chapters 472, 473, 474 and 475, RSMo.”

probate law.” Additionally, a state’s definition of “estate” “may include, at the option of the State . . . any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.” § 1396p(b)(4)(B). The State Medicaid Manual, provided by Centers for Medicare & Medicaid Services (CMS), instructs the state to “Specify in your State plan the definition of estate that will apply.” State Medicaid Manual, § 3810 B.

Missouri’s probate code defines “estate” as “the real and personal property of the decedent or ward, as from time to time changed in form by sale, reinvestment or otherwise, and augmented by any accretions and additions thereto and substitutions therefor, and diminished by any decreases and distributions therefrom.” § 472.010(11), RSMo 2007. The definition of “estate” found in section 472.010(11) is also used in Missouri’s Medicaid State Plan. Mo. State Plan, § 4.17, Attach. 4.17-A-3. Missouri’s State Plan further notes that “Missouri’s Medicaid estate recovery program is authorized by State law in the probate code. The State must pursue its claims against Medicaid decedent estates following the processes established by statute.” Mo. State Plan, § 4.17, Attach. 4.17-A-5.

It is clear that Decedent’s beneficiary deed was effective to transfer his home to Knight and Jones and that this nonprobate transfer disposed of Decedent’s only asset. *See* §§ 461.025, 461.005(2), (7), RSMo 2007. Accordingly, Knight and Jones argue that because Missouri has not chosen to use the expanded definition of “estate,” the State has no authority to make a claim against the nonprobate transfer. In its brief, the State admits that Missouri has not expanded the

definition of “estate” to include nonprobate transfers and that the definition of “estate” in section 472.010(11) applies to this action, “as it does for all other creditors under § 461.300.”

Additionally, Knight and Jones rely on two recent decisions from Missouri appellate courts, arguing that these decisions hold that the State cannot recover against certain property because it does not fall within the section 472.010(11) definition of “estate.” See *In re Estate of Bruce*, 260 S.W.3d 398 (Mo. App. W.D. 2008); *In re Estate of Shuh*, 248 S.W.3d 82 (Mo. App. E.D. 2008). In the context of spousal recovery under the Medicaid Act, *Bruce* and *Shuh* both held that Missouri has not adopted the broader definition of “estate” allowed by section 1396p(b)(4)(B). See *Bruce*, 260 S.W.3d at 403; *Shuh*, 248 S.W.3d at 89. However, each of these cases has additional analysis pertaining to whether the State can recover Medicaid benefits under section 461.300, which is what the State seeks to do in this case. Therefore, the relevant issue is not whether Missouri has expanded its definition of “estate” for estate recovery purposes, but whether Missouri’s estate recovery statutes allow the State to proceed under section 461.300. This issue is addressed by Knight and Jones in their second point.

Point II

In their second point on appeal, Knight and Jones contend that the probate court erred in allowing the State’s claim because the State is not a creditor within the meaning of section 461.300 in that the State’s claim did not arise until after the death of Decedent. It is also in this point that Knight and Jones argue that section 473.398 provides no authority for the State to recover under section 461.300.

Section 461.300.1 provides: “Each recipient of a recoverable transfer of a decedent’s property shall be liable to account for a pro rata share of the value of all such property received, to the extent necessary to discharge . . . claims remaining unpaid after application of the

decedent's estate” The obligation of the recipient may be enforced by an action for accounting brought by a qualified claimant. § 461.300.2. A “qualified claimant” includes a “creditor,” which is in turn defined as “any person to whom the decedent is liable, which liability survives whether arising in contract, tort, or otherwise, and any person to whom the decedent's estate is liable for funeral expenses and the reasonable cost of a tombstone.” § 461.300.10(1), (3). Finally, a “recoverable transfer” is defined in part as “a nonprobate transfer of a decedent's property under sections 461.003 to 461.081.” § 461.300.10(4).

Knight and Jones argue that the State's avenues of recovery are limited by Missouri's estate recovery statute, which states “The debt shall be collected as provided by the probate code of Missouri, chapters 472, 473, 474, and 475, RSMo.” § 473.398.1. Knight and Jones assert that section 461.300 is not part of Missouri's probate code and that because section 461.300 is not specifically listed in section 473.398, the estate recovery statute, it follows that the State has no authority to recover its Medicaid payments under section 461.300.

Missouri's other appellate courts have both allowed petitions for accounting brought by the State under section 461.300. See *In re Estate of Hayden*, 258 S.W.3d 505 (Mo. App. E.D. 2008); *In re Estate of Macormic*, 244 S.W.3d 254 (Mo. App. S.D. 2008). While analyzing whether section 461.300 is substantive or procedural in nature, the court in *Hayden* found that section 461.300 “is part of the machinery for the collection of debts incurred after the passage of Section 473.398,” thus implicitly acknowledging that section 473.398 allows for an estate recovery claim to be collected through a section 461.300 accounting action. *Hayden*, 258 S.W.3d at 514.

In evaluating whether the State had standing to file a petition for discovery of assets, the court in *Macormic* noted that “Section 473.398.1 gives the State the right to petition for the debt

it is owed 'from the estate of the decedent.' Under section 473.398.1, then, the State has an interest in *any property* which could possibly be part of Decedent's estate" *Macormic*, 244 S.W.3d at 259. Because beneficiary deeds are governed by section 461.025, Decedent's home is a recoverable transfer pursuant to section 461.300.⁵ Under the analysis set forth in *Macormic*, the State has an interest in the home because it could possibly be part of Decedent's estate if a successful accounting action is brought under section 461.300. Furthermore, because the court in *Macormic* ultimately concluded that the State was entitled to file a petition for accounting under 461.300, the court recognized that a section 461.300 proceeding was a proper method for recovering from a Medicaid recipient's estate. *See Macormic*, 244 S.W.3d at 260.

Similarly, the cases cited by Knight and Jones do not entirely support the proposition that the State cannot recover under section 461.300 simply because Missouri has not adopted an expanded definition of "estate." *See In re Estate of Bruce*, 260 S.W.3d 398; *In re Estate of Shuh*, 248 S.W.3d 82. In *Bruce*, the court did not hold that the State could not recover under section 461.300 because the property at issue did not fall under Missouri's definition of "estate," but instead held that the State could not recover under section 461.300 because property owned as tenants by the entirety was not a recoverable transfer. 260 S.W.3d at 403. Correspondingly, the court in *Shuh* did not wholly prohibit the State from bringing an action under section 461.300, but instead held that, due to specific limitations within the statute, section 461.300 did not expand the definition of "estate" to include *all* non-probate transfers. 248 S.W.3d at 89. Nevertheless, any hesitation by the court in *Shuh* to allow a proceeding under section 461.300 has been eradicated, as evidenced by its allowance of a petition for accounting by the State in *Hayden*. *See Hayden*, 258 S.W.3d 505.

⁵ Recall that a recoverable transfer includes any nonprobate transfer under section 461.003 to 461.081. § 461.300.10(4).

In addition to Missouri appellate court cases that have allowed the State to petition for an accounting, the state legislature itself has deemed a section 461.300 proceeding to be a proceeding under the probate code. § 461.300.7.⁶ Various provisions of section 461.300 also provide that an action for accounting is filed in the name of the estate, the action may be filed in probate court, the sum recovered is a monetary judgment in the name of the estate, and any monetary judgment is to be administered by the personal representative of the decedent's estate. *See* § 461.300.2, .6, .7. Knight and Jones's argument focuses on the fact that section 473.398 states that the debt created by the extension of Medicaid benefits "shall be collected as provided by the probate code of Missouri, chapters 472, 473, 474, and 475, RSMo." Although Missouri's probate code consists of the chapters listed, and chapter 461 is not listed in section 473.398, the state legislature has obviously chosen to deem section 461.300 accounting actions as proceedings under the probate code. The several other aspects of section 461.300, listed above, also tend to show that the legislature characterizes section 461.300 accounting actions as proceedings under the probate code. Because the legislature indicated that section 461.300 actions should be treated as proceedings under the probate code and expressed no intent that such actions not be treated as proceedings under the probate code for the purposes of recovering Medicaid benefits, the language of section 473.398 does not preclude the use of section 461.300 to recover Medicaid benefits from Decedent's estate.

Even if section 473.398 does not preclude an accounting action under section 461.300, Knight and Jones assert that the State still cannot recover under section 461.300 because it is not a "creditor." Their argument centers on the language in section 461.300.10(1) defining a "creditor" as "any person to whom the decedent is liable, which liability survives whether arising

⁶ Section 461.300.7 provides: "Any proceeding under this section . . . shall be deemed to be proceedings . . . under the probate code that are subject to section 472.013, RSMo."

in contract, tort, or otherwise,” and the language in section 473.398, which provides that upon the death of a person who has received Medicaid benefits, there shall be a debt due the state from the decedent’s estate. Knight and Jones claim that section 473.398 only provides for the creation of a debt *after* the decedent’s death, and that, therefore, the State cannot be a person to whom the decedent is liable during his lifetime, which liability survives.

As discussed earlier, the Eastern and Southern District appellate courts have already held that the State has standing as a creditor to bring an action for accounting under section 461.300 to recover debts from the estates of deceased Medicaid recipients. *See In re Estate of Hayden*, 258 S.W.3d 505 (Mo. App. E.D. 2008); *In re Estate of Macormic*, 244 S.W.3d 254 (Mo. App. S.D. 2008). Regarding the debt due from the deceased Medicaid recipient’s estate, the Southern District held that “Such a debt necessarily survives the death of [a] [d]ecedent in that section 473.398 specifically states it can be collected from the estate of [a] [d]ecedent.” *Macormic*, 244 S.W.3d at 260. In *Hayden*, the appellant did not argue that the State was not a creditor within the meaning of section 461.300, and, therefore, the Eastern District affirmed the judgment of the probate court allowing an action for accounting under section 461.300 without discussing whether a section 461.300 accounting action is a proper method for recovering Medicaid benefits from a deceased recipient’s estate. 258 S.W.3d 505.

In addition to Missouri appellate court cases, cases from other states dealing with estate recovery characterize the debt as one created during the lifetime of the decedent. *See, e.g., Estate of Wood v. Ark. Dep’t of Human Servs.*, 894 S.W.2d 573, 576 (Ark. 1995) (noting that the relationship created after the enactment of the estate recovery statute “was as if [the recipient] had a loan from [the State] to be repaid from the assets of her estate”); *In re Estate of Burns*, 928 P.2d 1094, 1099 (Wash. banc 1997) (ruling that “The precipitating event is, therefore, the receipt

of the benefits giving rise to the contingent indebtedness, and not the creation of the decedent's estate"); *In re Estate of Hooey*, 521 N.W.2d 85, 87 (N.D. 1994) (finding that "Although the [State]'s ability to enforce the claim was tolled until [the recipient]'s death, the obligation [to repay] was incurred by [the recipient] during her lifetime"); *In re Estate of Reimers*, 746 N.W.2d 724, 728 (Neb. Ct. App. 2008) (stating that "While the debt arising under [the estate recovery] statute accrues during the recipient's lifetime, it is held in abeyance for payment until the recipient's death.").

Finally, it is likely that the Missouri Supreme Court would determine that the State is a "creditor" within the meaning of section 461.300 based on its interpretation of the term "claim" in the context of Medicaid claims filed against a deceased recipient's estate. See *In re Estate of Thomas*, 743 S.W.2d 74 (Mo. banc 1988). In interpreting statutes, "it is appropriate to take into consideration statutes involving similar or related subject matter when such statutes shed light upon the meaning of the statute being construed, even though the statutes are found in different chapters and were enacted at different times." *Lane v. Lensmeyer*, 158 S.W.3d 218, 226 (Mo. banc 2005) (internal quotations omitted).

In *Thomas*, the Court dealt with a claim by the Missouri Department of Social Services for the reimbursement from a decedent's estate of medical payments made on behalf of the decedent. 743 S.W.2d at 75. In holding that the State's claim fell within the exemption for a claim by a taxing authority, the Court also concluded that an estate's liability under section 473.398 "is a 'claim' of the sort contemplated in probate which falls within the scope of sec. 472.010(3), RSMo 1986, defining 'claims' as 'liabilities of the decedent which survive whether arising in contract, tort or otherwise.'" *Id.* at 77 (emphasis omitted). This language is still present in the current version of section 472.010 and is very similar to the language used to

define a “creditor” in section 461.300.10(1). Because the language used is similar and both statutes involve definitions regarding the liability of a decedent, it is probable that the Missouri Supreme Court would interpret “creditor” much like it interpreted the term “claim” and would find that the State is a creditor for purposes of section 461.300.

Therefore, because a section 461.300 petition for accounting is a proceeding under Missouri’s probate code and because the State qualifies as a “creditor” under section 461.300.10(1), the State may utilize section 461.300 to bring an action for accounting in the context of Medicaid estate recovery. Point two is denied.

Point III

In their third point on appeal, Knight and Jones contend that the probate court erred in allowing the State’s claim because even if the State is a creditor under section 461.300, the State failed to follow proper procedure when it did not amend the Missouri Medicaid State Plan and promulgate a rule.

A State Plan must be amended “whenever necessary to reflect . . . [a] material change in any phase of State law, organization, policy or State agency operation.” 45 C.F.R. § 205.5. Knight and Jones argue that the State’s interpretation of section 461.300 should have been promulgated as a rule in accordance with section 536.010(6), RSMo 2008.⁷ “Any agency announcement of policy or interpretation of law that has future effect and acts on unnamed and unspecified facts is a ‘rule.’” *Dep’t of Soc. Servs., Div. of Med. Servs. v. Little Hills Healthcare, L.L.C.*, 236 S.W.3d 637, 642 (Mo. banc 2007) (citing *NME Hosps., Inc. v. Dep’t of Soc. Servs.*, 850 S.W.2d 71, 74 (Mo. banc 1993)). Knight and Jones argue that the State’s attempt to recover against a nonprobate transfer comes within this definition of a rule.

⁷ Section 536.010(6) defines a “rule” as “each agency statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or practice requirements of any agency.”

Knight and Jones's contentions that the State Plan should have been amended and that a rule should have been promulgated are based on their assertion that the State's use of section 461.300 constitutes an expansion of the definition of "estate" for purposes of Medicaid estate recovery. This assertion is incorrect. Because our judgment that the State may recover under section 461.300 is founded on the definition of "estate" in section 472.010, no expanded definition of "estate" is necessary and, therefore, the State need not amend the State Plan or promulgate a rule.

A proceeding under section 461.300 is not an action to bring nonprobate assets into the probate estate, because the substance of section 461.300 "is a rule of liability, not of ownership." *Cook v. Barnard*, 100 S.W.3d 924, 927 (Mo. App. W.D. 2003). Instead, a proceeding under section 461.300 allows the decedent's estate to recover the value of nonprobate assets when the assets already in the estate are insufficient to cover the claims of the decedent's creditors. *Id.* As discussed in the analysis of point two, the judgment recovered in a section 461.300 action for accounting is a monetary judgment for the value of the nonprobate asset, which becomes part of the decedent's estate as defined by section 472.010(11). This monetary judgment is then distributed by the personal representative, just as all other assets in the estate are distributed.

Because the judgment recovered under a section 461.300 proceeding is an asset of the estate as defined by section 472.010(11), the definition of "estate" to which all creditors remain subject, no expanded definition of "estate" is necessary. Therefore, there has been no material change in Missouri's definition of "estate," and the State may proceed under section 461.300 without amending Missouri's Medicaid State Plan. Point three is denied.

Point IV

In their fourth point on appeal, Knight and Jones contend that the probate court erred in allowing the State's claim because the State failed to give Decedent sufficient notice of the State's estate recovery program in that the State did not inform Decedent that it would pursue assets outside Missouri's definition of a decedent's estate.

The State Medicaid Manual issued by CMS states, "You should provide notice to individuals at the time of application for Medicaid that explains the estate recovery program in your State." State Medicaid Manual, § 3810 G.1, Medicaid Estate Recoveries. In the application for Medicaid benefits that Knight signed on behalf of Decedent, there is a provision that states: "I/We UNDERSTAND that the State of Missouri may file a claim against my/our estate to recover any assistance received."

Again, Knight and Jones base their argument regarding lack of notice on the contention that the State is pursuing nonprobate assets. As discussed in point three, Knight and Jones's argument is flawed because the State's action under section 461.300 does not bring nonprobate assets into the estate but, rather, allows the State to recover the value of Medicaid benefits received by Decedent in the form of a monetary judgment from Decedent's estate. Furthermore, Missouri's estate recovery statutes give the State "an interest in *any property* which could possibly be part of Decedent's estate." *Macormic*, 244 S.W.3d at 259.

Under federal law, a state's definition of "estate" for Medicaid estate recovery purposes is drawn from that state's probate law. *See* 42 U.S.C. § 1396p(b)(4)(A). Pursuant to section 461.300, which the legislature considers to be part of the probate code, recipients of nonprobate transfers may be liable to the estate of a decedent when the decedent's estate is insufficient to satisfy the claims of the decedent's creditors. Section 461.300 makes it possible for the value of

nonprobate transfers to become an asset of the "estate," as it is defined by section 472.010(11) for estate recovery purposes. Because it is possible for the value of nonprobate transfers to become an asset of the estate, the State has an interest in that property. Therefore, since the State has an interest in any property that may become part of the estate and section 461.300 allows for the value of nonprobate transfers to become a part of Decedent's estate, the notice provided by Missouri's Medicaid application is sufficient. Point four is denied.

Conclusion

As a creditor within the meaning of section 461.300, the State is entitled to bring a petition for accounting to recover the value of a nonprobate asset Decedent transferred to Knight and Jones. In addition, the State's utilization of section 461.300 does not necessitate an amendment to Missouri's Medicaid State Plan, and the State's Medicaid application gives sufficient notice of its estate recovery program. The judgment of the probate court is affirmed.

VICTOR C. HOWARD, JUDGE

All concur.



SHORT SALE ADDENDUM

ADDENDUM TO CONTRACT CONCERNING THE PROPERTY AT

8787 New Street

Houston

(Street Address and City)

- A. This contract involves a "short sale" of the Property. As used in this Addendum, "short sale" means that:
 - (1) Seller's net proceeds at closing will be insufficient to pay the balance of Seller's mortgage loan; and
 - (2) Seller requires:
 - (a) the consent of the lienholder to sell the Property pursuant to this contract; and
 - (b) the lienholder's agreement to:
 - (i) accept Seller's net proceeds in full satisfaction of Seller's liability under the mortgage loan; and
 - (ii) provide Seller an executed release of lien against the Property in a recordable format.
- B. As used in this Addendum, "Seller's net proceeds" means the Sales Price less Seller's Expenses under Paragraph 12 of the contract and Seller's obligation to pay any brokerage fees.
- C. The contract to which this Addendum is attached is binding upon execution by the parties and the earnest money and the Option Fee must be paid as provided in the contract. The contract is contingent on the satisfaction of Seller's requirements under Paragraph A(2) of this Addendum (Lienholder's Consent and Agreement). Seller shall apply promptly for and make every reasonable effort to obtain Lienholder's Consent and Agreement, and shall furnish all information and documents required by the lienholder. Except as provided by this Addendum, neither party is required to perform under the contract while it is contingent upon obtaining Lienholder's Consent and Agreement.
- D. If Seller does not notify Buyer that Seller has obtained Lienholder's Consent and Agreement on or before _____, this contract terminates and the earnest money will be refunded to Buyer. Seller must notify Buyer immediately if Lienholder's Consent and Agreement is obtained. For purposes of performance, the effective date of the contract changes to the date Seller provides Buyer notice of the Lienholder's Consent and Agreement (Amended Effective Date).
- E. This contract will terminate and the earnest money will be refunded to Buyer if the Lienholder refuses or withdraws its Consent and Agreement prior to closing and funding. Seller shall promptly notify Buyer of any lienholder's refusal to provide or withdrawal of a Lienholder's Consent and Agreement.
- F. If Buyer has the unrestricted right to terminate this contract, the time for giving notice of termination begins on the effective date of the contract, continues after the Amended Effective Date and ends upon the expiration of Buyer's unrestricted right to terminate the contract under Paragraph 23.
- G. For the purposes of this Addendum, time is of the essence. Strict compliance with the times for performance stated in this Addendum is required.
- H. Seller authorizes any lienholder to furnish to Buyer or Buyer's representatives information relating to the status of the request for a Lienholder's Consent and Agreement.
- I. If there is more than one lienholder or loan secured by the Property, this Addendum applies to each lienholder.

Buyer

Seller

Buyer

Seller

The form of this addendum has been approved by the Texas Real Estate Commission for use only with similarly approved or promulgated forms of contracts. Such approval relates to this contract form only. TREC forms are intended for use only by trained real estate licensees. No representation is made as to the legal validity or adequacy of any provision in any specific transactions. It is not intended for complex transactions. Texas Real Estate Commission, P.O. Box 12188, Austin, TX 78711-2188, 1-800-250-8732 or (512) 459-6544 (<http://www.trec.state.tx.us>) TREC No. 45-0.