

NEW YORK
state department of
HEALTH

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ADMINISTRATIVE DIRECTIVE

TRANSMITTAL: 11 OHIP/ADM-8

TO: Commissioners of
Social Services

DIVISION: Office of Health
Insurance Programs

DATE: September 26, 2011

SUBJECT: Expanded Definition of "Estate" for Medicaid Recoveries

**SUGGESTED
DISTRIBUTION:**

Medicaid Staff
Resource Recovery Staff
Temporary Assistance Staff
Fair Hearing Staff
Legal Staff
Staff Development Coordinators

**CONTACT
PERSON:**

Local District Liaison:
Upstate (518)474-8887
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ATTACHMENTS:

Attachment I - OHIP-0054, Important Information Regarding Medicaid Estate Recovery
Attachment II - Notice of Claim - Non Probate Assets
Attachment III - Medicaid Estate Recovery Questionnaire
Attachment IV - Notice of Post Death Medical Assistance Lien
Attachment V - LDSS-4454EL, LDSS Quarterly Estate and Casualty Recovery Report

FILING REFERENCES

Previous ADMs/INFs	Releases Cancelled	Dept. Regs.	Soc. Serv. Law & Other	Manual Ref.	Misc. Ref.
89 ADM-45		360-1.4	SSL 366 & 369		State Fin.
89 ADM-47		360-4.4	SSA 1917(b)		Law 18 (4&5)
92 ADM-45		360-4.7			Gen. Bus.Law
94 ADM-17		360-7.2			453
96 ADM-08		360-7.4			94 LCM-89
02 ADM-3		360-7.11			GIS 10 MA/008
06 ADM-5					
09 ADM-3					
88 INF-12					

I. PURPOSE

This Administrative Directive (ADM) provides guidance to local departments of social services on implementation of the expanded definition of "estate" for Medicaid recovery purposes.

II. BACKGROUND

Chapter 170 of the Laws of 1994 amended Social Services Law (SSL) Section 369 to conform to the federal requirements in the Omnibus Budget Reconciliation Act of 1993 (OBRA '93) regarding Medicaid estate recoveries. Prior to the requirements of OBRA '93, pursuing estate recoveries was voluntary and limited to Medicaid recipients who were 65 years of age or older when they received Medicaid benefits and who had no surviving spouse, minor child, or adult certified blind or certified disabled child. The provisions of OBRA '93 mandated that states pursue a recovery from the estate of a deceased Medicaid recipient who was age 55 or older when he or she received Medicaid benefits or who, regardless of age, was permanently institutionalized. At a minimum, the State is required to recover from assets that pass through probate as defined under the State's probate law. The requirements of OBRA '93 and required actions were issued in Administrative Directive 02 OMM/ADM-3, "Medicaid Liens and Recoveries."

OBRA '93 also provided states with the option to expand estate recoveries to include assets that pass outside of the probate estate, but which the Medicaid recipient had an interest in at the time of death. Chapter 59 of the Laws of 2011 amended Section 369(6) of the SSL to elect this option. Effective for Medicaid recoveries made on or after September 8, 2011, the definition of estate includes assets that normally bypass probate (e.g., assets that pass directly to a survivor or heir through joint tenancy, right of survivorship, life estate or living trust). Department regulations at 18 NYCRR 360-7.11 have been revised to implement the amendments made to SSL Section 369(6).

The policy guidance provided in this directive does not rescind current policy on liens and recoveries as outlined in 02 OMM/ADM-3. This directive advises of the additional assets that are to be included in a Medicaid recipient's estate for recovery purposes.

III. PROGRAM IMPLICATIONS

Medicaid correctly paid for any recipient who was age 55 or older or, regardless of age, was permanently institutionalized, is recoverable from the estate of the recipient. Under the expanded definition of estate, non probate assets that generally pass directly to another individual upon the decedent's death are considered part of the decedent's estate. These assets include jointly owned financial institution accounts, jointly held real property, life estate interests, interests in certain trusts and annuities regardless of whether there is a named beneficiary or right of survivorship.

The expanded definition of estate will increase revenue from estate recoveries by including assets that normally bypass probate. The expanded definition of estate also limits the ability of Medicaid recipients to avoid estate recoveries by shifting assets out of the future probate estate.

A. Prohibitions on Recoveries

Medicaid estate recoveries will continue to be prohibited:

- during the lifetime of the surviving spouse, or at any time when the recipient has a surviving child who is under age 21 or is certified blind or certified disabled; this prohibition applies to all assets covered by the expanded definition of estate, including assets that pass directly upon the decedent's death to individuals other than a surviving spouse or minor child or blind or disabled child;
- with respect to the home of a deceased Medicaid recipient, when one of the following relatives is residing in the home:
 - a sibling with an equity interest in the home who lived in the home for at least one year immediately before the recipient was institutionalized and who has lawfully resided in the home continuously since that time; and
 - an adult child who lived in the home for at least two years immediately before the recipient was institutionalized, who provided care that may have delayed the recipient's institutionalization, and who has lawfully resided in the home continuously since that time.

If the prohibited period ends (e.g., the spouse dies or a minor child reaches the age of 21) or in the case of decedent's home, the sibling or adult child no longer resides in the home or the property is to be sold, a recovery can then be pursued.

As advised in GIS 10 MA/008, effective January 1, 2010, Medicaid payments for Medicare cost sharing expenses made on behalf of any individual receiving benefits through the Medicare Savings Program, including Medicare Part A and Part B premiums, Medicare deductibles, coinsurance and co-payments are exempt from estate recovery. Medicaid payment for all other services not related to Medicare cost sharing, continue to be subject to estate recovery. In addition, Medicare cost sharing payments made on behalf of individuals who are not enrolled in the Medicare Savings Program, continue to be subject to estate recovery.

The extent to which recoveries may be pursued with respect to Medicaid recipients who are Qualified Partnership Policyholders depends on the type of plan chosen. Qualified policyholders with a Total Asset Protection Plan are excluded from estate recoveries. Dollar-for-Dollar Asset Protection Plans protect a certain dollar amount of the individual's resources from recovery. See 09 OHIP/ADM-3, "Medicaid Extended Coverage for New York State Partnership for Long-Term Care Policyholders," for further information about Medicaid recipients who are Qualified Partnership Policyholders.

Additional assets from which no estate recovery may be pursued include income, resources and property belonging to an American Indian or Alaskan Native, as described in further detail in 02 OMM/ADM-3, and estate assets that include reparations payments.

B. Hardship

No recovery of Medicaid correctly paid will be pursued against all or a portion of the estate if it will result in undue hardship. Undue hardship may exist when the asset subject to estate recovery is the sole income-producing asset of the beneficiary(ies), such as a family farm or family business and income produced by the asset is limited, or when the asset subject to recovery is real property of modest value (i.e., having a value no higher than 50 percent of the average selling price in the county where the home is located, as of the decedent's date of death) and the home is the primary residence of the beneficiary(ies). There may be other compelling circumstances that should be considered when deciding whether estate recovery will be waived due to undue hardship.

The potential for undue hardship must be considered when deciding whether to pursue recovery from the estate. In some cases, it may only be necessary to waive recovery of certain assets in order to avoid causing undue hardship; in these cases recovery may be pursued from the remaining assets in the estate. In addition to the district's consideration of undue hardship, the beneficiary or fiduciary of the estate may also request a consideration of undue hardship.

Undue hardship is not considered to exist based on the inability of the beneficiaries to maintain a pre-existing lifestyle or when the alleged hardship is the result of Medicaid or estate planning methods involving divestiture of assets.

C. Real Property Post Death Lien

Section 369(6) of the Social Services Law provides that a Medicaid estate claim can be asserted against property that passes outside an individual's probate estate, to the extent of the individual's interest in the property at the time of death. A post death lien may be placed on real property that passes outside the probate estate to a joint owner, heir, dependent or survivor to secure their obligation to pay the Medicaid estate claim up to the value of the property received. Such a lien should not be imposed if recovery from the estate is prohibited as outlined in Section III.A. of this ADM, or recovery of the asset(s) is waived under undue hardship, as described in Section III.B.

NOTE: A post death lien should be imposed against real property as soon as practicable after the individual's death, to put mortgage lenders and prospective purchasers of the property on notice of the Medicaid program's claim against the property.

In addition to the filing of a post death lien on real property, the district may consider a voluntary repayment agreement in order to assist the individual(s) in paying down the lien amount. Section IV.B.3. of this directive describes the conditions for entering into a repayment agreement.

D. Procedural Requirements

The social services district may assert a claim against the estate of a deceased Medicaid recipient for the amount of Medicaid paid from the date the recipient turned 55 years of age or the date of permanent institutionalization, whichever occurs first. Medicaid is a preferred creditor of the estate. Recovery of Medicaid paid is subject to the funds remaining in the deceased Medicaid recipient's estate, including probate and non probate asset(s), after payment of funeral and burial expenses. For recovery of non probate assets, formal court administration is not required to dispose of the assets; therefore, the Medicaid claim is not subject to funds remaining after payment of amount(s) claimed for administration costs. After all debts (including Medicaid) of the estate are satisfied, the remainder goes to the beneficiary designated by will or law.

Social services districts may determine the cost effectiveness of pursuing recoveries for Medicaid paid. Cost effectiveness is based on a variety of factors, including, but not limited to: the administrative cost of a court action; the amount of Medicaid paid; the availability of assets from which to recover; and previous experience with the court.

The social services district must notify affected heirs of the initiation of an estate claim and give these individuals an opportunity to request a waiver of the recovery based on undue hardship. The district must waive recovery if it would cause undue hardship as described in this directive.

IV. REQUIRED ACTION

Effective September 8, 2011, assets subject to estate recovery also include property in which the deceased Medicaid recipient has any legal interest at the time of death, including jointly owned real and personal property and other assets, retained life estates, and interests in trusts regardless of whether there is a designated beneficiary or a payable on death provision.

In order to advise Medicaid applicants of the assets subject to estate recovery, the "Important Information Regarding Medicaid Estate Recovery" (Attachment I) must be included with the LDSS-4148B, "What You Should Know About Social Services Programs," until revisions can be made regarding the expanded assets that may be recovered from a Medicaid recipient's estate.

To pursue a recovery from non probate assets, the "Notice of Claim - Non Probate Assets" and the "Medicaid Estate Recovery Questionnaire" (Attachments II and III) must be sent to the representative of the estate, beneficiary, survivor of jointly owned assets, or person granted remainder interest in real property, advising of the Medicaid claim against the decedent's estate.

If no response is received to the "Notice of Claim - Non Probate Assets" and "Medicaid Estate Recovery Questionnaire," it may be necessary to initiate court proceedings to recover from the surviving owner, heir, dependent or beneficiary.

A. Recovery of Expanded Probate Assets

1. Jointly Owned Bank Accounts

For Medicaid eligibility purposes, when a Supplemental Security Income-related (SSI-related) applicant/recipient (A/R) and one or more persons jointly own a bank account, the A/R is presumed to have a 100% interest in the account. The joint owner(s) is considered to be named on the account for purposes of convenience. The presumption can be rebutted. Evidence that the account is, in fact, the property of more than one of the persons named as an owner and each owner's proportionate share should be documented in the case record.

The Medicaid recipient's interest in the joint account at the time of his/her death is subject to recovery from the person(s) who is named joint owner on the account.

If the case record does not contain evidence that rebuts the presumption of 100% ownership by the decedent or the decedent was not subject to a resource test for Medicaid eligibility purposes and the joint owner claims the funds in the joint account were not wholly assets of the decedent, the joint account owner must be allowed the opportunity to provide documentation of his/her interest in the account through verifiable deposits and withdrawals.

Jointly owned securities (e.g., stocks, bonds, mutual funds) in which the Medicaid recipient had interest at the time of death are also subject to recovery to the extent of the decedent's per capita share.

2. Jointly Held Real Property

For purposes of Medicaid eligibility for SSI-related applicants, real property owned jointly by the Medicaid applicant and one or more other individual(s) may not have been considered available as a resource if the other joint owner(s) did not agree to liquidate the property. The property may have been subject to placement of a Medicaid lien on the recipient's interest. Regardless of whether the property was an unavailable resource, a Medicaid lien was placed on the property or the property was not subject to treatment as a resource (recipient was not SSI-related), recovery shall be pursued against the deceased recipient's interest in such property.

3. Life Estate Interest

A life estate interest that was created by a recipient or the recipient's spouse, in property in which the recipient or spouse held interest at the time the life estate was created, or a life estate interest that was created for the benefit of a recipient or the recipient's spouse in property in which the recipient or spouse held any interest within five years prior to the creation of the life estate, is subject to estate recovery.

The value of the life estate interest is an actuarial computation based on the age of the recipient and the fair market value (FMV) of the property immediately prior to death.

The Internal Revenue Service (IRS) provides an actuarial table, "Table S, Single Life Factors," in accordance with the most recent mortality table, "Table 2000CM," and interest rates under IRS code 7520, "Section 7520 Interest Rates."

The appropriate section of "Table S," based on the applicable interest rate, must be used when determining the life estate value for the month/year in which the recipient died.

Districts will need to obtain information from two tables provided on the IRS website: the interest rate for the appropriate month/year that applies to the life estate calculation; and the corresponding section of "Table S," based on the applicable interest rate. The following steps are provided to access the website:

1. Determine the IRS code 7520 interest rate that applies to the month and year to be used in the life estate computation. Interest rates under IRS code 7520 can be found at <http://www.irs.gov/businesses/small/article/0,,id=112482,00.html>.
2. Once you have determined the appropriate interest rate to be used in the life estate computation, "Table S" can be found at <http://www.irs.gov/retirement/article/0,,id=206601,00.html>. Click on "Table S," then scroll down to the appropriate interest rate (noted at the top of each section). Each section of the table provides the life estate and remainder interest at the specific interest rate.

Using the age of the recipient for the applicable month/year, and the FMV of the property in which the life estate was retained, the following example describes the valuation of life estate interest.

Example: In July of 2011, the recipient dies possessing life estate interest in real property he/she had previously owned. At the time of death the recipient is 76 years of age, and the FMV of the real property in which he/she has life estate interest immediately prior to death, is \$270,000. Pursuant to the table provided in "1" above, the IRS code 7520 interest rate is 2.4%. Using "Table S" as described in "2" above and the section of "Table S" noted as "Interest Rate at 2.4 Percent," the life estate factor for a 76 year old recipient is 0.21231.

The calculation is as follows:

\$270,000
<u>X .21231</u>
\$57,323.70

The life estate value is \$57,323.70, and is subject to estate recovery.

NOTE: Effective with the release of this ADM, the IRS table at the applicable interest rate must be used for all calculations to determine the value of life estate interest. This rescinds the previous direction issued in 96 ADM-8, "OBRA '93 Provisions on Transfers and Trusts," to use a reasonable method of valuing life estate interest.

For interests in real property (including joint ownership and life estate interest), the social services district shall file a post death lien on real property in which the deceased recipient had interest at the time of death. The attached "Notice of Post Death Medical Assistance Lien" (Attachment IV) has been developed for use in filing the lien in the county clerk's office.

4. Interest In a Trust

Any interest the Medicaid recipient had in a living trust at the time of death shall be included in the estate recovery. The trust document must be reviewed to determine whether the decedent had any interest that would be considered available at the time of death.

For revocable living trusts created by the Medicaid recipient or the recipient's spouse, the entire value of the principal and accumulated interest is considered an available resource at the time of death and is included in the individual's estate for purposes of estate recovery.

In the case of an irrevocable trust funded in whole or in part with the assets of the Medicaid recipient or the recipient's spouse, any principal and accumulated interest that was required to be paid to or for the benefit of the Medicaid recipient under the terms of the trust agreement is included in the decedent's estate and is subject to Medicaid recovery. If under the terms of the trust, the recipient was entitled to receive trust income, any income that, as of the date of the recipient's death, was required to be distributed but had not yet been distributed is included in the decedent's estate for recovery purposes.

Note: Exception trusts are required to be disregarded as available income and resources for purposes of determining Medicaid eligibility. As outlined in 96 ADM-8, one type of exception trust is created for the benefit of a certified disabled individual under age 65 and the other type of exception trust is created for the benefit of a certified disabled individual of any age (pooled trust). These trusts are required to include provisions giving the Medicaid program a remainder interest payable at the time of the disabled individual's death. Under the required remainder provisions, the Medicaid program is to receive all amounts remaining in the trust (or in the case of a pooled trust, all amounts not retained by the trust) up to **the total value of all Medicaid paid on behalf of the disabled individual**. The expanded estate definition does not allow Medicaid to make a recovery from such a trust in excess of its remainder interest; however, the amount of the remainder interest is not limited to the amount of Medicaid provided to the individual on or after age 55 or following permanent institutionalization.

5. Annuities

Annuities are investments that create income payments over fixed intervals, once annuitized. Although there may be a designated beneficiary, the beneficiary is not entitled to the funds if there is an outstanding Medicaid debt. The remaining balance or income distributions from an annuity purchased by or with assets of the decedent or the decedent's spouse is included in the Medicaid recipient's estate and is subject to recovery.

For an SSI-related applicant/recipient, if the annuity was purchased on or after February 8, 2006, and was not treated as a countable resource (considered countable income only), the State would have been named as the remainder beneficiary as part of the eligibility determination. If the annuity was treated as a countable resource, the State would not be named remainder beneficiary; however, the annuity would be subject to estate recovery.

A "payable on death" clause does not alter the status of these funds from being subject to an estate recovery, since the investment is considered an asset of the recipient at the time of death.

6. Life Insurance

Since life insurance policies are based on risk, there is little or no cash value at the moment before death; therefore, life insurance policies generally are not property of the estate. If, however, the beneficiary is the estate or there are no surviving beneficiaries, the payout is recoverable as part of the deceased Medicaid recipient's estate.

B. Estate Recovery of Correctly Paid Medicaid

1. Notice of Claim

Upon notification of the death of the Medicaid recipient or the surviving spouse of such individual, the local department of social services shall issue a written notice of claim to the fiduciary of the decedent's estate, if applicable, and to the person in possession of property or assets in which the decedent had any legal title or interest at the time of death, including assets conveyed to a survivor or heir through joint tenancy, tenancy in common, survivorship, life estate, living trust or other arrangement. Attachment II, "Notice of Claim - Non Probate Assets," is the written notification that is required to be sent. This notice must be reproduced on district letterhead. Attachment I, "Important Information Regarding Medicaid Estate Recovery," must be attached to the "Notice of Claim - Non Probate Assets."

The written notice will:

- set forth the basis for the estate claim, and the specific laws and/or regulations supporting the claim;
- specify the amount determined to be owed to the Medicaid program as of the date of the notice;
- describe the criteria for being granted a deferral or waiver of the estate recovery, and the timeframes for requesting such deferral or waiver;
- indicate that the Medicaid program has or may impose a lien against any real property which was conveyed through joint tenancy, tenancy in common, survivorship, life estate, living trust or other arrangement; and
- instruct the fiduciary to inform the decedent's dependents, heirs, or survivors of the Medicaid claim and of their right to seek a deferral or waiver of the estate recovery, or to contest the Medicaid program's claim.

2. Waiver of Estate Recovery

The estate claim will be waived, in whole or in part, if recovery against the decedent's interest in the asset will result in undue hardship to the heir, beneficiary or survivor. Undue hardship is described in Section III.B. of this directive.

3. Deferral of Estate Recovery

Recovery against a deceased Medicaid recipient's estate must be deferred:

- during the lifetime of the recipient's surviving spouse; or
- during any period in which the recipient has a surviving child under 21 years of age; or
- during the lifetime of a recipient's surviving child of any age who is certified blind or certified disabled; or
- with respect to the home of a deceased Medicaid recipient, when one of the relatives (adult child or sibling as described in Section III.A.) is lawfully residing in the home.

Upon death of the surviving spouse or blind or disabled child, or upon the minor child reaching 21 years of age, or in the case of a decedent's home, upon the adult child or sibling ceasing to reside in the home or the home being put up for sale, the estate claim against the deceased Medicaid recipient's estate that was previously prohibited, shall be pursued. A claim against such individual for the receipt of such property by distribution or survival shall be limited to the value of the property received from the estate of the deceased Medicaid recipient or the amount of medical assistance otherwise recoverable, whichever is less.

Districts are advised to maintain a file on estate claims that are deferred. At a minimum, the file should contain the surviving spouse and/or child's name, address and social security number, as well as, information on the estate value at the time of the deceased Medicaid recipient's death.

Deferral of recovery may also be considered on real property subject to a post death lien if:

- undue hardship has not been found to exist;
- the heir or survivor has lawfully and continuously resided in the real property, beginning prior to the deceased Medicaid recipient's death, and is unwilling to sell the real property;
- the Medicaid claim cannot be paid in full unless the property is liquidated;
- the heir or survivor is able to demonstrate the inability to obtain financing to pay the estate claim; and
- a written agreement has been entered into between the Medicaid program and the dependent, heir, or survivor whereby the Medicaid program holds a lien on such real property and the dependent, heir, or survivor agrees to pay the amount of the claim in accordance with a reasonable payment schedule, subject to reasonable interest.

In this situation a lien is filed in the county clerk's office in the county where the property is located and remains on file to protect the interest of the Medicaid program to the extent of the claim against the recipient's estate, less any payments actually received toward such claim. Recovery is deferred until:

- the death of the dependent, heir, or survivor; or
- the sale, refinance, transfer or change in title of the real property; or
- the determination by the Medicaid program that the dependent, heir, or survivor is in breach of the repayment agreement.

D. Reporting Requirements

Local departments of social services report estate recoveries under Section B, "Refunds" on the LDSS-157-A, "Schedule E-1 Summary of Refunds and Cancellations, Decertified Facility Information and Rate Adjustments," monthly report. Currently, the form allows entry for a total amount of probate recoveries. The Office of Temporary and Disability Assistance will be revising the form to require separate entry of amounts representing recovery from probate assets and non probate assets.

In addition to reporting estate recoveries on the LDSS-157-A, Local Commissioners Memorandum 94 LCM-89 advised districts of the requirement to complete and submit the LDSS-4454EL, "LDSS Quarterly Estate and Casualty Recovery Report," (Attachment V). Districts are reminded of the requirement to complete and submit this quarterly report. The LDSS-4454EL has been revised to separate reporting of estate recoveries from probate and non probate assets. Submission of the LDSS-4454EL is especially necessary since the monthly reporting on the LDSS-157-A only allows entry for the total amount recovered from estate claims.

V. NOTICE REQUIREMENTS

OHIP-0054, "Important Information Regarding Medicaid Estate Recovery," (Attachment I) - This informational notice must be included with the LDSS-4148B, "What You Should Know About Social Services Programs," until revisions can be made regarding Medicaid estate recoveries. This form is available on the intranet.

"Notice of Claim - Non Probate Assets" (Attachment II) - This letter is reproduced on district letterhead and must be used to notify the fiduciary, if applicable, the individual who is the designated beneficiary, and the recipient of the remainder interest as a joint owner or remainder person of the district's right to recover from the asset(s) in which the deceased Medicaid recipient had any interest at the time of death.

"Medicaid Estate Recovery Questionnaire" (Attachment III) - This form is reproduced on district letterhead and must accompany the "Notice of Claim - Non Probate Assets" for purposes of obtaining information regarding the assets in which the decedent may have had interest at the time of death.

"Notice of Post Death Medical Assistance Lien" (Attachment IV) - This is a sample notice of lien which may be used to file the lien in the clerk's office in the county in which the property is located.

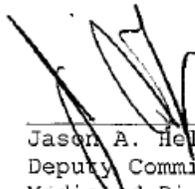
LDSS-4454EL, "LDSS Quarterly Estate and Casualty Recovery Report," (Attachment V) - Since there are budgetary expectations regarding implementation of the expanded definition of estate, this form must be completed by districts on a quarterly basis. The revised form is available on the intranet.

VI. SYSTEMS IMPLICATIONS

There are no systems implications.

VII. EFFECTIVE DATE

The provisions of this ADM are effective for all Medicaid estate recovery claims against assets of a deceased Medicaid recipient filed on or after September 8, 2011.



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Medicaid Director
Office of Health Insurance Programs