

OTHER ELIGIBILITY REQUIREMENTS**RECOVERIES**
ESTATE RECOVERIES

Description: Estate recovery is when the cost of Medicaid provided to an individual who was after age 55 or older, or when the recipient was permanently residing in a medical institution, is recovered from the assets in the recipient's estate.

Policy: 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. Non-probate assets of the recipient that generally pass directly to another individual upon death, including: 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 are considered part of the decedent's estate.

References:

SSL Sect. 366(3)(a)
369

Social Security Act 1917(b)

NYS Finance Law 18 (4&5)

General Business Law 453

Dept. Reg. 360-1.4
360-4.4
360-4.7
360-7.2
360-7.4
360-7.11

ADMs 11 OHIP/ADM-8
09 OHIP/ADM-3
02 ADM-03
96 ADM-08
94 ADM-17
92 ADM-53
92 ADM-45
89 ADM-47
89 ADM-45

LCMs 94 LCM-89

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GISs 10 MA/008
 08 MA/031
 06 MA/018
 06 MA/022

Interpretation: Effective September 8, 2011 assets subject to estate recovery include all property in which the deceased Medicaid recipient has any legal interest including jointly owned real and personal property, retained life estates, interests in trusts and other assets.

Medicaid Recoveries are 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 a child of any age who is certified blind or certified disabled. This prohibition applies to all assets of the recipient including those that pass directly upon the recipient's death to individuals other than a surviving spouse or minor child, or blind or disabled child.
- From the income, resources and property belonging to an American Indian or Alaskan Native.
- From government reparation payments paid to special populations.
- From Workers' Compensation, volunteer firemen's benefits, Social Security, SSI or other such benefits.
- From the recipient's personal injury action that was filed against a nursing home. This prohibition runs for the lifetime of the recipient.
- From the personal account of a veteran who died in a Veteran's Administration (VA) nursing facility. If a veteran was transferred from a non-VA facility to a VA facility (e.g. a VA hospital) for treatment and died while in the VA facility no recovery from the personal account maintained by the non-VA facility is pursued. Similarly if the VA contracted for the care of a veteran in a private nursing facility at VA expense recovery is not sought from the personal account maintained by the private nursing facility.
- From payments made through the Office of Mental Health Comprehensive Outpatient Program (COPs).

Medicaid Recoveries involving a homestead are prohibited:

- When a sibling with an equity interest in the home of a

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deceased Medicaid recipient 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;

- When an adult child who lived in the home of a deceased Medicaid recipient 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;
- From the real property of a permanently institutionalized individual if the value of the property when counted in determining eligibility results in the applicant having to spend down excess resources. An example is a permanently institutionalized individual who does not intend to return home and does not have a relative that would allow the homestead to be exempt from recovery (as described above). In such instances, the home is treated as a countable resource.

If the prohibited period ends (e.g., the spouse dies or a minor child reaches the age of 21) or in the case of a 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.

Recoveries and Liens-Qualified Partnership Policy Holders

The extent to which liens may be imposed and recoveries pursued with respect to Medicaid recipients who are Qualified Partnership Policyholders (QPPs) depends on the type of plan chosen by the QPP.

- Total Asset Protection Plans (TAP) - No liens may be imposed against the real property of a permanently institutionalized individual who is a TAP QPP nor may recoveries be made from the estate of a TAP QPP.
- Dollar-for-Dollar Asset Protection (DDAP) Plans- Since homes of DDAP QPPs must be evaluated for their exempt/countable status, a lien shall be placed on the real property of the permanently institutionalized individual DDAP QPP in an amount equivalent to his/her unprotected resources, if any.

Recovery of Expanded Probate Assets

- Jointly Owned Bank Accounts and Securities - the Medicaid

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recipient's per capita interest in a joint bank account as well as jointly owned securities (e.g., stocks, bonds, mutual funds) at the time of his/her death is subject to recovery from the person(s) who is named as the joint owner on the account.

NOTE: 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 Held Real Property - real property owned jointly by a Medicaid recipient and one or more other individuals may not have been considered available as a resource during the eligibility process. Whether the property was considered available or unavailable, recovery must be pursued against the deceased recipient's interest in such property. A post death lien must be filed.

Life Estate Interest - A life estate interest that was created by a recipient or his/her 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 the recipient's death. Effective September 08, 2011, the Internal Revenue Service (IRS) 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", must be used for this computation. These tables and rates are found on the IRS website.

Example:

- Step 1. Determine the IRS code 7520 interest rate that applies to the month and year of the recipient's death.

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Step 2. Determine the interest rate factor from "Table S".

Step 3. Multiply the FMV of the property by the interest rate factor from "Table S" to arrive at the life estate value.

NOTE: If the life estate was jointly owned by the recipient, the district must file a post death lien on the real property using the "Notice of Post Death Medical Assistance Lien".

- Trusts - Any interest the recipient had in a living trust at the time of death must be included in the estate recovery.
 - Revocable living trusts – when created by the 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.
 - Irrevocable trusts – when funded in whole or in part with the assets of the recipient or the recipient's spouse, any principal and accumulated interest that was required to be paid to or for the benefit of the recipient are included in the decedent's estate for recovery.

NOTE: Exception trusts created for the benefit of a certified disabled individual under age 65, and exception trusts created for the benefit of a certified disabled individual of any age (pooled trusts) are disregarded as available income and resources when determining eligibility. However, these trusts must include provisions giving the Medicaid program a remainder interest of 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, payable at the time of the recipient's death.

- Annuities - The remaining balance or income distribution 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 regardless of a designated beneficiary. A "payable on death" clause does not alter the status of these funds from being subject to estate recovery as the investment is considered an asset of the recipient at the time of death.

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An annuity purchased on or after February 8, 2006 by an SSI-related Medicaid recipient is required to have the State named as the remainder beneficiary if the annuity is not treated as a countable resource (considered countable income only).

- Life Insurance – Generally, life insurance policies are not part of a decedent's estate. However, if the beneficiary of the policy is the estate, or there are no surviving beneficiaries, the payout is recoverable as part of the estate.

Hardship

No recovery of Medicaid correctly paid will be pursued against any portion of an estate if it will result in undue hardship. Examples of undue hardship include:

- the sole income-producing asset of the beneficiary (ies), such as the family farm or family business and income produced by the asset is limited, or
- real property of modest value (i.e., having a value no higher than 50% 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), or
- other complying circumstances.

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.

Waiver of Estate Recovery

The estate claim may be waived in whole or in part if the recovery against the decedent's interest in the asset will result in undue hardship as described above.

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

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- with respect to the home of a deceased Medicaid recipient, when one of the relatives, adult child or sibling as described above, is lawfully residing in the home.

Upon the 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 estate that was previously prohibited must be pursued. The claim against such individual for the receipt of such property by distribution or survival is 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.

Deferral of estate recovery on real property is 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.

When such deferrals of estate recovery are made, a lien must be filed in the county clerk's office in the county where the property is located and remain 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.

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Amount of the Lien

A claim may be asserted against the estate of a deceased Medicaid recipient for the amount of Medicaid paid from the date the recipient reached 55 years of age or the date of permanent institutionalization, whichever occurs first.

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 payments 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.

If a recipient who is not permanently institutionalized (non PI) was 65 years of age prior to October 1, 1993, a claim may be made against the estate for the amount of Medicaid paid from the date the recipient became 65 until his/her death. If such recipient was less than 65, but more than 55 years of age as of October 1, 1993 then a claim may be made against the estate for the amount of Medicaid paid from the date the recipient became 55 years old or October 1, 1993, whichever is later

The local social services district is a preferred creditor of the estate. After the payment of funeral and burial expenses, the recovery of Medicaid is subject to the funds remaining in the estate including: probate assets, non-probate assets, excess revocable burial funds and payments for burial space items that are not used after the payment of funeral. After all debts of the estate are satisfied, including Medicaid, the remainder goes to the beneficiary or beneficiaries designated by will or by law if no will exists.

Social services districts must notify affected heirs when an estate claim is made and give the individuals an opportunity to request an undue hardship waiver.

Districts must evaluate the cost effectiveness of pursuing Medicaid recoveries. Cost effectiveness is based on factors including but not

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limited to: the administrative cost of court action, the amount of Medicaid paid, the availability of assets from which to recover, and previous experience with the court.

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 "Notice of Claim-Non Probate Assets" reproduced on district letterhead, "Medicaid Estate Recovery Questionnaire", and "Important Information Regarding Medicaid Estate Recovery" to the fiduciary of the decedent's estate, and, if applicable, to the person in possession of property or assets in which the decedent had any legal title or interest at the time of death.

NOTE: For estates with a fiduciary, the district should file its claim within seven months from the date the fiduciary is first appointed to probate the decedent's will. If the district files its claim after this seven month period, the fiduciary will not be liable if he or she has in good faith paid other claims or distributed the estate.