

**Estate Administration and the Medicaid Estate Recovery Program:  
The Personal Representative's Duty to Notify**

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*Ohio Medicaid and the Estate Recovery Program*

Medicaid is a state and federally funded entitlement health program that guarantees health care coverage to certain low-income and medically vulnerable people who meet program eligibility requirements. Ohio's Medicaid program began in 1968 and is administered by the Ohio Department of Job and Family Services through 88 local county departments.<sup>1</sup> Nearly two million Ohioans, 17% of the state population, are enrolled in Medicaid with total annual spending exceeding \$11.8 million.<sup>2</sup>

Medicaid estate recovery became a required element of Ohio's Medicaid program when the United States Congress passed the Omnibus Budget Reconciliation Act in 1993 (OBRA '93). Under OBRA '93, all states receiving federal Medicaid funding are required to establish an estate recovery program.<sup>3</sup> The federal statute describes the minimum standards that states must use to identify the population and assets subject to recovery, and those Medicaid services whose costs are eligible for recovery.<sup>4</sup> States, however, are permitted under OBRA '93 to enforce recovery program rules that are more expansive than the minimum standards articulated in the statute.<sup>5</sup>

The State of Ohio established its Medicaid estate recovery program effective January 1, 1995 with the adoption of Ohio Rev. Code §5111.11 and related code sections. Ohio's estate

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<sup>1</sup> Ohio Admin. Code §5101:1-38-01.2

<sup>2</sup> The Henry J. Kaiser Family Foundation, [statehealthfacts.org](http://statehealthfacts.org), December 12, 2006; most recent spending information available is from fiscal year 2005.

<sup>3</sup> 42 U.S.C. §1396p(b).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

recovery program is jointly administered by the Ohio Department of Job and Family Services (JFS) and the Ohio Attorney General's Office (AGO).<sup>6</sup> The Ohio legislature initially established estate recovery rules following the minimum federal standards for the population, assets, and Medicaid services subject to recovery. The legislature has since expanded the definitions of each of these categories to allow for the broadest scope of recovery permitted under federal law.<sup>7</sup> The AGO may pursue estate recovery against a deceased Medicaid recipient who is either a permanently institutionalized individual of any age, or an individual fifty-five years or older.<sup>8</sup> A permanently institutionalized individual is an individual who is (1) an inpatient of a nursing facility, an intermediate care facility for the mentally retarded, or other medical institution, (2) required to apply all of her income, except an amount for personal needs, towards the costs of medical or nursing care, and (3) is not reasonably be expected to be discharged from the institution and return home as determined by JFS.<sup>9</sup> The cost of all services paid by Medicaid on behalf of a decedent recipient is eligible for reimbursement from the decedent recipient's estate.<sup>10</sup> Examples of services subject to recovery include physician and outpatient visits, home and community-based waiver services, and all medically related Medicaid services.

Initially, a decedent recipient's estate subject to recovery consisted only of the probate assets of the estate. However, effective July 1, 2005, Ohio expanded the class of assets against which Medicaid costs may be recouped by adopting an "augmented estate" approach to estate recovery.<sup>11</sup> Under the revised statute, which is applicable to Medicaid recipients who died on or after 9/29/05, the augmented estate includes not only all real and personal property in the probate

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<sup>6</sup> Ohio Admin. Code §5101:1-38-10(F).

<sup>7</sup> See 42 U.S.C. §1396p(b)(1)(A); (b)(1)(B)(ii); (b)(4)(B).

<sup>8</sup> Ohio Rev. Code §5111.11(B)(1)-(2).

<sup>9</sup> Ohio Rev Code §5111.11(A)(4).

<sup>10</sup> Ohio Rev. Code §5111.11(B).

<sup>11</sup> Ohio Rev. Code §5111.11(A)(1).

estate, or any such property that would be part of the probate estate except for release of administration procedures, but also any other real or personal property and other assets in which the decedent had legal title or interest at the moment before death, to the extent of the interest.<sup>12</sup>

By adopting the augmented estate approach, Ohio prevents Medicaid recipients from avoiding estate recovery by avoiding probate. Any property that would pass to a survivor, heir, or assignee of the decedent outside probate through joint tenancy, tenancy in common, survivorship, extinguishment of a life estate, or living trust is now subject to payback to Ohio's Medicaid program. Assets now part of the decedent recipient's estate for estate recovery purposes, but previously exempt from recovery, include joint and survivor or payable on death bank accounts, transfer on death vehicles, real estate and securities, and life insurance policies still owned by the Medicaid recipient (at least to the extent of their cash values).

The AGO may only pursue recovery against the estate of a Medicaid recipient after the death of the recipient's surviving spouse, if applicable, and when the recipient no longer has any surviving children under age 21 or who are blind or totally disabled according to Medicaid regulations.<sup>13</sup> The surviving spouse's estate is subject to Medicaid estate recovery to the extent that assets passed through the recipient spouse's estate to the surviving spouse when the recipient spouse died.<sup>14</sup>

The Ohio Department of Job and Family Services has authority under state statute to preserve and give notice of the state's recovery claim by imposing a lien against the property of a

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<sup>12</sup> Under property law, a life estate of joint ownership interest terminates upon the owner's death. Ohio Rev. Code §5111.11(A)(6) overcomes this by stating "'Time of death' shall not be construed to mean a time after which a legal title or interest in real or personal property or other asset may pass by survivorship or other operation of law due to the death of the decedent or terminate by reason of the decedent's death."

<sup>13</sup> Ohio Rev. Code §5111.11(C)(1). Although not stated in the regulation, the State's position is that only those assets actually received by the minor or disabled child are exempt from recovery.

<sup>14</sup> *Ohio Dept. of Job and Family Services v. Tultz*, 152 Ohio App.3d 405, 409 (9<sup>th</sup> App. Dist 2003).

Medicaid recipient.<sup>15</sup> In the case of a permanently institutionalized individual, the AGO may impose a lien against real property owned either individually or jointly by the recipient and recipient's spouse.<sup>16</sup> As to the family home, however, no lien may be filed: (1) while the spouse lives there; (2) while the institutionalized individual's sibling with an equity interest continues to reside in the home and resided in the home for at least one year immediately preceding the individual's admission to the institution; or (2) while the institutionalized individual's child continues to live in the home and lived in the home for two years immediately preceding admission to the institution while providing care to the recipient that delayed admission to the institution.<sup>17</sup> A lien, if imposed, dissolves upon the recipient's discharge and return home from the institution.<sup>18</sup> However, in practice, liens are not currently imposed, except as a means of providing notice when the surviving spouse dies and estate assets had passed earlier from the Medicaid recipient spouse's estate to the surviving spouse.<sup>19</sup>

The personal representative of the decedent Medicaid recipient's estate may give notice to the AGO of circumstances indicating eligibility for an undue hardship waiver from the estate recovery program.<sup>20</sup> An undue hardship waiver is most likely in those situations where, if the state's claim against the estate is not waived, the surviving relative would be deprived of a necessity of life.<sup>21</sup> Specifically, an undue hardship waiver is generally appropriate when the estate subject to recovery is the sole income-producing asset of the survivors, like a family farm, or when without the receipt of the estate proceeds, the survivor would become eligible for public

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<sup>15</sup> Ohio Rev. Code §5111.111(A)

<sup>16</sup> Ohio Rev Code §5111.111(B).

<sup>17</sup> Ohio Rev. Code §5111.11(C)(2); §5111.111(C).

<sup>18</sup> Ohio Rev. Code §5111.111(E).

<sup>19</sup>Robert J. Byrne, Ohio Assistant Attorney General, *Medicaid Planning Update: Medicaid Estate Recovery*, August 29, 2006, p. 2.1.

<sup>20</sup> Ohio Rev. Code §5111.11(E); §5111.11(G)(2); Ohio Admin. Code §5101:1-38-10(C)(3).

<sup>21</sup> Ohio Admin. Code §5101:1-38-10(C)(1).

assistance.<sup>22</sup>

*The Personal Representative's Duty to Notify the Attorney General*

The executor, administrator, commissioner, or person who filed for release from administration of an estate (i.e., the person responsible for the estate under the notice statute), has a duty to notify the AGO within thirty days of being approved as executor or administrator of the estate, or filing the application for release or summary release from administration, that a decedent was a Medicaid recipient.<sup>23</sup> That person must give notice if she determines the decedent received Medicaid benefits and was a permanently institutionalized individual or an individual fifty-five years or older at the time of death.<sup>24</sup>

The format of the required notice described in the estate recovery notice statute remains inconsistent with the realities of estate administration in Ohio. The statute requires a completed “Medicaid estate recovery reporting form” that lists all the decedent’s probate assets as well as the additional assets considered part of the decedent’s augmented estate.<sup>25</sup> The form must also contain a statement printed in bold type warning personal representatives of the estate completing the form that “knowingly making a false statement...is falsification...a misdemeanor of the first degree.”<sup>26</sup> Such a form has yet to be introduced by either JFS or the AGO, and it is doubtful whether either agency will create the detailed form required by the notice statute.

Regardless of whether the official reporting form ever becomes available, the personal representative of an estate is still required to notify the AGO that a decedent received Medicaid benefits. Current estate administration procedure includes filing Standard Probate Form (SPF)

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<sup>22</sup> *Id.*

<sup>23</sup> Ohio Rev. Code §2117.061(B).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* and Ohio Rev. Code §2117.061(D).

<sup>26</sup> *Id.*

7.0, also mandated under the notice statute.<sup>27</sup> The statute is not clear regarding the deadline for filing this form with the probate court, but does direct the court to forward a copy of the filed form to the AGO.<sup>28</sup> Suggested practice for those attorneys providing counsel to an estate representative is to file SPF 7.0 with the probate court within the 30-day time limit. The weakness in using SPF 7.0 as the sole form of notice to the AGO is that the form itself contains only the estate name, probate case number, and identity of the person responsible for the estate. The probate form does not request a Medicaid case number or recipient Social Security Number that the AGO may use to accurately verify the identity of the decedent. Adding the decedent's Social Security Number or Medicaid case number to SPF 7.0 is not recommended as the completed form becomes public record upon filing with the court. As counsel for the estate representative, the attorney should also consider providing written notice directly to the AGO with additional identifying information. Filing SPF 7.0 along with mailing written notice to the AGO within the 30-day limit provides the required notice, triggers the window in which a claim must be made by the AGO against the estate, and creates a record of the notice with probate court if a question is later raised as to whether notice was given to the Medicaid estate recovery program.

When an estate requires no probate filings, notice may be made by mail directly to the Medicaid Estate Recovery Program at 150 E. Gray Street, 21<sup>st</sup> Floor, Columbus, Ohio 43215. Notice may also be made to one of the "special counsels" appointed by the AGO to act as agents for the estate recovery program in various counties throughout Ohio.

The AGO may forward the notice received from the estate representative to the appropriate local special counsel who then contacts the estate representative to initiate estate

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<sup>27</sup> Ohio Rev. Code §2117.061(C).

<sup>28</sup> *Id.*

recovery procedures, or the AGO may pursue the claim itself. The AGO has ninety days after notice or one year after the date of decedent's death, whichever is latest, to present a claim to the estate.<sup>29</sup> If the AGO decides not to pursue a claim, a letter advising that there will be no claim made is sent to the estate representative.<sup>30</sup>

Special counsel contacts the estate representative via an initial claim letter containing an interim claim amount for the Medicaid services actually paid on behalf of the decedent at the time of death. The interim claim amount may not include any pending payments or services not yet billed to Medicaid.<sup>31</sup> The interim claim letter advises the estate representative that the final claim amount will be available approximately seven months after the decedent's date of death. The final claim amount includes all Medicaid payments on behalf of the decedent, including amounts for those services provided prior to death but not actually paid until after the interim claim amount was determined. The estate representative will not automatically receive the final claim amount, but must request it from the AGO by calling the Collections Enforcement Section.

If the AGO does not receive notice from the person responsible for the estate when notice is due, the period during which a claim can be filed does not expire. Failure to give notice to the AGO may result in the state bringing action against the heirs and beneficiaries of the decedent's estate months or years after assets have been distributed.

Note: This article was provided for informational purposes only and should not be considered binding legal advice.

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<sup>29</sup> Ohio Rev. Code §2117.061(E).

<sup>30</sup> Byrne, *Medicaid Estate Recovery*, p. 2.3.

<sup>31</sup> Byrne, *Medicaid Estate Recovery*, p. 2.2.