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Will my estate have to repay Medicaid after my death? What is Medicaid Estate Recovery?

Medicaid estate recovery is the process by which states recoup, from the estates of deceased Medicaid recipients, some of the costs of running their Medicaid programs. Ever since the inception of Medicaid in 1965, states have had the legal authority to implement estate recovery programs. Today, all states are required by federal law to have them. 42 USC 1396p(b)(1).

In Oregon, Medicaid is administered by the Oregon Department of Human Services (hereafter “Oregon DHS” or “DHS”), and is governed by both federal and state law. Oregon law also requires DHS to seek recovery from the estates of deceased recipients. ORS 414.105. The branch of DHS tasked with administering Oregon’s estate recovery program is the Estate Administration Unit. [see footnote 1]

When Medicaid recipients die, their estates are required to pay back some or all of the medical assistance received during life. The concept of estate recovery is sometimes confusing because, when people think of Medicaid, they (correctly) think of individuals with modest means, and the idea of an “estate” is at odds with that image. Medicaid does impose strict limits on the assets and income of recipients. In fact, individuals with financial resources in excess of \$2000 generally do not qualify for Medicaid assistance. However, some assets are considered to be “exempt” for purposes of Medicaid eligibility, and it is these exempt assets that are most commonly pursued in estate recovery. The largest and most important of these is the home. A Medicaid recipient can own a home and still qualify for Medicaid if the home is used as his or her primary residence (and/or the primary residence of his or her spouse). OAR 461-145-0220(2).

Not a Lien

One of the most common misconceptions about the estate recovery program is that DHS places liens on the homes of Medicaid recipients. This is not the case. Although the home is, more often than not, the primary asset in most Medicaid recipients’ estates, Oregon DHS does not use a lien mechanism to recover its costs. Instead, DHS makes “claims” against the estates of deceased recipients, just as any other creditor (such as a hospital or credit card company) might do. The only difference is that DHS’s estate recovery claim is given priority over the claims of most other creditors, so that in insolvent estates, DHS gets paid before them. ORS 115.125

Scope of Recovery

Oregon estate recovery law defines “estate” very broadly, so as to facilitate recovery of Medicaid assistance paid regardless of how it passes upon a recipient’s death. OAR 461-135-0832. Federal Medicaid law allows (and Oregon has opted for) an “expanded” definition of “estate” that includes not only the assets in a person’s



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Scope of Recovery (*continued*)

probate estate (as determined by state law) but also those assets that pass outside of probate, including through:

- Joint Tenancy/Tenancy by the Entirety
- Life Estates
- Living Trusts
- Certain Annuities

Any property that in which an individual has an interest on the date of death may be reached by Oregon's estate recovery program, to the extent of that interest.

Limits of Recovery

Not all Medicaid assistance provided by DHS is recoverable under the estate recovery laws. For example, DHS cannot recover the costs of basic medical care (i.e., Oregon Health Plan) provided to recipients who were under the age of 55 when the care was provided. (However, if the recipient was permanently institutionalized, DHS can recover benefits paid at any age.). In addition, if a Medicaid recipient is survived by a spouse, DHS must defer enforcement of its recovery claim until the surviving spouse's death. Finally, if a recipient is survived by a child under age 21; a permanently disabled child; or a blind child; the estate recovery claim cannot be enforced. ORS 416.350. OAR 461-135-0835.

Hardship Waivers

DHS is empowered to waive enforcement of any estate recovery claim if it finds that enforcing the claim would result in undue hardship to the family members, heirs, or beneficiaries of the deceased Medicaid recipient. ORS 416.340. OAR 461-135-0841. For example, if enforcement of a recovery claim would cause the waiver applicant to become homeless, or would result in the applicant becoming eligible for Medicaid himself, DHS may opt to waive recovery. In some cases, the claim is forgiven in its entirety. In other instances (such as where a deceased recipient's family has compelling reasons to continue residing in the recipient's home, but lacks the liquid resources to pay the Claim), the Department will negotiate with the interested parties, sometimes accepting a Note and Trust Deed on the property in lieu of a lump-sum payment.

Notice to DHS: Probates; Small Estate Affidavits; and Wrongful Death Probates

Although estate recovery in Oregon is not limited to assets that pass through probate estates, Oregon law



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Notice to DHS: Probates; Small Estate Affidavits; and Wrongful Death Probates (*continued*)

does require that notice of all probates initiated in the state (including copies of Small Estate Affidavits) be provided to the DHS Estate Administration Unit. ORS 113.145(6); ORS 114.525(11); OAR 461-135-0834. DHS takes the position that this requirement applies even to probates opened for the sole purpose of pursuing a wrongful death claim.

In general, proceeds of wrongful death claims are not available to creditors of the decedent, as the claim is not property of the decedent. However, DHS contends that it may nonetheless have valid claims for reimbursement of Medicaid costs from wrongful death proceeds, and thus should be notified of wrongful death probates. Specifically, DHS points to the reporting requirement contained in ORS 416.530, which requires recipients and/or their attorneys to notify DHS whenever an action for personal injuries is initiated. In these cases, DHS takes the position that notice of the probate should be given to the Estate Administration Unit (as required by ORS 113.145(6)) and notice of the wrongful death action for which the probate is opened should be given to the Personal Injury Liens Unit (as required by ORS 416.530).

Funeral Expenses

As mentioned above, Oregon probate law prioritizes certain creditor claims over others in insolvent estates. One claim with a higher priority than DHS's estate recovery claim is a "plain and decent funeral" for the decedent. ORS 115.125 (1)(c). In its administrative rules, DHS has determined that such a funeral can and must be arranged for no more than \$3500.00. OAR 461-135-0833.

Relevance of Estate Recovery to Personal Injury Lawyers

Medicaid estate recovery is, obviously, not central to the practice of most personal injury attorneys. However, a basic understanding of estate recovery is useful for a number of reasons:

1. Personal injury lawyers need to be able to distinguish between Medicaid liens against personal injury actions and estate recovery claims against estates. Medicaid recipients frequently confuse and conflate the two concepts, and lawyers can reduce client anxiety by separating and clarifying them.
2. Medicaid recipients who receive personal injury settlements or awards (and whose Medicaid liens are negotiated and resolved) are sometimes unaware that settlement funds remaining at their death may be subject to estate recovery claims, notwithstanding the lien resolution. Whereas injury liens are limited to accident-related medical expenses, estate recovery is limited only as described in these materials.
3. As mentioned above, Medicaid estate recovery is, according to DHS, directly relevant to wrongful death actions, and personal injury lawyers may put themselves or their clients at risk by failing to properly notify DHS in such cases.



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Relevance of Estate Recovery to Personal Injury Lawyers (*continued*)

4. Medicaid recipients receiving settlements or awards may want to factor a future estate recovery claim into their settlement decisions. For example, in evaluating the attractiveness of a proposed settlement, a Medicaid recipient may want to determine the amount of money he or she will be able to pass on to family and friends at death, after satisfaction of the estate recovery claim. The Estate Administration Unit of DHS will, on request, prepare an "Assistance Summary" detailing the type and amount of recoverable assistance provided up to the date of request. The Estate Administration Unit can be reached at 503-378-2884 or, toll-free in Oregon, at 800-826-5675.

Footnotes:

1-The Estate Administration Unit is a subdivision of Oregon DHS's Office of Payment Accuracy and Recovery, but should not be confused with the Personal Injury Liens Unit (also a subdivision of OPAR), which deals with liens against personal injury settlements of Medicaid recipients.

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