

5101:1-38-10 **Medicaid estate recovery.**

(A) This rule describes Ohio's medicaid estate recovery program and the undue hardship waiver request process.

(B) Definitions.

(1) "Estate" includes both of the following:

(a) All real and personal property and other assets to be administered under Title XXI of the Revised Code and property that would be administered under that title if not for section 2113.03 or 2113.031 of the Revised Code; and

(b) Any other real and personal property and other assets in which an individual had any legal title or interest at the time of death (to the extent of the interest), including assets conveyed to a survivor, heir, or assign of the individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.

(2) ~~"Home" is defined in rule 5101:1-39-31 of the Administrative Code, for the purpose of this rule, means any property in which an individual has an ownership interest and which serves as the individual's principal place of residence. Home includes the structures and land appertaining to the home property. Appertaining land must be contiguous to the land on which the home property is located and must not be separated by intervening land property owned by others.~~

(3) "Individual," for the purpose of this rule, means a past or current recipient of medicaid.

(4) "Permanently institutionalized individual" is defined in section 5111.11 of the Revised Code.

(5) "Person responsible for the estate" is defined in section 2117.061 of the Revised Code.

(6) ~~"Personal property" is defined in rule 5101:1-39-05 of the Administrative Code means any property that is not real property. The term includes, but is not limited to, such things as cash, jewelry, household goods, tools, life insurance policies, automobiles, promissory notes, etc.~~

(7) "Qualified long- term care partnership (QLTCP)" is defined in rule

5101:1-38-11 of the Administrative Code.

- (8) "Real property" ~~is defined in rule 5101:1-39-05 of the Administrative Code~~ means land, including buildings or immovable objects, attached permanently to the land.
- (9) "Time of death" is defined in section 5111.11 of the Revised Code.
- (C) The Ohio attorney general (AGO) will seek recovery or adjustment, on behalf of the Ohio department of job and family services (ODJFS), from the estates of the following individuals:
- (1) A permanently institutionalized individual of any age, in the amount of all medicaid benefits correctly paid; or
 - (2) An individual fifty-five years of age or older who is not a permanently institutionalized individual, in the amount of all medicaid benefits correctly paid (other than benefits paid under the medicare premium assistance programs set forth in rules 5101:1-38-03 and 5101:1-39-01.1 of the Administrative Code) after the individual attained such age.
- (D) Any adjustment or recovery under paragraph (C) of this rule may be sought only:
- (1) After the death of the individual's surviving spouse, if any; and
 - (2) When the individual has no surviving child who either is under age twenty-one or is blind or permanently and totally disabled as defined in Chapter 5101:1-39 of the Administrative Code; and
 - (3) If recovery is sought against a permanently institutionalized individual under paragraph (C)(1) of this rule, no recovery may be made against the individual's home while either of the following lawfully resides in the home:
 - (a) The permanently institutionalized individual's sibling who:
 - (i) Resided in the home for at least one year immediately before the date of the individual's admission to the institution, and
 - (ii) Has resided in the home on a continuous basis since that time.
 - (b) The permanently institutionalized individual's son or daughter who:

- (i) Provided care to the permanently institutionalized individual that delayed the individual's institutionalization, and
- (ii) Resided in the home for at least two years immediately before the date of the individual's admission to the institution, and
- (iii) Has resided in the home on a continuous basis since that time, and
- (iv) Documents that he or she has fulfilled these requirements by submitting the following:
 - (a) A written statement of the date that he or she moved into the home;
 - (b) A level of care assessment showing that the individual would have become institutionalized earlier without care provided by the adult son or daughter;
 - (c) A written statement from the individual's attending physician, stating the kind and duration of care that was required to delay the individual's institutionalization; and
 - (d) All relevant documentation of the care that delayed institutionalization and the role the adult son or daughter played in that care. This documentation shall include (but is not limited to) one or more of the following:
 - (i) A written statement of the number of hours per day during which the adult son or daughter provided personal care, specifying the extent and type of care provided;
 - (ii) A written statement of any part-time or full-time jobs performed by the adult son or daughter, and any schools or other similar institutions attended by the adult son or daughter, while providing care; or
 - (iii) Written documentation from a service agency which provided care to the individual, the dates on which care was provided, and the extent and type of care provided.

(E) Notice requirements.

- (1) When an individual was age fifty-five or older or was permanently institutionalized at the time of death, the person responsible for the estate must give notice to the AGO, as required by section 2117.061 of the Revised Code.
 - (2) After the individual's death, whenever adjustment or recovery is sought by ODJFS or its designee, a claim for recovery must be presented by the AGO.
 - (a) The claim must include all information required by Chapter 2117. of the Revised Code and must be served on the person responsible for the estate or, if there is no person responsible for the estate, any person who received or controls probate or non-probate assets inherited from the individual.
 - (b) The claim must include the following:
 - (i) That this rule defines undue hardship in paragraph (H) of this rule, and sets out the process for requesting an undue hardship waiver in paragraph (I) of this rule;
 - (ii) What form (as specified by the ODJFS director) must be completed to request an undue hardship, and where that form can be obtained; and
 - (iii) The date by which that form must be submitted in order to request an undue hardship waiver.
 - (3) The person responsible for the estate must notify any person who received or controls probate or non-probate assets, inherited from the individual, affected by the proposed recovery.
- (F) If the person responsible for the estate from which recovery is sought requests to satisfy the claim without selling a non-liquid asset subject to recovery, the AGO may establish a payment schedule, promissory note, or lien.
- (G) Qualified long-term care partnership disregard.
- (1) The amount of resources disregarded at eligibility determination (as established

in rule 5101:1-38-11 of the Administrative Code) will be disregarded during estate recovery.

- (2) The following resources, which are not considered a resource at eligibility determination, will not be disregarded during estate recovery:
 - (a) Special needs trusts as established in rule 5101:1-39-27.1 of the Administrative Code;
 - (b) Pooled trusts as established in rule 5101:1-39-27.1 of the Administrative Code; and
 - (c) Annuities as described in rule 5101:1-39-22.8 of the Administrative Code.
 - (3) The QLTCF disregard at estate recovery is reduced to the extent that an individual made a transfer (that would otherwise have been considered an improper transfer under rule 5101:1-39-07 of the Administrative Code) without a restricted medicaid coverage period.
- (H) The ODJFS director, or designee, may grant an undue hardship waiver on a case-by-case basis when there are compelling circumstances.
- (1) ODJFS may, at the sole discretion of the ODJFS director or the director's designee, waive estate recovery when recovery would work an undue hardship on an individual's survivors. Undue hardship may be found in the following cases.
 - (a) The estate subject to recovery is the sole income-producing asset of the survivor, such as a family farm or other family business, which:
 - (i) Produces a limited amount of income, or
 - (ii) Is the sole asset of the survivor.
 - (b) Without receipt of the estate proceeds, the survivor would become eligible for public assistance.
 - (c) Recovery would deprive the survivor of necessary food, shelter or clothing. Deprivation does not include situations in which the survivor is merely inconvenienced but would not be at risk of serious harm.

- (d) The survivor provides clear and convincing evidence of substantial personal financial contributions to the deceased individual, creating an equity interest in the property.
- (e) The survivor is age sixty-five or older and financially dependent upon receipt of the estate proceeds.
- (f) The estate proceeds are preserved for the benefit of a survivor who:
 - (i) Is totally and permanently disabled as defined in Chapter 5101:1-39 of the Administrative Code; and
 - (ii) Is financially dependent upon receipt of the estate proceeds.
- (2) The following situations do not, without additional showing of hardship, show undue hardship:
 - (a) When recovery will prevent heirs from receiving an anticipated inheritance.
 - (b) When recovery results in the loss of a pre-existing standard of living, or prevents the establishment of a source of maintenance that did not exist prior to the individual's death.
- (3) Regardless of actual hardship, an undue hardship waiver will not be granted in the following situations:
 - (a) When the individual created the hardship by using estate planning methods under which the individual divested, transferred, or otherwise encumbered assets in whole or in part to avoid estate recovery.
 - (b) When an undue hardship waiver will result in the payment of claims to other creditors with lower priority standing under Ohio's probate law.

(I) Request for undue hardship waiver.

- (1) Within thirty calendar days after notice of the estate recovery claim was mailed by the AGO, an undue hardship waiver may be requested (upon such form as may be designated by the ODJFS director) by an heir or potential heir who would suffer an undue hardship if a waiver is not granted, a person with an

interest in assets of the estate, or a representative of such persons. An undue hardship waiver may not be requested by a creditor of the estate, unless such creditor is also a potential heir of the estate.

- (2) Within sixty calendar days of receipt of the request for an undue hardship waiver, ODJFS must notify the applicant whether the waiver request has been approved (in full, in part, or for a limited time) or denied. Failure to meet this sixty day deadline does not result in an automatic decision on the request.
 - (3) If the waiver request was not approved in full, or if the approval was time-limited, the applicant may, within thirty calendar days, request (on such form as the director designates) that the ODJFS director, or designee, review the undue hardship waiver decision.
 - (a) The ODJFS director, or designee, will review only those portions of the undue hardship waiver request that were denied or time-limited. The director will not deny or limit any portion of the undue hardship waiver request that has already been granted.
 - (b) The ODJFS director, or designee, must review the undue hardship waiver request and notify the applicant within sixty calendar days whether (at the director's sole discretion) the director, or designee, has approved (in full, in part, or for a limited time) or denied the request for an undue hardship waiver. Failure to meet this sixty day deadline does not result in an automatic decision on the request.
- (J) Within thirty days after notice of the estate recovery claim was mailed by the AGO, a person with an interest in assets of the estate (or a representative of any such person) may (upon such form as may be designated by the ODJFS director) present a claim showing evidence that assets of the estate are exempt assets under one of the following categories.
- (1) Government reparation payments to special populations are exempt from medicaid estate recovery.
 - (2) Certain American Indian and Alaska native income and resources, including:
 - (a) American Indian and Alaska native income and resources which are exempt from medicaid estate recovery by other laws and regulations;
 - (b) Ownership interest (when ownership would pass from an Indian to one or more relatives; to a tribe or tribal organization; and/or to one or more

Indians) in trust or non-trust property, including real property and improvements:

- (i) Located on a reservation (any federally recognized Indian tribe's reservation, pueblo, or colony, including former reservations in Oklahoma, Alaska native regions established by Alaska native claims settlement act and Indian allotments) or near a reservation as designated and approved by the bureau of Indian affairs of the U.S. department of the interior; or
 - (ii) For any federally-recognized tribe not described in paragraph (J)(2)(b)(i) of this rule, located within the most recent boundaries of a prior federal reservation; or
- (c) Income left as a remainder in an estate derived from property protected in paragraph (J)(2)(b) of this rule, that was either collected by an Indian, or by a tribe or a tribal organization and distributed to an Indian, as long as the income clearly comes from protected sources;
- (d) Ownership interests left as a remainder in an estate in rents, leases, royalties, or usage rights related to natural resources (including extraction of natural resources or harvesting of timber, other plants and plant products, animals, fish, and shellfish) resulting from the exercise of federally-protected rights, and income either collected by an Indian, or by a tribe or tribal organization and distributed to an Indian derived from these sources the income or ownership interest clearly comes from protected sources; and
- (e) Ownership interests in or usage rights to items that have unique religious, spiritual, traditional, and/or cultural significance or rights that support subsistence or a traditional life style according to applicable tribal law or custom.

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