
ESTATE RECOVERY FOR MEDICAL SERVICES PAID FOR BY THE STATE

COLUMBIA LEGAL SERVICES

SEPTEMBER 2009

1. What is estate recovery?

The Washington State Department of Social & Health Services (DSHS) has many programs that pay for medical services. Under some of these programs, and with important limitations, the State is permitted to recover (to get back) the cost of the services it pays for out of the estate of the person who got the services. This process is called "estate recovery."

The estate-recovery law allows recovery from a recipient's estate under limited circumstances. (What "estate" means for estate-recovery purposes is explained in the answer to question 2 below.) The law does not generally allow recovery during a recipient's lifetime. (The exception is discussed in the answer to question 6 below.) Also, it does not allow recovery during the lifetime of a surviving spouse or registered domestic partner, or while there is a surviving child who is under 21 years old or blind or disabled.

Within DSHS, the Office of Financial Recovery (OFR) is the office responsible for estate recovery.

2. What is an estate?

An estate includes all real property (land or buildings) and all other property (mobile homes, vehicles, savings, other assets) a person owns or has a legal interest in at the time of death (or at an earlier time in the

event that pre-death recovery is authorized). This includes property that is, or could be, disposed of under a will. For purposes of the estate recovery laws, an estate may also include certain other property interests an individual had immediately before death. These include a joint interest or a life estate in a house or land.

Regardless of what medical services a person has received, if the person has no estate when the State's authority to recover begins, then there is no estate recovery.

3. Which medical services are subject to estate-recovery laws?

In discussing services subject to estate recovery, it is important to distinguish between services provided under the Medicaid program – a program funded jointly by the State and Federal governments – and services that are funded entirely with State funds.

A. Estate recovery under Medicaid programs

Estate recovery may be allowed for almost all expenses of medical services *provided under Medicaid programs beginning June 1, 2004 to persons who were 55 or older when the services were provided*. Recovery is not allowed for expenses paid by the State for Medicare premiums and other Medicare Savings Program expenses for clients who were eligible *only* for assistance under a Medicare Savings Program (such as QMB or

SLMB) and not for any other Medicaid program.

Estate recovery is never allowed for services provided under a Medicaid program to a person under 55.

Estate recovery may be allowed for the following Medicaid services provided any time **from June 1995 through May 2004 to persons age 55 and older:**

- Nursing home care
- COPES
- Traumatic brain injury (TBI)
- Community Alternatives Program (CAP)
- Outward Bound Residential Alternatives (OBRA)
- Coordinated Community Aids Service Alternatives (CASA)
- Medicaid personal care services
- Adult day health
- Private duty nursing
- hospital and prescription drug services provided to people while receiving benefits under one of the other listed programs

B. Estate recovery under 100% state-funded programs

Estate recovery is allowed *for state-only funded long-term care services provided beginning June 1, 2004 to persons of any age* through the Department of Social & Health Services, including services provided either through the Division of Developmental Disabilities or the Division of Home and Community Services. These include state-funded services in adult family homes, adult residential care or “congregate care” and chore services. Estate recovery is also allowed for state-only funded hospital and

prescription drug services provided to people while receiving long-term care services.

There may be estate recovery for state-funded long-term care services provided through the Home & Community Services (HCS) Division – but not to those provided through the Division of Developmental Disabilities – from July 1995 through May 2004. (For services provided in June 2004 or later, it applies to both.) When there is estate recovery for long-term care services, there is also recovery for hospital and prescription drug services provided to long-term care clients.

For additional information about estate recovery for services provided before July 1995, see the Appendix at the end of this pamphlet.

4. Are adult protective services subject to estate recovery?

State-funded services provided to a frail elder or vulnerable adult under the Adult Protective Services program are not subject to estate recovery, but COPES or other Medicaid services provided to APS clients are subject to normal estate recovery rules.

5. Are there times when estate recovery does not take effect even after the recipient's death?

Yes. The state cannot begin recovery efforts during the life of a surviving spouse or registered domestic partner, or while a surviving child is under age 21, or blind or disabled.

After distribution of the estate of a Medicaid recipient who is survived by a spouse or

registered domestic partner or by a child who is under 21 or disabled, the new owner of the property is free to make unrestricted use of it. This includes selling it or doing anything else that can be done with one's own property.

There may be steps that should be taken, after the death of the Medicaid recipient, to transfer title to property from the estate or to otherwise protect distributed assets. Questions about such steps should be addressed to a lawyer who is knowledgeable about estate planning.

Certain property in the estates of American Indians or Alaska Natives is exempt from estate recovery. Information about those exemptions is found in Washington Administrative Code, section 388-527-2754(4).

6. Can the state file a lien against property during the lifetime of a person receiving medical assistance?

Under limited circumstances, the state may file a lien against the home of a nursing home resident on Medicaid and proceed to recover for Medicaid payments. Before doing either, the state must determine that the resident cannot reasonably be expected to be discharged from the nursing home and to return home, and must give the resident an opportunity to request a hearing to contest that determination. No lien may be filed if any of the following family members of the resident are living in the home: a spouse, a registered domestic partner, a child who is under 21 or blind or disabled, or a sibling with an equity interest in the home who has lawfully resided in it for at

least a year before the resident's admission to the facility.

If a lien is filed and the nursing home resident subsequently returns to the home, the lien must be removed. A lien that has been filed may not be enforced until the Medicaid recipient dies, unless the home is sold before that time.

7. Can estate recovery ever be waived?

The state may waive or defer estate recovery (that is, it may agree not to recover, or not to recover for a period of time) when it would cause an undue hardship to a survivor who is an heir of the deceased Medicaid recipient. The waiver is limited to the period for which the hardship exists. Undue hardship is considered to exist when

- the property subject to recovery is the sole income-producing asset of one of the survivors whose income is low; or
- recovery would deprive a survivor of shelter when the survivor lacks the financial means necessary to obtain and maintain alternative shelter.

If an heir requests that the state waive or defer recovery due to hardship, and the state denies the request, that decision may be appealed. The state's decision should explain how to appeal.

8. Can anything be done to avoid estate recovery?

Estate planning may reduce the effect of estate recovery laws. Since recovery is from the recipient's estate, a plan that reduces what the recipient owns while alive will

limit what is available for recovery after death. However, certain transfers of property will result in penalties (specifically, in periods of ineligibility for certain kinds of medical assistance). So, actions to avoid estate recovery should be taken only after consultation with an attorney knowledgeable both about estate and tax planning and about medical assistance rules. Here are some examples of situations where estate recovery may be avoided:

- *Property owned solely by the surviving spouse.* Since transfers of assets between spouses are permitted without penalty, a person may avoid estate recovery from a particular asset by transferring any ownership share in that asset to a spouse.
- *Exempt resources.* A recipient may transfer *certain* exempt resources to anyone without penalty. (An exempt resource is one that is not counted when determining eligibility for medical assistance.) More information about the effects of transfers of assets is available in Columbia Legal Services pamphlets entitled "Questions & Answers on Medicaid for Nursing Home Residents" and "Questions & Answers on the COPES Program."

9. What happens to funds held by a nursing home or other residential facility?

When a recipient dies, any funds held by a nursing home, an adult family home, an adult residential care facility or an assisted

living facility must ordinarily be sent, within 30 days of death, to the state. The state may authorize release of funds to pay for burial costs, either before or after it receives the funds.

10. How should the state be advised that a recipient has died and that there is an estate?

The person responsible for the estate of a deceased recipient generally is required to send a notice to the state. So, in the case of estates in which a probate proceeding is filed in court, the personal representative must send the state a notice; and in the case of non-probated estates the notice agent must send the notice. For estates valued at under \$100,000 in which an affidavit procedure is used as an alternative to probate, an affidavit of successor must be sent to the state.

Legally required notices may be sent, by certified mail with return receipt requested, to the Office of Financial Recovery, P.O. Box 9501, Olympia, WA 98507-9501. The telephone for the Office of Financial Recovery is 1 (800) 562-6114.

References: Revised Code of Washington, Sections 43.20B.080 & 090; Washington Administrative Code, Chapter 388-527.

Estate recovery rules can be complicated. Before taking steps you don't understand, you should get individualized legal advice.

ER 9-09 (8-31-09)

Prepared by COLUMBIA LEGAL SERVICES

APPENDIX: Estate recovery rules that applied for services that were provided before July 1995

All medical assistance provided between July 26, 1987 and June 30, 1994 to persons who were age 65 or older at the time of the service is subject to estate recovery, even if long-term care services were not provided. Recovery for assistance provided from July 26, 1987 through July 24, 1993 is subject to certain special limits: the first \$50,000 of the estate, and 65% of any amount above \$50,000 are exempt from recovery when, at the date of death, there is a surviving child 21 years old or older.

The following services provided **from July 1994 through June 1995 to persons age 55 and older** are subject to estate recovery:

- Nursing home care
- COPES
- Traumatic brain injury (TBI)
- Community Alternatives Program (CAP)
- Outward Bound Residential Alternatives (OBRA)
- Coordinated Community Aids Service Alternatives (CASA)
- hospital and prescription drug services provided to people while receiving benefits under one of the other listed programs