

**RULES
OF
DEPARTMENT OF COMMUNITY HEALTH
MEDICAL ASSISTANCE**

**CHAPTER 111-3-8
ESTATE RECOVERY**

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111-3-8-.01 Legal Authority. In accordance with Title XIX of the Social Security Act, 42 U.S.C. § 1396a, the State of Georgia has defined a process to recover the cost of medical assistance payments from the estates of deceased members. The Official Code of Georgia gives the state the authority to recover these monies. O.C.G.A. § 49-4-147.1. In addition, the recovery methodology must adhere to statutory provisions of the Probate Code of 1998, O.C.G.A. Title 53.

Authority: O.C.G.A. § 49-4-147.1.
Effective: August 5, 2004

111-3-8-.02 Definitions.

- (1) "Debt" means a sum of money owed from one person to another, including the right of the creditor to receive and enforce payment.
- (2) "Department" means the Georgia Department of Community Health, Division of Medical Assistance.

(3) "Equity interest in the home" means value of the property that the individual holds legal title to beyond the amount owed on it in mortgages and liens.

(4) "Estate" means all real and personal property under the probate code. Estate also includes real property passing by reason of joint tenancy, right of survivorship, reserved life estate, survivorship, trust, annuity, homestead or any other arrangement. The estate also includes excess funds from a burial trust, promissory notes, cash, and personal property. Estates valued at \$25,000 or less are exempt from estate recovery because it is not cost effective for the state to pursue recovery.

(5) "Heirs" mean those who are entitled under the statutes of interstate succession to property of a decedent.

(6) "Hearing" means a formal proceeding before an Administrative Law Judge or Probate Judge in which parties affected by an action or an intended action of the Department shall be allowed to present testimony, documentary evidence, and argument as to why such action should or should not be taken.

(7) "Individual's home" means true, fixed and permanent home and principal establishment to which whenever absent, the individual has the intention of returning to his domicile.

(8) "Lawfully residing" means permissive use by the owner/power of attorney and the law.

(9) "Long-term care" means a service provided in a long-term care facility or in the home under federally approved home and community based services, as an alternative to institutionalization.

(10) "Medical assistance" means payment by the State's program under Title XIX of the Social Security Act or Medicaid program, administered by the Department.

(11) "Member" means a person who has been certified as Medicaid eligible, pursuant to the terms of the State Plan, to have medical assistance paid on his or her behalf.

(12) "Permanently institutionalized" means residing in a nursing facility or intermediate care facility for the mentally retarded and developmentally disabled for six (6) months or more.

(13) "Residing in the home on a continuous basis" means the principal place of residence.

(14) "State Plan" means all documentation submitted by the Commissioner, on behalf of the Department, to and for approval by the Secretary of Health and Human Services pursuant to Title XIX of the federal Social Security Act of 1935, as amended.

Authority: O.C.G.A. § 49-4-147.1.

Effective: August 5, 2004

111-3-8-.03 Notification to Member or Their Heirs.

(1) If a debt is due under this section from the estate of a member, the administrator of the nursing facility, intermediate care facility for persons with mental retardation, or mental health institute in which the member resided at the time of his/her death, and the personal representative, if applicable, shall report the death to the Department within thirty (30) days of the death of the member. This notice is in addition to the notice required by the member's responsible party.

(2) If a personal representative of an estate makes a distribution either in whole or in part of the property of an estate to the heirs, next of kin, distributees, legatees, or devisees without having executed the obligations pursuant to this section, the personal representative may be held personally liable for the amount of medical assistance paid on behalf of the member, for the full value of the property belonging to the estate which may have been in the custody or control of the personal representative.

(3) When the Department receives notification of an affected Medicaid member's death, a written notice will be provided to the personal representative and any known heirs which:

(a) Explains the terms and conditions of estate recovery and refers to the applicable statute and regulations;

(b) Advises of the Department's intent to recover the value of Medicaid benefits correctly paid on the member's behalf from the member's estate and states the amount;

(c) Explains that the Department's recovery action may include filing a lien on real property;

(d) Explains that the heirs may file an undue hardship waiver and the procedures and time frames for filing the waiver;

(e) Advises the heirs of their right to a hearing and the method by which they may obtain a hearing;

(f) Includes a statement advising the amount of the claim may increase if there are additional Medicaid claims that have not yet been processed.

Authority: O.C.G.A § 49-4-147.1.

Effective: August 5, 2004

111-3-8-.04 Recovery for payments made on behalf of Medicaid-eligible persons.

(1) These regulations shall be construed and applied to further the intent of the Legislature to supplement Medicaid funds that are used to provide medical services to eligible persons. Estate recovery shall be accomplished by the agency filing a statement of claim against the estate of a deceased Medicaid member. Recovery shall be made pursuant to federal authority in § 13612 of the Omnibus Budget Reconciliation Act of 1993 which amends § 1917(b)(1) of the Social Security Act, 42 U.S.C. 1396p(b)(1).

(2) Recovery will be pursued from Medicaid members:

(a) Who at the time of death were any age and an inpatient in a nursing facility, intermediate care facility for the mentally retarded, or other mental institution if the individual is required, as a condition of receiving services in the facility under the state plan, to spend for costs of medical care all but a minimal amount of the person's income required for personal needs; or

(b) Who at the time of death were fifty-five (55) years of age or older when the individual received medical assistance, but only for medical services consisting of nursing facility services, personal care services, home and community based services, and hospital and prescription drug services provided to individuals in nursing facilities or receiving home and community based services.

(3) The acceptance of public medical assistance, as defined by Title XIX of the Social Security Act, including mandatory and optional supplemental payments under the Social Security Act, shall create a debt to the agency in the total amount paid to or for the benefit of the member for medical assistance. Upon filing a statement of claim in the probate proceeding, the Department shall be given priority status.

(4) The Department may amend the claim as a matter of right until the member's estate has been closed.

(5) The Department's provider processing reports shall be admissible as prima facie evidence in substantiating the agency's claim.

(6) Any trust provision that denies recovery for medical assistance is void on and after the time of its making.

(7) The debt created in this section shall not be enforced if the member is survived by:

(a) A spouse;

(b) A child or children under twenty-one (21) years of age; or

(c) A child or children who are blind or permanently and totally disabled pursuant to the eligibility requirements of Title XIX of the Social Security Act.

(8) No debt under this section shall be enforced against any property that is determined to be exempt from the claims of creditors under the constitution or laws of this state.

(9) The agency shall not recover from an estate if doing so would cause undue hardship for the qualified heirs, as defined in section 111-3-8-.08. The personal representative of an estate and any heir may request that the agency waive recovery when recovery would create a hardship. A hardship does not exist solely because recovery will prevent any heirs from receiving an anticipated inheritance.

(10) The state's right to full reimbursement of the costs of medical assistance shall not be diminished by the recovery of any judgment, settlement, or award of an amount less than the value of the original or settled claim. To enforce its rights, the state may intervene or join in any action or proceeding brought by a claimant against a third person. To aid in the recovery of medical funds, the state shall have a first lien in the full amount of the costs of medical assistance against the proceeds from all damages awarded in a suit or settlement.

(11) Transfers of real or personal property, on or after the look-back dates defined in 42 U.S.C. §1396p, by a member of such aid, or by their spouse, without adequate consideration are voidable and may be set aside by an action in court.

(12) Counsel fees, costs, or other expenses shall not reduce any third party recovery obtained by the state incurred by the member or the member's attorney.

(13) If, after the reported death of the member, the Department is prohibited because of exception conditions, the Department may

postpone recovery until all exception conditions are no longer present. An estate does not have to be open in order for the Department to execute its claim after all exception conditions are no longer present. Termination of recovery will occur when all real and personal property included as part of the member's estate is no longer accessible.

Authority: O.C.G.A. § 49-4-147.1 and U.S.C. 1396p.

Effective: **August 5, 2004**

111-3-8-.05 Recovery of assistance; probate.

(1) After receipt of notice of the death of an affected member, the Department will file a claim against the estate for the full value of the Medicaid benefits paid on behalf of the member.

(2) No action to recover a debt due by the decedent shall be commenced against the personal representative until the expiration of six (6) months from the date of qualification of the first personal representative to serve.

(3) Notwithstanding any other law, a claim filed for recovery of Medicaid assistance has priority in order of payment from the estate over all other claims, except the following:

(a) Years support for the family;

(b) Funeral expenses in an amount not to exceed five thousand dollars (\$5,000). However, this amount is zero (0) if the decedent has prepaid funeral expenses that were excluded as a resource for Medicaid eligibility;

(c) Necessary expenses of administration;

(d) Reasonable expenses of the decedent's last illness;

(e) Unpaid taxes or other debts due the state or the United States. The category of Medicaid Estate Recovery is a debt due the state.

(4) The affidavit of a person designated by the Commissioner to administer this action is prima facie evidence of the amount of the claim.

(5) Notwithstanding any statute of limitations or other claim presentation deadline provided by law, a state claim against an estate is not barred for lack of timely presentation if it is presented in the probate proceeding within the time specified in the published notice to creditors.

(6) The personal representative must notify the Department of the member's death before dispersing assets of the member. The personal representative is personally liable for any incorrectly paid assets if the Department is not informed of the member's death and assets are distributed to heirs and/or creditors.

Authority: O.C.G.A. §§ 49-4-147.1 and 53-7-42.

Effective: August 5, 2004

111-3-8-.06 Recovery of assistance; no estate.

(1) The administrator of the program may present an affidavit to a financial institution requesting that the financial institution release account proceeds to recover the cost of services correctly provided to a member. The affidavit shall include the following information:

- (a) The name of the decedent;
- (b) The name of any person who gave notice that the decedent was a Medicaid member and that person's relationship to the decedent;
- (c) The name of the financial institution;
- (d) The account number;
- (e) A description of the claim for estate recovery;

- (f) The amount of funds to be recovered.
- (2) A financial institution shall release account proceeds to the administrator of the program if all of the following conditions apply;
 - (a) The decedent held an account at the financial institution that was in the decedent's name only;
 - (b) No estate has been, and it is reasonable to assume that no estate will be, opened for the decedent;
 - (c) The decedent has no outstanding debts known to the administrator of the program;
 - (d) The financial institution has received no objections or has determined that no valid objections to release proceeds have been received.
- (3) If proceeds have been released pursuant to this section and the Department receives notice of a valid claim to the proceeds that has a higher priority under O.C.G.A. § 53-7-40 than the claim of this section, the Department may refund the proceeds to the financial institution or pay them to the person or government entity with the claim.

Authority: O.C.G.A. §§ 49-4-147.1 and 53-7-40.

Effective: August 5, 2004

111-3-8-.07 Imposition of Liens.

- (1) The basis for authority to impose liens is based on the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA). The TEFRA lien law provides that the agency can place a lien on the available real estate of a member who enters a nursing home and is "permanently institutionalized."

(2) The state may place a lien on the member's home when there is not a reasonable expectation that the member will return home and when none of the following persons are living in the home:

(a) The member's spouse;

(b) A child under twenty-one (21) years of age;

(c) A disabled child of any age; or

(d) A sibling with an equity interest in the home who has lived in the home for at least one (1) year before the member entered the nursing home.

(3) Liens may be imposed to protect recovery of benefits correctly paid to Medicaid members when permitted by federal and state law. However, the use of lien authority requires prior notification to the member or any known heirs.

(4) The Department shall notify the member and the personal representative, if applicable, of its determination that the member is permanently institutionalized and not reasonably expected to return home and its intent to file a lien on member's real property. Notice must include an explanation of liens and their effect on an individual's ownership of real property. A lien may not be filed less than thirty-one (31) days from the date of the notice to the member and after any hearing process has been completed, if a hearing is requested.

(5) A member or his or her designee may, within thirty (30) days after receipt of notice request an administrative hearing under this rule. A member is deemed to have received notice within five (5) days from the date of the notice. Administrative hearings and appeals by Medicaid members are governed by the procedures and time limits set in Georgia Administrative Comprehensive Chapter §290-1-1-.01. Only one (1) appeal shall be afforded on behalf of a member, for each notice received.

(6) The Department or its designee shall file a notice of lien with the recorder of the county in which the real property subject to the lien is located. The notice shall be filed prior to the member's death and shall include the following:

(a) Name and place of residence of the real property subject to the lien; and

(b) Legal description of the real property subject to the lien.

(7) The Department shall file one (1) copy of the notice of lien with the local DFCS office in the county in which the real property is located. The county in which the real property is located shall retain a copy of the notice with the county office's records. The Department or its designee shall provide one (1) copy of the notice of lien to the member or the member's authorized representative, if applicable, whose real property is affected.

(8) The lien continues from the date of filing until the lien is satisfied, released or expires. From the date on which the notice of lien is recorded in the office of the county recorder, the notice of lien:

(a) Constitutes due notice against the member or member's estate for any amount then recoverable under this article; and

(b) Gives a specific lien in favor of the Department on the Medicaid member's interest in the real property.

(9) The state may not enforce a lien under any of the following circumstances:

(a) The member's spouse is alive, even if not living in the home;

(b) The member's child under twenty-one (21) years of age is alive, even if not living in the home;

(c) The member's blind or disabled child of any age is alive, even if not living in the home;

(d) An adult child of the member is living in the home, if that child lived in the home for at least two (2) years prior to the member's admission to the nursing home and provided care that kept the member from entering a nursing home.

(e) The member's brother or sister is living in the home, if he or she lived in the home for at least two (2) years prior to the member's admission to a nursing home.

(10) The Department has the authority to release any lien placed upon the property of an individual deemed permanently institutionalized should that person be discharged and return to a non-institutional home environment. The Department shall release a lien obtained under this rule within thirty (30) days after the Department receives notice that the member is no longer institutionalized and is living in his or her home. If the real property subject to the lien is sold, the office shall release its lien at the closing and the lien shall attach to the net proceeds of the sale.

Authority: O.C.G.A. § 49-4-147.1 and G A ADC § 290-1-1-.01.

Effective: August 5, 2004

111-3-8-.08 Hardship Waiver.

(1) Hardship waivers will be submitted to the administrator for review. The denial of a hardship waiver may be appealed as provided under the Administrative Procedures Act, O.C.G.A. §50-13-1 et. seq. The waiver is limited to the period in which the undue hardship exists.

(2) There is no hardship waiver provided at the time of lien placement against the real property of a deceased Medicaid member. The equity interest of the heir will be considered to determine the percentage of the deceased member's interest in the property.

(3) Lien placement is utilized to delay recovery until such time as an exemption to recovery does not exist, or in the case of a hardship, until such time as the hardship no longer exists. The state's lien would be for the Medicaid benefits paid on behalf of the member or the percentage of interest of the deceased member at the time of sale, whichever is less.

(4) Recovery will be waived of any estate recovery when the requesting party is able to show, through clear and convincing evidence, that the state's pursuit of estate recovery subjects them to undue hardship. In determining whether an undue hardship exists, the following criteria will be used:

(a) The asset to be recovered is a income producing farm of one or more of the heirs and the annual gross income is limited to \$25,000 or less; or

(b) The recovery of assets would result in the applicant becoming eligible for governmental public assistance based on need and/or medical assistance programs.

(5) Undue hardship does not exist when:

(a) The adjustment or recovery of the client's cost of assistance would merely cause the client's family members inconvenience or restrict the family's lifestyle;

(b) The heir divests assets to qualify under the hardship provision.

(6) To the extent that there is any conflict between the preceding criteria and the standards that may be specified by the secretary of the Department of Health and Human Services, the federal standards shall prevail.

(7) The personal representative and/or heirs shall apply for an undue hardship exemption by:

- (a) Making a written request to the Department within thirty (30) days of receipt of the notice.
- (b) Verifying to the Department's satisfaction the criteria specified in this section for an undue hardship waiver.
- (8) The Department shall issue a decision on an undue hardship exemption request within thirty (30) days of receipt of the request and supporting documentation;
- (9) If the state denies the personal representative's request for an undue hardship waiver, the personal representative may request an appeal. The denial of a waiver must state the requirements of an application for an adjudicative proceeding to contest the Department's decision to deny the waiver and where assistance may be obtained to make such application.
- (10) If an appeal is requested, an hearing shall be conducted by the probate judge if the estate is in probate court. An administrative law judge shall conduct the administrative hearing if the case is not in probate court.
- (11) If the Department deems a hardship does exist, the state may waive recovery or defer recovery until the death of eligible exempt dependents, on the sole discretion of the Department.
- (12) The provisions of this section are severable. If any provision of this section is held invalid, the remaining provisions remain in effect.

Authority O.C.G.A. 49-4-147.1.

Effective: August 5, 2004