

# MEDICAID ESTATE RECOVERY BASICS

What Medicaid Can Recoup From Your Estate

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Jan Neal  
JAN NEAL LAW FIRM, LLC

Jan Neal  
JAN NEAL LAW FIRM, LLC  
207 N. 4th St. Opelika, AL 36801  
Telephone (334) 745-2779  
Toll Free 1-800-270-7635  
Fax (334) 745-4176  
[jbneal@me.com](mailto:jbneal@me.com)/[jbneal@icloud.com](mailto:jbneal@icloud.com)/[neal@janneallaw.com](mailto:neal@janneallaw.com)  
[www.janneallaw.com](http://www.janneallaw.com)

## MEDICAID ESTATE RECOVERY

Federal law requires states to recoup money spent for some Medicaid services, and the rules implementing this required federal recoupment vary from state to state. The importance of understanding the rules of recoupment in your state comes into play in two situations:

- At application: when a person applies for any type of Medicaid he or she needs to understand the ultimate cost of those services to his or her estate.
- At death: When a Will is probated or an estate administered, Medicaid is considered an estate creditor and must be put on notice before any estate funds are disbursed or else the person serving as personal representative (aka executor) can incur personal liability for failure to notify Medicaid of its right to reimbursement from the estate.

## TEFRA LIENS

Liens given to Medicaid during lifetime on specific property in order to qualify for benefits are given pursuant to the Tax Equity and Fiscal Responsibility Act. These pre-death liens are known as TEFRA liens. TEFRA liens are seen in the Institutional Medicaid application process, but Medicaid does not take TEFRA liens from Medicaid Home and Community Based Waiver applicants.

Example: a single person of any age cannot qualify for nursing home Medicaid because he owns a home valued at more than \$2000, and he cannot live there any longer. He will put the property on the market, give a lien to Medicaid to recoup funds it paid for care until it sells, and qualifies under the bonafide effort to sell property exclusion. If the property sells during his lifetime Medicaid is repaid, and any remaining funds are used to pay privately for care until spent down to \$2000. Then the person reapplies for Medicaid. If that property remains unsold at death, Medicaid can claim against the estate by enforcing the TEFRA lien.

## STATUTORY LIEN

Medicaid Estate Recovery goes a step further. Without a specific TEFRA lien being given by the property owner on any particular property, Medicaid has a statutory lien (a lien created by law) to recover funds from a probate estate when the Medicaid recipient dies. The statutory lien is given by the applicant upon filling out the application for benefits.

## CAPACITY TO GIVE INFORMED CONSENT FOR ESTATE RECOVERY

It is important that the individual signing the Medicaid application understand the effect of signing the application which says:

"ESTATE RECOVERY

\* I understand that my estate may be subject to recovery of any funds expended by Medicaid pursuant to this application and/or redetermination. My sponsor, relative, or other person who files my estate MUST notify Alabama Medicaid at ATTN: Estate Administration, P.O. Box 5624, Montgomery, Alabama 36103-5624."

When assisting in completing a Medicaid application it is reasonable to learn who currently handles finances and health care decisions for an applicant who may have serious health issues. It is important to understand that capacity is a fluid concept, and people needing Institutional Medicaid or Medicaid Waiver services are or may be ill. People may appear competent when they are not (especially if the applicant has good social skills) or people may comprehend a concept one day and not on another day.

## MANDATORY MEDICAID ESTATE RECOVERY CATEGORIES

Medicaid Estate Recovery is required for the following expenditures:

- Benefits that were not paid correctly to a person of any age (resulting in what is known as an overpayment)
- Benefits paid after age 55 for nursing home Medicaid

- Benefits paid after age 55 for waiver services
- Benefits paid for hospital and drugs for persons who received those benefits in connection with nursing home or waiver Medicaid after the age of 55

### **OPTIONAL MEDICAID ESTATE RECOVERY CATEGORY**

Federal law gives states the option to recover funds for all Medicaid expenditures for services received after age 55 unless otherwise exempted. This would include expenditures for SSI eligible persons who qualify for Medicaid in the community.

Alabama has elected to exercise this option and recover these expenditures.

### **DISPUTED MEDICAID ESTATE RECOVERY CATEGORY**

The Alabama Administrative Code includes language indicating that the agency will recover expenditures for a person of any age who permanently resides in a nursing facility, intermediate care facility for the intellectually disabled or other medical institution.

A number of Alabama attorneys believe that blanket recovery for institutional benefits for persons under the age of 55 violates federal law. This type of recovery could result in legal challenges in the future.

### **NO MEDICAID ESTATE RECOVERY CATEGORIES**

Estate recovery does not apply to the Medicare Savings Programs known as QMB, SLMB and QI1 which are programs that help low income persons eligible for Medicare pay for healthcare costs through Medicaid (single persons with income not exceeding \$1426 and married couples with income not exceeding \$1923 per month).

These programs are exempt from estate recovery due to the Medicare Improvements for Patients and Providers Act (MIPPA).

As of 2016 award letters in Alabama for these programs incorrectly indicated that estate recovery would apply.

An exception to this exception is the recoupment of funds paid through Medicare Savings Programs for beneficiaries of first party Special Needs Trusts.

### **MEDICAID ESTATE RECOVERY APPLIES ONLY TO PROBATE PROPERTY**

In Alabama the only property Medicaid can claim for Estate Recovery is property left in the deceased Medicaid beneficiary's probate estate. This would include property requiring a will or administration of an estate through the court to pass.

This means that property that passes directly to someone outside the probate estate cannot be reached for recoupment. Examples include property titled as survivorship property (in a deed where the owners hold property as joint tenants with right of survivorship); property in which the deceased had already transferred to another retaining only a life estate (through a life estate and remainder deed); proceeds of life insurance, IRAs or brokerage accounts with a beneficiary named to take the proceeds at death; joint bank accounts with a co-owner or set up as payable on death to a named beneficiary.

### **MEDICAID ESTATE RECOVERY DELAY**

Medicaid Estate Recovery or lien enforcement can be delayed in certain circumstances:

- until after the death of any surviving spouse (no lien was taken);
- related to the home:
- until the property is no longer occupied by a surviving child under the age of 21; a surviving child who is blind or disabled (no lien was taken);

- until the property is no longer occupied by a sibling with an equity interest who had

resided in the home for at least one year preceding the Medicaid recipient's admission to the facility where benefits were paid (no lien was taken, and note that the property could have been transferred to the sibling without penalty);

- until the property is no longer occupied by a son or daughter who provided two years or more of care immediately before admission to the facility where benefits were paid and that care was of such a level that it allowed the Medicaid recipient to reside in the home and avoid institutional care (a lien may have been taken, and note that the property could have been transferred to the child without penalty);

- until the property is no longer occupied by a sibling who is lawfully living in the home and was lawfully residing continuously in the home for at least one year immediately prior to the Medicaid recipient being admitted to the facility where benefits were paid (no lien was taken).

### **MEDICAID ESTATE RECOVERY WAIVER**

Medicaid Estate Recovery may be waived in certain circumstances:

Medicaid will waive or delay recovery upon a showing that an undue hardship exists. For purposes of this Rule, "Undue Hardship" is defined as the existence of a situation, established by convincing evidence, that the estate subject to recovery is an asset such as a family farm or family business which produces "limited income" and is the sole income-producing asset of one or more heirs to the estate.

To apply for a waiver, application must be made to Alabama Medicaid Agency within 30 days of receiving the agency notice against the estate or upon sale, transfer or conveyance of the real property subject to a TEFRA lien.

## NEW PROBATE NOTICE REQUIREMENT

The provider, attorney, personal representative, sponsor or case manager is asked by Medicaid to contact Alabama Medicaid Agency's Estate Recovery section to provide notification of a recipient's death within 30 days of the death. Upon notification of death, Medicaid will send a questionnaire to the next of kin to ask about property the decedent owned at the time of death.

Those handling the estate of the decedent who formerly drew benefits have always been under a duty to treat Medicaid as they would any creditor and notify the agency of intent to distribute the estate, but that requirement is now more stringent, and all estates are subject to notice.

A law passed in 2019 requires that as of 09/01/19 all estates filed in Alabama notify Medicaid to give the agency an opportunity to review its records to determine if the estate may be subject to estate recovery. This is true for probating wills, administering estates and filing for Small Estate (Summary) Distribution, and the notice is required whether the decedent ever received Medicaid or not. The agency will have 30 days to file any claim it may have against the estate.

