

# Estate Recovery

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A state is entitled to recover for Medicaid payments correctly paid on behalf of the individual by use or real or personal property liens and recovery from decedents' estates. 42 U.S.C. § 1396p(b)(1)(B); HCFA Transmittal 63; *N.J.S.A. 30:4D-7.2 et seq.*; *N.J.A.C. 10:49-1 et seq.* The state is required to seek reimbursement from an individual's estate for the cost of nursing facility services. 42 U.S.C. § 1396p(b)(1)(B). However, no recovery may be made until after the death of the recipient's surviving spouse, and only when there are no surviving children who are under age 21 or blind or permanently disabled.

## A. Definition of Estate

New Jersey seeks recovery from estates of deceased individuals. While federal law only requires that states recover from the *probate estate* of the deceased Medicaid recipient, New Jersey has elected to expand the definition of an estate as follows:

“Estate includes all real and personal property and other assets included in the recipient's estate as defined at N.J.S. 3B:1-1, as well as any other real or personal property and other assets in which the recipient had any legal title or interest at the time of death, to the extent of that interest, including assets conveyed to a survivor, heir or assign of the recipient through joint tenancy, tenancy in common, survivorship, life estate, living trust or other arrangement.”

## B. Age 55

With respect to an institutional level of care, estate recovery applies to all Medicaid payments made or services received after an individual is 55 years of age or older. *N.J.A.C. 10:49-14.1(c)*. Under federal and state law, in the case of a recipient who became deceased on or after April 1, 1995 for whom a Medicaid payment was made on or after October 1, 1993, a lien may be filed against, and recovery sought, from the estate of a deceased recipient for assistance correctly paid or to be paid on his behalf for all services received when he was 55 years of age or older. 42 U.S.C. § 1396p(b); *N.J.A.C. 10:49-14.1(c)*.

## C. De minimus Amounts

Under *N.J.A.C. 30:4D-7.2a*, recovery cannot be made against the estate of a deceased recipient if the amount sought is less than \$500 or the gross estate of the deceased recipient is less than \$3,000.

**D. Surviving Spouse or Child under 21 or Blind or Disabled**

No recovery shall be made if there is a surviving spouse or a surviving child who is under the age of 21 or is blind or permanently and totally disabled, except for assistance incorrectly or illegally paid or for third party liability recovery. These exceptions to estate recovery are also incorporated in *N.J.A.C. 10:49-14.1(a)*.

**E. PAAD**

No estate recovery shall be made under the Pharmaceutical Assistance to the Aged and Disabled program (PAAD), unless the assistance was incorrectly or illegally paid.

**F. Life Estates/Trusts**

- *Life Estate.* Life estates that expire upon the Medicaid beneficiary's death are exempt from estate recovery. *N.J.A.C. 10:49-14.1(n)(1)*.

- *Inter Vivos Trust.* An inter vivos trust established by a third party for the benefit of a deceased Medicaid recipient is not subject to estate recovery provided that the Medicaid recipient could not compel distributions from the trust and the trust contains no assets in which the Medicaid beneficiary held any interest within either five (5) years prior to applying for Medicaid benefits or five (5) years prior to the Medicaid recipient's death. *N.J.A.C. 10:49-14.1(n)(2)*.

- *Testamentary Trust.* Testamentary trusts are exempt from estate recovery provided that the Medicaid recipient could not compel distribution and the trust contains no assets in which the Medicaid recipient held an interest within either five (5) years prior to applying for Medicaid benefits or five (5) years prior to the recipient's death. Assets of the community spouse which formed a part of the Community Spouse Resource Allowance shall not be considered assets of the Medicaid recipient. Any assets of the community spouse other than those that formed part of the CSRA allowance are considered assets of the Medicaid recipient if acquired from the Medicaid recipient with five (5) years prior to the date of application for the Medicaid benefits or five (5) years prior to the date of the death of the Medicaid beneficiary. It is believed that the reference to assets acquired from the Medicaid recipient means assets acquired from the Medicaid recipient's spouse.

**G. Tracing**

*N.J.A.C. 10:49-14.1(l)* makes clear that estate recovery may be sought from trusts and annuities, even if established by a third party. This applies to living trusts and testamentary trusts if the assets in the trust belonged to the Medicaid beneficiary as of five years prior to the beneficiary's death. *N.J.A.C. 10:49-14.1(n)*. This provision may be invalid since it appears to be more restrictive

than either the federal or state statute, which limits recovery to “living trusts.” However, in *DeMartino v. Division of Medical Assistance and Health Services*, 373 N.J. Super. 210 (App. Div. 2004), the court held that such a trust was subject to Medicaid estate recovery.

## H. Spouse

New Jersey’s current regulations exempt the estate of the spouse from recovery. *N.J.A.C.* 10:49-14.1(n).

An issue arises as to whether a state may recover from the estate of a spouse of a deceased Medicaid recipient. In the case of *Wisconsin v. Estate of Budney*, 197 NW2d 245 (Wis. Ct. App. 1995), the court held that the Wisconsin statute authorizing recovery from the spouse of a deceased Medicaid recipient is invalid. In a California case, *Demille v. Bleshe*, 1995 WL 23636 (N.D. Cal. 1995), the court held that the state was free to impose liens on property of the deceased Medicaid recipient, after the recipient is dead, and that those liens become payable upon the death of the surviving spouse or upon sale of the property.

New Jersey has a policy of not forcing a sale while any family member is still living in the house. This is documented in *N.J.A.C.* 10:49-14.1(j). Recoveries will not be pursued against property held by bona fide purchasers. *N.J.A.C.* 10:49-14.1(k).

There may be an issue as to whether Medicaid can recover for payments made on behalf of the deceased Medicaid recipient prior to December 23, 1995, which is the effective date of the New Jersey statute.

New Jersey will exempt assets from estate recovery on a hardship basis only if the asset is the sole income-producing asset of the survivor, and recovery by the state would result in the survivor becoming a beneficiary of public benefits himself or herself. Thus, New Jersey’s tentative definition of “hardship” is very rigid. There is also a rebuttable presumption in New Jersey that there is no hardship if Medicaid planning was effected. *N.J.A.C.* 10:49-14.1(h). The representative of the estate of the Medicaid recipient has 20 days from the date of receipt of the notice of the State’s lien to file a request for a waiver or compromise of the claim.