



## Unraveling the Mysteries of Medicaid Estate Recovery

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# Medicaid Estate Recovery



- ★ What is Medicaid Estate Recovery (MER)?
  - ★ Federally mandated program.
  - ★ Began in Ohio on January 1, 1995.
  - ★ When a Medicaid recipient dies, the MER Program attempts to recover from their estate what Medicaid paid for services provided.

# Medicaid Estate Recovery



- ★ Who is subject to Medicaid Estate Recovery?
  - ★ Medicaid recipients aged 55 years or older.
  - ★ MER recovers Medicaid benefits correctly paid after the individual attained age 55.
  - ★ Recover Medicaid benefits correctly paid to a person of any age while they were permanently institutionalized.

# Medicaid Estate Recovery



- ★ What Medicaid services are recovered?
  - ★ Any medical assistance correctly paid by Medicaid.
  - ★ However, Medicaid recipients age 55 and older and not permanently institutionalized, the amount Medicaid paid for Medicare Savings Programs, such as QMB (Qualified Medicare Beneficiary), SLMB (Special Low Income Medicare Beneficiary) or QI-1 (Qualified Individuals-1), after January 1, 2010 is not subject to estate recovery.

# Medicaid Estate Recovery



- ★ What is a Medicaid Estate Recovery estate?
  - ★ All real and personal property in which the Medicaid recipient had any legal interest at the moment before death.
  - ★ Includes assets conveyed to others at death via survivorship, transfer-on-death and living trusts.
  - ★ After death, property Medicaid determined exempt for purposes of ongoing Medicaid eligibility is no longer exempt and is subject to recovery.

# Medicaid Estate Recovery



- ★ Who administers the Medicaid Estate Recovery program?
  - ★ Ohio Department of Medicaid, and
  - ★ Ohio Attorney General's Office (OAG).
  - ★ ODM Form 07400, informs Medicaid recipients of the MER Program.

# Medicaid Estate Recovery



## ★ MER Summary

- ★ Who: Medicaid & 55 or institutionalized
- ★ Amount: All Medicaid paid except MSP
- ★ Estate: Everything owned one moment prior to death
- ★ Administrator: Ohio Attorney General

# Medicaid Estate Recovery



- ★ When can Medicaid costs be recovered?
  - ★ Only after the death of the Medicaid recipient.
  - ★ But no recovery at death while the following are alive:
    - ★ a surviving spouse, or
    - ★ a surviving child under age twenty-one, or
    - ★ a surviving child over age twenty-one who is
      - Blind or Permanently & totally disabled as determined by Social Security.



# What about Exempt Resources?



Let's review what are exempt resources for Medicaid eligibility.

For Medicaid **eligibility**, an individual's countable resources must be below \$1500. Countable resources do not include exempt resources and do not include unavailable resources.

# Exempt Resources

See 5101:1-39-26 Medicaid: Resource Exemption



- ★ One Car- exempt if less than \$4500 *or any value for CS*
- ★ Household goods
- ★ A burial space [5160:1-3-32.2 Medicaid: Burial Spaces]
  - ★ A burial space includes:
    - ★ burial plot, gravesite, crypt, mausoleum, casket, urn, & niche
  - ★ Includes reasonable improvements to such spaces:
    - ★ Including but not limited to vaults, headstones, markers, or plaques, burial containers (e. g., for caskets) and arrangements for the opening and closing of the gravesite.

# Medicaid Eligibility Exempt Resource



## ★ Ohio's Partnership for Long-Term Care Ins.

- ★ Purpose is to offer private long-term care insurance to moderate income consumers most likely to deplete assets and rely on Medicaid for long-term care.
- ★ Qualified Partnership Policies offer Medicaid Asset Protection benefits. For a list of LTC insurance companies offering Qualified Partnership Policies see <http://www.ltc4me.ohio.gov/findAgent.aspx>.

# Exempt Resource: Long Term Care Insurance



- ★ Ohio's Partnership for Long-Term Care Ins..
  - ★ The total assets a person may keep is the combined total of the Medicaid asset limit, \$1,500, **and** the total amount paid by a partnership policy.
    - ★ For example, a single individual whose partnership policy has paid \$100,000 toward nursing home or community-based long-term care would qualify for Medicaid coverage and still retain **\$101,500** worth of assets.

# Exempt Resource

## The Expensive House



- More than \$543,000 in equity:
  - Post 1/1/2006, not exempt
  - But exempt if living in the house is
    - Spouse, or
    - Child who is under 21, blind or disabled
  - Exempt if demonstrated hardship exists
- Can use a reverse mortgage or equity loan to lower the home equity

# Exempt Resource

## The House As Home



- ★ Exempt if:
  - ★ IS or CS's principal place of residence, and
  - ★ Deed in either name.
    - ★ Deed in a Living Trust means house is not exempt
  
- ★ If no spouse, it is no longer the applicant's principal place of residence after continuously residing in the NF for 13 months and therefore no longer exempt.

# Exempt Resource

## The House As Home



- But always exempt if residing in the home is:
  - CS; or
  - Child who is under 21, blind or disabled; or
  - Child who is age sixty-five or older and is financially dependent upon the applicant for housing; or
  - The individual's sibling who has a verified equity and ownership interest in the home and has resided in the home for at least one year immediately before the date the individual was admitted to the nursing facility.

# Exempt Resource

## Trying to Sell The House



- The home is no longer the principal place of residence but it is still exempt when:
  - property is listed for sale with a real estate agent on or before the date the 1<sup>st</sup> exemption ran out.
  - listed for sale at an amount not greater than the market value as determined by the county auditor.
  - may not refuse a purchase offer of 90% of county auditor's value.
  - If not sold within six months of listing, it is no longer exempt, unless seller establishes good cause.



# Case Facts Individual Eligibility and Exempt Resources



- ★ **James Jones suffers from severe dementia and permanently entered a nursing facility on March 1, 2014. James owns his home worth \$75,000.00 free and clear and has \$1,000.00 in a checking account. He owns a 1990 Honda Civic.**

# Medicaid Eligibility Unavailable Resources



## ★ Unavailable Resources

- ★ OAC § 5160:1-2-01.7 Medicaid: assisting individuals unable to access verifications due to a physical or mental impairment. (August 1, 2009)
- ★ Verifications or means of self-support that are not available, due to a physical or mental impairment substantially limiting the individual's ability to access such verifications or support, shall not be considered a disqualifying factor until a means of access to those items is obtained or established.

# Unavailable Resources



Resources may also be unavailable because of some legal impediment to liquidation.

eg. Shared ownership of real estate

- ✿ If co-owner is spouse, parent or child of applicant then presumed able to sell unless rebutted.
- ✿ If co-owner blocks sale, legal action required to be taken by IS.
- ✿ If owner cannot be located, the cost of a legal action is prohibitive, or the individual was unsuccessful in a legal action, the resource is not counted.

# MER and Exempt Resources



How do the rules change after death for Medicaid estate recovery purposes?

# Title Is Everything



After death, the only question is how the property is legally titled.

# Medicaid Estate Recovery



## ★ Medicaid exempt property included in MER estate

- ★ Household goods & personal property
- ★ Car (FMV \$4,500 or more if married)
- ★ Life insurance of \$1,500 face value or less
- ★ Irrevocable burial contracts & burial plots
- ★ Any resource not available legally or otherwise
- ★ Personal needs account (\$1,500 or less)
- ★ CSRA (Max of \$117,240 if married)
- ★ Homestead (13 months or longer if married)

# MER Exempt Property



Property exempted under the qualified long term care exception at eligibility continue to be exempt after death.

# Medicaid Estate Recovery- Home Exemption



- ★ Homestead always exempt while either of the following continuously reside in the home:
  - ★ Adult child caretaker (with much stricter rules); or
  - ★ The individual's sibling who has resided in the home for at least one year immediately before the date the individual was admitted to the nursing facility and on a continuous basis since that time.



# Medicaid Estate Recovery



## ★ Summary

- ★ If you own any real or personal property when you die, no MER while the following are alive:
  - ★ Spouse, minor child or disabled or blind child
  
- ★ If you own a house when you die, no MER against the home while living in the home:
  - ★ Adult child who provided 2 years of care or
  - ★ Sibling who has resided in the home for at least one year

# Medicaid Estate Recovery



- Other ways to avoid Medicaid Estate Recovery.
  - Don't own any property when you die, i.e. no estate.
    - Take advantage of Medicaid permissible transfers.
  - ODM determines that a recovery would work an undue hardship.



## Medicaid Permissible Transfers

# Medicaid Estate Recovery



- Types of property owned by Medicaid recipient while on Medicaid.
  - Exempt property, or
  - Property allocated to the community spouse but still owned by the institutionalized spouse during the 12 month period of protected Medicaid eligibility.

# CSRA for Medicaid Eligibility



Lets review how the resources are divided between a couple where one, (the IS) is institutionalized.

# Medicaid Eligibility Resource Allocation



## ★ Resource Allocation

- ★ Determine the amount of resources that may be transferred from the institutionalized spouse to the community spouse (Form JFS 04077 – Resource Transfer Worksheet)
- ★ Protect a portion of the combined countable resources for the community spouse (CSRA)
- ★ The Community Spouse Resource Allowance (CSRA)
  - ★ Minimum is \$23,448 (2014)
  - ★ Maximum is \$117,240 (2014)
  - ★ Amounts indexed to the CPI and increase annually

# Medicaid Eligibility Resource Assessment



## ★ Resource Assessment

- ★ Lists all resources owned by the couple and their value (Form JFS 04076)
- ★ Only one resource assessment is completed per couple regardless of how often an individual has been institutionalized or has applied for Medicaid.
- ★ **Snapshot Date**: The resources and their value are calculated as of the "beginning of the first continuous period of institutionalization," *not* the date of application for Medicaid.

**Institutionalized Spouse**

# Medicaid Resource Allocation - 2014

**Community Spouse**

\$300,000	\$417,240	Max Allocation	\$117,240
	72% 28%		
\$117,240	\$234,480	Max Allocation	\$117,240
	50% 50%		
\$50,000	\$100,000	50%	\$50,000
	50% 50%		
\$23,448	\$46,896	50% or Minimum	\$23,448
	50% 50%		
\$6,552	\$30,000	Minimum	\$23,448
	24% 76%		
\$ 1,500	\$24,948	100% of 1 <sup>st</sup>	\$23,448
	6% 94%		



# Case Facts CSRA



- ✿ **James Jones suffers from severe dementia and permanently entered a nursing facility on November 1, 2014. James owns his home worth \$175,000.00 free and clear and has \$20,000.00 in a checking account. He owns a 1990 Honda Civic.**
- ✿ **James has a wife, Joan who continues to live in the home, although the deed is in James' name.**
- ✿ **Joan also has IRAs totaling \$30,000.00**
- ✿ **Instead of a Civic, James owns a 2014 Porsche, and \$300,000 in P&G stock.**

# CSRA Resource Exemption Time Limited



- ★ One year to remove Institutionalized Spouse's name from resources – at first recertification, must verify that IS has below \$1,500 in assets
- ★ First year is a period of protected eligibility allowing resources in IS name to count as either exempt or part of CS CSRA
- ★ At end of first year, resources lose their protected status.

# Medicaid Estate Recovery



- If the Medicaid recipient has no spouse, transfers are more problematic.
- Asset transfers are either proper or improper.
- Medicaid penalizes for improper transfers.
- Proper transfers still include transfers of exempt resources, *including property exempted because of long term care payments.*
  - But not the home.

# Proper Transfers



- ★ The home, even though an exempt resource, can only be transferred for less than fair market value to:
  - ★ Spouse;
  - ★ Child under 21 or disabled or blind;
  - ★ Adult caretaker child exception; or
  - ★ A sibling who lived in the home for a year prior to applicant entering the NF and who has an equity interest in the home

# Adult Child Caretaker Rule



- The individual's adult child who was
  - residing in the home for at least two years immediately before the date the Applicant becomes institutionalized, and
  - who provided care to the Applicant which permitted him/her to reside at home, rather than in an institution or facility.
- A JFS 03697 "Level of Care Assessment" must be completed to determine if the individual would have required institutionalization **from the beginning** and throughout the two-year period if the adult child had not provided personal care.

# Sibling Equity Rule



- ★ The individual's sibling who
  - ★ has an equity interest (must be a documented, legal interest) in the home and
  - ★ was residing in the home for at least one year immediately before the individual became institutionalized.

# Transfers permitted under MER



**After** death, the Medicaid eligibility proper transfer rules no longer apply.

The only question is whether the property was owned by the Medicaid recipient immediately prior to death

# Medicaid Estate Recovery



- ★ If the Medicaid recipient has a spouse, transfer ownership of all property to the community spouse as soon as possible:
  - ★ Exempt property, and
  - ★ Property allocated to the spouse but still owned by the Medicaid recipient during a 12 month period of protected eligibility.



# Medicaid Estate Recovery



- ★ If, however, the Medicaid recipient dies owning the home, MER rules state that there is no **recovery** as long as the following are alive:
  - ★ a surviving spouse, or
  - ★ a surviving child under age twenty-one, or
  - ★ a surviving child over age twenty-one who is
    - ★ Blind, or
    - ★ Permanently & totally disabled as determined by Social Security.

# Medicaid Estate Recovery



- MER rules provide recovery against the home may be *postponed* while either of the following lawfully resides in the home:
  - The permanently institutionalized individual's sibling who:
    - Resided in the home for at least one year immediately before the date of the individual's admission to the institution, and
    - Has resided in the home continuously since that time.

# Medicaid Estate Recovery: Caretaker exception



- ✿ Adult caretaker exception magnified:
  - ✿ Provided care that delayed institutionalization,
  - ✿ Resided in the home for at least two years immediately before institutionalization,
  - ✿ Has resided in the home on a continuous basis since that time, and
  - ✿ Documents the above including:
    - Level of Care documentation
    - Physician's statement as to the kind and duration of care provided

# MER Caretaker Exception



- A written statement of the number of hours, extent and type of care provided per day by the adult child;
- Any part-time or full-time jobs performed or schools attended by the adult child while providing care; or
- Written documentation from a service agency which provided care, the dates when, extent and type of care provided.

# Case Facts MER



- ★ **James Jones suffers from severe dementia and permanently entered a nursing facility on November 1, 2014. James owns his home worth \$175,000.00 free and clear and has \$20,000.00 in a checking account. He owns a 2014 Porsche.**
- ★ **James has a wife, Joan who continues to live in the home, although the deed is in James' name.**
- ★ **Joan also has IRAs totaling \$30,000.00**
- ★ **James dies on January 1, 2015.**
- ★ **Before death James transferred the checking account, Porsche and home to Joan**

# Case facts MER



- ❖ Joan lives at home with her daughter who cares for her for 2 years.
- ❖ Joan dies.
- ❖ Joan goes on passport and transfers home to her daughter.
- ❖ Joan goes into a nursing home but dies before transferring home to her daughter.
- ❖ Joan's sister moves in with her, pays ½ of the expenses and lives with her for 1 year before Joan goes into a nursing home.
- ❖ Joan transfers the home to her sister before she dies.

# Medicaid Estate Recovery



## ★ Summary:

- ★ Medicaid allows asset transfers *during the Medicaid recipients lifetime* to
  - ★ spouse
  - ★ a surviving child under age twenty-one, or
  - ★ a surviving child over age twenty-one who is
    - Blind, or permanently & totally disabled as determined by Social Security.
  - ★ Sibling with an equity interest
  - ★ Adult caretaker child



## MER Would Cause Undue Hardship



# Medicaid Estate Recovery



- ★ Ohio Administrative Code Section **5160:1-2-10** contains an undue hardship waiver request process.
- ★ ODJFS is also required to forgo recovery where it would work an undue hardship.
- ★ What constitutes an undue hardship is assessed on a case-by-case basis and the circumstances must be compelling.

# Medicaid Estate Recovery



- ★ The granting of an undue hardship waiver may involve either a permanent waiver of recovery efforts, a temporary deferral or postponement of recovery while the hardship exists, including negotiation of a modified recovery agreement or the imposition of a lien.

# Medicaid Estate Recovery



- ★ An undue hardship waiver may be requested by an heir who would suffer an undue hardship if a waiver is not granted.
- ★ 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.

# Medicaid Estate Recovery



- Undue hardship may be found in the following cases:
  - The estate subject to recovery is the sole income-producing asset of the survivor, such as a family farm or other family business, which:
    - Produces a limited amount of income, or
    - Is the sole asset of the survivor.
  - Without receipt of the estate proceeds, the survivor would become eligible for public assistance.

# Medicaid Estate Recovery



- ★ 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.
- ★ The survivor provides clear and convincing evidence of substantial personal financial contributions to the deceased individual, creating an equity interest in the property.

# Medicaid Estate Recovery



- The survivor is age sixty-five or older and financially dependent upon receipt of the estate proceeds.
- The estate proceeds are preserved for the benefit of a survivor who is totally and permanently disabled and is financially dependent upon receipt of the estate proceeds.

# Undue Hardship Waiver



Only an heir, potential heir or someone with an interest in the asset can request the hardship waiver by showing a compelling reason. The waiver could be permanent or temporary while the hardship exists and could include a negotiated recovery agreement or lien.

# Medicaid Estate Recovery



## ★ MER Summary

- ★ Who: Medicaid & 55 or institutionalized
- ★ Amount: All Medicaid paid except MSP
- ★ Estate: Everything owned one moment prior to death
- ★ Administrator: Ohio Attorney General



# Medicaid Estate Recovery



## ✿ Exceptions to MER

- ✿ If you own any real or personal property when you die, no MER while the following **are alive**:
  - ✿ Spouse, minor child or disabled or blind child
- ✿ If you own a house when you die, no MER against the home **while living in the home**:
  - ✿ son or daughter who provided 2 years of care or
  - ✿ sibling who has resided in the home for at least one year

# Medicaid Estate Recovery



## ★ Medicaid Estate Recovery avoidance.

- ★ Don't own any property when you die, i.e. no estate.

- ★ Take advantage of Medicaid permissible transfers.

- ★ ODJFS determines that a recovery would work an undue hardship.



## The MER Collection Process

# Medicaid Estate Recovery



- ★ The MER collection process:
  - ★ The Medicaid Information Technology System (MITS) tracks Medicaid expenditures
  - ★ MITS also tracks recipient's death
    - ★ CDJFS caseworker inputs recipient's death, or
    - ★ Database check with Bureau of Vital Statistics
      - This can take up to six months or more
  - ★ Recipients' death data is uploaded to OAG Collection Enforcement Section monthly.

# Medicaid Estate Recovery



- The OAG sends an initial MER collection form letter to the last known address requesting information.
  - If response indicates probate estate information then a claim letter is mailed to the estate representative
  - If no estate, 2<sup>nd</sup> letter mailed to next of kin to gather additional MER estate information

# Medicaid Estate Recovery



- ★ The final MER claim amount is generally not available until 7 months after death
- ★ For an itemized post-death claim printout call 614.752.2211 or 614.466.8459.

# Medicaid Estate Recovery



- Generally, 4 types of MER estates:
  - No estate other than a Personal Needs Account,
  - Real property or other assets that require the opening of a probate estate, or
  - Real property or other assets that pass “Transfer On Death”, survivorship or “Payable On Death.”
  - There is a surviving spouse

# Medicaid Estate Recovery



- RC § 5162.22 states re PNA accounts:
  - 0 to 60 days after death pay PNA to
    - Funeral home for unpaid expenses; or
    - Probate estate representative
  - 60 to 90 days after death pay PNA to
    - ODM through the OAG
- Note: no statutory provisions for surviving spouse



# Medicaid Estate Recovery



- Within 30 days of probate estate being filed
  - Estate administrator must determine if Medicaid paid any of decedent's bills and
  - Must mail standard probate form 7.0(A) to OAG
- ODM has 90 days after notice or one year after death, whichever is later, to present its claim.
- If form 7.0(A) not mailed, then no claim time limit

# Medicaid Estate Recovery



- ★ The person responsible for the estate is the executor, administrator, or person filing for the probate of the estate.
- ★ If the decedent was a Medicaid recipient, the administrator shall file a report with the OAG's office listing all the assets of the estate. The administrator also files a similar report with the Probate Court.

# Medicaid Estate Recovery



- ★ The MER claim is paid as an unsecured priority claim **after** payment of the following:
  - ★ Costs of administration;
  - ★ \$2,000 funeral and \$2,000 burial expenses;
  - ★ Family allowance of \$25,000;
  - ★ Preferential debts under Federal Law;
  - ★ Expenses of last sickness; and
  - ★ \$1,000 of additional funeral expenses.

# Medicaid Estate Recovery



- Real estate transferred by TOD affidavit or joint tenant with right of survivorship passes outside of probate.
- But when the TOD beneficiary or surviving tenant files their new interest at the Recorder's Office, MER reporting forms must be completed per
  - RC §§ 5302.221 (TOD) and 5309.082.

# Medicaid Estate Recovery



- Though ODJFS has statutory authority to impose Medicaid Liens on real estate owned by Medicaid recipients during their lifetime under certain circumstances per RC § 5162.211, ODJFS has chosen not to exercise this option.
- In the past though, the Department did file post-death Medicaid liens on real estate owned by Medicaid recipients, however, the Department no longer files such liens except on rare occasions.

# Medicaid Estate Recovery



- ★ To protect its MER claim in real estate that is transferred to the surviving spouse, ODM is filing an Affidavit of Facts Relating to Title (RC § 5301.252) against the property in the Recorder's Office.
- ★ Such affidavits have the practical effect of putting a question (cloud) on the title of the real estate.

# Medicaid Estate Recovery



- ★ In other words, a potential buyer may want the affidavit on file satisfied or otherwise removed prior to purchasing the property.
- ★ By filing Affidavits of Facts Relating to Title, ODJFS forces the owners of real estate to deal with its MER claim prior to selling the real estate.

# Medicaid Estate Recovery



- ✿ However, this poses a problem for surviving spouses, who according to federal law are not subject MER claims.
- ✿ ODM will remove the affidavit upon the request of a surviving spouse.
- ✿ But ODM can recover from the surviving spouse's estate to the extent that assets subject to MER passed through the surviving spouse's estate and the MER reporting forms cover this contingency.



What do you tell  
your client?

# Medicaid Estate Recovery



- ★ Your client
  - ★ owns her home
  - ★ has no spouse, disabled, blind or minor children
  - ★ No sibling living with her or child caretaker.
- ★ She refuses Medicaid because when she dies, MER will take her house and she wants to give it to her children.

# Medicaid Estate Recovery



- ★ Do your children want you to forgo needed care so they can inherit the house?
- ★ MER will only have a claim against the house, limited to the cost of the Medicaid services.
- ★ Without help now you will end up in the NF much faster and the Medicaid cost for NF care is 5 times as much as home care.

# Medicaid Estate Recovery



- ★ If you end up in a NF, you will be forced to sell the house after 13 months anyway.
- ★ Transfer house, wait 5 years, then go on Medicaid.

# Medicaid Estate Recovery



- Transfer house, apply for PASSPORT and wait out improper transfer penalty period
- Transfer house, keep life estate, apply for PASSPORT, shorter penalty period
  - Life estate arguably has no value for MER estate purposes

None of these should be done without the assistance of a Medicaid planning attorney

# Medicaid Estate Recovery



- Apply for and be approved for Medicaid but wait to transfer the house until immediately before death.
  - If transferred before death, not part of MER estate.

Bottom line, the informed choice to forgo Medicaid is the client's decision and must be respected.

# Pro Seniors Resources



## ★ Legal Hotline

- ★ Staffed by licensed attorneys.
- ★ Pre set appointments
- ★ By telephone
- ★ 30 minutes
- ★ Free legal advice and counsel
- ★ Call (800) 488-6070.

