

TEXAS ADMINISTRATIVE CODE**TITLE 1 ADMINISTRATION****PART 15 TEXAS HEALTH AND HUMAN SERVICES COMMISSION****CHAPTER 373 MEDICAID ESTATE RECOVERY PROGRAM****Subchapter A GENERAL****373.101 Purpose**

The purpose of this chapter is to implement section 531.077, Government Code, consistent with applicable federal law at 42 U.S.C. § 1396p(b)(1), which requires the Health and Human Services Commission, as the State Medicaid Agency, to operate a Medicaid Estate Recovery Program (MERP) to recover the costs of Medicaid long-term care benefits received by certain Medicaid recipients.

373.103 Applicability

- a. A Medicaid Estate Recovery claim may be filed against the estate of a deceased Medicaid recipient for covered Medicaid services if the recipient:
 1. Was age 55 years or older at the time the services were received; and
 2. Initially applied for covered Medicaid long-term care services on or after March 1, 2005, the effective date of these rules.
- b. For purposes of this chapter, an individual will be considered to be age 55 as of the first day of the month following the month in which the recipient attains the age of 55.
- c. Covered Medicaid long-term care services include the following services provided to a recipient age 55 years or older under the State of Texas Medicaid plan under Title XIX of the Social Security Act (SSA):
 1. Nursing facility services;
 2. Intermediate Care Facilities for the Mentally Retarded (ICF-MR);
 3. Home and Community-Based Services (§1915(c), SSA) and Community Attendant Services (§1929(b), SSA); and
 4. Related costs of hospital and prescription drug services.
- d. For the purposes of this chapter, covered services do not include services provided before the effective date of these rules.

373.105 Definitions

For the purposes of this chapter, the following words and terms have the following meanings, unless the context clearly indicates otherwise:

- (1) Applied for Covered Medicaid Long-Term Care Services - An individual or his or her representative files an application, a nursing facility submits an admission notice and medical necessity determination, or an individual elects Medicaid waiver services, which results in a covered service being approved under Medicaid.
- (2) Claim - A right to recover the total amount of Medicaid assistance paid for the following services: nursing facility; Intermediate Care Facility for the Mentally Retarded (ICF-MR); Home and Community-Based Services (§1915(c), SSA) and Community Attendant Services (§1929(b), SSA); and all related hospital and prescription drug services, provided from the time the decedent was 55 years of age or older.
- (3) Cost-effective - Economical to the extent that the amount reasonably expected to be recovered by the Medicaid Estate Recovery Program exceeds the cost of recovery by the program as provided in this chapter.
- (4) Decedent - A deceased individual who was 55 years of age or older at the time that covered Medicaid long-term care assistance was received.
- (5) Effective date - March 1, 2005, the date on which these rules take effect under §2001.036, Government Code.
- (6) Estate - The real and personal property of a decedent, both as such property originally existed and as from time to time changed in form by sale, reinvestment, or otherwise, and as augmented by any accretions and additions and substitutions that are included in the definition of the probate estate found in §3(l), Definitions and Use of Terms, Texas Probate Code.
- (7) Federal Poverty Level - Income guidelines established annually by the federal government.
- (8) Heirs - Those persons, including the surviving spouse, who are entitled under the statutes of descent and distribution to the estate of a decedent who dies intestate, as defined in §3(o), Definitions and Use of Terms, Texas Probate Code.
- (9) Intestate - To die without leaving a valid will.
- (10) Legatee - Any person entitled to a legacy under a will, as defined in §3(s), Definitions and Use of Terms, Texas Probate Code.

(11) MERP - The Medicaid Estate Recovery Program.

(12) Personal Representative- Includes executor, independent executor, administrator, temporary administrator, together with their successors as defined in §3(aa), Definitions and Use of Terms, Texas Probate Code.

(13) Recipient - An individual who received covered long-term care Medicaid services on or after the effective date of these rules.

(14) Value of real property - Property value determined by current year tax appraisal district.

TEXAS ADMINISTRATIVE CODE

TITLE 1 ADMINISTRATION

PART 15 TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 373 MEDICAID ESTATE RECOVERY PROGRAM

Subchapter B RECOVERY CLAIMS

373.201 Basis for Claims

The acceptance of Medicaid medical assistance, as defined by Title XIX of the Social Security Act, including mandatory and optional payments under the Social Security Act, provides a basis for:

(1) A Class 7 probate claim, as defined in §322 of the Texas Probate Code, Classification of Claims against Estates of Decedents, in favor of the Medicaid Estate Recovery Program as an interested party in the estate of the deceased Medicaid recipient.

373.203 Claims Procedures

(a) The Medicaid Estate Recovery Program (MERP) may file or present a:

1. Class 7 probate claim under §298, Claims Against Estates of Decedents, Texas Probate Code, against the estate of deceased Medicaid recipients in accordance with the priorities contained in §322, Classification of Claims against Estates of Decedents, Texas Probate Code.

(b) A claim may be filed in accordance with applicable provisions of the Texas Probate Code, including §298, Claims Against Estates of Decedents, which allows unsecured claims to be presented at any time before the estate is closed or within 4 months of receipt of notice from the estate administrator.

373.205 Medicaid Estate Recovery Program (MERP) Claim

(a) Contents of MERP Recovery Claim. The MERP claim will be presented to the estate personal representative (executor, administrator, or guardian) or filed by depositing it in the appropriate Probate Court and will include the amount of the claim, the date or dates of the covered Medicaid services provided, and a statement that to MERP's best knowledge the deceased Medicaid recipient had:

1. No surviving spouse;
2. No surviving child under age 21;
3. No surviving child of any age who is blind or disabled as defined by 42 U.S.C. §1382c;
4. No unmarried adult child residing continuously in the decedent's homestead for at least one year prior to the time of the Medicaid recipient's death; and
5. hat to the best knowledge of the MERP no undue hardship, as defined by these rules, exists and that recovery will be cost-effective.

(b) A Medicaid Estate Recovery (MERP) claim will be filed within 70 days after MERP has actual notice of the death of a Medicaid recipient aged 55 years or older who received covered long-term care services.

373.207 Exemptions From Claims

(a) Medicaid Estate Recovery claims will be sought only after the death of the Medicaid recipient, and if there is no:

1. Surviving spouse;
2. Surviving child or children under 21 years of age;
3. Surviving child of any age who is blind or disabled as defined by 42 U.S.C. §1382c; or
4. Unmarried adult child residing continuously in the decedent's homestead for at least one year prior to the time of the Medicaid recipient's death.

(b) Certain assets and resources of American Indians (AI) and Alaska Natives (AN) are exempt from estate recovery claims. The following AI/AN income, resources, and property are exempt from Medicaid Estate Recovery:

1. Certain AI/AN income and resources (such as interests in and income derived from Tribal land and other resources currently held in trust status and judgment funds from

- the Indian Claims Commission and the U.S. Claims Court) that are exempt from Medicaid estate recovery by other laws and regulations;
2. Ownership interest in trust or non-trust property, including real property and improvements:
 - A. Located on a reservation (any federally recognized Indian Tribe's reservation, pueblo, or colony, including former reservations in Oklahoma, Alaska Native regions established by Alaska Native Claims Settlement Act and Indian allotments) or near a reservation as designated and approved by the Bureau of Indian Affairs of the U.S. Department of the Interior; or
 - B. For any federally recognized Tribe not described in subsection (A) of this section located within the most recent boundaries of a prior Federal reservation.
 - C. Protection of non-trust property described in subsections (A) and (B) of this section is limited to circumstances when it passes from an Indian (as defined in section 4 of the Indian Health Care Improvement Act) to one or more relatives (by blood, adoption, or marriage), including Indians not enrolled as a member of a Tribe and non-Indians such as spouses and step-children, that their culture would nevertheless protect as family members; to a Tribe or Tribal organization; and/or to one or more Indians;
 3. Income left as a remainder in an estate derived from property protected in paragraph (2) of this subsection, that was either collected by an Indian, or by a Tribe or Tribal organization and distributed to Indian(s), as long as the individual can clearly trace it as coming from protected property;
 4. Ownership interests left as a remainder in an estate in rents, leases, royalties, or usage rights related to natural resources (including extraction of natural resources or harvesting of timber, other plants and plant products, animals, fish, and shellfish) resulting from the exercise of Federally-protected rights, and income either collected by an Indian, or by a Tribe or a Tribal organization and distributed to Indian(s) derived from these sources as long as the individual can clearly trace it as coming from protected sources; and
 5. Ownership interests or usage rights to items not covered by paragraphs (1) - (4) of this subsection that have unique religious, spiritual, traditional, and/or cultural significance, or rights that support subsistence or a traditional life style according to applicable Tribal law or custom.

(c) American Indians and Alaska Natives Income, Resources, and Property Not Exempt from Medicaid Estate Recovery include:

1. Ownership interests in assets and property, both real and personal, that are not described in subsection (b) of this section; or
2. Any income and assets left as a remainder in an estate that do not derive from protected property or sources in subsection (b) of this section.

(d) Government reparation payments to individuals in special populations are exempt from Medicaid estate recovery claims.

373.209 Undue Hardship Waivers

(a) The Medicaid Estate Recovery Program (MERP) will not recover from estates if recovery would cause undue hardship. An undue hardship waiver request form will be provided with the MERP Notice of Intent to File a Claim, and undue hardship waiver requests must be made within 60 days of the date of the MERP Notice of Intent to File a Claim.

(b) An undue hardship does not exist solely because:

1. Recovery would prevent heirs or legatees from receiving an anticipated inheritance; or
2. The circumstances giving rise to the hardship were created by, or are the result of, estate planning methods under which assets were sheltered or divested contrary to the requirements of Medicaid law in order to avoid estate recovery.

(c) Undue hardship waivers include:

1. The estate property subject to recovery has been the site of the operation of a family business, farm, or ranch at that location for at least 12 months prior to the death of the decedent; is the primary income producing asset of heirs and legatees, and produces 50 percent or more of their livelihood; and recovery by the State would affect the property and result in the heirs or legatees losing their primary source of income;
2. Heirs and legatees would become eligible for public and/or medical assistance if a recovery claim were made;
3. Allowing one or more survivors to receive the estate will enable him or her or them to discontinue eligibility for public and/or medical assistance;
4. The Medicaid recipient received medical assistance as the result of a crime, as defined by Texas law, committed against the recipient; or
5. Other compelling reasons.

(d) Undue Hardship Waivers Applicable to Homesteads

After receiving a Medicaid estate recovery claim, an heir may assert that recovery against a deceased Medicaid recipient's homestead would be an undue hardship and that the homestead should therefore be exempt from recovery for the cost of Medicaid long-term care services. The Health and Human Services Commission will exempt a decedent's home from

estate recovery based on undue hardship when the following conditions have been established to the Commission's satisfaction:

1. The tax appraisal district value of the homestead is less than \$100,000. If the tax appraisal district value of the homestead exceeds this amount, the first \$100,000 of the tax appraisal district value for the most recent tax year at the time of the recipients' death shall be exempt from estate recovery. Any equity value of the tax appraisal district value for the most recent tax year at the time of the recipients' death in excess of \$100,000 is subject to estate recovery.
2. One or more siblings or direct descendants of the deceased person (lineal heir(s), such as children and grandchildren) will inherit the homestead of the deceased Medicaid recipient, provided that each sibling or lineal heir inheriting the homestead has gross family income below 300 percent of the Federal Poverty Level.
3. When there are multiple heirs and not all heirs qualify for the hardship waiver, only that percentage of the homestead that corresponds to the qualifying heir or heirs' share of the homestead will be exempt from Medicaid estate recovery.
4. "300 percent of the federal poverty level" is a gross income test; no exclusions or deductions are allowed.
5. "Family" means that the Health and Human Services Commission will consider each heir separately. Heirs will not be aggregated into one family unless the heirs are minor children who are siblings. In the case of the adult heir, his or her family will be limited to the heir, the heir's spouse, and the heir's biological or legally adopted minor children and stepchildren residing in the household. In the case of the heir who is a minor, the heir's family will be the heir, his or her parent(s) or stepparent residing in the household, and the heir's minor siblings residing in the household, including half-, step-, and legally adopted siblings.

Type Of Heir	Family Members, If Living in the Heir's Household
Adult 18 years of age or older, or individual younger than 18 years of age and legally emancipated	Heir Heir's spouse Heir's biological or legally adopted minor children or stepchildren under age 18
Individual younger than 18 years of age and not legally emancipated	Heir Heir's parent (s) Heir's stepparent Heir's minor siblings residing in the household, including half-, step-, and legally adopted siblings under age 18

(e) HHSC has exclusive authority to waive its Medicaid estate recovery claim and grant undue hardship waivers as determined by the Medicaid Estate Recovery Program (MERP) program on an individual case-by-case basis. An undue hardship waiver determination will be made by MERP within 40 days of the receipt of an undue hardship waiver request form and all required necessary supporting documents by MERP.

(f) Undue hardship waiver request forms must be submitted to the following address: MERP, Hardship Waiver Request, P.O. Box 13247, Austin, Texas 78711.

373.211 Right to a Review of An Undue Hardship Waiver Denial

(a) A Medicaid Estate Recovery Program (MERP) undue hardship waiver applicant may request a review of the denial of an undue hardship waiver request within 60 days of receiving notice of the denial from MERP. The review is an informal process and is not a hearing.

(b) MERP will review the request within 40 days from the date the request is received by MERP. All requests for a review of the denial of an undue hardship waiver request must be made in writing to MERP, Hardship Waiver Denial Review Request, P.O. Box 13247, Austin, Texas 78711.

373.213 Deduction Allowed for Expenses for Home Maintenance and Costs of Care

(a) An amount equal to necessary and reasonable maintenance expenses and taxes may be deducted from the Medicaid Estate Recovery Program (MERP) claim for maintaining the home of the deceased Medicaid recipient, provided that sufficient supporting documentation of these expenditures, such as receipts, is provided to MERP by estate personal representatives, heirs, or legatees. Necessary and reasonable expenses for maintaining the home include real estate taxes, utility bills, insurance, home repairs, and home maintenance expenses such as lawn care.

(b) An amount equal to the necessary and reasonable expenses for the direct payment of the costs of care (including payment of personal attendant care) provided for a deceased Medicaid recipient that enabled the recipient to remain in his or her home and thereby delayed the institutionalization of the Medicaid recipient may be deducted from the MERP claim, provided that sufficient supporting documentation of these expenditures, such as receipts, is provided to MERP by estate personal representatives, heirs, or legatees.

(c) Requests for obtaining allowable deductions from MERP claims for expenses under subsections (a) or (b) of this section must be made in writing within 60 days after receipt of the Notice of the Intent to File a Claim by MERP. All supporting documentation must be attached to the request and sent to MERP, Home Maintenance/Costs of Care Request, P.O. Box 13247, Austin, Texas 78711.

373.215 Recovery Not Cost-Effective

No Medicaid estate recovery claim will be filed if it is not cost effective. A claim will not be cost-effective if:

1. the value of the recoverable estate is \$10,000 or less,
2. the recoverable amount of Medicaid costs is \$3,000 or less, or
3. the cost involved in the sale of the property would be equal to or greater than the value of the property.

373.217 Claim Amount

(a) The amount of the Medicaid Estate Recovery Program (MERP) claim will be calculated as the amount paid under §373.103(c) for the benefit of a Medicaid recipient for covered medical assistance services received after the Medicaid recipient reached 55 years of age.

(b) No claim will be filed for services received prior to the effective date of these rules.

(c) The claim amount may be amended prior to and after MERP files the recovery claim.

373.219 Claim Payments

(a) All payments on estate recovery claims must be made payable to the "Texas Medicaid Account for Long-Term Care," and must be sent to MERP, P.O. Box 13247, Austin, Texas 78711.

(b) HHSC MERP may compromise, settle, or waive any claim that does not qualify for an undue hardship waiver upon good cause shown. Interest on the unpaid portion of any claim is the same as the amount provided under §2251.025(b), Government Code.

TEXAS ADMINISTRATIVE CODE

TITLE 1 ADMINISTRATION
PART 15 TEXAS HEALTH AND HUMAN SERVICES COMMISSION
CHAPTER 373 MEDICAID ESTATE RECOVERY PROGRAM
Subchapter C NOTICE

373.301 Notice Upon Application

(a) Written notice of the MERP provisions will be provided to:

1. Individuals for Medicaid-covered nursing facility services:
 - A. With an application packet or notice of eligibility for Medicaid nursing facility services;
 - B. Within 14 days of the Department of Aging and Disability Services' receipt of a nursing facility admission notice for a Medicaid recipient.
2. Individuals for Medicaid-covered Home and Community-Based Services (§1915 (c), Social Security Act) and Community Attendant Services (§1929(b), Social Security Act):
 - A. Prior to an individual's signing an election statement for Home and Community-Based Services, as an alternative to institutionalization; or
 - B. At the initial home visit for Community Attendant Services;
3. Individuals for Medicaid-covered mental retardation services by the Local Mental Retardation Authority, in conjunction with other notification described in:
 - A. 40 T.A.C. §9.244, for Intermediate Care Facilities for the Mentally Retarded;
 - B. 40 T.A.C. §9.164, for the Home and Community- Based Services waiver; and
 - C. 40 T.A.C. §9.567, for the Texas Home Living waiver.
4. Individuals committed by a court order for evaluation of fitness or competency to state Intermediate Care Facilities for the Mentally Retarded (ICFMR) will be notified of the MERP provisions by faculty staff at the time of their admission to the facility.

(b) Medicaid long-term care services provided before the effective dates of these rules are not covered services for the purpose of MERP.

373.303 Additional Application Notice Provision to Recipients and Others

Written notice about the Medicaid Estate Recovery Program (MERP) will be provided to the following, if known by MERP, upon request for an application for Medicaid benefits, release from a waiver interest list, or notice of admission to a nursing facility or an Intermediate Care Facility for the Mentally Retarded (ICFMR):

- (1) The recipient;

- (2) The recipient's guardian of the person, if any; guardian of the estate, if any; or guardian of the person and estate, if any, provided that the name and address of the guardian or guardians are known;
- (3) The recipient's agent under a durable power of attorney if the name and address of the agent are known;
- (4) The recipient's agent under a medical power of attorney if the name and address of the agent are known; or
- (5) If none of the above are known, to family members acting on behalf of the recipient, provided that the name and address of those family members acting on behalf of the recipient are known.

373.305 Medicaid Application Estate Recovery Notice Contents

The written notice provided about the Medicaid Estate Recovery Program (MERP) to those listed in §373.303 of this chapter (relating to Additional Application Notice Provision to Recipients and Others) will contain the following information:

- (1) Description of the Medicaid Estate Recovery Program;
- (2) Information as to covered Medicaid long-term care services subject to estate recovery;
- (3) Claim procedures found in §322, Classification of Claims Against Estates of Decedents, Texas Probate Code;
- (4) Information as to applicable "look-back" penalties for transfers of property for less than market value when applying for Medicaid benefits described at 1 T.A.C. §358.430(e);
- (5) Description of undue hardship waiver requests and related request procedures in regard to any recovery claim; and
- (6) Information concerning the MERP Notice of Intent to File a Claim and the Medicaid Estate Recovery Claim on the death of a Medicaid recipient.

373.307 Notice of Intent to File A Claim upon the Death of a Medicaid Recipient

(a) The Medicaid Estate Recovery Program (MERP) will, within 30 days of the notification of the death of a Medicaid recipient, provide a Notice of Intent to File a Claim, to the following:

1. Estate representative;
2. Recipient's guardian of the person, if any; guardian of the estate, if any; or guardian of the person and estate, if any, provided that the name and address of the guardian or guardians are known by MERP;
3. Recipient's agent under a durable power of attorney if the name and address of the agent are known by MERP;
4. Recipient's agent under a medical power of attorney if the name and address of the agent are known by MERP; or
5. If none of the above are known, family members who have acted on behalf of the recipient provided that the name and address of those family members who have acted on behalf of the recipient are known by MERP.

(b) Contents of Notice of Intent to File a Claim. Written notice of MERP's intent to file an estate recovery claim against the estate of a deceased Medicaid recipient for covered services will be provided to individuals identified in subsection (a) of this section. The notice will include the following:

1. A program overview;
2. A questionnaire that seeks to determine whether the deceased recipient had:
 - A. A surviving spouse;
 - B. A surviving child under age 21;
 - C. A surviving child of any age who is blind or disabled, as defined by 42 U.S.C. §1382c; or
 - D. An unmarried adult child residing continuously in the decedent's homestead for at least one year prior to the time of the Medicaid recipient's death.

(c) An undue hardship waiver request form. Undue hardship request forms and supporting documentation must be submitted to MERP within 60 days of the date of the Notice of Intent to File a Claim. No action will be taken on an undue hardship request that is submitted without supporting documentation. The request form and documentation should be sent to MERP, Hardship Waiver Request, P.O. Box 13247, Austin, Texas 78711.

(d) The Notice of Intent to File a Claim will state the date that MERP received notification of the death of a Medicaid recipient and the source of the death notification of the Medicaid recipient.

