

PRESENTED AT

25th Annual Estate Planning, Guardianship and Elder Law Conference

The University of Texas School of Law

10-11, 2023

Galveston, Texas

**WHAT EVERY ESTATE PLANNING AND PROBATE
ATTORNEY NEEDS TO KNOW ABOUT THE MEDICAID
ESTATE RECOVERY PROGRAM**

Jennifer L. Coulter

Author Contact Information:

Jennifer L. Coulter
Townsend Allala, Coulter & Kludt,
PLLC
El Paso, TX

jen@elpasoelderlaw.com
(915) 533-0007

Table of Contents

I.	INTRODUCTION	1
II.	WHAT IS MERP?	1
	a) THE MERP MANDATE	1
	b) MERP UNDER THE TEXAS STATE PROGRAM	2
III.	DURING THE ESTATE PLANNING PROCESS	3
	a) THE HOMESTEAD	4
	b) THE CAR.....	9
	c) FINANCIAL INSTRUMENTS	10
IV.	THE MERP CLAIM IN PROBATES.....	12
V.	DETERMINING THE NEED FOR AND TYPE OF PROBATE.....	12
	a) PROBATE V. NON-PROBATE ASSETS	13
	b) VALUING THE ESTATE.....	14
	c) CALCULATING DEBTS	15
	d) DETERMINING IF A MERP CLAIM IS EASILY DISPOSED OF	16
	e) DETERMINING TYPE OF PROBATE PROCEEDING	22
VI.	BARRING A MERP CLAIM IN A DEPENDENT ADMINISTRATION	23
	a) PAYING VALID MERP CLAIMS.....	27
VII.	SATISFYING NON-PROBATE PAY-BACKS.....	28
	a) SELF-SETTLED SPECIAL NEEDS TRUSTS.....	28
	b) POOLED TRUSTS.....	30
	c) QUALIFIED INCOME TRUSTS	30
	d) ABLE ACCOUNTS	30
	e) MEDICAID COMPLIANT ANNUITIES.....	31
	f) NOT IN A THIRD-PARTY SETTLED!	32
VIII.	CONCLUSION.....	33

I. INTRODUCTION

Recently, I had a consultation with a prospective client, Juan. Juan received a Medicaid Estate Recovery Program (MERP) claim on the estate of his mother, Maria. Maria's house had already been sold, and Juan had distributed the proceeds to himself and his siblings. Juan contacted an attorney when he received the claim. That attorney told Juan that he would have to pay the claim and may be in legal trouble for not having paid it before distribution to himself and his siblings. Juan contacted another attorney for a path forward. The second attorney indicated Juan would have to pay, but indicated that MERP was not the attorney's expertise and sent Juan to me. Juan sent me the documents related to Maria's estate, the sale of the property, and the MERP claim. I reviewed the documentation then spent thirty minutes on the phone with Juan helping him get rid of the claim.

Maria had, while she had capacity, retained an estate planning attorney. That attorney had used a Lady Bird deed to put Maria's home into a trust on her passing. As a non-probate asset, the home passed free from recovery to the named beneficiaries in the trust, Juan and his siblings. When I ended the consult, Juan, with what I could only think of as giddy glee told me "This is the best thirty minutes of my year." He also asked if I could do his estate planning and Lady Bird deed. I sent him to the hero of this tale, the estate planning attorney local to him who did Maria's estate plan.

MERP is a deeply misunderstood program. This is true for our clients, but also true for attorneys and the State's case workers, who often frighten people who would otherwise receive benefits out of accepting services. These misunderstandings can result in a refusal to accept necessary care. It can result in a failure to plan. It can also result in paying the State when the State does not need to be paid. Understanding how this program works may seem like it should be the domain of elder law attorneys who practice in Medicaid, but the truth is that estate planners, real estate attorneys, and probate attorneys all need to understand MERP and help people be able to avoid it in order to ensure that they are doing their very best for their clients.

II. WHAT IS MERP?

a) THE MERP MANDATE

Since Medicaid was created in 1965, States have had the ability to create recovery programs to offset the costs of providing medical care.¹ There was, however, a decided lack of enthusiasm for voluntary recovery programs. Some states, like Oregon, did have a form of MERP in place.² Most States, though, simply and quietly did not establish any recovery programs.

¹ <https://aspe.hhs.gov/reports/medicaid-estate-recovery-0>

² *Id.*

As the cost of care ballooned and more and more individuals relied on long term care Medicaid benefits to pay for the bulk of their long-term care, Congress took action. Under the Omnibus Reconciliation Act of 1993 (OBRA 93), Congress demanded that each State establish a Medicaid Estate Recovery Program.³ The statute provided the basic guidelines for the individuals and programs to which MERP was to apply. It was to apply to individuals over 55 years of age at the time of receipt of benefits who received certain long-term care Medicaid benefits, including for nursing homes and waiver programs providing in home care, and to the related hospital and prescription costs.⁴

Congress left some leeway in exactly how each State was to establish its program, though, resulting in a complex patchwork of state-by-state rules with widely disparate results. States must try to collect against the probate estate of certain Medicaid recipients. They may also collect against any assets belonging to the deceased recipient, including, in some cases, through the use of liens on the Medicaid recipient's property.⁵

Some states, like Oregon, whose recovery program was established well before any such mandate and upon whose example the mandate was based, have robust estate recovery programs.⁶ Texas' program, on the other hand, was late in being established and has been relatively weak in actual execution. It was not until March 1, 2005, that Texas finally made effective the Medicaid Estate Recovery Program to comply with OBRA 93.⁷ The program the Texas legislature instituted, though, complied only with the absolute minimums the Federal statutes required.

b) MERP UNDER THE TEXAS STATE PROGRAM

For the most part, the terms of the Texas Administrative Code laying out MERP in Texas track the Federal enabling legislation. MERP claims may be made against the probate estate of Medicaid recipients who initially applied for covered Medicaid benefits after the effective date of the program⁸, March 1, 2005, who were at least 55 years of age at the time of receipt, and who received "covered medical services".⁹ Texas defined covered medical services as those the Federal enabling legislation required, Long Term Care Medicaid benefits for nursing facilities, Intermediate Care Facilities for people with intellectual disabilities, and home and community-based services (which includes the Star Plus Plus program and Community Attendant Services, among others).¹⁰ Additionally, the related costs of hospital and prescription drug services are

³ [42 U.S.C. §1396\(p\)\(b\)\(1\)\(b\). \(2011\)](#)

⁴ *Id.*

⁵ *Id.*

⁶ <https://aspe.hhs.gov/reports/medicaid-estate-recovery-0>

⁷ [1 TEX. ADMIN. CODE §373.103 \(2016\)](#)

⁸ Note that the Medicaid recipient need only to have applied for covered services after the effective date. If the Medicaid recipient had been previously receiving non-covered Medicaid benefits, such as the type of Medicaid benefit that comes with SSI eligibility, and then applied for covered services after March 1, 2005, the recipient will not be grandfathered for Medicaid Estate Recovery Program purposes.

⁹ [1 TEX. ADMIN. CODE §373.103 \(2016\)](#)

¹⁰ [1 TEX. ADMIN. CODE §373.103 \(2016\)](#)

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: What All Estate and Probate Attorneys Need to Know About Medicaid Estate Recovery

Also available as part of the eCourse

[2023 Estate Planning, Guardianship and Elder Law eConference](#)

First appeared as part of the conference materials for the

25th Annual Estate Planning, Guardianship and Elder Law Conference session

"What All Estate and Probate Attorneys Need to Know About Medicaid Estate Recovery"