

Secretary of State
**CERTIFICATE AND ORDER FOR FILING TEMPORARY ADMINISTRATIVE RULES
and
STATEMENT OF NEED AND JUSTIFICATION**

I certify that the attached copies are true, full and correct copies of the TEMPORARY Rule(s) adopted on
February 13, 2017 by the

Department of Human Services, Office of Self-Sufficiency Programs	461
Agency and Division	Chapter Number

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to become effective February 13, 2017 through August 11, 2017.*

**Temporary rules are effective for a maximum of 180 days including the effective date.*

Rule Caption: Amending rules relating to estate administration

In the Matter of: *Temporary amendment of OAR 461-135-0832 and OAR 461-135-0835*

ADOPT:

AMEND: 461-135-0832 and 461-135-0835

SUSPEND:

ORS 410.075, 411.060, 411.070, 413.042, 416.340, 416.350, 2013 Or Laws 14 Section 10

Stat. Auth.

42 USC §1396p; 42 CFR §433.36; CMS State Medicaid Manual §3810

Other Auth.

ORS 93.969, 125.495, 411.404, 411.620, 411.630, 411.708, 411.795, 413.085, 416.310, 416.350

Stats. Implemented

Rule Summary

OAR 461-135-0832 and OAR 461-135-0835 about limits on estate claims and definitions used in estate administration rules are being amended to implement an adverse Oregon Supreme Court decision by amending the definition of “estate” with respect to the collection of payments for assistance provided and limit when the Department collects against the spouse of a recipient.

The rule text showing proposed changes is available at http://www.dhs.state.or.us/policy/selfsufficiency/ar_temporary.htm.

Need for the Rules

OAR 461-135-0832 and OAR 461-135-0835 need to be amended to implement an adverse Oregon Supreme Court decision by amending the definition of “estate” with respect to the collection of payments for assistance provided and limit when the Department collects against the spouse of a recipient.

Documents Relied Upon

Oregon State Plan §4.17 (available from the Hearings and Rules Unit, 500 Summer Street NE, E-48, Salem, Oregon 97301 and *Nay v. Dept. of Human Services* available at <http://www.publications.ojd.state.or.us/docs/S062978.pdf>

Justification of Temporary Rules

The Department finds that failure to act promptly by amending OAR 461-135-0832 and 461-135-0835 will result in serious prejudice to the public interest, the Department, and some estates of DHS clients. The Department needs to proceed by temporary rule because the Department has pending estate claims and needs to comply with the applicable state statutes limiting what the Department may collect.

R461-135-0832

~~Eff. 7-1-14~~ Temporary effective 02-13-17

Estate Administration; Definitions

Effective July 18, 1995, for purposes of these rules (OAR 461-135-0832 to 461-135-0847) and ORS 93.268, 410.075, 411.620, 411.630, 411.694, 411.708, 411.795, 416.310, 416.340, and 416.350 the terms listed below have the meanings ascribed to them herein; provided, however, as used in these rules, any term has the same meaning as when used in a comparable context in the laws of the United States in effect on June 1, 1996, relating to the recovery of medical assistance paid by a state pursuant to 42 USC 1396 et. seq. relating to Grants to States for Medical Assistance Programs, unless a different meaning is clearly required or the term is specifically defined herein. The Department applies the definitions and procedures set forth in these rules to recoveries and claims made pursuant to ORS 411.708, 411.795, 416.310, 416.340, and 416.350.

- (1) "Assets" means all income and resources of an individual, including any income or resources that an individual is entitled to at the time of death, including any income or resources to which the individual is entitled, but does not receive, because of action: by the individual; the individual's *spouse* (see OAR 461-001-0000); by a person, including a court or administrative body with legal authority to act in place of or on behalf of the individual; or by any person, including any court or administrative body, acting at the direction or upon the request of the individual.
- (2) "Assign" means a *person* who acquires an interest in *real* or *personal property* or an *asset* pursuant to a written or oral assignment of such *real* or *personal property* or *asset* from a *person* with the legal right to assign it.
- (3) "Assistance" means general assistance and public assistance as defined in ORS 411.010 and medical assistance as defined in ORS 414.025.
- (4) "Bona fide purchaser for value" means any *person* who provides consideration, including money or property, to a seller or transferor of *real property* or *personal property* equal to the fair market value of the *real* or *personal property* sold or transferred.
- (5) "Child under age 21" means the deceased recipient's natural or adopted son or daughter who is under 21 years of age throughout the time the Department seeks to enforce its claim.
- (6) "Child with a disability" means the deceased recipient's natural or adopted son or daughter of any age, who meets SSI disability criteria throughout the time the Department seeks to enforce its claim, and who presents evidence to the Department substantiating the disability within two years after the Department initially asserts its claim.
- (7) "Child with a visual impairment" means the deceased recipient's natural or adopted son or daughter, of any age, who, within two years after the Department initially asserts its claim, substantiates blindness throughout the time the Department seeks to enforce its claim by presenting evidence of:

- (a) Vision of 20/200 or less in the better eye with a corrective lens;
 - (b) A limitation in vision field to an angle of 20 degrees or less; or
 - (c) Meeting any other SSI criteria for blindness.
- (8) "Consideration furnished test" means the method by which the ownership of *real or personal property* is traced to its economic origin. The fractional share of the property considered owned by a co-owner shall be that fractional share to have originally belonged to or to be attributable to the monetary consideration furnished by the co-owner. The fractional share is based on the proportion the original ownership share or monetary consideration bore to the acquisition cost and, if applicable, capital additions for the property. The fractional share is not based on the dollar amount of contribution compared to the current market value of the property. For example, if one co-owner contributed \$2,500 and the other \$7,500 to the purchase price of a \$10,000 property in 1960; in 1995, the property is appraised at \$50,000. The co-owner who contributed \$2,500 is considered to own 25% of the property in 1995.
- (9) "Convincing evidence" includes, but is not limited to:
- (a) Recorded documents of title.
 - (b) Unrecorded documents of title executed contemporaneously with the transaction or transfer at issue.
 - (c) Tax statements or returns.
 - (d) Records of banking, financial or other similar institutions.
 - (e) Written receipts, bills of sale or other writings or documents executed contemporaneously with the transaction or transfer at issue.
 - (f) Such other reliable, probative evidence, including oral, of a similar nature and authenticity that accurately reflects the true facts of the transaction or transfer at issue.
- (10) "Date of request" means the date an individual or someone authorized on behalf of the individual contacts the Department or uses another appropriate method to request benefits (see OAR 461-115-0150). The request may be oral or in writing. It starts the application process.
- (11) "Department" means the Department of Human Services, the Oregon Health Authority, or both.
- (12) "Domestic partner" means an individual joined in a domestic partnership as defined in ORS 106.310.

(13) "Estate" means with respect to the collection of payments made for *assistance* provided prior to July 18, 1995:

~~(a) For recipients who die prior to October 1, 2008, all real property, personal property, or other assets, wherever located, in which a recipient had any legal title or ownership or beneficial interest at the time of death, including real property, personal property, or other assets conveyed by the recipient to, subsequently acquired by, or traceable to, a person, including the recipient's spouse and any successor-in-interest to the recipient's spouse, through:~~

~~(Aa) Tenancy by the entirety;~~

~~(Bb) Joint tenancy;~~

~~(Cc) Tenancy in common;~~

~~(Dd) Not as tenants in common, but with the right of survivorship;~~

~~(Ee) Life estate;~~

~~(Ff) Transfer on death deed;~~

~~(Gg) Living trust;~~

~~(Hh) Annuity purchased on or after April 1, 2001; or~~

~~(Ii) Other similar arrangement.~~

~~(b) For recipients who die on or after October 1, 2008, all real property, personal property, or other assets, wherever located, in which a recipient had any legal title or ownership or beneficial interest at the time of death of the recipient, including real property, personal property, or other assets conveyed by the recipient to, subsequently acquired by, or traceable to, a person, including the recipient's spouse and any successor-in-interest to the recipient's spouse, through:~~

~~(A) Tenancy by the entirety;~~

~~(B) Joint tenancy;~~

~~(C) Tenancy in common;~~

~~(D) Not as tenants in common, but with the right of survivorship;~~

~~(E) Life estate;~~

~~(F) Transfer on death deed;~~

~~(G) Living trust;~~

~~(H) — Annuity purchased on or after April 1, 2001; or~~

~~(I) — Other similar arrangement, includes, but is not limited to, an interspousal transfer of assets, including one facilitated by a court order, which occurred no earlier than 60 months prior to the first date of request established from the recipient's and the recipient's spouse's applications, or at any time thereafter, whether approved, withdrawn, or denied, for the medical assistance program.~~

- (14) "General Assistance" means "general assistance" as defined in ORS 411.010.
- (15) "Heir" means any individual, including the surviving *wife*, who is entitled under *intestate succession* to the *real property, personal property, and assets* of a decedent who died wholly or partially *intestate*.
- (16) "Interest" means any form of legal, beneficial, equitable or ownership interest.
- (17) "Interspousal transfer" means any transfer, or chain of transfers, that effectively transfers title or control of an asset, or an interest in an asset, from one *wife* to another, including: direct transfers between spouses, transfers from one or both spouses to a trust, and transfers from one trust to another trust.
- (18) "Intestate" means one who dies without leaving a valid will, or the circumstance of dying without leaving a valid will, effectively disposing of all of a decedent's estate.
- (19) "Intestate succession" means succession to *real property, personal property or assets* of a decedent who dies *intestate* or partially *intestate*.
- (20) "Joint tenancy" means ownership of property held under circumstances that entitle one or more owners to the whole of the property on the death of the other owner(s), including, but not limited to, joint tenants with right of survivorship and tenants by the entirety.
- (21) "Legal title" means legal ownership by a *person*.
- (22) "Life estate" means an *interest in real or personal property* that terminates upon the death of a measuring life.
- (23) "Living trust" means a revocable or irrevocable inter vivos trust funded with assets to which the recipient is legally entitled.
- (24) "Medical Assistance" (MA) is defined in ORS 414.025 and incorporated by this reference.
- (25) "Medical institution" means a facility that provides care and services equivalent to those received in a nursing facility. "Medical institution" does not apply to *home and community-based care* (see OAR 461-001-0030), in-home services, adult foster home (AFH) care, residential care facility (RCF) services, or assisted living facility (ALF) care.

- (26) "Medicare cost sharing" means *medical assistance* funds used to pay Medicare premiums, coinsurance, copayments and deductibles.
- (27) "Ownership documents" mean any applicable documents, certificates or written evidence of title or ownership such as, but not limited to, recorded deeds, stock certificates, certificates of title, bills of sale, or other similar documents evidencing ownership or *legal title* held by a *person*.
- (28) "Permanently institutionalized" means an individual, regardless of age, who, at the time of his or her death, had resided in a nursing facility, intermediate care facility for the mentally retarded, or other medical institution, for 180 days or more.
- (29) "Person" means any individual, corporation, association, firm, partnership, trust, estate or other form of entity.
- (30) "Personal property" means all tangible and intangible personal property wherever located, including, but not limited to, chattels and movables, boats, vehicles, furniture, personal effects, livestock, tools, farming implements, cash, currency, negotiable papers, securities, contracts, and contract rights.
- (31) "Probate estate" means all *real property*, *personal property*, or other *assets* included in a decedent's estate as it is defined by applicable state probate law.
- (32) "Real property" means all land wherever situated, including improvements and fixtures thereon, and every estate, interest, and right, whether legal or equitable, therein including, but not limited to, fee simple, terms for years, life estates, leasehold interests, condominiums or time share properties. "Real property" includes property conveyed by the individual to, subsequently acquired by, or traceable to, a person, including the individual's surviving *spouse* and any successor-in-interest to the individual's surviving *spouse*, if the "real property" may be included in the individual's, or the individual's surviving spouse's, estate, as defined in this rule.
- (33) "Recipient of property" means:
- (a) Any *survivor*, *heir*, *assign*, devisee under a will, beneficiary of a trust, transferee or other *person* to whom *real property*, *personal property* or other *assets* pass upon the death of the decedent either by law, *intestate succession*, contract, will, trust instrument or otherwise; and
 - (b) Any subsequent transferee of such *real property*, *personal property*, or *asset*, or proceeds from the sale thereof, through any form of conveyance, that is not a *bona fide purchaser for value*.
- (34) "Survivor" means any *person* who, as a co-tenant, is automatically entitled to an expanded share of *real* or *personal property* upon the death of a fellow co-tenant.

- (35) "Survivorship" means an interest in *real or personal property* that expires upon the death of an individual whereby the Interest of the individual's co-owners automatically expands to the same extent without necessity for any act of transfer or distribution.
- (36) "Tenancy in common" means ownership of *real or personal property* by an individual together with one or more other persons which ownership *interest* shall not pass by *survivorship* upon the death of the individual.
- (37) "Time of death" means the instant of death, the time and date of which shall be established in the place of the decedent's residence; in no case shall *time of death* be construed to mean a time after which an *interest in real or personal property* or other *assets* may:
- (a) Pass by *survivorship* or other operation of law due to the death of the decedent; or
 - (b) Terminate by reason of the decedent's death.
- (38) "Transfer on death deed" has the meaning set out in ORS 93.949.
- (39) "Value" means the fair market value. Fair market value is the price at which *real or personal property* would change hands between a willing buyer and a willing seller. In the event the *real or personal property* was not reported to the Department by the deceased Medicaid recipient, the "value" would be established based on its fair market value at the time of discovery.

Stat. Auth.: ORS 410.075, 411.060, 411.070, 413.042, 416.340, 416.350, 2013 Or Laws 14 Section 10

Stats. Implemented: ORS 93.969, 410.070, 410.075, 411.010, 411.060, 411.708, 411.795, 416.310, 416.340, 416.350, 2013 Or Laws 14 Section 10

16Temporary Effective 02-13-17

Limits on Estate Claims

- (1) The Estate Administration Unit is designated and authorized to administer the estate recovery program for the Oregon Health Authority and the Department of Human Services, and to present and file claims for payment. The Manager and Assistant Manager of the Estate Administration Unit, Estate Administrators, Assistant Estate Administrators, and Accounts Receivable Specialist are authorized to present, file, and resolve claims for the Estate Administration Unit. The Manager or Assistant Manager may designate other individuals to present, file, or resolve claims. This rule sets out some of these claims.
- (2) For the OSIP program (see OAR 461-101-0010):
 - (a) The amount of any payments or benefits, including an *overpayment* (see OAR 461-195-0501), are a claim against the *probate estate* (see OAR 461-135-0832) of any deceased recipient.
 - (b) The claim for correctly paid payments or benefits under OSIP are deferred until the death of the *spouse* (see OAR 461-001-0000) or *domestic partner* (see OAR 461-135-0832), if any, of the deceased recipient.
 - (c) If the deceased recipient has no *probate estate*, the enforcement of the claim has been deferred, or there are insufficient resources in the *probate estate* to pay the claim in full, the *probate estate* of the *spouse* or *domestic partner* of the deceased recipient, if any, is charged for any payments or benefits paid under OSIP to the deceased recipient, the *spouse*, or *domestic partner*.
 - (d) The claim for correctly paid payments or benefits under OSIP may not be enforced if the deceased recipient is survived by a *child under age 21* (see OAR 461-135-0832), a *child with a disability* (see OAR 461-135-0832), or a *child with a visual impairment* (see OAR 461-135-0832); and the child survives to the closing of the *probate estate*.
 - (e) Transfers of real or personal property without adequate consideration, by recipients of payments or benefits under OSIP, are voidable and may be set aside under ORS 411.620.
 - (f) Except when there is a surviving *spouse* or *domestic partner*, or a surviving *child under age 21*, a *child with a disability*, or a *child with a visual impairment*, the amount of any payments or benefits provided is a claim against the *estate* (see OAR 461-135-0832) in any conservatorship proceedings and may be paid pursuant to ORS 125.495.
- (3) For *General Assistance* (see OAR 461-135-0832):

- (a) The amounts of any payments or benefits, including overpayments, are a claim against the *probate estate* of any deceased recipient. The amount includes the state's monthly contribution, paid prior to January 1, 2014, to the federal government for the recipient's Medicare Part D prescription drug coverage. Effective July 1, 2016, any correctly paid benefits under Oregon Laws 2016, chapter 93, section 1 are excluded, except than an *overpayment* of benefits under Oregon Laws 2016, chapter 93, section 1 is included in a claim against the *probate estate*.
 - (b) The claim for correctly paid payments or benefits under the *General Assistance* program is deferred until the death of the *spouse* or *domestic partner*, if any, of the deceased recipient.
 - (c) If the deceased recipient has no *probate estate*, the enforcement of the claim has been deferred, or there are insufficient resources in the *probate estate* to pay the claim in full, then the *probate estate* of the *spouse* or *domestic partner* of the deceased recipient, if any, is charged for any payments or benefits to the deceased recipient, the *spouse*, or *domestic partner*.
 - (d) The claim for correctly paid payments or benefits under the *General Assistance* program may not be enforced if the deceased recipient is survived by a *child under age 21*, a *child with a disability*, or a *child with a visual impairment*; and the child survives to the closing of the *probate estate*.
 - (e) Except when there is a surviving *spouse* or *domestic partner*, or a surviving *child under age 21*, a *child with a disability*, or *child with a visual impairment*, the amount of any assistance paid is a claim against the *estate* in any conservatorship proceedings and may be paid pursuant to ORS 125.495.
- (4) For *Medical Assistance* (MA, as defined in OAR 461-135-0832):
- (a) In determining the extent of the *estate* resources subject to the claim of the Department for correctly paid benefits, except as provided in subsection (b) of this section, the Department must disregard resources in an amount equal to the *value* (see OAR 461-135-0832) of resources excluded in the most recent eligibility determination under OAR 461-160-0855, based on payments received under a *qualified partnership policy* (see OAR 461-001-0000). The disregard of resources specific to the estate recovery claim applies to MA benefits received after the effective date of the MA eligibility determination in which a *qualified partnership policy* was considered and approved. The amount of any MA incurred in a prior MA eligibility period where *qualified partnership policy* benefits were not considered is not subject to the estate resource disregard.
 - (b) There is no disregard of resources under subsection (a) of this section if the recipient, or the *spouse* of the recipient, at any time transferred the *value* of the

qualified partnership policy excluded resource amount to another individual for less than fair market value prior to the death of the recipient or the recipient's *spouse*, or exhausted the disregarded resource amount by purchasing things of *value* to the recipient or the recipient's *spouse* while either was living.

- (c) The amount of any incorrectly paid payments or benefits, excluding an administrative error *overpayment*, are a claim, against the *probate estate* of any deceased recipient.
 - (d) The claim for correctly paid payments or benefits under MA is deferred until the death of the surviving *spouse*, if any, of the deceased recipient. After the death of a surviving *spouse*, the deferred claim of the deceased recipient is a claim against the following *assets* (see OAR 461-135-0832) or their proceeds in the *probate estate* of the *spouse*.
- ~~(A) For a recipient who died prior to October 1, 2008, the~~ The Department has a claim against the *probate estate* of the *spouse* for *medical assistance* (see OAR 461-135-0832) paid to the recipient, but only to the extent that the *spouse* received property or other *assets* from the recipient through any of the following:

- ~~(i)~~ Probate.
- ~~(ii)~~ Operation of law.

~~(B) For a recipient who dies on or after October 1, 2008, the Department has a claim against the *probate estate* of the recipient's *spouse* for *medical assistance* paid to the recipient, but only to the extent that the recipient's *spouse* received property or other *assets* from the recipient through any of the following:~~

- ~~(i) Probate.~~
- ~~(ii) Operation of law.~~
- ~~(iii) An interspousal transfer (see OAR 461-135-0832), including one facilitated by a court order, which occurs:~~
 - ~~(I) Before, on, or after October 1, 2008; and~~
 - ~~(II) No earlier than 60 months prior to the first *date of request* (see OAR 461-135-0832) established from the applications for MA of the recipient and the recipient's *spouse*, or at any time thereafter, whether approved, withdrawn, or denied.~~

- (e) The claim for correctly paid payments or benefits under MA may not be enforced if the deceased recipient is survived by a *child under age 21*, a *child with a disability*, or a *child with a visual impairment*.
- (f) For recipients who are not *permanently institutionalized* (see OAR 461-135-0832):
 - (A) The amount of any payments or benefits paid prior to October 1, 1993 to or on behalf of a recipient 65 years of age or older are a claim against the *probate estate* of any deceased recipient.
 - (B) The amount of any payments or benefits, paid on or after October 1, 1993 and prior to July 18, 1995, to or on behalf of a recipient 55 years of age or older are a claim against the *probate estate* of any deceased recipient.
 - (C) The amount of any payments or benefits, paid on or after July 18, 1995 and prior to October 1, 2013, to or on behalf of a recipient 55 years of age or older are a claim against the *estate* of any deceased recipient. All correctly made payments on or after January 1, 2010 for *Medicare cost sharing* (see OAR 461-135-0832) are excluded from a claim.
 - (D) The amount of any payments or benefits, paid October 1, 2013 or later, to or on behalf of a recipient 55 years of age or older, during the time the Department was paying any of the cost of care of the individual in a nursing facility, *home and community based care* (see OAR 461-001-0030), or in home services through the *State Plan Personal Care Services* (see OAR 411-034-0010), are a claim against the *estate* of any deceased recipient. All correctly made payments on or after January 1, 2010 for *Medicare cost sharing* are excluded from a claim.
- (g) For *permanently institutionalized* individuals, a claim includes amounts calculated according to subsection (f) of this section and the following:
 - (A) The amount of any payments or benefits before July 18, 1995 to or on behalf of a recipient who was *permanently institutionalized* is a claim against the *probate estate* of the deceased recipient.
 - (B) The amount of any payments or benefits paid between July 19, 1995 through September 30, 2013 to or on behalf of a recipient who was *permanently institutionalized* is a claim against the *estate* of the deceased recipient.
 - (C) The amount of any payment for services provided in a nursing facility, an intermediate care facility for an individual with intellectual or developmental disabilities, a psychiatric institution, or other *medical institution* (see OAR 461-135-0832) paid after September 30, 2013 to or

on behalf of a recipient who was *permanently institutionalized* is a claim against the *estate* of the deceased recipient.

- (5) The amount paid, for a recipient age 55 or older, after December 31, 2013, to the federal government for the recipient's Medicare Part D prescription drug coverage is a claim against the *estate* of the deceased recipient.
- (6) For trusts that comply with OAR 461-145-0540(10) and (11), the maximum distribution to the Department is the total of all MA payments or benefits paid to or on behalf of the deceased recipient. Subsections (4)(d) and (4)(e) of this rule do not apply to this section.

Stat. Auth.: ORS 409.050, 411.060, 411.070, 411.404, 413.042, 413.085, 416.340, 416.350
Stats. Implemented: ORS 93.969, 125.495, 411.404, 411.620, 411.630, 411.708, 411.795,
413.085, 416.310, 416.350, Or Laws 2016, ch 93