



MassHealth's Amended Medicaid Estate Recovery Regulations
[Eligibility Letter 238](#) (May 2021) releasing amended regulations effective May 14, 2021
(130 CMR §§ 50.013 and 515.011)

Overview: MassHealth released proposed Medicaid Estate Recovery regulations for comment in January 2021. MLRI and 13 other organizations submitted written comments commending the changes, making recommendations for more changes and pointing out the need for added legislative reform. The final rules were published on May 4 with a May 14, 2021 effective date. The final rules adopt several of our recommendations with respect to the agency's proposed amendments, but reject all our recommendations for added grounds for hardship or for requiring better notice in the regulations. Pending legislation would both limit estate recovery in ways that can only be accomplished by legislation and provides for added grounds for hardship and better notice as we recommended to the agency. *An Act Protecting the Homes of Seniors and Disabled People on MassHealth*, [Senate Bill 749](#) (Sen. Comerford) and [House Bill 1246](#) (Rep Barber).

The final regulations are a vast improvement over the old regulations which had not been significantly amended since 2003 when the hardship rules were made *more* restrictive. The final regulations exempt estate recovery for probate estates with total value of \$25,000 or less which according to MassHealth represent over 50 percent of claims filed but just 4 percent of the amount recovered. This rule is effective for dates of death after May 14, 2021, but the policy has been in place since the COVID-19 public health emergency and is described in a [November 2020 policy update](#). Another reform enacted in the FY 2021 GAA was a reduction in the statutory interest rate on unpaid claims from 12 percent to 3.25 percent.

The final regulations also make significant improvements to the rules for waiving estate recovery based on undue hardship to the heirs. The new hardship rules apply to MassHealth notice of claims presented on May 14, 2021 or later. Under the old rules, there was only one ground for a hardship waiver and it was conditional for two years. The final rules eliminated the two year conditional period (but retains the very low 133 percent income level) and add two new grounds for a hardship waiver, one new waiver would protect the house based on hardship to a caregiver who had lived with and cared for the MassHealth member for at least two years prior to a nursing home admission or death, and another new waiver would enable heirs with income of 400 percent of the poverty level or less to inherit a certain dollar amount free of the MassHealth recovery claim.

The agency has also created a new [Massachusetts Medicaid Estate Recovery website](#) with more information about the process including a set of FAQs, and a link to the new rules. The agency has also developed a form for the personal representatives to use in applying for a hardship waiver that should be posted once the rules take effect, and it plans to distribute a notice to members age 55 and older or in nursing homes with information about Medicaid estate recovery.

Comparison of Final Estate Recovery Regulations (effective May 14, 2021) with [recommendations in our Jan. 2021 comments on the proposed regulations](#)

1. Changes for “clarity or consistency,” 130 CMR 501.011 and 515.011 throughout.

Recommendations:

- Change “may” to “shall” or “will” throughout when describing hardship waivers and exemptions. CHANGES MADE
- Prohibit recovery from protected property of American Indians/Alaska natives and reparation payments at any point that the existence of such property comes to the attention of the agency. PARTIAL CHANGE (changes “may” to will; requires application for AI/AN exemption but at least no deadline for filing specified; nothing added about reparations payments)

2. New cost-effectiveness exception, 130 CMR §§ 501.011(B) and 515.011(B)

Recommendations:

- Amend the cost-effectiveness definition to provide that it also applies to probate estates that include real estate if the net value of real estate less mortgages or liens with priority over MassHealth claims, together with other gross assets in the estate, are \$25,000 or less. NOT CHANGED
- Amend the regulation to identify acceptable verification of asset value available in informal and formal probate proceedings as well as in voluntary administration. NOT CHANGED

3. Amendment of the existing Residence and Financial hardship waiver. 130 CMR §§ 501.011(D)(1) and 515.011(D)(1)

Recommendations

- Change “may” to shall. CHANGED
- Add a higher income limit for financial hardship than 133% of poverty level such as 400% of the poverty level. NOT CHANGED
- Add a more reasonable residence requirement for heir than two years before decedent enrolled in MassHealth such as two years before the death of the member. CHANGED (2 years before institutionalization or death)
- Make waivers final for those who are currently in the 2-year conditional period on the effective date of the rule change. CHANGED

4. Creation of two new grounds for a hardship waiver

The proposed amendments would create two new waivers of estate recovery due to undue hardship: a Care Provided Hardship Waiver and an Income-Based Hardship Waiver.

a. Care Provided Hardship Waiver, 130 CMR 501.011(D)(2) and 130 CMR 515.011(D)(2)

Recommendations:

- Clarify that the new Care Provided waiver is available if the MassHealth member met a nursing home level of care and, but for the care provided by the heir, would have needed nursing home care *even if the member also received LTSS in the community while receiving such care from the heir*. CHANGED
- Amend the waiver to apply when the care provider's residence was for less than two years before *death* (we didn't ask for shorter period of residence before institutionalization) NOT CHANGED
- Expand hardship waivers to protect the home in additional circumstances as recommended below. NOT CHANGED

b. Income-Based Waiver, 130 CMR 501.011(D)(3) and 130 CMR 515.011(D)(3)

Recommendation:

Include an example in the regulation; it is difficult to understand without one. ADDED

Recommendations for additional new hardship criteria:

Add a hardship waiver for family members and caregivers to whom the MassHealth member could have transferred the house during his or her lifetime with no transfer of asset penalties. NOT ADDED

Add the hardship circumstances contemplated by Congress in the legislative history and recommended in federal guidance: exempting income-producing property that is sole support of heirs, exempting homestead of modest value as defined by CMS. NOT ADDED

Add a requirement of adequate notice of the specific reasons the agency disagrees with the Personal Representative's request for a waiver and provide an opportunity for the PR to cure a deficiency in the waiver request. NOT ADDED

Add a provision for adequate notice of potential estate recovery for amount of managed care premiums. NOT ADDED

Add clarification that anyone appointed as a public administrator also has the ability to apply for a hardship waiver on behalf of eligible heirs. NOT ADDED

Delete reference to property passing outside of probate in 130 CMR 501.011(F) and 515.011(F). CHANGED

Links

Final Rules, Eligibility Letter 238 (May 2021):

<https://www.mass.gov/lists/2021-masshealth-eligibility-letters>

An Act Protecting the Homes of Seniors and Disabled People on MassHealth, Senate Bill 79

(Sen. Comerford) <https://malegislature.gov/Bills/192/S749>

and House Bill 1246 (Rep Barber) <https://malegislature.gov/Bills/192/H1246>

November 2020 Estate Recovery policy update: <https://www.mass.gov/doc/masshealth-estate-recovery-policy-update-0/download>

Massachusetts Medicaid Estate Recovery website: <https://www.mass.gov/info-details/massachusetts-medicaid-estate-recovery>

Recommendations in our Jan. 2021 comments on the proposed regulations:

<https://www.masslegalservices.org/content/proposed-masshealth-estate-recovery-regulations-comments>