



## CHAPTER 900—ESTATE RECOVERY

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## CHAPTER 900—ESTATE RECOVERY

### 900.1 SCOPE

This rule establishes State standards and procedures for recovery of medical assistance payments from the estates of certain deceased recipients and from property sold by permanently institutionalized recipients of such assistance. This recovery is limited in scope to medical assistance payments for nursing facility services, home and community-based services and related hospital and prescription drug services and will not exceed the amount actually paid for such services.

### 900.2 AUTHORITY

W.Va. Code ' 9-5-11c

### 900.3 APPLICATION AND ENFORCEMENT

#### 900.3.1 APPLICATION

This rule applies to payments made by the Department of Health and Human Resources, Bureau for Medical Services, or any successor agency responsible for administering the State's Medicaid program for nursing facility services, home and community-based services and related hospital and prescription drug services provided to individuals fifty-five years of age or older or to individuals who, after notice and an opportunity for hearing, have been deemed to be permanently institutionalized.

#### 900.3.2 ENFORCEMENT

This rule is enforced by the Secretary of the Department of Health and Human Resources.

### 900.4 DEFINITIONS

Adult Child - means a natural child, legally adopted child or step child.

Bureau - The Bureau for Medical Services or any successor agency or its authorized representative or agent responsible for administration of the Medicaid Program in the State.

Estate - The real and personal property belonging to a decedent at the time of his/her death, including any intangible interests therein. The term "estate" includes all property identified in W.Va. Code ' 11-11-2(b)(4).

Home and Community-based Services - Those services provided by Medicaid pursuant to Section 1915C Waivers No. 0133 and 0134, as approved by the Health Care Financing Administration of the United States Department of Health and Human Services.

Nursing Facility Services - Those services provided in nursing facilities or in a distinct part of a larger facility which is set aside for the provision of nursing services. This term also includes services in an intermediate care facility for the mentally retarded (ICF/MR).



Related Hospital and Prescription Drug Services - Those hospital and prescription drug services which are rendered in conjunction with nursing facility and/or home and community-based services whether or not they are billed by the nursing facility or home and community-based service provider.

Other necessities are defined as utilities, major home repairs, real estate taxes, real estate insurance and normal upkeep and maintenance.

Permanently Institutionalized - An individual who:

- Is an inpatient in a nursing facility, ICF/MR facility or other medical institution;
- Is required, as a condition of receiving services in such institution under the state plan, to spend for costs of medical care all but a minimal amount of his/her income required for personal needs; and,
- After notice and opportunity for a hearing, has been deemed permanently disabled to such an extent that he or she cannot reasonably be expected to be discharged from the medical institution and returned to a non-institutional home environment prior to death.

Recipient - An individual who receives nursing facility services, or home and community-based services paid for by Medicaid.

Secretary - The Secretary of the West Virginia Department of Health and Human Resources or his or her lawful designee.

## **900.5 DETERMINATION OF PERMANENT INSTITUTIONALIZATION**

Upon admission of a Medicaid recipient to a nursing facility or other institution which provides twenty-four hour a day nursing and custodial care, the facility will notify the local Department of Health and Human Resources office of the recipient's admission, legal guardian, physician, and discharge prognosis.

The discharge prognosis shall be determined by the admitting physician.

The discharge prognosis will state, to a reasonable degree of medical probability and given the state of medical science at the time of admission, whether the recipient can reasonably be expected to be discharged from the medical institution and returned to a non-institutional home environment prior to death.

If, in the opinion of the admitting physician, it is not reasonable to expect the recipient to be discharged from the medical institution and returned to a non-institutional, home environment prior to death, the nursing home or institution will forward the information to the Bureau and/or the Bureau's agent.

The Bureau will determine whether, based upon the information supplied, the recipient may be permanently institutionalized. There shall be a rebuttable presumption that the recipient is permanently institutionalized. The presumption of permanent institutionalization after six (6)



months of residence can be rebutted by documentation of the personal physician that the individual will be discharged within a reasonable period of time not to exceed three (3) months and that the individual has a place to which he/she can return. If said individual is not discharged within this three (3) month period, the nursing facility will notify the Bureau and a presumption of permanent institutionalization will be instituted.

If it is determined that the recipient is permanently institutionalized, the recipient and his/her legal guardian will be advised in writing of this determination and the right to a hearing before the Bureau should this determination be disputed.

The recipient and his/her legal guardian shall have thirty (30) days from the date of receipt of the Bureau determination in which to request a hearing.

No lien shall be placed upon property belonging to a recipient until a final determination is made regarding whether the individual is permanently institutionalized.

Any lien imposed shall dissolve within thirty (30) days upon that individual=s discharge from the medical institution and return home. The individual shall provide written documentation of the return home and request that the lien be dissolved.

#### **900.6 IDENTIFICATION OF ESTATES SUBJECT TO RECOVERY**

All local Department of Health and Human Resources case managers will advise the Bureau when any recipient in their case load age fifty-five or older is admitted to a nursing facility, ICF/MR or becomes a recipient of home and community-based services pursuant to a 1915C waiver. Nursing facilities, ICF/MR facilities and case managers will also advise the Bureau on a monthly basis, of those individuals in their case load who are in nursing facilities or receiving home and community-based services and have attained the age of fifty-five.

#### **900.7 RECOVERY FROM ESTATES**

Pursuant to 42 USC & 1396p (2)(A) recovery will be made against an estate of a recipient and a lien imposed only after:

- The death of the individual=s spouse
- No surviving child under age 21, or
- The individual=s blind or permanently and totally disabled child, who are lawfully residing in the home.

Pursuant to 42 USC & 1396p (2)(b) recovery will be made against an estate of a recipient and a lien imposed only after:

- The death of the individual=s spouse
- No surviving child under age 21, or
- The individual=s blind or permanently and totally disabled child, who are lawfully residing



in the home, or

- The recipient's sibling:
- Who was residing on the real property for a period of at least one year immediately before the date of the recipient's admission to a medical institution on a continual basis since the date of the recipient's admission, or
- A son or daughter of the recipient who was residing in the recipient's home for a period of at least two years immediately before the date of the recipient's admission to the medical institution, and who establishes, to the satisfaction of the Department that he or she provided care.

### **900.7.1 DELAYED RECOVERY**

Recovery from estates may occur when the condition upon which the delay was based no longer exists. The Department may impose a recovery property lien to be executed only when the condition no longer exists and the property is to be sold.

If property subject to delayed recovery is sold, only that portion of the proceeds which represents the recipient's interest in the property is subject to a recovery lien.

### **900.8 UNDUE HARDSHIP WAIVERS**

No lien will be placed nor recovery made from the estates of recipients when:

(a.) An adult child who has resided continuously in the home for a two year period of time prior to the date the parent became a recipient and continued to reside in the home until the parent's death, if that child can establish that he/she provided care to the recipient which permitted the parent to remain at home without Medicaid assistance for at least that two year period;

(b.) A beneficiary or heir in intestacy, who maintains continuous employment in the family business for a period of time beginning at least one year before the recipient became a Medicaid recipient until the time of the recipient's death, if the property which would otherwise be subject to an estate recovery lien is an integral part of the business and is required for the continued viability of the business.

(c.) An adult child maintains continuous employment in the family business for a period of time beginning at least three (3) years before the parent became a recipient until the time of the parent's death if the property which would otherwise be subject to an estate recovery lien is an integral part of the business and is required for the continued viability of the business.

(d.) An adult child regardless of whether he/she was living in the family home, is able to present proof of monetary support to his/her parent for medical care and other necessities including upkeep, utilities and repairs prior to the date the parent became a recipient and continued said upkeep in order to maintain the recipient's property. Such support will reduce the medical assistance lien on a dollar-for-dollar basis.



(e.) An adult grandchild, whose is the recipient's beneficiary or heir in intestacy and whose parents are both deceased prior to the date the grandparent became a recipient is able to present proof of monetary support to his/her grandparent for medical care and other necessities prior to the date the grandparent became a recipient. Such support will reduce the medical assistance lien on a dollar-for-dollar basis.

(f.) A sibling who is able to present proof of monetary support to his/her sibling for medical care and other necessities prior to the date the sibling became a recipient. Such support will reduce the medical assistance lien on a dollar-for-dollar basis.

(g.) Beneficiaries may apply for a hardship waiver by presenting evidence that recovery from the estate will jeopardize the survival of the family unit or severely disrupt the family=s income or business unless the circumstances which caused the disruption were created by the recipient=s use of estate planning methods to avoid estate recovery.

An application for an undue hardship waiver shall be submitted to the Bureau within forty-five (45) days of the placement of the lien or filing of the proof of claim. The Bureau will have ninety (90) days from receipt in which to issue an approval or denial of a request for a hardship waiver or to advise the applicant that additional time is necessary to consider the request. The presence of a will that bequests specific property to beneficiaries cannot be used as evidence of an undue hardship. Documentation of an inter vivos gift cannot be used as evidence of an undue hardship unless the gift would not have been considered an uncompensated transfer and resulted in the imposition of a penalty period.

#### **900.9 ESTATES OF \$5,000.00 VALUE**

The Department will impose no recovery on estates with a value of \$5,000.00 or less at the time the estate is admitted to probate.

No undue hardship waiver will be granted if the recipient had a long term insurance policy and because Medicaid eligible by virtue of disregarding assets because of payments or entitlement to payments under such policy. [See 42 USC ' 1396p(b)(C)(ii) (I)]

#### **900.10 SPECIAL TREATMENT TRUST**

For any special treatment trust established under 42 USC 1396p the trustee must assure that the Department of Health and Human Resources is the primary beneficiary of the trust after the recipient=s death. The Department is to be reimbursed up to the amount of medical assistance paid on behalf of recipient since June 9, 1995 or the balance of the trust whichever is less.

The trustee shall account to the Department and forward payment within thirty (30) days of the recipient=s death.

#### **900.11 ADMINISTRATIVE DUE PROCESS**

Those persons adversely affected by the enforcement of this rule desiring an administrative review or appeal the issue of permanently institutionalized or to contest the failure to grant an undue hardship waiver only shall do so in conformance with the following:



## **Administrative Review**

The administrative review procedure provides an informal conference to allow the recipient, administrator, executor, the beneficiary or heir in intestacy an opportunity to present his/her case, to provide additional information bearing on the adverse administrative action. Through this procedure, the Bureau is afforded an opportunity to receive additional information that could affect its decision or impending action on permanent institution or undue hardship.

## **Request for Administrative Review**

A recipient, administrator, executor, beneficiary or heir in intestacy may, within thirty (30) days after receipt of a notice of an adverse administrative action taken by the Bureau request an administrative review. The request for an administrative review must be in writing, dated, signed and must set forth in detail the items in contention, and identify the representatives who will be present for the conference. Upon receipt of the request for an administrative review conference, the Bureau will establish a mutually agreeable date and time for the review.

## **Notice of Decision**

A written decision based on findings and setting forth the reasons for the conclusions will be issued within thirty (30) to sixty (60) days after the administrative review hearing. The decision may nullify, modify, or uphold the original administrative action and will establish an effective date for any further action to be taken. In the case where the decision is disputed, the recipient, beneficiary or heir in intestacy may/must request an evidentiary hearing within thirty (30) days after receipt of the notice of decision.

## **Evidentiary Hearing**

An evidentiary hearing is a formal hearing procedure before the Commissioner of the Bureau or his/her designee. The recipient, beneficiary or heir in intestacy may present evidence and argument and cross examine adverse witnesses. Only those issues presented in the administrative review will be considered in the evidentiary hearing.

## **Request for Evidentiary Hearing**

The request for an evidentiary shall be in writing, dated, signed and filed within thirty (30) days of the date on the notice of decision from the administrative review conference or other adverse ruling. The request for an evidentiary hearing shall contain a statement as to the specific issues or findings of fact and/or conclusions of law in the preceding determination with which the recipient, administrator, executor, beneficiary or heir disagrees and basis for his/her contention that the specific issues and/or findings and conclusions were incorrect. The request shall include identification of the representatives who will be present at the hearing.

Any recipient, beneficiary, administrator, executor, or heir in intestacy requesting a hearing resulting from an adverse decision of the Bureau shall bear the necessary and attendant costs of such hearing, including costs of transcription, court reporting, production and copying of documents and all similar costs. If a fact-finder or hearing examiner should be designated by the Bureau shall bear the costs of said fact-finder or hearing examiner.



### **Record of Hearing**

A complete record of proceedings at the hearing shall be made and transcribed in all cases.

### **Notice of Decision**

A written decision based on findings and setting forth reasons for the decision will be issued as soon as practical after the hearing. The decision by the Commissioner is final. The recipient, beneficiary, heir, administrator, or executor in intestacy may pursue further recourse through judicial review.