

3810. MEDICAID ESTATE RECOVERIES

Under the estate recoveries provisions in '1917(b) of the Act, you must recover certain Medicaid benefits correctly paid on behalf of an individual. The following instructions explain the rules under which you must recover from an individual's estate Medicaid benefits correctly paid and incorrectly paid.

A. Adjustment and Recovery.--You must seek adjustment or recovery of medical assistance correctly paid on behalf of an individual under your State plan as follows.

1. Permanently Institutionalized Individuals.--In the case of permanently institutionalized individuals who the State determines cannot reasonably be expected to be discharged and return home, including individuals who qualify as both permanently institutionalized individuals and who are at least 55 years old, you must seek adjustment or recovery from the individual's estate or upon sale of the property subject to a lien, at a minimum, of amounts spent by Medicaid on the person's behalf for services provided in a nursing facility, ICF/MR, or other medical institution. These amounts also include Medicare cost sharing for qualified Medicare beneficiaries (QMBs) to the extent that the Medicare cost sharing was for these institutional services. At your option, you may also recover amounts up to the total amount spent on the individual's behalf for medical assistance for other services under the State plan. The date on which you determine the individual to be permanently institutionalized does not affect which expenditures you must or may recover from the individual or his or her estate. If you elect to recover all medical assistance, it would include assistance furnished prior to the time you determined the individual to be permanently institutionalized. If you only elect to recover for expenditures for institutional services, you must recover for all institutional services furnished to the individual, regardless of whether they were furnished during the current stay in the facility. Your State plan must reflect the medical assistance subject to recovery. Recoveries must be made from the individual's estate (after death) or from the proceeds of the sale of the property on which a lien has been placed.

Permanently institutionalized individuals are persons of any age who are inpatients in a nursing facility, ICF/MR, or other medical institution as defined in 42 CFR 435.1009, and who must, as a condition of receiving services in the institution under your State plan, apply their income to the cost of care, as provided in 42 CFR 435.725, 42 CFR 435.733, 42 CFR 435.832, and 42 CFR 436.832. You must specify in your State plan the process by which you will determine that an institutionalized individual cannot reasonably be expected to be discharged from the medical institution and return home, the notice to be given the individual, the process by which the individual will be given the opportunity for a hearing, the hearing procedures, and by whom and on what basis the determination that the individual cannot reasonably be expected to be discharged from the institution will be made. States are not required to use the supplemental security income intent to return home rule for purposes of determining whether an individual is permanently institutionalized for purposes of estate recovery. This rule applies only to eligibility determinations.

2. Individuals Age 55 or Older.--You must seek adjustment or recovery from the estate of an individual who was age 55 or older when that person received medical assistance. You must recover up to the total amount spent by Medicaid on the person's behalf, but only for spending on nursing facility services, (which includes skilled nursing facility and intermediate care facility for the mentally retarded services), home and community based services, as defined in "1915(c) and (d), 1929, and 1930 of the Act, and

related hospital and prescription drug services. Related hospital and prescription drug services are any hospital care or prescription services provided to an individual while receiving nursing facility services and home and community-based services. These amounts also include Medicare cost sharing for QMBs to the extent that the Medicare cost sharing was for nursing facility services, home and community-based services, and related hospital and prescription drug services described above. At your option, you may also recover additional amounts up to the total amount spent on the individual's behalf for medical assistance for any other items or services under your State plan. List these other items and services in your State plan. Recovery is limited to medical assistance for services received at age 55 or thereafter.

### 3. Individuals With Long Term Care Insurance Policies.--

a. Adjustment or Recovery Required.--Except as provided in '3810.A.3.b, you must seek adjustment or recovery from the individual's estate for all Medicaid costs for nursing facility and other long term care services if (1) assets or resources are disregarded to the extent of payments made under a long term care insurance policy, or (2) assets or resources are disregarded because the individual received (or is entitled to receive) benefits under a long term care insurance policy.

b. Assets or Resources Disregarded/Not Disregarded.--If you had an approved State plan, as of May 14, 1993, (California, Connecticut, Indiana, Iowa, and New York) which provided for the disregard of assets or resources in determining eligibility for medical assistance either to the extent that payments are made under a long term care insurance policy, or because an individual has received or is entitled to receive benefits under such a policy, you are not required to seek adjustment or recovery from the individual's estate for Medicaid costs for nursing facility and other Medicaid long term care expenses. While HCFA cannot compel you to recover any amounts from the estates of these individuals, you are free to do so if consistent with the terms of your State plan.

4. Adjustment or Recovery Limitations.--Adjustment or recovery can only be made after the death of the individual's surviving spouse, if any, and only at a time when the individual has no surviving child under age 21, or a blind or disabled child as defined in '1614 of the Act. For Guam, Puerto Rico, and the Virgin Islands, any surviving child's blindness or permanent or total disability would be determined under the definitions found in the State plan program for providing assistance to the blind or permanently and totally disabled. If a lien is placed on an individual's home, adjustment or recovery can only be made when (1) there is no sibling of the individual residing in the home, who has resided there for at least one year immediately before the date of the individual's admission to the institution, and has resided there on a continuous basis since that time, and (2) there is no son or daughter of the individual residing in the home, who has resided there for at least two years immediately before the date of the individual's admission to the institution, has resided there on a continuous basis since that time, and can establish to the agency's satisfaction that he/she has been providing care which permitted the individual to reside at home rather than in an institution.

### B. Definition of Estate.--Specify in your State plan the definition of estate that will apply.

1. Probate Definition.--At a minimum, you must include all real and personal property and other assets included within the individual's estate as provided in your State probate law.

2. Optional Definition.--In addition to property and assets under the probate definition, you may include any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest). This includes assets conveyed to a survivor, heir, or assign of the deceased through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.

3. Special Rule for Individuals With Long Term Care Insurance.--In the case of individuals described in '3810.A.3.a, you must use the definition of estate as described in subsection B.2.

C. Undue Hardship.--Where estate recovery would work an undue hardship, adjustment or recovery is waived. Establish procedures and standards for waiving estate recoveries when they would cause undue hardship. You may limit the waiver to the period during which the undue hardship circumstances continue to exist. Describe your policy in your State plan. You have flexibility in implementing an undue hardship provision. However, your undue hardship waiver protection does not apply to individuals with long term care insurance policies who became Medicaid eligible by virtue of disregarding assets because of payments made by a long term care insurance policy or because of an entitlement to receive benefits under a long term care insurance policy. California, Connecticut, Indiana, Iowa, and New York must apply their undue hardship rules to all individuals, including those eligible for Medicaid by virtue of State plan provisions related to the purchase of a long term care insurance policy.

1. Undue Hardship Defined.--Undue hardship might exist when the estate subject to recovery is the sole income-producing asset of the survivors and income is limited (e.g., a family farm or other family business which produces a limited amount of income when the farm or business is the sole asset of the survivors). The legislative history of '1917 of the Act states that the Secretary should provide for special consideration of cases in which the estate subject to recovery is (1) the sole income-producing asset of survivors (where such income is limited), such as a family farm or other family business, (2) a homestead of modest value, or (3) other compelling circumstances. HCFA suggests that you consider the examples listed above in developing your hardship waiver rules, but does not require you to incorporate these examples once you have considered whether they are appropriate for determining the existence of an undue hardship.

In considering your criteria, you may conclude that an undue hardship does not exist if the individual created the hardship by resorting to estate planning methods under which the individual divested assets in order to avoid estate recovery. You may adopt a rebuttable presumption that if the individual obtained estate planning advice from legal counsel and followed this advice, the resulting financial situation would not qualify for an undue hardship waiver.

D. Collection Procedures.--You must adopt procedures under which individuals who will be affected by recovery of amounts of medical assistance will have the right to apply for an undue hardship waiver. These procedures must, at a minimum, provide for advance notice of any proposed recovery. They must also specify the method for applying for a waiver, the hearing and appeal rights, and the time frames involved. You should specify the procedures used for collection, which must be reasonable. In the situation where recovery is not waived because of undue hardship and heirs of the estate from which recovery is sought wish to satisfy your recovery claim without selling a non-liquid asset subject to recovery, you may establish a reasonable payment schedule subject to reasonable interest. You may also undertake partial recovery to avoid an undue hardship situation.

E. Adjustment or Recovery Not Cost Effective.--You may waive adjustment or recovery in cases in which it is not cost effective for you to recover from an individual's estate. The individual does not need to assert undue hardship. You may determine that an undue hardship exists when it would not be cost effective to recover the assistance paid. You may adopt your own reasonable definition of cost effective. However, any methodology you use for determining cost-effectiveness must be included in your State plan. If you made individuals eligible for Medicaid because of a long term care insurance policy or disregard of income because of the purchase of long term care insurance, you are restricted from using this waiver authority unless you had as of May 14, 1993, an approved State plan which provided for long term care insurance-related disregards from income. In that event, you can use the undue hardship exception as a basis for applying a cost effectiveness test to individuals who became eligible based upon long term care insurance-related disregards.

F. Placement of TEFRA Liens.--You are not required to use TEFRA liens in '1917(a) of the Act. Section 13612 of OBRA 1993 did not mandate the use of TEFRA liens. The TEFRA liens allow you to place liens on certain types of property and recover specific types of payments as described in subsections F.1 and F.2. You may use liens as a mechanism/tool to recover medical assistance incorrectly paid as indicated in F.1, or correctly paid on behalf of certain permanently institutionalized individuals, as indicated in subsection F.2.

1. Incorrect Payments.--You may place a lien against an individual's property, both personal and real, before his or her death because of Medicaid claims paid or to be paid on behalf of that individual if a court determines that benefits were incorrectly paid for that individual.

2. Correct Payments.--You may place a TEFRA lien against the real property of an individual at any age before his or her death because of Medicaid claims paid or to be paid for that individual when (1) he/she is an inpatient of a medical institution and must, as a condition of receiving services in the institution under your State plan, apply his/her income to the cost of care (as provided in 42 CFR 435.725, 42 CFR 435.733, 42 CFR 435.832, and 42 CFR 436.832), and (2) the agency determines that the person cannot reasonably be expected to return home as specified in '3810.A.1. The State's authority to place a lien after the individual's death is not restricted by the TEFRA lien provisions.

G. Restriction on Placement of TEFRA Liens.--You may not place a TEFRA lien, as indicated in subsection F.2, on an individual's home if any of the following individuals are lawfully residing in the home: (1) the spouse, (2) the individual's child who is under age 21 or blind or disabled, as defined in '1614 of the Act, in States (or blind or permanently and totally disabled in Guam, Puerto Rico, and the Virgin Islands), or (3) the individual's sibling (who has an equity interest in the home and who was residing in the individual's home for at least one year immediately before the date the individual was admitted to the medical institution).

H. Termination of Liens.--You must dissolve any lien imposed as provided in subsection F.2 on an individual's real property when that individual is discharged from the medical institution and returns home.

I. Notice.--

1. General Notice.--You should provide notice to individuals at the time of application for Medicaid that explains the estate recovery program in your State.

2. Recovery or Adjustment Notice.--You should give a specific notice to individuals affected by the proposed recovery whenever you seek adjustment or recovery. In the case that the individual is dead, the notice should be served on the executor or legally authorized representative of the individual's estate. The executor or legally authorized representative should be required to notify individuals who would be affected by the proposed recovery. In the situation where there is no executor or legally authorized representative, the State should notify the family or the heirs. The notice should include, at a minimum, the action the State intends to take, reason for the action, individual's right to a hearing, method by which he/she may obtain a hearing, procedures for applying for a hardship waiver, and the amount to be recovered. An administrative hearing is not required if State law provides for court review as the next appellate step.

J. Effective Date of New Provision.--Section 13612 of OBRA 1993 does not apply to individuals who died before October 1, 1993. This section applies to Medicaid payments beginning on or after October 1, 1993.

K. Delayed Compliance Date.--If legislation other than for appropriating funds is needed in order to meet these requirements, you may request a delayed compliance date through the HCFA regional office.

L. Effective Date - States With Estate Recovery Programs in Effect Prior to October 1, 1993.-If you had an estate recovery program approved under your State plan and in operation prior to October 1, 1993, for individuals of any age who are determined permanently institutionalized prior to October 1, 1993, you may recover from the estate or upon sale of the property subject to a lien for all services correctly paid before October 1, 1993. You may also recover for services paid for before October 1, 1993, from the estate of an individual age 65 or older when that person received medical assistance. Recovery for these services is in accord with the features of your approved plan in effect prior to October 1, 1993.

3812 TREATMENT OF CONTRIBUTIONS FROM RELATIVES TO MEDICAID  
APPLICANTS OR RECIPIENTS

Section 1902(a)(17) of the Social Security Act (the Act) provides that a State plan must include reasonable standards for determining Medicaid eligibility that do not take into account the financial responsibility of any individual for any applicant or recipient of Medicaid unless the applicant or recipient is the individual's spouse, or child under age 21, or a child over age 21 who is blind or disabled. Under Medicaid regulations (42 CFR 435.602 and 436.602), States may consider only the income and resources of spouses as available to each other; and income and resources of parents as available to children under age 21, or children over 21 if they are blind or disabled. The income and resources of any other relative are not considered available to the individual. While the regulations do not deal with contributions actually made by relatives, any voluntary contributions actually made by relatives or friends are to be taken into account by the State in determining Medicaid eligibility. It should be noted, however, that this policy is not related to, nor does it affect, rules on deeming of income for purposes of determining eligibility.

The law and regulations permit States to require adult family members to support adult relatives without violating the Medicaid statute by the use of a statute of general applicability. Such contribution requirements are permissible as a State option. There are two legally supportable interpretations of section 1902(a)(17)(D) of the Act upon which to base this policy. First, if support is required under a State statute of general applicability, and not under a State plan requirement applicable only to Medicaid recipients, the statute would not violate the requirements of 1902(a)(17)(D) of the Act that a State plan cannot take into account the financial responsibility of relatives other than parents or spouses. Second, section 1902(a)(17)(D) of the Act can be interpreted as prohibiting only the "deeming" of income (that is, the assumption that income is available to the Medicaid applicant or recipient whether or not it is actually received), except in limited specified circumstances. Thus, a policy which would permit States to consider only income actually received even though relative contributions are required by a general support statute, would not be in violation of section 1902(a)(17)(D). Furthermore, such a policy is consistent with section 1902(a)(17)(B), which provides for taking into account only such income and resources as are actually available.

Required contributions must be imposed under a State statute of general applicability, and cannot be imposed just as a State plan provision. This means that the law cannot limit provisions requiring contributions from relatives. The State may not assume that these funds are available, nor may a State reduce its payments to Medicaid providers in anticipation of the receipt of a relative's payment. Within these guidelines, the State may determine who is a relative, how much relatives must contribute under the statute of general applicability, and the methods of enforcement. Amounts actually received by an applicant or recipient as a result of a State support statute of general applicability that requires the contribution must be counted as income in determining Medicaid eligibility.

It should be noted that third party liability regulations at 42 CFR 433, subpart D, do not apply to collections pursuant to a statute of general applicability. Third party liability is expressly limited by 42 CFR 435.602 and 436.602 to spouses and parents, as noted above.