

Original: 2043



COMMONWEALTH OF PENNSYLVANIA  
**DEPARTMENT OF PUBLIC WELFARE**  
P.O. BOX 2675  
HARRISBURG, PENNSYLVANIA 17105-2675

REVIEW COMMISSION

Michael Stauffer  
Deputy Secretary for Administration

JUL 16 2001

(717) 787-3422  
Email: MikeS@dpw.state.pa.us

Mr. Robert E. Nyce  
Executive Director  
Independent Regulatory Review Commission  
333 Market Street, 14<sup>th</sup> Floor  
Harrisburg, Pennsylvania 17101

Dear Mr. Nyce:

On July 16, 2001, the Independent Regulatory Review Commission suggested revisions to sections of final-form regulation #14-445 (relating to Medical Assistance Estate Recovery Program), which was submitted for your review on June 29, 2001. At the Commission's request, we are requesting that the time for review of this final-form regulation be tolled.

Pursuant to the discussions with staff from the Commission and your July 16 letter, we are considering making the following revisions to the final-form regulation:

1. In response to the confusion and lack of clarity with the definition of "individual" in Section 258.2, we will consider deleting the definition of "Individual" and replacing the word "individual" with the word "decedent" in the appropriate sections of the regulation.
2. In Section 258.3(g), in response to your concerns on the use of the UFTA and its application to a personal representative, we will consider modifying this provision by either considering one of the options listed in your letter or deleting the provision in its entirety.
3. In section 258.3(g), we will consider deleting the word "only" that appears between the words "will" and "presume" to address the clarity concerns with this section.
4. In Section 258.7(c)(2), we will consider including a reference to the Uniform Commercial Code to add clarity to this section.
5. In Section 258.12(a), we will consider including citations to Sections 1412(a.1) and (2) of the Act.

For any changes in the final-form regulation, we will make corresponding changes in the Preamble to ensure consistency.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Stauffer".  
Michael Stauffer

Mr. Robert E. Nyce

- 2 -

cc: The Honorable Harold F. Mowery  
The Honorable Vincent J. Hughes  
The Honorable Dennis M. O'Brien  
The Honorable Frank L. Oliver  
Mr. Howard A. Burde, Deputy General Counsel  
Mr. David J. DeVries, Chief Deputy Attorney General

# Regulatory Analysis Form

|  |  |
|--|--|
| <p>(1) Agency</p> <p>Department of Public Welfare</p>  | <p style="text-align: center;">2001 JUN 29 11:11:29<br/>REVENUE COMMISSION</p> <p>This space for use by IRRC</p>   |
| <p>(2) ID Number (Governor's Office Use)</p> <p>14-445</p>   | <p>IRRC Number: 2043</p>   |
| <p>(3) Short Title</p> <p>Medical Assistance Estate Recovery</p>   |  |
| <p>(4) PA Code Cite</p> <p>55 Pa Code Ch 258</p>   | <p>(5) Agency Contacts &amp; Telephone Numbers</p> <p>Primary Contact: Charles Tyrrell – 772-4139</p> <p>Secondary Contact: Karen Kroh – 772-2681</p>  |
| <p>(6) Type of Rule Making (Check One)</p> <p><input type="checkbox"/> Proposed Rule Making</p> <p><input checked="" type="checkbox"/> Final Order Adopting Regulation</p> <p><input type="checkbox"/> Final Order, Proposed Rule Making Omitted</p>   | <p>(7) Is a 120-Day Emergency Certification Attached?</p> <p><input checked="" type="checkbox"/> No</p> <p><input type="checkbox"/> Yes By the Attorney General</p> <p><input type="checkbox"/> Yes. By the Governor</p> |
| <p>(8) Briefly explain the regulation in clear and nontechnical language.</p> <p>This regulation implements § 1412 of the Public Welfare Code which requires the Department to establish an estate recovery program and implement requirements of the Federal Medicaid program relating to estate recovery.</p> <p>The regulations apply to estates of individuals who received Medical Assistance (MA) for nursing facility services, home and community based services or related hospital and prescription drug services, who were 55 years of age or older at the time MA was received, who died on or after August 15, 1994. and who received medical assistance on or after August 15, 1994.</p> |  |
| <p>(9) State the statutory authority for the regulation and any relevant state or federal court decisions</p> <p>§§ 201(2), 1410 and 1412 of the Public Welfare Code (62 P.S. § 201(2), 1410, 1412)</p>  |  |
| <p>(10) Is the regulation mandated by any federal or state law or court order, or federal regulation? If yes, cite the specific law, case or regulation, and any deadlines for action.</p> <p>Yes, the estate recovery program is mandated by both federal and state law There are no statutory deadlines for regulatory promulgation</p> <p>§§ 201(2), 1410 and 1412 of the Public Welfare Code (62 P.S. § 201(2), 1410, 1412)</p> <p>Pub L. No 103-66 of title XIX (42 U.S.C. § 1396p(b)(1))</p>   |  |

## Regulatory Analysis Form

(11) Explain the compelling public interest that justifies the regulation. What is the problem it addresses?

This regulation is necessary to clarify and interpret Federal MA law and State law. External stakeholders, such as the Long Term Care Council, have requested this regulation.

(12) State the public health, safety, environmental or general welfare risks associated with non-regulation.

The risk associated with non-regulation is that the Commonwealth may be determined to be out of compliance with the Federal law and we could jeopardize the significant Federal share of funds in the long term care appropriation which provided long term care services to many Pennsylvanians.

(13) Describe who will benefit from the regulation. (Quantify the benefits as completely as possible and approximate the number of people who will benefit.)

These regulations will increase compliance by estates with the Federally mandated estate recovery requirements and will decrease confusion regarding those requirements. These regulations will result in increased recovery amounts currently pending collection as unadministered estates. These regulations encourage and support the use of home and community based services by permitting undue hardship waivers for persons who live in the home with the individual and provide care and support to the individual to prevent or delay admission to a nursing facility. These regulations encourage family and friends to help maintain the home while an individual receives home and community based services, or while an individual is in a nursing facility, by permitting undue hardship waivers for the person to recover maintenance expenses for the home.

(14) Describe who will be adversely affected by the regulation. (Quantify the adverse effects as completely as possible and approximate the number of people who will be adversely affected.)

The heirs of decedents of estates subject to estate recovery may inherit less due to these regulations. However, since this program has been operational since 1994, the changes associated with the new regulations are minimal.

(15) List the persons, groups or entities that will be required to comply with the regulation. (Approximate the number of people who will be required to comply.)

Affected persons include attorneys administering estates, courts and heirs of decedents.

The number of estates subject to estate recovery in 2000 were about 2,700.

(16) Describe the communications with and input from the public in the development and drafting of the regulation. List the persons and/or groups who were involved, if applicable.

The regulations were published as proposed rulemaking on July 24, 1999 with a 30 day public comment period.

During the review of the public comments and the development of the regulations the Department met with the Estate Recovery Workgroup of the Long Term Care Council on several occasions to discuss the public comments and possible solutions. The Estate Recovery Workgroup includes representatives from the consumer, advocate and provider community.

## Regulatory Analysis Form

(17) Provide a specific estimate of the costs and/or savings to the regulated community associated with compliance, including any legal, accounting or consulting procedures that may be required.

Not applicable.

(18) Provide a specific estimate of the costs and/or savings to local governments associated with compliance, including any legal, accounting or consulting procedures that may be required.

Local governments will have no legal, accounting or consulting costs as a result of this regulation.

(19) Provide a specific estimate of the costs and/or savings to state government associated with the implementation of the regulation, including any legal, accounting, or consulting procedures that may be required.

The annual recovery amount the estate recovery program has generated in calendar year 2000 was approximately \$20 million. 44% of the amount recovered (the state share) goes directly into the Long Term Care appropriation to provide home and community based services and nursing home services to other qualified individuals. For every 1 million recovered through estate recovery, approximately 70 home and community based slots or 141 individuals are served annually.

The Department anticipates a negligible cost impact as a result of these regulations. The total estate recovery collection amount will be reduced with the implementation of the new exemption for estates valued at \$2,400 or less and by the implementation of the new waiver provision providing for waivers for persons living in the home and caring for decedent. However, this cost will be offset by increased revenues due to improved program efficiency resulting in better compliance with estate recovery requirements, in collection of recovery monies now pending in unadministered estates, collection at the end of postponement periods where applicable, active enforcement of the new regulations and as a result of the Department's new public education campaign.

*San Lopez* 6-6-01

## Regulatory Analysis Form

(20) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

(Dollar Amounts in Thousands)

|                             | Current FY<br>Year | FY +1<br>Year | FY +2<br>Year | FY +3<br>Year | FY +4<br>Year | FY +5<br>Year |
|-----------------------------|--------------------|---------------|---------------|---------------|---------------|---------------|
| <b>SAVINGS:</b>             |                    |               |               |               |               |               |
| Regulated Community         |                    |               |               |               |               |               |
| Local Government            |                    |               |               |               |               |               |
| State Government            |                    |               |               |               |               |               |
| <b>Total Savings</b>        | \$0                | \$0           | \$0           | \$0           | \$0           | \$0           |
| <b>COSTS:</b>               |                    |               |               |               |               |               |
| Regulated Community         |                    |               |               |               |               |               |
| Local Government            |                    |               |               |               |               |               |
| State Government            | \$0                | \$249         | \$493         | \$367         | \$40          | \$40          |
| <b>Total Costs</b>          | \$0                | \$249         | \$493         | \$367         | \$40          | \$40          |
| <b>REVENUE LOSSES:</b>      |                    |               |               |               |               |               |
| Regulated Community         |                    |               |               |               |               |               |
| Local Government            |                    |               |               |               |               |               |
| State Government            |                    |               |               |               |               |               |
| <b>Total Revenue Losses</b> | \$0                | \$0           | \$0           | \$0           | \$0           | \$0           |

(20a) Explain how the estimates listed above were derived.

|                     | FY 00-01 | FY 01-02 | FY 02-03 | FY 03-04 | FY 04-05 | FY 05-06 |
|---------------------|----------|----------|----------|----------|----------|----------|
| MA - Long-Term Care | \$0      | \$249    | \$493    | \$367    | \$40     | \$40     |

Cost estimates were derived based on projections of the number of cases/estates affected and the average cost per case/estate from current recoveries. The fiscal impact associated with these changes is the result of reduced collections during the first years of implementation. Future year costs will be offset by savings represented by an increase in Home and Community-Based waiver services versus more costly nursing home placements as well as improved program efficiency.

## Regulatory Analysis Form

(20b) Provide the past three-year expenditure history for programs affected by the regulation.

| Program           | FY -3     | FY -2     | FY -1     | Current FY |
|-------------------|-----------|-----------|-----------|------------|
| MA-Long Term Care | \$617,252 | \$721,631 | \$693,625 | \$793,246  |
|                   |           |           |           |            |
|                   |           |           |           |            |
|                   |           |           |           |            |

(21) Using the cost-benefit information provided above, explain how the benefits of the regulation outweigh the adverse effects and costs.

This is a revenue producing regulation required in order to comply with Federal and State law. The cost to operate the estate recovery program is about \$500,000 per year, with an annual revenue generation of about \$20 million per year.

(22) Describe the nonregulatory alternatives considered and the costs associated with those alternatives. Provide the reasons for their dismissal.

No nonregulatory alternatives were considered since Federal and state law requires the Department to run an estate recovery program. These regulations have been requested by external stakeholders such as the Long Term Care Council to interpret and clarify the state and federal statutes.

(23) Describe alternative regulatory schemes considered and the costs associated with those schemes. Provide the reasons for their dismissal.

No alternate regulatory schemes were considered because this is a Federal mandate.

## Regulatory Analysis Form

(24) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulation.

No provisions in this regulation are more stringent than the Federal law.

(25) How does this regulation compare with those of other states? Will the regulation put Pennsylvania at a competitive disadvantage with other states?

This will not put Pennsylvania at a competitive disadvantage with other states.

According to a 1996 study by the American Association of Retired Persons (AARP), 45 states have established estate recovery programs. Forty-one (41) states have published regulations to implement the Federal law.

About 30 states exempt estates or claims under a specific value (see § 258.10 (f) relating to undue hardship waivers). A Long Term Care Council study of various state estate recovery programs shows only about 4 states have homestead exemptions for homes valued under a specific amount.

The Department has also contacted several states to study their programs on specific issues such as recovery amounts and undue hardship waivers (see preamble discussion at § 258.10 (b) relating to undue hardship waivers).

A copy of the AARP report, the Long Term Care Council study and the Department's targeted research is available upon request.

(26) Will the regulation affect existing or proposed regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

No.

(27) Will any public hearings or informational meetings be scheduled? Please provide the dates, times, and locations, if available.

The Department will provide training on this new regulation to interested persons such as probate and estate attorneys.

The Department will develop an education brochure and campaign to explain to individuals applying for or receiving MA, and their beneficiaries, about the requirement of the estate recovery program.

(28) Will the regulation change existing reporting, record keeping, or other paperwork requirements? Describe the changes and attach copies of forms or reports that will be required as a result of implementation, if available.

No additional paperwork is required as a result of this regulation. Some paperwork is required in order to obtain and prepare statements of claim, but these procedures have been in place since 1994.



## Regulatory Analysis Form

(29) Please list any special provisions that have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, elderly, small businesses, and farmers.

In § 258.10 (c), special undue hardship waivers are available for small farms or businesses where the decedent's income producing asset is the primary income for the family who inherits the estate.

(30) What is the anticipated effective date of the regulation; the date by which compliance with the regulation will be required; and the date by which any required permits, licenses or other approvals must be obtained?

The regulation will be effective 90 days after final promulgation.

(31) Provide the schedule for continual review of the regulation

The effectiveness of this regulation will be reviewed on an ongoing basis. The Department will study the costs of operating this program as compared to the amount of MA recovered on an annual basis. The Department will continue to talk with the Long Term Care Council as the new regulations are implemented, particularly to study the effectiveness and appropriateness of the new undue hardship waiver section (§ 258.10 ).

FACE SHEET  
FOR FILING DOCUMENTS  
WITH THE LEGISLATIVE REFERENCE BUREAU  
(Pursuant to Commonwealth Documents Law)

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BY: \_\_\_\_\_  
(Deputy Attorney General)

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Date of Approval

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of a document issued, prescribed or promulgated by:

\_\_\_\_\_  
DEPARTMENT OF PUBLIC WELFARE  
(Agency)

LEGAL COUNSEL: Ruth O'Brien

DOCUMENT/FISCAL NOTE NO. 14-445

DATE OF ADOPTION: \_\_\_\_\_

BY: [Signature]

TITLE: SECRETARY OF PUBLIC WELFARE  
(Executive Officer, Chairman or Secretary)

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form and legality. Executive or independ-  
ent Agency.

BY: [Signature]

6/28/01  
Date of Approval

(Deputy General Counsel)  
(~~Chief Counsel, Independent Agency~~)  
(Strike inapplicable title)

☐ Check if applicable. No Attorney Gen-  
eral approval or objection within 30  
days after submission.

Department of Public Welfare  
Office of Administration

[55 Pa. Code Chapter 258]

Medical Assistance Estate Recovery

### ***Statutory Authority***

The Department of Public Welfare (Department), by this order, under the authority of §§ 201(2), 1410 and 1412 of the Public Welfare Code (62 P.S. § 201(2), 1410, 1412) adopts a new Chapter 258 to 55 Pa. Code to implement a Medical Assistance estate recovery program as set forth in Annex A.

Notice of proposed rulemaking was published at 29 Pa. B. 3888 (July 24, 1999).

### ***Need for the Regulations***

The purpose of these regulations is to interpret and implement § 1412 of the Public Welfare Code (62 P.S. § 1412) that requires the Department to establish and implement a Medical Assistance estate recovery program. The regulations will implement requirements of the Federal Medicaid Program (42 U.S.C. § 1396p(b)(1)), which mandate that each state operate an estate recovery program.

Title XIX of the Social Security Act (42 U.S.C. §1396 – 1396v) established the Medicaid program in 1965 as a cooperative Federal-State program through which various health care services are provided to individuals who are poor and needy. Under Title XIX, a participating state must designate a single state agency to administer or supervise the administration of the state Medicaid program (42 U.S.C. § 1396a(a)(5)). The designated state agency must prepare a medical assistance plan consistent with Federal law and regulations and submit it to the Health Care Financing Administration (HCFA) of the United States Department of Health and Human Services (DHHS), for approval. Upon approval of its plan by HCFA, the state becomes eligible for Federal matching funds for reimbursement of the cost of specific types of medical care and services (42 U.S.C. § 1396a).

The Commonwealth participates in the Title XIX Medicaid program. The Department is designated as the single State agency responsible for administration of the Commonwealth's Medicaid program, which is known as the Medical Assistance (MA) program.

Pub. L. No. 103-66 amended Title XIX to add a requirement that participating states establish and implement a program to recover Medical Assistance payments from the probate estates of certain individuals (42 U.S.C. § 1396p(b)(1)). In order to comply with this Federal mandate, the Legislature amended the Public Welfare Code in 1994 to authorize creation and implementation of the estate recovery program (62 P.S. § 1412) (act of June 16, 1994, P.L. 319, No. 49) as amended by the act of June 30, 1995 ( P.L. 129, No. 20). The estate recovery program has been in operation in Pennsylvania since August 15, 1994. Notice of Rule Change was published in the Pennsylvania Bulletin at 24 Pa. B. 1916 on May 13, 1995. During the period of its operation, many questions have arisen as to interpretation and procedures under the statute. These regulations are needed to supply guidance with respect to issues not directly addressed by the Federal and State statute and to resolve ambiguities in the statutory language. Conforming changes to 55 Pa. Code Chapter 178 at §178.1(h) and Chapter 257 at § 257.21(b) (relating to general policy on MA resources common to all categories of MA) will be made when those

chapters are revised.

### ***Affected Individuals, Groups and Organizations***

Affected persons include attorneys administering estates, courts and heirs of decedents.

### ***Accomplishments/Benefits***

These regulations will increase compliance by estates with the Federally mandated estate recovery requirements and will decrease confusion regarding those requirements. These regulations will result in increased recovery amounts currently pending collection as unadministered estates. These regulations encourage and support the use of home and community based services by permitting undue hardship waivers for persons who live in the home with the individual and provide care and support to the individual to prevent or delay admission to a nursing facility. These regulations encourage family and friends to help maintain the home while an individual receives home and community based services, or while an individual is in a nursing facility, by permitting undue hardship waivers for the person to recover maintenance expenses for the home.

### ***Scope***

This chapter applies to the estates of deceased individuals who received Medical Assistance (MA) for nursing facility services, home and community based services or related hospital and prescription drug services, who were 55 years of age or older at the time that MA was received, who died on or after August 15, 1994, and who received Medical Assistance on or after August 15, 1994. This chapter does not apply to individuals who received MA before 55 years of age, and whose MA eligibility terminated before 55 years of age.

Although the Legislature has authorized adoption of a broad estate recovery program, the Department has generally elected to establish the minimum program required by Federal law consistent with the policy of Executive Order 1996-1. The Department will recover only from the estates of persons who were 55 years of age or older at the time assistance was received. The Department will restrict its recovery efforts to obtaining reimbursement for the following types of medical assistance: nursing facility services, home and community based services and related hospital and prescription drug services. The Department will not seek reimbursement for other services. The Department will also restrict its recovery efforts to property that passes through a decedent's estate. Accordingly, property held jointly with a right of survivorship, Totten trust bank accounts and property held in trust at time of death will generally not be subject to estate recovery.

Section 1412 of the Public Welfare Code uses the term "probate estate" to define the scope of estate recovery, and in this Commonwealth, the term "probate" generally refers to a proceeding involving a will. See 20 Pa. C.S. § 3131 (relating to place of probate). However, the Federal statute requires the Commonwealth to include all assets included in an estate as defined

for purposes of "State probate law". Nationally, the term "probate" has a much broader meaning. See for example *Black's Law Dictionary* (4th Ed. 1968). It is clear from the Federal statute, as well as from Federal interpretative materials, that intestate estates are subject to the estate recovery program. The Legislature's intent was to conform to Federal law and accordingly, the Department has adopted an interpretation, which includes property passing by intestacy in its definition of "estate property".

### ***Paperwork Requirements***

These regulations require no added paperwork from that which is required in the existing estate recovery program. The estate recovery program requires paperwork to obtain and provide statements of claim. However, there is no reasonable alternative to the paperwork. These regulations do not increase paperwork beyond that required since August 15, 1994.

### ***Summary of Public Comment and Changes***

Written comments, suggestions and objections regarding the proposed regulation were requested within a 30-day period following the publication of proposed rulemaking at 29 Pa. B. 3888 (July 24, 1999). A total of 25 letters were received by the Department within the 30-day public comment period, in response to the proposed rulemaking. In addition, the Independent Regulatory Review Commission (IRRC) and the Senate Minority Chair of the Public Health and Welfare Committee submitted comments on the proposed regulation. The majority of the comments submitted on the regulations were from the IRRC. The public comments submitted centered around several issues including testamentary trusts, the Pennsylvania Uniform Fraudulent Transfer Act, postponement of collections, undue hardship waivers, unadministered estates and due process. Following is a summary of the major comments received and the Department's response to those comments. A summary of the major changes from proposed rulemaking is also included.

#### ***§ 258.2. Relocation of definitions.***

Several definitions were relocated to the body of the chapter in order to comply with *Pennsylvania Code* requirements. If a term to be defined is used in only one section of the regulations, the term should be defined in the appropriate section. This makes it easier for the reader to find the definition at the location of use, rather than have the reader flip to the beginning of the regulation to find the definition of a term.

The definition of "cash equivalent assets" was relocated within the definition of protectable assets. The definition of "estate property" was relocated to § 258.3 (a) (relating to property liable to repay the Department). The definition of "facility of payment clause" was relocated to § 258.3 (c). The definition of "family exemption" was relocated to § 258.6 (d) (relating to priority of the Department's claim). The definition of "immediate family member" was relocated and is now listed specifically in § 258.10 (c) (relating to undue hardship waivers). The definition of "income producing asset" was relocated to § 258.10 (c). The definition of "perfected liens" was revised, a new term of "properly perfected security interests" is used and the definition was relocated to § 258.7 (c)(2) (related to postponement of collections). The

definition of “testamentary trust” was relocated to § 258.3 (d) (relating to property liable to repay the Department).

*§ 258.2. Elimination of definitions.*

Several definitions were eliminated since they are not used in the regulations. In accordance with *Pennsylvania Code* requirements, definitions may include only terms used in the chapter. The terms “primary residence” and “surviving spouse or child” were therefore deleted.

*§ 258.2. Definition of “fair market value”.*

The IRRC suggested clarification of “fair market value”.

*Response.*

The Department added a definition to clarify the meaning of “fair market value”.

*§ 258.2. Definition of “individual”.*

The Department clarified that the term “individual” will be used throughout the regulations to mean the person who is 55 years of age or older whose estate is subject to this chapter.

*§ 258.2. Definition of “nursing facility services”.*

The Department clarified that “nursing facility services” include intermediate care facilities for persons with other related conditions. The term intermediate care facility for persons with other related conditions (ICF/ORC) is derived from Federal regulation at 42 C.F.R. 483.400-480.

*§ 258.2. Definition of “personal representative”.*

The IRRC requested clarification of the phrase “administrator of any description”.

*Response.*

The Department clarified that this is broad and encompassing and includes all types and forms of executors and administrators.

*§ 258.2. Definition of “protectable asset”.*

The IRRC requested clarification of monetary limits and whether the limits are cumulative or exhaustive.

*Response.*

The Department agrees that this was unclear as proposed, and has dropped the proposed paragraph (iv) relating to other property in excess of \$10,000. Subparagraph (ii) has been revised to indicate that this applies to an individual item with a fair market value in excess of \$10,000.

*§ 258.2. Definition of “real and personal property”.*

The IRRC suggested adding a new definition of “real and personal property”.

*Response.*

In response to the request of the IRRC, this definition was added. This definition is intentionally broad so that this definition will remain valid as any other laws related to “real and personal property” are written or changed.

*§ 258.2. Definition of “response period”.*

The IRRC requested adding the statutory reference prescribing the 45-day response period.

*Response.*

This statutory reference to 62 P.S. § 1412(b) (relating to repayment from probate estates) was added to § 258.4 (b) (relating to request of statement of claim) in the section of the regulations where the 45-day period is addressed. Since it is a substantive requirement and not a definition, the requirement for the 45-day period was relocated from the definition of “response period” to the body of the regulations at § 258.4 (b).

*§ 258.2. Definition of “statement of claim”.*

The IRRC suggested adding a definition of “statement of claim”.

*Response.*

This new definition was added.

*§ 258.2. Definition of “surviving spouse or child”.*

The IRRC requested clarification of “surviving spouse or child” and asked about the age of the surviving child.

*Response.*

The Department agrees that this definition was unclear and inaccurate and has deleted this from the definitions since it is no longer used in the regulations. This term was used to specify requirements for the postponement of collections. Section 258.7 (relating to postponement of collection) specifies the applicability of the postponement of collections for surviving relatives. As specified in § 258.7, there is no age limit for a child with a disability, and the age of the surviving child without a disability is 21 years of age.

*§ 258.3 (a). Property liable to repay the Department.*

The IRRC suggested changing the term from “estate” to “estate property”. The IRRC suggested referencing other subsections where exemptions are set forth.

*Response.*

The Department has added a sentence explaining the concept of estate recovery. The Department has not included cross-references to the exceptions because such references would not add clarity to the regulations.

*§ 258.3 (c). Property liable to repay the Department.*

The IRRC requested clarification of third party.

*Response.*

The Department has revised this subsection to delete the reference to third party and clarify the circumstances under which life insurance is subject to the Department's claim.

*§ 258.3 (e). Property liable to repay the Department.*

The IRRC and one commentator suggested that testamentary trusts for disabled children

of any age be exempt from the Department's claim.

*Response.*

This new exemption was added. The Department agrees that such trusts should be exempt for estate recovery.

*§ 258.3 (f). Property liable to repay the Department.*

The IRRC requested clarification as to which assets are exempt with a cross-reference to 20 Pa. C.S. § 3101.

*Response.*

The proposed regulation does cross-reference to 20 Pa. C.S. § 3101 (relating to payments to family and funeral directors). The Department deleted the listing of the specific examples and will rely on the referenced statute.

*§ 258.3 (g). Property liable to repay the Department.*

The IRRC, the Senate Minority Chair of the Public Health and Welfare Committee and three private attorneys submitted extensive comments relating to the interpretation of the Pennsylvania Uniform Fraudulent Transfer Act (UFTA). They questioned the Department's legal authority to apply this requirement, suggested inconsistency with UFTA, requested clarification of less than equivalent value and offered general objections to this section.

*Response.*

Minor changes were made to this section to clarify that the Department as a creditor, may pursue a claim under the UFTA. The Department also clarified that it will only presume that transfers within one year of death are recoverable.

Fairness dictates that similarly situated individuals be treated the same under the estate recovery program. Individuals who have chosen to retain control over their property while on MA are subject to the estate recovery requirements, and such individuals and their heirs should not be able to defeat this liability through gamesmanship. The regulation prohibits deathbed transfers to avoid liability for estate recovery. Such transfers are properly characterized as fraudulent under the UFTA. The Department may, at its option, recover such fraudulent transfers or ask the court to direct the personal representative to do so for the benefit of the estate.

*§ 258.3 (h). Property liable to repay the Department.*

The Department added a new subsection (h) to specify exemptions from estate recovery for special populations in accordance with Health Care Financing Administration's (HCFA) State Medicaid Manual amendments, Transmittal 75, issued January 11, 2001, relating to exemptions for special populations.

*§ 258.4 (a). Request for statement of claim.*

The IRRC suggested adding a definition of "statement of claim".

*Response.*

This change was made.

*§ 258.4 (a). Request for statement of claim.*



The IRRC asked why a certified mail date is necessary to establish the date of the notice from the personal representative. The IRRC suggested that we permit communication by alternate means to submit notices. Two other commentators suggested that all forms of communication be subject to same rules.

*Response.*

An accurate, written date is necessary to clearly establish and track the date of receipt by the Department. The receipt date starts the Department's 45-day clock in preparing the statement of claim.

The Department amended this section to permit a notice requesting a statement of claim to be submitted to the Department by facsimile or electronic mail, in addition to certified mail, in order to make it easier for a personal representative to submit a notice. Notices by telephone are not acceptable as an official notice, since written documentation is required and there is no method to accurately record the date the information was submitted. The date on the certified mail receipt, electronic mail or facsimile document will start the Department's 45-day clock.

The proposed (e) related to receipt of information by alternate means was deleted as it allowed Departmental discretion and it did not allow the 45-day clock to start.

A new paragraph (8) specifying what must be sent with the request for a statement of claim was added to require documentation of the value of the estate. This is needed in order to apply to exemption in 258.10(f) (relating to undue hardship waivers) to exempt estates with a gross value of \$2,400 or less from estate recovery.

*§ 258.4 (b). Request for statement of claim.*

The IRRC requested that procedures and timeframes be established to specify what happens if a personal representative does not submit accurate and complete information.

*Response.*

If the Department finds an error or missing information in the notice by the personal representative, the Department's Third Party Liability Unit makes a telephone call or sends a written notice to the personal representative or his attorney notifying him of the error or missing information. This notice will include notice to the personal representative that the 45-day clock will not start until the Third Party Liability Unit receives the corrected or missing information.

*§ 258.4 (c). Request for statement of claim.*

The IRRC suggested that the Department should not rely on its own internal date stamp for documentation of receipt of a notice from a personal representative.

*Response.*

The Department concurs and will use the certified mail receipt date, date on the electronic mail or date on a facsimile document as the official receipt date of the notice of the personal representative.

*§ 258.4 (d). Request for statement of claim.*

This section was revised to clarify the date as the issuance date of the statement of claim, versus the submission date.

§ 258.4 (e). *Request for statement of claim.*

The IRRC interprets 62 P.S. § 1412 (b) (relating to repayment from probate estates) regarding the 45-day Departmental response period as a firm one that cannot be altered by regulation.

*Response*

The Department has applied standard rules of statutory construction regarding the computation and application of time limits. There are numerous cases where statutory deadlines are interpreted to mean the next business day following a date that falls on a weekend or holiday.

This regulation also provides the personal representative with the opportunity to request an extension of the Department's time period if desired. An extension of the time period might be requested by the personal representative if they know they have outstanding documentation they want to be considered when the Department's prepares the statement of claim. Nothing in the statute prohibits a personal representative from waiving the 45-day limit.

It is well-settled that individuals can waive a statutory or constitutional right where waiver is not contrary to public policy. Morgan Signs, Inc. v. Pa. Dept. of Transportation, 676 A.2d 1284 (Pa. Cmwlth. 1996). In this instance, the General Assembly's intent in enacting the 45-day limit was to insure that the estate recovery program did not unduly delay the estate administration process. However, it is sometimes the case that estate administration is delayed for other reasons, and an extension of time granted to the Department will not have any impact. In these situations, the personal representative will often request or consent to an extension.

§ 258.4 (f). *Request for statement of claim.*

The IRRC questions the Department's legal authority to amend a statement of claim after it has been issued and the 45-day time period has passed.

*Response.*

The Department has added clarification to this subsection to explain the circumstances under which the Department will amend a claim. This will occur only if there is new or updated information relating to the statement of claim. For example, additional medical bills or funeral expenses, or updated property lists or appraisals could be submitted to the Department after the original statement of claim is prepared. The Department must amend its claim in order to be fair to the personal representative and to prepare an accurate statement of claim. The Department does not believe this violates the 45-day time period in 62 P.S. § 1412 (b) (relating to repayment from probate estates), since a statement of claim was prepared in accordance with the statute. The statute does not preclude amendment of a claim. The concept of an amendment being timely, because it relates back to an original document, is an established legal concept. Thus for example, a civil complaint may be amended after the statute of limitations has expired if it does not introduce a new cause of action. Laursen v. General Hospital of Monroe County, 494 Pa. 238, 431 A.2d 237 (1981). Likewise, a claim against an estate may be amended if it does not introduce a new cause of action. Cepull v. Borland, 81 D & C 527, 34 Westmoreland 79 (1952). A similar rule exists in bankruptcy. In re: Kolstad, 928 F. 2d 171 (5<sup>th</sup> Cir. 1991). The Department believes the legislature intended that a similar rule apply to estate recovery.

§ 258.5 (b). *Computation of claim.*

The IRRC suggested adding a definition of “qualified Medicare beneficiary”.

*Response.*

This definition was added.

§ 258.5 (c). *Computation of claim.*

The IRRC suggested adding a definition of “capitation payment”. The IRRC commented that the proposed subsection (e) relating to MCOs was unclear.

*Response.*

The Department revised this section to include the new requirements in Health Care Financing Administration’s (HCFA) State Medicaid Manual amendments, Transmittal 75, issued January 11, 2001, relating to managed care.

The Department deleted the proposed subsection (e) as it was no longer necessary and conflicting with the new (c).

The Department deleted the proposed subsection (c) relating to postponement since this concept is adequately and appropriately addressed in § 258.7 (relating to postponement of collection).

§ 258.5 (d). *Computation of claims.*

The IRRC and the Senate Minority Leader of the Public Health and Welfare Committee state that it is not reasonable to shift the burden of proof to the personal representative to show that the Department’s claim is not correct; they also question the Department’s legal authority to adopt this requirement.

*Response.*

The Department has considered this comment and decided to delete this proposed section because the Department lacks authority to regulate the burden of proof in Orphans’ Court. Case law provides that while a creditor has the burden of proving its claim, the Department’s records are entitled to a presumption of correctness. See Cameron’s Estate, 130 A. 2d 173 (Pa. 1957).

§ 258.7. *Postponement of collection.*

IRRC requested that the Department include its internal operating process for initiating, reviewing and making a decision on postponement requests.

*Response.*

The Department will develop internal operating procedures to manage postponement requests.

§ 258.7 (a). *Postponement of collection.*

IRRC questioned the use of “the later of one of the following”. IRRC requested adding the statutory citation for the Supplemental Security Income Program. One commentator suggested that claims should be permanently waived for those specified in this section, rather than postponed.

*Response.*

The language is correct as proposed. This means until the last of any of these occur. For

example, if there is a surviving spouse and an adult child who has a disability, the claim is postponed until both the spouse and adult child are deceased.

The citation for the Supplemental Security Income Program was added.

The Department considered permanent waivers versus postponement as suggested, but this section is based on 42 U.S.C. 1396p (b)(2) that addresses the temporary postponement of collection.

Paragraph (4) was relocated from § 258.10 (d) so that all the postponement clauses were located together. The period of time was corrected to “one year” to coincide with 42 U.S.C. 1396p (a) (2) (C).

*§ 258.7 (c). Postponement of collection.*

The IRRC and another commentator suggested that this allows the Department to take enforcement action on an unripe claim. The IRRC questioned how the dollar amounts were determined, how appraisals would be done and how a properly perfected security interest would be placed on the property. The IRRC also requested the addition of a definition of remainderman. Another commentator requested that the \$10,000 limit be applied to individual items rather than the total of all items. The IRRC asked the Department to specify the directions of the Department in (c) (4).

*Response.*

The Department is required by Federal law to postpone collection of its claim against certain property, but the Department does not have authority to simply forgive the claim. The Department has tried to balance the right of heirs to use property subject to postponement with the interest of the Commonwealth and Federal government in obtaining ultimate repayment from that property.

The Department revised and relocated the definition of “properly protected security interest” in (c)(2) to clarify how security interests are placed on property. This is a legal process governed by applicable statutes and regulations.

The Department made the change to (c) (2) as requested by the commentator to consider the \$10,000 amount for each individual item as opposed to the total value of all property. A properly perfected security interest will be placed only on an individual item valued in excess of \$10,000, but not for any item valued at \$10,000 or less.

The amounts specified in (c) (2) and (3) are reasonable amounts based upon cost effectiveness for the Department to recover MA dollars. Appraisals to determine the value of the property items are undertaken by the executor or administrator of the estate.

The Department added a definition of remainderman to paragraph (c)(3) where the term is used.

The Department revised (c) (4) to clarify that the personal representative shall appropriately protect assets by an appropriate method. Appropriate methods might include noting the Department’s interest on a certificate of title. The Department decided not to list examples in the regulations as this provision is intended to deal with novel or unusual circumstances.

*§ 258.7 (f). Postponement of collection.*

The Department added a new paragraph (f) to clarify that the Department’s claim is

subject to collection at the end of the postponement period.

*§ 258.7 (e). Postponement of collection.*

The IRRC asked why the age in (e) is 18 years of age and in (a)(3) it is 21 years of age. The IRRC also requested that the Department specify the procedures for waivers.

*Response.*

The age in (a)(3) is taken directly from the Federal statute, which prescribes the age at 21 years of age (42 USC 1396p (a) (2) (B)). The age in (e) is specified as “under 18 years of age” since the term “adult child” used in this subsection legally covers a person who is age 18 years of age and older. The age specification in this paragraph clarifies that a child under 18 years of age needs a legal representative acting on their behalf.

There is no waiver procedure or process. This simply allows an heir to turn over property to the Department prior to the end of the official postponement period. This is at the full discretion of the heir.

*§ 258.8. Liability of personal representative.*

The IRRC suggested that the Department state what is acceptable documentation of fair market value. One commentator suggested that (8) (d) discourages resolution of small estates by family settlements. One commentator suggested that the personal representative should be held to a negligence standard versus strict liability.

*Response.*

The Department added a definition of “fair market value”. Acceptable documentation might be a real estate appraisal.

Family settlements are only appropriate when they do not prejudice the rights of creditors. There is nothing to prevent the use of a family settlement agreement if the Department's claim is satisfied.

A stringent standard for personal representative conduct is appropriate given the fiduciary relationship undertaken by the representative relative to the estate and its creditors.

*§ 258.9. Liability of transferees.*

The IRRC asked what is acceptable documentation for fair market value and suggests that the transferee be limited to the difference between the amount paid for an asset and the fair market value.

*Response.*

The Department added a definition of “fair market value”. Acceptable documentation might be a real estate appraisal.

The Department made the requested change to limit the difference between the amount paid for an asset and the fair market value. The Department clarified that the transferee's liability is limited to the fair market value of the property that was not protected.

*§ 258.10 (b). Undue hardship waivers.*

The IRRC and Senate Minority Leader of the Public Health and Welfare Committee requested that the language for the granting of undue hardship waivers be changed from “may” which is discretionary, to “will”, which is mandatory. Five other commentators also requested

clarification of the vagueness of waiver criteria and requested waivers be granted if the guidelines are met.

*Response.*

The Department agrees and has made this change from “may” to “will” throughout this section relating to hardship waivers. Waivers must be granted if all of the criteria are met. Waiver criteria have been revised to be clear and precise.

*§ 258.10 (b). Undue hardship waivers.*

The IRRC, Senate Minority Leader of the Public Health and Welfare Committee and three other commentators suggested that the criteria for undue hardship waivers be extended to apply beyond immediate family members.

*Response.*

This change was made to extend the waiver criteria to include not only immediate family, but also extended family and non-relatives.

*§ 258.10 (b). Undue hardship waivers.*

The Senate Minority Leader of the Public Health and Welfare Committee and one other commentator suggested that an amendment be made to include home and community based services, as well as nursing facility services.

*Response.*

This change was made. Home and community based services was added in (b) (1) and (3).

*§ 258.10 (b) Undue hardship waivers.*

The IRRC, Senate Minority Leader of the Public Health and Welfare Committee and 17 other commentators suggested that a homestead exemption of a specific amount such as \$50,000.

The homestead exemption means that no MA would be recovered for the value of the home, if the decedent leaves a home valued at \$50,000 or less.

*Response.*

The Department spent considerable time researching and meeting with the Intergovernmental Council on Long Term Care and others regarding this issue. When completing a thorough review of the public comments and talking with many consumer, advocacy and provider organizations, the Department found that the homestead exemption was suggested for five main reasons: a) to reduce urban blight and abandonment of homes; b) the right for heirs to inherit something from decedent's estate; c) concern over refusal of home and community based services due to fear of self or spouse losing home; d) a desire to settle the many unadministered estates now in limbo with no recovery paid; e) a reward for family, extended family and non-relatives who moved into home and provided care and supports to delay or prevent admission to a nursing home.

Many different alternatives were reviewed and considered. The following four alternatives best address the concerns of the commentators: 1) There would be a homestead exemption of a specified amount, for homes of modest value (based on appraised value of home). This means that if the decedent owned a home at the time of his/her death, valued at or below a specific \$ amount, the heir(s) would keep the home and no recovery would be made on the

sale/value of the home. If the home is valued above the specific amount, the entire value of the home would be subject to recovery; 2) There would be a flat exemption of a specified amount, for estates of any value, not based on home ownership. This would apply for all heirs and estates regardless of the value of the estate, the income of the heirs, or the value of any home. The first specified amount of any estate, based on the net value of an estate of any value would not be subject to recovery; 3) Waiver criteria would be revised to expand opportunities for extended family and non-relatives living with and caring for person to be considered for a hardship waiver; and 4) There would be an exemption for estates valued below a specified amount (e.g. \$2,000).

The Department weighted the pros and cons of each of these four alternatives and considered cost implications for each. While the homestead exemption option was the favored option of those submitting public comments, as the Department met with external stakeholders this option was not necessarily the preferred option, since it was applicable to only some of the estates and only some of the reasons given for the requested change. When meeting with external stakeholders, their concerns narrowed to three: 1) the fear of losing one's home while receiving home and community based services or the fear of a surviving spouse losing the home, 2) the need to settle unadministered estates and recover added potential revenue and 3) the desire to reward persons who moved into the home with the decedent to provide care.

The Department found no evidence to support the notion that a homestead exemption would decrease the number of abandoned homes in urban areas. There is no data in Pennsylvania or in other states to suggest that urban blight is the result of, or related to, estate recovery. The Department reviewed the Health Care Financing Administration's (HCFA) State Medicaid Manual amendments, Transmittal 75, issued January 11, 2001 relating to a homestead exemption. While the HCFA transmittal provides additional clarification as to how a homestead exemption might be calculated, the HCFA continues to provide this as an option for states to consider. Very few states have chosen to adopt the homestead exemption option.

The concern that an individual will lose their home if they receive MA services or that their surviving spouse will lose their home is unwarranted. The Department and the external stakeholders agree that a broad based public education program is needed to explain to potential users of MA that they will never lose their homes while receiving MA and that their surviving spouses, minor children or adult children with disabilities will never lose the home. The Department will soon publish and disseminate a brochure on the estate recovery program to explain that people will not lose their homes as a result of the estate recovery program.

The Department also considered the cost impact for the four alternatives. Both the homestead exemption and the flat exemption for estates of any value are estimated to result in substantial loss of recovery dollars. Dollars recovered through the estate recovery program are used to directly fund other individuals in need of home and community based services or nursing facility care. Every \$1M recovered through the estate recovery program provides services to approximately 70 home and community based slots or 140 individuals living in home and community based settings annually.

The Department made several major changes to address the concerns of the commentators relating to the hardship waivers. First, the Department extended the provision that had limited waivers to immediate family members to include not only extended family, but non-relatives as well.

Next, the waiver criterion that allowed waivers to be granted only for persons who had an

annual gross income that does not exceed 100% of the Federal poverty guidelines, was deleted. This permits anyone to receive a waiver regardless of family income. Although not requested by commentators, this change was made to support and encourage persons to provide live-in care and support to individuals, regardless of the person's income level.

Third, the Department substituted a new waiver criterion, to replace the proposed poverty guideline requirement, with a requirement that the person living in the home with the decedent provided care or support to the decedent during which time the decedent needed care or support in order to remain at home. This is similar to the provision in 55 Pa. Code § 178.101 (relating to disposition of property and fair consideration), which requires a son or daughter to have provided care for a two-year period prior to the transfer of property. This will support and encourage the use of home and community based services by permitting the individual to remain at home for as long as possible. Use of home and community based services not only provides individuals with the opportunity and choice to stay at home, but also save taxpayer dollars, since home and community based services are a less expensive option than nursing facility care.

Fourth, the Department added an exemption from estate recovery for administered estates valued at \$2,400 or less (§ 258.10 (f)). This exemption will apply to about half of the estate recovery claims filed by the Department. No waiver process would be applied. The estates valued at \$2,400 or less will simply be exempted. Exemption amounts of between \$5,000 and \$2,000 were studied for fiscal impact. With an exemption of \$5,000, the state share loss to the estate recovery program, and hence the reduction to the Commonwealth's long-term care appropriation, would be slightly over \$1 million. With an exemption of \$2,400, the state share loss will be about \$500,000, which can be absorbed by the other potential revenue-increasing components to the regulations.

The combination of these four major changes to the regulations, coupled with an education campaign relating to the estate recovery program, will address the majority of the stakeholder concerns related to undue hardship waivers. The Department further addresses the concern relating to unadministered estates in § 258.11 (related to unadministered estates).

#### *§ 258.10 (c). Undue hardship waivers.*

Although not specifically requested, the Department raised the income level from 100% to 250% of the Federal poverty guidelines for the gross family income allowed for income producing asset-related waivers. The Department made this change to allow a spouse or other family member to have a reasonable income outside the family farm or business, and still permit the waiver for the family farm or business.

The Department also extended the term "immediate family member" as proposed to include grandchildren of the decedent.

#### *§ 258.10 (d). Undue hardship waivers.*

The definition of "income producing asset" was relocated from § 258.2 (relating to definitions), to (d) so that readers can easily find the definition where the term is actually used.

#### *§ 258.10 (e). Undue hardship waivers.*

This new subsection was added to allow persons who paid expenses to maintain a decedent's vacant home while the decedent was in a nursing facility, or during receipt of home



and community based services, to be reimbursed for such home maintenance costs. Maintenance costs include real estate taxes, utility bills, home repairs and home maintenance such as lawn care and snow removal necessary to keep the property in adequate condition for the decedent to return home or to live in the home.

This may indirectly address some of the concern about abandoned properties. If a person knows that if they spend their own money to maintain a family or friend's home, they can recover their maintenance expenses from the estate at a later date, perhaps they will be more willing to maintain the home in good condition.

*§ 258.10 (g). Undue hardship waivers.*

This new subsection was added to clarify that a person who is eligible for a postponement of collection in § 258.7 (relating to postponement of collection) is not precluded from also seeking a permanent undue hardship waiver under this section, as long as all the undue hardship waiver criteria are met.

*§ 258.11 (a). Unadministered estates.*

The IRRC raised questions of the Department's legal authority to either refer cases of unadministered estates outside the Commonwealth for settlement or to handle the cases of unadministered estates directly. The IRRC raised the concern of conflict of interest if the Department handled the settlement of estates. The IRRC requested clarification of reasonable fees. One commentator requested clarification of the role of outside attorneys. One commentator objected to referral of unadministered estates to outside attorneys because it would result in unfair and inequitable application of estate recovery.

*Response.*

The Department spent considerable time and effort to resolve not only the concerns of the commentators, but also to address a major concern it has with the existing estate recovery program. There are numerous unadministered estates sitting in limbo in the Department's Office of Legal Counsel. While estates sit in limbo, no recovery is made, resulting in loss of recovery dollars and any real estate title remains under a cloud. The case remains "on the books" and continues to be tracked in the estate recovery program. While the new exemption for estates valued under \$2,400 will reduce the number of unadministered estates, there will continue to be cases pending and needing resolution.

The Department has revised (a), to refer unadministered estates to the probate and estate sections of local county bar associations. This will facilitate the resolution of unadministered estates and provide a central location in each county where information regarding such estates may be obtained. The administration of estates by private attorneys will not result in an unequal application of the estate recovery program as the commentator suggested. The local attorneys will simply file the necessary paperwork to settle the estate. They will not administer the estate recovery program.

Lists of unadministered estates will be sent periodically to the local bar associations. The frequency will depend on the number of pending cases. For example, Philadelphia County Bar Association may receive a list of pending cases monthly, while a smaller county may receive notice of cases on an ad hoc basis as they occur. It is expected that this provision will permit the settlement of a large percent of currently unadministered estates. This will result in a higher

amount of MA dollars recovered, which can be used to provide home and community based services, and a reduction in the tracking paperwork for the estate recovery program.

As requested, the Department has specified the maximum administration and attorney fee that can be charged. These fees are based on existing rates generally charged by private probate and estate attorneys, providing that a fair amount may be charged for handling even very small estates.

In response to the perceived potential conflict of interest for the Department to settle estates directly, this may be done legally by any creditor. While there may be a conflict of interest between the role of a personal representative and that of a creditor, the same kind of conflict exists when an inheriting child or spouse serves in the role of personal representative. Indeed, substantial conflict of interest is inherent in the estate administration system. As a creditor of the estate, the Department has express authority to administer estates under 20 Pa. C.S. 3155 (b) (4). A private creditor may file and administer an estate to recover outstanding bills. It is extremely rare that the Department's Office of Legal Counsel has the staff time or a reason to settle an unadministered estate directly; however, the Department wants to make clear the procedures that would apply should it desire to do so. The same fee requirements that apply to an outside attorney would apply to the Department.

*§ 258.12 (a). Administrative enforcement.*

The IRRC requested clarification of "other remedies allowed by law" and suggested that citations to other laws be added. The IRRC suggested that the Department clarify how the personal representative will be notified of the assessment of liability and the right to appeal. One commentator suggested that this creates two different forums for actions, conflicts with existing laws and creates notice and due process problems for transferees.

*Response.*

The Department added clarification that the personal representative will be notified in writing of the assessment of liability and the right to appeal the decision in accordance with § 258.13 (relating to appeals and jurisdiction).

The Department considered but did not add any citations or clarifications to "other remedies allowed by law". This statement is clear and accurate as drafted. It is not possible to list all applicable statutes. By specifying some remedies and not others, the list may be interpreted as being exhaustive.

The Department does not agree with the commentator who raised legal concerns with this section. The Department has successfully used this process for over 50 years. This is much simpler process than to have all cases go to the Court of Common Pleas.

*§ 258.13. Appeals and jurisdiction.*

The IRRC suggested adding a cross-reference to the rules governing the appeal procedure. The IRRC questioned the Department's authority to claim exclusive jurisdiction and the use of the abuse of discretion standard. The IRRC and the Senate Minority Public Health and Welfare Committee questioned the Department's authority to claim concurrent jurisdiction with the Court of Common Pleas and to supercede the jurisdiction of the Orphan's Courts. The IRRC and the Senate Minority Public Health and Welfare Committee requested that the error of law standard be used instead of the abuse of discretion standard.

### *Response*

The Department has added a reference to the applicable hearing and appeals regulations.

The Department clarified (c) regarding the abuse of discretion standard to clarify that it is not a function of the hearing officer to substitute his discretion for that of the Third Party Liability Section of the Department, but rather to review the legal sustainability for that discretion. Where discretion is not involved, the hearing officer is expected to decide the case de novo.

The Department did not change the statement in (c) that we have exclusive jurisdiction over issues of waiver, compromise or postponement of a claim. This is the usual standard for review of discretionary actions of an administrative agency. However, the Department recognizes that courts retain jurisdiction to determine whether the Department has a valid claim within the framework of the estate administration process.

The Department clarified (d) to eliminate the requirement that filing with the Bureau of Hearing and Appeals (Bureau) is deemed as an election to proceed exclusively before the Bureau.

The Department clarified that the decision is binding upon all parties participating before the Bureau. The Department understands that there could be cases where the Court of Common Pleas applies and we would defer. However, we would encourage the use of the Bureau of Hearings and Appeals to resolve disputes where possible in order to reduce court time and costs.

### *Fiscal Impact*

#### Public Sector - Commonwealth

The annual recovery amount the estate recovery program has generated in calendar year 2000 was approximately \$20 million. Forty-four (44) % of the amount recovered (the state share) goes directly into the Long Term Care appropriation to provide home and community based services and nursing home services to qualified individuals. For every one million recovered through estate recovery, approximately 70 home and community based slots or 141 individuals in home and community based settings are served annually.

The Department anticipates a negligible cost impact as a result of these regulations. The total estate recovery collection amount will be reduced with the implementation of the new exemption for estates valued at \$2,400 or less and by the implementation of the new waiver provision providing for waivers for persons living in the home and caring for decedent. However, this cost will be offset by increased revenues due to improved program efficiency resulting in better compliance with estate recovery requirements, in collection of recovery monies now pending in unadministered estates, collection at the end of postponement periods where applicable, active enforcement of the new regulations and as a result of the Department's new public education campaign.

#### Public Sector-Local Government

These regulations may impact the process of estate administration in the courts of common pleas. In particular, these regulations clarify the duties and responsibilities of personal representatives. However, no significant impact is expected because the changes to the process of estate administration are minimal.

### Private Sector-General Public

The estate recovery program results in an increase of revenue to the Commonwealth and helps to ensure continued financing of long term care services under Medical Assistance. These regulations reduce the amount of inheritance an heir would have received, if the decedent received MA for nursing home or home and community based services. With the exception of a home of a decedent, this inheritance amount is minimal since the decedent is required to spend down most assets prior to becoming eligible for MA services.

### *Effective Date*

This chapter is effective 90 days after publication in the Pennsylvania Bulletin.

### *Sunset Date*

A sunset date is not anticipated because the underlying statute is permanent.

### *Regulatory Review Act*

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on JUN 29 2001, the Department submitted a copy of these final-form regulations to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House Committee on Health and Human Services and the Senate Committee on Public Health and Welfare. The Department provided IRRC and the committees with copies of all comments received during the public comment period. The Department has also provided IRRC and the Committees with a copy of a detailed Regulatory Analysis Form prepared by the Department in compliance with Executive Order 1996-1, "Regulatory Review and Promulgation." A copy of this material is available to the public upon request.

In preparing the final-form regulations, the Department has considered all comments received from the public, the IRRC and the Committees.

These final-form regulations were deemed approved by the House Committee on Health and Human Services and the Senate Committee on Public Health and Welfare on \_\_\_\_\_. The IRRC approved the final form regulations on \_\_\_\_\_, in accordance with § 5.1(e) of the Regulatory Review Act ( 71 P.S. § 745.5a(e)).

### *Findings*

The Department finds that:

- (1) Public notice of proposed rulemaking was given under §§ 201 and 202 of the CDL and the regulations thereunder, 1 Pa. Code §§ 7.1 and 7.2.
- (2) A public comment period was provided as required by law and all comments were considered.
- (3) These final-form regulations are necessary and appropriate for the administration of §§ 201(2), 1410 and 1412 of the Public Welfare Code (62 P.S. § 201(2), 1410, 1412).

***Order***

The Department hereby adopts 55 Pa. Code Ch. 258 (Medical Assistance estate recovery).

(a) The Secretary of Public Welfare has submitted this order and Annex A to the Office of General Counsel and the Office of the Attorney General for review and approval as to legality and form as required by law. The Office of General Counsel and the Office of the Attorney General have approved this order and Annex A as to legality and form.

(b) The Secretary of Public Welfare shall certify and deposit this order and Annex A with the Legislative Reference Bureau as required by law.

(c) This order takes effect on (insert effective date—90 days after publication).

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**KEY:**

~~Strikethrough = deletion from  
proposed rulemaking~~  
Underline = addition to  
proposed rulemaking

Annex A

TITLE 55. PUBLIC WELFARE

PART II. PUBLIC ASSISTANCE MANUAL

CHAPTER 258. MEDICAL ASSISTANCE ESTATE RECOVERY ~~PROGRAM~~

§ 258.1 Policy.

(a) This chapter applies to the estates of individuals who received Medical Assistance (MA) for nursing facility services, home and community based services or related hospital and prescription drug services, ~~clients~~ who were 55 years of age or older at the time that MA was received, ~~and~~ who died on or after August 15, 1994, and who received Medical Assistance on or after August 15, 1994. This chapter ~~It~~ does not apply to individuals who received MA before ~~they reached~~ 55 years of age; and whose MA eligibility terminated before ~~reaching age~~ 55 years of age.

(b) The estate of a an individual ~~MA-client~~ who was 55 years or older at the time that MA was received is liable to repay the Department for the amount of MA paid for all nursing facility services, home and community based services and related hospital and prescription drug services provided upon their reaching age from the time the individual was 55 years of age and thereafter. Only Medical Assistance MA services provided on or after August 15, 1994, are subject to ~~the~~ Estate Recovery Program. ~~The above noted services provided prior to August 15, 1994 are not subject to the estate recovery program.~~

§258.2. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

~~Cash equivalent assets -- Stocks, bonds, notes, bank accounts, mutual fund shares and other financial instruments convertible into cash.~~

Decedent -- A deceased ~~MA-client~~ individual who was 55 years of age or older at the time that MA was received.

Decree of distribution -- An instrument by which heirs receive the property of a ~~deceased~~ decedent. It is the final determination of the parties to a proceeding.

Department's claim (claim) -- The claim of the Department computed and made under this chapter.

~~Estate property — All real and personal property of a decedent which is subject to administration by a decedent's personal representative, whether actually administered or not administered.~~

Fair market value — The price for which that property would be expected to sell on the open market.

~~Facility of payment clause — A provision which authorizes the direct payment to an individual.~~

~~Family exemption — The exemption provided by 20 Pa. § 3121.~~

Home and community based services -- A broad array of Medicaid services provided to an individual to avoid institutionalization under the waiver authority of Section 1915(c) of the Social Security Act.

~~Immediate family member — Spouse, child, parent, or sibling.~~

Individual -- A person who is 55 years of age or older, who has received or is receiving MA services in a nursing facility or through home and community based services.

~~Income producing asset — Property which is used in a trade or business such as a family farm, family business or rental property. The term excludes cash, stocks and bonds, mutual fund shares, or other marketable financial instruments.~~

MA -- Medical Assistance.

Nursing facility services - General, hospital based, and county nursing facility services and services provided in an intermediate care facility for the mentally retarded or for persons with other related conditions.

~~Perfected liens — A claim or charge on a property for payment of a debt, for which the person owed such debt has taken the necessary legal steps required to secure his interest in the subject property.~~

Personal representative -- An executor or administrator of ~~any description~~ a decedent's estate. This includes executors and administrators of any type or description.

Postponement period -- The period during which the Department will defer collection of its claim.

~~Primary residence — The principal home of the decedent at the time of death or prior to admission to a nursing facility.~~

Protectable asset -- An asset which must be preserved and protected for eventual payment of the Department's claim after the postponement period. The term includes:

- (i) Real estate and all improvements thereto.
- (ii) ~~Items~~ An item of personal property with a fair market value in excess of \$10,000.
- (iii) Cash and cash equivalent assets of an estate with an aggregate value in excess of \$50,000. Cash equivalent assets are stocks, bonds, notes, bank accounts, mutual fund shares and other financial instruments convertible into cash.
- (iv) ~~Other property with a fair market value in excess of \$10,000.~~

Real and personal property – Any property in which an individual has an ownership interest.

Related hospital and prescription drug services -- Hospital and prescription drug services received by a decedent as follows:

- (i) While the ~~client~~ individual was a resident in a nursing facility or was receiving home and community based services.
- (ii) While the ~~client~~ individual was on temporary leave from a nursing facility.
- (iii) Subsequent to a transfer from a nursing facility to a hospital.

Response period -- The period during which the Department will respond to a notice requesting a statement of claim. ~~The response period is forty-five calendar days unless extended in accordance with this chapter.~~

Statement of claim – A computation of the amount of MA paid for all nursing facility services, home and community based services and related hospital and prescription drug services provided from the time the individual was 55 years of age and thereafter.

~~Surviving spouse or child – The surviving spouse of a decedent or a child who is blind or totally and permanently disabled, as determined under the standards of the Supplemental Security Income (SSI) program operated under Title XVI of the Social Security Act, 42 U.S.C. §1382 et. seq.~~

~~— Testamentary trust – A trust created by the will of a decedent.~~

Transferee -- An individual or entity, other than a personal representative, possessing or receiving property subject to the Department's claim. This includes both the initial and any subsequent recipients of property if the property is transferred more than once are transferees.

### **§ 258.3. Property liable to repay the Department.**

(a) All estate property is subject to the Department's claim. Estate property includes all real and personal property of a decedent which is subject to administration by a decedent's personal representative, whether actually administered or not administered.



(b) Property held by a decedent and another at the time of death as joint tenants with rights of survivorship, or as tenants by the entireties, is not subject to the Department's claim.

~~(c) The proceeds of life insurance on the decedent which is directly payable to a third party is not subject to the Department's claim. However, life insurance which is payable to the decedent's estate is subject to the Department's claim even if the life insurance policy contains a facility of payment clause.~~ Life insurance which is payable to the decedent's estate is subject to the Department's claim, even if the life insurance policy contains a facility of payment clause. A facility of payment clause is a provision which authorizes direct payment to a person. The proceeds of life insurance on the decedent which is directly payable to a beneficiary is not subject to the Department's claim.

(d) Assets placed in trust prior to the death of the decedent, including irrevocable burial reserves, are not subject to the Department's claim ~~so long as if~~ if the assets are not payable to the decedent's estate. Trust assets and burial reserve proceeds which are or become payable to the decedent's estate are subject to the Department's claim. Assets designated for a testamentary trust are subject to the Department's claim. A testamentary trust is a trust created by the will of the decedent.

~~(e) A trust which meets the requirements of 55 Pa. Code § 178.7 (f) (relating to treatment of trust amounts for all categories of MA for trusts established on or after July 30, 1994) is not subject to the Department's claim.~~

~~(e) (f) Property within the scope of 20 Pa. C.S. § 3101 (relating to payments to family and funeral directors), including unpaid wages, certain bank accounts, certain life insurance, and patient care accounts, are~~ is subject to the Department's claim.

~~(f) (g)~~ Notwithstanding paragraph (b) - (d) (e), any property which a personal representative or creditor could recover for the benefit of the estate under 12 Pa. C.S. Chapter 51 (relating to the Pennsylvania Uniform Fraudulent Transfer Act) is subject to the Department's claim. For purposes of this chapter, the Department will only presume that any transfer of assets which a decedent made within one year of death for less than reasonably equivalent value is recoverable for the estate.

(h) The following special populations are exempt from estate recovery:

(1) Certain income, resources and property of Native American Indians and Alaska Natives. Exempt items include:

(i) Interests in and income derived from Tribal land and other resources currently held in trust status and judgment funds from the Indian Claims Commission and the U.S. Claims Court.

(ii) Ownership interest in trust or non-trust property, including real property and improvements including the following:

(A) Property located on any federally recognized Native American Indian Tribe's reservation, Pueblo, or Colony, including former reservations in Oklahoma, Alaska Native regions established by Alaska Native Claims Settlement Act and Indian allotments or

near a reservation as designated and approved by the Bureau of Indian Affairs of the U.S. Department of the Interior.

(B ) For any federally-recognized Tribe not described in (A), property located within the most recent boundaries of a prior Federal reservation.

(C) Protection of non-trust property described in (A) and (B) is limited to circumstances when it passes from an Native American Indian as defined in section 4 of the Indian Health Care Improvement Act to one or more relatives by blood, adoption, or marriage, including Native American Indians not enrolled as member of a Tribe and non-Indians, such as spouses and stepchildren that their culture would nevertheless protect as family members; to a Tribe or Tribal organization; or to one or more Native American Indians.

(iii) Income left as a remainder in an estate derived from property protected in (ii) that was either collected by a Native American Indian, or by a Tribe or Tribal organization and distributed to Native American Indians, as long as the individual can clearly trace it as coming from the protected property.

(iv) Ownership interests left as a remainder in an estate in rents, leases, royalties, or usage rights related to natural resources including extraction of natural resources or harvesting of timber, other plants and plant products, animals, fish and shellfish resulting from the exercise of Federally-protected rights, and income either collected by a Native American Indian, or by a Tribe or Tribal organization and distributed to Native American Indians derived from these sources as long as the individual can clearly trace it as coming from protected sources.

(v) Ownership interests in or usage rights to items not covered by (i) - (iv) that have unique religious, spiritual, traditional, or cultural significance or rights that support subsistence or a traditional life style according to applicable Tribal law or custom.

(2) Government reparation payments to special populations.

#### **§ 258.4. Request for statement of claim.**

(a) ~~The personal representative of the estate of any decedent who was 55 years of age or older at the time of death~~ has a duty to ascertain whether the decedent received MA services during the 5 years preceding death and, if so, will give notice to the Department requesting a statement of claim. The 5-year time frame is for notification purposes only and does not limit the Department's claim. Effective August 15, 1994, the amount of Medical Assistance paid for services rendered after August 15, 1994, to an individual 55 years of age or older is subject to the Department's claim. The notice shall be ~~mailed~~ sent by certified mail return receipt, facsimile machine or electronic mail to the address of the Department specified by at § 258.14 (relating to service on the Department). The notice shall include, ~~at a minimum,~~ the following information:

(1) A statement that the personal representative is requesting a statement of claim against the estate of the decedent.

(2) The decedent's name.

(3) The decedent's last address.

(4) The decedent's date of birth.

(5) The decedent's date of death.

- (6) The decedent's Social Security Number.
- (7) The personal representative's name, address, and telephone number.
- (8) Written documentation of the gross value of the decedent's estate.

(b) The Department will submit a statement of claim to the personal representative within the response period of forty-five calendar days in accordance with 62 P.S. § 1412(b) (relating to repayment from probate estates). If the notice from the personal representative is mailed to the incorrect address, or does not otherwise fully comply with subsection (a), the response period shall be suspended until a fully complying notice is received. If the Department fails to submit a statement of claim to the personal representative within the response period, the Department's claim ~~will be~~ is forfeited.

~~(c) The Department's Third Party Liability Section will date stamp all notices from personal representatives when received. The date stamp shall conclusively establish the date of the Department's receipt of the notice. The certified mail receipt date, facsimile receipt date or the electronic mail receipt date verifies the receipt date of the notice from the personal representative.~~

~~(d)~~ (d) The Department will also date ~~all the~~ statements of claim. The date on the statement of claim shall ~~conclusively~~ establish the Department's submission issuance date ~~for~~ of the statement of claim, ~~regardless of any postmark date.~~

~~(e)~~ (e) A personal representative may extend the Department's response period. Additionally, if the last date of the response period falls on a weekend, state Commonwealth holiday or other day that the offices of the ~~Third Party Liability Section~~ Department are closed, the response period shall ~~be extended until~~ end on the next business day.

~~(e) The Department may issue a statement of claim based upon information received via telephone, fax machine, or electronic mail. However, use by the personal representative of such alternative forms of communication shall not cause the Department's response period to commence.~~

(f) The Department may amend a statement of claim after the response period has elapsed if there is new or updated information relating to the statement of claim. The amended statement of claim shall relate back to the date of the original statement of claim.

#### § 258.5 Computation of claim.

(a) The Department's claim with respect to a decedent shall consist of the total of all MA payments made with respect to the decedent for nursing facility services, home and community based services and related hospital and prescription drug services rendered on or after August 15, 1994.

(b) Premium payments and cost-sharing for decedents who were qualified Medicare beneficiaries shall be included in the statement of claim for the period of time the decedent received nursing facility services, home and community based services or related hospital and prescription drug services rendered on or after August 15, 1994. A qualified Medicare beneficiary is an individual whose Medicare co-payments, premiums or deductibles only are paid by the MA program.

~~(c) If the decedent was a surviving spouse or child, the Department's statement of claim shall include the Department's claim against a previously deceased spouse or parent deferred by the Department during the postponement period.~~

~~(d) With respect to a claims against third parties for the costs of MA services delivered through a Managed Care Organization (MCO) contract, the Department's claim will be based on recover the amount the Department paid to the MCO on behalf of the decedent actual payment to the hospital or other medical provider for the service. If no specific payment is earmarked by the MCO for the service, such as in the example of a capitated payment to physicians, the Department will recover its fee schedule amount for the service.~~

~~(e) If the MCO fails to provide the Department with information necessary to compute the statement of claim within contractual deadlines, the Department will use the amount of the capitation payments made to the MCO since the date of the injury as its claim against the third party until sufficient information is provided to compute a statement of claim in accordance with (d). In any case where the Department is forced to use the capitation payment to compute its statement of claim, the MCO will be liable to the Department for the amount of the Department's diminished recovery in accordance with the terms of the MCO's contract with the Department.~~

~~(f) There shall be a rebuttable presumption that the Department's statement of claim is correct. The burden of proof is upon the personal representative to show that the Department's statement of claim is incorrect by a preponderance of evidence.~~

~~(g) (d)~~ The Department will not reduce its claim on account of attorneys' fees or other costs incurred by the estate to obtain or liquidate assets. These costs may be treated as expenses of administration of the estate.

#### **§ 258.6. Priority of the Department's claim.**

(a) The Department's claim shall be entitled to priority under 20 Pa. C.S. § 3392(3) (relating to classification and order of payment) to the extent it includes payment for services rendered within six months of death. Otherwise, the Department's claim shall be paid under 20 Pa. C.S. § 3392(6).

(b) The Department's claim against deposit accounts and patient care accounts subject to 20 Pa. C.S. § 3101 (relating to payments to family and funeral directors) shall be subordinate to reasonable funeral expenses and to those claims of creditors having priority over the Department under 20 Pa. C.S. § 3392.

(c) The Department's claim against assets subject to 20 Pa. C.S. § 3101 shall be superior to that of family members and any person receiving money pursuant to said provision of law shall be answerable to the Department.

(d) The Department's claim is subordinate to the family exemption and to perfected liens on specific property. A family exemption is the exemption provided by 20 Pa. C.S. § 3121.

**§ 258.7. Postponement of collection.**

(a) The Department will postpone collection of its claim until the ~~later~~ last of one of the following occurs:

(1) The death of any surviving spouse.

(2) The death of any child who is blind or totally and permanently disabled, as determined under the standards of the Supplemental Security Income (SSI) program at 42 U.S.C. 1382 et seq).

(3) The date any surviving child ~~attains age~~ is 21 years of age.

(4) The death of, property transfer by or vacating of the property by a sibling who has an equity interest in the property and who has been living in the home for at least one year prior to the death of the decedent.

(b) The personal representative has a duty to insure protection of the Department's claim during the postponement period.

(c) The personal representative will be deemed to have complied with his responsibilities to protect the Department's claim during the postponement period if, after liquidating such assets as is appropriate and paying all expenses of administration and superior claims of creditors against the estate, the personal representative takes one or more of the following actions until the Department's claim is fully protected, or until all protectable assets are protected.

(1) If the decedent's estate contains real estate, the personal representative shall cause a mortgage or other recorded encumbrance to be placed against the real estate in favor of the Department.

(2) If the decedent's estate contains one or more individual items of personal property with ~~an aggregate~~ a fair market value in excess of \$10,000, the personal representative shall cause a properly perfected security interest to be placed against the items of personal property in favor of the Department. A properly perfected security interest is a lien on property for payment of a debt, for which the necessary legal steps have been taken to make the lien valid and enforceable against all third parties.

(3) If the estate contains cash or cash-equivalents in an aggregate amount in excess of \$50,000, the personal representative shall cause said money to be placed in trust, with terms and

trustees approved by the Department. Said ~~The~~ trust shall name the Department as remainderman and shall allow the spouse or child, or both, to consume income without court approval, shall allow the consumption of principal to pay reasonable medical expenses of the spouse or child, or both, and shall allow the consumption of principal for the benefit of the spouse or child, or both, with court approval. The personal representative may serve as trustee and a reasonable trustee fee may be provided by the trust document. A remainderman is a person entitled to receive money in a trust, upon termination of the trust.

(4) If the decedent's estate contains protectable assets which are not adequately protected by the procedures ~~provided in~~ at (1) - (3), the personal representative shall ~~request and follow the directions of the Department.~~ appropriately protect the assets by another method, as approved by the Department.

(d) No interest is charged on the Department's claim during the postponement period.

(e) Postponement of collection may be waived by a spouse, adult child, or legal representative of a child under ~~the age of 18~~ years of age.

(f) The Department's claim is subject to collection at the end of the postponement period.

#### **§ 258.8 Liability of personal representative.**

(a) The personal representative has a duty to insure that the Department's claim is adequately presented to the Court and, unless the Department's claim is postponed, to pay the Department's claim after payment of all superior claims of creditors.

(b) The personal representative is personally liable to pay the Department's claim if property subject to the Department's claim, and not subject to postponement of collection, is transferred without valuable and adequate consideration to a heir or other person having a lower priority claim of a creditor, without satisfaction of the Department's claim.

(c) When the Department's claim is postponed, the personal representative is personally liable if property subject to the Department's claim is transferred without valuable and adequate consideration to a heir or other person having a lower priority claim of a creditor, without protecting the Department's claim.

(d) A decree of distribution will discharge the liability of the personal representative to the Department only if the following conditions are met:

(1) The Department is served with a copy of the proposed distribution at least 30 days in advance of court approval.

(2) The court records show that the personal representative made the inquiry required by § 258.4 (relating to request for statement of claim) and obtained a statement of claim, if appropriate.

(3) The court records show that any claim of the Department was presented to the Court and paid, or that there were insufficient assets to pay the Department's claim.

(4) The Department is served with a copy of the final distribution order and paid all amounts that it is due.

(e) Notwithstanding (d), a decree of distribution will not discharge the liability of the personal representative to the Department if the petition for distribution fails to disclose the existence of property subject to the Department's claim, or if the personal representative refuses to present and pay the Department's claim.

#### **§ 258.9. Liability of transferees.**

(a) A transferee is liable to pay the Department's claim when he receives property subject to the Department's claim for which he did not pay ~~valuable and adequate consideration, that is fair market value for said property.~~ The transferee's liability is limited to the fair market value of the property received—the difference between the fair market value of the property that was not protected and the amount of money received by the estate in exchange for the transfer, if any.

(b) When the Department's claim is postponed, ~~any~~ a transferee is personally liable to pay the Department's claim if the transferee receives property subject to the Department's claim and the transferee fails to protect the Department's claim during the postponement period. The transferee's liability is limited to the fair market value of the property that was not protected.

(c) The arms length sale of the decedent's real property at fair market value by the personal representative to a party unrelated to the decedent or the personal representative shall be deemed to be supported by valuable and adequate consideration.

#### **§ 258.10. Undue hardship waivers.**

(a) The Department will waive its claim in cases of undue hardship.

(b) The Department ~~may~~ will find undue hardship and ~~may~~ will permanently waive its claim with respect to the ~~real and personal property constituting the primary residence of a decedent and an immediate family member of the decedent, if they have~~ the person requesting the undue hardship waiver meets all of the following conditions:

(1) The person has ~~have~~ continuously resided in the primary residence of the decedent for at least two years immediately preceding the decedent's receipt of nursing facility services, or, for at least two years during the period of time which Medicaid-funded home and community based services were received.

(2) The person has ~~have~~ no other alternative permanent residence.

~~(3) The person has have an annual gross family income that does not exceed 100% of the Federal poverty guidelines. The person has provided care or support to the decedent for at least two years during the period of time that Medicaid-funded home and community based services were received by the decedent, or for at least two years prior to the decedent's receipt of nursing home services during which time the decedent needed care or support to remain at home~~

(c) The Department ~~may~~ will find undue hardship and ~~may~~ will permanently waive its claim with respect to an income-producing asset if ~~an immediate family member~~ a spouse, child, parent, sibling or grandchild of the decedent meets ~~one~~ both of the following:

(1) ~~The asset is used~~ utilizes the asset to generate the primary source of income for the household.

(2) ~~There would be have a gross family income of less than 100%~~ 250% of the Federal poverty guideline without use of the asset.

~~(d) An income producing asset is property which is used in a trade or business such as a family farm, family business or rental property, excluding cash, stocks and bonds, mutual fund shares or other marketable financial instruments.~~

~~(d) The Department may will find undue hardship and may will postpone collection of its claim until one of the following:~~

~~(1) The death of a sibling who has an equity interest in the property and has been living in the house for at least two years prior to the death of the decedent.~~

~~(2) Upon the disposition of the property by the sibling living in the house.~~

~~(e) The Department will find undue hardship and will permanently waive from the amount of the Department's recovery, an amount equal to the necessary and reasonable expenses for maintaining the decedent's home while the decedent was receiving home and community based services or decedent's vacant home while the decedent was in a nursing facility. Necessary and reasonable expenses for maintaining the home include real estate taxes, utility bills, home repairs and home maintenance such as lawn care and snow removal necessary to keep the property in condition for the decedent to return home or to sell at fair market value. Creditors are not eligible to request a waiver under this subsection.~~

~~(f) The Department will find undue hardship and will permanently waive its claim for administered estates with a gross value of \$2,400 or less, if there is an heir.~~

~~(g) A spouse, parent, child or sibling of the decedent who receives a postponement of collection in accordance with § 258.7 (relating to postponement of collection) is not precluded from receiving an undue hardship waiver if the criteria in (b), (c), (e) or (f) are met.~~

(e) (h) The Department has exclusive authority to waive its claim, compromise its claim, or



postpone collection, in other circumstances where undue hardship exists, or where collection is not cost-effective, as determined by the Department on an individual case-by-case basis.

(f) (i) Waiver requests shall be submitted to the following address: Estate Recovery Program, Post Office Box 8486, Harrisburg, PA 17105-8486.

#### § 258.11. Unadministered estates.

(d) ~~(a)~~ ~~The Department may periodically develop lists of unadministered estates which may have assets. Such lists will be made available to any attorney or member of the public who may desire to seek appointment as administrator. The Department may also, in its sole discretion, refer unadministered estates to local private counsel to administer the estate. The Department will provide information regarding unadministered estates to the probate and estate section of local county bar associations so that such estates can be administered by willing attorneys under the sponsorship of the bar association as a public service and under the authority of 20 Pa. C.S. § 3155.(b)(5). When appropriate, the Department will authorize a member of this local county bar association to obtain letters of administration on the Department's behalf pursuant to 20 Pa. C. S. § 3155 (b) (4). A reasonable administrator's commission and attorney's fee may be charged to the estate as expenses of administration, but shall not exceed a combined fee of \$1,000, or 6% of the gross assets of the estate, whichever is greater.~~

~~(a)~~ (b) The Department may cause one of its employees to administer an estate if no administrator has been appointed and assets may exist to pay the Department's claim.

~~(b)~~ (c) The Department's Office of Legal Counsel may provide legal services to an estate if a Departmental employee has been designated to administer the estate. Alternatively, the administrator may employ private counsel.

~~(e)~~ (d) The Department will charge the estate a reasonable administrator's commission and attorney's fee as an expense expenses of administration not to exceed a combined fee of \$1,000, or 6% of the gross assets of the estate, whichever is greater, if administration- administrative services and or attorney services are provided to the estate by Commonwealth employees.

#### § 258.12. Administrative enforcement.

(a) In addition to any other remedies allowed by law, the Department may administratively assess liability upon a personal representative or transferee in accordance with §§ 258.8 and 258.9 (relating to liability of personal representative and liability of transferees). A personal representative or transferee will be notified in writing of the assessment of liability and the right to appeal this decision in accordance with ~~Such assessment may be appealed pursuant to § 258.13 (relating to appeals and jurisdiction).~~

(b) A final administrative order in any proceeding to assess liability against a personal representative or transferee shall be binding upon the parties in any subsequent judicial proceeding to enforce the administrative order.

**§ 258.13. Appeals and jurisdiction.**

(a) A personal representative, transferee or family member adversely affected by a decision of the Department under this chapter may appeal to the Department's Bureau of Hearing and Appeals in accordance with 55 Pa Code Ch. 275 (relating to Appeal and Fair Hearing and Administrative Disqualification Hearings), within 30 days of the date the affected person is notified of the decision.

(b) An appeal shall be mailed to the Bureau of Hearings and Appeals, Department of Public Welfare, Post Office Box 2675, Harrisburg, PA 17105.

(c) The Bureau of Hearings and Appeals has exclusive jurisdiction over disputes involving a request for waiver, compromise or postponement of collection. ~~Such appeals shall be reviewed by the Bureau under an abuse of discretion standard.~~ Appeals involving the exercise of the Department's discretion shall be reviewed by the Bureau of Hearings and Appeals under an abuse of discretion standard, otherwise the Bureau of Hearings and Appeals shall review the matter de novo. The Bureau's decision is binding on all parties, subject to the Secretary's reconsideration and appellate review.

(d) The Bureau of Hearings and Appeals has concurrent jurisdiction with the courts of common pleas over disputes involving the computation of the Department's claim or assessment of liability against a personal representative or transferee. ~~However, if the personal representative or transferee files an appeal with the Bureau of Hearings and Appeals, such filing shall be deemed to be an irrevocable election to proceed exclusively before the Bureau.~~ The Bureau's decision is binding upon all parties participating before the Bureau of Hearing and Appeals, subject to the Secretary's reconsideration and appellate review.

**§ 258.14. Service on the Department.**

The address for requesting a statement of claim or for serving legal papers on the Department is: Third Party Liability Section, Department of Public Welfare, Estate Recovery Program, Post Office Box 8486, Harrisburg, PA 17105-8486.

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IRRC

**TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE  
REGULATORY REVIEW ACT**

I.D. NUMBER: 14-445

SUBJECT: Medical Assistance Estate Recovery

AGENCY: DEPARTMENT OF PUBLIC WELFARE

**TYPE OF REGULATION**

Proposed Regulation

X Final Regulation

Final Regulation with Notice of Proposed Rulemaking Omitted

120-day Emergency Certification of the Attorney General

120-day Emergency Certification of the Governor

Delivery of Tolled Regulation

a. With Revisions      b. Without Revisions

2001 JUN 29 PM 11:29

**FILING OF REGULATION**

| DATE    | SIGNATURE               | DESIGNATION                                 |
|---------|-------------------------|---|
| 6/29/01 | <i>Lela J. Burris</i>   | HOUSE COMMITTEE ON HEALTH & HUMAN SERVICES  |
| 6/29/01 | <i>Matthe McKinney</i>  |   |
| 6/29/01 | <i>Kristi Kreiser</i>   | SENATE COMMITTEE ON PUBLIC HEALTH & WELFARE |
| 6/29/01 | <i>Lanaene Chalmers</i> |   |
| 6/29/01 | <i>Elena Pagan</i>      | INDEPENDENT REGULATORY REVIEW COMMISSION    |
| _____   | _____                   | ATTORNEY GENERAL                            |
| _____   | _____                   | LEGISLATIVE REFERENCE BUREAU                |

June 28, 2001