

**GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2007**

**SESSION LAW 2007-442
HOUSE BILL 1537**

AN ACT TO MAKE CHANGES TO THE MEDICAID ESTATE RECOVERY LAW;
TO AMEND THE LAW RESPECTING DATA SHARING BY HEALTH
INSURERS WITH THE DEPARTMENT OF HEALTH AND HUMAN
SERVICES, DIVISION OF MEDICAL ASSISTANCE; AND TO ENACT A
PROCEDURE FOR THE WAIVER OF THE MEDICAID TRANSFER OF
ASSETS PENALTY DUE TO UNDUE HARDSHIP.

The General Assembly of North Carolina enacts:

SECTION 1.(a) G.S. 108A-70.5, as enacted by Section 10.21C of S.L. 2005-276, and as amended by Section 16 of S.L. 2005-345, and as amended by Section 10.9B of S.L. 2006-66, and as further amended by Section 10 of S.L. 2007-145, reads as rewritten:

"§ 108A-70.5. Medicaid Estate Recovery Plan.

(a) There is established in the Department of Health and Human Services, the Medicaid Estate Recovery Plan, as required by the Omnibus Budget Reconciliation Act of ~~1993~~.1993, to recover from the estates of recipients of medical assistance an equitable amount of the State and federal shares of the cost paid for the recipient. The Department shall administer the program in accordance with applicable federal law and regulations, including those under Title XIX of the Social Security Act, 42 U.S.C. § 1396(p). ~~To the extent allowed by section 1396(p) of Title XIX of the Social Security Act, the Department may impose liens against real property, including the home, of a recipient of medical assistance. The Department shall file any liens imposed under this section in the court where the property is located in the same manner as for any other lien under North Carolina law.~~

(b) As used in this section:

- (1) "Medical assistance" means medical care services paid for by the North Carolina Medicaid Program on behalf of the recipient:
 - a. If the recipient of any age is receiving medical care services as an inpatient in a nursing facility, intermediate care facility for the mentally retarded, or other medical institution, and cannot reasonably be expected to be discharged to return home; or
 - b. If the recipient is 55 years of age or older and is receiving one or more of the following medical care services:
 1. Nursing facility services.
 2. Home and community-based services.
 3. Hospital care ~~and prescription drugs related to nursing facility services or home and community based services.~~
 - 3a. Prescription drugs.
 4. Personal care services.
 5. ~~Medicare premiums.~~
 6. ~~Private duty nursing.~~
 7. ~~Home health aide services.~~
 8. ~~Home health therapy.~~
 9. ~~Speech pathology services.~~

- (2) "Estate" means all the real and personal property considered assets of the estate available for the discharge of debt pursuant to G.S. 28A-15-1.
- (3) ~~"Home" means property in which a recipient has, or had immediately before or at the time of the recipient's death, an ownership interest or legal title to, consisting of the recipient's dwelling and the land used and operated in connection with the dwelling.~~

(c) The amount the Department recovers from the estate of any recipient shall not exceed the amount of medical assistance made on behalf of the recipient and shall be recoverable only for medical care services prescribed in subsection (b) of this section. ~~To the extent that allowable Medicaid claims are not satisfied as a result of the execution of any liens held by the Department, the~~The Department is a fifth-class creditor, as prescribed in G.S. 28A-19-6, for purposes of determining the order of claims against an estate; provided, however, that judgments in favor of other fifth-class creditors docketed and in force before the Department seeks recovery for medical assistance shall be paid prior to recovery by the Department.

(d) The Department of Health and Human Services shall adopt rules pursuant to Chapter 150B of the General Statutes to implement the ~~Plan~~Plan, including rules to waive whole or partial recovery when this recovery would be inequitable because it would work an undue hardship or because it would not be administratively cost-effective and rules to ensure that all recipients are notified that their estates are subject to recovery at the time they become eligible to receive medical assistance.

~~(e) Regarding trusts that contain the assets of an individual who is disabled as defined in Title 19 of Section 1014(a)(3) of the Social Security Act, as amended, if the trust is established and managed by a nonprofit association, to the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the nonprofit association, the trust pays to the Department from these remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the North Carolina Medicaid Program."~~

SECTION 1.(b) G.S. 108A-70.6, 108A-70.7, 108A-70.8, and 108A-70.9, as enacted by Section 10.21C of S.L. 2005-276, and as amended by Section 16 of S.L. 2005-345, and as amended by Section 10.9B of S.L. 2006-66, and as further amended by Section 10 of S.L. 2007-145, are repealed.

SECTION 2. G.S. 108A-55.4 reads as rewritten:

"§ 108A-55.4. Insurers to provide certain information to Department of Health and Human Services.

- (a) As used in this section, the terms:
 - (1) "Department" means the Department of Health and Human Services.
 - (2) "Division" means the Division of Medical Assistance of the Department of Health and Human Services.
 - (3) "Health insurer" includes self-insured plans, group health plans (as defined in section 607(1) of the Employee Retirement Income Security Act of 1974, [29 USC Section 1167(1)]), service benefit plans, managed care organizations, or other parties that are, by statute, contract, or agreement, legally responsible for payment of a claim for a health care item or service as a condition of doing business in the State.
 - (4) "Medical assistance" means medical assistance benefits provided under the State Medical Assistance Plan.
 - (5) "Subscriber" means the policyholder or covered person under the insurance policy.
 - (6) "Applicant" means an applicant or former applicant of medical assistance benefits.
 - (7) "Recipient" means a present or former recipient of medical assistance benefits.

(8) "Request" means any inquiry by the Department or Division for the purpose of determining the existence of insurance where the Department or Division may have expended public assistance benefits.

(b) Health insurers, and pharmacy benefit managers regulated as third-party administrators under Article 56 of Chapter 58 of the General Statutes, shall provide, with respect to ~~individuals who are eligible for, or are provided, medical assistance, a~~ subscriber upon request of the ~~Division, Division or its authorized contractor,~~ Division or its authorized contractor, information to determine during what period the individual or the individual's spouse or dependents may be (or may have been) covered by a health insurer and the nature of the coverage that is or was provided by the health insurer (including the subscriber's name, address, identification number, social security number, date of birth and identifying number of the plan) in a manner prescribed by the ~~Division, Division or its authorized contractor.~~ Division or its authorized contractor. Notwithstanding any other provision of law, every health insurer issuing a health benefit plan shall provide, not more frequently than twelve times in a year and at no cost, to the Department of Health and Human Services, Division of Medical Assistance, or the Department's or Division's authorized contractor, upon its request, ~~information, including automated data matches conducted under the direction of the Department of Health and Human Services, Division of Medical Assistance,~~ information as necessary ~~to so that the Division may~~ (i) ~~identify individuals- applicants or recipients who may also be subscribers covered under the insurer's health benefit plans of the health insurer; who are also recipients of medical assistance;~~ (ii) determine the period during which the ~~individual or the individual's spouses individual, the individual's spouse,~~ individual, the individual's spouse, or the individual's dependents may be or may have been covered by the health benefit plan; and (iii) determine the nature of the coverage. To facilitate the Division or its authorized contractor in obtaining this and other related information, every health insurer shall:

- (1) Cooperate with the Division to determine whether a named individual who is a recipient of medical assistance may be covered under the insurer's health benefit plan and eligible to receive benefits under the health benefit plan for services provided under the State Medical Assistance Plan.
- (2) Respond to the request for ~~information payment~~ payment within 90 working days after receipt of written proof of loss or claim for payment for health care services provided to a recipient of medical assistance who is covered by the ~~insurer's health benefit plan, benefit plan of the health insurer.~~ benefit plan of the health insurer.
- (3) Accept the Division's right of recovery and the assignment to the Division of any right of an individual or other entity to payment from the party for an item or service for which payment has been made under the State Medical Assistance Plan.
- (4) Respond to any inquiry by the Division or its authorized contractor regarding a claim for payment for any health care item or service that is submitted not later than three years after the date of the provision of the health care item or service.
- (5) Notwithstanding subsection (d) of this section, agree ~~Agree~~ not to deny a claim submitted by the Division solely on the basis of the date of submission of the claim, the type of format of the claim form, or a failure to present proper documentation at the point-of-sale that is the basis of the claim, if:
 - a. The claim is submitted by the Division within the three-year period beginning on the date on which the item or service was furnished; and
 - b. Any action by the Division to enforce its rights with respect to such claim is commenced within six years of the Division's submission of the claim.

(c) ~~An~~ A health insurer that complies with this section shall not be liable on that account in any civil or criminal actions or proceedings.

(d) A health insurer is obligated to reimburse the Department only if the insurer has a contractual obligation to make payment for the covered service or item."

SECTION 3.(a) Part 6 of Article 2 of Chapter 108A of the General Statutes is amended by adding the following new section to read:

"§ 108A-58.2. Waiver of transfer of assets penalty due to undue hardship.

(a) Prior to imposition of a period of ineligibility for long-term care services because of an asset transfer, also known as a penalty period, the county department of social services shall notify the individual of the individual's right to request a waiver of the penalty period because it will cause an undue hardship to the individual. The director of the county department of social services, or the director's designee shall grant a waiver of the penalty period due to undue hardship if the individual meets the conditions set forth in subsection (e) of this section. As used in this section, "long term care services" are those services described in 42 U.S.C. § 1396p(c)(1)(C)(i) and (ii).

(b) When a Medicaid applicant who is requesting Medicaid to pay for institutional care requests a waiver of a penalty period due to undue hardship, the determination of whether to waive the penalty period shall be processed as part of the Medicaid application and is subject to the application processing standards set forth in 10A NCAC 21B .0203.

(c) When an ongoing Medicaid recipient applies for institutional care or is receiving Medicaid payment for institutional care receives the notice described in subsection (a) of this section, the recipient has 12 calendar days from the date of the notice to request a waiver of the penalty due to undue hardship. The following are the procedures for processing the waiver request:

- (1) Within five work days of receipt of a request for a waiver of the transfer of assets penalty, the county department of social services shall notify the individual in writing of the information and documentation necessary to determine if the requirements for approving the undue hardship waiver are met.
- (2) The individual shall have 12 calendar days from the date of the notice specified in subdivision (1) of this subsection to provide the necessary information and documentation to establish the undue hardship.
- (3) If at the end of the first 12 calendar day period the necessary information and documentation has not been received by the county department of social services, the county department of social services shall again notify the individual of the necessary information and documentation. The individual shall be given an additional 12 calendar days to provide the information and documentation.
- (4) If the individual fails to request the undue hardship waiver within 12 calendar days from the date of the notice described in subsection (a) of this section, the county department of social services shall impose the transfer of assets penalty in accordance with notice requirements in G.S. 108A-79.
- (5) If by the end of the 12 calendar days from the notice described in subdivision (3) of this subsection, the necessary information and documentation has not been received by the county department of social services, the county department of social services shall deny the request for waiver of the penalty for undue hardship and notify the individual of the denial in accordance with G.S. 108A-79.
- (6) If by the end of the time allowed under subdivisions (2) and (3) of this subsection the county department of social services has received the necessary information and documentation, the county department of social services shall make a determination of whether the imposition of the penalty period would cause an undue hardship to the individual.

The county department of social services shall complete the determination and notify the individual, pursuant to subsection (g) of this section, of whether the imposition of the penalty period will be waived due to undue hardship within 12 calendar days of the receipt of the necessary information and documentation.

- (7) If as part of the determination described in subdivision (6) of this subsection the county department of social services identifies the need for additional information and documentation, it shall notify the individual in writing of that information and documentation. This notice shall initiate a new period of time for the individual to provide the information and documentation as set forth in subdivisions (2) and (3) of this subsection. Within 12 calendar days of the receipt of the additional information and documentation, the county department of social services shall complete the determination and notify the individual, pursuant to subsection (g) of this section, of whether the imposition of the penalty period will be waived due to undue hardship.

(d) As required by 42 U.S.C. § 1396p(c)(2)(D), the facility in which an institutionalized individual is residing may request an undue hardship waiver on behalf of the institutionalized individual with the written consent of the individual or the personal representative of the individual. A facility applying for a waiver for an individual residing in the facility shall adhere to the requirements of this section but shall not be required to advance the costs of acquiring an attorney to aid the institutionalized individual.

(e) Except as provided for in subsection (f) of this section, undue hardship exists if the imposition of the penalty period would deprive the individual of medical care, such that the individual's health or life would be endangered; or of food, clothing, shelter, or other necessities of life. The individual must provide the information and documentation necessary to demonstrate to the director of the county department of social services or the director's designee that:

- (1) The individual currently has no alternative income or resources available to provide the medical care or food, clothing, shelter, or other necessities of life that the individual would be deprived of due to the imposition of the penalty; and
- (2) The individual or some other person acting on the individual's behalf is making a good faith effort to pursue all reasonable means to recover the transferred asset or the fair market value of the transferred asset, which may include:
 - a. Seeking the advice of an attorney and pursuing legal or equitable remedies such as asset freezing, assignment, or injunction; or seeking modification, avoidance, or nullification of a financial instrument, promissory note, loan, mortgage or other property agreement, or other similar transfer agreement; and
 - b. Cooperating with any attempt to recover the transferred asset or the fair market value of the transferred asset.
- (3) The following definitions shall apply to this subsection.
 - a. "Health or life would be endangered" means a medical doctor with knowledge of the individual's medical condition certifies in writing that in his or her professional opinion, the individual will be in danger of death or the individual's health will suffer irreparable harm if a penalty period is imposed.
 - b. "Other necessities of life" includes basic, life sustaining utilities, including water, heat, electricity, phone, and other items or activities that without which the individual's health or life would be endangered.

- c. "Income" means all income of the individual and the community spouse less a protected amount for the community spouse equal to the minimum monthly maintenance needs allowance as determined under 42 U.S.C. § 1396r-5(d), including in all circumstances the excess shelter allowance described under 42 U.S.C. § 1396r-5(d)(3)(A)(ii), without regard to any adjustment that would be made under 42 U.S.C. § 1396r-5(e), plus fifty percent (50%) of such income in excess of the protected amount.
- d. "Resources" means all resources of the individual and of the community spouse except the homesite in which the individual or community spouse has an equity interest not exceeding five hundred thousand dollars (\$500,000), a motor vehicle in which the individual or community spouse has an equity interest not exceeding thirty thousand dollars (\$30,000), personal property, and, in the case of a community spouse, a portion of such other resources in an amount equal to the community spouse resource allowance as defined by 42 U.S.C. § 1396r-5(f)(2), provided that such amount shall not exceed sixty percent (60%) of the maximum community spouse resource allowance as defined by 42 U.S.C. § 1396r-5(f)(2)(A)(ii). For purposes of this sub-subdivision, "homesite" means the principal place of residence of the individual or the community spouse in which the individual or community spouse has an equity interest.

(f) An undue hardship shall not exist when the application of a transfer of assets penalty merely causes the individual an inconvenience or restricts the individual's lifestyle.

(g) If the director of the county department of social services or the director's designee determines that:

- (1) An undue hardship exists, the county department of social services shall waive the penalty period and notify the individual of approval of the waiver of the penalty in accordance with G.S. 108A-79.
- (2) An undue hardship does not exist, the county department of social services shall deny the request for the waiver of the penalty and notify the individual of denial of the waiver request in accordance with G.S. 108A-79.

(h) During a penalty period that has been waived because of undue hardship, acquisition by the individual of new or increased income or resources shall be treated as a change in situation and evaluated pursuant to the rules adopted by the Department of Health and Human Services.

(i) While the determination on a request for a waiver of the penalty period due to undue hardship is pending, Medicaid shall not make payments for nursing facility services or intermediate care facility for the mentally retarded services to hold a bed for the individual, as described in 42 U.S.C. § 1396p(c)(2)(D). However, if the individual is institutionalized and receiving Medicaid payment for services, Medicaid will maintain the same level of services until the last day of the month after the latter of the following:

- (1) Expiration of the 10 workday period following the notice required by G.S. 108A-79, or
- (2) The date of the decision of a local appeal hearing described in G.S. 108A-79 is issued if the individual requests an appeal of the imposition of a transfer of assets penalty period within the 10 workday period described in subdivision (1) of subsection (i) of this section."

SECTION 3.(b) Notwithstanding G.S. 150B-21.3(b1), 10A NCAC 21B .0314, adopted by the Department of Health and Human Services on January 19, 2007, and approved by the Rules Review Commission on March 15, 2007, is disapproved.

SECTION 3.5. The Department of Health and Human Services shall report, by April 15, 2008, to the Chairs of the Senate and House of Representatives Appropriations Committees and the Chairs of the Senate and House of Representatives Appropriations Subcommittees on Health and Human Services the following information:

- (1) For the previous twenty four months, the total expenditure for personal care services for each year, and the total expenditure for each setting in which personal care services were provided.
- (2) For the period beginning October 1, 2007, the total number of deceased recipients that received personal care services, the average expenditure for personal care services for those recipients, and the average value of the estate of those recipients.
- (3) For the period beginning October 1, 2007, for each estate against which recovery is sought for the provision of personal care services, the total amount of personal care services provided, and the value of the estate.
- (4) Recommendations, if any, by the Department for a threshold to begin recovery from the estate of a deceased recipient of personal care services.

SECTION 3.6. Unless required by federal law, the Department of Health and Human Services, Division of Medical Assistance shall limit notification of estate recovery to the application process for Medicaid and to following the death of the recipient.

SECTION 4. This act is effective when it becomes law.

In the General Assembly read three times and ratified this the 2nd day of August, 2007.

s/ Marc Basnight
President Pro Tempore of the Senate

s/ Joe Hackney
Speaker of the House of Representatives

s/ Michael F. Easley
Governor

Approved 11:17 a.m. this 23rd day of August, 2007