

CHAPTER 258. MEDICAL ASSISTANCE ESTATE RECOVERY

Sec.	
258.1.	Policy.
258.2.	Definitions.
258.3.	Property liable to repay the Department.
258.4.	Request for statement of claim.
258.5.	Computation of claim.
258.6.	Priority of the Department's claim.
258.7.	Postponement of collection.
258.8.	Liability of personal representative.
258.9.	Liability of transferees.
258.10.	Undue hardship waivers.
258.11.	Unadministered estates.
258.12.	Administrative enforcement.
258.13.	Appeals and jurisdiction.
258.14.	Service on the Department.

Authority

The provisions of this Chapter 258 issued under sections 201(2), 1410 and 1412 of the Public Welfare Code (62 P. S. §§ 201(2), 1410 and 1412), unless otherwise noted.

Source

The provisions of this Chapter 258 adopted November 2, 2001, effective February 1, 2002, 31 Pa.B. 6034, unless otherwise noted.

§ 258.1. Policy.

(a) This chapter applies to the estates of individuals who received 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 MA on or after August 15, 1994. This chapter does not apply to individuals who received MA before reaching 55 years of age and whose MA eligibility terminated before reaching 55 years of age.

(b) The estate of a an individual 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 from the time the individual was 55 years of age and thereafter. Only MA services provided on or after August 15, 1994, are subject to estate recovery.

§ 258.2. Definitions.

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

Decedent—A deceased 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 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.

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

Home and community based services—A broad array of Medicaid services provided to a decedent to avoid institutionalization under the waiver authority of section 1915(c) of the Social Security Act (42 U.S.C.A. § 1396n(c)).

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.

Personal representative—An executor or administrator of 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.

Protectable asset—An asset which shall 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) 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.

Real and personal property—Any property in which a decedent had an ownership interest.

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

- (i) While the decedent was a resident in a nursing facility or was receiving home and community based services.
- (ii) While the decedent 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.

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 decedent was 55 years of age and thereafter.

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.

§ 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) 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 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 § 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.

(f) Property within the scope of 20 Pa.C.S. § 3101 (relating to payments to family and funeral directors), is subject to the Department's claim.

(g) 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 United States Claims Court.

(ii) Ownership interest in trust or nontrust 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 United States Department of the Interior.

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

(C) Protection of nontrust property described in clauses (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 (25 U.S.C.A. § 1603) 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 subparagraph (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 subparagraphs (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 has a duty to ascertain whether the decedent received MA services during the 5 years preceding death and, if so, 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 MA 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 sent by certified mail return receipt, facsimile machine or electronic mail to the address of the Department specified in § 258.14 (relating to service on the Department). The notice shall include the following:

- (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 45-calendar days in accordance with section 1412(b) of the Public Welfare Code (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 is forfeited.

(c) 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) The Department will date the statements of claim. The date on the statement of claim shall establish the Department's issuance date of the statement of claim.

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

(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.

Cross References

This section cited in 55 Pa. Code § 258.8 (relating to liability of personal representative).

§ 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 copayments, premiums or deductibles only are paid by the MA program.

(c) With respect to a claim for the costs of MA services delivered through a Managed Care Organization (MCO) contract, the Department's claim will be based on the amount the Department paid to the MCO on behalf of the decedent.

(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 is 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 6 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) is 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 under that 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 (relating to when available).

§ 258.7. Postponement of collection.

(a) The Department will postpone collection of its claim until the 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 in the Social Security Act. See 42 U.S.C.A. § 1382.

(3) The date any surviving child 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 1 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 the assets as appropriate and paying all expenses of administration and superior claims of creditors against the estate, the personal represen-

tative 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 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, as specified in 13 Pa.C.S. §§ 9101—9507 (relating to the Uniform Commercial Code), 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 that money to be placed in trust, with terms and trustees approved by the Department. 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 in paragraphs (1)—(3), the personal representative shall 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 18 years of age.

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

Cross References

This section cited in 55 Pa. Code § 258.10 (relating to undue hardship waivers).

§ 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 an 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 an 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 subsection (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.

Cross References

This section cited in 55 Pa. Code § 258.12 (relating to administrative enforcement).

§ 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 fair market value. The transferee's liability is limited to 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, 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.

Cross References

This section cited in 55 Pa. Code § 258.12 (relating to administrative enforcement).

§ 258.10. Undue hardship waivers.

- (a) The Department will waive its claim in cases of undue hardship.
- (b) The Department will find undue hardship and will permanently waive its claim with respect to the primary residence of a decedent if the person requesting the undue hardship waiver meets all of the following conditions:
 - (1) The person has continuously resided in the primary residence of the decedent for at least 2 years immediately preceding the decedent's receipt of nursing facility services, or, for at least 2 years during the period of time which Medicaid-funded home and community based services were received.
 - (2) The person has no other alternative permanent residence.
 - (3) The person has provided care or support to the decedent for at least 2 years during the period of time that Medicaid-funded home and community based services were received by the decedent, or for at least 2 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 will find undue hardship and will permanently waive its claim with respect to an income-producing asset if a spouse, child, parent, sibling or grandchild of the decedent meets both of the following:
 - (1) The asset is used to generate the primary source of income for the household.
 - (2) There would be a gross family income of less than 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.
- (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 maintaining 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 subsection (b), (c), (e) or (f) are met.

(h) The Department has exclusive authority to waive its claim, compromise its claim, or postpone collection, in other circumstances when undue hardship exists, or when collection is not cost-effective, as determined by the Department on an individual case-by-case basis.

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

§ 258.11. Unadministered estates.

(a) The Department will provide information regarding unadministered estates to the probate and estate section of local county bar associations so that those 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) (relating to persons entitled). When appropriate, the Department will authorize a member of this local county bar association to obtain letters of administration on the Department's behalf under 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 may not exceed a combined fee of \$1,000, or 6% of the gross assets of the estate, whichever is greater.

(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.

(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.

(d) The Department will charge the estate a reasonable administrator's commission and attorney's fee as 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 administrative 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) under section 1412 of the Public Welfare Code (62 P. S. § 1412(a.1)(1) and (2)). 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 § 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 Chapter 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 Human Services, Post Office Box 2675, Harrisburg, Pennsylvania 17105.

(c) The Bureau of Hearings and Appeals has exclusive jurisdiction over disputes involving a request for waiver, compromise or postponement of collection. 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.

(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. 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.

Cross References

This section cited in 55 Pa. Code § 258.12 (relating to administrative enforcement).

§ 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 Human Services, Estate Recovery Program, Post Office Box 8486, Harrisburg, Pennsylvania 17105-8486.

Cross References

This section cited in 55 Pa. Code § 258.4 (relating to request for statement of claim).

[Next page is 259-1.]

258-12

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