

STATE OF VERMONT
AGENCY OF HUMAN SERVICES

P A T H

Department of Prevention, Assistance, Transition, and Health Access

BULLETIN NO.: 03-08F

FROM: John Michael Hall, Commissioner
for the Secretary

DATE: November 7, 2003

SUBJECT: Homestead Exemption for Medicaid Estate Recovery

CHANGES ADOPTED EFFECTIVE 12/1/03

INSTRUCTIONS

X Maintain Manual - See instructions below.

___ Proposed Regulation - Retain bulletin
and attachments until you receive
Manual Maintenance Bulletin: _____

___ Information or Instructions - Retain
until _____

MANUAL REFERENCE(S):

TOC M100 M159

Federal law requires the department to recover Medicaid expenses for long-term care for individuals over age 55 and to define undue hardship criteria exemptions (42 U.S.C. §1396p(b)(3)). This rule proposes to amend the department's undue hardship exemptions from estate recovery as authorized in Act 152 (33 V.S.A. §1906a) and reflected in the terms of the Medicaid state plan amendment approved by the Centers for Medicare and Medicaid Services (formerly the Health Care Finance Administration) on July 20, 2000.

Specific Changes to Existing Regulations

[M159 through
M159.2](#)

Content in M159.1 revised for consistency with M154. Reorganizes, clarifies, and updates existing regulations. In addition, a new subsection (c) has been added to M159.2 to mirror the content of Vermont's state Medicaid plan.

[M159.21
through
M159.23](#)

Revises regulation to conform with the conditions of approval given to Vermont to amend its Medicaid state plan provisions related to undue hardship by the Health Care Financing Administration (HCFA; since renamed the Centers for Medicare and Medicaid Services, or CMS).

Prior Rule History

This rule was filed once before, on March 15, 2002, as PATH proposed rule 02-06.

During the first public comment process, some commenters, including a legislator, objected to the department's proposal to limit the homestead exemption to \$125,000. These commenters asserted instead that homesteads of any value should be exempted from Medicaid estate recovery, provided the heirs met the other requirements of the hardship test. In that filing, the Agency of Human Services had included a \$125,000 cap on the value of a homestead that may be subject to this exemption, consistent with 33 V.S.A. §1906a as passed in 1999, and amended in 2000.

In response, the Agency withdrew the first filing in order to request explicit approval from the federal government to exempt homesteads of any value from the estate recovery program when the descendants of the deceased person meet the qualifying conditions. On November 25, 2002, the federal government clarified that a cap on homestead value is required.

The department refiled the proposed rule with the originally proposed \$125,000 cap on value based on the written comments received from two probate court judges, one legislator, one attorney, and one advocacy group, the Council of Vermont Elders, during the prior rule filing. The final proposed rule has been amended since originally filed on September 19, 2003 to raise the proposed \$125,000 cap on value to \$250,000 in response to an expressed concern of the Legislative Committee on Administrative Rules.

Summary of Public Hearing and Written Comments

A public hearing was held on April 14, 2003. Written comments were submitted by a Legislator, the Health Care Ombudsman, the Community of Vermont Elders, and an attorney with a private practice in Vermont. The comments are summarized and responded to below.

Elimination of the \$125,000 cap

Comment: Three commenters asked the department to remove the \$125,000 cap.

Response: From the onset of this policy discussion, the issue of undue hardship has been rooted in the federal requirement that the exemption be limited to homes of modest value. Legislation passed in 1999 exempted homesteads from Medicaid estate recovery if they were valued at or below \$125,000 provided the heirs had income below 300 percent of the federal poverty level, or had given care that had delayed or avoided nursing home placement.

During the 8 months following passage of the statute, CMS posed a hurdle. It was poised to deny Vermont's request to amend its state plan to exempt homes from estate recovery because the \$125,000 cap significantly exceeded CMS' definition of "modest value". Following negotiations with CMS officials, "modest value" and "\$125,000" were removed from the proposed state Medicaid plan amendment with the understanding that the state would still comply with the Vermont General Assembly's

directive to apply a \$125,000 cap via regulation. Moreover, Medicaid is a poverty program providing public health care assistance for indigent individuals. Consistent with the clearly expressed Congressional intent, persons and individuals with greater means should be liable for reimbursement of some costs of their long-term care through estate recovery.

In response to an expressed concern of members of the Legislative Committee on Administrative Rules, the department has revised the rule to enable heirs to seek the homestead exemption up to a \$250,000 value of the home if they otherwise qualify. These changes are intended to more accurately reflect the change in the value of real property in this state since the passage of the original legislation in 1999. In addition, applying the cap to the first \$250,000, of value enables any heir who otherwise meets the criteria to seek the exemption.

Broadening applicability beyond statutory language referencing lineal heirs or siblings

Comment: One commenter requested the rule be changed to allow lineal descendants of siblings to be eligible for the exemption because it violates the public benefits clause of the Vermont Constitution to preclude availability of the exemption to grandchildren of a sibling who provided substantial care to an unmarried, childless, deceased Medicaid recipient.

Response: The statutory authority is specifically limited. It extends the exemption “provided that the homestead would pass to one or more lineal heirs or siblings of the descendent.” The department’s discretion is prescribed by the mandatory statutory language. It is not authorized to extend the exemption to “lineal heirs, siblings, *and the lineal heirs of siblings* of the descendent”.

Allow full exemption when, in multiple heir situations, only one of the heirs meets the criteria

Comment: One commenter recommended that the department allow the full exemption in multiple heir situations because it is unlikely all heirs will meet the criteria, so homes will have to be sold.

Response: The Centers for Medicare and Medicaid Services conditioned approval of the state Medicaid plan upon limiting the hardship only to qualifying heirs. The purpose of the exemption is to benefit only individuals who meet the criteria. In some cases that will permit preservation of a homestead. In other circumstances, depending on the other assets and liabilities of the estate and the number of heirs, it may simply result in a cash payment or a credit to qualifying heirs.

* * * * *

Vertical lines in the left margin indicate significant changes. Dotted lines at the left indicate changes to clarify, rearrange, correct references, etc., without changing regulation content.

Three dots at the bottom of a page after the last line of text and three dots at the top of the following page before the first line of text indicate that text has been moved.

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For more information about the Administrative Procedures Act and the rules applicable to state rulemaking please go to the website of the Office of the Vermont Secretary of State at: vermont-archives.org/apa/rules.html or call Louise Corliss at 828-2863.

For information on upcoming hearings before the Legislative Committee on Administrative Rules please go to the website of the Vermont Legislature at: www.leg.state.vt.us/schedule/schedule2.cfm or call 828-5760.

Manual Holders: Please maintain manuals assigned to you by removing and inserting the following pages.

Manual Maintenance

Medicaid Rules

<u>Remove</u>		<u>Insert</u>	
M159	(94-26F)	M159	
M159 P.2	(97-10F)	M159.2	(03-08)
M159 P.3	(99-12)	M159.21	(03-08)
M159 P.4	(99-12)	M15.21 P.2	(03-08)
Nothing		M159.22	(03-08)

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M159

M159 Adjustment or Recovery

The department may take action either before or after Medicaid payment of a claim to assure appropriate disbursement of Medicaid funds when payment turns out to be inappropriate due to subsequently discovered resources, fraud, error, or the development of third party-liability. Taking administrative action and accepting partial or full reimbursement shall not preclude either simultaneous or subsequent action in civil or criminal court as appropriate.

The department may:

- (a) negotiate adjustment or recovery on a voluntary basis with recipient, provider, or an obligated third party;
- (b) accept adjustment or recovery in conjunction with the imposition of provider sanctions (see M155.4);
- (c) file a lien against any third party to recover Medicaid expenditures from any settlement, judgment, or other income that may be awarded through negligence liability action;
- (d) enter direct civil action to effect adjustment or recovery when other efforts fail; or
- (e) investigate and prepare for referral to the appropriate criminal prosecutor any case presumed subject to adjustment or recovery by way of such action.

Providers may be required to enter a claim against any subsequently discovered health insurance resources previously unknown or overlooked and submit an adjusted Medicaid claim upon collection, with reimbursement as appropriate.

M159.1 Adjustments or Recoveries from Estates

The department shall seek adjustment or recovery from the estates of individuals who died on or after January 1, 1994 provided that the individuals were 55 years of age or older when they received long-term care services paid for by the Medicaid program for nursing facility services, home-and-community-based waiver services, and related hospital and prescription drug services. Related hospital and prescription drug services are those paid for by the Medicaid program during a period of time when the individual is living in a nursing facility or enrolled in a home-and-community-based waiver program. Adjustment or recovery shall include amounts in personal needs accounts.

The department will file a claim with the probate court as a creditor of the estate to recover its expenditures for long-term care services only after the death of an individual's surviving spouse, if any, and when the individual has no surviving child who is under age 21, or blind, or permanently and totally disabled as defined by the Social Security Administration.

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M159.2

M159.2 Exemptions from Estate Adjustment or Recovery

The department exempts the following assets from estate adjustment or recovery when an heir requests an exemption in writing no later than four months after the publication of notice to creditors of the estate.

(a) Homes in trust prior to December 1, 1997

The department normally recovers for long-term care Medicaid costs incurred after January 1, 1994. Individuals with homes in revocable trusts who received Medicaid payment of long-term care services before December 1, 1997, however, are exempt from recovery until after May 1, 1998, or, if later, the effective date of the first Medicaid eligibility review completed after December 1, 1997.

(b) When loss of assets would present an undue hardship

The department will not seek adjustment or recovery from assets when that adjustment or recovery would present an undue hardship to the decedent's family members, as specified below and in subsection M159.21.

(1) Income-producing assets

Undue hardship exists when adjustment or recovery from an income-producing asset can be made only if the asset, alone or in combination with other related assets, is sold and either or both of the following conditions are met:

- (A) The assets sold are the sole source of income for the decedent's spouse, parents, children, or siblings.
- (B) As a result of the sale, the decedent's spouse, parents, children, or siblings would qualify for public assistance (Reach Up benefits, SSI/AABD, general or emergency assistance, or TANF or TANF/MOE benefits from another state).

(c) Estates with personal property valued at less than \$2,000

The department will not seek recovery where the estate inventory filed with the probate court consists only of personal property that does not exceed \$2,000 in value, such as home furnishings, apparel, personal effects, and household goods.

The department will not seek to recover assets for which the department has imposed a penalty period of ineligibility for Medicaid coverage of long-term care services related to the transfer of those assets.

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M159.21

M159.21 Undue Hardship Exemptions Applicable to Homesteads

At any time before closure of the probate estate, an heir may assert that adjustment or recovery against the homestead would be an undue hardship and that the homestead should be exempt from adjustment or recovery for the costs of Medicaid long-term care services. The department shall exempt a decedent's home from estate adjustment or recovery based on undue hardship when one or more of the following three conditions have been established to the department's satisfaction.

- (a) A sibling has been living in the home continuously for at least one year immediately before the date the decedent began receiving long-term care services.
- (b) A son or daughter has been living in the home continuously for at least two years immediately prior to the date the decedent began receiving long-term care services and provided care that allowed the decedent to remain at home.
- (c) Conditions (1), (2), and (3) below have been met.
 - (1) The fair market value of the homestead is less than \$250,000. If the fair market value of the homestead exceeds this amount, the first \$250,000 in fair market value shall be exempt from estate recovery and any equity value in excess of \$250,000 shall be subject to the provisions of M159.1.
 - (2) A sibling or lineal heir of the deceased Medicaid beneficiary will inherit the homestead. A lineal heir is a direct descendant, such as a child or grandchild.
 - (3) The heir meets one or both of conditions (A) and (B) below.
 - (A) The heir has gross family income below 300 percent of the federal poverty level. No income exclusions or deductions are allowed. The income of the persons presented in the following table is included in the heir's gross family income, provided that they are living in the heir's household.

Type of Heir	Family Members, If Living in the Heir's Household
Adult 18 years or older; or person younger than 18 and emancipated	Heir Heir's spouse or civil union partner Heir's biological or adoptive child or stepchild
Person younger than 18 and not emancipated	Heir Heir's parent Heir's stepparent Heir's biological or adoptive sibling, stepsibling, or half sibling, if younger than 18 and not emancipated

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M159.21 P.2

M159.21 Undue Hardship Exemptions Applicable to Homesteads (Continued)

- (B) The heir demonstrates that significant services or financial support provided to the deceased person by heirs meeting condition (2) or the spouses of such heirs enabled the person to avoid long-term care or delay it at least six months. It is not necessary for the deceased person to have been a Medicaid beneficiary when the services or financial support were provided. Services may have been provided in combination with services provided by governmental or other private entities.

To meet condition (B), the services or financial support must fall into one or both of the following two categories:

(i) Medical or remedial care or support services that were:

- medically necessary;
- provided directly by the heir or the heir's spouse without compensation, or purchased with the heir's funds; and
- provided while the deceased person required medical care and services consistent with the level of care standard for level III residential care homes at a frequency averaging no fewer than three times per week or, if provided less frequently, constituting the equivalent expenditure of time or money.

The department shall not verify the level of care unless it has a reasonable basis for questioning that the level III standard was met.

(ii) Other services or financial support at least as significant as the care or services described in category (i).

When there are two or more heirs, the full value of the homestead is exempt from Medicaid estate adjustment or recovery only if each heir meets conditions (1), (2), and (3) above. When one or more heirs do not meet conditions (1), (2), and (3), the percentage of the value of the homestead corresponding to their share is subject to Medicaid estate adjustment or recovery.

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M159.22

M159.22 Methodology for Adjusting a Claim Against a Homestead

An estate includes all real and personal property and other assets listed on an inventory filed in the probate court. The probate court oversees the distribution of assets to heirs and the payment of the decedent's outstanding debts, which requires creditors to submit proof of their claims to the court.

The probate court judge compares the total value of claims filed by creditors to the total value of available assets in the estate. The court determines which assets are available to pay debts.

When any heir meets the department's undue hardship criteria as specified in M159.2, some or all of these available assets may be exempt from adjustment or recovery by the department under these rules. Nonexempt assets are those subject to the department's claim because an heir has not met the undue hardship criteria. Creditors other than the department are not subject to these exemptions.

When the total available assets are insufficient to pay all claims, the probate court prioritizes the debts and prorates each claim according to law. Each creditor collects the resulting percentage of its claim.

If there are sufficient nonexempt assets to allow the department to collect its full percentage, it does so. If the nonexempt assets allow the department to collect only a partial amount of its share after the court's proration, it collects that amount. The department shall maintain its original claim so it can be prorated along with all other creditor's claims according to law. The department notifies the court of its decision on the homestead exemption. If the department grants a homestead exemption, it shall inform the court of the maximum payment it will accept against its claim. The department determines the maximum payment it will accept by subtracting the amount of the exemption from the amount of the department's claim.

M159.23 Methodology for Retroactive Homestead Exemption Claims

The undue hardship exemption applicable to homesteads shall be effective for any probate estate opened after June 30, 1999. Heirs seeking the exemption from July 1, 1999, through the effective date of this policy must submit their claim to the department's Third Party Liability Unit in the Office of Vermont Health Access within 60 days following receipt of proper notice from the department. In the sole discretion of the commissioner, the department may make exceptions to the 60-day rule when an heir establishes undue hardship due to lack of notice, a medical need, or natural disaster. Heirs seeking an exemption from the 60-day submission requirement must sign an affidavit describing the condition that prevented them from complying with the 60-day submission requirement and submit the affidavit along with supporting documentation to the commissioner.