

**WEST VIRGINIA
SECRETARY OF STATE**

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #5

FILED

JUN 16 2 50 PM '95

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF AGENCY ADOPTION OF A PROCEDURAL OR INTERPRETIVE RULE
OR A LEGISLATIVE RULE EXEMPT FROM LEGISLATIVE REVIEW**

AGENCY: Department of Health and Human Resources TITLE NUMBER: 78

CITE AUTHORITY: W. Va. Code § 9-5-11c

RULE TYPE: PROCEDURAL _____ INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE X

CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

W. Va. Code § 29A-1-3(c)

AMENDMENT TO AN EXISTING RULE: YES _____, NO X

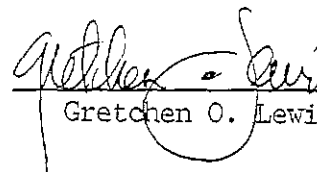
IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING ADOPTED: 17

TITLE OF RULE BEING ADOPTED: Estate Recovery

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE
EFFECTIVE DATE OF THIS RULE IS June 16, 1995



Gretchen O. Lewis, Secretary

4.00

TITLE 78

**WEST VIRGINIA ADMINISTRATIVE RULES
DEPARTMENT OF HEALTH AND HUMAN RESOURCES**

ESTATE RECOVERY

SERIES 17

1995

**WEST VIRGINIA ADMINISTRATIVE RULES
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
ESTATE RECOVERY
78 CSR 17**

TABLE OF CONTENTS

§78-17-1. General	1
§78-17-2. Application and Enforcement	1
§78-17-3. Definitions	1
§78-17-4. Determination of Permanent Institutionalization	3
§78-17-5. Identification of Estates Subject to Recovery	4
§78-17-6. Estates Subject to Delayed Recovery	4
§78-17-7. Estates Not Subject to Recovery	5
§78-17-8. Application for an Undue Hardship Waiver	6
§78-17-9. Release of Liens	6
§78-17-10. Administrative Due Process	6
§78-17-11. Severability	7

TITLE 78
WEST VIRGINIA ADMINISTRATIVE RULES
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
SERIES 17
ESTATE RECOVERY

§78-17-1. General.

1.1. **Scope** - This legislative rule establishes State standards and procedures for recovery of certain medical assistance payments from the estates of certain recipients and from property sold by permanently institutionalized recipients of such assistance. This recovery is limited in scope to medical assistance payments for nursing facility services, home and community-based services and related hospital and prescription drug services and will not exceed the amount actually paid for such services.

1.2. **Authority** -- W.Va. Code § 9-5-11c.

1.3. **Filing Date** - June 16, 1995.

1.4. **Effective Date** - ~~June 10, 1995~~

1.5. **Supersession or Repeal of Former Regulations** - None

§78-17-2. Application and Enforcement.

2.1. **Application** - This rule applies to payments made by the Department of Health and Human Resources pursuant to the State's Medicaid program for nursing facility services, home and community-based services and related hospital and prescription drug services provided to individuals fifty-five (55) years of age or older or to individuals who, after notice and an opportunity for hearing, have been deemed to be permanently institutionalized.

2.2. **Enforcement** - This rule is enforced by the Secretary of the Department of Health and Human Resources.

§78-17-3. Definitions.

3.1. **Bureau** - The Department of Health and Human Resources, Bureau for Medical Services.

3.2. **Estate** - The real and personal property belonging to a person or a decedent at the time of his/her death, including any intangible interests therein. The term "estate" includes all property identified in W.Va. Code § 11-11-2(b)(4).

3.3. **Home and Community-based Services** - Those services paid for by Medicaid pursuant to Section 1915C Waivers No. 0133 and 0134, as approved by the Health Care Financing Administration.

3.4. Legal Representative -

3.4.1. A conservator, temporary conservator or limited conservator appointed pursuant to the West Virginia Guardianship and Conservatorship Act, W.Va. Code, §44-1-1-et seq., within the limits set by the order;

3.4.2. A guardian, temporary guardian or limited guardian appointed pursuant to the West Virginia Guardianship and Conservatorship Act, W.Va. Code, §44-1-1-et seq., within the limits set by the order;

3.4.3. An individual appointed as committee or guardian prior to June 9, 1994, within the limits set by the appointing order and W.Va. Code 44A-1-2(d);

3.4.4. A person having a medical power of attorney pursuant to the West Virginia Medical Power of Attorney Act, W.Va. Code §§16-30A-1 et seq., within the limits set by the law and the appointment;

3.4.5. A representative payee under the U.S. Social Security Act, Title 42 US Code §301 et seq., within the limits of the payee's legal authority;

3.4.6. A surrogate decision-maker appointed pursuant to the West Virginia Health Care Surrogate Act, W.Va. Code §§16-30B-1 et seq., or the West Virginia Do Not Resuscitate Act, §§16-30C-1 et seq., within the limits set by the appointment;

3.4.7. An individual having a durable power of attorney pursuant to W.Va. Code §39-4-1, or a power of attorney under common law, within the limits of the appointment; or

3.4.8. An individual lawfully appointed in a similar or like relationship of responsibility for a resident under the laws of this State, or another State or legal jurisdiction, within the limits of the applicable statute and appointing authority.

3.5. Nursing Facility Services - Those services provided in nursing facilities or in a distinct part of a larger facility which is set aside for the provision of nursing services.

3.6. Permanently Institutionalized - An individual who:

3.6.1. Is an inpatient in a nursing facility, intermediate care facility for the mentally retarded, or other medical institution;

3.6.2. Is required, as a condition of receiving services in such institution under the State Medicaid Plan, to spend for costs of medical care all but a minimal amount of his/her income required for personal needs; and

78 CSR 17

3.6.3. After notice and opportunity for a hearing, has been deemed disabled to such an extent that he/she cannot reasonably be expected to be discharged from the medical institution and returned to a non-institutional home environment prior to death.

3.7. **Recipient** - An individual who receives nursing facility services or home and community-based services paid for by Medicaid or the estate of such an individual.

3.8. **Related Hospital and Prescription Drug Services** - Those hospital and prescription drug services which are rendered in conjunction with nursing facility and/or home and community-based services whether or not they are billed by the nursing facility or home and community-based service provider.

3.9. **Secretary** - The Secretary of the State Department of Health and Human Resources or his/her lawful designee.

3.10. **Undue Hardship** - Recovery would jeopardize the survival of the family unit or severely disrupt the family's income because of circumstances beyond the control of the recipient. An undue hardship shall not be found if the individual or recipient created the hardship by resorting to estate planning methods under which the individual divested assets in order to avoid estate recovery.

§78-17-4. Determination of Permanent Institutionalization.

4.1. No later than thirty (30) days after the admission of an individual to a nursing facility or other institution which provides twenty-four (24) hour a day nursing and custodial care, the facility shall notify the local Department of Health and Human Resources office of the individual's admission, legal representative, if any, physician, and discharge prognosis.

4.1.1. The discharge prognosis shall be determined by the admitting physician.

4.1.2. The discharge prognosis shall state, to a reasonable degree of medical probability, given the state of medical science at the time of admission, whether the individual can reasonably be expected to be discharged from the medical institution and returned to a non-institutional home environment prior to death.

4.2. If, in the opinion of the admitting physician, it is not reasonable to expect the individual to be discharged from the medical institution and returned to a non-institutional or home environment prior to death, the local Department of Health and Human Resources office shall forward the information supplied by the facility or institution to the Bureau.

4.3. The Bureau shall determine whether, based upon the medical information supplied, the individual will be deemed permanently institutionalized.

78 CSR 17

4.3.1. If the individual is deemed permanently institutionalized, the individual and his/her legal representative and the local Department of Health and Human Resources office will be advised by certified mail, return receipt requested, of this determination and the right to a hearing before a hearing examiner should this determination be disputed by a recipient or the legal representative of a recipient.

4.3.2. The Bureau shall make its determination within ninety (90) days after receipt of information from the local office.

4.3.3. If the individual is not a recipient at the time this determination is made, the right to request a hearing before a hearing examiner is extended until forty-five (45) days after the individual becomes a recipient.

4.3.4. If the individual is not deemed permanently institutionalized, no further action shall be required.

4.4. The recipient and his/her legal guardian shall have forty-five (45) days from the date of receipt of the Bureau determination in which to request a hearing.

4.5. A final determination as to whether the individual is permanently institutionalized shall not be made until after the time for requesting a hearing expires or the appeal process is complete, whichever occurs last.

§78-17-5. Identification of Estates Subject to Recovery - The Department of Health and Human Resources will utilize its computer data system to determine those individuals whose estates are subject to a lien. Agencies within the Department shall notify the Bureau of recipient deaths on a monthly basis.

§78-17-6. Estates Subject to Delayed Recovery.

6.1. No recovery shall be made against a recipient so long as:

6.1.1. The spouse of the recipient is living on real property in which the recipient has a property interest;

6.1.2. The real property in which the recipient has a property interest is the lawful residence of the recipient's minor child;

6.1.3. The real property in which the recipient has a property interest is the lawful residence of the recipient's blind or permanently and totally disabled adult child; or

6.1.4. The recipient's sibling:

6.1.4.a. Has an equity interest in the home;

78 CSR 17

6.1.4.b. Was residing on the real property for a period of at least one (1) year immediately before the date of the recipient's admission to a nursing facility or receipt of home and community-based services; and

6.1.4.c. Continued to live on the real property after the recipient's death or determination that the recipient is permanently institutionalized.

6.2. Recovery from these recipient's estates may occur when the condition upon which the delay was based no longer exists.

6.3. If property subject to delayed recovery is sold, only that portion of the proceeds which represents the recipient's interest in the property is subject to a recovery lien.

§78-17-7. Estates Not Subject to Recovery.

7.1. The following situations are considered undue hardship situations and no lien shall be placed or recovery made from the estates of recipients when evidence is presented to the Bureau that:

7.1.1. An adult child resided continuously in the home for a two-year period of time immediately prior to the date the parent became a recipient and continued to reside in the home until the parent's death, if that child can establish that he/she provided care to the recipient which permitted the parent to remain at home without Medicaid assistance for at least that two-year period;

7.1.2. An adult child maintains continuous employment in the family business for a period of time beginning at least three (3) years before the parent became a recipient until the time of the parent's death if the property which would otherwise be subject to an estate recovery lien is an integral part of the business and is required for the continued viability of the business; or

7.1.3. The secretary determines that it is not cost-effective for the State to pursue recovery from the estate.

7.2. The following situations shall be considered undue hardships which, upon presentation of proof, qualify for limited exclusion from estate recovery:

7.2.1. An adult child, regardless of whether he/she was living in the family home, is able to present proof of monetary support to his/her parent for medical care and other necessities prior to the date the parent became a recipient. Such support shall reduce the medical assistance lien on a dollar-for-dollar basis;

7.2.2. An adult grandchild whose parents are both deceased prior to the date the grandparent became a recipient is able to present proof of monetary support to his/her grandparent for medical care and other necessities prior to the date the

78 CSR 17

grandparent became a recipient. Such support shall reduce the medical assistance lien on a dollar-for-dollar basis; or

7.2.3. A sibling is able to present proof of monetary support to his/her sibling for medical care and other necessities prior to the date the sibling became a recipient. Such support shall reduce the medical assistance lien on a dollar-for-dollar basis.

7.3. An application for an undue hardship waiver to exempt wedding rings from the recipient's estate shall be granted without presentation of evidence.

§78-17-8. Application for an Undue Hardship Waiver - Recipients and beneficiaries of an estate may apply for an undue hardship waiver by presenting evidence to the Bureau that recovery from the recipient's estate will jeopardize the survival of the family unit or severely disrupt the family's income unless the circumstances which will cause such disruption were created by the recipient's use of estate planning methods designed to avoid estate recovery.

8.1. An application for an undue hardship waiver shall be submitted to the Bureau within forty-five (45) days of the placement of the lien.

8.1.1. The Bureau shall have ninety (90) days from the date of receipt in which to issue a denial of a request for a hardship waiver or to advise the applicant that additional time will be needed to consider the request.

8.1.2. An application for an undue hardship waiver must set out in specificity the reason for the request, the name, telephone number and address of the person making the request, financial and other evidence which supports the reason for the request and an authorization allowing the Bureau to validate the evidence presented in support of the request.

8.2. The presence of a will bequeathing specific property to beneficiaries can not be used as evidence of an undue hardship.

8.3. Documentation of an inter vivos gift can not be used as evidence of an undue hardship unless the gift would not have been considered an uncompensated transfer and resulted in imposition of a penalty period.

§78-17-9. Release of Liens - The secretary has the authority to release any lien placed upon the property of an individual deemed permanently institutionalized should that person be discharged and return to a non-institutional, home environment.

§78-17-10. Administrative Due Process.

Those persons adversely affected by the enforcement of this rule desiring a contested case hearing to determine any rights, duties, interests or privileges shall do so

78 CSR 17

in a manner prescribed in 42 C.F.R. 431.220 through 431.246, Fair Hearing for Applicants and Recipients.

§78-17-11. Severability.

The provisions of this rule are severable. If any provision of this rule is held invalid, the remaining provisions remain in effect.



KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

STEPHEN N. REED
Deputy Secretary of State

CATHERINE FREROTTE
Executive Assistant

WILLIAM H. HARRINGTON
Chief of Staff

JUDY COOPER
Director, Administrative Law

PENNEY BARKER
Supervisor, Corporations

MAY 24 1996

STATE OF WEST VIRGINIA
REGULATORY DEVELOPMENT
SECRETARY OF STATE
Building 1, Suite 157-K
1900 Kanawha Blvd., East
Charleston, WV 25305-0770

Telephone: (304) 558-6000
Corporations: (304) 558-8000
FAX: (304) 558-0900

(Plus all the volunteer help we can get)

TO: Kay Howard
Jim Morton

AGENCY: Health & Human Resources

FROM: JUDY COOPER, DIRECTOR, ADMINISTRATIVE LAW DIVISION

DATE: May 22, 1996

THE ATTACHED RULE FILED BY YOUR AGENCY HAS BEEN ENTERED INTO OUR COMPUTER SYSTEM. PLEASE REVIEW, PROOF AND RETURN IT WITH ANY CORRECTIONS. IF THERE ARE NO CORRECTIONS, PLEASE SIGN THIS MEMO AND RETURN IT TO THIS OFFICE. YOU WILL BE SENT A FINAL VERSION OF THE RULE FOR YOUR RECORDS.

PLEASE RETURN EITHER THE CORRECTED RULE OR THIS FORM WITHIN TEN (10) WORKING DAYS OF THE DATE YOU RECEIVED THIS REQUEST. CALL IF YOU HAVE ANY QUESTIONS.

SERIES: 17 TITLE: 78 Health & Human Resources

* THE ATTACHED RULE HAS BEEN REVIEWED AND IS CORRECT.

SIGNED: Kay Howard
TITLE OF PERSON SIGNING: Director, Regulatory Development
DATE: 5/21/96

* THE ATTACHED RULE HAS BEEN REVIEWED AND NEEDS CORRECTING. THE CORRECTIONS HAVE BEEN MARKED.

SIGNED: _____
TITLE OF PERSON SIGNING: _____
DATE: _____

NOTE: IF YOU ARE NOT THE PERSON WHO HANDLES THIS RULE, PLEASE FORWARD TO THE CORRECT PERSON.

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE
MAY 31 3 04 PM '96
FILED