

NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES
NOTICE OF PUBLIC HEARING

September 25, 2018
10:00 a.m. Central Time
Nebraska State Office Building – Lower Level B
301 Centennial Mall South, Lincoln, Nebraska

The purpose of this hearing is to receive comments on proposed changes to Title 471, Chapter 38 of the Nebraska Administrative Code (NAC) – *Estate Recovery*. The proposed regulations will ensure compliance with the new requirements of LB268 (2017). The proposed changes strengthen the ability of DHHS to recover taxpayers' funds from the assets of deceased Medicaid beneficiaries and broaden the definition of estate to include non-probate assets to the fullest extent allowed under federal law.

Authority for these regulations is found in Neb. Rev. Stat. § 81-3117(7).

Interested persons may attend the hearing and provide verbal or written comments or mail, fax or email written comments, no later than the day of the hearing to: DHHS Legal Services, PO Box 95026, Lincoln, NE 68509-5026, (402) 742-2382 or dhhs.regulations@nebraska.gov, respectively.

A copy of the proposed changes is available online at <http://www.sos.ne.gov>, or by contacting DHHS at the mailing address or email above, or by phone at (402) 471-8223. The fiscal impact statement for these proposed changes may be obtained at the office of the Secretary of State, Regulations Division, 1201 N Street, Suite 120, Lincoln, NE 68508, or by calling (402) 471-2385.

Auxiliary aids or reasonable accommodations needed to participate in a hearing can be requested by calling (402) 471-8223. Individuals with hearing impairments may call DHHS at (402) 471-9570 (voice and TDD) or the Nebraska Relay System at 711 or (800) 833-7352 TDD at least 2 weeks prior to the hearing.

FISCAL IMPACT STATEMENT

Agency: Department of Health and Human Services	
Title: 471	Prepared by: Todd Baustert
Chapter: 38	Date prepared: 11-14-17
Subject: Estate Recovery	Telephone: 402.471.1641

Type of Fiscal Impact:

	State Agency	Political Sub.	Regulated Public
No Fiscal Impact	(<input type="checkbox"/>)	(<input checked="" type="checkbox"/>)	(<input checked="" type="checkbox"/>)
Increased Costs	(<input type="checkbox"/>)	(<input type="checkbox"/>)	(<input type="checkbox"/>)
Decreased Costs	(<input checked="" type="checkbox"/>)	(<input type="checkbox"/>)	(<input type="checkbox"/>)
Increased Revenue	(<input type="checkbox"/>)	(<input type="checkbox"/>)	(<input type="checkbox"/>)
Decreased Revenue	(<input type="checkbox"/>)	(<input type="checkbox"/>)	(<input type="checkbox"/>)
Indeterminable	(<input type="checkbox"/>)	(<input type="checkbox"/>)	(<input type="checkbox"/>)

Provide an Estimated Cost & Description of Impact:

State Agency: Regulation updates will result in an estimated potential savings of \$19,891 in general funds and \$27,891 in federal funds for FFY2018 and \$281,507 in general funds and \$313,507 in federal funds for FFY2019 through the strengthened ability of DHHS to recover Medicaid liabilities from the estates of deceased beneficiaries.

Political Subdivision:

Regulated Public:

If indeterminable, explain why:

TITLE 471 NEBRASKA MEDICAL ASSISTANCE PROGRAM SERVICES

CHAPTER 38 ESTATE RECOVERY

001. SCOPE AND AUTHORITY. Medicaid estate recovery is mandated by §1917(b) of the Social Security Act and Neb. Rev. Stat. §68-919.

002. RESERVED.

003. RESERVED.

004. UNDUE HARDSHIP WAIVER.

004.01 PURPOSE. Waivers granted by the Department based on undue hardship are a rare and extraordinary remedy intended to prevent the impoverishment of the deceased recipient's family if the Department were to pursue an estate-recovery claim. Anticipating or expecting an inheritance, or being inconvenienced economically by the lack of an inheritance, is not a valid basis for an undue-hardship waiver.

004.02 HEIR. Any person who could be considered an heir of the now-deceased Medicaid recipient under the Probate Code may apply for an undue-hardship waiver.

004.03 CRITERIA. Any of the following circumstances may constitute an undue hardship that results in a complete or partial waiver of claim:

(A) An heir of the recipient resided in the recipient's home for two years prior to the recipient's entry into a nursing home and during that time provided the type and quantity of unreimbursed care that delayed the recipient's entry into a nursing home;

(B) An heir of the recipient resided in the recipient's home for two years prior to the recipient's receipt of recoverable medical services and during that time provided the type and quantity of unreimbursed care that delayed the recipient's receipt of those services;

(C) Payment of the Department's claim would cause an heir of the deceased recipient to become eligible for public assistance;

(D) Waiver of the Department's claim would allow an heir to discontinue eligibility for public assistance for a substantial time period; or

(E) Other situations that the Department, in its discretion and on a case-by-case basis upon consideration of all facts and circumstances, determines constitutes an undue hardship.

004.04 LIMITATION. An undue hardship does not exist if action taken by the recipient, whether directly or by another person pursuant to sufficient authorization, impermissibly divested or diverted assets to avoid estate recovery.

004.05 APPLICATION AND REVIEW PROCESS. An undue-hardship waiver application must be submitted in writing to the Department within 30 days of the creditor's claim-filing deadline or 90 days from the recipient's date of death if there is no probate proceeding. The application must explain:

(A) How the applicant is related to the now-deceased Medicaid recipient, and include documents or other evidence of this relationship; and

(B) The specific reason(s) why the application should be granted, according to 471 Nebraska Administrative Code (NAC) 38-004.03, and include documents or other evidence to support the application.

The applicant will receive a written decision within 90 days after the Department has received the application. If the application is completely or partially denied, the decision will include general information about appealing the decision.

005. LONG-TERM CARE PARTNERSHIP PROGRAM. Neb. Rev. Stat. §68-1095.01 established Nebraska's Long-Term Care Partnership Program.

Resources equal to the amount of benefits paid out by a long-term care partnership policy are disregarded for an individual applying for Medicaid if the policy was issued on July 1, 2006 or later and the individual is otherwise Medicaid eligible. The amount of the resource disregard is also excluded from estate recovery.

The Department accepts the Department of Insurance's approval of the policy.

005.01 RECIPROCITY WITH OTHER STATES. The Department will accept partnership policies issued in other states with Qualified Long-Term Care Partnership Programs that meet the criteria established in §1917(b)(1)(C) of the Social Security Act.

38-000 ESTATE RECOVERY

38-001 Scope and Authority: Medicaid estate recovery is mandated by §1917(b) of the Social Security Act. State statutory requirements are set forth in Neb. Rev. Stat. §68-919.

38-002 Definitions: The following definitions apply for purposes of Medicaid estate recovery:

Claim means the total amount of medical assistance paid after July 16, 1994 for a recipient when the recipient was fifty-five years of age or older or during a period of institutionalization as described in 471 NAC 38-003.

Estate means all real and personal property and other assets included within the Medicaid recipient's estate as defined for purposes of state probate law.

Medical institution means a skilled nursing facility, intermediate care facility, intermediate care facility for the mentally retarded, nursing facility, inpatient hospital or residential treatment center.

Qualified Long-Term Care Partnership Policy means a long-term care insurance policy that has been approved by the Nebraska Department of Insurance.

Recipient means an individual who has received Medicaid benefits.

38-003 Estate Recovery Criteria: The Department of Health and Human Services has a claim for medical assistance paid against Medicaid recipients who meet the following criteria:

1. The recipient was fifty-five years of age or older at the time medical assistance was provided or the recipient resided in a medical institution and, at the time of institutionalization or application for medical assistance, whichever is later, the Department determines the recipient could not have reasonably been expected to be discharged and resume living at home.
2. The recipient is not survived by a spouse or a child who is either under age twenty-one or blind or totally and permanently disabled as defined by the Supplemental Security Income criteria.

38-004 Undue Hardship

38-004.01 Purpose: Waivers granted by the Department based on undue hardship are intended to prevent the impoverishment of the deceased recipient's family if the Department were to pursue its estate recovery claim. The fact that family members anticipate or expect an inheritance or may be inconvenienced economically by the lack of an inheritance is not a valid basis for an undue hardship waiver.

~~38-004.02 Criteria: Any of the following circumstances may constitute an undue hardship and may result in a full or partial compromise of claim:~~

- ~~1. An heir of the recipient resided in the recipient's home for two years prior to the recipient's entry into a nursing home and the heir provided the type of unreimbursed care that delayed the recipient's entry into a nursing home;~~
- ~~2. An heir of the recipient resided in the recipient's home for two years prior to the recipient's receipt of recoverable medical services and the heir provided unreimbursed care that delayed the recipient's receipt of those services;~~
- ~~3. Payment of the Department's claim would cause heirs of the deceased recipient to be eligible for public assistance;~~
- ~~4. Waiver of the Department's claim would allow an heir to discontinue eligibility for public assistance for a substantial time period; or~~
- ~~5. Other situations which the Department, in its discretion, determines constitutes an undue hardship on the heirs.~~

~~38-004.03 Limitations: Any heir of the estate of a Medicaid recipient may apply for waiver of the estate recovery claim based on undue hardship. Any claim may be waived by the Department, partially or fully. An undue hardship does not exist if action taken by the recipient, or by his or her legal representative or heirs, divested or diverted assets from the estate. The Department may grant undue hardship waivers on a case by case basis upon consideration of all the facts and circumstances including any action taken to divert or shelter assets available for estate recovery or to avoid estate recovery.~~

~~38-004.04 Application and Review Process: A waiver applicant must have a beneficial interest in the estate and must apply for a waiver in writing within thirty days from the creditor's claim filing deadline or ninety days from the recipient's date of death if the estate is not probated. The written application must include:~~

- ~~1. A statement of the applicant's relationship to the recipient with supporting documentation; and~~
- ~~2. A statement of the basis for the hardship waiver under 471 NAC 38-004.02 with supporting documentation.~~

~~The Department must review each application and issue a written decision within ninety days after the Department's receipt of the application. The Department's written decision must advise the applicant of the procedure for requesting an administrative hearing should the applicant want to appeal the Department's decision.~~

~~38-005 Long-Term Care Partnership Program: Neb. Rev. Stat. Section 68-1095.01 established Nebraska's Long-Term Care Partnership Program.~~

~~Resources equal to the amount of benefits paid out by a long-term care partnership policy are disregarded for an individual applying for Medicaid if the policy was issued on July 1, 2006 or later and the individual is otherwise Medicaid eligible. The amount of the resource disregard is also excluded from estate recovery.~~

~~The Department accepts the Department of Insurance's approval of the policy.~~

~~38-005.01 Reciprocity with Other States: The Department will accept partnership policies issued in other states with Qualified Long-Term Care Partnership Programs.~~