



Bulletin

NUMBER

#14-21-03C

DATE

January 14, 2015

OF INTEREST TO

County Directors

County Attorneys

Social Services Supervisors
and Staff

Alternative Care Program
Administrator

County Fiscal
Administrative Staff

County Collection Workers

County Financial Workers

ACTION/DUE DATE

Please read and implement
the changes in this bulletin
when reviewing claims for
estate recoveries effective
August 1, 2014

EXPIRATION DATE

August 13, 2016

Revised #14-21-03: MA Estate Claim Recovery and Undue Hardship Waivers

TOPIC

Procedural guidance for undue hardship waivers

PURPOSE

Correct an error made on the attachment to DHS bulletin
#14-21-03 and its attachment A.

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TERMINOLOGY NOTICE

The terminology used to describe people we serve has
changed over time. The Minnesota Department of Human
Services (DHS) supports the use of "People First" language.

The Minnesota Department of Human Services (DHS) issued bulletin #14-21-03 on August 13, 2014. That bulletin discusses the following:

- Estate recovery claims against MA recipients determined eligible using the modified adjusted gross income (MAGI) methodology.
- The suggested procedures for determining undue hardships when evaluating applications of claims filed against the estate of an MA recipient or in the estate of the recipient's surviving spouse.

Clarification is needed in the following sections of the bulletin:

1. Section I, Estate recovery claims; subsection B, Policy item 1, MA liens; paragraph 2 on page 3.
2. Attachment A; "Notice of Claim and Application for Waiver of Claim" section; subsection 1, What a Notice of Claim should contain; item c, A Statement of What Constitutes Undue Hardship; bullet point 2, on page 3 of the attachment.

The corrected language is underlined in the text shown below.

1. Clarification to Estate Recovery Claims:

Section I.B.1 of IB #14-21-03 is revised to read as follows:1. MA liens

MA liens are real property liens filed before the death of an MA recipient. The Minnesota Department of Human Services (DHS) cannot place an MA lien against a client's home while they are receiving MA and living in their home. MA liens are an instrument DHS uses as a way to secure reimbursement for LTC services received by MA recipients (See Minnesota Health Care Program Manual (HCPM) section 19.50, [Liens and Estate Recovery](#) for more information on MA liens).

Currently, DHS files liens on all individuals who receive MA payments for LTC services who reside in a medical institution and DHS has received verification that they cannot reasonably be expected to return home regardless of age.

However, based on the current guidance by CMS, DHS will not file an MA lien on real property owned by an MA recipient who receives MA payment for LTC services and who was determined eligible for MA LTC using the MAGI income methodology.

This does not change how the counties process their lien paperwork for purposes of sending them to DHS for placement of a lien on real property. Counties should continue to send all MA and NPC lien worksheets they believe are applicable to any given recipient.

2. Clarification to the Statement of What Constitutes an Undue Hardship in Attachment A:

Attachment A, in subsection 1 of the “Notice of Claim and Application for Waiver Claim”; item c (page 3 of attachment); reads as follows:

- The county’s estate claim...

OR:

- The county’s estate claim could not be paid except by the sale of the decedent’s real estate subject to the probate proceedings for which all of the following are true:
 - The waiver applicant actually and continuously occupied the real estate as his or her only dwelling place for at least 180 days prior to the date of the decedent died and continues to do so from the date through the date the waiver is finally granted;
 - And the waiver applicant has and had an ownership interest in the real estate prior to the death of the decedent;
 - And the real estate for which the waiver is requested was classified as homestead property for property tax purposes as described by Minnesota Statutes, section 273.124, throughout the entire period of time as referenced in the bullet above.

See the revised Attachment A in this Bulletin

Legal References

United States Code, Title 42, Section 1396p

Minnesota Statutes, section 256B.15

Americans with Disabilities Act (ADA) Advisory

This information is available in accessible formats for people with disabilities by calling (651) 431-4671 (voice) or by using your preferred relay service. For other information on disability rights and protections, contact the agency's ADA coordinator.

Attachment A

The following suggested procedure assumes that the county has already filed a claim in the estate of the MA recipient or in the estate of the recipient's surviving spouse as described by Minnesota Statutes, section 256B.15, subd. 1a.

Definitions

Heir - A person who is entitled to all or a portion of the decedent's property under the laws of the State of Minnesota when the decedent dies without a will.

Devisee – A person receiving property by will.

Reasonable Diligence – The diligence commonly expected from, and ordinarily exercised by a person to satisfy a requirement or to discharge an obligation.

Decedent – The medical assistance recipient who has died or community spouse who has died.

Personal Representative – A person who manages the legal affairs of another because of death.

Identifying Decedent's Heirs and Devisees Using Reasonable Diligence

1. Make a reasonable effort to identify the names and current addresses of as many of the decedent's heirs or devisees as possible.

For example, in the case where a personal representative must search for creditors, the court has identified a reasonably diligent search in the following manner:

A reasonably diligent search does not require extensive search. It must be a good faith search with proper motives within the bounds of reasonable judgment. *In re Estate of Thompson*, 484 N.W.2d 258 at 261, (Minn.App. 1992).

A county must make reasonable efforts to learn the names and current addresses of each of the decedent's heirs and devisees. If the county cannot identify an heir or devisee after applying reasonable efforts it does not have to send that person the notice of the claim or notice of their right to apply for a hardship waiver.

If the county identifies an heir or devisee but cannot determine the person's current mailing address, the notice of claim should be sent to the last known address requesting that it be forwarded and that an address correction be given to sender.

2. What is a reasonable effort?

Attachment A

Reasonableness varies based on the given situation. However, in most cases, the county should review the following sources:

a. The probate file

The decedent's probate file will usually contain a list of names and addresses of all the heirs and devisees. Additionally, a file should contain the name, address, and telephone number of the personal representative and the attorney for the personal representative. If the probate file does not contain this information, or if the information is incomplete, call the attorney for the estate and ask for the information. The personal representative for the estate may also be able to provide this information.

The county is required to give notice to all identifiable heirs and devisees.

b. The recipient's file

The recipient's file will often contain the names, addresses, and telephone numbers of the decedent's authorized representative, family members, or relatives. These persons may be able to supply the needed information.

c. The county database

The county's database will often contain the names, addresses and telephone numbers of the decedent's authorized representative, family members, or relatives. These persons may be able to supply the needed information.

3. Document the county's efforts to obtain the names of all devisees and heirs.

Document all of the county's efforts to identify the names and current addresses of each of the decedent's heirs and devisees in the claim file for the decedent. The county should retain such documentation especially if the efforts are not successful. This documentation will serve as proof the county used reasonable diligence to identify the decedent's heirs and devisees.

Notice of Claim and Application for Waiver of Claim

1. What a Notice of Claim should contain.

a. A Statement of the Claim.

Attachment A

The Notice of Claim (Notice) should contain a statement that the county has filed a claim under Minnesota Statutes, section 256B.15 in the decedent's estate to recover amounts paid for MA to or on behalf of the decedent or the decedent's predeceased spouse.

b. Notice of Right to Apply for a Hardship Waiver.

An applicant for a hardship waiver must be an heir or devisee. The Notice should contain a statement that the applicant has a right to apply for a waiver of the claim if recovery would cause them an undue hardship. An applicant must personally benefit from the Application for waiver of Claim (waiver). If an applicant does not personally benefit from a waiver, the county shall not grant a waiver.

c. A Statement of What Constitutes Undue Hardship.

An undue hardship exists when the circumstances described in either of the following exist:

- The county's estate claim cannot be paid except by the sale of real or personal property subject to the probate proceedings for which all of the following are true for a period of at least 180 days prior to the date of the decedent died and from that date through the date when a hardship waiver is granted:
 - The assets are used by the waiver applicant to produce income in his or her trade, profession, or occupation; and
 - The assets are a necessary part of the waiver applicant's trade, profession or occupation; and
 - The trade, profession or occupation in which the assets are used is the waiver applicant's sole source of income; and
 - The waiver applicant has worked continuously and exclusively in the trade, profession or occupation in which the assets are used.

OR:

- The claim could not be paid except by the sale of the decedent's real estate subject to the probate proceedings for which all of the following are true:
 - The waiver applicant actually and continuously occupied the real estate as his or her only dwelling place for at least 180 days prior to the date the decedent died and continues to do so from that date through the date the waiver is finally granted;
 - And the waiver applicant has and had an ownership interest in

Attachment A

the real estate prior to the death of the decedent;

- And the real estate for which the waiver is requested was classified as homestead property for property tax purposes as described by Minnesota Statutes, section 273.124, throughout the entire period of time as referenced in the bullet above.

An undue hardship does not exist if the following circumstances are present:

- If the decedent took any of the following actions and the waiver applicant's circumstances are related to or a consequence of those actions, the circumstances of the waiver applicant does not constitute an undue hardship:
 - Actions which divested or diverted assets in order to avoid recovery of amounts advanced on behalf of the decedent or the decedent's spouse for medical assistance from the decedent's estate; or
 - Action which divested or diverted assets with the result or effect that amounts advanced on behalf of the decedent or the decedent's spouse are wholly or partially unrecoverable from the decedent's estate.

2. Procedures and Instructions for Filing an Application for an Undue Hardship Waiver.

The Notice must:

- Describe the procedure for applying for waiver
- Describe the contents of the application
- Require application for waiver be in writing
- Direct applicant to return waiver to a specific person or unit
- Specify the number of days a waiver must be received from the filing of a Notice of Claim

3. Contents of the Application for a Waiver of Claim.

At a minimum the application should include the following:

- Name of decedent
- Name and probate number of the estate (if applicable)
- County in which probate is pending (if applicable)
- County's case name and file number (if applicable)
- Name, address, home and business telephone numbers of the waiver applicant
- Name, address, telephone number of any person or firm representing the applicant
- Statement that applicant would personally benefit from a waiver
- Statement of the circumstances the applicant believes constitute an undue hardship

Attachment A

- Identification of any documentation applicant should attach
- Application should be signed and dated by the applicant

4. The Time Frame in Which Application Must be Made.

The notice should clearly state:

- The application must be received by the county or postmarked within 30 days of the date of the Notice, whichever is later.
- That persons who do not make their application within that period of time will give up their right to apply for and receive a waiver.
- The time period for filing the application should begin running on the date of the Notice.

5. The Time Frame Within Which a Determination Will be Made on the Application.

- The notice should contain a statement that the county will make a determination as to whether or not and to what extent it will grant the application.
- The determination will be made within 30 days of the date it receives application.
- The county may provide for the option to extend the determination period if it finds it necessary to do so.

6. Information Regarding Appeal Rights and Procedure.

- The notice should clearly state the applicant has the right to appeal the county's determination.
- Instruction on how to file an appeal should be included in the determination letter sent by the county.

Sending the Notice of Claim

- The notice of claim may be sent to each heir or devisee by ordinary first class mail.
- The individual mailing the notice must complete an affidavit of mailing.
 - The affidavit will serve as proof of compliance with the notice requirements and the date on which the time period for filing a waiver application begins.
- The county should keep a complete copy of the notice of claim it sends to each heir or devisee for its file and a copy of the affidavit of mailing.

Review and Determination of the Application for Waiver

1. Counties should have a procedure for reviewing application for waivers.

a. Counties should have the following procedures:

- Receipt and logging of waivers

Attachment A

- Review of waivers
- Responses to waivers

2. Counties should have a procedure for issuing determinations.

a. Counties should have the following procedures:

- How to issue a determination within 30 days
- Guidelines for extending the response time for a determination

b. Minimum guidelines for determinations:

- The determination decision should
 - be in writing
 - be addressed to the applicant or the applicant's attorney
- Summarize the basis for the request
- State the county's decision
- State the reasons for the county's decision
- Contain all necessary information regarding the applicant's rights to appeal and the procedures for doing so.

c. Minimum guidelines for delivery of a determination:

- A determination should be sent to the applicant or the applicant's attorney by certified mail, return receipt to the address shown on the waiver application.
- The person sending the determination should complete an affidavit of mailing.
- The affidavit will serve as proof that a determination was mailed if the return receipt is not received.
- The return receipt will serve as proof of the date on which the determination was received and the date on which the period to file an appeal began.
- A copy of the determination, the return receipt, and the affidavit of mailing should be retained for the file.

3. The County's decision.

The county may decide to grant or deny an application entirely. In some cases it may not be necessary to grant the application in full in order to avoid undue hardship. In these cases the county may grant the application and waive its claim to the extent necessary to avoid an undue hardship and deny the rest of the application. The county will then proceed with the portion of its claim as to which it has refused to grant the waiver.

Appealing the County's Determination

Attachment A

- If the applicant disagrees with the county's decision, the applicant has a right to appeal.
- The applicant can appeal the county's determination to the Appeals Office of the Minnesota Department of Human Services in St. Paul, Minnesota. The appeal process and procedures are those described in Minnesota Statutes, sections 256.045 and 256.0451.
- The county must defend its decisions at the state's fair hearing.

Collection of Claims in Probate

1. Collection from an Estate

To the extent an estate claim is allowed in probate and to the extent there are sufficient assets, the personal representative will pay the claim from the estate's assets as part of the process of administering the estate.

2. Collection from Heirs or Devisees

When the county does not grant an undue hardship waiver of its claim and the estate's heirs or devisees wish to satisfy the claim without selling non-liquid assets subject to recovery, the county can establish a reasonable payment schedule and charge a reasonable rate of interest on unpaid balances.

If the county makes an agreement for an heir or devisee to pay the claim in installments this agreement should be in writing.

The writing should contain:

- All the terms of the agreement
- A payment schedule
- The rate of interest
- Specify default events
- Specify remedies for default
- The collateral which the heir or devisee has subject to the agreement

3. Other Collections

There are multiple types of collections. Should the county need to establish other procedures to collect MA counties should establish such procedures.

Reference

Below are links to suggested forms to use for the Waiver process:

- a. [Application for a Waiver of Claim](#) (Newly revised)
- b. [Determination of Waiver Request](#) (Requestor)

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- c. [Determination of Waiver Request](#) (Attorney)
- d. [MHCP Hardship Waiver Request for Information](#) (Newly revised)
- e. [Affidavit of Service](#)
- f. [Affidavit of Service by Certified Mail](#)
- g. [Affidavit of Service By Personal Service](#)
- h. [Notice of Claim for Medical Assistance](#)