

STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT

STATE Alabama

Liens and Recoveries

Citation

FR 43647,
October 1, 1982
42 CFR 433.36
AT-82-29

(a) The process by which the State will determine that an institutionalized individual cannot reasonably be expected to be discharged from the medical institution (SNF or ICF) and return home will be based on the following:

- (1) The agency will notify the individual through a written notice which explains what is meant by the term "lien," and that imposing a lien does not mean that the individual will lose ownership of the home. The notice explains by whom and on what basis the determination that the individual cannot reasonably be expected to be discharged from the institution will be made. (The determination process is herein after described).

Information concerning the process by which an individual will be given the opportunity for a hearing is provided through the aforementioned notice, and through a written Notice of Action (which notice will be sent at least ten days in advance of the date of action). These written notices inform the applicant/recipient in writing of his right to a hearing; of the method by which he may obtain a hearing; that he may represent himself or use legal counsel, a relative, a friend or other spokesman. These written notices inform the applicant/recipient that the agency will grant an opportunity for a hearing to any applicant/recipient or his legally appointed representative

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or other authorized person who files a written request within 60 days following the action with which he is dissatisfied. These written notices inform the applicant/recipient that benefits may continue pending the outcome of the hearing unless there are unnecessary delays by the person or his representative when a hearing is requested within 10 days from the date of the action.

The request for the hearing may be dismissed if the applicant/recipient withdraws the request in writing; or the applicant/recipient fails to appear at a scheduled hearing without good cause.

Upon receipt of the written request, the hearing is scheduled for a reasonable date, time and place. At least 10 days advance notice of the hearing date will be given. The applicant/recipient, or his representative is informed in writing of the opportunity to examine the content of the applicant or recipient's case file, and all documents and records to be used by the state or local agency at the hearing, bring witnesses, establish all pertinent facts and circumstances, present an argument without undue interference, and question or rebut any testimony or evidence, including

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- opportunity to confront and cross-examine adverse witnesses.
- (2) The process by which the state agency will determine that an individual cannot reasonably be expected to be discharged from the medical facility (SNF or ICF) is as follows.

The agency will send a form to the individual's personal physician requesting the physician's opinion, based on his/her medical condition, as to the individual's actual probability of permanent institutionalization. That form will also request the physician's opinion as to whether the individual can reasonably be expected to be discharged from the nursing facility and return home. That form will also ask the physician to support his/her opinion with a statement of the individual's diagnosis, prognosis and other relevant medical data. The agency's initial determination will be based upon the physician's report.

If the physician's opinion is that the individual cannot reasonably be expected to be discharged and return home, then the Agency may require a lien from the individual. This individual will be notified in writing of this determination. If the

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individual disagrees with this determination, he/she may submit to the agency any credible medical evidence that the individual can reasonably be expected to be discharged and return home, and it will be accepted and considered by the State Agency.

Further, an actual absence from the home will not be considered temporary if the individual has been in the institution for a period in excess of 12 months, although this is a rebuttable presumption.

Each case will be considered individually on its merits. Any adverse decision can be appealed through the State's fair hearing process as described herein above.

No liens or encumbrances of any kind are required from or imposed against the property of an individual because of Medicaid claims paid or to be paid on his or her behalf except as permitted under 42 CFR 433.36. The State may require a lien against the real property of an individual described in paragraphs B.2. and/or B.7. of Attachment 2.2-A of the State Plan who is a patient in a SNF or ICF, if the State has made a medical determination that the individual cannot reasonably be expected to be discharged from the facility and return home; and has determined that the applicant/

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recipient has no spouse, child under age 21, blind or disabled child lawfully living in the home; and has determined that there is no sibling of the applicant/recipient with an equity interest in the house and who was residing in the home for at least one year immediately before the date the applicant/recipient was admitted to the medical institution, lawfully living in the home. See Attachment 2.6-A for Eligibility Conditions or Requirements. In any event no lien will be imposed or required except as allowed by §1917 of the Social Security Act, as implemented in 42 C.F.R. §433.36.

There is no adjustment or recovery of Medicaid claims correctly paid, except as permitted under 42 CFR 433.36.

(b) For the purpose of this rule:

- (1) "Home" is defined as any shelter in which the individual (or spouse with whom the individual lives) has an estate or ownership interest and which is used by the individual (and spouse, if any), as his principal place of residence, and includes a mobile or modular home located on realty in which the individual has an estate or ownership interest. A home will be limited to the actual dwelling, plus any noncommercial outbuildings plus up to five contiguous acres as a curtilage.

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- (2) "Equity interest in the home" is defined as any estate in real property which is cognizable under the laws of the State of Alabama in the homeplace under consideration.
- (3) "Residing in the home for at least one (two) year(s)" refers to:
- i. "A sibling of the applicant/recipient" (who is residing in the applicant's or recipient's home for at least one year immediately before the date of the applicant's/recipient's admission to the medical institution) is defined as one who is lawfully residing in the home on a continuous basis since the date of the individual's admission to the medical institution;
 - ii. "Son or daughter of the applicant/recipient" is defined as one who was residing in the home for at least two years immediately before the date the individual was admitted to the medical institution, who establishes to the satisfaction of the State that the care that he or she provided during these two years permitted the individual to live at home rather than in an institution and is one who is lawfully residing in the home on a continuous basis since the date of the individual's admission to the medical institution (SNF or ICF).

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- (4) On a "continuing basis" is defined as lawfully residing in the applicant's/recipient's home with an absence from the home not to exceed seven days per calendar month since the date of the applicant's/recipient's admission to the medical institution. This "seven-day rule" is a rebuttable presumption. Exceptions for involuntary absences or clearly temporary absences will be considered on a case-by-case basis. Examples: an involuntary absence would be a stay in a hospital of over 7 days' duration; and a clearly temporary absence would be an absence of over 7 days' duration for a vacation or the like. Each absence of over 7 days' duration will be judged individually. Adverse decisions can be appealed through the State's fair hearing process (which is described hereinabove).
- (5) "Discharge from the medical institution and return home" is defined as a discharge based on the approval of the attending physician in accordance with the discharge plan, and as actual residence at the home on which the lien was placed for at least 120 continuous hours following discharge from the medical institution.

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- (6) "Lawfully residing" is defined as living in the home as the principal place of residence under a legal right to do so with the full knowledge and consent of the applicant/recipient.
- (c) The State will foreclose upon a lien only when there is no spouse or child under age 21 (or blind or disabled) lawfully residing in the home; there is no sibling of the applicant/recipient who was residing in the applicant's/recipient's home at least one year immediately prior to the date of the applicant's/recipient's admission to the medical institution (SNF or ICF) and who is lawfully residing, in the home on a continuous basis since the date of the applicant's/recipient's admission to the medical institution; and there is no son or daughter of the applicant/recipient who was residing in the home for at least two years immediately prior to the date of the applicant's/recipient's admission to the medical institution, who establishes to the satisfaction of the State that the care that he or she provided during these two years permitted the applicant/recipient to live at home rather than in an institution, and who is lawfully residing in the home on a continuous basis since the date of the applicant's/recipient's admission to the medical institution.

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A son or daughter can establish to the agency's satisfaction that he or she has been providing care which permitted the individual to reside at home rather than in an institution (SNF or ICF) by providing the agency with convincing evidence that establishes that fact.

- (7) The State defines "estate" as: An estate consists of real and personal property and other assets as defined by Alabama probate law.
- (8) The State defines "undue hardship" as: The existence of a situation, established by convincing evidence, that the estate subject to recovery is an asset such as a family farm or family business which produces limited income and is the sole income-producing asset of one or more heirs to the estate. The State will waive recovery while such a situation exists. An undue hardship waiver is not available: (a) for individuals with long term care insurance policies who became Medicaid eligible by virtue of disregarding assets because of payments made by a long term care insurance policy or because of entitlement to receive benefits under a long term care insurance policy; or (b) where an individual has created the claimed hardship by resorting to estate planning methods under which the individual illegally divested assets in order to avoid estate recovery.
- (9) The State defines "cost-effective" as: A situation where the State determines that the amount to be recovered exceeds the cost of recovery. The State will determine cost-effectiveness on a case-by-case basis, based on such factors as: the size of the estate; the amount of the State's claim; whether an estate has already been opened by an heir or other creditor; the expected amount of fees for appraisals, filings and other items; and other anticipated legal and administrative costs.

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