

CALIFORNIA ADVOCATES FOR NURSING HOME REFORM

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July 24, 2006

Office of Regulations
Department of Health Services
MS 0015
P.O. Box 997413
Sacramento, CA 95899-7413
By FAX and email: (916) 440-7714
regulation@dhs.ca.gov

Re: Comments on Estate Recovery Regulations, R-14-04

Dear Sir/Madam:

These comments are submitted on behalf of California Advocates for Nursing Home Reform. Please note that by making these comments California Advocates for Nursing Home Reform does not waive any right it may have under California or federal law to challenge these regulations.

Suggested changes are bolded and/or underlined.

1. Section 50961 (a) (2)

This section does not conform with federal law or the previous regulations and should read:

(2) The decedent's equity interest in the property **at the time of death (to the extent of such Interest).**

2. Section 50961 (d):

We recommend that "***Subject to Section 50966(a)***" be deleted. If in fact a child of a deceased Medi-Cal beneficiary has sent notice of death and adequate documentation on a timely basis, then the claim must be withdrawn.

Currently, the Estate Recovery Unit has taken anywhere from six to fourteen months to respond to hardship waiver requests, despite the fact that the current regulations require them to respond with a decision within ninety (90) days of submission of the hardship request. Adding this 'exception' to a prohibition that is mandated by federal law not only invites litigation, but also is disingenuous given the Estate Recovery Unit's record of response to applicants.

Further, we recommend that the added language, “**provide an exemption of the claim**” be deleted and the original language “**shall not make a claim**” be retained. The state statute, Welfare and Institutions Code §14009.5, is quite clear. The Department “may not claim” under certain specified circumstances. There is no authority in the statute for the Department to “provide an exemption.”

The difference is substantive and not merely formal. It appears that the Department is trying to shift the burden of proof onto the successor of the decedent. To the contrary, the Department is prohibited from making any claim under the statutory circumstances described, regardless of whether or not the successor meets the burdensome evidentiary requirements the Department proposes.

3. Section 50961(d)(3) and (4):

Although the Department, in its Initial Statement of Reasons, indicates that it has permission from a staff member at Region IX of CMS to require that disability must be established... *“as of the date of the Department's notice of claim,”* it is doubtful that CMS is aware that the Department is permitted up to three years to file a claim in the case of non-probated estates, which constitute sixty percent (60%) of the Department's claims. The Department should amend the notification requirements in Section 50962(c) to incorporate a four-month response time.

Without an obligation on the Department to file a claim within a reasonable amount of time for all estates, using the date of the notice of claim, in conjunction with Section 50966 (a), allows the Department years to delay due process to a disabled child of a deceased beneficiary. Because a disabled child is more likely to die prematurely, these regulations have created a scenario in which the Department can only benefit from such delays.

Further, whether or not the Department has any such permission from a staff person at CMS, the Department is still subject to Welfare and Institutions Code §14009.5. Again the state statute is quite clear. The state statute says that the Department “*may not claim . . . where there is any of the following: . . . (B) A surviving child who is under age 21, (C) A surviving child who is blind or permanently and totally disabled.*” It seems fairly clear that “a surviving child” means a child who survives the death of the decedent, a former Medi-Cal beneficiary. It seems equally clear that at the time of decedent’s death, he or she either does or does not have such a child. In other words, the existence of a “surviving child” is determined *at the moment of decedent’s death.*

4. 50961 (h):

Proposed §50961(h) does not exclude annuities purchased and owned by third parties on the life of the decedent. Without such a limitation, the Department’s attempt at recovery will probably amount to an unconstitutional taking and resulting litigation.

Nor does this section expressly exclude life insurance policies and retirement accounts that do not revert to the estate or name the state as a beneficiary. This omission will lead to confusion

and error and should be amended to specifically exclude these insurance and retirement arrangements.

5. Section 50961 (i):

We appreciate the Department's deletion of the provisions in subsection (i), regarding irrevocable transfers of remainder interests in property where the decedent retained a life estate. However, by simply deleting the irrevocable life estate provisions in subsection (i), the Department has now simply omitted to address the issue. Omitting language that addresses the most common life estate arrangements (while the most obscure arrangements are treated in depth) is very likely to cause confusion and uncertainty. The Department should replace the earlier language with new language that actually addresses the issue.

From our understanding of the statement of reasons for this change, we suggest that this subsection would read more clearly if the following language were added to the beginning of subsection 50961(i):

The Department's claim shall not apply against a life estate or the remainder interest where the decedent made an irrevocable transfer of a remainder interest in property with a retained life estate.

6. Section 50961 (j):

The current language in this section is legally incorrect. The Department does not claim against "transfers." It claims against property interests. This language should instead read:

The Department may not claim against property interests that the decedent irrevocably transferred before his or her death.

7. Section 50961(l) - interest

The interest should run - not from the date of the claim - **but from the date the amount of the claim is finally determined, i.e., when it becomes a liquidated, final amount.** The department has made numerous errors in establishing the amount of the claim, and the regulations still do not include a procedure to challenge the amount of the claim. Yet, these regulations would charge interest on the claim "from the date of the claim or the date of distribution, whichever is later." Charging interest on an incorrect amount of claim would be illegal. Which amount is the Department planning to use if the claim amount as of the date of the claim is incorrect or is incorrect as of the date of distribution?

Nor are consumers informed through regulations or otherwise as to how to correct an error in the claim amount. We recommend that the regulations include such a procedure rather than leave it vague, uncertain, and unpredictable.

8. Section §50962 (c). Notification.

See comments in #3 above. Again, it is imperative that the Department, particularly relative to minor and disabled children, establish a timeline for the filing of claims. In probate proceedings and in trust administrations, Probate Codes §§9202 and 19202 require the Department to file a claim within four (4) months after notice of death is given. No such timeline exists for non-probated estates, and the Department can take up to three years to file a claim. Thus, the Department could wait three years to file a claim after a minor, blind or disabled child sent notice of death. A minor child would no longer be a "minor." A disabled child could be dead. We recommend that this section be amended as follows:

(c) The Department shall provide written notice to the person handling the decedent's estate **within four (4) months of receipt of notice of death**, which includes the following:

9. Section 50966 (a):

As previously noted in comment #2, this exception to a mandated federal prohibition is contrary to federal law and invites litigation, particularly in view of the Department's history of delays in responding to applicants and consumers and the lack of any timeline for determinations of disability. The Department cannot wait until a minor, blind or disabled child dies and then enforce a recovery claim.

In the initial statement of reasons, the Department notes that the public should be assured by the fact that a determination of disability by DSS will result in the claim being "deemed withdrawn" as of the date of determination of disability. However, this is cold comfort to disabled applicants who must wait months before such a disability determination, as the regulations do not include any timeline for determination of disability. Nor is it a comfort to those applicants who receive SSA disability, as their fate rests solely on the discretionary timelines of the Estate Recovery Unit. This section should be deleted. It is illegal.

10. Section 50966(b)(1):

The requirement that an applicant produce a copy of an SSI or SSA "award" letter (which could have been issued decades earlier) is unrealistic, unnecessary and creates a burden that exceeds federal requirements. Submission of a copy of any correspondence from the Social Security Administration that reflects the applicant's proof of disability or verification of disability benefits should be acceptable.

11. Section 50966(f):

The regulations should incorporate a "**good cause**" exception into this section, as the applicant should be able to show that he/she was hospitalized or otherwise unable to respond in a timely basis for a good cause. After all, these regulations are directed to young children, who may or may not have adequate representation, and to disabled individuals, who are prone to illnesses and may be unable to respond within the normal time limits because of their disability.

12. Section 50966(g):

These regulations limit DSS disability determinations to those children whose "incomes" do not exceed the federal Substantial Gainful Activity (SGA) limit, and precludes those whose incomes exceed that amount. The Initial Statement of Reasons refers to the federal SGA limit and notes:

"To be determined disabled for purposes of exemption of an ER claim, a person must be unable to engage in SGA. A person who is earning more than a certain monthly amount is ordinarily considered to be engaging in SGA. The amount of monthly earnings considered as SGA depends on the nature of a person's disability." (emphasis added)

The drafters of these regulations don't seem to understand that SSA disability has nothing to do with the applicant's total "income", but looks at "earned" income. For example, a recipient of Social Security disability benefits (SSA) could have an unearned income well over the SGA from a trust or investments. Only his or her ability to obtain earned income is a legitimate component of a disability determination. "SGA" refers only to income from Gainful Activity, i.e., earnings. The federal estate recovery statute clearly says that meeting the SSA definition of disability is sufficient to bar estate recovery. Nevertheless, the Department's proposed regulations now appear to add an unauthorized and unlawful additional requirement: that the disabled person's *total* income (both earned and unearned) be below the SGA limit. This is a mistake, and the Department must amend its proposed regulation to limit the income considered to earned income to comply with federal law.

As written, these regulations prohibit children who are aged (65+) and disabled and who are not otherwise eligible for SSA or SSI from asserting an exemption. Any disabled child who is 65 years of age or over will not, despite how many times they apply, be eligible for SSA or SSI disability benefits. They can only be eligible on the basis of age. Yet, they may well meet the criteria for disability even though their income is above the SGA. We suggest that, in the case of all applicants who are 65 or over and who have not previously received SSA or SSI disability benefits, the disability determinations should be referred to DSS.

Other disabled children may be ineligible for SSA/SSI benefits because of inadequate payments of quarters or because their incomes exceed the SGA, yet they may well meet the criteria for disability. The regulations require that a child whose income exceeds the SGA limit must apply for disability benefits from the SSA. The Department will recognize the disability exemption only if "benefits are approved" by SSA. This proposed regulation violates the Social Security Act, because it makes the disability exemption dependent on eligibility for SSDI or SSI. This is not the law.

Title 42 U.S.C. § 1396p(b)(2) exempts disabled children from recovery when they meet the definition of disability found in 42 U.S.C. § 1382c. Section 1382c is simply a definitional section describing the qualifications for disability, including inability to engage in substantial gainful activity, among other things. Title 42 U.S.C. 1382 sets out the criteria that are used in determining eligibility (ie. qualification) for benefits. A person can meet the definition of disabled, without qualifying for benefits. Under the

Department's proposed regulation a child would need to meet the definition and be found eligible. Section 1396p(b)(2) only requires that he or she meet the definition.

Among the materials relied upon in the Initial Statement of Reasons is the 1999 Medicaid Review Report of the TPL by The Centers for Medicaid and Medicare Services (CMS). This report stated very clearly and numerous times:

In determining exemptions from recovery on the basis of disability, the State must follow the criteria and the procedures for determining disability as specified in Federal law and regulations, including Section 1614 of the Social Security Act (the Act) and Federal regulations at 42 CFR 435.541 and 20 CFR 416 Subparts I and J.

Whether or not an individual is receiving disability benefits through the Social Security Administration (SSA), California must apply the same criteria and procedures for disability specified above in determining exemption from estate recovery on the basis of disability.

Despite these directions from the federal agency, these regulations do not state that disability will be determined in accordance with the criteria and procedures for disability as specified in federal law and regulations; they do not include a deadline for final determination of disability; and they incorporate income standards that are contrary to federal law.

We suggest that the Department revise its proposed regulations pursuant to DSS disability determinations for the purposes of estate recovery. Otherwise, it will be vulnerable to litigation for failure to comply with the federal law.

Thank you for consideration of these comments

Sincerely,

Patricia L, McGinnis
Executive Director