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CLEARINGHOUSE RULE 94-188

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated October 1994.]

1. Statutory Authority

a. Section HSS 108.02 (10) (a) provides that one of the occasions when the amount of Medical Assistance (MA) paid is to be recovered is “while the recipient was an inpatient in a *hospital* and was required to contribute to the cost of care” (emphasis added). However, s. 49.496 (3) (a) 1, Stats. (as amended by 1993 Wisconsin Act 437), requires recovery “while the recipient was an inpatient in a *medical institution* and was required to contribute to the cost of care” (emphasis added). What is the basis for limiting recovery to those situations in which the MA recipient was in a hospital as opposed to in a medical institution?

b. The last section of the proposed order indicates that the rule will take effect on the first day of the month following publication in the Administrative Register. The proposed order implements 1993 Wisconsin Act 437, which increases the number of services funded under the MA program for which recovery from a decedent’s estate must be sought and which creates the hardship waiver provision. However, 1993 Wisconsin Act 437 specifies that these provisions become effective April 1, 1995 and apply to recoveries from estates of MA recipients who die on or after that date for MA services provided on or after that date. [See SECTIONS 9326 (2g) and 9426 (9) of 1993 Wisconsin Act 437.] The effective date provision of the proposed order does not take into account these statutory limitations and must be revised to do so.

Moreover, because of the complexity of these statutory provisions and their applicability to most, but not all, of the proposed order [for example, they do not apply to the nursing home provision in s. HSS 108.02 (10) (a)], these effective date and initial applicability provisions also should be explained in the text of s. HSS 108.02 (10) and (12) or in notes following these subsections.

c. Section 49.496 (6m), Stats. (as created by 1993 Wisconsin Act 437), provides that the Department of Health and Social Services (DHSS) is to establish standards for determining whether pursuing a lien or estate recovery would “work an undue hardship in individual cases.” Section HSS 108.02 (12) (b) 1 allows only a “relative” or “heir” of a decedent to apply for a hardship waiver. If a decedent had a valid will, the persons nominated in the will to receive an interest in property in other than a fiduciary capacity are “beneficiaries.” A beneficiary may or may not be a relative. Even if a beneficiary is not a relative, he or she may be subjected to undue hardship if DHSS attempts to recover from the decedent’s estate. What is the statutory basis for excluding a beneficiary of a decedent’s estate from the hardship waiver provisions unless he or she is a “relative” as defined in s. HSS 108.02 (12) (a) 4? [See the definitions of “beneficiary” in s. 851.03, Stats., and “heir” in s. 851.09, Stats.]

2. Form, Style and Placement in Administrative Code

a. The analysis omits a description of the provision of 1993 Wisconsin Act 437 related to expanding the estate recovery provisions to the amount of MA paid while a recipient was an inpatient in a medical institution and required to contribute to the cost of care. This provision is included in the rule. As other provisions of 1993 Wisconsin Act 437 that are included in the rule are explained in the analysis, an explanation of this provision also should be included in the analysis.

b. Statutory subunits that follow introductory material should end with periods rather than semicolons. This facilitates insertion or deletion of subunits in the future. [See s. 1.03 (intro.), Manual.] Thus, s. HSS 108.02 (10) (b) 1. a. to c. and 2 to 6 should end with periods.

c. In s. HSS 108.02 (12) (b) 1, “2. a.” should replace “2 a” in two locations.

4. Adequacy of References to Related Statutes, Rules and Forms

In s. HSS 108.02 (12) (d) 1. b., the reference to “par. (b)” should be to “par. (b) 2. a. or b.”

5. Clarity, Grammar, Punctuation and use of Plain Language

a. In the treatment clause of SECTION 1 of the rule, a comma should be inserted between “(10)” and “(11).”

b. In s. HSS 108.02 (11), the phrase “ss. 49.496 and 867.035, Stats,” should be changed to “s. 49.496 or 867.035, Stats.”.

c. Section HSS 108.02 (12) (a) 4 provides that:

“Relative” means a son, daughter, grandson, granddaughter, stepson, stepdaughter, in-law, mother, father, stepmother, stepfather, grandmother, grandfather, aunt, uncle, sister, brother, stepbrother, stepsister, half sister, half brother, niece, nephew or cousin.

It would be preferable to use more generic terms such as parent, grandparent, child, grandchild, etc. Also, the meaning of “in-law” is unclear. It would be preferable to specify who

is included under this term, for example, parents-in-law, grandparents-in-law, brother-in-law, sister-in-law, etc. Does the term include the spouse of a niece or the spouse of a cousin?

Also, it is unclear whether all degrees of cousins are included. If they are, there appears to be no rational basis for not including other persons who are more closely related than a distant cousin, for example, great grandchildren or grand nephews or nieces.

d. In s. HSS 108.02 (12) (b) 1, it would be preferable to replace the phrase “the person handling the decedent’s estate” with a phrase that more clearly reflects the person’s legal status, such as “the personal representative or special administrator of the decedent’s estate.”

e. The department should clarify that a waiver under s. HSS 108.02 (12) (b) 2. b. extends only to the real property that is used in the waiver applicant’s business and not to other property in the decedent’s estate, if this is the department’s intent.

f. Section HSS 108.02 (12) (c) 1 provides that DHSS must include the hardship waiver notice with the claim that DHSS files with the probate court if DHSS cannot ascertain who is handling the decedent’s estate. Section HSS 108.02 (12) (c) 2 indicates that the individual receiving the notice under s. HSS 108.02 (12) (c) 1 is responsible for notifying the decedent’s relatives and heirs of the hardship waiver provisions. As it is unlikely that the probate court will undertake this duty, it is suggested s. HSS 108.02 (12) (c) 1 specify that when the notice is sent to the probate court, it shall be accompanied by a request that the court provide the notice to the personal representative or special administrator of the decedent’s estate.

g. Section HSS 108.02 (12) (c) 2 indicates that the individual receiving the hardship waiver notice under s. HSS 108.02 (12) (b) 1 is responsible for notifying *all of the decedent’s relatives and heirs* of the hardship waiver provisions.

The definition of “relative” in s. HSS 102.08 (12) (a) 4 is very expansive and includes many more people than are defined as “heirs” under the statutes of intestate succession, ch. 852, Stats. For example, the definition of “relative” includes in-laws, step-parents and step-siblings. Unless these people are nominated as beneficiaries in the decedent’s will, they have no claim on the decedent’s estate, and there appears to be no purpose served in requiring the person handling the decedent’s estate to send the hardship waiver notice to *all of these people*. Has DHSS considered requiring that this notice be sent as follows: (1) if the decedent had a will, to beneficiaries who are “relatives” [or to all beneficiaries (see comment 1, c)]; or (2) if the decedent did not have a will, to the decedent’s heirs?

h. It is unclear in s. HSS 108.02 (12) (d) 1. a. what documents a waiver applicant may submit to establish a relationship. A parent, child or spouse could submit a birth certificate or marriage license. What documents would be submitted by a cousin?

i. In s. HSS 108.02 (12) (d) 1. b., the reference to “the applicant’s” should be changed to “the waiver applicant’s” in order to use the defined term consistently.

j. In the Note following s. HSS 108.02 (12) (e) 1, the word “address” is misspelled.

k. In s. HSS 108.02 (12) (f), “a” should precede the first occurrence of “hearing.”