

# DEPARTMENT OF HEALTH AND SOCIAL SERVICES

## DIVISION OF MEDICAID AND MEDICAL ASSISTANCE

Statutory Authority: 31 Delaware Code, Section 512 (31 **Del.C.** §512)

### FINAL

### ORDER

#### Irrevocable Funeral Arrangements and Burial Trusts

##### Nature of the Proceedings:

Delaware Health and Social Services ("Department") / Division of Medicaid and Medical Assistance (DMMA) initiated proceedings to amend existing rules in the Division of Social Services Manual (DSSM) used to determine eligibility related to irrevocable funeral arrangements and burial trusts. The Department's proceedings to amend its regulations were initiated pursuant to 29 **Delaware Code** Section 10114 and its authority as prescribed by 31 **Delaware Code** Section 512.

The Department published its notice of proposed regulation changes pursuant to 29 **Delaware Code** Section 10115 in the December 2007 *Delaware Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by December 31, 2007 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

##### Summary of Proposal

##### Statutory Authority

- House Bill #137, *An Act to Amend Title 5 of the Delaware Code Relating to Preneed Funeral Contracts*
- 5 **Del.C.** Ch. 34, *Preneed Funeral Contracts*

##### Background

Since January 30, 1992, Delaware law has allowed the establishment of irrevocable trust accounts for prepaid funerals. The irrevocable trust may represent all funds or any portion of payments made under the burial agreement, contract or plan.

##### Summary of Proposal

House Bill #137 with House Amendment 1 adds a new section that amends §3404(a) of Title 5 by increasing from \$10,000 to \$15,000 the amount of funds that may be placed in an irrevocable trust for a preneed funeral contract. The effective date is January 1, 2008. As such, DSSM 20340.5, *Irrevocable Funeral Arrangements* and DSSM 20400.12.2, *Burial Trusts* are revised to incorporate this mandatory provision.

##### Summary of Comments Received with Agency Response

The State Council for Persons with Disabilities (SCPD) offered the following observations and recommendations summarized below. DMMA has considered each comment and responds as follows.

As background, qualifying irrevocable prepaid funerals are generally deemed disregarded assets for purposes of meeting Medicaid resource limits. See, e.g., 16 **DE Admin. Code** 20310.8.5 which recites as follows:

A prepaid burial contract (sometimes funded by a life insurance policy) that cannot be revoked and cannot be sold without significant hardship is excluded.

In May 2007, the Legislature enacted H.B. 137 which increased the statutory limit on prepaid funerals from \$10,000 to \$15,000 effective January 1, 2008. DMMA is now proposing to amend its Medicaid regulations to

authorize a resource exemption of \$15,000 for conforming arrangements. SCPD endorses the proposed regulations since it expands resource exemptions for beneficiaries.

**Agency Response:** DMMA thanks you for the endorsement.

#### **Findings of Fact:**

The Department finds that the proposed changes as set forth in the December 2007 *Register of Regulations* should be adopted.

**THEREFORE, IT IS ORDERED**, that the proposed regulation to amend the Division of Social Services Manual (DSSM) related to the increase in the statutory limit on irrevocable funeral arrangements and burial trusts is adopted and shall be final effective February 10, 2008.

Vincent P. Meconi, Secretary, DHSS, January 1, 2008

#### **DMMA FINAL ORDER REGULATION #08-01 REVISION:**

##### **20340.5 Irrevocable Funeral Arrangements**

Effective January 30, 1992, Delaware law allows the establishment of irrevocable trust accounts for prepaid funerals. The irrevocable trust may represent all funds or any portion of payments made under the burial agreement, contract or plan. The principal sum (excluding accrued interest) may not exceed \$5,000. Effective ~~March 22, 1996~~ January 1, 2008 the principal sum may not exceed ~~\$10,000~~ \$15,000. Irrevocable trusts established under ~~Section 304~~ Title 5, Chapter 34 of the **Delaware Code** must contain the following mandatory provisions.

##### **20340.5.1 Irrevocable**

The trust must include a provision which expressly identifies the trust as irrevocable for the lifetime of the beneficiary.

##### **20340.5.2 Alternative Disposition**

The trust must include a provision for the alternative disposition of trust funds upon discontinuation of business or inability to provide goods or services in accordance with the terms of the trust.

##### **20340.5.3 Inadequate Funds**

The trust must include a provision which sets forth that in the event funds paid into the trust are inadequate, at the time of the death of the beneficiary, to cover anticipated funeral expenses, the trustee shall contribute all trust funds toward payment of the actual funeral expenses for the funeral of the beneficiary.

##### **20340.5.4 Excess Funds**

The trust must include a provision which sets forth that in the event the sum held by the trust exceeds the total actual costs of the goods and services for the funeral of the beneficiary, the excess funds shall be paid to the estate of the beneficiary.

##### **20340.5.5 Contributions to Trust**

The trust must include a provision which sets forth that the trustee may, from time to time, accept periodic monetary contributions to the trust, provided that the principal sum contributed, exclusive of interest earned, shall not exceed

~~\$10,000.00~~ \$15,000.00.

#### **20340.5.6 Maximum Amount**

The trust must include a provision which shall state "In no event shall the principal amount of the trust exceed ~~\$10,000.00~~ \$15,000.00 plus interest".

Once an irrevocable trust is executed in conjunction with a burial contract, the funds are not available to the buyer. Any written request for a refund of money is no longer an option. The irrevocable trust arrangement will offset the \$1500 burial allowance. This is effective for irrevocable trust arrangements executed on or after January 30, 1992.

#### ***(Break in Continuity of Sections)***

#### **20400.12 When Application Of The Trust Provisions Would Cause Undue Hardship**

20400.12.1 Undue Hardship

20400.12.2 Burial Trusts

##### **20400.12.1 Undue Hardship**

Undue hardship exists when application of the trust provisions would deprive the individual of medical care such that his/her life would be endangered. Undue hardship also exists when application of the trust provisions would deprive the individual of food, clothing, shelter or other necessities of life AND there are no State facilities available to take care of this individual in the absence of Medicaid eligibility.

##### **20400.12.2 Burial Trusts**

A burial trust is a trust established by an individual for the purpose of paying, at some point in the future, for the various expenses associated with the individual's funeral and burial. Irrevocable prepaid burial trusts that do not exceed ~~\$10,000~~ \$15,000.00 are exempted under the undue hardship policy.