

MEDICAID ESTATE RECOVERY IN VIRGINIA:
What to do when DMAS comes knocking at the door?

by

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I. **Introduction.** Created in 1965, Medicaid is a system funded and administered through a state and federal partnership. It pays the medical costs, including long-term nursing home care and community-based nursing care, for individuals who are deemed to be financially and medically needy. States have broad discretion with the administration of the program, and the eligibility and benefit rules vary significantly.

Medicaid recipients must have limited income and resources. Through various means, however, recipients occasionally die with financial resources or assets. It can occur as a result of an inheritance, personal injury settlement or award, ownership of the recipient's residence, or another unplanned economic windfall.

In 1993, the federal government mandated that states establish individual plans to recover Medicaid payments from recipients after they die¹ for nursing facility services, home and community based services and prescription drug services, or, at the option of the state, any items or services under the state plan.²

States have various levels of estate recovery programs in place. New Jersey aggressively attempts to recover against estates.³ In comparison, West Virginia implemented Medicaid estate recovery programs only after threats from the federal government and court action.⁴

¹ 42 U.S.C. 1396 p (b).

² 42 U.S.C. 1396 p (b)(I)(B).

³ N.J. Admin. Code Title 10 § 49-14.1.

⁴ *West Virginia v. U.S. Dep't of Health & Human Serv.*, 289 F.3d 281 (4th Cir. 2002).

II. **Billions and Billions.** The late Senator Everett Dirksen reportedly said, “A billion here and a billion there and pretty soon we’re talking real money.” For fiscal year 2020, the Commonwealth's entire projected expenditures are approximately \$62 billion. Of this amount, approximately \$15 billion is appropriated for the Department of Medical Assistance Services (“DMAS”), the administrator of Medicaid. It is the Commonwealth’s largest single line item and in excess of 24% of the budget! Of DMAS’ budget, in calendar year 2018, approximately \$2.9 billion was spent on long term health care in nursing facilities and provided by Medicaid certified caregivers in the recipient’s home (this sum includes Medicaid waivers such as DD Waivers). Therefore, 19.3% of the DMAS budget is set to be spent on nursing care. Obviously, there is a financial incentive to recoup some of those funds. In 2019, there were 24,236 individuals on Medicaid in nursing facilities in Virginia and 50,690 on community based care provided through Medicaid.

The Commonwealth has recovered and collected significant funds from estates and trusts. In fiscal year 2017, it collected \$2.6 million; in fiscal year 2018, it collected \$3.7 million; for the current fiscal year, to date, it has collected \$2.9 million. The administrative budget for the agency staff that handles the estate recovery program is approximately \$200,000 annually. However, the overall dollar amount recovered is scant and negligible when compared to the cost; the recovery is approximately 0.08% of the expenditures. The meager amount recovered is due to the fact that most Medicaid recipients die with little or no assets. The countable resource limit for a single individual receiving Medicaid nursing home benefits is \$2,000.00. For a married couple with both in a nursing home, the countable resource limit is \$3,000.00.⁵ For many Medicaid recipients, however, the potential to have available assets at death is possible because they have engaged in sophisticated financial and long term care planning. The amount collected

⁵ Medicaid Manual § M1110.003 B 2.

may be inconsequential when compared to the expenditures; however, DMAS is hoping there is growth on the upside.

For example, when an individual receives community based health care paid for by Medicaid and resides in his or her own home, the residence is not considered a resource that must be sold; however, when the recipient dies, the home *may* be an asset that is subject to a DMAS claim.

For the personal representative in the proper administration of a decedent's estate, the issue is potentially critical because the Commonwealth may be a creditor. The personal representative can have personal, and often unlimited liability if he or she does not administer the estate appropriately.

III. **Non-Fraud Recovery: We're Here For The Money.** DMAS is charged with administering Virginia's Medicaid program, and has incorporated an estate recovery program in the Virginia Medicaid Manual ("Manual"). The Manual is the handbook for Medicaid eligibility workers; it is approximately 1,300 pages and can be accessed at dmasva.dmas.virginia.gov/#/assistance. The Chapter M17 specifically addressing recovery is "Medicaid Fraud and *Non-Fraud* Recovery;" it is attached and marked as Schedule A.

To comply with the federal guidelines, the Virginia Code (the "Code"), and the Virginia Administrative Code ("VAC"), DMAS formed a "Third Party Liability / Estates" ("TPL") unit that falls under the Recipient Audit Unit. It investigates fraudulent and non-fraudulent receipt of Medicaid monies. DMAS can recover correctly and incorrectly paid benefits. DMAS "shall operate a program of estate recovery for all persons who receive payments or on whose behalf payments are made for Medicaid-financed nursing facility care."

DMAS may make a claim against the estate of an indigent person for the amount of any medical assistance payments made. Fortunately, the

amount recovered cannot exceed the amount of total Medicaid payments.⁶ Even though, your author could find no cases brought in the Commonwealth's Courts regarding Medicaid estate recovery by DMAS, TPL has become increasingly aggressive in pursuing collection against estates.

IV. **The Letter: Inquiring Minds Want To Know.** Notwithstanding that the statute grants TPL discretion in deciding whether to make a claim, in every estate of a deceased Medicaid recipient with which your author has dealt in the last 2-3 years, the "heirs," "the estate," or family members receive a form letter and "Deceased Member Information Form" from TPL. A copy of the form is attached and marked as Schedule B.

The letter usually is not addressed to a specific person who qualified as the personal representative of the estate; in fact, most times, no one has yet qualified – nor should they. The heir or family member should be particularly careful in completing this form. The letter is not, obviously, a "claim," nonetheless, DMAS (vis-à-vis TPL) is searching for estates in which to file a claim. Are the heirs or family members obligated to respond to TPL's investigation undertaken with the hope of discovering information? Your author is unaware of any such duty on the heirs or family members.

V. **The Personal Representative: To Qualify Or Not.** If an individual nominated as executor under the Last Will and Testament or an individual authorized⁷ to be granted Letters of Administration of an intestate recipient, should request to be qualified as the personal representative is a many faceted consideration. The amount of time necessary to complete the project and the complexity of the legal issues are just two factors. In the realm of

⁶ Va. Code § § 32.1-326.1 and 32.1-327.

⁷ Va. Code § 64.2-502.

this discussion, a major concern is DMAS' legal authority to hold the fiduciary liable for a claim against the estate.

As set out in the Code, in any action required to be prosecuted or defended by or in the name of a personal representative, the style of the case shall be substantially in the following form: "(Name of fiduciary), (type of fiduciary relationship), (Name of the subject of the fiduciary relationship)."⁸ In other words, if there is no qualification and there is no probate administration, then the creditor does not have an easy target.

VI. Estate Administration: What to do? What should the personal representative do?

a. **What is this "Estate" of which you speak?** Once qualified, the personal representative of a decedent's estate has the duty to "administer, well and truly, the whole personal estate of his decedent."⁹ Which raises the question: what assets are in the "personal estate of his decedent?"

The Manual does not limit the "estate" of the deceased recipient to the individual's "probate estate." Federal law directs the Commonwealth to "recover funds in satisfaction of the claim against the individual's estate or real property"¹⁰ Further, the term "property" includes "the homestead and all other personal and real property in which the beneficiary has a legal interest."¹¹

⁸ Va. Code § 8.01-6.3.

⁹ Va. Code § 64.2-514.

¹⁰ 42 CFR § 433.36.

¹¹ *Ibid.*

Some states are fairly conservative about the collection efforts. They recover costs from real estate, personal property, and other assets only if included within the "probate estate." A probate estate includes only assets that were owned solely by the individual at the time of death, where there is no beneficiary or joint owner designated. A joint account, an account with a payable on death designation, life insurance proceeds, a deed with life estate reservation, TOD deed, or a contract with a named or designated beneficiary are not included in the probate estate.

Other states use a broader definition of the term "estate" that includes any assets an individual had legal title to or an interest in at the time of death, including property that bypasses probate. In these states, the estate includes assets that the individual attempted to convey to a survivor, heir, or assign through an arrangement such as a joint tenancy, tenancy in common, survivorship, deed with life estate reservation, TOD deed, or living trust.

To recover expenses paid under the probate definition of estate, the Commonwealth may file a claim in the probate estate of the decedent just as would any creditor. TPL filed a claim against an estate recently in which your author represents the executor. See the attached Schedule C. The first time your author has seen such an action; an unscientific poll of other Virginia elder law attorneys found this effort by DMAS to be novel.

Under the more expansive definition of estate, the state can enforce its rights by pursuing the heirs or beneficiaries directly. The VAC defines estate as "(i) all real and personal property and other assets held by the individual at the time of death and (ii) any other real and personal property and other assets in which the individual had any legal title or interest (to the extent of such interest) at the time of his

death.”¹² TPL seems to be pursuing the former strategy; however, the expansive and amorphous definition of the terminology opens the door to additional collection efforts under the latter approach.

In 2013, Virginia adopted the Uniform Real Property Transfer on Death Act.¹³ It established “Transfer Upon Death Deeds” (“TOD Deed”) in Virginia. The statute provides that at the death of the transferor, the property transferred at death by a TOD deed is subject to claims of the deceased transferor's creditors, costs of administration of the transferor's estate, the expenses of the transferor's funeral and disposal of remains, and statutory allowances to a surviving spouse and children of the transferor including the family allowance, the right to exempt property, and the homestead allowance to the extent the probate estate is inadequate to satisfy those claims, costs, expenses, and allowances.¹⁴ A traditional creditor has one year from the death of the transferor to file suit to enforce liability; see the discussion below on Statute of Limitations. In other words, the TOD deed passes real estate outside of probate but can be brought back into the probate estate to satisfy creditors - just like a specific devise of real estate found in a Last Will and Testament.¹⁵ Since the TOD deed property is “subject to the claims of the deceased,” it seems reasonable to assume this statute created an *in rem* cause of action for the creditors to collect from the property.

¹² 12 Va. Admin. Code § 30-20-141

¹³ Va. Code § 64.2-621 *et seq.*

¹⁴ Va. Code § 64.2-634.

¹⁵ Va. Code § 64.2-106.

The VAC specifically singles out annuities as part of the estate and subject to claim for recovery. It provides that TPL “may seek recovery from individuals’ estates that may include such annuities.”¹⁶ Many annuities have beneficiary designations (that pass outside of probate); however, some (as required for Medicaid qualification) must name the Commonwealth as a beneficiary.

When making an application for Medicaid, an individual may protect resources by use of certain qualified long-term care insurance policies.¹⁷ If the policy is not qualified, then TPL will seek recovery against the individual’s estate if the estate receives funds from the policy; however, it will not seek recovery to the extent that assets were protected (when the Medicaid application was made) by use of qualified long-term care partnership insurance policy.¹⁸

b. **Mo’ money or no money?** It is commonplace that the estate of the deceased recipient is insolvent, as the known debts may exceed the assets available to pay the debts. In this instance, the executor or administrator must pay the debts in a particular order.¹⁹ To the extent there are assets, they must be used to pay the debts as follows:

- i. Costs and expenses of the administration of the estate (including administrative court costs, probate taxes, attorney’s fees, Commissioner of Account’s fees, surety bond premium, and fiduciary commission);
- ii. The homestead, exempt property, and family allowances;²⁰

¹⁶ 12 Va. Admin. Code § 30-20-141 C 8.

¹⁷ Medicaid Manual § 1460.160.

¹⁸ 12 Va. Admin. Code § 30-20-141 C 3.

¹⁹ Va. Code § 64.2-528.

²⁰ Va. Code § 64.2-309 *et seq.*

- iii. Funeral expenses not to exceed \$4,000;
- iv. Federal debts and taxes;
- v. Medical and hospital expenses of the decedent's last illness plus compensation of persons attending the decedent not to exceed \$2,150 for each hospital and nursing home and \$425 for each person furnishing services or goods;
- vi. Debts and taxes due to Virginia;
- vii. Debts due as trustee for persons under disabilities; as receiver or commissioner under Court Order; as personal representative, guardian, conservator, or committee; and for moneys collected by anyone to the credit of another and not paid over, regardless of whether or not a bond has been executed for the faithful performance of the duties of the party so collecting such funds;
- viii. Child support arrearages;
- ix. Debts and taxes due to localities and municipal corporations; and,
- x. Any and all other claims.

No preference can be given in the payment of any claim over any other claim of the same class.

As a possible class 4 (or class 6²¹) creditor, DMAS could have priority over all other claims except for the costs of administration of the estate, the family, homestead and exempt property allowances (these allowances apply only to decedents leaving a surviving spouse or minor children), and maximum funeral expenses of \$4,000.

It seems possible that DMAS could assert a claim in the eleventh month of the estate administration and wipe out all other creditors

²¹ During your author's recent telephone discussion with a TPL supervisor, she stated that a DMAS' claim is a Class 6 claim. However, your author can find no authority on this subject.

and beneficiaries. The estate of a recipient receiving nursing home benefits for two years could easily be responsible to satisfy a claim of more than \$100,000. In 2018, the average monthly private pay rate in Virginia was \$7,452. Even though DMAS pays much less (based on the resource utilization groups), the cost is still significant.

c. **Procedurally protect the personal representative?** There is no formal procedure requiring the personal representative to notify every *suspected* creditor. Some could interpret this informality to mean that a personal representative is not necessarily required to notify DMAS of a potential estate recovery. As discussed above, DMAS is now sending entreaties to the “heirs of [deceased Medicaid recipient]” and “estate of [deceased Medicaid recipient]” in the days and weeks after death and long before fiduciaries are qualifying.

In addition to the general lack of knowledge about this possible claim against a decedent's estate, DMAS' claim can be optional²² or can be required.²³ If DMAS' claim is optional, then it is not fixed until details are provided. However, the VAC states that TPL “shall” seek recovery and “shall recover.” Just because an investigatory letter is received by a personal representative (possibly through an heir or family member of the deceased), does the fiduciary have an obligation to complete the form and send it in?

Unless a personal representative delves into the VAC, the personal representative could infer that a recovery claim is something not to be concerned with because DMAS' claim is not certain. During a typical estate administration, the personal representative does not seek

²² Va. Code § 32.1-327.

²³ 12 Va. Admin. Code § 30-20-141 C 1.

questionable and potential creditors, much less notify all potential creditors in writing. If the personal representative were required to notify every potential creditor in writing, the personal representative's duties would be so extensive that few individuals would likely serve. The personal representative typically pays taxes, credit card debts, house and car debts, utility bills, medical bills, funeral expenses, and other typical debts of a decedent, but the personal representative rarely goes on a fishing expedition looking for possible creditors.

A decedent's unknown or disputed creditor generally has one (1) year to make a claim against the personal representative for sums due.²⁴ If a cause of action against a decedent accrues subsequent to death, an action may be brought against the personal representative before the expiration of the applicable limitation period or within two years after the qualification of the decedent's personal representative, whichever occurs later.²⁵

Moreover, a creditor may sue an heir or beneficiary for any distribution from an estate within five years of receipt thereof. The heir or beneficiary can be ordered to refund his or her proportion of any claims enforceable against the decedent or his estate that have been finally allowed by the commissioner of accounts or the court, or that were not presented to the commissioner of accounts. Additionally, the creditor may be awarded the costs of the recovery.²⁶

d. **Debts and Demands: Prove It.** Even though a personal representative of a decedent's estate is generally not required to

²⁴ Va. Code § 64.2-550.

²⁵ Va. Code § 8.01-229(B)(4).

²⁶ Va. Code § 64.2-556.

specifically notify the decedent's creditors, in order to avoid personal liability, the personal representative may utilize a voluntary Debts and Demands hearing before the Commissioner of Accounts.²⁷

Notification of the hearing is only required for contested claimants known to the fiduciary. Unknown creditors are notified through publication in a local newspaper.²⁸ Any personal representative who has in “good faith complied [with the Debts and Demands statute] or, as subsequently approved by, the order of the court, paid and delivered the money or other estate in his possession to any party that the court has adjudged entitled thereto shall not be liable for any demands of creditors and all other persons.”²⁹

The issue of estate recovery should not be completely ignored; if DMAS asserts a claim against a decedent's estate, not only could it affect distributions to the decedent's beneficiaries, but it could also dramatically affect the standing of the decedent's other creditors, much to the detriment of the personal representative, especially if the personal representative had already paid some other creditors.

The personal representative's duties regarding creditors in Virginia are not carved in stone, but generally, the onus is on the creditor to pursue claims against a decedent. The probate procedures

²⁷ *Ibid.*

²⁸ The Code requires a publication of the debts and demands hearing in "some newspaper of general circulation in the county or city in which the fiduciary qualified...". See Va. Code § 64.2-550. The fiduciary must give written notice to "any claimant of a disputed claim." This bare requirement hardly suffices to provide actual notice to creditors, such as DMAS.

²⁹ Va. Code § 64.2-556.

require a creditor to pursue a debtor, possibly even long after the death of the debtor. While the personal representative must acknowledge known debts of a decedent, a creditor could have a difficult time proving that the personal representative knew of a particular debt.

e. **Shall the Executor Sell Black Acre?** A very good discussion of an executor's responsibilities with regard to the sale of real estate is found in an opinion of John H. Rust, Jr., Commissioner of Accounts for Fairfax County for many years which is attached as Schedule D. Briefly, in that insolvent estate, the Commissioner ruled that the Executor had only a "naked" power to sell the real estate and was not required to sell black acre to satisfy the claims against the estate.

The executor cannot be compelled to exercise a discretionary naked power to sell; that is the perfunctory grant of fiduciary powers (or the incorporation of Virginia Code § 64.2-105) found in most Last Wills and Testaments. If the executor is directed to sell the real estate, then the proceeds from the sale are included in the probate estate and subject to the claims of creditor, *i.e.* "the *nature* [emphasis added] of the power to sell delineates the titleholder of the decedent's real estate, as well as determines whether the real estate is within the decedent's probate estate and available for the payment of debts."

Further, when "the decedent's will directs that his 'just debts and funeral expenses be paid by my executor...as soon as is practical,' but does not direct any sale of real estate for the payment of such debts. Such standard provisions in most wills have uniformly been held not to charge the real estate for the satisfaction of debts."³⁰

³⁰ See 31 See *Broaddus v. Broaddus*, 144 Va. 727, 742-43, 130 S.E. 794, 799 (1925); *In re Estate of Trent*, 58 Va. Cir. 83, 83-84 (City of Richmond, 2001).

f. **Notice: What is the claim of which you speak?** Every personal representative should be aware of DMAS' potential claim. The possibility of a potential claim can result from simply making inquiries about whether the decedent ever received Medicaid benefits.

For incapacitated persons dying in Virginia, the guardian or conservator or an agent under a power of attorney should be aware of this information.

If the personal representative is not a beneficiary, prudence dictates that DMAS be notified, in writing, of the right to make a claim against the decedent's estate. The proper party to notify is the Virginia Attorney General.³¹ The Manual specifies that TPL is the proper party

See also, e.g. Estate of Achilli v. Bradley, 71 Ill.App.3d 474, 389 N.E.2d 644 (1979); Forster v. First American Bank of Duluth, 212 Minn. 407, 4 N.W.2d 353 (1942); Schwertley v. Schwertley, 228 Iowa 1209, 293 N.W. 445 (1940). Accord, 12B M.J. Marshalling Assets and Securities § 24 ("The mere statement in a will of the desire of the testator that his debts be paid is not sufficient to charge his real estate with his indebtedness. In order to so charge, the intention must be clearly expressed. Because the common law afforded little protection to the creditor in his effort to subject the land of his deceased debtor to the payment of his claim, courts were quick to seize on any words in the will which even by implication might be construed as an intention on the part of the testator to charge his real estate. However, with the enactment of statutes making the real estate liable for debts, the necessity of strained construction ended, and courts now require that the intention to so charge debts be clearly expressed.")

³¹ Va. Code § 8.01-195.4.

for the eligibility worker to notify when the eligibility worker suspects an estate recovery situation exists.³²

g. **DMAS: Some Rules Just Don't Apply.** Even if TPL files a claim after one year, the statute of limitations which typically bar a traditional creditor does not apply to DMAS. In essence, DMAS is a “super creditor” without a time limit on its actions, to-wit: “No statute of limitation...shall be deemed a bar to any proceeding by or on behalf of” the Commonwealth.³³ With a nearly infinite amount of time for DMAS to attempt recovery against an estate, TPL could theoretically pursue the personal representative or heirs after final distribution or if there is no administration.

VII. In God We Trust All Others Must Pay Cash. Note that when sending funds to TPL, it will only accept a cashier's check. Personal checks are not accepted.

VIII. No Qualification. No estate administration. No problem?

DMAS has until infinity and beyond to make its claim against the personal representative; however, if there is no probated estate, are the heirs free of potential liability? What if the only “asset” in the “estate” of the deceased recipient is a life estate in the primary residence?

During the recipient's life, the life estate is not a resource that precludes Medicaid eligibility.³⁴ In many instances, individuals will gift real estate to their heirs and reserve a life estate in the property. If the 60 month

³² Medicaid Manual § M1700.300 C 3.

³³ Va. Code § 8.01-231.

³⁴ Medicaid Manual §§ M1140.1106 A.6.b and M1140.1006 A 6 d.

look back period (from the date of the Medicaid application) is satisfied³⁵, the gift is ignored and no penalty period is imposed. Except for a life estate created between August 28, 2008 and February 24, 2009,³⁶ a life estate is an exempt asset.³⁷

Whether a life estate is an asset in the estate of the deceased recipient is yet to be determined. Now doesn't that sound counterintuitive? There is no Virginia case law on point. Clearly, if the property had been sold during the recipient's life, the life tenant would receive value for the ownership interest as determined by the Code³⁸ or the Manual.³⁹ Nevertheless, a partition suit cannot be brought by or against the life tenant.⁴⁰

In trying to determine what may be in the estate for recovery purposes, it is prudent to determine what DMAS defines as the assets and resources of the applicant/recipient. "Not everything a person owns (*i.e.*, not every asset) is a resource and not all resources count against the resource limit. The Social Security Act and other Federal statutes require the exclusion of certain types and amounts of resources. Any assets that are resources but not specifically excluded are 'countable.'"⁴¹

³⁵ Medicaid Manual §§ M1450.000 I and M1450.000 J.

³⁶ Medicaid Manual §§ M1110.515 B 1 a. and M1140.1106 A 6 c.

³⁷ Medicaid Manual §§ M1140.1106 A 6 b and M1140.1006 A 6 d.

³⁸ Va. Code § 55-269.1 *et seq.*

³⁹ Medicaid Manual § S1140.120.

⁴⁰ Va. Code § 8.01-81.

⁴¹ Medicaid Manual § M1110.001 B 2.

“[A]n asset that is not a resource may become one at a later date or vice versa. For example, the recipient’s home is not a resource for the first six months of institutionalization in a nursing facility and then becomes a resource thereafter unless listed for sale at its fair market value and the listing agent states in writing that the property is unlikely to sell within 90 days.⁴²

Further, the Manual provides that an asset is any “property...not a resource even though it may be an asset (*e.g.*, an individual who has an ownership interest in property but is not legally able to transfer that interest to anyone else does not have a resource.)”⁴³

It defines resources as cash and any other personal or real property that an individual owns; has the right, authority, or power to convert to cash (if not already cash); and is not legally restricted from using for his or her support and maintenance.⁴⁴

Keep in mind that the VAC states that for estate recovery purposes "estate" means *all* property [assets and resources] *held* by the recipient at death and *any* property in which the recipient had *any* interest at death.⁴⁵

It is important to note that other states have been very aggressive in collection efforts. The power to reach a decedent's assets has been extended

⁴² Medicaid Manual § 1130.140.

⁴³ Medicaid Manual § S1110.100 B 3.

⁴⁴ Medicaid Manual § S1110.100 B 1.

⁴⁵ 12 Va. Admin. Code § 30-20-141.

to include the surviving spouse's real property,⁴⁶ transfers into living trusts,⁴⁷ any assets that could be traced to the deceased recipient,⁴⁸ and the proceeds of a personal injury action, without any deduction for attorney's fees.⁴⁹ Your author could not find that any of these types of cases have appeared before a Virginia court.

Moreover, the Code allows a creditor to sue the heirs. The creditor may pursue the asset even after it has landed in the hands of an heir or devisee. The creditor must record a notice of *lis pendens* when filing the suit.⁵⁰ The creditor must prove there are not sufficient personal assets to satisfy all claims against the estate.⁵¹ It seems reasonable that if there are insufficient assets to necessitate the personal representative's qualification, then there is

⁴⁶ *In re Estate of Gullberg*, 652 N.W.2d 709 (Minn. Ct. App. 2002). In *Gullberg*, the estate recovery in the recipient's real property passing to the surviving spouse was limited to the recipient's interest at the time of his death.

⁴⁷ *Belshe v. Hope*, 39 Cal. Rptr. 2d 917 (Cal. Ct. App. 1995).

⁴⁸ *In re Estate of Wirtz*, 607 N.W.2d 882 (N.D. 2000).

⁴⁹ *Florida v. Estate of Wilson*, 782 So.2d 977 (Fl. Dist. Ct. App. 2001). In *Wilson*, the estate did not object to the recovery, but simply wanted to prorate the attorney's fees to the state's distributive share. The estate successfully sued a third party for malpractice, thereby benefitting the creditors as well as the beneficiaries of the estate. The Florida court denied proration to the state's share, and required the state's recovery share to be paid in full, notwithstanding the fact that the state benefitted primarily from the malpractice action.

⁵⁰ Va. Code § 8.01-268.

⁵¹ Va. Code § 64.2-536.

no personal estate to satisfy the creditor. Adding to the potential misery, DMAS' claim against the heir or devisee is possible without the burden of limitation of the matter being time-barred.

IX. From Beyond The Grave: Recovery From Preneed Funeral Arrangements?

A Medicaid applicant may set aside funds to pay for his or her burial and funeral in an irrevocable burial trust. A brief explanation of the regulations is set out on Medicaid Fact Sheet #42 which was prepared by DMAS. A copy is attached and marked as Schedule E.

Recently, the Department of Health Professions (“DHP”) sent a “NOTICE” to Virginia licensed funeral directors regarding Medicaid burial set aside plans. It states:

The Department of Health Professions is requesting that Funeral Service Licensees include notification to the contract buyer that if preneed arrangements for Medicaid burial set aside are reduced from the original contract amount, that the Department of Medical Assistance Services (DMAS) is entitled to receive the remainder of the funds. Likewise, if the contract is modified or terminated to reduce the original set aside amount, DMAS is entitled to receive any remaining funds resulting from the termination or modification of the contract.

Virginia Code § 64.2-108.2F provides that funds remaining in an irrevocable burial trust after the Medicaid recipient passes away shall remunerate the Commonwealth up to the total medical assistance paid.

X. Waiver of Estate Recovery.

In accordance with the Code, TPL “may” assert a claim for payments made on behalf of recipients for payments for nursing facility services, home and

community-based services, and related hospital and prescription drug services. The VAC states that TPL “shall” assert a claim. However, recovery is prohibited in certain instances when federal law deems the needs of certain relatives or heirs of the estate take priority over Medicaid reimbursement.⁵² States are required to waive estate recoveries when undue hardship would result, but they have considerable discretion in their definition of “hardship” and its impact on their estate recovery activities.

- a. **Too Young.** Although not cited in the Code, the VAC and Manual limit estate recovery in non-fraudulent cases to those over 55 years old.⁵³ Therefore, if the recipient dies younger than 55, there is no claim.⁵⁴
- b. **Medicaid recipient.** If an heir is a current Medicaid recipient, then DMAS will waive the claim.⁵⁵ It has been your author’s experience, if a single heir or beneficiary of an estate is a current Medicaid recipient, TPL will release the entire claim against the estate – *not* just a prorated release.
- c. **Keep It All In The Family.** TPL will not recover property from an estate in which the deceased recipient was survived by one or more

⁵² See § 1917(b)(2) of the Social Security Act (42 USC 1396).

⁵³ Medicaid Manual § M1700.300 E 1.

⁵⁴ Note if the individual’s assets are held in a special needs trust, created in accordance with 42 USC 1396, which is known as a “first party special needs trust” in common parlance, this provision is inapplicable.

⁵⁵ VAC 30-20-141.D states, “recovery...shall be waived when the heirs themselves are Medicaid eligible.”

of the following: a spouse, a child under 21 years old, or, a blind or disabled child.

d. **Other disabled heirs.** A personal representative should ask if any of the heirs or beneficiaries of the estate have *ever* received Social Security disability income. The individual should obtain a copy of the disability adjudication letter from Social Security and provide it to TPL and ask for a waiver. Your author has successfully requested TPL to waive its claim in an estate when a sibling heir had been determined “disabled” by the Social Security Administration several years (and then began receiving Social Security retirement benefits) before the death of the recipient.⁵⁶

e. **Too Unfair.** Other than the above, there needs to be a specific prima facie case that the claim will work a substantial hardship to heirs or dependents “against whom the estate claim exists”.⁵⁷ TPL states that it is looking for “threatened foreclosure,” “low assets,” “low income,” “necessitous circumstances,” “threatened loss of income,” or an heir is a recipient of Social Security Disability.⁵⁸ If an individual receives Supplemental Security Income, they are usually eligible for Medicaid - see above. After the hardship is established, then they look to additional factors such as:

i. **A Humble Abode.** A “[h]omestead of modest value” means a home that is worth 50% or less of the average or median

⁵⁶ However, note that once an individual attains full retirement age, in accordance with POMS DI 10105.0101, he is no longer “disabled.”

⁵⁷ Virginia Code § 32.1-327.

⁵⁸ This information is from your author’s telephone call with a TPL supervisor; there is no written guidance.

price, as contained in the most recent U.S. Census data or any other such source of home value information as published in the agency's guidance documents, of homes in the county or city, as appropriate, where the homestead is located as of the date of the individual's death.⁵⁹ The census data for Harrisonburg and Rockingham County can be found online.⁶⁰

ii. **The Family Farm.** The VAC does not define “income-producing property” except to provide the following guidance: “[s]pecial consideration shall be shown in cases in which the estate subject to recovery is: (i) the sole income-producing asset of survivors (where such income is limited), such as a family farm or other family business.” Note that, in the Manual, certain assets in the application process are exempt “regardless of value or rate of return” if used for “self-support.”⁶¹ Therefore, they seem to retain their protection in the estate recovery process.

iii. **Are they ABLE?** A Medicaid recipient may hold funds in an ABLE account which are exempt in determining resource eligibility. ABLE means Achieving a Better Life Experience. The accounts are tax-advantaged savings accounts (like IRAs) for individuals with disabilities. The account cannot exceed \$100,000.00. In 2020, the Commonwealth waived Medicaid reimbursement at the owner’s death.⁶²

⁵⁹ 12 Va. Admin. Code 30-20-141.

⁶⁰ Rockingham Co.: <https://www.census.gov/quickfacts/rockinghamcountyvirginia> and Harrisonburg City: <https://www.census.gov/quickfacts/fact/table/harrisonburgcityvirginia/PST045219>

⁶¹ Medicaid Manual § S1130.500.

⁶² Virginia Code § 23.1-707 G 2.

iv. **Am I My Sibling's Keeper?** TPL will not pursue real property of deceased recipient's property if the recipient is survived by a sibling with an equity interest in the deceased recipient's primary residence and the surviving sibling resided with the recipient for one year prior to the deceased recipient's entry into a nursing facility. Likewise, the transfer of an equity interest to a sibling who resides in the home is an exempt uncompensated transfer during the recipient's life.⁶³

XI. **No Pyrrhic Victories.** If recovery is not cost effective, TPL will not pursue it. Your author has not seen TPL attempt recovery if a personal representative has not qualified, although the Code and VAC seem to indicate it does have the authority.

TPL has the discretion to waive recovery in cases in which it is determined that it would not be cost effective to recover from a deceased recipient's estate. The personal representative does not need to assert undue hardship in such situations. "Cost effective" means that both the dollar amount of the claim and the value of the estate at least exceed the administrative costs of recovery.

Factors used to determine if recovery is effective include: staff time, litigation costs, expert witness fees, deposition expenses, travel expenses, office supplies, postage, advertising, and publishing costs.⁶⁴

XII. **Off Topic: Recovery of Uncompensated *Inter Vivos* Transfers.** This issue is not estate administration related, but is important.

⁶³ Medicaid Manual § 1450.000 C 2.

⁶⁴ 12 Va. Admin. Code § 30-20-141 F.

- a. DMAS may file suit to recover from the recipients *inter vivos* gifts made in anticipation of Medicaid eligibility.⁶⁵
- b. The look back period is 30 months (prior to the date on which any person receives benefits from any program of public assistance). If a donor transfers property or resources resulting in uncompensated value, the donee is liable to repay the DMAS for benefits paid on behalf of the donor.
- c. There are several exceptions:
 - i. The gift did not exceed \$25,000;
 - ii. If the donor transferred his or her residence to a spouse, a child under 21 years old, a disabled child⁶⁶ or a blind child who resides in the home; or
 - iii. The transferee is without financial means or that such payment would work a hardship on the transferee or his family.

Take note that there is neither case law citing nor annotations to this statute since enacted in 1992.

XIII. **Conclusion.** The duties of a personal representative generally do not require a personal representative to notify the DMAS of a claim that is uncertain. A good conservative approach, however, is for the personal representative to notify DMAS, in writing, of the decedent's death or at a minimum to respond to the information request letter which TPL sends soon after the recipient's death.

⁶⁵ Va. Code § 20-88.02.

⁶⁶ A person under 65 and disabled as defined in 42 U.S.C. § 1382c(a)(3)(A).

For the attorney representing a personal representative, a letter to the client outlining TPL's right to pursue past Medicaid payments, the infinite period during which the Commonwealth can recover against the estate and beneficiaries, and the risks involved with not notifying the Commonwealth, will at least serve to protect the attorney against a malpractice claim if TPL does try to recover against the assets of the estate or beneficiaries.

For the attorney consulting with an heir or family member, in the absence of qualification, who receives a TPL information inquiry, what shall counsel advise the client? Your author will explain the Commonwealth's rights and the potential or possibility of collection efforts. As the heir or family member has no obligation to search for a creditor. The burden is on TPL to find assets. Your author believes the client can ignore the information request and wait for the creditor to make pursuit.

With Medicaid appropriations consuming an increasingly substantial portion of Virginia's budget, DMAS (with the tools discussed above) is likely to continue and accelerate more aggressive Medicaid estate recovery procedures.

SCHEDULE A

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M17 MEDICAID FRAUD AND NON-FRAUD RECOVERY

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M1700 MEDICAID FRAUD AND NON-FRAUD RECOVERY

M1700.100 INTRODUCTION

A. Administering Agency The Department of Medical Assistance Services (DMAS) investigates and accepts referrals regarding fraudulent and non-fraudulent payments made by the Medicaid Program. DMAS has the authority to recover any payment incorrectly made for services received by a Medicaid recipient or former Medicaid recipient. DMAS will attempt to recover these payments from the recipient or the recipient's income, assets, or estate, unless such property is otherwise exempt from collection efforts by State or Federal law or regulation.

The DMAS Recipient Audit Unit (RAU) is responsible for the investigation of allegations of acts of fraud or abuse committed by recipients of the Medicaid and the Family Access to Medical Insurance Security Plan (FAMIS) programs. The RAU recovers overpayments due to recipient fraud, abuse, and overpaid benefits through voluntary repayments and criminal prosecution of recipient fraud.

The Third Party Liability Unit (TPL) at DMAS is responsible for investigating and recovering funds paid by DMAS from recipients' estates, trust accounts, annuities and/or other health insurance policies. This unit performs investigations to find "third party resources" that result when Medicaid pays medical costs that a third party should have paid. Medicaid is always the payer of last resort.

B. Utilization Review The DMAS Recipient Monitoring Unit is responsible for reviewing all Medicaid and FAMIS covered services of recipients who utilize services at a frequency or an amount that is not medically necessary in accordance with utilization guidelines established by the state. Only recipients who are excluded, pursuant to 12VAC30-120-370 B, from receiving care from a managed care organization are reviewed and evaluated.

M1700.200 FRAUD

A. Definitions Fraud is defined as follows:

An intentional deception or misrepresentation made by a person with the knowledge that the deception could result in some unauthorized benefit to himself or some other person. It includes any act that constitutes fraud under applicable Federal or State law. (42 CFR 455.2)

Abuse is defined as follows:

Beneficiary practices that result in unnecessary cost to the Medicaid program. (42 CFR 455.2)

B. DMAS Authority DMAS has sole authority over cases of suspected Medicaid fraud when eligibility for a public assistance payment is not involved (Medicaid only cases). The local department of social services (LDSS) must refer all Medicaid cases involving suspected fraud to the DMAS Recipient Audit Unit, 600 E. Broad Street, Suite 1300, Richmond, Virginia 23219, using the Notice of Recipient Fraud/Non-Fraud (form #DMAS 751R) available at <http://spark.dss.virginia.gov/divisions/bp/me/forms/index.cgi>. The following information must be provided when making a referral:

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- confirmation that ongoing eligibility has been reviewed (in relation to the allegation) with evaluation results attached;
- reason(s) for and estimated period of ineligibility for Medicaid;
- the recipient's name and Medicaid enrollee identification number;
- the recipient's Social Security number;
- applicable Medicaid applications or review forms for the referral/ineligibility period;
- address and telephone number of any attorney-in fact, authorized representative, or other individual who assisted in the application process;
- relevant covered group, income, resource, and/or asset transfer documentation for the time period in question;
- any record of communication between the agency and the client or representative, such as case narratives, letters, and notices; and
- information obtained from the agency's fraud investigation, including names and addresses of knowledgeable individuals for testimony and/or interviews.

1. Amount of Loss

There is no fiscal threshold for any case for fraudulent and non-fraudulent erroneous payments made by the Medicaid Program.

In order to determine the amount of the loss of Medicaid funds related to the enrollee's eligibility when LDSS has jurisdiction because of participation in another public assistance program, a Medicaid Claims Request (form #DMAS 750R, available at <http://spark.dss.virginia.gov/divisions/bp/me/forms/index.cgi>) must be sent to DMAS to obtain the amount of the loss. The local agency should allow a three-week turnaround for the documents. There may be exceptional circumstances when claims can be provided within a shorter time, i.e., expedited trial dates. Once the information is received and the agency determines that it will not make a joint criminal prosecution referral, the LDSS must send DMAS the Notice of Recipient Fraud/Non-Fraud. DMAS will determine if administrative non-fraud recovery is appropriate.

2. Recipient Fraud

a. Medical Assistance Only

The LDSS must refer cases of suspected fraud involving only medical assistance to the RAU for investigation using the DMAS 751R form. The LDSS must provide the RAU with the recipient's identifying information, address, and information regarding the circumstances of the suspected fraud. The LDSS is also responsible for reviewing and taking appropriate action for ongoing eligibility or termination of coverage, as appropriate. The RAU will determine the amount of the misspent funds and pursue recovery and/or legal action as appropriate.

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b. Cases in which Medicaid is received with TANF, AG, and other money payment public assistance programs.

The LDSS is responsible for the investigation of suspected fraud involving cases with combined Medicaid and Auxiliary Grant (AG); Medicaid and TANF; and other money payment public assistance programs. The final disposition on all money payment fraud cases shall be communicated to the RAU no later than 5 business days after disposition.

c. Cases in which Medicaid is received with Supplemental Nutrition Assistance Program (SNAP), Energy Assistance, and other non money payment public assistance programs

The LDSS must refer suspected fraud involving Medicaid cases combined with SNAP, Energy Assistance or other non money payment public assistance programs to the RAU using the DMAS 751R form. The local agency shall coordinate cases pending referral for prosecution with the RAU so that Medicaid may take concurrent action.

3. Provider Fraud

Cases of suspected fraud involving enrolled providers of medical services to Medicaid recipients shall be referred to the Medicaid Fraud Control Unit in the Office of the Attorney General, and a copy of the referral correspondence shall be sent to the Provider Review Unit at the Department of Medical Assistance Services.

C. Medicaid Ineligibility Following Fraud Conviction

1. Period of Eligibility

An individual who has been convicted of Medicaid fraud is ineligible for Medicaid for a period of 12 months beginning with the month of fraud conviction. Action to cancel the individual's Medicaid coverage shall be taken in the month of conviction or in the month the agency learns of the conviction, using cancel reason 014 (42 United States Code §1320a-7b.(a)(6)(ii); 12 Virginia Administrative Code 30-10-70).

2. Who is Ineligible

a. TANF or Families and Children (F&C) Cases

Only the parent/caretaker of a TANF/Medicaid or F&C Medicaid case is ineligible for Medicaid when the parent/caretaker has been convicted of Medicaid fraud. The TANF payment made to the caretaker on a child's behalf shall not be affected.

b. Aged, Blind, Disabled (ABD) or Pregnant Women Cases

In an ABD or pregnant woman case, only the individual found guilty of Medicaid fraud will be ineligible. If only one spouse of a married couple is convicted, the eligibility of the innocent spouse is not affected.

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3. Family Unit

If both spouses of an eligible couple are found guilty of fraud, neither is eligible for Medicaid. If only one member of a family unit is convicted of fraud, only that member's Medicaid coverage is canceled. The fraud conviction does not affect the composition of the family unit or the treatment of the family unit's income or resources. The convicted individual is included in the family unit according to Medicaid policy, but is not eligible for Medicaid coverage and is not enrolled.

M1700.300 NON-FRAUD RECOVERY

A. Authority

Any person who, without intent to violate this article, obtains benefits or payments under medical assistance to which he is not entitled shall be liable for any excess benefits or payments received. (COV 32.1-321.2)

B. Recovery of Erroneous Payments

DMAS has the authority to investigate cases and recover expenditures made for services received by ineligible enrollees without fraudulent intent. Examples of when recovery of expenditures is possible include, but are not limited to:

- eligibility errors due to recipient misunderstanding,
- agency errors,
- medical services received during the appeal process, if the agency's cancellation action is upheld.
- long-term care (LTC) patient pay underpayments totaling \$1,500 or more.

Complete and send the *Notice of Recipient LTC Patient Pay Underpayment (form #DMAS752R)* located at <http://spark.dss.virginia.gov/divisions/bp/me/forms/index.cgi> to:

Department of Medical Assistance Services
Recipient Audit Unit,
600 E. Broad Street, Suite 1300,
Richmond, Virginia 23219

The form can be faxed to 804-452-5472 or emailed to recipientfraud@dmass.virginia.gov.

Underpayments less than \$1,500 can be collected by adjusting the ongoing patient pay (see M1470.900 for patient pay adjustments).

C. Post-eligibility Investigations

The RAU conducts post-eligibility investigations. Medicaid nonfinancial and financial requirements are reviewed and applied in accordance to Medicaid policy. See Chapter M02 for the nonfinancial eligibility requirements, and Chapters M06 and M11 for resource requirements.

RAU investigations are based on projected income consistent with the eligibility policies for counting ongoing income referenced in Chapters M04, M07, and M08. Post-eligibility determinations are made using a point-to-point method in which the income estimation period begins with an event that would have triggered a partial review under M1450.100. The end point is the next scheduled renewal that the LDSS actually completed.

D. Uncompensated Asset Transfers

Individuals receiving long-term care services (LTC) who transfer assets and do not receive adequate compensation are subject to the imposition of a penalty period during which Medicaid cannot pay for long-term care services. When an uncompensated

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transfer resulted in a penalty period during which LTC services were received, a referral must be made to the RAU to recover the misspent dollars. RAU staff will contact the recipient or the recipient's authorized representative to pursue recovery.

Section §20-88.02 of the Code of Virginia also allows DMAS to seek recovery from the **transferee** (recipient of the transfer) if the amount of the uncompensated transfer is \$25,000 or more and occurred within 30 months of the individual becoming eligible for or receiving Medicaid LTC services. The transferees may be liable to reimburse Medicaid for expenditures up to the amount of funds spent on the enrollee or the amount of the uncompensated transfer, whichever is less.

E. Recovery of Correctly Paid Funds

Within specific restrictions, DMAS may recover funds correctly paid for medical services received by eligible recipients.

1. Deceased Recipient's Estate

Under federal regulations and state law, DMAS may make a claim against a deceased enrollee's estate when the recipient was age 55 or over. The recovery may include any Medicaid payments made on his/her behalf. This claim may be waived if there are surviving dependents. **(42 CFR §433.36; Va. Code §32.1-326.1 and 32.1-327).**

Section 1917(b)(1)(C)(ii) of the Social Security Act was amended by the Deficit Reduction Act of 2005 to exempt assets disregarded under a "qualified" Long-term Care (LTC) Partnership Policy from estate recovery, as defined in clause (iii) of 1917(b)(1)(C). The same amount of assets that was disregarded in the Medicaid eligibility determination for an individual under an LTC Partnership Policy will be protected during estate recovery.

Referrals should be made to DMAS for estate recovery when the deceased recipient is over 55, has no surviving spouse, no children under 21 or a disabled/blind child of any age.

2. Insurance Settlements and Similar Recoveries

Settlements related to personal injuries are a form of third party liability (TPL). When a Medicaid enrollee has received an insurance settlement or similar settlement from a law suit related to a medical condition or injury, DMAS may seek recovery of any amount of medical assistance expended on the enrollee prior to the receipt of the settlement. Generally, the insurance company notifies DMAS of the settlement; however, if an agency discovers that an enrollee received a settlement, the agency shall report it to DMAS. An insurance settlement that is sent directly to a recipient, in his name only, should be reviewed for its impact on the recipient's eligibility.

3. Trusts

Refer trust documents, including irrevocable, discretionary, pooled, and special needs trusts, to DMAS TPL for potential recovery at the time of recipient's (beneficiary's) death. Refer trust documents in all instances in which a Medicaid recipient is a beneficiary of a trust and the trustee refuses to make the assets available for the medical expenses of the recipient. Include a copy of the Medical Assistance Program Consultant's evaluation of the trust with the referral form, if available.

Include in the referral any corrective action that has been or will be taken by the LDSS, as well as the name of the supervisor of the person submitting the form. The supervisor's signature is not required.

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4. Notification to DMAS

Referrals must be made to the Third Party Liability Unit when: a recipient has received funds from a settlement; DSS has received information concerning a recipient being in an accident; DSS has information where a recipient has other third party payers; or the recipient is the beneficiary of a trust. The cases should be referred to DMAS using the Notice to DMAS of Estate Recovery/TPL/Trust Form (DMAS 753R) located at <http://spark.dss.virginia.gov/divisions/bp/me/forms/index.cgi>, to make referrals to the TPL unit. The form should be completed and sent to:

Department of Medical Assistance Services
Third Party Liability Unit
600 East Broad Street, Suite 1300
Richmond, Virginia 23219

The form may be faxed to 804-786-0729.

M1700.400 RECOVERY RESPONSIBILITIES: LDSS AND DMAS

A. VDSS/LDSS Responsibilities in Loss Prevention Efforts

VDSS Medicaid operates under an interagency agreement with DMAS which lists specific responsibilities of VDSS and, by extension, the LDSS, for active participation in loss prevention efforts. The responsibilities of the LDSS fall under the interagency agreement and are neither optional nor discretionary for the LDSS. VDSS shall supervise the programmatic activities of the LDSS to ensure compliance.

B. LDSS Requirements

LDSS must participate in the identification, tracking, and correction of eligibility errors. LDSS must also determine and review ongoing or current recipient eligibility. **The DMAS RAU does not determine ongoing recipient eligibility, but rather reviews recipient eligibility in relation to allegations of fraud.** LDSS shall:

1. Report Individuals

Report to DMAS RAU every known instance relating to a non-entitled individual's use of Medicaid services, regardless of the reason for non-entitlement such as:

- instances where evidence of fraud may exist;
- errors involving eligibility discovered by the LDSS in which it appears there has been deliberate misrepresentation by an applicant/recipient with intent to defraud;
- eligibility errors discovered by the LDSS, independent of other audit or quality control functions, including cases in which the individual was enrolled incorrectly, added in error, not cancelled timely, allowed to remain on Medicaid during the conviction sanction period or when information known to the agency would render ineligibility;
- cases in which the LDSS discovers that the enrollee failed to report information that impacts eligibility; and
- LTC patient pay underpayments resulting from any cause totaling \$1,500 or more.

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2. PARIS Match Data

The Public Assistance Reporting Information System (PARIS) is a Federal computer matching initiative that the Virginia Department of Social Services (VDSS) participates in quarterly. VDSS participates in the data exchange with all active Medicaid enrollees and they are matched for the receipt of Veteran benefits and enrollment in multiple state's Medicaid programs. Each public assistance report is matched by social security number.

The worker must evaluate all matches for current and ongoing eligibility and take appropriate case action within 30 days. Multiple matches must be assessed as a whole for the entire case. Workers must document findings in VaCMS under Case Comments. Once the evaluation of the match is completed and the case comments are documented, send the Notice of Recipient Fraud/Non-Fraud Recovery, (form #DMAS 751R) to the DMAS Program Integrity Division where steps will be conducted to complete the match and Benefit Impact Screen (BIS). Procedures for researching and reporting PARIS matched individuals are found in the PARIS User Guide at: http://spark.dss.virginia.gov/divisions/bp/fm/files/intro_page/guidance_procedures/PARIS_User_Guide_5-2017.pdf.

Complete and send the Notice of Recipient Fraud/Non-Fraud Recovery (form #DMAS 751R) located at <http://spark.dss.virginia.gov/divisions/bp/me/forms/index.cgi> to

*Department of Medical Assistance Services
Recipient Audit Unit,
600 E. Broad Street, Suite 1300,
Richmond, Virginia 23219*

The form may be faxed to 804-452-5472 or emailed to recipientfraud@dmass.virginia.gov

3. Corrective Action

Report to the DMAS RAU corrective action taken on all discovered eligibility errors. Corrective action is a function of the loss prevention process. All corrected errors shall be reported to DMAS.

3. Cancel Coverage

Cancel the eligibility of all persons convicted of public assistance fraud or medical assistance fraud to the extent allowable under federal and state regulations, using the cancel code for fraud convictions (Cancel Code 014).

C. DMAS Response

The RAU shall send a referral acknowledgement letter to the LDSS worker making the referral. RAU may send out additional communication to the LDSS should additional verifications/documentation be required to complete the investigation.

D. Recipient Audit Reporting

The RAU has two prevention efforts for reporting fraud and abuse of Medicaid Services by individuals within the community. Both referral methods should be given to the individual by the LDSS. The individual may remain anonymous.

- *The individual may send an e-mail to recipientfraud@dmass.virginia.gov.*
- *The individual can call the Recipient Audit fraud and abuse hotline. Both a local and a toll free number are available 24 hours daily for reporting suspected fraud and abuse: local (804) 786-1066; and toll free (866) 486-1971.*

E. Statute of Limitations

There is no "statute of limitations" for Medicaid fraud; cases that are referred for fraud shall be flagged to ensure that the information is not purged.

SCHEDULE B



COMMONWEALTH of VIRGINIA

Department of Medical Assistance Services

ESTATE OF

INFORMATION REQUEST

DATE OF LETTER: NOVEMBER 1, 2018

RE:

ID#:

DOD:

Dear Representative:

We have information indicating that the above referenced Medicaid member died on [redacted]. In accordance with section 32.1-326.1 and 32.1-327, Code of Virginia and Federal Regulation under CFR 42 section 433.36, the Department of Medical Assistance Services may recover funds paid for medical services received by the member. The funds may be recovered from his/her estate.

In order to determine existing assets, we ask that you complete the attached form. IF YOU ARE THE SURVIVING SPOUSE, Medicaid will NOT pursue recovery. However, it is requested that you fill in your name and address only and return the form so that we may close our record. Please use the enclosed self-addressed and postage-paid envelope to send the form to:

Department of Medical Assistance Services
600 East Broad Street, Suite 1300
Richmond, Virginia 23219
Attention: TPL/Estates

You may direct any questions to (804)786-5482. Thank you in advance for your assistance and cooperation.

Sincerely,

Recovery Analyst
Third Party Liability Estates



COMMONWEALTH of VIRGINIA
Department of Medical Assistance Services

TPL/Estates
Deceased Member Information Form

Member Name	
Medicaid ID Number	
Date of Death	
Name of Executor, Administrator, or Representative	
Address of Executor, Administrator, or Representative	
Telephone Number of Executor, Administrator, or Representative	
Value of Estate	
Address of Real Estate Property Owned by the Member	
Property to be Sold	YES or NO
Life Insurance Company	
Name and Address of Surviving Spouse	
Where was the Estate Accounting Filed	
Name, Address, and Phone Number of Person Completing this Form	

SCHEDULE C



COMMONWEALTH of VIRGINIA *Department of Medical Assistance Services*

JENNIFER S. LEE, M.D.
DIRECTOR

SUITE 1300
600 EAST BROAD STREET
RICHMOND, VA 23219
804/786-7933
800/343-0634 (TDD)
www.dmas.virginia.gov

May 9th, 2019

Office of Commissioner of Accounts

RE:

Medicaid #:

Fiduciary #:

Dear Sir/Madam:

In accordance with Sections 32.1-326.1 and 32.1-327, Code of Virginia, and Federal Regulation, CFR 42, Section 433.36, Virginia Medicaid is making a claim for these funds from any monies received which is part of the estate of the decedent. A check for \$55.00 is enclosed as payment for the filing fee.

The Department of Medical Assistance Services has made payments in the amount of \$50,082.12 for the treatments Nina Smoke received from 06/15/2017 through 08/13/2018.

Please make your cashier's check payable to the Department of Medical Assistance Services and send to:

Department of Medical Assistance Services
Fiscal Division, TPL Unit
Attention:
600 E Broad Street, Suite 1300
Richmond, VA 23219

~~If you have any questions or need additional information, please feel free to call (804) 418-4571.~~

Sincerely,

Recovery Analyst
Third Party Liability/Estates

Cc:



COMMONWEALTH of VIRGINIA
Department of Medical Assistance Services

JENNIFER S. LEE, M.D.
DIRECTOR

December 6th, 2018

SUITE 1300
600 EAST BROAD STREET
RICHMOND, VA 23219
804/786-7933
800/343-0634 (TDD)
www.dmas.virginia.gov

Estate of

RE:
Medicaid ID#:
Inv ID#:

Dear Sir/Madam:

In accordance with Sections 32.1-326.1 and 32.1-327, Code of Virginia, and Federal Regulation CFR 42, Sec. 433.36, Virginia Medicaid is making a claim for any monies received, which is part of the estate of the decedent. This agency may make an adjustment or recovery under code stated above:

- (a) after the death of the surviving spouse and
- (b) when there is no surviving child under age 21 or blind or disabled.

The Department of Medical Assistance Services has made payments of \$50,082.12 for the treatments the above referenced decedent received from 06/15/2017 through 08/13/2018. This agency may, at its discretion, waive its claim if it is determined that enforcement of the claim would result in substantial hardship.

Please make your check payable to the Department of Medical Assistance Services and send to:
Department of Medical Assistance Service
Estates Recovery, 8th Floor
Attn:
600 E. Broad St., Suite 1300
Richmond, VA 23219

If you need additional information or have questions, please feel free to call me at (804) 418-4571.

Sincerely,

Recovery Analyst
Third Party Liability/Estates

Department of Medical Assistance Services

Medicaid Recipient:

Medicaid ID#:

Inv ID#:

Serv Frm Dt	Serv Thru Dt	Serv Prov Name	Billed Amt	Pmt Amt
6/15/17	6/17/17	HOME CARE	\$241.74	\$241.74
6/15/17	6/30/17	HOME CARE	\$284.58	\$241.74
6/18/17	6/24/17	HOME CARE	\$402.90	\$402.90
6/25/17	6/30/17	HOME CARE	\$402.90	\$402.90
7/1/17	7/31/17	HOME CARE	\$300.39	\$255.17
7/2/17	7/8/17	HOME CARE	\$402.90	\$355.20
7/9/17	7/15/17	HOME CARE	\$402.90	\$402.90
7/16/17	7/22/17	HOME CARE	\$402.90	\$402.90
7/23/17	7/29/17	HOME CARE	\$402.90	\$402.90
7/30/17	7/31/17	HOME CARE	\$80.58	\$80.58
8/1/17	8/5/17	HOME CARE	\$322.32	\$274.62
8/1/17	8/31/17	HOME CARE	\$379.44	\$322.32
8/6/17	8/12/17	HOME CARE	\$402.90	\$402.90
8/13/17	8/19/17	HOME CARE	\$402.90	\$402.90
8/20/17	8/26/17	HOME CARE	\$402.90	\$402.90
8/27/17	8/31/17	HOME CARE	\$335.75	\$322.32
9/1/17	9/2/17	HOME CARE	\$67.15	\$19.45
9/1/17	9/30/17	HOME CARE	\$316.20	\$268.60
9/3/17	9/9/17	HOME CARE	\$402.90	\$402.90
9/10/17	9/16/17	HOME CARE	\$402.90	\$402.90
9/17/17	9/23/17	HOME CARE	\$402.90	\$402.90
9/24/17	9/30/17	HOME CARE	\$402.90	\$402.90
10/1/17	10/7/17	HOME CARE	\$402.90	\$355.20
10/1/17	10/31/17	HOME CARE	\$537.54	\$456.62
10/8/17	10/14/17	HOME CARE	\$402.90	\$402.90
10/15/17	10/21/17	HOME CARE	\$402.90	\$402.90
10/22/17	10/28/17	HOME CARE	\$402.90	\$402.90
10/29/17	10/31/17	HOME CARE	\$161.16	\$161.16
11/1/17	11/4/17	HOME CARE	\$241.74	\$194.04
11/1/17	11/30/17	HOME CARE	\$537.54	\$456.62
11/5/17	11/11/17	HOME CARE	\$402.90	\$402.90
11/12/17	11/18/17	HOME CARE	\$402.90	\$402.90
11/19/17	11/25/17	HOME CARE	\$402.90	\$402.90
11/26/17	11/30/17	HOME CARE	\$322.32	\$322.32
12/1/17	12/31/17	HEALTHCARE C OMMUNITY PLAN	\$4,537.70	\$4,490.00
1/1/18	1/31/18	HEALTHCARE C OMMUNITY PLAN	\$4,207.44	\$4,162.74
2/1/18	2/28/18	HEALTHCARE C OMMUNITY PLAN	\$4,207.44	\$4,162.74
3/1/18	3/31/18	HEALTHCARE C OMMUNITY PLAN	\$4,207.44	\$4,162.74
4/1/18	4/30/18	HEALTHCARE C OMMUNITY PLAN	\$4,207.44	\$4,162.74
5/1/18	5/31/18	HEALTHCARE C OMMUNITY PLAN	\$4,207.44	\$4,162.74
6/1/18	6/30/18	HEALTHCARE C OMMUNITY PLAN	\$4,207.44	\$4,207.44

7/1/18	7/31/18	HEALTHCARE C OMMUNITY PLAN	\$4,380.70	\$4,370.54
8/1/18	8/15/18	HEALTHCARE C OMMUNITY PLAN	\$4,380.70	\$4,370.54
8/13/18	8/13/18		\$250.00	\$250.00

Total				\$50,082.12
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Please make checks payable to the Department
of Medical Assistance Services and send to:

Department of Medical Assistance Services
Third Party Liability Unit, Estates, 8th Floor
600 E. Broad Street, Suite 1300

FC

SCHEDULE D

IN THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

In Re: Estate of John Theodore Finley, deceased
Fiduciary No. FI-2011-0000346

Commissioner's Report
of Debts and Demands

To the Honorable Judges of the Circuit Court of Fairfax County, Virginia:

At the request of Timothy M. Finley, co-fiduciary of the above estate, the undersigned gave the notice required by Virginia Code § 64.1-171,¹ setting the 1st day of December, 2011 at 1:00 p.m. at the office of your commissioner in Fairfax, Virginia, as the time and place for receiving proof of debts and demands against the estate of John Theodore Finley. At the said time and place, Tim Finley and Patrick Finley, co-fiduciaries, appeared on behalf of the estate. No other person appeared to offer proof of any debts or demands against said estate.

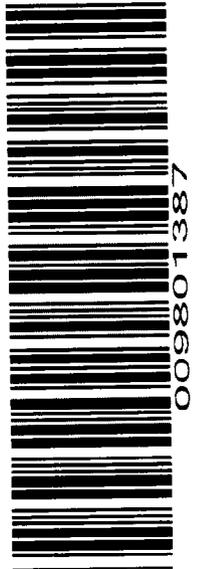
Claims against the Estate

One creditor filed a claim with your commissioner in the following amount:

Navy Federal Credit Union	\$14,808.34
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The undersigned provided notice of the hearing to the claimant, a copy of which is attached hereto as Exhibit 1. At the hearing, the estate informed your commissioner of additional claims against the estate in the following amounts:

Inova Home Health	\$433.86
Fairfax Radiological Consultants PC	\$30.00
Roberts Home Medical, Inc.	\$99.42
Juno, a United Online Company	\$26.93
Bank of America	\$1,585.88
DirecTV	\$1,108.73
Sprint	\$835.24
American Express	\$114.07
Fairfax County	\$26.19
Internal Revenue Service	\$3,952.00



¹ Now VA. CODE ANN § 64.2-550.

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Virginia Dept. of Taxation	\$2,273.55
Timothy Finley (to reimburse for real property taxes paid)	\$350.00

The estate did not provide notice of the hearing to any of the claimants; however, Virginia Code § 64.2-550 requires such notice only for disputed claims. The estate does not dispute the above claims, but states it is insolvent and unable to pay such claims in full. As the foregoing claims are not disputed, your commissioner allows the claims in full, in the amounts shown, except as otherwise expressly set forth herein, to be satisfied in accordance with the priorities set forth in Virginia Code § 64.2-528.

At the hearing before your commissioner, the fiduciaries discussed certain expenses that had been paid from the account that the decedent held jointly with Timothy Finley to benefit the children of the decedent, principally payment of health insurance premiums. As the expenditure is from an account that passed to Timothy Finley by virtue of the survivorship nature of the account, the funds are outside the assets of the estate. Your commissioner advised that no sums would be available from the estate for the beneficiaries unless the spouse or the children timely filed a claim for a family allowance or other statutory allowance. The fiduciaries indicated that they would seek to have such a claim filed; however, your commissioner received no notice that a claim for a statutory allowance has been filed and the clerk's office has no record of any such claim. The fiduciaries did file notice of such a claim with your commissioner; however, such notice is not sufficient under the statute to constitute a claim for statutory allowances. The time for filing a claim for a statutory allowance has now lapsed. Based upon the foregoing, your commissioner is of the opinion that no valid claim for any statutory allowance has been filed.

Order of Payment of the Estate's Debts

Pursuant to Virginia Code § 64.2-528, any outstanding administrative costs, including fiduciary fees and fees due the commissioner's office are allowed as priority 1 claims. Administrative costs would include reimbursement to Timothy Finley for administrative costs previously paid from the joint account he held with the decedent, which passed to him by right of survivorship. Your commissioner will also allow the fiduciaries a fiduciary fee of \$500.00 in light of the effort required to administer the relatively small estate. Such fee is also an administrative cost. To the extent

that the assets in the estate are insufficient to satisfy all of the priority 1 expenses, your commissioner directs that all priority 1 claimants receive pro-rata disbursements of the estate's assets.

The fiduciaries provided your commissioner with documentation indicating that the claim of Fairfax County in the amount of \$26.19 arises out of personal property tax owed on the decedent's vehicle accruing after his death. The vehicle was a 1998 Toyota that Fairfax County assessed at \$3,000.00. The fiduciaries believe that the vehicle was titled in the name of the decedent, but used by the decedent's son. The fiduciaries testified that they omitted the vehicle from the inventory; however, they planned to adjust in the value of the vehicle on the next account filed. Subsequent to the hearing, the fiduciaries advised your commissioner that the decedent's spouse obtained a duplicate title from the Department of Motor Vehicles upon representation that the decedent left no will and transferred the vehicle to her mother, where the decedent's son resides and who continues to use the vehicle. As the fiduciaries never came into possession of the vehicle, the fiduciaries are not required to account for its disposition. Whether the fiduciaries elect to pursue the decedent's spouse, the decedent's mother-in-law, and the decedent's son for the value of the vehicle is a matter within their discretion; in any event, the vehicle is not an asset of the estate. Your commissioner notes that there are limited assets in the estate with which to pursue such recourse, there is no assurance of recovery, and the assessed value of the vehicle was \$3,000.00 in 2011. Your commissioner will not require that the fiduciaries seek to recover the value of the vehicle. As the fiduciaries never took control of the motor vehicle, your commissioner further finds that the personal property tax is a debt of the motor vehicle owner and not the estate. Your commissioner therefore denies the claim for post-death personal property tax in its entirety.

At the hearing before your commissioner, the fiduciary indicated that the decedent's father personally satisfied funeral expenses of the decedent in the amount of \$8,659.00. Pursuant to Virginia Code § 64.2-528(3), the decedent's father is entitled to reimbursement as a priority 3 creditor for the first \$3,500.00 of the funeral expenses, and as a priority 9 creditor for the balance of said expenses. Your commissioner directs that the priority 3 claims receive pro-rata disbursements of any estate assets remaining after full satisfaction of the priority 1 claims.

At the hearing, the fiduciary provided documentation to your commissioner indicating that the decedent had an outstanding federal income tax liability of \$3,952.00 for the 2010 tax year. Pursuant to Virginia Code § 64.2-528(4), the federal government is entitled to the payment of debts and taxes as a priority 4 creditor. Your commissioner directs that the priority 4 claim receive disbursements of any estate assets remaining after full satisfaction of the higher priority claims.

The claims of Inova Home Health, Fairfax Radiological Consultants, and Roberts Home Medical, Inc. are expenses of last illness. All three claimants are health care providers of goods or services, rather than hospitals, and are entitled to priority as class 5 creditors up to the sum of \$150.00, and as a priority 9 creditor for the balance of their claims. Your commissioner directs that the priority 5 claims receive disbursements of any estate assets remaining after full satisfaction of the higher priority claims.

The fiduciary also provided documentation to your commissioner at the hearing indicating that the decedent had an outstanding Virginia income tax liability of \$2,316.13 for the 2006 tax year. The fiduciary provided your commissioner with three Notices of Tax Liens and a Demand for Payment of State Taxes informing the decedent that the Department of Taxation had issued liens against the decedent's employer and two bank accounts. The liens arose out of individual state income taxes due for the 2006 tax year, assessed on November 2, 2009. Pursuant to Virginia Code § 64.2-528(6), the Commonwealth of Virginia is entitled to payment of debts and taxes as a priority 6 creditor. Your commissioner directs that the priority 6 claim receive disbursements of any estate assets remaining after full satisfaction of the higher priority claims.

The claim of Timothy M. Finley for reimbursement of real estate taxes paid relates to the decedent's one-third interest in undeveloped real estate located in King George County, Virginia. In light of your commissioner's determination set forth hereinafter, such real property is not available for satisfaction of the decedent's creditors. The payment of such taxes is therefore not for the preservation of assets of the estate. Your commissioner denies such claim as not properly an estate expense.

All other claims against the estate are allowed in their entirety as priority 9 claims. Your commissioner directs that the priority 9 claims

receive pro-rata disbursements of any estate assets remaining after full satisfaction of the higher priority claims.

Obligation to Sell Realty to Satisfy Debts of the Estate

During his lifetime, the decedent owned an undivided one-third interest in a parcel of real estate located in King George County, Virginia, containing approximately 30.88 acres of land. The decedent's brothers, who are also the fiduciaries in this case, own the remaining two-thirds interest in the property. The property is undeveloped, has limited access through the property of another, and the decedent and his brothers used the property principally as a hunting preserve. In the inventory, the fiduciaries listed the property as a "1/3 share of 33 (sic) acres in King George Co., VA" and valued the land at between \$20,000.00 and \$30,000.00. The fiduciaries indicate in their testimony that they do not wish to sell their personal interests in the property and believe that there is a limited market for the property as a whole in any event. Your commissioner is of the opinion that it will be difficult for the estate to realize the decedent's proportionate share of the market value of the whole parcel, if the estate is required to sell only the decedent's one-third interest in the property.

The decedent's will incorporated by reference Virginia Code § 64.1-57,² which grants the executors the power

[t]o sell, assign, exchange, transfer and convey or otherwise dispose of, any or all of the . . . property, either real, personal or mixed, which may . . . at any time become part of the . . . estate upon such terms and conditions as the fiduciary, in his absolute discretion, may deem advisable.³

In Virginia, incorporation of the statute by reference remains the most common means of granting a power of sale to the executor. The will contained no conditions upon that power of sale and did not specifically require the sale of the real estate. The will further directs that the "entirety of [the decedent's] estate, real, personal and mixed" be distributed equally to the decedent's four sons. The fiduciaries state that they do not wish to sell the decedent's real estate. If the matter is one in which they have discretion,

² Now VA. CODE ANN. § 64.2-105.

³ VA. CODE ANN. § 64.2-105(B)(1).

they will not exercise the power of sale. The fiduciaries sought your commissioner's aid and direction in determining whether they were required to sell the real property to satisfy the debts of the estate.

It is clear from the findings contained above in this report that the debts of the decedent far exceed the personal property in the probate estate. The issue presented, therefore, is whether a fiduciary to whom the power to sell real estate has been granted must exercise that power when the claims of creditors exceed the value of the personal property available to satisfy the decedent's debts. For the reasons set forth more fully hereinafter, your commissioner is of the opinion that a fiduciary may not be compelled to exercise a discretionary naked power of sale.

Under the laws of the Commonwealth, a decedent's estate remains liable for the decedent's debts subsequent to his death.⁴ An executor or administrator, as a fiduciary, is responsible for the management of a decedent's estate.⁵ The fiduciary bears a duty to demand and receive the decedent's estate, to ascertain the decedent's debts and distributees, and report the administration of such to the court.⁶ Executors are responsible for payment of the decedent's debts from the estate assets.⁷ Nevertheless, in Virginia, "it is the general rule that the personal estate is the primary fund for the discharge of the debts, and is to be first applied and exhausted, even in payment of debts for which the real estate may be expressly charged by mortgage."⁸ Executors are therefore responsible only for the finite resources of the estate:

The executor is charged with the administration of the personal assets, and such real assets as may be charged with the payment of debts by the will; but otherwise his relations to the real estate, to the heir descended or devises, remain as heretofore; that is, as such, he has no concern with them whatever.⁹

⁴ See *Denny v. Searles*, 150 Va. 701, 735, 143 S.E. 484, 495 (1928).

⁵ See *Boyd's Sureties v. Oglesby*, 64 Va. (23 Gratt.) 674, 683-84 (1873).

⁶ *Denny*, *supra*, 150 Va. at 735, 143 S.E. at 495.

⁷ *Broadus v. Broadus*, 144 Va. 727, 130 S.E. 794 (1925).

⁸ *Elliott v. Carter*, 50 Va. (9 Gratt) 541, 549 (1853). See also *Peatross v. Gray*, 181 Va. 847, 856, 27 S.E.2d 203, 208 (1943) (*citing* *Todd v. McFall*, 96 Va. 754, 762-63, 32 S.E. 472 (1899); *New v. Bass*, 92 Va. 383, 389, 23 S.E. 747 (1895)).

⁹ *Peirce v. Graham*, 85 Va. 227, 235, 7 S.E. 189, 194 (1888) (*citing* *Litterall v. Jackson*, 80 Va. 604 (1885)).

Virginia has nonetheless enacted legislation providing that, upon exhaustion of the personal estate, a decedent's real estate is available for the satisfaction of the debts of the decedent:

All real estate of any person who may hereafter die, as to which he may die intestate, or which, though he die testate, shall not by his will be charged with or devised subject to the payment of his debts, or which may remain after satisfying the debts with which it may be so charged or subject to which it may be so devised, shall be assets for the payment of the decedent's debts and all lawful demands against his estate, in the order in which the personal estate of a decedent is directed to be applied.¹⁰

The statute provides creditors a direct remedy against a decedent's realty when the decedent's personal estate is insufficient to satisfy the debts. The Supreme Court of Virginia has interpreted this statute on numerous occasions and has consistently held that it does not alter the common law rule that a decedent's personal estate is the primary source for payment of debts.¹¹

Under the laws of the Commonwealth, a fiduciary of a decedent's estate has no power to interfere with the descent of real estate.¹² Rather, at the decedent's death, the real estate vests immediately in his heirs.¹³ In Virginia, only the Court or the testator may empower the fiduciary to deal with the decedent's real estate.¹⁴ The fiduciary generally obtains such power or right through the grant of a power of sale. There are two types of powers of sale granted in Virginia, a power of sale coupled with an interest and a naked power of sale. A naked power of sale may also be either mandatory

¹⁰ VA. CODE ANN. § 64.2-532. Virginia has also authorized the personal representative to file suit to recover a creditor's claim due from the estate against an heir receiving property from the decedent. *See* VA. CODE ANN. § 64.2-536.

¹¹ *See* *Frasier v. Littleton*, 100 Va. 9, 40 S.E. 108 (1901); *McCandlish v. Keen*, 54 Va. (13 Gratt.) 615 (1857).

¹² *Bruce v. Farrar*, 156 Va. 542, 545, 158 S.E. 856, 857 (1931); *Peirce*, *supra*, 85 Va. at 235, 7 S.E. at 194.

¹³ *Bruce*, *supra*, 156 Va. at 545, 158 S.E. at 857; *Broaddus v. Broaddus*, 144 Va. 727, 742-43, 130 S.E. 794, 799 (1925).

¹⁴ *Neblett v. Smith*, 142 Va. 840, at 855, 128 S.E. 247, 252 (1925); *Broaddus*, *supra*, 144 Va. at 743, 130 S.E. at 799.

or discretionary. The nature of the power of sale delineates the titleholder of the decedent's real estate, as well as determines whether the real estate is within the decedent's probate estate and available for the payment of debts.

A power of sale coupled with an interest is in effect a devise to the fiduciary with a superadded power of sale that includes express direction to sell the real estate.¹⁵ The fiduciary is then responsible for distributing the decedent's probate estate, including the proceeds of sale from the real estate. In such circumstances, "[t]he testator obviously did not design that until a sale of the land it should devolve on his heirs."¹⁶ Therefore, a power of sale coupled with an interest automatically brings the decedent's real estate within the decedent's probate estate. Title to the real estate passes directly to the executor and the executor holds the property until the sale is effected.¹⁷ The interest in the land devised to the executor "takes away the descent, and vests the estate of the land in the executor."¹⁸ If the testator grants a power of sale coupled with an interest, the real estate and its proceeds are available for the payment of the decedent's debts, provided that the testator may direct the disposition of the real estate proceeds in a way that requires exhaustion of other personal estate before the real estate proceeds are available.

A mere power to sell, known as a naked power to sell, gives the executor no interest in the decedent's real estate. Title to the decedent's real estate passes to the devisees under the will or his heirs at law, subject only to divestiture should the fiduciary exercise the naked power of sale.¹⁹ Accordingly, the devisees are entitled to use the property as their own until the fiduciary executes the power of sale.²⁰ If the fiduciary executes the power of sale, the devisees or heirs are divested of title, and the executors may convey good and marketable title to the decedent's real property.²¹

¹⁵ Stark v. City of Norfolk, 183 Va. 282, 288, 32 S.E.2d 59, 61 (1944); In re Estate of Woods, 71 Va. Cir. 224, 226 (Arlington County, 2006). See also Harrison, WILLS AND ADMINISTRATION § 21.25 (4th ed. 2011).

¹⁶ Mosby's Adm'r v. Mosby's Adm'r, 50 Va. (9 Gratt.) 584, 594 (1853).

¹⁷ Stark, *supra*, 183 Va. at 288, 32 S.E.2d at 61; Woods, *supra*, 71 Va. Cir. at 226.

¹⁸ Mosby's Adm'r, *supra*, 50 Va. at 590 (quoting 1 Lomax on Executors 219).

¹⁹ Stark, *supra*, 183 Va. at 288, 32 S.E.2d at 61; Coles' Heirs v. Jamerson, 112 Va. 311, 316-17, 71 S.E. 618, 619-20 (1911); Woods, *supra*, 71 Va. Cir. at 226.

²⁰ *Id.*

²¹ Yamada v. McLeod, 243 Va. 426, 431, 416 S.E.2d 222, 225 (1992) (citing Stark, *supra*, 183 Va. at 288, 32 S.E.2d at 61; Coles' Heirs, *supra*, 112 Va. at 316, 71 S.E. at 619-20); Woods, *supra*, 71 Va. Cir. at 226.

A naked power of sale may either be mandatory or discretionary. If the testator directs the sale of the property, either expressly or by necessary implication, the power of sale is mandatory; however, title remains with the devisees until such sale is consummated. Where the exercise of the power of sale is mandatory, under the doctrine of equitable conversion, the Court will treat the real estate as personal property.

In the Commonwealth, “equity treats that as done which ought to be done.”²² From this principle grows the doctrine of equitable conversion, whereby, “land which is directed to be converted into money is treated as money, and money which is directed to be invested in land is treated as land.”²³ In the case of a will, the sole purpose of the doctrine is to effectuate the intent of the testator.²⁴ When a will directs that land be sold and converted into money, such direction operates as a conversion causing the land to assume the character of personalty prior to any actual sale.²⁵ In those circumstances, a sale is obligatory and the testator’s clear direction of such sale effects an equitable conversion dating from the date of the testator’s death.²⁶ Therefore, the testator’s clear direction to sell results in the executor in effect possessing personal property, subject to the payment of debts, in lieu of real property. In contrast, when the testator’s will does not direct the fiduciary to sell, but rather provides the fiduciary a discretionary power of sale, no equitable conversion occurs.²⁷ In the case of a discretionary power of sale, the actual conversion to personal property only occurs at the time of a sale.²⁸ The extent of an equitable conversion is similarly proscribed by the intent expressed in the testator’s will.²⁹

²² Moore v. Kernachan, 133 Va. 206, 211, 112 S.E. 632, 633 (1922).

²³ *Id.*

²⁴ *Id.* (citing Painter v. Painter, 220 Pa. 82, 87, 69 A. 323, 324 (Pa. 1908)).

²⁵ Marcy v. Graham, 142 Va. 285, 293, 128 S.E. 550, 553 (1925); Carr v. Branch, 85 Va. 597, 602, 8 S.E. 476, 478 (1889); Effinger v. Hall, 81 Va. 94, 107 (1885); Harcum’s Adm’r v. Hudnall, 55 Va. 369, 374-75 (1858); Tazewell v. Smith’s Adm’r, 22 Va. 313, 320-21 (1823).

²⁶ Moore, *supra*, 133 Va. at 211-20, 112 S.E. at 633-36. See also Carr, *supra*, 85 Va. at 601-02, 8 S.E. at 478-79; Tazewell, *supra*, 22 Va. at 320-21.

²⁷ Evans v. Kingsberry, 23 Va. (2 Rand.) 120 (1823). *Accord*, 7A M.J. *Equitable Conversion* § 4.

²⁸ *Id.*

²⁹ Where a testator directs a conversion for a special purpose and the purpose or intention fails, equity will regard the testator as not having directed the conversion. Moore, *supra*, 133 Va. at 213-21. Consequently, “in case of lands directed to be sold to pay the debts of

Therefore, in the opinion of your commissioner, the value of a decedent's real property is available to satisfy creditors when the fiduciary is granted a power of sale coupled with an interest or where the fiduciary is granted a naked power of sale that the will requires that he exercise. In the opinion of your commissioner, when the fiduciary is granted a discretionary naked power of sale and declines to exercise that power, the character of the property remains real estate and the executor cannot be compelled to exercise the power of sale. The creditors may seek recourse against the real estate pursuant to Virginia Code § 64.2-532; however they may not require the fiduciary to exercise his right to sell that real estate.

In the instant case, the testator vested the executors with the power of sale solely by incorporation by reference of Virginia Code § 64.1-57.³⁰ The will does not indicate that the testator intended to pass title to his real property to the executors, to the exclusion of the devisees. The language of the will therefore grants to the executors a naked power of sale. There is no express direction in the will to sell the real property; therefore, unless one finds that such sale is necessary by implication from the provisions of the will, the power of sale is discretionary.

The decedent's will directs that his "just debts and funeral expenses be paid by my executor . . . as soon as is practical," but does not direct any sale of real estate for the payment of such debts. Such standard provisions in most wills have uniformly been held not to charge the real estate for the satisfaction of debts.³¹ A direction to pay debts adds nothing to the existing

the testator, if the debts are paid without a sale, it remains land; or if sold, as nothing but the payment of debts was intended, all beyond will remain real estate." *Id.* (citing *Pratt v. Taliaferro*, 30 Va. 419, 423 (1832)). Additionally, where the testator directs real estate to be sold and the proceeds divided equally, the testator is deemed to have converted the whole of said property from realty to personalty. *Marcy, supra*, 142 Va. 285 at 293, 128 S.E. at 553.

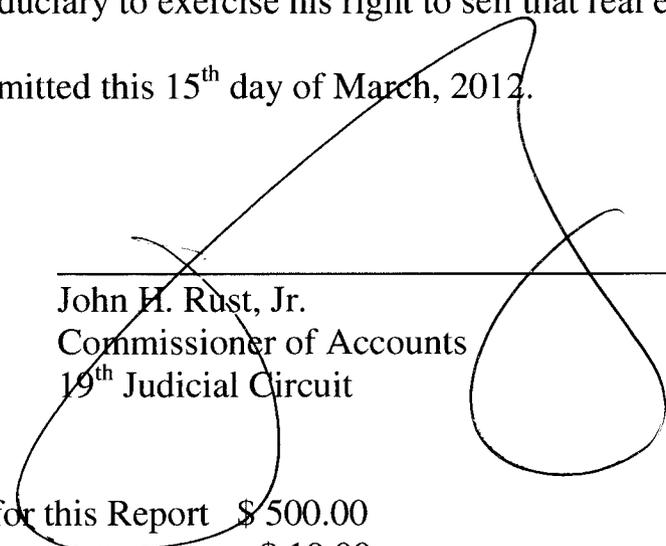
³⁰ Now VA. CODE ANN. § 64.2-105.

³¹ See *Broaddus v. Broaddus*, 144 Va. 727, 742-43, 130 S.E. 794, 799 (1925); *In re Estate of Trent*, 58 Va. Cir. 83, 83-84 (City of Richmond, 2001). See also, e.g. *Estate of Achilli v. Bradley*, 71 Ill.App.3d 474, 389 N.E.2d 644 (1979); *Forster v. First American Bank of Duluth*, 212 Minn. 407, 4 N.W.2d 353 (1942); *Schwertley v. Schwertley*, 228 Iowa 1209, 293 N.W. 445 (1940). *Accord*, 12B M.J. *Marshalling Assets and Securities* § 24 ("The mere statement in a will of the desire of the testator that his debts be paid is not sufficient to charge his real estate with his indebtedness. In order to so charge, the intention must be clearly expressed. Because the common law afforded little protection to the creditor

fiduciary duty to well and truly administer the estate contained in Virginia Code § 64.2-514, including the duty to pay the debts of the decedent.³² In the opinion of your commissioner, an equitable conversion is not favored in the law and the use of standard form provisions in one's will should not create a result disfavored in the law. Therefore, your commissioner finds that the power of sale granted in the decedent's will is a discretionary naked power of sale.

Based upon such finding, the fiduciaries in this case may decline to exercise the power of sale in the will and the character of the 30.88 acres in King George County will remain real estate. The fiduciaries cannot be compelled to exercise the power of sale. The creditors may seek recourse against the real estate pursuant to Virginia Code § 64.2-532; however they may not require the fiduciary to exercise his right to sell that real estate.

Respectfully submitted this 15th day of March, 2012.



John H. Rust, Jr.
Commissioner of Accounts
19th Judicial Circuit

Commissioner's Fee for this Report	\$ 500.00	
Publication costs	\$ 10.00	
<u>Total Amount Due</u>	<u>\$ 510.00</u>	UNPAID

in his effort to subject the land of his deceased debtor to the payment of his claim, courts were quick to seize on any words in the will which even by implication might be construed as an intention on the part of the testator to charge his real estate. However, with the enactment of statutes making the real estate liable for debts, the necessity of strained construction ended, and courts now require that the intention to so charge debts be clearly expressed.”)

³² See *Denny v. Searles*, 150 VA. 701, 143 S.E. 484 (1928); *Crawford v. Shower*, 70 Va. (29 Gratt.) 69 (1877); *May v. Bentley*, 8 Va. (4 Call) 528 (1800); *Gaymon v. Gaymon*, 63 Va. Cir. 264 (Fairfax County 2003).

CERTIFICATE OF MAILING

I hereby certify that on this 15th day of March, 2012, a true and correct copy of the above Commissioner's Report was mailed, first-class mail, postage prepaid, to the following persons at the addresses shown below:

Patrick T. Finley
88 Rapidan Church Lane
Madison, Virginia 22727

Timothy Finley
104 Gold Cup Ct.
Magnolia, Delaware 19962

Navy Federal Credit Union
820 Rollin Lane
Vienna, Virginia 22180

Inova Home Health
5101 Backlick Rd.
Annandale, Virginia 22003

Inova Home Health
c/o Complete Coll. Svcs. Inc.
P.O. Box 10052
Alexandria, Virginia 22310

Fairfax Radiological Consul. PC
c/o Nationwide Credit Corp.
P.O. Box 9156
Alexandria, Virginia 22304

Fairfax Radiological Consul. PC
2722 Merrilee Drive, Ste. 230
Fairfax, Virginia 22031

Roberts Home Medical, Inc.
8100 Gate House Rd.
Falls Church, Virginia 22042

Roberts Home Medical, Inc.
c/o NCO Financial Systems, Inc.
P.O. Box 15630, Dept. 02
Wilmington, DE 19850

Juno
c/o United Online Collection Div
P.O. Box 5006-BD
Woodland Hills, CA 91365-9637

Bank of America, NA
c/o Associated Recovery Sys.
P.O. Box 463023
Escondido, CA 92046-3023

DirecTV
c/o CBE Group
1309 Technology Pkwy
Cedar Falls, IA 50613

The DirecTV Group, Inc.
c/o CSC
Bank of America Center, 16th Fl
1111 East Main St.
Richmond, Virginia 23219

Sprint
P.O. Box 7951
Shawnee Mission, KS 66207

Sprint
c/o NCO Financial Systems, Inc.
P.O. Box 15630, Dept. 02
Wilmington, DE 19850

Sprint
c/o West Asset Mgmt., Inc.
P.O. Box 790113
St. Louis, Missouri 63179-0113

American Express
P.O. Box 981540
El Paso, TX 79998-1540

American Express
c/o West Asset Mgmt., Inc.
P.O. Box 956842
St. Louis, Missouri 63179-0113

Fairfax County
Department of Tax Admin.
P.O. Box 10202
Fairfax, Virginia 22035-0202

Virginia Dept. of Taxation
Office of Compliance
P.O. Box 27407
Richmond, Virginia 23261-7407

United States Treasury
Internal Revenue Service
P.O. Box 970011
St. Louis, Missouri 63197-0011

Virginia Dept. of Taxation
Office of Compliance
P.O. Box 27407
Richmond, Virginia 23261-7407

John H. Rust, Jr.
Commissioner of Accounts
19th Judicial Circuit

I, JOHN T. FREY, Clerk of the Circuit Court of Fairfax County, Virginia, do hereby certify that the foregoing Account or Report has been filed in my office for more than 10 days, and that no exceptions have been filed thereto and the same is now recorded pursuant to the provisions of §§64.2-122 & 64.2-1214 of the 1950 Code of Virginia, as amended
Teste: JOHN T. FREY, Clerk

4/1/13
Date

By: [Signature]
Deputy Clerk

SCHEDULE E

Virginia Department of Social Services
Medicaid Fact Sheet #42
BURIAL FUNDS

The following information is given as a guideline only. In order to determine Medicaid eligibility, an application must be filed with the local department of social services in the area in which you live.

Burial Funds are funds specifically set aside and clearly designated for an individual's or his spouse's burial, cremation or other burial-related expenses. It is possible to set aside funds to pay for your or your spouse's funeral and burial expenses and not have these funds counted when you apply for or receive Medicaid.

\$3,500 Limit: Most Medicaid recipients can set aside \$3,500 to help pay for their funeral and burial expenses. If you are married, you can also set aside \$3,500 for the funeral or burial expenses of your spouse. Medicaid will not count this amount when determining eligibility if you have no other burial arrangements.

\$1,500 Limit: If you are eligible for Medicaid because you receive cash assistance from Supplemental Security Income or the Auxiliary Grants Program, you need to know that these programs exclude only \$1,500 for burial funds. Also, if you are eligible for Medicaid because you are a Qualified Disabled and Working Individual you may only exclude \$1,500 in funds for burial.

Burial Space Items: Burial space items include, for example, caskets; headstones (including engraving), vaults, urns, burial plots and expenses for opening and closing the grave. Burial space items are not counted when they have been paid for or are included in a funeral contract that has been paid for either through cash, a burial trust or an insurance policy and assigned to a funeral home. When a funeral is being paid for through an installment contract, the value of burial space items is not exempt until the payments for those items has been made.

Life Insurance Funded Funerals: A life insurance funded burial contract involves purchasing a life insurance policy and using the proceeds of the policy to pay a funeral home for the expenses of a funeral which you have arranged in advance. You make a funeral contract for goods and services prior to your death and assign a life insurance policy to a funeral home in payment for the funeral. In some cases, the funeral home works with an organization, which holds the insurance policy in trust for your funeral. Once you have transferred ownership of the policy to a funeral home or to an organization which will hold the policy in trust for your funeral, the cash value of the life insurance policy will not affect your eligibility for Medicaid. The value of the life insurance policy is not counted when determining your Medicaid eligibility because you no longer own it. There is no limit on the cost of a funeral you purchase. If the value of the funeral you purchase, excluding burial space items, does not exceed the limits discussed above, you may be able to increase the amount of your burial funds.

Trusts: Funds placed in a trust designated to pay for a funeral and burial expenses may be exempt in determining Medicaid eligibility. The funds in a revocable trust or an irrevocable trust you establish may be exempted when Medicaid eligibility is determined. The nonexempt funds will be counted as a resource. If a funeral director establishes an irrevocable trust to pay for your funeral and burial expenses, the funds in the trust are not counted in determining your eligibility for Medicaid.

Additional Funds for Burial: To determine if you can set aside additional funds for your burial expenses, subtract from the limit (\$3,500 or \$1,500) the following:

- The value of any burial insurance you already own;
- The face value of all life insurance policies you own that have a cash surrender value if the total face value of all the policies does not exceed \$1,500;
- The value of any prepaid funeral contract you already own; and
- The value of any burial trust or any irrevocable burial arrangement.

The remainder is the additional amount that you may set aside to pay the cost of your funeral. If the value of the arrangements you have, excluding burial space items, exceed the allowed limit (\$3,500 or \$1,500), no funds can be set aside to pay for your funeral.

MEDICAID FACT SHEET #42 - BURIAL FUNDS

FORM NUMBER - d032-03-0838-08-eng

PURPOSE OF FORM - To provide information regarding burial funds.

USE OF FORM - The local agency workers may distribute this form to provide customers with basic burial policy information.

NUMBER OF COPIES - One

DISPOSITION OF FORM - One per inquirer

INSTRUCTIONS FOR PREPARATION OF FORM - The form does not require the addition of any information by the eligibility worker.