

2021 Burial Fund Legislation – SB 2261

To determine whether an individual is eligible for Medicaid, the state will count some of the individual's assets and exclude others. Like other states, North Dakota allows individuals to pre-pay for their burial by contracting with a funeral home and paying in advance for the various costs associated with their funeral. In certain cases, this burial fund can be excluded from the individual's assets when determining Medicaid eligibility. The issue is the changing state law in how Medicaid applicants or members can set aside funds for burial expenses.

Testimony in support of SB 2261, by NDBA President & CEO, Rick Clayburgh.

The Old Rule

Before August 1, 2019, individuals could set aside funds for burial expenses up to \$6,000 simply by setting aside and designating the funds to be used for funeral or burial expenses. For banks, this meant that customers could deposit funds in a CD or savings account and ensure that such funds would be excluded simply by having the bank designate the funds that way on the account.

2019 Legislation: The Irrevocable Itemized Burial Contract

Effective August 1, 2019, the legislative changes to Sections 43-10.1-03.1 and 50-24.1-02.3 first remove the \$6,000 cap on the amount that can be excluded as burial funds. Now, the amount simply “may not exceed the amount to pay for a funeral.” In addition, the law now requires that the money be placed in an “irrevocable itemized funeral contract” to qualify for the exemption.

Subsequent Issues

The North Dakota Department of Human Services (Department) later received direction from the Centers for Medicare & Medicaid Services (CMS), that the Department must apply the changes made to sections 43-10.1-03.1 and 50-24.1-02.3 to all Medicaid recipients and that the Department may not permit current Medicaid recipients to maintain their pre-August 1, 2019

funds set aside and designated for burial. Based on CMS' direction, the [North Dakota Medicaid Burial Policy](#) created in October 2020, states that individuals must move their funds to an irrevocable itemized burial contract by January 31, 2021 or such funds will be counted. One issue is that the statutes do not define what exactly an “irrevocable itemized burial contract” is. As this is the only way to have such assets excluded, it is important that the statutes state the same. The new policy further directs that any CD would need to be placed into an irrevocable trust, but direction for such trust is found nowhere in the statutes.

The Proposed Change

The focus of the proposed legislation is to make it clearer for banks, individuals, and funeral directors as to how funds are correctly designated as excludable assets.

First and foremost, it defines “irrevocable itemized funeral contract.” It is also more direct in what must be done when payments made under an irrevocable itemized funeral contract are being deposited with a bank, credit union, savings and loan association, or trust company. Specifically, such funds “must be carried in a separate account with the names of the depositor or transferor, cemetery association or licensed funeral establishment, and the person making payment on behalf of the individual for whose benefit payment is made.”

This will result in less uncertainty for individuals and their banks.